

**MEMORANDUM OF UNDERSTANDING  
BETWEEN THE HEALTH AND SAFETY EXECUTIVE  
(HSE)  
AND THE OFFICE OF RAIL AND ROAD (ORR)**

Signed by Richard Judge, Chief Executive on behalf of the Health and Safety Executive on 19 January 2017

Signed by Joanna Whittington, Chief Executive on behalf of the Office of Rail and Road on 15 December 2016

# C O N T E N T S

Memorandum of Understanding between the Health and Safety Executive and the Office of Rail and Road

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# MEMORANDUM OF UNDERSTANDING BETWEEN THE HEALTH AND SAFETY EXECUTIVE AND THE OFFICE OF RAIL AND ROAD

## PART I

### FRAMEWORK OF UNDERSTANDING

#### Introduction

1. This Memorandum of Understanding (MoU) is made between the Chief Executives of the Health and Safety Executive (HSE) and the Office of Rail and Road (ORR). Its purpose is to ensure effective coordination and cooperation between these organisations in relation to the regulation of health and safety, including policy matters and the enforcement of health and safety law, on all Britain's railways, tramways and other guided transport systems. This version includes a new Annex 3 dealing with the enforcement functions relating to the Design of Railways, Tramways and Other Systems of Guided Transport. It replaces the previous MoUs, including the most recent 2015 version.

2. HSE and ORR recognise each other's status as independent health and safety regulators. In accordance with the better regulation principles, we are committed to work closely together to achieve our health and safety objectives, and to ensure coordinated and consistent joint-working where appropriate.

3. HSE considers, in accordance with Section 11(6) of the Health and Safety at Work etc Act 1974 (HSWA), that this MoU facilitates the performance of its functions under part 1 of HSWA. ORR considers, in accordance with paragraph 2(a) of Schedule 3 to the Railways Act 2005 (RA 2005), that this MoU contributes to the provision of appropriate arrangements for fulfilling its duties in relation to the *railway safety purposes*.

4. HSE and ORR undertake to cooperate to enable each other to carry out their responsibilities and functions, and to maintain effective working arrangements for that purpose. This MoU describes the arrangements HSE and ORR will put in place to assist this.

5. HSE and ORR undertake to:

- secure through their regulatory activity, including enforcement, consistent standards of protection for people at work and members of the public affected by work activities;
- share knowledge and avoid duplication of effort to maximise efficiency in government and minimise burdens on business;
- cooperate to ensure that the allocation of responsibilities set out in the Health and Safety (Enforcing Authority for Railways and Other Guided Transport Systems) Regulations 2006 (as amended) (EARR) works effectively and provides clarification for duty holders as necessary;
- ensure that the development of general health and safety policy takes account of issues relevant to the railways and that mutual research interests are considered; and
- provide mutual expertise and assistance to enable the two organisations to fulfil their functions.

#### Purpose of this MoU

6. The RA 2005 transfers responsibility for railway-related health and safety matters from HSE to ORR by giving ORR responsibility for the application of HSWA Part 1 in respect of 'railway safety purposes'. This means that ORR has policy responsibility for any health and safety risks that either exclusively or primarily concern the construction or operation of railways, tramways or other guided transport systems. RA 2005 (Schedule 3, paragraph 10) requires ORR and HSE to enter into arrangements to secure 'cooperation and the exchange of information, in connection with the carrying out of safety functions'.

7. The Railways Act 2005 (Amendment) Regulations 2006 remove 'guided bus systems' and 'trolley vehicle systems' from the definition of 'railway safety purposes', so these systems

remain with HSE. These Regulations also make it clear that ‘transport system’ does not include fairground equipment as defined in section 53 of HSWA.

8. EARR allocates enforcement functions to ORR and defines who the enforcing authority (EA) is for particular activities and in relation to certain premises. **Appendix A** (page 12) of this MoU describes how this will work in practice.

### **Liaison arrangements**

9. The following liaison arrangements will be adopted:

<b>ORR</b>	<b>HSE</b>	<b>Frequency</b>	<b>Purpose</b>
Chief Executive	Chief Executive	Annual	To review the success of the MoU in ensuring an effective partnership between ORR and HSE.
ORR operational and/or policy representative(s) (to be determined)	Workplace Road Transport Team (JET)	twice a year (or more as necessary)	To discuss current and emerging or important legal and enforcement issues.

### **Central Contact Points**

10. Each organisation will have a named single central contact point responsible for monitoring the practical implementation and effective working of the MoU and to assist good working relationships between the organisations. The contact should be made aware of major issues relating to how the MoU works, and will participate in the preparation of briefing for the annual liaison meetings.

11. The role of the central contact points will be to:

- a. act as a gatekeeper to help colleagues make contact with the right people in ORR and HSE. This includes maintaining up to date contact details for HSE’s Heads of Specialist Groups, HSE Construction Division, ORR Area Field Teams and ORR National Expertise Teams;
- b. monitor how well the MoU is working and provide briefing on this for the senior-level liaison meetings;
- c. monitor the level of demand for support made throughout each year, making regular contact with their opposite number if necessary to compare and confirm levels of demand by each organisation;
- d. assist in resolving any disputes between ORR and HSE; and
- e. champion the interests of the other party so that knowledge of the MoU, and the mutual needs of both ORR and HSE, is maintained.

### **Resolving disagreements**

12. Any disagreements will normally be resolved at working-level. If this is not possible, the central contact points will seek to settle the issue and ensure a mutually satisfactory resolution. Senior management of both parties at appropriate levels will be involved as necessary.

### **Liaison**

13. In practice, most contacts between ORR and HSE will arise in the context of day-to-day operations, often at regional principal inspector-level. It is the responsibility of individuals in both organisations to identify topics requiring liaison between the two organisations, and ensure that they are dealt with efficiently and effectively.

14. A separate MoU exists between ORR and Local Authorities. A separate MoU also exists between ORR and the Office for Nuclear Regulation (ONR).

### **MoU review arrangements**

15. This MoU will be reviewed and updated using the following principles:

- a) reviewed approximately every five years or sooner if a substantive need arises;
- b) the arrangements for the provision of mutual advice and support described in Part II (see *page 7*) and the collaborative work set out in all the annexes of this document can be reviewed and amended through the agreement of both parties at working-level from time-to-time, as appropriate and needed. This includes scrutiny of actual resources used against predicted usage.
- c) key findings and any proposals for changing the MoU will first be considered as part of routine ORR/HSE liaison arrangements; and
- d) the detailed working arrangements set out in Appendix A may be clarified or amended from time-to-time outside the formal procedures for reviewing this MoU, but must secure the agreement of both parties in writing.

## **PART II**

### **ARRANGEMENTS FOR THE PROVISION OF MUTUAL ADVICE AND SUPPORT IN POLICY DEVELOPMENT AND ENFORCEMENT ACTIVITY**

16. In the railway context, ORR is responsible for enforcing non-railway-specific health and safety legislation relating to risks, such as noise and manual handling. HSE has enforcement responsibility in respect of certain railway activity, as described in EARR, such as within industrial sites. Therefore, both HSE and ORR have an interest in the development of each other's policy and regulations, and technical knowledge relating to those areas, and will require advice, information and support from each other.

17. Both HSE and ORR will give advice to one another on their own areas of expertise as part of the normal working relationships between two government departments. However, both will need to communicate proactively with and seek more substantive support from each other from time-to-time, in particular where expertise in support of enforcement activity and/or policy development is needed.

#### **Principles**

18. As enforcing authorities of health and safety law, HSE and ORR:

- a) recognise the importance of their close working relationships, formal consultation and mutual support in health and safety policy development, enforcement and research;
- b) agree to provide annual outline estimates of the specialist resources each will seek from the other based on regulatory priority areas, in good time, and in accordance with each other's planning cycle, recognising the need for flexibility in order to respond to the demands of reactive work; and
- c) will make adequate arrangements for the reimbursement of significant costs for the provision of mutual advice and support to each other on an, as near as possible, monthly basis and will monitor the demands each makes of the other, and maintain appropriate records centrally.

#### **Nature of support between HSE and ORR**

19. HSE will provide support to ORR's health and safety functions which extends, but is not necessarily limited to:

- a) 'railways' - which includes tramways and other guided transport systems throughout the rest of this MoU, where applicable - health and safety policy development;
- b) the provision of specialist support and advice - *see paragraph 21* - to assist formal enforcement action and in connection with the railway; and
- c) the investigation and monitoring of occupational fatalities, injuries, industrial diseases, ill-health or harm and dangerous occurrences in connection with the railway<sup>1</sup>.

20. ORR will provide policy input from a railway perspective to support HSE's work-related health and safety functions, as it relates to ORR's health and safety work on Britain's railways which will include, but is not limited to:

- a) occupational health and safety policy development as they relate to the railway;
- b) the provision of specialist advice and opinion in support of enforcement action in connection with the railway; and

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<sup>1</sup> In accordance with the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013 (RIDDOR).

- c) the investigation of occupational fatalities, injuries and industrial dangerous occurrences in connection with the railway.

### **Arrangements for the provision of specialist support**

21. HSE will provide specialist ergonomist and psychologist support to ORR on risks from occupational health risks (such as occupational hygiene, noise and vibration, ergonomics and stress), ionising radiation, construction and civil, mechanical and electrical engineering, pesticides and other health and safety hazards, such as on manual handling and hand-arm vibration issues; and appropriate support from HSE Scotland on Scottish legal matters. ORR will provide specialist support to HSE on risks from railway activity remaining within HSE's remit, for example, railways within industrial sites, cableways and fairground equipment.

