

# Defra – DfT guidance on S120(3) and (3A) Highways Act 1980

Outlines how S120 (3) and (3A) of the Highways Act 1980 escalation route works and what will be required for an application to progress.

From: [Department for Environment, Food and Rural Affairs](#) and [Department for Transport](#)

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Applies to England

## 1. Who the guidance is for

- 1.1. This guidance is aimed at level crossing operators and local highway authorities.
- 1.2. This guidance is for England only, as the functions under S120 of the Highways Act 1980 (HA 1980) have been devolved in Wales.
  - 1.2.1. For matters relating to Wales, contact [PEDW.Casework@gov.wales](mailto:PEDW.Casework@gov.wales)

## 2. Background

- 2.1. This guidance covers the escalation route for:
  - Proposed Rail Crossing Extinguishment Orders under S118A HA 1980; and
  - Proposed Rail Crossing Diversion Orders under S119A HA 1980.
- 2.2. These sections were introduced to HA 1980 by the Transport and Works Act 1992 to enable local highway authorities to expedite rail crossing extinguishment or diversion order applications in the interests of the safety of members of the public using it or likely to use it.
- 2.3. For both sections the making of the order is a discretionary exercise by the order making authority.
- 2.4. However, S120(3) and S120(3A) of the HA 1980 sets out circumstances in which the decision to promote an order can be made by the Secretary of State instead of the local highway authority.
- 2.5. This guidance should be read in conjunction with the 2022 guidance developed jointly by the Association of Directors of Environment, Economy, Planning and Transport (ADEPT), Institute of Public Rights of Way and Access Management (IPROW) and Network Rail Infrastructure Limited (Network Rail), about the S118A and S119A rail crossing extinguishment and diversion order process (“the S118A/119A guidance”). The below guidance sets out how to escalate an application made originally under S118A/119A.

## 3. The Escalation Route under S120 (3) or (3A) Highways Act 1980

- 3.1. Under S120(3) HA 1980, level crossing operators are able to apply in writing to the Secretary of State for Environment, Food and Rural Affairs, to make a decision on whether a rail crossing should be closed or diverted, where they think the Secretary of State would have the power to confirm the order in accordance with the requirements set out in S118A or S119A, and no council having the power to do so

have proposed an order. S120(3) escalations would require a consultation with the relevant authority before the Secretary of State could make the order.

- 3.2. Under S120(3A) HA 1980 level crossing operators are able to apply in writing to the Secretary of State for Environment, Food and Rural Affairs, if they have made a S118A rail crossing extinguishment or S119A diversion order application to local highway authority which has neither been confirmed, nor submitted to the Secretary of State, within 6 months of receiving the request. The Secretary of State may then make an order if they are satisfied it meets the requirements set out in S118A or S119A. This may be done without consultation with the local highway authority.
- 3.3. The Secretary of State has delegated decision-making power under S120 (3) and (3A) to the Planning Inspectorate (PINS) to carry out casework on their behalf, when instructed to do so by the Department for Environment, Food and Rural Affairs (Defra).
- 3.4. Upon receipt, Defra will consider whether it is expedient to make the order, noting the legislative requirements set out under S118A and S119A. As stated in paragraph 9.2, Defra expect to give a determination within 3 months.
- 3.5. This will involve considering the facts of any application with a focus on the site-specific safety considerations. Defra's consideration of the application may include that:
  - the criteria set out in S120(3) or (3A) of the HA 1980 are met;
  - the S118A/119A guidance produced by ADEPT, IPROW and Network Rail has been complied with;
  - there is evidence of significant safety issues at the crossing, such as multiple near misses or recent fatalities at the site (and likelihood of repeat or increased occurrence);
  - there has been extended closure(s) of the crossing due to safety concerns; and
  - For diversions<sup>1</sup> – the proposed new route is not substantially less convenient to the public, and consideration is given to the effect the diverted way will have on the rights of way network as a whole and the safety of the diversion (particularly where it passes along or across a vehicular highway).
- 3.6. If satisfied that the application meets the prescribed threshold and the safety case is made out as below, Defra will instruct PINS to determine the application.
- 3.7. Upon instruction from Defra, PINS will look in greater detail to check if the original S118A/119A application to the council and the subsequent S120 escalation application contains the contents required by the Rail Crossing Extinguishment and Diversion Orders Regulations 1993 (see "Information to include in a S120 application" section 5 below). Providing the full information has been provided, PINS will progress the order (see "Timings" section 9 below for information about the process).

#### **4. Necessary steps before utilising the escalation route**

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<sup>1</sup> Diversions could include bridges or tunnels, although this is not an exhaustive list of diversion types. It should be noted that the criteria for diversions are less stringent than those for extinguishments.

