Greengauge 21 High Speed Rail Development Programme

Report on Statutory Processes and Consultation

Executive Summary

1 A legal requirement to consult may arise through an express statutory requirement, through the application of policy guidance or, more indirectly, by way of a common law duty of fairness, e.g. where a legitimate expectation of consultation has been created.

Stage 1 – 3 Consultation (*consultation by Greengauge 21 to build a consensus on HSR*)

2 Greengauge 21's Invitation to Tender Document outlined three stages to its consultation activity: stage 1, involving initial consultation and the consideration of statutory processes; stage 2, covering strategic choice workshops, and consultation on emerging findings; and stage 3, wider public consultation.

3 Although there are no statutory requirements with regard to this consultation activity, we would recommend that relevant Government guidance is followed where appropriate, as the results of the consultation are more likely to be considered by the Government in its developing policy on High Speed Rail ("HSR") if this can be demonstrated.

4 A key objective for Greengauge 21, following completion of the consultation exercise and its final report (anticipated to be issued in Summer 2009), should be to ensure that the findings of the report can feed into developing government policy in such a way that the policy becomes more open to supporting HSR. In particular, Greengauge 21's final report should be aimed at feeding into the DfT's National Networks National Policy Statement being developed under the Planning Act 2008 in relation to railways and other networks and expected to be published for consultation in autumn 2009.

5 As the "option generation" stage under the DfT's framework policy report, *Towards a Sustainable Transport System (October 2007)* is 2009-2010 and the consultation on the National Networks Policy Statement is proposed to be in late 2009, Greengauge 21 may be able to issue its final report so that it is available to the Government at the time when policy options are still being generated. The final report should also aim to provide the strategic framework for the Government's new HS2 company.

Authorising Regime for Corridors 1, 2 and 4

6 These corridors would be authorised either under the new Planning Act 2008 regime or alternatively by an Act of Parliament (via the Hybrid Bill procedure) if the Government was willing to promote the project.

7 Under the Planning Act 2008 the key statutory processes[1] in relation to the new regime are:

(a) statutory requirements on the Government to publish National Policy Statements ("NPSs") for nationally significant infrastructure projects, including a requirement to consult on and publicise a draft NPS and lay it before Parliament;

(b) a duty on the Government to carry out an "appraisal of the sustainability of the policy" in a draft NPS, which may include a Strategic Environmental Assessment ("SEA"); and

(c) the creation of a new procedure for the examination and determination of major infrastructure project applications by an Infrastructure Planning Commission ("IPC"), including detailed statutory requirements on a promoter to consult prior to submitting an application to the IPC.

8 Unless and until HSR is included in the National Networks NPS, it is difficult to see how any HSR application could be granted by the IPC. This is because the Panel or Commissioners' Council[2] *must* decide each application in accordance with any relevant NPS, except under certain specified limited circumstances. However, once a NPS is designated, there is an ongoing duty on the Secretary of State to review it when he thinks it appropriate. If there have been significant changes in circumstances on the basis of which any of the policy was decided, that may be one of the circumstances in which the Secretary of State may review the NPS.

9 In the debates that took place on the Planning Bill in the House of Lords during October and November 2008, the Government indicated that it will, as far as practicable, incorporate the requirements of the SEA Directive into any "sustainability appraisal" for a NPS, in order to ensure one integrated assessment process without unnecessary duplication[3]. The more locationally-specific a NPS will need to be, the more likely this is to be the case. An SEA is a process which would include the preparation of an environmental report on the likely significant effects of the draft NPS and reasonable alternatives, taking into account the objectives and geographic scope of the plan. However, SEA is more than just an environmental assessment and report; it includes specific duties to consult and take into account the results of consultation in decision-making. There may be scope for Greengauge 21 to respond to such a consultation to maintain the pressure on the Government to consider the strategic development of a national HSR network fully and to give adequate reasons

[1] It should be noted that there remains a political risk that a future government will seek to amend or perhaps even scrap the new regime and procedures introduced by the Planning Act 2008.

[2] See footnote 11.

[3] See, for example, Lord Adonis's comments in the House of Lords during the Report stage debate, 10 November 2008. On the basis of these comments it may be expected that a "sustainability appraisal" might also include "appropriate assessment" under the Habitats Directive, where this is necessary.

within the designated NPS as to how Greengauge 21's responses to the SEA report were taken into account.

10 The Hybrid Bill procedure (the alternative option for authorising Corridors 1, 2 and 4) was used for the promotion of High Speed 1 and Crossrail, resulting in the Channel Tunnel Rail Link Act 1996 and the Crossrail Act 2008. The Government is likely to carry out extensive consultation on any proposed Hybrid Bill for HSR. The Hybrid Bill process includes a "petitioning period" whereby those "specially and directly affected" by the Bill can object to the Bill in each House and be heard by a Select Committee of MPs in the Commons and of Peers in the Lords, should negotiations with the petitioners not lead to the withdrawal of their objections.

Corridor 3 (London – Bristol/Cardiff)

11 The construction or alteration of a railway line only falls within the scope of the Planning Act 2008 if the railway will be *wholly* in England when constructed. This restriction may become an issue if Corridor 3 were to extend to Cardiff rather than just to Bristol. There would seem to be three options to overcome the "wholly in England" restriction:

(a) divide up the works, authorising those sections of the railway running from London to the Welsh border under the Planning Act 2008 regime, and those sections of the railway from the Welsh border to Cardiff under the Transport and Works Act 1992 regime ("TWA 1992"). The latter regime was followed for elements of the West Coast Main Line and Thameslink 2000 projects. There is a pre-application consultation process set out in government guidance relating to the TWA 1992, although this is not as rigorous as the equivalent requirements in the Planning Act 2008; or

(b) authorise the entire HSR line by way of an order made under the TWA 1992; or;

(c) if government sponsorship of Corridor 3 could be achieved, an Act of Parliament (the Bill for which was considered by way of the Hybrid Bill procedure) could authorise the entire HSR line.

12 If Corridor 3 was to be constructed using a series of upgrades that incorporated some new infrastructure and some existing infrastructure (e.g. an existing crossing of the River Severn), then option (a) above would offer a realistic solution. However if Corridor 3 was to be an entirely new separate line in its own right, we consider that there might be some difficulty "artificially" dividing up the line for the purposes of authorisation, in which case options (b) and (c) might offer a more attractive solution.

Corridor 5: Anglo-Scottish

13 Authorisation of a new high-speed line that extended from England to Scotland would raise similar cross-border issues to those considered above in respect of one that

extended into Wales. However, due to additional restrictions on the methods of authorisation, the following options are conceivably available:

(a) as with the England to Wales line, if some method was created to divide the railway works into separate parts, the works within England would be authorised under the Planning Act 2008 regime, and the works in Scotland would be authorised by an Order made under the Transport and Works (Scotland) Act 2007 or by a Hybrid Bill promoted in the Scottish Parliament; or

(b) the entire high-speed line could be authorised by way of an Act of the UK Parliament, the result of either a Private Bill (if promoted by a private entity) or a Hybrid Bill (if promoted by the Government, as with the Crossrail project). For either option, a convention since devolution and the Scotland Act 1998 would require the Scottish Parliament to give its consent to such a Bill through the approval of a so-called "Sewel Motion".

14 As before, unless Corridor 5 was constructed using a series of upgrades incorporating existing infrastructure, option (b) would seem to offer the more practical solution for a cross-border scheme with Scotland. The requirements for promoting a Private Bill in the UK Parliament are set out in each House's Standing Orders relating to Private Business. In order to promote a Private Bill, the promoter would need to submit a petition to Parliament for leave to introduce the Bill. Such a petition can only be submitted on or before 27 November each year. Any pre-application consultation would need to be timed with this date in mind. As the Standing Orders do not set out any requirements for pre-consultation in relation to a Private Bill, any pre-consultation process would need to follow best practice as set out in Government guidance, such as the Cabinet Office's Code of Practice on Consultation.

Adequacy of consultation

15 As the requirement to consult is now a statutory duty under the Planning Act 2008, rather than a matter of good practice as generally under the Transport and Works Act Order procedures, it is likely that the Infrastructure Planning Commission ("IPC") will examine very carefully, not just whether pre-application consultation has been carried out, but whether it has been carried out with genuine invitations for advice and genuine considerations of that advice. The IPC can reject an application on the basis that an applicant has not complied with the pre-application consultation processes.