22. ORR and HSE agree in principle to provide reciprocal specialist support in response to major incidents as needed and recognise the potential need to provide support in response to major incidents on an ad-hoc basis.

### **Procedure for requesting specialist resource**

23. To gain access to HSE's Specialist Group resource, ORR's Principal Inspectors, or more appropriate ORR personnel, should inform the ORR's central contact point before contacting the appropriate head of specialist group resource provider in HSE.

24. In agreeing with ORR about the nature of the specialist support required, HSE's head of specialist group or specialist unit will consider the level of hazard and risk associated with the issues, in the same way as for a request from within HSE and take appropriate account of its operational and strategic priorities. Details of the level of resource supplied to each job will be confirmed on its conclusion and recorded by ORR's and HSE's central contact points.

25. To gain access to support from HSE's operational teams, ORR's Principal Inspectors should contact the relevant HSE Head of Operations. Details of the level of resource supplied for each job will be confirmed on its conclusion and recorded by the ORR's and HSE's central contact points.

26. To gain access to support from ORR's operational teams, HSE's team managers must contact the relevant ORR Principal Inspector, or more appropriate ORR personnel, and inform the HSE central contact point. Details of the level of resource supplied for each job will be confirmed on its conclusion of and recorded by HSE's and ORR's central contact points.

### **Policy development**

27. HSE and ORR agree to involve proactively one another as appropriate in relevant policy development. This may cover, for example:

- policy issues where the two organisations have a common interest in legislation and a consistent approach is necessary, such as dealing with international regulation;
- cross-departmental policy initiatives, such as better regulation, where mutual legal and policy issues may exist and coordination of response would be desirable;
- determining strategies and targets to improve generic health and safety standards, and developing programmes or other coordinated cross-industry initiatives to help achieve them;
- developing statistical or other information systems on health and safety, and the sharing of such information; and
- responding to formal consultation exercises on health and safety matters; each will normally include the other as statutory consultees. Where changes to legislation are involved, informal consultation should precede the publication of a consultation document (CD) to allow both regulators to raise and discuss any implications for regulatory activity before publication of the CD.

## **Research**

28. HSE and ORR will also consult one another, as appropriate, when proposals for health and safety research to be funded by either organisation may have relevance to the other.

## **Exemptions and other policy processes**

29. Applications from the railway industry for exemption from general (i.e. not railway-specific) health and safety legislation will be dealt with by HSE, who will consult ORR where practicable and inform ORR of the outcome of its deliberations.

30. Similarly, where employers make use of other HSE policy processes, such as appeals against a doctor's decision under the Control of Substances Hazardous to Health Regulations 2002, HSE may inform ORR of the appeal and its outcome.

## **Statutory notifications and complaints**

31. Legislation makes arrangements for certain persons to notify enforcing authorities of certain events or concerns, such as accidents and dangerous occurrences. It is likely that from time to time notifications about health and safety will be sent to the wrong EA.

32. When HSE or ORR receive an incorrectly directed notification, they will arrange for it to be supplied promptly in an agreed format and delivery medium to the appropriate organisation through their nominated central policy-level contact point. Periodic provision will be made to review whether the sign-posting provided to industry for notify reportable incidents is operating effectively.

## **The reporting of railway-related occupational road fatalities**

33. HSE will ensure that all railway-related occupational road fatalities are reported to ORR in an agreed format and delivery medium.

## **Sharing statistical information**

34. HSE has to report annually on incidences of ill-health, injuries and numbers of working days lost across all industries. To help monitor cross-industry progress it will need to obtain statistical information from ORR.

35. HSE's Corporate Medical Unit appoint, monitor and support the work of HSE-Appointed Doctors, who undertake statutory medical surveillance of employees whose work with specified hazards requires that they be supervised under certain health and safety legislation. For statutory enforcement purposes, HSE will provide ORR's Information and Analysis team with the case details of railway employees whose blood lead-levels exceed those that require them to be suspended from working with lead under the Control of Lead at Work Regulations 2002. Any sharing of personal data and sensitive personal data for such purposes shall be carried out in accordance with the provisions of the Data Protection Act 1998, so far as it is applicable.

36. In order to maintain consistent recording of health and safety statistics for Great Britain, ORR will provide end of year statistics (provisional and final) for HSE's annual report as required.

## **Financial arrangements**

37. HSE and ORR recognise that the cost of providing significant levels of support from technical and other specialists must be measured, recorded and reimbursed. HSE and ORR will recover the full costs of reciprocal services in accordance with HM Treasury guidelines in Managing Public Money. Invoices will be raised on a twice yearly basis with a reconciliation towards the end of each financial year. Any exceptional resource requirements, over and

above Business As Usual (BAU) at historic levels, will need to be agreed in advance and more regular invoicing arrangements put in place.

38. In Scotland, ORR or HSE will, when requesting the other party to provide expert witness opinion in criminal and civil health and safety cases, underwrite the expert witness costs of the other party as appropriate and on a case-by-case basis.

### **Civil contingencies**

39. HSE is a category two responder under the Civil Contingencies Act 2004, which requires it to provide support during emergency planning and in response to any major civil contingency event.

40. As Network Rail, Transport for London and all train and railway infrastructure operating companies are also included on the list of category two responders, they are able to provide the necessary advice when planning for or responding to emergencies involving railway transport.

41. ORR will provide HSE with any additional advice on matters within its field of expertise as necessary to enable HSE to fulfil its duties under this legislation.

### **Out of hours response**

42. ORR's and HSE's Out-of-Hours Duty Officers will hold each other's contact details, and will maintain appropriate guidance liaison arrangements as appropriate.

### **Clarification of investigation arrangements**

43. The respective enforcement responsibilities are set out in EARR. In cases where both HSE and ORR have enforcement responsibilities at the same site, such as at harbours or intermodal depots, ORR will be responsible for any incident connected with the operation of the railway, while HSE will be responsible for all other at-work activities. ORR and HSE will apply their own specific criteria and priorities to inform decisions about whether to investigate or not; neither organisation can mandate the other's investigation decisions, but there is an overall expectation of mutual co-operation and liaison.

44. Where an incident occurs at the interface between activities enforced by HSE and ORR, discussions at local principal inspector-level should be used to allocate enforcement lead roles and responsibilities, and to decide what action, if any, will be taken. For example where a failure occurs during loading or unloading operations at a multi-modal container depot, the technical or organisational issues around the failure of the lifting equipment or process would be for HSE, but railway-related issues, such as a load striking a shunter, would be for ORR.

45. The Rail Accident Investigation Branch (RAIB) has the prime responsibility for investigating serious incidents involving train movements, and there is a separate ORR/RAIB MoU which describes this. RAIB's role is limited to establishing the technical causes of an incident and making recommendations overseen by ORR, as Britain's national railway safety authority, including those directed at other parties. ORR retains the responsibility for investigating accidents with a view to establishing any legal breaches of health and safety and railway-specific law and taking appropriate enforcement action against railway employers.

### **Enforcement**

46. HSE and ORR have the same powers under HSWA, for their respective areas of enforcement, which includes powers to issue improvement and prohibition notices, formal cautions and to bring legal proceedings. HSE and ORR are guided by their own respective published enforcement policy statements, of which both set out expectations and performance standards.

47. Where either HSE or ORR inspectors observe *matters of evident concern* in areas of the site being visited for which they are not the EA, these should be brought to the attention of the applicable EA in the following way:

- where a risk of serious personal injury appears to be involved, notify the EA immediately by telephone so that the EA can consider issuing a prohibition notice. The EA should inform the other authority of the action decided; or
- in other less serious and immediate cases, notify the EA in writing.

48. Both HSE and ORR will provide each other with supporting information and expertise, if necessary, to support any notice subsequently issued by the EA.

49. If these matters are within the responsibility of another EA, the receiving authority will forward the notification as appropriate and advise the original inspector. The initiative for any further action to rectify any inadequacy then rests with the appropriate EA.

50. Where HSE and ORR have a shared interest, they should keep each other informed about issues of interest to both parties, such as identified weaknesses in a company's health and safety management system.

### **Liaison with emergency services**

51. HSE is the EA for the premises occupied by the emergency services, and their activities. However, ORR will liaise closely with the emergency services when they are carrying out their operational duties on the railway, mostly during operational responses to incidents. Any causes for concern, which relate to the emergency services' practices or procedures, will be referred to HSE.

52. ORR will provide support on railway-related issues for any interventions carried out by HSE.

### **Access to HSE's internal advice and guidance on health and safety legislation and enforcement**

53. HSE will provide ORR's inspectors with access to its internal advice on interpretation of health and safety legislation. This will be by advice from, among others, HSE Sectors and policy teams. HSE will bring to ORR's attention any significant changes in its key operational procedures, such as the Enforcement Management Model.