- 4.1. Defra will expect any application follows the steps set out in the S118A/119A guidance developed jointly by ADEPT, IPROW and Network Rail. This guidance sets out clear expectations for how both local highway authorities and level crossing operators engage with the application, including:
  - An expectation that the required information for each application is included, as outlined in Annex B of the guidance;
  - An expectation that both parties discuss and agree a reasonable timescale to progress each stage of the application process, and work to that indicative timeline wherever possible;
  - An expectation that a local highway authority indicates if more information is required as soon as possible, and the level crossing operator responds promptly to confirm whether they can fulfil this request and when.
- 4.2. We recommend level crossing operators and local highway authorities consult the legislation, each other and the full ADEPT-IPROW-NR guidance, including all annexes, at every stage of the application process, to identify any potential issues early.
- 4.3. It is expected that level crossing operators take measures to alleviate concerns raised by local highway authorities, where appropriate, and communicate clearly to the local highway authority where this is not appropriate, and why.
- 4.4. In return, the local highway authority is expected to substantively respond within a reasonable timeframe to communications from the level crossing operator, setting out clearly and precisely what additional information it requires and/or stating reasons for refusal to progress the application, against the legal threshold as outlined in s118A/119A. Not responding to an application within 6 months would provide grounds for a S120(3A) application.
- 4.5. It should be noted that S120 escalation powers would only be exercised by Defra exceptionally. The preference would be for local highway authorities to promote orders wherever possible. Nevertheless, S120(3) and S120(3A) provide a route for applications to be escalated to the Secretary of State. The circumstances where S120(3) and S120(3A) escalations would apply are outlined below.
- 4.6. Instances where:
  - 4.6.1. No local highway authority having the power to do so has made and submitted a rail crossing extinguishment or diversion order; and
  - 4.6.2. Defra is satisfied that, if such an order were made and submitted to them, they would have power to confirm the order in accordance with S118A and S119Awould constitute sufficient grounds for the level crossing operator to exercise the S120(3) escalation route, as outlined below.
- 4.7. As noted in paragraph 4.5, the process for railway crossing extinguishment or diversion order applications is for them to be made to the local highway authority first under S118A/S119A, and for the local highway authority to be given 6 months to consider an application. That period should be used in constructive dialogue between the parties, before S120(3) is used (see 4.1 to 4.4).
- 4.8. However, there may be exceptional circumstances where a level crossing operator feels there is a strong and urgent enough safety case to bring a case to the Secretary

of State sooner. If a local highway authority declines an order, or has expressly indicated to the level crossing operator that it will not progress an order within 6 months, the level crossing operator may also wish to pursue a S120(3) escalation.

4.9. Instances where the local highway authority has either:

4.9.1. not confirmed an order within 6 months of receiving the request; or

4.9.2. not submitted it to the Secretary of State within 6 months of the application

would constitute sufficient grounds for the level crossing operator to exercise the S120(3A) escalation route as outlined below.

4.10. Public safety-related applications should be expedited in line with this guidance.

## **5. Information to include in a S120 application**

5.1. When drafting an application for a S120 escalation, applicants should include the following information (which should have been included in the original application to the local highway authority):

5.1.1. Basic information about the level crossing, such as:

- the name and location of the crossing;
- details on paths and bridleways to be extinguished; and
- the names and address of landowners around the crossing.

5.1.2. Two maps to the scale of 1:25,000 and 1:2,500 respectively, or to the largest scale readily available, showing:

- the crossing;
- any paths or ways to be extinguished (represented by a bold continuous line) or created (represented by a bold broken line);
- a breakdown of existing and new routes into sections (e.g. A-B, B-C);
- any connecting paths or ways; and
- grid references and orientation

5.1.3. Text to explain the contents of the maps, including what all labels are showing, including the width, length and terminal points of particular sections. Information about local landmarks or features, junctions with other highways or any other information that would assist with orienting the description in the order, particularly in respect of the start and end points of the section to be diverted, would be welcomed.

5.1.4. Evidence of written consent from every person with an interest in the land which the extinguishment passes, or detail as to why consent has not been obtained.

5.1.5. Justification for the proposed extinguishment (such as the safety case).

5.1.6. An indication whether you are willing to enter into an agreement with the council under S118A(5) or S119A(8) of the Highways Act 1980.

5.1.7. Information about the public utility providers in the area.

- 5.2. For applications where the existing right of way is proposed to be **diverted** to a new restricted byway, bridleway or footpath, the following information will also be required:
- 5.2.1. Details about the new footpath, bridleway or restricted byway, as labelled on the 1:2,500 map provided, such as the width; length; and terminal points (grid references) of the sections, and including orientation
  - 5.2.2. If planning permission for the proposed diversion way has been granted:
    - A copy of the planning application (including the plans submitted with the application),
    - A copy of the local planning authority's report to its planning committee on the application (or their officer's delegated report);
    - A copy of the local planning authority's decision notice;
    - Detail of what stage the construction of the diversion is at currently; and
    - Estimated timescales for completion of the development.
  - 5.2.3. Evidence of written consent from every person with an interest in the land which the new path crosses, or detail as to why consent has not been obtained.
  - 5.2.4. Information about whether the applicant is willing to maintain all or part of the new footpath or bridleway.
  - 5.2.5. Information about whether the local highway authority is willing to maintain all or part of the new footpath or bridleway.
  - 5.2.6. Justification for the proposed diversion.
- 5.3. Paragraphs 5.1 and 5.2 set out requirements contained in Schedule 1 of The Rail Crossing Extinguishment and Diversion Orders Regulations 1993.
- 5.4. A draft of the required order and order map should also be submitted with the application.
- 5.5. Schedule 1 contains a form for rail crossing extinguishment orders (where no new footpath or bridleway is to be created) and a different form for a rail crossing diversion order (where a new path or way is to be created). Please ensure you used the correct form in your original application to the council.