16 In addition, the scope for judicial review of decisions made by the IPC on the basis of inadequate consultation is wider than under the current TWA 1992 procedures, where there is no statutory duty to consult. There may also be some scope for the courts to consider whether the "sustainability appraisal" carried out in relation to proposed National Policy Statements, whether incorporating an SEA or not, has been carried out with due process and regard to statutory consultation requirements, or adequately considered the responses to that consultation.

17 Four requirements have been identified by the courts for a "lawful" consultation:

(a) consultation must be undertaken at a time when proposals are still at a formative stage;

(b) the consultation must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response;

(c) adequate time must be given for such purposes; and

(d) the product of consultation must be conscientiously taken into account when the ultimate decision is taken.

18 However, unless something has gone "clearly and radically wrong" with the consultation exercise, the courts have indicated that they are reluctant to intervene, because the consulting party has a broad discretion in how it carries out consultation.

Bircham Dyson Bell LLP
February 2009

Greengauge 21 High Speed Rail Development Programme

Report on Statutory Processes and Consultation

Main Report

Introduction

1 This report considers –

(a) the statutory and non-statutory requirements and processes regarding consultation, to ensure that the programme of work to identify the most appropriate form of high-speed rail ("HSR") network for Great Britain is carried out with a robust methodology so reducing the risk of criticism at later stages; and

(b) how HSR lines in the five corridors identified by Greengauge 21 can be authorised.

2 A legal requirement to consult may arise through an express statutory requirement, through the application of policy guidance or, more indirectly, by way of a common law duty of fairness, e.g. where a legitimate expectation of consultation has been created[4].

3 This report considers consultation requirements with regard to:

(a) the consultation leading up to the identification of the most appropriate form of HSR (i.e. stages 1 - 3 referred to at page 7 of the Invitation to Tender document, namely: stage 1, initial consultation and the consideration of statutory processes; stage 2, strategic choice workshops, and consultation on emerging findings; and stage 3, wider public consultation); and

(b) consultation requirements in relation to applications to construct HSR lines in the five corridors identified by Greengauge 21.

[4] Where a public authority has issued a promise to consult or adopt a practice of consultation, that promise may create a legitimate expectation of future consultation that can be acted on in the courts if that legitimate expectation is not satisfied - *(Nadarajah and Abdi) v Secretary of State for the Home Department* [2005] EWCA Civ 1363. See also *Greenpeace v Secretary of State for Transport for Trade and Industry* [2007] EWHC 311 (Admin).

A: Stages 1 – 3 (Consultation by Greengauge 21 to build a consensus on HSR)

4 Prior to the issuing of the relevant draft National Policy Statement for consultation, and prior to the making of any specific application under the Planning Act 2008 for a HSR line, there are no statutory requirements with regards to consultation on HSR.

5 However if a government department (or a UK non-departmental public body) were to conduct consultation akin to Greengauge 21's stage 1-3 work, it would be expected to adhere where appropriate to the Government's Code of Practice on Consultation ("the Code"), a revised version of which was issued by the Department for Business, Enterprise and Regulatory Reform in July 2008 and which became effective from November 2008. Equally there would be an expectation that a body commissioned by Government to consult on HSR (e.g. Network Rail) would follow the same Code.

6 Greengauge 21 is not a public body[5], and its work has not been commissioned by the Government[6]. It is therefore free to consult with those bodies which it sees as the most appropriate, and in a manner it considers appropriate. However, although the procedures to be followed in so doing are discretionary, the findings of the consultation (should it favour HSR) will need to feed into national or regional policy for a HSR network to become achievable. It follows that the results of Greengauge 21's consultation are more likely to be seriously considered by the Government if it can be demonstrated that, at the least, Greengauge 21 has where appropriate followed guidance in the Code on how effective consultation should be conducted.

7 The Code consists of seven consultation criteria. It is important to recognise that the criteria are targeted at formal, written, public consultations. The Code itself recognises that the criteria may not be relevant to all forms of consultation, particularly at the early stage of policy development (preceding formal consultation) when the scope of an exercise and the specialised nature of the issues make it more appropriate to target specific stakeholders. Moreover the Code accepts that there will be times when deviations from the criteria are necessary even in formal, written, public consultations.

8 Applying this to Greengauge 21's consultation work, whilst the Code should be used as a general guide to stages 1 and 2 of the work where relevant, compliance with the seven consultation criteria is most relevant to stage 3, assuming that it takes the form of a wider, more formal, written consultation.

9 We set out below the seven consultation criteria, with an outline of where and how they have been, or should be, followed throughout the three-stage consultation process being undertaken by Greengauge 21:

---

[5] The existence of Greengauge 21's Public Interest Group does not have any material bearing on this issue.

[6] It must be conceded that the conclusions of Greengauge 21's consultation may not carry the same weight as consultation undertaken by the DfT or carried out by bodies commissioned by it (e.g. Network Rail). However, the TaSTS policy presumption in favour of approaches that seek to build consensus can be highlighted to Greengauge 21's advantage.

(1) *Consultation should take place at a stage when there is scope to influence the policy outcome*.

This criterion is relevant to all three stages. Greengauge 21 is consulting in order to reach a consensus on a HSR network. No options should be ruled out at this stage and Greengauge 21 should therefore be seen to be addressing the question of whether or not there is a need for a HSR network, as well as addressing the extent and routes of such a network. This principle has guided the consultation work undertaken thus far, and will continue to do so.

(2) *Consultations should normally last for at least 12 weeks, with consideration given to longer timescales where feasible and sensible.*

The rationale behind this criterion is that the quality of responses is improved where consultees have been provided with sufficient time to prepare a response. It will therefore be apparent that this criterion more naturally engenders itself to formal, written, public consultations. Therefore whilst this criterion should guide the wider public consultation undertaken at stage 3, there is no intrinsic value in its application to stages 1 and 2, where consultation has involved roundtable discussions and one-to-one interviews with key stakeholders. Furthermore this criterion is more suited to consultation on specific detailed plans, which Greengauge 21 does not have at this point. As the proposals being discussed are still in their very early stages, stages 1 and 2 are better viewed as the process through which Greengauge 21 is developing and fine tuning the proposals that will later be put out to a wider 12-week public consultation.

(3) *Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.*

This is relevant to all three stages of Greengauge 21's consultation work. It has been complied with in respect of the work undertaken to date, where the reasoning behind the consultation and the scope to influence the work has been clearly outlined. It will be particularly important at stage 3, when the consultation documents must be of a sufficient level of depth and clarity to enable a considered response to be made by consultees.

(4) *Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.*

As outlined above, consultation at stages 1 and 2 has been clearly targeted at specific key stakeholders. Where wider consultation is undertaken at stage 3, the target audience will need to be determined and appropriate communication measures put in place to ensure that those people are reached. The Code does not prescribe precisely *who* should be consulted; that is a matter to be determined by the body carrying out consultation and depends on the nature of the subject matter. By way of an example, we attach a list at **Appendix A** of the organisations consulted by the Department for Transport on its draft

guidance for the preparation of the third round of Local Transport Plans ("LTP3") by local authorities.

(5) *Keeping the burden of consultation to a minimum is essential if consultations are to be effective and consultees' buy-in to the process is to be obtained.*

This criterion was adhered to at stage 1, where respondents were either visited for an interview or invited to reply online in their own time, and will be relevant to stages 2 and 3. Given that a number of organisations are concurrently considering HSR proposals (see below), there may be some value in investigating whether the wider consultation at stage 3 can be coordinated with other organisations in order to minimise the burden of consultation.

(6) *Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.*

A summary of consultation responses is recommended by the Code, setting out what decisions have been taken in light of what was learned during the exercise. In Greengauge 21's case, summary reports will be produced at each stage of consultation. A "summary of responses" could be built into the stage 3 consultation document, explicitly setting out the outcome of stages 1 and 2, so that interested parties are clear as to how the initial consultation fits into the broader picture.

(7) *Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.*

This is effectively being done through the appointment of BDB as consultation advisers.

10 In addition to the Code, reference can also be made to consultation guidance contained in:

(a) the Government's Code of Practice on the Dissemination of Information during Major Infrastructure Developments[7], which also contains general recommendations on conducting consultation; and

(b) the Scottish Executive's Consultation Good Practice Guidance[8], which contains similar guiding principles to those set out in the Code.