### **Training and Development**

54. As there are many common inspector competence requirements, the participation of ORR inspectors in joint training sessions with HSE inspectors is desirable where this is appropriate and relevant, including the involvement of new ORR inspectors on the Regulator's Training Programme (RTP). HSE will work with ORR managers to exchange learning and development strategies and plans. HSE and ORR will identify and make available opportunities to share or cooperate in training activities wherever this is desirable and practical. HSE and ORR will identify and make available opportunities to share or cooperate in training activities wherever this is desirable and practical. HSE and ORR will meet reasonable costs for participation in such events either through transfer of funds or through an agreed contribution in kind. Cooperation in staff development may include arrangements for the exchange of inspectors.

## ENFORCEMENT RESPONSIBILITIES: RELATIONSHIP BETWEEN ORR AND HSE

### General approach to the allocation of enforcement responsibilities

A1. The Health and Safety (Enforcing Authority for Railways and Other Guided Transport systems) Regulations 2006 (EARR) (as amended) made ORR the health and safety enforcing authority (EA) for the operation of railways, tramways and other systems of guided transport in place of HSE<sup>2</sup>.

A2. Irrespective of the allocation of EA responsibilities, ORR has regulatory (i.e. overall policy) responsibility for all 'railway safety purposes', as defined by the Railways Act 2005 (RA 2005)<sup>3</sup>, in connection with the construction or operation of railways, tramways, or transport systems using any other mode of guided transport. The definition of 'railway safety purposes' specifically excludes fairground equipment (as defined by s.53 HSWA), guided bus systems and trolley vehicles. HSE regulates (i.e. develops overall policy) on all generic health and safety matters, such as working at heights or exposure to dangerous chemicals.

A3. The allocation of enforcement responsibilities in EARR enshrines some broad principles, namely:

- ORR would deliver the enforcement responsibilities formerly delivered within HSE by HMRI, unless there are overriding reasons otherwise;
- wherever possible, there should be a single EA for railway industry duty holders and stakeholders, particularly avoiding circumstances where HSE and ORR both enforce at the same location; and
- the EA should be determined by the principal nature of the activity which is being carried out and is causing the risk; and should take account of the relevant expertise available to both HSE and ORR. In other words, the EA is established on the basis of the operation that creates the risk and not on where the effects of the risk may be felt. ORR will be the EA where a risk is part of a railway operation, even where an incident then causes effects outside the railway. For example, an incident with a train results in damage to non-railway premises. Equally, operations enforced by HSE will remain within HSE's enforcement remit, even if the risks affect the railway. For example where masonry from an HSE-enforced construction site could fall on to the railway line.

A4. EARR makes ORR the EA for the 'operation of a railway'<sup>4</sup> which includes:

- railway infrastructure integrity and its use;
- railway vehicle or rolling stock safe design, maintenance and use;

<sup>2</sup> For the purposes of this Appendix, any reference to a 'railway' can be read to include a tramway or other guided transport systems where applicable and the context so requires. Railway, tramway and guided transport shall each have the meaning as set out in EARR (see regulation 2 and regulation 4(2)).

<sup>3</sup> See section 2 and paragraph 1 of Schedule 3 of the RA 2005.

<sup>4</sup> For the purposes of this Appendix, any references to the 'operation of a railway' can be read to include the operation of a tramway and operation of any other system of guided transport system where applicable and the context so requires. Operation of a railway, operation of a tramway and operation of any other system of guided transport shall each have the meaning as set out in regulation 2 of EARR, subject to regulations 4 and 5 of EARR.

- train preparation;
- train movements and carriage of goods; and
- the operation of stations or light maintenance depots.

A5. In all other cases enforcement falls to HSE, except where allocated to local authorities (LAs) under the Health and Safety (Enforcing Authority) Regulations 1998 (EA 98), or alternative EAs under other regulations made under section 15(3)(c) of HSWA. From 1 April 2014 the Office of Nuclear Regulation has an enforcement role for Britain's nuclear sites and ORR is developing a separate MoU with ONR.

A6. Where either HSE or ORR is described as the EA, this means in respect of all health and safety legislation. For ease of reference, this document also refers to the enforcement responsibilities of LAs, although they are not a party to this MoU.

A7. EARR uses the term 'operation of a railway' as a description of the activities for which ORR is the EA. 'Operation of a railway' includes the use of railway infrastructure. It also includes activities carried out within railway premises, including the common parts of stations, and may include activities being carried out elsewhere, such as premises used for the operation and monitoring of railway communications, even when that centre is not within operational railway premises. This term is defined widely and is not limited solely by the specified activities in regulation 2 of EARR - see *paragraph A11*. ORR is also the EA for section 6 of HSWA as it relates to articles and substances exclusively or primarily for railway usage - see *paragraphs A15-A16*.

A8. ORR's enforcement role is limited by EARR regulation 4, which lists exceptions to the activities for which ORR is the EA. In most cases, HSE is the EA for these excepted activities, other than where LAs are the EA under EA 98. There are some premises where both ORR and HSE have enforcement responsibilities - see *paragraph A69-70, for example*. In these interface areas, HSE's and ORR's responsibilities are set out in EARR.

A9<sup>5</sup>. The following paragraphs describe how EARR allocates the EA and provides guidance and clarification on areas where there is a potential for ambiguity. There is no provision under EARR for enforcement allocations to be transferred between HSE and ORR by mutual agreement (i.e. the local transfer agreements allowed for under EA 98 are not possible for activities covered by EARR). In instances where, having read the relevant paragraphs in the MoU, an ambiguity about the EA still remains, then HSE and ORR inspectors should use their collective knowledge to work together transparently and quickly to reach a common understanding of which organisation has enforcement responsibility under EARR. The starting point for inspectors will be the definition within EARR for the 'operation of a railway' and the non-exhaustive list of examples, as well as considering whether one of the exceptions in EARR applies. If HSE and ORR inspectors cannot reach a common understanding, then ORR inspectors should swiftly seek additional advice from ORR's RSD Policy Team, who may in turn recommend seeking advice from the ORR Legal Team. For HSE Inspectors, advice should be sought from HSE's Transport Sector team. The frequency and type of situations where inspectors seek additional advice will be captured, and may in time inform future clarifications or guidance. In seeking to resolve ambiguity, HSE and ORR inspectors should also note the Out of Hours response arrangements noted elsewhere in this MoU. Additionally, both ORR and HSE are signatories to the Work Related Death Protocols for England and Wales, and

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<sup>5</sup> In accordance with the MoU review arrangements set out in paragraph 15, the wording in paragraph A9 was amended through the agreement in writing of both ORR and HSE on 29 November 2019.

Scotland. Inspectors should apply the multi-agency liaison arrangements set out in these protocols in instances where there are fatalities, noting the protocols can also be the basis for arrangements in any serious, non-fatal, multi-agency investigations.

### **What is the extent of ORR's enforcement authority? *Regulations 3(1) and 3(2)***

A10. Regulation 3(1) of EARR makes ORR the EA for all relevant statutory provisions under HSWA to the extent that they relate to the operation of a railway, tramway or other guided transport system. This is the case even if, by virtue of EA 98, those activities take place at premises where HSE or an LA is the EA, and includes activities at premises occupied by the Crown<sup>6</sup>.

A11. Under EARR, ORR is the EA for any railway which either has a gauge of at least 350mm, or crosses a carriageway, (whether or not at the same level), and for any tramways<sup>7</sup>. The term 'operation of a railway' is defined in regulation 2 of EARR by reference to a non-exclusive list of activities. It is not limited to particular premises and, therefore, may extend beyond the physical boundary of a railway. This means that some activities at railway access points, such as railway employees unloading goods from lorries on the public highway for use on the railway, would be within the meaning of 'operation of a railway'.

A12. ORR's enforcement remit is subject to the exceptions in EARR regulations 4 and 5 - see paragraphs A53–A93.

A13. The enforcement of the mainline railway, metro and light railway systems, minor railways, tramways, and guided transport systems, such as monorails and people movers, is allocated to ORR by EARR regulation 3(2). Guided bus systems are not included<sup>8</sup>.

### ***Regulation 3(3) – duties of designers, manufacturers, importers and suppliers***

A14. Under the RA 2005, paragraph 1 of Schedule 3, ORR's regulatory (i.e. overall policy) responsibility for 'railway safety purposes' includes developing policy with a view to securing the proper construction of transport systems and the proper construction of locomotives, rolling stock or other vehicles used, or to be used, on such systems.

A15. Complementary to this function, regulation 3(3) of EARR makes ORR the EA for section 6 of HSWA in respect of articles and substances for use in transport systems. This is limited to articles that are designed or constructed, either exclusively or primarily, for use on a transport system, or have been specifically adapted or modified for use on such a system. Similar considerations apply to the manufacture, import or supply of substances.

A16. An example would be a road/railway vehicle designed as a piece of construction plant, but then adapted for use on the railway infrastructure. ORR would be responsible for following up any issues about the railway running part (e.g. how the brakes work when switching from one mode to the other on the railway), while HSE would have the lead in pursuing section 6 enquiries for a brake failure which could equally well have occurred on the road. So, HSE will continue to have enforcement responsibility for some failures of equipment not exclusively used on the railway, even if the failure occurs while the equipment is used on the railway.

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<sup>6</sup> See regulation 4(3)(h) of EA 98.

<sup>7</sup> See the definition of 'railway' and 'tramway' in regulation 2 of EARR.

<sup>8</sup> See regulation 4(2)(a) of EARR.