## 6. Submitting a S120 application

- 6.1. Applications should be submitted to:
- [defra.helpline@defra.gov.uk](mailto:defra.helpline@defra.gov.uk) (quoting "FAO: The Rights of Way Team")
- 6.2. Or they should be sent to;
- The Rights of Way Team  
Seacole Building  
2 Marsham Street  
London

SW1P 4DF

United Kingdom

- 6.3. The applicant should ensure the application includes all of the information specified above, as Defra cannot begin processing the application until all of the information required by law has been received.

## 7. What happens next

- 7.1. When an application is received by PINS it will be checked to ensure they have all the necessary documentation to enable them to proceed. If an application is incomplete, or a document is insufficient, the application will be delayed until they are received.
- 7.2. From formal request from Defra to consider an application, PINS aim to issue a decision to either make or reject the order<sup>2</sup>;
  - 7.2.1. Where no objections are received - within 29 weeks
  - 7.2.2. Where objections are received, and to be determined by way of:
    - Written representations - within 52 weeks
    - A hearing - within 54 weeks
    - A local inquiry - within 60 weeks
- 7.3. The timings for hearings and local inquiries are as set out in The Rights of Way (Hearings and Inquiries Procedure) (England) Rules 2007 and take effect when an order notice has been issued.

## 8. Right of Appeal

- 8.1. Once an order decision is issued there is no power to amend or change it. The only way that a decision may be reviewed is by way of judicial review. To be successful, it would need to be shown that the law had been misinterpreted or that some relevant criteria had not been met.

## 9. Timings

- 9.1. Application received by Defra – Defra consideration according to safety criteria
- 9.2. The consideration of an application and whether to accept it for the S120 process can take some time, depending on the legal test of the application; but Defra expect to give a determination within 3 months. Defra will informally consult PINS at this stage for a view as to whether the application passes the expediency tests in the interests of public safety. Upon receiving this information Defra will assess the evidence against the legal requirements under the Highways Act 1980, and providing it meets these, it will pass the application to PINS to process.
- 9.3. Application sent to the Planning Inspectorate

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<sup>2</sup> It should be noted that s120 HA1980 provides for a single stage procedure (i.e. only order making) instead of the standard, two stage process (i.e. order making and confirmation of a made order) under s118(A)/119(A)

9.4. PINS timelines are as set out in The Rights of Way (Hearings and Inquiries Procedure) (England) Rules 2007.

## 10. The Process

<p><b>1. Instruction and application received from Defra.</b></p> <p>Application and document checked.</p> <p>Missing documents requested.</p> <p><i>(4 weeks)</i></p>
<p><b>2. Draft Order</b></p> <p>Draft order, consulting internally, including with the appointed Inspector. Consult with applicant, local authority and modify the draft accordingly, resolve queries, recirculate until all parties are happy with the order.</p> <p><i>(8 weeks)</i></p>
<p><b>3. Advertise Order</b></p> <p>Draft notice and arrange for it to be published. Prepare letters to be served, including prescribed organisations and notified parties, prepare a certificate of posting to send to applicant.</p> <p><i>(4 weeks prep, 28 days for responses)</i></p>
<p><b>4. No objections</b></p> <p>Prepare notice for publication, once ready arrange for order to be signed, sealed and dated, and prepare letters and certificate of posting.</p> <p>Publish making of order and prepare and issue letters to all relevant and notified parties.</p> <p><i>(9 weeks)</i></p>
<p><b>5. Objections</b></p> <p>Acknowledge them, decide procedure (liaise with the Inspector as necessary).</p> <p><i>(1 week)</i></p>
<p><b>6. Proceed as per written representations process</b></p> <p><i>(22 weeks)</i></p>
<p><b>6. Proceed as per hearing process</b></p> <p><i>(24 weeks)</i></p>
<p><b>6. Proceed as per local inquiry process</b></p> <p><i>(30 weeks)</i></p>
<p><b>7. Confirm order – publish notice and Issue decision</b></p> <p>Prepare notice for publication, once ready arrange for order to be signed, sealed and dated, and prepare letters and certificate of posting.</p>

Publish making of order and prepare and issue decision to all relevant and notified parties.  
(9 weeks)

**8. Order not confirmed**

Issue decision  
(1 week)

**9. Advertised modifications**

Issue decision.  
(1 week)

**10. Arrange for advertised modifications to be advertised**

Arrange for notice to be published, prepare and send letters to all relevant and notified parties.  
(4 weeks prep + 28 days for responses)  
Go to step 4 if no objections received, step 5 if objections received.