11 A key objective for Greengauge 21, following completion of the consultation and the Final Report, should be to ensure that the findings of that report can feed into

[7] This document was published by the Office of the Deputy Prime Minister in October 1999; it is now under the remit of the Department for Communities and Local Government and can be accessed from its website as follows: http://www.communities.gov.uk/publications/planningandbuilding/codepractice

[8] Published in June 2004: http://www.scotland.gov.uk/About/FOI/19260/18512

developing government policy in such a way that this policy becomes more open to supporting HSR. Without such support at government policy level it will be extremely difficult for any promoter to succeed in any application for a HSR line. In particular, the Final Report should be aimed at feeding into the DfT's National Policy Statement ("NPS") being developed under the Planning Act 2008 in relation to railways and other networks, which is expected to be published for consultation in autumn 2009 (see below).

12 In the run-up to the publication of that draft NPS for consultation the Government is pursuing a range of interrelated initiatives to investigate the feasibility of new HSR lines and Greengauge 21 should also aim to feed its findings into each of those initiatives, as outlined in the following paragraphs.

TaSTS and DaSTS

13 In October 2007 the DfT published its framework policy report, *Towards a Sustainable Transport System (*"TaSTS"). It followed this up with the publication in November 2008 of *Delivering a Sustainable Transport System* ("DaSTS"). These documents set out a new approach to improve strategic transport planning, based on the recommendations in the Eddington Transport Study *(December 2006)*. The central proposals are to:

(a) implement a rigorous process to define the key transport challenges, drawing on detailed geographical analysis of pressures, and the improvements in performance sought, focussing on the "whole journey" rather than particular stages or modes in a journey;

(b) consider the full range of possible actions for meeting the challenges and delivering the improvements, including different modal options, and policies for making more efficient use of existing capacity as well as small and larger scale capacity enhancements and packages of policy measures;

(c) prioritise public resources on those policies which most cost-effectively deliver Government's objectives, taking account of the full social, environmental and economic costs and benefits; and

(d) changing the way the Government engages with users, the transport industry and other stakeholders, putting an increased emphasis on the need to build consensus on the way forward for transport.

14 It is proposed that this approach should be used within a framework that provides short-term (5 year) delivery plans, backed up by a medium-term strategy (10 – 20 years ahead), and a clear long-term outlook that identifies possible future options to address changes in the level and pattern of transport demand. It proposes to introduce this framework of transport plans into the already existing 5 yearly High Level Output Statements ("HLOS") and Rail Control Periods. It therefore proposes a New Approach transport plan in 2012, covering the years from 2014-2019. The "Option Generation" stage is indicated to be 2009-2010, such options being those that cost-

effectively deliver the Government's objectives, taking account of the full social, environmental and economic costs and benefits. In terms of timing, Greengauge 21's Final Report should be available to the DfT at the "Option Generation" stage of the DfT Report.

15 DaSTS indicates that, where the preferred options involve the development of national transport infrastructure, the planning process for these schemes will be supported by the production of the National Networks National Policy Statement.

Strategic Transport Networks Group

16 On 29 October 2008, the Secretary of State for Transport announced the setting up of a Strategic Transport Networks Group to build on the recommendations in the DfT Report, to be chaired by Lord Adonis and to include senior members from the Highways Agency, Network Rail, the Department for Transport, HM Treasury and other government departments as required. It is to focus on two issues: first, on how to make best use of existing key networks; and secondly, on longer term solutions for strategic corridors including (crucially) high speed rail. The Group is to report back to the Secretary of State in early 2009 and it may be possible for Greengauge 21 to feed its emerging findings through to the Group via its contacts in its Public Interest Group.

Network Rail Study

17 In March 2008 the Government asked Network Rail to undertake a study to identify capacity limits on existing railway lines, and to consider the case for building new railway lines to address such limits. This will also influence developing government policy. The Network Rail report is due in the summer of 2009.

High Speed 2

18 On 15 January 2009 the Government reported that Network Rail's initial work has pointed to a strong case for an entirely new rail line in the corridor from London to the West Midlands. Such a line would enable faster and enhanced services to be run on new and existing lines to Manchester, Liverpool, Glasgow and other destinations in the north of England and Scotland, cutting journey times and increasing capacity substantially. In the South, any new line could connect to a new Heathrow International interchange station on the Great Western main line, providing a direct 4-way interchange between the airport, the new north-south line, existing Great Western rail services and Crossrail into central London.

19 The Government has responded by announcing the formation of a new company, High Speed 2. Its purpose is to consider the case for new high speed services from London to Scotland, and as a first stage it is being asked to develop a proposal for an entirely new line between London and the West Midlands, in line with Network Rail's recommendation. The Government expects this work to be completed by the end of

2009, at which point it will assess the options put forward for the development of the new line. Clearly, as before, Greengauge 21 should seek to use its findings to influence this work.

HSR and Scottish Transport Policy

20 Given that one of Greengauge 21's preferred corridors would see a cross-border HSR line between Scotland and England, it is also worth considering the extent to which existing Scottish transport policy supports HSR, and how the policy position might be strengthened. The following publications are of particular relevance:

(a) Scotland's National Planning Framework ("NPF**"**) sets out the Scottish Government's strategic development priorities for the next 20 to 25 years. It provides the strategic spatial policy context for decisions and actions by the Government and its agencies. Scotland's second NPF ("NPF2") was laid before the Scottish Parliament on 12 December 2008. The NPF has statutory footing and so planning authorities in Scotland are required to take it into account when preparing development plans, and furthermore it is a material consideration in the determination of planning applications.

For transport, NPF2 focuses strongly on the improvement of infrastructure to further long-term development, promoting policies set out in the National Transport Strategy and the Strategic Transport Projects Review (for which, see (b) and (c) below). The NPF can designate certain developments as national developments. HSR is not listed as one of the 12 major infrastructure projects identified in the Annex to NPF2 which are considered essential for Scotland's long-term development. However, paragraph 121 of NPF2 states that *"the Scottish Government will pursue discussions with the UK Government on the development of a high-speed rail link to reduce journey times between Central Scotland and London to under 3 hours and provide direct rail services to the Continent"*.

(b) Scotland's National Transport Strategy (December 2006) maps out the long-term future for transport in Scotland. At paragraph 97 it explains that responsibility for cross-border rail services is reserved to the Secretary of State for Transport, but like NPF2 confirms that the Scottish ministers will liaise closely over the potential value of HSR links to London and on to Europe, and are committed to investigating the feasibility and value for money of a high speed rail link between Scotland and London and will work closely with the UK Government on this issue.

(c) In December 2008 the Scottish Government issued its Strategic Transport Projects Review, recommending a portfolio of long term improvements to the road and rail network in Scotland to meet economic, environmental and social needs. The 27 recommended projects do not include HSR, although this would appear to be explained by the fact that the Review concerns domestic policies in Scotland. It would also be consistent with the statements made in NPF2 and the National Transport Strategy that HSR is a policy to be taken

forward by the Secretary of State for Transport in liaison with the Scottish ministers.

21 It is apparent from these documents that the Scottish Government is broadly receptive to the building of a new HSR line, albeit that at this stage policy is limited only to a consideration of options. The Scottish Parliament's Transport, Infrastructure and Climate Change Committee is currently holding an inquiry into the potential benefits of HSR. The opportunity to give comments and views on the inquiry ended on 17 October 2008 and the Committee held four dates in November and December 2008 where evidence was given to it, including evidence from Greengauge 21.

22 It is desirable that policies in support of HSR are incorporated within Scottish transport policy. Therefore in addition to its work with the UK Government, Greengauge 21 should seek to use its findings to influence the development of HSR policy by the Scottish Government. In particular it is important that the NPF contains policies in support of HSR, given that it guides planning decision-making in Scotland. The final version of NPF2 is expected to be approved by the Scottish Parliament in spring 2009. However the Planning etc (Scotland) Act 2006 now requires the Scottish Ministers to review the NPF every five years, which involves extensive consultation (two years in the case of NPF2), offering further opportunity for Greengauge 21 to influence long term policy-making.

B: Applications for HSR - Authorising Regimes

23 In terms of authorising HSR in the five corridors which Greengauge 21 is exploring, a number of regimes may be available. A definition and explanation of the terminology used below to describe these regimes is provided at **Appendix B**. We set out below a table indicating which of these legislative regimes are potentially available for authorising HSR in each corridor.