A17. ORR inspectors deal with manufacturers and suppliers, including visiting their premises as appropriate to enforce railway-related design and supply issues only, but not other occupational health and safety legislation, which are enforced by either HSE or LAs as appropriate. In discharging its duty under s.6 of HSWA, ORR may take enforcement action at premises outside of the operation of a railway where elements of railway design and supply activities take place in those premises. ORR's inspectors can use the established mechanism – see *Part II paragraph 47* - to raise matters of evident concern about any workplace health, safety and welfare issues with other relevant EAs identified by site visits.

A18. Similarly, EARR regulation 3(4) makes ORR the EA for section 6(3) of HSWA with regard to the erection or installation of articles for use in the operation of a railway.

### ***Regulation 3 (6) – effect of EARR on provisions in EA 98***

A19. Regulation 3(6) of EARR ensures that the allocation to ORR in regulation 3 has effect, regardless of anything to the contrary in various provisions of EA 98. For example, under EA 98, the LA is the EA for office-based activities<sup>9</sup>. However, under EARR, ORR is the EA for railway offices within the same premises, such as signalling control centres or centres used for the operation of communications systems or for monitoring the 'operation of the railway'<sup>10</sup>. Likewise, regulations 3(3) and 3(4) of EARR take precedence over regulation 4(4)(a) of the EA 98 in respect of matters relating to the 'operation of a railway'.

A20. ORR enforces relevant statutory provisions in respect of county councils, LAs and the Crown and their premises to the extent that they come under the activities in regulation 3(2)<sup>11</sup>, i.e. the operation of a railway, tramway or other guided transport system.

### ***Regulation 3 – effect of allocations for particular activities***

#### *Stations occupied by a railway undertaking and non-railway premises*

A21. ORR is the EA for stations<sup>12</sup>, including the common parts, station car parks, railway offices, ticket offices, left luggage and lost property facilities, but excluding those parts of stations occupied by a separate business engaged in office, retail, catering or other consumer services<sup>13</sup>. The relevant LA is the EA for these separate businesses. The exceptions to this are: dry-cleaning establishments, which could be found at large stations; radio and TV repairs (highly unlikely to be found on station premises); and walk-in health centres, for which HSE is the EA. ORR is the EA for some activities of non-railway duty holders at stations, e.g. movement of goods across a station concourse for loading/unloading of a train. This activity is covered by the term 'operation of a railway'.

A22. Separately, occupied parts of operational premises in which non-railway related activities are carried out are not part of operational railways premises. For example, LAs remain the EA for newsagents, even where they are located within a railway station<sup>14</sup>. LAs are also the EA for any railway-related office or catering activities not carried out on

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<sup>9</sup> See regulation 3(1) and paragraph 3 of Schedule 1 of EA 98.

<sup>10</sup> See paragraph (f) of the definition of operation of a railway in regulation 2 of EARR.

<sup>11</sup> See regulation 3(6) of EARR.

<sup>12</sup> See paragraph (e) of the definition of 'operation of a railway' and paragraph (b) of the definition of 'operational premises' in regulation 2 of EARR.

<sup>13</sup> See paragraphs (b) and (e) of the definition of 'operational premises' in regulation 2 of EARR.

<sup>14</sup> See paragraph (e) of the definition of 'operational premises' in regulation 2 of EARR.

operational premises. For example, in office buildings occupied by railway companies but separate from a station<sup>15</sup>.

### *Training activities*

A23. ORR is the EA for any training that forms part of the operation of a railway, or if it takes place within operational railway premises, including signal cabins and control centres<sup>16</sup>. For example, personal track safety training or possession management training.

A24. Where training takes place in operational railway premises, including signal cabins and control centres, ORR will be the EA. Where training takes place elsewhere, ORR will be the EA for the training, but HSE or the LA will be the EA for the premises.

### *Light Maintenance*

A25. 'Light maintenance depots' are premises normally used for light maintenance services, whether or not they are also used for other purposes. 'Light maintenance services' are defined in regulation 2 as refuelling, cleaning and planned maintenance normally carried out at intervals of up to twelve months. 'Maintenance' includes the detection and rectification of faults. ORR is the EA for light maintenance depots even where the depot is not connected to the network, or owned or operated by a railway undertaking.

A26. ORR is the EA for the parking, sheltering, maintenance and repair of any rail, tram or other guided transport vehicle including its inspection, cleaning, fuelling and preparation for use<sup>17</sup>.

### *Entities in charge of maintenance*

A27. An entity in charge of maintenance (ECM) is any person or organisation that is responsible for the safe maintenance of a railway vehicle and is registered as an ECM in the national vehicle register<sup>18</sup>. This can include people or organisations such as a train operator, an owner or a maintenance organisation.

A28. Regulation 4(4A) of EARR makes ORR the EA in relation to maintenance work by an ECM on a vehicle to be put in service on the mainline railway. This applies where ever that maintenance work is carried out, including

- harbours;
- factories;
- mines;
- GB nuclear sites;
- quarries;
- warehouse premises; and
- establishments to which the Control of Major Accident Hazards Regulations 2015 apply.

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<sup>15</sup> See paragraph (j) of the definition of 'operation of a railway' in regulation 2 of EARR.

<sup>16</sup> See paragraphs (f) and (g) of the definition of 'operation of a railway' in regulation 2 of EARR.

<sup>17</sup> See paragraph (a) of the definition of 'operation of a railway' in regulation 2 of EARR.

<sup>18</sup> The national vehicle register is a database of railway vehicles authorised or operated in Great Britain under the Railways (Interoperability) Regulations 2011.

### *Factories*

A29. Activities in factories except activities of ECMs, are enforced by HSE, irrespective of whether or not the site is occupied by a railway undertaking or connected to the network<sup>19</sup>. This includes those premises that build or renovate railway vehicles or rolling stock, or manufacture or repair components for use on the railway. Note that under EARR there are some exceptions (by virtue of Regulation 2 of EARR) as to what might be otherwise considered a factory and in these cases ORR is the EA as explained below.

A30. ORR is the EA for light maintenance depots and for any renovation, refurbishment, repair or reconstruction work to locomotives or railway vehicles carried out at heritage railway premises, if the premises form part of the heritage railway and are used exclusively or primarily by the heritage railway.

### *Signalling, electrical and operational control centres*

A31. ORR is the EA for the activities of signalling, electrical and operational control centres operated from within administrative buildings, or from other premises, whether adjacent to or remote from the railway<sup>20</sup>.

### *Non-railway premises*

A32. EARR identifies certain premises on the railway as 'operational premises'. These include the permanent way, stations, light maintenance depots and land next to the permanent way that is used, occupied or held for railways purposes. However, separately occupied parts of operational premises, in which non-railway related activities are carried out, are not operational premises. For example, as covered in A21, LAs remain the EA for newsagents, even where they are located within a railway station.

A33. LAs are also the EA for any railway-related office or catering activities not carried out on operational premises. For example, in office buildings occupied by railway companies but which are separate from a station<sup>21</sup>.

### *Museums and heritage centres not part of a 'heritage' railway*

A34. Where a railway is operated at a museum or heritage attraction, ORR is the EA for the operation of the railway. This will include museums where running vehicles are exhibited and which may be moved on a railway system around and/or out of the museum site. Any surrounding and associated activities would also fall to ORR, in so far as they form a part of the operation of the railway.

A35. When a railway at a museum is operated on a seasonal basis, ORR is the EA even when the railway is dormant. However, where a museum houses static exhibits which are not operated then ORR will not be the EA. As an example, if a museum decided to steam a locomotive to demonstrate the operation of the boiler but it did not move, ORR would not be the EA. ORR would, however, be EA for the steaming of a locomotive or operation of the boiler in preparation for the operation of a railway vehicle<sup>22</sup>.

### *Railway systems in military establishments*

A36. To provide consistency of approach, under EARR, ORR is the EA for all railways in military establishments, with the exception of Britain's nuclear sites which includes certain

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<sup>19</sup> See regulation 4(3)(d) of EARR.

<sup>20</sup> See paragraph (f) of the definition of 'operation of a railway' in regulation 2 of EARR.

<sup>21</sup> See paragraph (j) of the definition of 'operation of a railway' in regulation 2 of EARR.

<sup>22</sup> See paragraph (a) of the definition of 'operation of a railway' in regulation 2 of EARR.

naval dockyards<sup>23</sup> which as of 1 April 2014 are regulated by ONR. However, ORR is the EA on a GB nuclear site in relation to the activities of an ECM<sup>24</sup>. ORR is the EA for any activity covered by the term 'operation of a railway', e.g. maintenance and safe operation, train preparation and train movements, the interface with the mainline railway network, and the safe design and use of vehicles and rolling stock.

A37. ORR is also the EA in respect of the condition and distribution of the wagon loading, to the extent that this could affect the safe running of the train and the importation of risk onto the mainline railway<sup>25</sup>. HSE is the EA for the activities of loading and unloading of goods on or from trains at premises owned or operated by, or on behalf of, the Secretary of State for Defence<sup>26</sup>. These activities are specifically excluded from the term 'operation of a railway'.

A38. Military establishments include sites under the direct control of the Ministry of Defence (MOD) or run by private companies on their behalf.

#### *Devonport Royal Dockyard*

A39. *Devonport Royal Dockyard* is a unique and complex establishment that can be used to show how the above principles will apply in practice. The naval base dockyard is a nest of separate sites each of which has to be considered individually in terms of their allocated EA. At its core, it is a dockyard owned by Babcock Marine (Devonport) Ltd. The dockyard is operated by Devonport Royal Dockyard Limited (DRDL) a wholly-owned subsidiary of Babcock Marine (Devonport) Limited. Part of the dockyard is a GB nuclear site and the surrounding area is the larger naval dockyard owned by MOD, but contains facilities run on their behalf by DRDL. A railway connected to the national infrastructure runs across the whole site.

A40. Under regulation 4(3) of EARR:

- ORR is the EA for the operation of the railway throughout the remainder of the site owned by or operated on behalf of MOD; and
- HSE is the EA for all other activities, except those within the nuclear licensed site where ONR is the EA and ORR is the EA in relation to the activities of an ECM.

#### *Railways at airports*

A41. Under regulation 3 of EA 98, HSE is the EA for the common parts of airports, which are either not within a building or where only passengers (and not the general public) are admitted. LAs are the EA for the common parts within airport terminals to which any member of the public can access.

A42. ORR is the EA for any railway or system of guided transport (including people movers) at an airport. The one exception to this is Birmingham Air-Link, a cableway installation, which is enforced by HSE, as are all cableways.

A43. The Civil Aviation Authority has specific responsibilities for 'air-side' aircraft and passenger safety that are not affected by this MoU.

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<sup>23</sup> See regulation 4(3)(a) and (f) of EARR.

<sup>24</sup> See regulation 4(4A) of EARR.

<sup>25</sup> See paragraph (c) of the definition of 'operation of a railway' in regulation 2 of EARR.

<sup>26</sup> See paragraph (k) of the definition of 'operation of a railway' at regulation 2 of EARR.

### *Channel Tunnel UK concession area<sup>27</sup>*

A44. The demarcated site known as ‘the UK Concession Area’ includes the terminal and three tunnels up to the mid-point of the tunnel between Britain and France. ORR and HSE have no jurisdiction for the ‘UK-control zone’ in France. The UK Concession Area operates under specific arrangements authorised by the Intergovernmental Commission for the Channel Tunnel (IGC), established under the Treaty of Canterbury 1986. The Channel Tunnel Safety Authority (CTSA) provides advice and assistance to the IGC on all matters concerning safety.

A45. ORR is the EA for activities relating to the operation of a railway in the UK Concession Area within the meaning of Regulation 2 of EARR. HSE is the EA for activities which do not relate to the operation of a railway in the UK Concession Area, except for those instances where Local Authorities are the EA (eg. station retail premises).

A46. Regulation 2 of EARR defines the term ‘operation of a railway’ by reference to a non-exhaustive list of activities. In addition, regulations 4 and 5 of EARR set out exclusions to ORR’s EA responsibilities.

A47. Safety inspections in relation to the UK Concession Area are carried out by inspectors using their national powers. ORR and HSE will keep each other informed where they carry out an inspection, or use their enforcement powers, in the UK Concession Area (including where either is requested by the CTSA carry out an inspection).

### *Carriage of dangerous goods*

A48. The carriage of dangerous goods by road and rail is regulated by The Carriage of Dangerous Goods and Use of Transportable Pressure Equipment Regulations 2009 as amended (CDG 2009). CDG 2009 implements the EU Dangerous Goods Directive and apply the international regulations on the carriage of dangerous goods by rail and road (known as RID and ADR respectively). HSE is the EA under CDG 2009 except in relation to railways for which ORR is the EA in accordance with the provisions of EARR. The other exception is that ONR is the EA for Class 7 Radioactive Materials.

### *Radiation emergencies*

A49. The Radiation (Emergency Preparedness and Public Information) Regulations 2001 (REPPIR) establish a framework for the protection of the public through emergency preparedness for radiation accidents with the potential to affect members of the public and ensure the provision of information to the public. REPPIR places duties on operators of premises which hold, or contain facilities to hold radioactive substances over certain thresholds, and to carriers who transport such substances by railway. HSE is the EA except where the goods are being handled as part of the operation of a railway, in which case ORR will enforce requirements related to duties on railway carriers.

A50. Certain radioactive sources and packages containing radioactive substances are exempted from REPPIR, but under current practice in this sector, the types of transport packages and quantities of radioactive substances generally carried by railway are unlikely to fall within the scope of REPPIR.

### *British Transport Police (and security of railways)*

A51. HSE is the EA for the British Transport Police when they are carrying out their duties on the operational railway, as they are a police service and not part of the operation of a

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<sup>27</sup> In accordance with the MoU review arrangements set out in paragraph 15, the wording in paragraphs A44 to A47 was amended through the agreement in writing of both ORR and HSE on 29 November 2019.

railway. This includes their occupation of police stations on railway premises, as this activity is not considered to come under the definition of 'operation of a railway.' Enforcement in respect of a police authority is reserved to HSE under EA 98. As many of the risks BTP officers are exposed to arise from the operation of the railway, ORR inspectors will work closely with HSE to provide the necessary expertise.

#### *Railway security services*

A52. Private security companies that operate on Britain's railways are considered to be part of the 'operation of a railway' and ORR is the EA.

### **Regulation 4 exceptions**

#### *Cableway installations*

A53. HSE is the EA for cableway installations, defined in full in regulation 2 of the Cableway Installation Regulations 2004, made under the Cableways Directive (European Directive 2000/9/EC)<sup>28</sup>. Cableways include cable-drawn cliff railways. However, where cable-drawn the installation is also a part of tramway, such as at Great Orme, or a rack railway, then ORR is the EA. ORR and HSE should co-operate and share expertise as necessary in the case of systems using both railway and cable technologies.

#### *Fairground equipment*

A54. HSE is the EA for the operation of any system that is defined as fairground equipment under section 53 of HSWA<sup>29</sup>. This will include rides in parks where other health and safety matters are enforced by LAs. If a railway or system of guided transport at a fairground falls outside the definition of 'fairground equipment', then enforcement will fall to ORR. If a railway or system of guided transport is similar to a fairground ride, but is nonetheless designed to carry passengers from one part of the park to another, or even if the journey is designed to see exhibits and begins and eventually ends at the same location, then this also takes it outside the definition of fairground equipment (because it was designed as a transport system rather than for entertainment purposes) and it too will be enforced by ORR.

#### *Guided buses*

A55. HSE is the EA for guided bus systems<sup>30</sup> that use vehicles that can operate both on road, under the guidance of a driver, or by means of external guidance such as tracks, buried cables etc.

A56. Overall, these vehicles look and operate like buses rather than trains, and are also subject to relevant road traffic legislation. DfT take the policy lead and the EAs are either the police, VOSA, Traffic Commissioners or Highways Agency. HSE is the EA for any residual health and safety issues outside of more specific road safety legislation enforced by other EAs.

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<sup>28</sup> The definition of a cableway installation in regulation 2 of the Cableway Installation Regulations 2004 includes at (c)(iii) 'funicular railway or other installation with vehicles mounted on wheels or other suspension devices where traction is provided by one or more cables.'

<sup>29</sup> See regulation 4(1)(b) of EARR, which removes the operation of fairground equipment (including rollercoasters which otherwise would fall under the definition of railway) etc from the activities specified in regulation 3(2). Also note that the Railways Act 2005 (Amendment) Regulations 2006 removed 'fairground equipment' from the reference to transport system in paragraph 1(3) to Schedule 3 of the RA 2005. This means that ORR does not have policy responsibility for health and safety of fairground equipment

<sup>30</sup> See regulation 4(2)(a) of EARR and the definition of 'guided bus system' in regulation 2 of EARR.

### *Railway-related occupational road safety*

A57. ORR's approach to railway-related occupational road safety issues reflects HSE's existing approach: the police take the lead in investigating road traffic incidents; ORR's enforcement action will be confined to where the police identify evidence of serious health and safety management failures which may have led to or been a significant contributory factor to the incident.

### *Provision of bus substitution services*

A58. A bus substitution service is a bus service provided as an alternative to a railway or tramway service. ORR is the EA for a bus substitution service while it is on railway operational premises, but not otherwise. ORR's enforcement role is confined to ensuring railway operators select a suitable bus company and manage safely the embarkation and disembarkation of passengers from buses within railway operational premises. However, there are more specific road traffic safety law enforced by other EAs, such as the traffic police, which relate directly to the road safety aspects of operating substitute bus services on the public highway.

### *Miniature railways*

A59. Most miniature railways, which operate within a site such as an amusement park or fairground, are enforced by HSE or LAs. ORR is the EA for miniature railways with a track gauge of 350mm or wider; and those miniature railways that cross a public highway<sup>31</sup>.

### *Harbours*

A60. ORR is the EA for the operation of any railway where the railway operates exclusively within a harbour and carries members of the public<sup>32</sup> or where it also operates outside the harbour and is transporting goods or passengers to and from the harbour<sup>33</sup>. This includes any activity within the definition of 'operation of a railway'.

A61. HSE is the EA for any railway within a harbour that is not connected to the mainline network and/or carries no members of the public or for any railway carried out at a harbour within any of the premises listed in regulation 4(3)(c) to (h)<sup>34</sup>. This includes railways where there is movement of materials to and from factories and associated storage facilities, such as tank farms on the harbour site. HSE will be the EA for all activities within the harbour, including the loading and unloading of trains<sup>35</sup>.

A62. The exception is where an ECM's activities take place inside these harbours, in which case ORR is the EA in relation to the ECM's activities.