Corridor	Authorising Regime
Corridor 1: London – Birmingham – Manchester	• Planning Act 2008; or • An Act of the UK Parliament (considered by the Hybrid Bill procedure)
Corridor 2: London – Cambridge – North-East	• Planning Act 2008; or • An Act of the UK Parliament (considered by the Hybrid Bill procedure)
Corridor 3: London – Bristol/Cardiff	If to Bristol: • Planning Act 2008; or • An Act of the UK Parliament (considered by the Hybrid Bill

	procedure) If to Cardiff: • An Order made under the Transport and Works Act 1992 ("TWA 1992"); or • An Act of the UK Parliament (considered by the Hybrid Bill procedure); or • Planning Act 2008 (for the English section) and an Order made under the TWA 1992 (for the Welsh section)
Corridor 4: Trans-Pennine	• Planning Act 2008; or • An Act of the UK Parliament (considered by the Hybrid Bill procedure)
Corridor 5: Anglo – Scottish	• Planning Act 2008 (for the English section) and either an Order made under the Transport and Works (Scotland) Act 2007 or a Scottish Hybrid Bill (for the Scottish section); or • An Act of the UK Parliament (considered by the Hybrid Bill procedure or the Private Bill procedure).

24 The potential authorising regimes for HSR in these Corridors, and the associated consultation requirements within them, are explained below. We conclude this report by setting out some legal considerations concerning the adequacy of that consultation.

Corridors 1, 2 and 4

Planning Act 2008

25 The Planning Act 2008 introduces (amongst other matters) a new regime to authorise "Nationally Significant Infrastructure Projects" ("NSIPs"). By virtue of section 25 of the Act, the construction or alteration of a railway is a NSIP if it meets three conditions: (i) it will be wholly within England; (ii) it will be part of a network operated by an "approved operator"; and (iii) its construction does not have the benefit of permitted development under the Town and Country Planning (General Permitted Development) Order 1995 ("GPDO"). These latter two conditions merit brief consideration:

(a) "Approved operators", referred to in condition (ii) above, will be defined by secondary legislation. Ministers have indicated that they will include Network Rail, the Heathrow Express, and the operators of High Speed 1. If any future HSR network was to be operated by a body other than these operators, its construction would not be an NSIP unless that body had also been prescribed as an "approved operator" by regulations made under section 25[9]. It should also be noted that a person or body cannot be an "approved operator" unless it is authorised to operate a network by way of a licence granted under section 8 of the Railways Act 1993.

(b) As for condition (iii) above, the GPDO affords permitted development rights for railway construction (i.e. the right to undertake development without having to obtain express planning permission) in two instances that might be relevant to HSR, if it was to be facilitated by way of an upgrade of an existing railway route:

- Part 11 of Schedule 2 to the GPDO provides permitted development rights where the development is authorised by an existing local or private Act which specifically designates the work and the land on which it may be carried out. It is very likely that the Acts that authorised existing lines also included powers to make modifications to those lines within the original formation such that would allow for an HSR upgrade.

- Part 17 of Schedule 2 to the GPDO provides that development by railway undertakers that is required in connection with the movement of traffic by rail is permitted where it takes place on "operational land", which in essence means land which is already held and used for the operation of the railway. Therefore, if HSR could be facilitated by way of an upgrade to an existing line, without the need for additional land to be acquired, it is conceivable that Part 17 permitted development rights could also be relied upon[10].

26 A series of conceptually linked but not physically contiguous schemes (e.g. a series of upgrades to an existing route) would be NSIPs, if they could not be implemented using permitted development rights. In terms of how these would be treated under the Planning Act 2008, we consider that it would be open to a promoter to make a single application covering each of the separate upgraded sections, in the same way as this is

[9] In the absence of "approved operator" status for the body responsible for HSR, authorisation would need to take place by alternative means, such as a Transport and Works Act Order (for which, see below). However, it is likely that the Secretary of State would use the powers under section 35 of the Planning Act 2008 to direct the application for the project to be treated as though it were an NSIP, by reason of it being a "project of national significance".

[10] We note that only some elements of the upgrade to the West Coast Mainline were authorised by way of a Transport and Works Act Order, which demonstrates that the majority of that upgrade could be and was done under permitted development rights.

currently permissible for a Transport and Works Act Order application (e.g. Thameslink 2000). Alternatively, a promoter could make a number of separate applications, which might be attractive if certain sections were less controversial than others.

27 On the assumption that HSR lines in Corridors 1, 2 and 4 would be NSIPs and would fall under the new development consent regime under the Planning Act 2008, the procedures outlined in the remainder of this section of this report would apply.

28 The key elements of the new development consent regime for HSR are:

(a) the establishment of an independent Infrastructure Planning Commission ("IPC"). A panel of at least three Commissioners, or a single Commissioner for smaller projects[11], will normally decide whether or not to authorise a NSIP, instead of the two stage process under the current Transport and Works Act 1992 ("TWA") regime where an Inspector makes a report to the Secretary of State who makes the decision whether or not to make the TWA Order. The Government is currently anticipating that the IPC will be operational "in the first half of 2010", with the recruitment process having recently commenced;

(b) the decisions of the IPC must be based on the relevant National Policy Statement(s) ("NPSs"), being statements designated by the Secretary of State setting out national policy in relation to NSIPs[12]; and

(c) the IPC's decision approving an NSIP would be in the form of a single unified "Development Consent Order" ("DCO"), which will take the place of many (but not all) of the various consents, etc., currently required for the development of major railway infrastructure, such as powers under the Transport and Works Act 1992, deemed planning permission under s.90(2A) Town and Country Planning Act 1990, Listed Building Consent and Conservation Area Consent.

29 The key statutory processes in relation to the new regime are:

(a) statutory requirements on the Government to consult on and publicise each draft NPS under sections 7 and 8 of the Act; and statutory requirements to lay the draft NPS before Parliament under section 9;

(b) statutory requirements on a promoter (which could, conceivably, be Greengauge 21) to consult prior to making an application for a particular NSIP, under Chapter 2 of Part 5 of the Act; and

---

[11] Under the single commissioner process, the commissioner produces a report which goes to a separate body of Commissioners, called the Commission's Council, which actually makes the decision.

[12] The DfT's current planning assumption is that a "National Networks NPS", covering the strategic road network, rail and rail freight interchanges, will be designated in 2010.

(c) statutory procedures of the Infrastructure Planning Commission ("IPC") for the examination and consideration of applications for NSIPs, leading to a decision.

30 The chart at **Appendix C** sets out the sequence of these key processes, from the initial formulation of an NPS through to a decision on a particular application. Each of the above processes (a) to (c) is outlined in more detail below.

(a) National Policy Statements

Consultation on draft NPSs

31 The Secretary of State has a duty to carry out such consultation and such publicity as he thinks appropriate[13], and a duty to have regard to the responses to the consultation in deciding whether to proceed[14]. In addition, he has the following obligations:

(a) a duty to consult such persons which are yet to be prescribed in secondary legislation[15];

(b) if the policy identifies one or more locations as suitable (or potentially suitable) for a specified description of development, the Secretary of State must ensure that appropriate steps are taken to publicise the proposal, including first consulting with the relevant local authorities, and the Greater London Authority if relevant, on what steps are appropriate to publicise the proposal[16]; and

(c) a duty to carry out an "appraisal of the sustainability of the policy" set out in the draft NPS. Although this is not further defined in the Act, such an appraisal may include a Strategic Environmental Assessment, which has its own separate consultation requirements (see below).

32 In January 2009 the Government published a "route map" for the implementation of the Planning Act, including the IPC[17]. It states that the National Networks NPS is scheduled for consultation and Parliamentary scrutiny in autumn 2009, to be designated "later in 2010" seemingly soon after the IPC has become operational during the first half of 2010. If the Greengauge 21 final report is issued around Summer 2009, Greengauge 21 should consider, together with the organisations in its Public Interest Group, how the information in its final report should be fed into development of the draft National Networks NPS.

---

[13] S.7(2).

[14] S.7(6).

[15] A draft list of these "statutory consultees" was published for consultation by the Department for Communities and Local Government on 28 January 2009.

[16] This requirement would seemingly apply to an HSR corridor even if it was widely drawn.

[17] See http://www.communities.gov.uk/documents/planningandbuilding/pdf/routemap.pdf. The route map itself is available at http://www.communities.gov.uk/documents/planningandbuilding/pdf/routemaptables.pdf.

33 Unless and until HSR is included in the National Networks NPS, it is difficult to see how any HSR application could be granted by the IPC. This is because the Panel or Commission's Council[18] *must* decide the application in accordance with any relevant NPS, except under the limited circumstances where to do so would lead to a breach of international obligations, the Panel or Council would be in breach of a duty imposed under any enactment, the decision would be unlawful by virtue of any enactment, or the adverse impact of the project would outweigh its benefits. It should be noted that the Panel has no flexibility to decide favourably for development where it is not in accordance with the NPS, even if it could be demonstrated that the beneficial impacts of the project would outweigh the adverse impacts. In other words, ensuring that the National Networks NPS favourably covers HSR must be a top priority objective of Greengauge 21.

34 In terms of what the National Networks NPS might say in respect of HSR, this could conceivably range from a simple generic policy presumption in favour of HSR, perhaps with a list of conditions or appropriate circumstances that must be satisfied, to a detailed identification of the preferred corridors. In terms of obtaining consent from the IPC, it would probably be enough for the NPS simply to state a policy in favour of HSR without specifying locations, and this should be the objective as an absolute minimum. However, it is likely that the prospects of obtaining consent would improve considerably and also shorten the IPC process if the particular corridor in question was identified on the basis of national need as a preferred route in the NPS. We advise that this is what Greengauge 21 should be aiming for, and there is a realistic prospect that this can be achieved, particularly following the announcement of High Speed 2. It would require the submission of material to the Government that makes a convincing and comprehensive social, economic and environmental case for HSR within Greengauge 21's preferred corridors, backed up with widespread stakeholder support.

35 If, following consultation on the draft National Networks NPS (and any associated sustainability appraisal), the Secretary of State designates the National Networks NPS without support for HSR, then Greengauge 21 should keep under review whether there is any new information which could be brought to the attention of the Secretary of State that may cause him subsequently to change the NPS. The Secretary of State *must* review each NPS whenever the Secretary of State thinks it appropriate to do so[19]. Section 11 of the Act goes on to state that, if the Secretary of State considers that:

(a) since the last time a NPS was first published or reviewed, there has been a significant change in any circumstances on the basis of which any of the policy in the NPS was decided;

(b) the change was not anticipated at that time; and

[18] See footnote 11.

[19] Section 6.

(c) if the change had been anticipated at that time, any of the policy set out in the NPS would have been materially different,

then the Secretary of State may suspend the operation of all or any part of the NPS until a review has been completed.

Sustainability Appraisals and Strategic Environmental Assessments ("SEA")

36 The Planning Act includes a duty to carry out an appraisal of the sustainability of the policy set out in a proposed NPS. Although this is not further defined in the Act, there is a similar requirement in section 19 of the Planning and Compulsory Purchase Act 2004 which requires local planning authorities to carry out "an appraisal of the sustainability of the proposals" in each Local Development Document, again without further definition. The Government guidance on SEA, "A Practical Guide to the Strategic Environmental Assessment Directive", explains that "Sustainability Appraisal is a form of assessment used in the UK, particularly for regional and local planning, since the 1990s. It considers social and economic effects as well as environmental ones, and appraises them in relation to the aims of sustainable development." It goes on to state that "sustainability appraisals" for Local Development Documents in the 2004 Act fully incorporate the requirements of Directive 2001/42/EC ("the SEA Directive") (although this of course is only a view until or unless a sustainability appraisal is challenged in the courts on the basis that it has not incorporated the SEA Directive requirements).

37 The 2007 White Paper leading to the Bill for the Planning Act 2008 stated that "wherever appropriate, we would expect that [sustainability appraisals] be in the form of an SEA"[20]. In the debates that took place on the Planning Bill in the House of Lords in October and November 2008, the Government indicated that it will, as far as practicable, incorporate the requirements of the SEA Directive into any "sustainability appraisal" for a NPS, in order to ensure one integrated assessment process without unnecessary duplication[21].

38 SEAs are required under either the SEA Directive or the Environmental Assessment of Plans and Programmes 2004 ("2004 Regulations"), in relation to plans and programmes which are subject to adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government and required by legislative, regulatory or administrative provisions. During the Lords' Committee debate on the Planning Bill on 8 October 2008, Baroness Andrews reiterated on behalf of the Government that,

[20] DCLG, Planning for a Sustainable Future White Paper, Para. 3.9.

[21] See, for example, Lord Adonis's comments in the House of Lords during Report stage debate, 10 November 2008. On the basis of these comments it may be expected that a "sustainability appraisal" will also include "appropriate assessment" under the Habitats Directive, where this is necessary. Under the Habitats Directive, where a plan or project is likely to have a significant effect on a designated European nature conservation site, it is to be subject to an "Appropriate Assessment" of its implications for the site in view of the site's conservation objectives. Where significant negative effects are identified, alternative options must be examined to avoid any potential damaging effects.

although the SEA Directive would apply to many NPSs, it was not the Government's view that the SEA Directive would apply to all NPSs. It is difficult to see how the SEA Directive could not apply to a NPS which would be at least corridor (if not locationally)-specific, such as the proposed National Networks NPS. At **Appendix D** we set out the processes that the Government would need to comply with in order to ensure that "sustainability appraisals" comply with the SEA Directive.

39 It should be noted that the objective of SEAs, as set out in Article 1 of the Directive, is to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development. It is a strategic document rather than one relating to a specific project and should take into account reasonable alternatives to the proposals in the draft plan, i.e. the draft NPS. Thus, the sustainability appraisal in relation to the draft National Networks NPS could potentially include analysis of HSR even if the actual draft NPS does not contain it as a proposal. Whether or not it does, a considered response to the statutory consultation on the "sustainability appraisal" would be an additional method of sustaining pressure on the Government to accept HSR as an option to be included in the designated NPS.

Parliamentary requirements

40 Section 9 of the Planning Act 2008 obliges the Secretary of State to lay a draft NPS before Parliament. It is understood that the parliamentary scrutiny period will run concurrently with the public consultation period, but with the Parliamentary period being slightly longer so that it can take account of the public consultation results. Where a Select Committee of either House of Parliament makes recommendations in relation to the draft NPS, or either House passes a resolution in respect of it, the Secretary of State must make a written response to those recommendations or resolution. Thus, members of Parliament will have a role in influencing the draft NPS.

41 As the contents of the National Networks NPS will be crucial to ensuring the progress of any HSR project in England, Greengauge 21 should (together with its Public Interest Group members) consider how best to utilise the support of members of both Houses, to ensure that the issue is debated in Parliament. The Conservative Party is in support of HSR, as demonstrated by the comments of Theresa Villiers, Shadow Transport Secretary, at the Conservative Party Conference in September 2008. The Liberal Democrat Party is also in support of HSR.

Regional and local planning policy, and safeguarding

42 The Planning and Compulsory Purchase Act 2004 ("PCPA 2004") provides that Regional Spatial Strategies "must set out the Secretary of State's policies (however

expressed) in relation to the development and use of land within the region"[22]. At a local level the PCPA 2004 provides that in preparing a local development document the local planning authority must have regard to national policies and advice contained in guidance issued by the Secretary of State[23]. It was made clear by the Government during the Report stage debate on the Planning Bill that it considered an NPS to constitute a national/Secretary of State policy for the purposes of the PCPA 2004[24].

43 The relevance of these matters to HSR is that, if a National Networks NPS identifies specific preferred corridors for HSR (particularly if those corridors are tightly defined) the corridors would also have to be reflected in regional and local planning policies of the areas affected. The formulation of regional and local planning policy documents is subject to consultation, and requires a sustainability appraisal of the plans. Therefore it is to be expected that HSR would also be subject to regional and local consultation within the areas that are affected and the adoption of a preferred route in regional and local planning policy documents would serve to "safeguard" the corridor.

44 Once a preferred corridor had been defined to a sufficient degree of specificity, statutory safeguarding of the route would also be desirable. Statutory safeguarding is the process by which the proposed route and its surrounding location could be protected by the Department for Transport from any developments which may interfere with the future construction of the HSR line, by ensuring that planning permission for those developments is not granted. It takes the form of a safeguarding direction, issued by the Secretary of State for Transport under powers contained in articles 10(3), 14(1) and 27 of the Town and Country Planning (General Development Procedure) Order 1995 ("GDPO").

45 Although there is no requirement in the GDPO for the Secretary of State to follow a consultation process before the direction is issued, in practice (for example as was done in relation to Crossrail) the Department for Transport undertakes a consultation exercise which involves a minimum 12 week consultation with relevant local authorities, affected landowners and the public generally. It is therefore safe to assume that any statutory safeguarding of a HSR route would require prior public consultation.