A63. Railways transferring goods or passengers to and from harbours and onto the mainline railway network, can therefore be contrasted with railways associated exclusively with industrial processes. This split of responsibility is considered appropriate because such harbours, unlike other industrial sites, are an integral part of the national transport network, and involve significant railway movements, often using level crossings over the public highway.

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<sup>31</sup> See the definition of 'miniature railway' in regulation 2 of EARR and regulation 4(1)(c) of EARR.

<sup>32</sup> See regulation 4(3)(b)(ii) of EARR.

<sup>33</sup> See regulation 4(3)(b)(i) of EARR.

<sup>34</sup> These are: establishments to which the Control of Major Accident Hazards Regulations 2015 apply, a factory, a mine, a GB nuclear site, a quarry or warehouse premises.

<sup>35</sup> See paragraph (k) of 'operation of a railway' in regulation 2.

### *The operation of pier railways and tramways*

A64. ORR is EA for pier railways and tramways, i.e. railways and tramways on a pier that are used by the public as a means of transport. However, HSE remains the enforcing authority where the pier railway is defined as a miniature railway - see A59.

### *Railway systems within industrial sites*

A65. Under EARR regulations 4(3)(c) to 4(3)(h), railway operations carried out at certain listed sites are exceptions to the operation of a transport system, except if it relates to the activities of an ECM. This means that ORR is not the EA for railway operations within:

- an establishment to which the Control of Major Accident Hazards Regulations 2015 applies;
- a factory<sup>36</sup> (including a power station<sup>37</sup>);
- a mine or quarry;
- a GB nuclear site; or
- warehouse premises.

However, ORR is the EA in relation to the activities of an ECM at all of these premises.

A66. At these sites the transport of materials tends to be primarily for processing locally, and railway movements are likely to be limited. HSE and ONR are the EAs within these sites. Once a train exits from them on to the mainline railway network, enforcement passes from HSE or ONR to ORR.

A67. When an incident occurs solely in relation to railway-related activities within the site (e.g. internal shunting of wagons), but has consequences which impact on activity on the mainline railway network, the EA will be that for the location where the original incident occurred, e.g. HSE if the failure occurs within the factory premises, and ORR if the failure occurs outside the factory premises.

### *Mines*

A68. Under the Mines and Quarries Act 1954<sup>38</sup>, a railway serving a mine and owned by a mining company is deemed to be part of the mine. However, for the purposes of EARR, the definition of a mine has been amended so that railways serving and owned by a mine, but outside the mine's curtilage, are not deemed to be part of the mine<sup>39</sup>. Under the definition in section 180 of the Mines and Quarries Act 1954, ORR is the EA for any:

- specialist mines regulations which could apply to any such railway outside of the mine's curtilage; and
- any activity of an ECM.

### *Quarries*

A69. Enforcement responsibilities for the operation of a railway at quarries will be ORR's responsibility where the railway line is exclusively under the control of either:

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<sup>36</sup> See definition of 'factory' at regulation 2 of EARR..

<sup>37</sup> Note that a factory does not include any power generating stations which produce power exclusively for the railway – e.g. power plants for the London Underground – see paragraph (e) of the definition of factory at regulation 2 of EARR.

<sup>38</sup> Mines and Quarries Act 1954, section 180.

<sup>39</sup> see definition of 'mine' in regulation 2 of EARR and the corresponding amendment to paragraph 5(2)(c) of EA 98.

- a railway company<sup>40</sup>; or
- a person who carries on an undertaking which consists of, or the main activity, or one of the main activities of which consists of, the management of a network within the meaning of section 83(1) of the Railways Act 1993.

A70. In all other circumstances, enforcement in relation to the operation of a railway in connection with a quarry will fall to HSE. Where enforcement matters arise relating to the safe design, construction, operation and maintenance of such a railway, ORR will provide technical support and advice to HSE in line with protocols existing at that time. The exception to this is in relation to the activities of an ECM, in which case ORR is the EA.

#### *Railway systems within inter-modal depots*

A71. Inter-modal depots are usually either part of a dock's complex or connected to the mainline railway network by short sidings or with road freight-handling facilities. They handle freight containers, which are transferred from rail to road to sea and vice versa, generally by the use of straddle carriers. EARR does not define 'container', so this is taken to mean any box, container, tank or tank container, vessel or platform capable of being used to store and move freight items and transferred between different types of modal vehicles. This may cover not only containers, as defined in international transport standards, but also vessels for gases or liquids or non-standard designs. Goods handling and transfer facilities which are properly part of railway operations, such as transferring materials from road to engineering trains working in possessions, are not classified as inter-modal depots because the work undertaken there is primarily a part of the operation of a railway and is enforced by ORR.

A72. ORR is the EA for the 'operation of a railway' within an inter-modal depot in relation to railway infrastructure maintenance and safe operation, train preparation and train movements, the interface with the mainline railway network, the safe design and use of rolling stock and the condition and distribution of the load (the load-examiners' duties)<sup>41</sup>.

A73. HSE is the EA for loading and unloading on or from trains at intermodal depots<sup>42</sup>. Inter-modal sites can include facilities shared by road and railway workers. ORR is the EA for issues that arise from the operation of a railway and/or affect railway workers. HSE is the EA for all other non-railway issues related to the other work activities at intermodal sites.

#### *Level crossings*

A74. ORR is the EA for all locations where railways cross public roads and other public rights of way, such as footpath and bridleway crossings, or cross private access ways, such as crossings between farm fields. HSE is the EA for crossings on railways within a range of industrial premises, including factories, mines, quarries, warehouses and certain harbour railways, in line with regulation 4 of EARR. ORR is the EA for crossings in GB nuclear sites, but ORR is the EA for any in-force level crossing orders made under section 1 of the Level Crossings Act 1983, regardless of whether the crossing is within licensed nuclear premises.

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<sup>40</sup> As defined in regulation 2 of the Quarries Regulations 1999, i.e. a railway company established under an enactment.

<sup>41</sup> See definition of 'operation of a railway' at regulation 2 of EARR.

<sup>42</sup> See definition of 'operation of a railway', paragraph (k) at regulation 2 of EARR, which takes loading and unloading at intermodal depots out of the ambit of the definition of operation of a railway.

A75. The enforcement allocations described in A78 mean that only ORR can take enforcement action in the event of a breach of a level crossing order, wherever the crossing may be. These orders specify controls which must be in place at a particular crossing. The duty to comply with such an order is set out in regulation 3 of the Level Crossings Regulations 1997. Good liaison is required between ORR, HSE and ONR in dealing with level crossing on industrial premises, including licensed nuclear sites, which has an order; in such cases ORR will confirm to HSE and ONR whether an order is in force.

A76. Enforcement action may be required in circumstances where a level crossing order is not in force, or that have nothing to do with an order's requirements, such as where a crossing is misused. These cases are often primarily enforced by the police, but following a police investigation both ORR and HSE can take enforcement action using general HSWA provisions.

A77. Situations may arise where HSE is the EA for a duty holder whose premises include a level crossing for which ORR is the EA. For example, when a farmer uses an accommodation crossing between two fields, and access is by a private road or track over his land rather than a public right of way. An incident at such a crossing may well involve both ORR and HSE looking at issues of possible crossing misuse and the duty holder's wider health and safety management arrangements. In such cases, ORR and HSE inspectors will need to cooperate closely and determine who the appropriate EA is for any enforcement action considered necessary.

A78. ORR inspectors have powers under HSWA section 20 to pursue inquiries with a non-railway duty holder and, if relevant, require the non-railway duty holder to implement a safe system of work for the use of that crossing and to ensure the safety of the railway network and relevant railway, non-railway and other employees.

### ***Construction Work Regulation 5***

A79. Regulation 5 of EARR sets out the type of construction work which is included in the definition 'operation of a railway' and is therefore enforced by ORR. Construction work is defined by the Construction (Design and Management) Regulations 2015 (CDM 2015)<sup>43</sup>; HSE is the EA for construction work which is not included within the term 'operation of a railway'.

A80. Good communication and proactive liaison between HSE and ORR is essential to ensure clarity as to who is the appropriate EA in relation to construction work for a particular project.

A81. In cases where the EA is clarified following discussion between HSE and ORR, it will be good practice to record the agreed enforcement roles electronically and to communicate these to the duty holders involved. For projects that should be notified to the relevant EA under CDM 2015, duty holders are encouraged to use HSE's on-line construction work notification form (the commonly known F-10 form). Such notifications will be regarded as having been made to the relevant EA as required by CDM 2015 as ORR has an agreement with HSE to access HSE's F10-notifiable construction projects database.

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<sup>43</sup> See regulation 2(1) of CDM 2015.

A82. The following paragraphs summarise ORR's and HSE's enforcement roles for construction work in relation to any relevant transport system. Where the term 'railway' is used the arrangements specified would also equally apply to tramways and other guided transport systems.

#### *ORR's enforcement role*

A83. ORR is usually the EA for construction work in the following circumstances:

(i) for the maintenance, repair, renewal or improvement of existing infrastructure as defined by EARR<sup>44</sup>. Infrastructure includes:

- the permanent way, which includes: the track; level crossings; viaducts, tunnels, culverts and bridges or other structures used for the support of, or otherwise in connection with, the permanent way, and boundary walls or fences;
- bridges or structures spanning the permanent way which are maintained by the owner, operator or manager of the railway, or someone working on their behalf. This would include bridges over the railway which are maintained by Network Rail, LUL, or any other infrastructure manager, or someone acting on their behalf e.g. a contractor; and
- electrical and mechanical installations used for signalling, electrical installations used for supplying power to vehicles and any other plant, equipment or electrical or mechanical installation. In the case of a tramway this does not include road lighting or traffic signals/signs unless they are used for the operation of the tramway and maintained by the owner/operator/manager of the tramway or someone acting on their behalf.