---

[22] PCPA 2004, s.1(2). Regional Spatial Strategies will soon be replaced by a "Single Regional Strategy", following the recommendations made by the sub-national economic development and regeneration in 2007. It is to be expected that s.1(2) would continue to apply to a Single Regional Strategy.

[23] Ibid, s.19(2)(a).

[24] See the comments of Lord Patel of Bradford during the Report stage debate in the House of Lords (10 November 2008, columns 483-486 Hansard). Amendments were tabled in the House of Lords to make specific reference to NPSs in the PCPA 2004 but these were not accepted by the Government.

(b) Pre-application consultation requirements

46 The following procedures apply to the organisation who is actually promoting a specific HSR scheme. These requirements would therefore apply to Greengauge 21 if it were itself to become the promoter of an HSR scheme under the Planning Act.

Pre-application consultation under the Planning Act 2008

47 The Planning Act sets out clear statutory duties on the promoter of a scheme to consult specified bodies and persons *before* making an application to the IPC. This is a departure from current requirements under the TWA 1992 procedures. Although the DfT guidance "A guide to TWA Procedures" strongly recommends extensive pre-application consultation (and a consultation report is required under the TWA (Application and Objections) (England and Wales) Rules 2006 as one of the formal application documents), there is no actual statutory duty to carry out consultation under the TWA regime.

48 Under the Planning Act, the promoter has a clear duty to consult the following where it proposes to make an application ("Proposed Application")[25]:

(a) such persons as may be prescribed (i.e. in any secondary legislation made under the Act);

(b) local authorities with responsibility over the land (or any part of the land) to which the proposed application relates, and neighbouring local authorities;

(c) the Greater London Authority if the land (or any part of the land) is in Greater London;

(d) any of the following persons that are known to the applicant after making diligent inquiry:

(i) an owner, lessee, tenant (of whatever period) or occupier of land to which the Proposed Application relates ("Category 1 Person");

(ii) a person interested in the land, or has power to sell and convey the land or to release the land[26] ("Category 2 Person"); and

(iii) a person who the applicant thinks would, if the Development Consent Order ("DCO") sought were to be made and fully implemented, or might be entitled (as a result of implementing the DCO or use of land once the DCO has been implemented) to make a claim under section

[25] Section 42

[26] This would include mortgagees.

10 of the Compulsory Purchase Act 1965[27], a claim under Part 1 of the Land Compensation Act 1973[28], or a claim for nuisance ("Category 3 Person").

49 In addition, the promoter must supply to the IPC the same information as it supplies to the above-mentioned consultees, but before commencing the actual consultation[29].

50 The promoter must also prepare a statement setting out how it proposes to consult with people living in "the vicinity of the land" ("Local Community Consultation Statement"). However, before preparing a Local Community Consultation Statement, the promoter must consult with each relevant local authority about what is to be in the Local Community Consultation Statement, and have regard to local authority responses and any guidance from the IPC or the Secretary of State. Once the Local Community Consultation Statement has been prepared, the promoter must publish it in a local newspaper and in such other manner as may be prescribed by regulations; and is then under a statutory duty to carry out its consultation in accordance with the Local Community Consultation Statement.

51 The promoter is required to publicise its intention to make the Proposed Application in the manner which is to be prescribed by secondary legislation.

52 Having carried out all the above-mentioned processes, the promoter is under a duty, when considering whether to make an application in the same terms as the Proposed Application, to have regard to all responses received as a result of the pre-application requirements.

53 If the promoter subsequently makes an application, the IPC has 28 days in which to decide whether to accept the application. One of the criteria to be applied by the IPC in deciding whether to accept the application is whether it considers the promoter has complied with all the pre-application consultation procedures and in doing so the IPC must have regard to any "adequacy of consultation" representation received from a local authority (or the GLA, if applicable). Any application to the IPC for a HSR line wholly within England would need to be, among other matters, accompanied by a consultation report which sets out how the promoter has complied with the pre-application consultation requirements under the Act[30].

---

[27] In essence, a claim for 'injurious affection' to land not compulsorily acquired caused by *the construction* of the project concerned.

[28] A claim for compensation for depreciated of land caused by *the use* of public works (e.g. noise).

[29] Section 46.

[30] Section 37(3).

54 If the IPC accepts the application, it is at this stage that the promoter is then required to provide notice of the application and the objection period to affected and interested parties[31], and to publicise the application in a manner to be prescribed by regulations.

55 The table at **Appendix E** sets out these pre-application requirements in chronological order. As the exact details of the requirements will be set out in secondary legislation to be made and guidance to be given during 2009 and in early 2010, it is not possible at this stage to give a precise indication of the period of time that will be required to carry out this pre-application consultation but for a HSR line it can be expected to be a very significant obligation on the promoter and to take approximately 6-9 months to carry out fully.

Environmental Impact Assessment and Consultation

56 In addition to preparing an application to the IPC, it is to be expected that a promoter of an HSR line would have to undertake an Environmental Impact Assessment (EIA) of the project, by reason of it being a project of a class listed in Annex I or Annex II of Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment. This would require the preparation of an Environmental Statement (ES) by the promoter. The EIA process and the preparation of the resulting ES will itself require detailed consultation by the promoter with the key affected stakeholders (e.g. English Nature and the Environment Agency). In addition if a "scoping opinion" is requested by the promoter (of the body due to consider the application, i.e. the IPC, to identify what information should be included in the Environmental Statement), that scoping opinion is also subject to consultation before being given.

(c) Statutory Requirements following acceptance of Application

57 Once the application has been accepted by the IPC, the Panel or the Single Commissioner of the IPC[32] ("the Examining Authority") assumes responsibility for examination of the application. The procedure for this examination is not wholly contained within the Act, as the Act makes provision for guidance to be issued by the IPC or the Secretary of State, and for rules to be made by secondary legislation ("section 97 Rules"). However, in terms of timing, the procedure can be broken into 3 stages, as in the following table. These stages are explained in more detail in **Appendix F**.

[31] i.e. all those persons consulted for the purposes of the pre-application consultation, as summarised in paragraph 45 above – see sections 56 and 57 of the Act.

[32] In certain circumstances, such as for defence or national security, the Secretary of State can direct that the application is referred to him for examination.

Examination Stage	Time Period
Stage 1 – Examining Authority to carry out preliminary assessment of the application, and to hold a preliminary meeting	(period to be set out in section 97 Rules)
Stage 2 – Examining Authority's examination of the application	+ 6 months from the preliminary meeting
Stage 3 – Examining Authority to make its decision on the application	+ 3 months from completion of the examination

Public Act of the UK Parliament (considered by the Hybrid Bill procedure)

58 If Government sponsorship of a HSR scheme could be achieved, a bespoke Public Act of the UK Parliament could be used to authorise corridors 1, 2 and 4, instead of using the Planning Act 2008. Any Bill for such a Public Act would follow the Hybrid Bill procedure, as its construction and operation would affect the private interests of individuals along the route. The two most recent rail lines to be promoted by the Hybrid Bill procedure were authorised by the Channel Tunnel Rail Link Act 1996 and the Crossrail Act 2008.

59 The Government is likely to carry out extensive consultation on any proposed Hybrid Bill for an HSR line. In relation to the Crossrail Bill which was considered under the Hybrid Bill process, the Government carried out key stakeholder discussions in 2001, before having two rounds of public consultation between September and December 2003, and August and October 2004, which was guided by the Transport and Works (Applications and Objections Procedures Rules) 1999 and the Department for Transport's guidance on the TWA Order regime.

60 Should a Hybrid Bill (or Bills) be promoted for Corridors 1, 2 and 4, there would be an opportunity for anyone "specially and directly affected by the Bill" to object to the Bill in each House by lodging a petition against it following the Bill's Second Reading. Petitions are heard by a Select Committee of MPs in the Commons and of Peers in the Lords. Proceedings are similar to a planning inquiry with the three main exceptions being that the case for the Bill in principle will be deemed already to have been accepted at Second Reading of the Bill, the investigating body is a committee of disinterested Parliamentarians rather than a neutral objective inspector with potentially less knowledge of planning processes, and there is no strict requirement to submit evidence in writing to the Select Committee in advance of giving evidence "on the day". The Select Committee in each House will decide whether to agree to each petitioner's requests, to refuse to do so, or to suggest a compromise between the petitioner and the promoter (i.e. the Secretary of State). The Select Committee can request the promoter to give it Undertakings, or can recommend amendments to the Bill.