(ii) for the extension or enlargement of the infrastructure, where the construction work is in such close proximity to the operation of the railway that there is risk to workers engaged in that work from the railway.

(iii) construction work carried out on the permanent way, within stations, light maintenance depots or on land adjacent to or adjoining the permanent way and used, occupied or held for the railway and relates to the maintenance, repair, renewal or improvement of any fixed asset (other than the infrastructure) of a railway.

#### *HSE's enforcement role*

A84. HSE is the EA for construction work in relation to:

- work on any structure or premises whose primary function is unrelated to the operation of a railway, or forms parts of a station separately occupied as a business, such as retail premises –see *paragraph A21*;
- work on a bridge, or other structure spanning, or adjacent to operational premises where it is carried out by someone other than the railway owner, operator or manager, or someone working on their behalf, for example work carried out by a local authority;

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<sup>44</sup> The full definition of 'infrastructure' is set out at regulation 2 of EARR.

- where normal railway activities in the operational premises have been suspended and the work is physically segregated from the railway infrastructure and the construction contractor can exclude people from the construction area;
- where normal railway activities continue, and, in addition to the segregation and exclusion points above, there is only emergency access between the segregated area and the rest of the operational premises;
- new build railways up to the point that they become 'operational railways'. A handover point should be agreed between HSE and ORR based on when both regulators agree that the railway has become operational- see paragraphs A87, A88; and
- the extension or enlargement of existing infrastructure, if there is no risk to the construction workers from the operation of a railway. The proximity of the work to the operational railway comes into consideration here - see *paragraph A87(ii)*.

*Situations where both EAs are required to reach agreement on allocation of responsibility based on the circumstances of the case*

A85. There is no provision in EARR or HSWA, for ORR and HSE to mutually transfer enforcement functions or, where the position is unclear, assign enforcement responsibility between them. Instead, agreement must be reached on who is the correct EA in accordance with the provisions of EARR and HSWA.

A86. This section gives further guidance on the respective enforcement roles and deals with some of the more complex situations which can arise and may require both EAs to agree on who is the appropriate EA in that particular circumstance. It includes examples of how the enforcement allocation has been interpreted in the past and is intended to act as a guide to assist both HSE's and ORR's inspectors in making decisions in future. However, these examples do not preclude different interpretations or outcomes as the circumstances of each particular case must be considered afresh each time.

*Major infrastructure projects (new-build railways)*

A87. Under EARR HSE is the EA for construction work on a new-build railway infrastructure project, such as Crossrail, up to the point at which the system becomes an operational railway, when ORR becomes the EA. However, ORR and HSE have entered into an agency agreement which delegates certain EA functions to ORR during the design of railway infrastructure and before the railway has become operational. Annex 3 provides more detail on this agency agreement and ORR's role in this regard.

A88. There should be agreement between HSE and ORR as to the point at which the new system becomes operational for the purpose of EARR – in practical terms this is usually the point at which functional connection is made between the new-build railway and the existing system, or the point at which test train running begins before the railway is connected to the existing system. This should be recorded, for example, by an exchange of e-mails, so that both EAs are clear about when HSE's enforcement role ends and ORR's enforcement role under EARR starts. The agreed arrangements should be explained to all the relevant duty holders.

### **Example 1 – the Crossrail enforcement handover**

In the case of London’s newly-built Crossrail central section, ORR and HSE have discussed and agreed that the construction work will be enforced by HSE up to the start of commissioning the system, i.e. operation of trains testing the signalling and control systems. At this point the railway is considered to be operational and enforcement will handover to ORR.

### *Bridges spanning the railway*

A89. Where there is construction activity on a bridge spanning or adjacent to the railway the EA is, in most cases determined by whether the work is being carried out by someone other than the owner or the operator of the railway. EARR specifies that construction activity carried out in relation to a bridge which spans or is adjacent to operational premises by *persons “other than the owners, operator or manager of the [railway] or persons acting on behalf of one or more of them”* does not fall within the “operation of a railway” and is therefore not within ORR’s enforcement remit.

A90. In most cases in order to determine who is the EA it should be sufficient to find out whether the work on a bridge is being carried out by Network Rail, LUL, or any other railway infrastructure manager, or someone acting on their behalf eg a contractor. If so, ORR is the EA.

A91. In situations where the position is not entirely clear under EARR, HSE and ORR should consider all the relevant circumstances on a case-by-case basis and reach an agreed view on how EARR applies to the situation and who is the responsible EA.

### **Example 2 – construction work on a road bridge over the railway**

Construction activity took place on a bridge that was part of a wider project of railway line electrification. The main site of construction activity in this case was considered to be about ‘improvement of existing infrastructure’ because it was electrical installation work. The demolition and replacement of a road bridge over the railway formed a key part of the work to enable installation of new overhead line electrification equipment. All of this work was being undertaken on Network Rail’s behalf by contractors.

In this situation ORR and HSE needed to consider all the relevant circumstances of the case and mutually agree on who the EA was according to the EARR. It was decided that ORR was the EA, primarily because the work was being done on behalf of the railway infrastructure manager and the work itself was about enhancing the ‘operation of the railway’. It was not necessary to consider who normally maintains the bridge.

Separately, this case also included separate excavation construction work by a contractor working for a utility company to relocate cables. For this aspect of the construction activity, it was mutually agreed by HSE and ORR that HSE was the EA because it was not carried out by a railway infrastructure manager or someone on their behalf, and the work was not directly related to the ‘operation of a railway’.

### *Bridges spanning the railway where there is no construction activity*

A92. There may be situations where there is no construction activity underway but there are concerns about the safety of a bridge’s structure in relation to trains running underneath it. In these circumstances, the EA allocation is determined by whether the bridge falls within the

term 'use of the infrastructure', because it would then fall within the 'operation of a railway'. To be covered by "use of the infrastructure", a bridge would need to be part of the "permanent way". According to EARR, a bridge could be part of the permanent way if it spans the permanent way and is maintained by the railway owner, operator, or manager, or someone on their behalf.

A93. This means that, in most cases, ORR will be the EA for bridges that are maintained by Network Rail or LUL or another railway infrastructure manager. In previous circumstances, ORR and HSE have interpreted 'maintained by' as referring to the person who has legal responsibility for maintaining the structure.

#### *Work with asbestos*

A94. HSE is the EA for any work with asbestos that requires a licence under the Control of Asbestos Regulations 2012<sup>45</sup> (COAR), whether or not such work is also 'construction work' as defined in CDM 2015. Asbestos-related work requiring a licence also requires notification to the appropriate EA (made at least 14-days before the work begins or as agreed with the EA), which for asbestos-related licensable work, including on Britain's railways, is HSE.

A95. ORR is the EA for any other work with asbestos that does not require a licence and that is carried out at light maintenance depots, operational premises or elsewhere on the railway system<sup>46</sup>. ORR is also the EA for the duty on occupiers of railway premises to manage the presence of asbestos in their buildings. However, HSE is the EA at sites requiring a COAR licence.

#### *Gas Safety*

A96. HSE is the EA for the installation, maintenance or repair of any gas system (or any work in relation to a gas fitting) where the work is being carried out in premises by people who do not normally work in those premises. This would include most work being carried out by Network Rail's gas fitters. ORR is the EA for the installation, maintenance or repair of gas systems (or any work in relation to a gas fitting) when it is being carried out by people who normally work in the premises where the work is being carried out.

### **HSE's liaison with ORR on Rail Accident Investigation Branch's recommendations**

A97. Under the Railway (Accident Investigation and Reporting) Regulations 2005 (as amended) (the RAIB Regulations), ORR has a role, as the Safety Authority for Britain's railways, to coordinate the implementation of recommendations addressed to ORR by the Rail Accident Investigation Branch (RAIB) under the RAIB Regulations<sup>47</sup>. Under regulation 12(2) of the RAIB Regulations, RAIB can directly address recommendations to HSE; HSE's response to those RAIB recommendations should also be copied to ORR.

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<sup>45</sup> See regulation 8(2) of COAR.

<sup>46</sup> See regulation 4(5) and the definition of 'operation of a railway' in regulation 2 of EARR.

<sup>47</sup> See regulation 12(2) of the RAIB Regulations.

## **Annex 1**

### **Road Vehicle Incursions – new Agreement on Enforcement Authority**

1. There has been uncertainty over whether ORR or HSE is the correct Enforcing Authority in respect of risks arising from the incursion of a road vehicle from a road onto the railway. In the most serious cases a road vehicle may come to rest across the railway causing an obstruction which could lead to a train derailment. The Health and Safety (Enforcing Authority for Railways and Other Guided Transport Systems) Regulations 2006 ('EARR') are not clear as to which body has enforcement responsibility for road vehicle incursions that could affect the safe operation of the railway.