61 Once all petitioners have been heard the Select Committee will report the Bill to the House, with or without recommendations for amendment, and the House will consider those recommendations at Report stage and usually accept the recommendations of the Select Committee, as it will have considered the matters before it in much greater detail than the House as a whole is or would be able to. Following the Report stage the Bill is given a Third Reading, after which it is sent to the second House where a similar process is undertaken.

Corridor 3 (London – Bristol/Cardiff)

62 The construction or alteration of a railway line only falls within the scope of the Planning Act if the railway will be *wholly* in England when constructed[33]. If Corridor 3 terminated at Bristol, this would clearly not be an issue, and the considerations outlined above in respect of Corridors 1, 2 and 4 would apply.

63 If the railway was to extend to Cardiff, then there would seem to be three options to overcome the "wholly in England" restriction:

(a) divide up the works, authorising those sections of the railway running from London to Bristol to the Welsh border under the Planning Act 2008, and a those sections of the railway running from the Welsh border to Cardiff under the TWA 1992 regime; or

(b) to authorise the entire high-speed line by way of an Order made under the TWA 1992; or

(c) if government sponsorship of Corridor 3 could be achieved, a bespoke Public Act of Parliament (passed by way of the Hybrid Bill procedure) could authorise the entire HSR line.

64 The Government has indicated that option (a) would be a possible way forward for cross-border schemes[34]. If Corridor 3 was to be constructed using a series of upgrades that incorporated some new infrastructure and some existing infrastructure (e.g. an existing crossing of the River Severn), then we agree that option (a) above offers a realistic solution. However, if Corridor 3 was to be an entirely new separate line in its own right, we consider that there might be some difficulty "artificially" dividing up the line for the purposes of authorisation, as in practice it would be difficult properly to assess the costs, benefits and impacts of a scheme, if it was not considered as a whole. Further, from a legal perspective a "railway" is defined in the Planning Act as in s.67 of the TWA, namely as being a system of transport employing parallel lines which provide support and guidance for vehicles. It may be difficult at

[33] Section 25(1).

[34] In relation to a cross-border HSR line between England and Scotland, this approach was noted as a possible option by the Minister of State, Lord Adonis, in the Lords Committee stage on the Planning Bill on 14 October 2008 (column 716), and in the Third Reading debate in the Lords on 18 November 2008 (Column 1018). It was also suggested as an option in the DfT's submissions to the Scottish Parliament's inquiry into the potential benefits of HSR (16 December 2008).

law to argue that a railway which ends on the Welsh border without a specific destination is a "system". For these reasons, it might be more attractive to authorise Corridor 3 either by a single TWA 1992 order (option (b) above), or by a Hybrid Bill (option (c) above) if the Government was prepared to sponsor the scheme.

65 Under option (a) above, the procedure for authorising the English sections of the high-speed line would be as set out in the preceding section on the Planning Act 2008. The Hybrid Bill procedure, option (c), has also been outlined above in relation to Corridors 1, 2 and 4.

66 We set out below a summary of the procedures to be followed when promoting an Order under the TWA 1992. These would apply to the Welsh section of the high-speed line if option (a) was pursued, or to the entire line if option (b) was pursued.

Order made under the Transport and Works Act 1992

67 This was the procedure followed for aspects of the West Coast Main Line and Thameslink 2000 projects. There is no statutory pre-application consultation process set out in the TWA (Application and Objections Procedure) (England and Wales) Rules 2006 ("TWA Rules"), although Department for Transport guidance *A Guide to TWA Procedures* has extensive provisions regarding pre-application consultation. In addition, the applicant is required to submit, with the application, a report summarising the consultation that has been undertaken, which must include confirmation that the bodies listed in Schedule 5 and 6 to the TWA Rules have been consulted. Although it is not statutory, the DfT guidance strongly advises wider consultation with all statutory utilities whose services may be affected, and with all other persons likely to be affected by the proposals.

68 It is quite likely that the construction of a new high-speed line between England and Wales would be considered to be a project "of national significance". If so, under section 9 of the TWA 1992, the application would have to be approved in principle by a resolution of both Houses of Parliament. If it should be so approved, the normal process of it being referred to an inquiry for consideration by an Inspector would then apply. The Inspector would make a report of his/her recommendations to the Secretary of State for Transport. Any decision to make the TWA Order by the Secretary of State would have to be agreed by the Welsh Ministers. This section 9 process was followed for (and resulted in the rejection of) the proposed Central Railway Order, which is the closest parallel to the proposed new high-speed lines.

Corridor 5: Anglo- Scottish

69 Authorisation of a new high-speed line that extended from England to Scotland would raise similar cross-border issues to those considered above in respect of one that extended into Wales. We consider that the following alternative authorising processes would conceivably be available:

(a) as with the England to Wales line, if some method was created to divide the railway works into separate parts, the works within England would be authorised under the Planning Act 2008 regime, and the works in Scotland would be authorised either by an Order made under the Transport and Works (Scotland) Act 2007[35] or by a Scottish Hybrid Bill; or

(b) the entire high-speed line could be authorised by way of a Private Act of the UK Parliament[36] (if the line was promoted by a private entity as a Private Bill); or

(c) if government promotion of Corridor 5 could be achieved, a Public Act of the UK Parliament could be passed by way of the Hybrid Bill procedure.

70 The procedures applicable to an application under the Planning Act (the English sections of option (a) above) have been considered earlier in this report and the same considerations would apply equally to Corridor 5.

71 As for the Scottish sections of option (a) above, if authorised by an Order under the Transport and Works (Scotland) Act 2007 then the procedure as set out at **Appendix G** would apply. It is broadly the same as the TWA procedure in England and Wales outlined earlier in this report. The application would need to include a statement that, in the view of the applicant, the provisions in the proposed Order were within the legislative competence of the Scottish Parliament together with a memorandum setting out the reasons for that view.

72 Alternatively it would appear that procedures will soon be in place to allow the Scottish sections to be authorised by a Hybrid Bill in the Scottish Parliament. Details are somewhat scarce at this stage, but we understand that the standing orders of the Scottish Parliament are to be amended during 2009 to allow for Scottish Hybrid Bills, and that the procedure will be used by the Scottish Government to promote the new Forth Road Bridge. The same procedure could be used for the promotion of HSR in Scotland, provided that the Scottish Government was willing to sponsor the scheme. It could not be used to authorise any HSR lines beyond the Scottish border, as that would stray outside the Scottish Parliament's legislative competence.

73 As with the cross-border HSR line with Wales, option (a) above may offer an attractive solution for authorising Corridor 5 if it was to be constructed using a series of upgrades that incorporated some new infrastructure and some existing infrastructure. However, as before we consider that options (b) and (c) above (i.e. an

---

[35] Until 2007, construction of a railway in Scotland could have been approved by way of a Bill promoted in the Scottish Parliament. However the Transport and Works (Scotland) Act 2007 effectively removes that avenue, now requiring that an Order be promoted under the 2007 Act to construct a railway in Scotland.

[36] The Transport and Works Act 1992 only applies to England and Wales, and does not extend to Scotland. Note that a Private Bill could probably not be used to authorise the England to Wales HSR line, as Parliament will not normally allow a Private Bill to be considered where there is an alternative method available for achieving the Bill's purposes (which, in the case of the England to Wales HSR line is the TWA 1992 or the Planning Act 2008).

Act of the UK Parliament, either the result of a Private Bill or a Government-promoted Hybrid Bill) would offer a more practical means of authorising an entirely new cross-border HSR line. This is because of the difficulties, as described in relation to Corridor 3, of "artificially" carving up a single new scheme for the purposes of authorisation.

74 The Hybrid Bill procedure in the UK Parliament is commented on above, in relation to Corridors 1, 2 and 4, and the same procedures would apply in respect of Corridor 5. We set out at the foot of this section of this report the procedures involved in promoting a Private Bill in the UK Parliament. It is worth noting that there would be some advantages to a Hybrid Bill over a Private Bill; under the Hybrid Bill procedure, the principle of the Bill cannot be debated after approval at Second Reading. Further, because a Hybrid Bill is government sponsored, it means that the Government will whip up support from MPs and Peers, and use its influence to ease the Bill's passage through Parliament.