2. As there is the potential for this risk to cause a serious rail accident ORR and HSE have decided to enter into a formal agreement to put beyond doubt the allocation of the enforcement responsibility for road vehicle incursion risks. The Road Vehicle Incursion Enforcement Agreement (the 'agreement') has been drawn up using the power in Paragraph 7(2) of Schedule 3 to the Railways Act 2005 and section 13(3) of the Health and Safety at Work etc Act 1974 ('HSWA'). It recognises that there is uncertainty as to who is the correct EA under the current legal framework.

3. To the extent that the responsibility for the enforcement for road vehicle incursion risks have not been transferred to ORR under EARR and consequently remain with HSE under HSWA, the agreement provides that ORR will assume all of HSE's enforcement functions in relation to road vehicle incursions. ORR will exercise these enforcement functions in line with its published Enforcement Policy. This will include giving advice and guidance, issuing improvement or prohibition notices where appropriate, and taking decisions on formal enforcement action where necessary.

4. The agreement means that ORR is the EA for situations where there is a health and safety risk to the operation of the railway arising out of or in connection with an actual or potential road vehicle incursion. The agreement also enables ORR to deal with situations where a road vehicle may damage a bridge or other structure which could create a health or safety risk to the railway. ORR will actively encourage action by Local Highways Authorities to mitigate the risks of road vehicle incursion where these are known to be significant.

5. HSE will continue to act as the EA for premises of relevant undertakings adjacent to the railway which are not allocated to ORR for enforcement under EARR, including in relation to the risk of a road vehicle incursion to the railway from such premises e.g. a factory or farm. In these situations ORR and HSE will work closely together sharing information as necessary.

6. HSE and ORR will keep each other informed of issues which arise from road vehicle incursion events, and will share information to encourage improvements in the management of this risk. The experience of both regulators will be taken into account when the agreement is reviewed at regular intervals.

## **Annex 2**

### **ORR's new strategic road network monitoring role**

1. From 1 April 2015 ORR took on responsibility for monitoring and enforcing the performance and efficiency of Highways England.
2. Unlike the railways this role does not include regulation of health and safety under HSWA. However, ORR will work with relevant stakeholders, including HSE, to take into account the effect of its monitoring role on England's strategic road network.

## Annex 3

### Agency Agreement between HSE and ORR on Enforcement Functions in relation to the Design of Railways, Tramways and Other Systems of Guided Transport

#### What the agreement covers

1. HSE and ORR have entered into a new agency agreement (the **agreement**) on enforcement in relation to the design of railways, tramways and other systems of guided transport. The agreement has been made using the powers in paragraph 7(2) of Schedule 3 to the Railways Act 2005 and section 13(3) of the Health and Safety at Work etc Act 1974. The effect of the agreement is that ORR will assume certain enforcement functions during the design stage of railway<sup>48</sup> infrastructure projects. ORR will, therefore, become the enforcing authority (**EA**) for the enforcement of existing relevant health and safety law as it applies in relation to aspects of the design of railway infrastructure. This delegation does not shift the ultimate statutory responsibility from HSE for making adequate arrangements for enforcing health and safety law (HSWA section 18) and therefore involves a shift of work, not a shift of responsibility. The objective is to ensure that designs eliminate or reduce health and safety risks which could otherwise arise during the operation of the railway, or which could adversely affect the safe operation of the railway.
2. The key pieces of relevant legislation are:
  - Health and Safety at Work etc. Act 1974 (**HSWA**);
  - Management of Health and Safety at Work Regulations 1999;
  - Railways and Other Guided Transport Systems (Safety) Regulations 2006;
  - Construction (Design and Management) Regulations 2015 (**CDM 2015**).
3. The agreement does not create any form of approval process in relation to the design of railway infrastructure. Nor does the agreement alter the allocation of enforcement functions for railway construction activities set out in the Health and Safety (Enforcing Authority for Railways and Other Guided Transport Systems) Regulations 2006 (as amended) (**EARR**).
4. ORR does not have an enforcement remit in respect of buildings built over or around a new railway station which are separately occupied for another purpose, for example offices or domestic dwellings.
5. ORR and HSE have arrangements to manage, train and support their inspectors to ensure that they will deliver their enforcement functions in line with their published enforcement policies, so that both EAs will take a consistent approach to enforcement under HSWA. These policies share consistent wording and principles for the exercise of enforcement functions, in particular that such enforcement should be proportionate, targeted, consistent and transparent and that there should be accountability. In fact ORR's policy shares almost identical text having been developed from the HSE policy

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<sup>48</sup> For the purpose of this Annex, any references to 'railway' should be taken to include tramway systems and any other guided transport systems which is within ORR's enforcement remit under EARR.

originally. Both EAs make enforcement decisions in line with HSE's Enforcement Management Model and comply with the Regulator's Compliance Code. Therefore, duty-holders can expect ORR and HSE to follow consistent approaches to enforcement activity and decision making.

6. ORR and HSE will co-ordinate their enforcement activities at the design stage of railway infrastructure projects and ensure that their roles are clear to the duty-holder. This will include:
  - Keeping each other informed of any issues which may be relevant to both EAs;
  - Communicating with each other if formal enforcement action is under consideration. In particular, if ORR is considering formal enforcement action, under this agreement it will inform HSE in advance;
  - Both EAs being represented at meetings with the duty holder as appropriate;
  - Setting up liaison arrangements at an operational level on a case by case basis to ensure good communication channels.
7. HSE and ORR will keep these working arrangements under review in order to assess the effectiveness of the liaison arrangements between the EAs, and to consider the impact of the agreement on enforcement arrangements. HSE and ORR are required to review the terms of the agreement at least once each year from the date that it comes into effect and will consult stakeholders, as appropriate, as part of that review to ensure any necessary and mutually agreeable changes are reflected in the agreement.

### **Why we have entered into an agreement**

9. The current period of significant growth and major new projects in the railway sector has highlighted the need for ORR to have an enforcement role in relation to the design of all railway infrastructure at an earlier stage. HSE and ORR both agree that it is appropriate for ORR to be the EA in respect of aspects of the design which are relevant to operational health and safety.
10. Under EARR, ORR's enforcement role begins when there is an operational railway. This means that HSE is the EA for the design and construction phases of a new build railway. HSE and ORR make arrangements to hand-over enforcement functions as a project moves from construction phase to operational phase. HSE is also the EA for certain construction activity on existing railways, for example HSE will be the EA for the extension or enlargement of railway infrastructure where the construction work is not in close proximity to the operation of the existing railway and consequently there is no risk from the operational railway to the health and safety of the construction workers. HSE could, therefore, be the EA for a construction project to extend the railway or a station.
11. Under the agreement, ORR will carry out certain enforcement functions on behalf of HSE. These functions relate to the design of infrastructure, operational premises or other fixed assets relating to a railway in so far as the design may adversely impact health and safety during the future operation of the system. HSE will retain its enforcement functions in relation to construction safety, i.e. ensuring that designs for the construction of railway

infrastructure eliminate, reduce and/or mitigate health and safety risks during the construction phase. In practice this means that HSE's role in relation to construction safety on major railway projects such as Crossrail will not change.

### **Application of agreement to enforcement roles on construction projects for new railway infrastructure**

12. ORR will undertake a new role at the early stages of new railway construction projects such as HS2 or Crossrail 2 to ensure that the general principles of prevention<sup>49</sup> are applied early in a project so that opportunities are taken to design out health and safety risks which could otherwise arise during the operation of the railway. In particular, ORR will encourage designers to produce design options for the elimination or reduction of such risks which may arise during the operation and maintenance of the railway. For example, infrastructure should be designed so as to reduce the need for maintenance workers to access the operating railway, thereby limiting their exposure to health and safety risks.
13. HSE will continue to be involved at the design stage of new railway construction projects but its enforcement role will be in relation to ensuring that the designs eliminate or reduce health and safety risks which may otherwise arise during the construction phase.
14. Notwithstanding the principles set out in this MoU in relation to enforcement of CDM 2015 and HSWA by HSE and ORR, both EAs may wish to explore alternative coordination arrangements with further regulators which may suit the needs of a particular project.
15. The following list gives some examples of projects for which ORR will be the EA for the purpose of ensuring designs eliminate or reduce health and safety risks which could otherwise arise during the operation of the railway or which could adversely affect the safe operation of the system:
  - Railway or tramway systems including tunnels, bridges, viaducts, supporting structures, level crossings;
  - Signalling installations;
  - Electrical installations for supplying power to vehicles;
  - Plant and equipment or electrical or mechanical installations;
  - Stations;
  - Light Maintenance depots and;
  - Proposals for innovative guided transit systems.

### **Application of agreement to enforcement roles for construction projects on the existing railway**

16. The agreement also clarifies that ORR has an enforcement role in respect of the design of infrastructure, operational premises (e.g. stations) or other fixed assets relating to or on the existing railway. This role will apply with respect to ensuring that the designs

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<sup>49</sup> As specified in Schedule 1 to The Management of Health and Safety at Work Regulations 1999.

eliminate or reduce health and safety risks which could otherwise arise during the operation of the railway, or which could adversely affect the safe operation of the railway.

17. For those construction projects on the existing railway for which HSE is the EA (see paragraph 11), ORR will also have an EA role in relation to ensuring that the general principles of prevention are applied early in a project so that opportunities are taken to design out health and safety risks which could otherwise arise during the operation of the railway.

## Annex 4 Cross-referenced A-Z listing of railway-related enforcement topic areas

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