75 As any such Private or Hybrid Bill promoted in the UK Parliament would affect Scotland, the principles of devolution as set out in the Scotland Act 1998 also need to be considered[37]. There are two basic principles to devolution. The first is that the Scottish Parliament has competence to legislate unless any provision of such legislation falls outside the "legislative competence" of the Scottish Parliament (s.29(1)). Section 29(2) of the Scotland Act 1998 sets out what would make a legislative provision fall outside the Scottish Parliament's legislative competence, including those matters reserved to the Westminster Parliament and which are set out in Schedule 5 to the Act. Such "reserved matters" include Category E2, being the provision and regulation of railway services except for those which start, end and remain in Scotland[38]. Therefore, the Westminster Parliament retains legislative competence over the provision of a cross-border railway, while the Scottish Parliament has had devolved to it competence over railways which are wholly within Scotland.

76 The second principle is that the Westminster Parliament's supremacy is retained, by providing that the power of the Westminster Parliament to make laws for Scotland (on any matter) is unaffected by the Scotland Act 1998 (section 28(7)). However, a convention has been adopted (commonly called the Sewel Convention[39]) whereby the

---

[37] An independent review of devolution and the Scotland Act 1998 is currently being carried out by the Commission on Scottish Devolution, chaired by Sir Kenneth Calman. The UK Department for Transport submitted written evidence to the Calman Commission as part of the Government's written submission on 10 November 2008. No specific mention was made of HSR although it did state that the current rail devolution settlement is working well. The first Report of the Calman Commission was due in early December 2008, with a final Report due in May 2009.

[38] Inserted by the Scotland Act (Modifications of Schedule 5) Order 2002 (SI 2002/1629).

[39] This is because, during the passage of the Bill for the Scotland Act 1998, Lord Sewel (then Parliamentary Under-Secretary of State) announced on behalf of the Government that "we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland, without the consent of the Scottish Parliament" (21 July 1998). This convention was set out in a Memorandum of Understanding between the UK Government and the devolved administration (CM 5240).

Westminster Parliament would seek the consent of the Scottish Parliament before legislating with regard to devolved matters within the competency of the Scottish Parliament. Such consent has been commonly called a "Sewel Motion" and has been formalised as a "Legislative Consent Motion" (or LCM) in the Standing Orders of the Scottish Parliament. Any LCM would need to conform with Standing Order 9B of the Scottish Parliament. Since 1999, there have been 87 LCMs in the Scottish Parliament, all which have been passed (in some cases after amendment).

77 As a cross border railway is not a devolved matter for the Scottish Parliament, the Sewel Convention would seem strictly not to apply. However, the view has been expressed by Lord Adonis on behalf of the Government that, where a cross-border railway was to be authorised by means of a Bill in the UK Parliament, then such a railway would very likely require a Sewel Motion[40]. As the Sewel Convention is only a convention and not law it may be that, for political reasons, the Government thinks it sensible that the Scottish Parliament be given an opportunity to debate and consent to any Bill for a cross-border HSR, notwithstanding the fact that it is not strictly a devolved matter.

Private Bill Procedure

78 Parliament will normally allow a Private Bill to be considered only where there is no alternative method available for achieving the Bill's purposes.

79 The requirements for promoting a Private Bill are set out in each House's Standing Orders relating to Private Business. In order to promote a Private Bill, the promoter needs to submit a petition to Parliament for leave to introduce the Bill. Such a petition can only be submitted on or before 27 November of each year, and the promotion of the Bill must be advertised in local newspapers and notices provided to specified parties. Any pre-promotion consultation would need to be timed with this date in mind.

80 The Standing Orders do not set out any requirements for pre-promotion consultation in relation to a Private Bill. Any pre-promotion consultation process would need to follow best practice as set out in Government guidance, such as the Code of Practice outlined above. The passage of a Private Bill through Parliament is a complex process, requiring strict compliance with the Standing Orders of both Houses which set out a number of procedures to be followed. In essence these are:

(a) deposit of the Bill in Parliament and at other specified places, and notice to be published and served on specified persons and bodies. The "petitioning period" then commences;

(b) Parliamentary Agents attend before the House Examiner to prove compliance with the Standing Orders;

[40] Lords Committee Debate on the Planning Bill, Col. 718 (14 October 2008).

(c) introduction of the Bill into, and First Reading in the first House;

(d) a meeting is held by the promoters to consent to the Bill being promoted (known as a "Wharncliffe Meeting", after Lord Wharncliffe who was largely responsible for framing the first standing order of this nature and for its adoption in 1838 by the House of Lords);

(e) Second Reading of the Bill;

(f) attendance before the House Examiner to prove compliance with the Wharncliffe Meeting procedures;

(g) either an Opposed Bill Committee if petitions are deposited against the Bill, or an Unopposed Bill Committee if no petitions are deposited. The petitioning process is the same as that for a Hybrid Bill outlined above; and

(h) if the Committee recommends that the Bill proceeds to Third Reading, then it will do so before going to the second House, where a similar process takes place.

81 Within the outline of the above process, there would be a number of challenges in successfully promoting a Private Bill through Parliament, in addition to settling issues raised by Petitioners. A cross-border railway promoted by a Private Bill could well give rise to political issues related to devolution, in particular given that it would be legislating from Westminster. If a Member of Parliament was opposed to the Bill, then the member could table a "blocking motion" which effectively stops the Bill until parliamentary time can be found to debate it, which can be very difficult if there is already a full legislative programme. However, unlike Public Bills which will usually lapse if they have not obtained the Royal Assent before the end of the parliamentary session in which they were introduced, it is normal for Parliament to allow a private bill to be carried over by a motion to the next parliamentary session provided it has made sufficient progress.

Legal considerations - adequacy of consultation

82 A legal requirement to consult may arise through an express statutory requirement (e.g. the pre-application consultation procedures in the Planning Act 2008), through the application of policy guidance or, more indirectly, by way of a common law duty of fairness, e.g. where a legitimate expectation of consultation has been created. As the requirements of a "lawful" consultation have become ever more stringent, projects have been challenged in the courts on the adequacy of their consultation, leading to the emergence of a body of judicial guidance in case law.

83 Webster J has usefully explained the process of consultation as follows, which arguably still holds good:

"*In any context the essence of consultation is the communication of a genuine invitation to give advice and a genuine consideration of that advice. In my view it*

must go without saying that to achieve consultation sufficient information must be supplied by the consulting to the consulted party to enable it to tender helpful advice. Sufficient time must be given by the consulting to the consulted party to enable it to do that, and sufficient time must be available for such advice to be considered by the consulting party"[41]

84 For consultation to be carried out properly, the case of *Coughlan (2001)*[42] confirmed that the following requirements laid down in *Gunning (1985)*[43] should be followed:

(a) consultation must be undertaken at a time when proposals are still at a formative stage;

(b) the consultation must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response;

(c) adequate time must be given for such purposes; and

(d) the product of consultation must be conscientiously taken into account when the ultimate decision is taken.

85 In the case of *Greenpeace v Secretary of State for Transport for Trade and Industry*[44], Greenpeace was successful in its challenge that there was a lack of proper consultation in 2006 on new nuclear power stations. However, having established that there was a legitimate expectation of consultation following on from the Government's express promise in a 2003 White Paper to carry out the "fullest public consultation", the court stated that it would only intervene, not merely if something went wrong, but when it went "clearly and radically wrong".

"*A consultation process which is flawed in one or even a number of respects is not necessarily so procedurally unfair as to be unlawful. With the benefit of hindsight it will almost invariably be possible to suggest ways in which a consultation exercise might have been improved upon.* ***That is most emphatically not the test.*** *It must also be recognised that a decision maker will usually have a broad discretion as to how a consultation exercise should be carried out […] In reality a conclusion that a consultation exercise was unlawful on the ground of unfairness will be based upon a finding by the Court, not merely that something went wrong but that it went clearly and radically wrong."*[45] [our emphasis].

86 The statutory duty imposed on the Secretary of State to consult in relation to draft NPSs gives rise to the prospect of increased numbers of *Greenpeace*-style legal

---

41 Secretary of State for Social Services (Association of Metropolitan Authorities) [1986] 1 All ER 164, Webster J.

42 R v N&E Devon Health Authority ex. p. Coughlan and others [2001] QB 213.

43 R v Brent London Borough Council ex p. Gunning (1985) 84 LGR 168.

44 [2007] EWHC 311 (Admin).

45 Ibid, para 62

challenges to NPSs based on the adequacy of the consultation undertaken. There may also be some scope for opponents to argue that the "sustainability appraisal" carried out, whether in the form of an SEA or not, was not carried out with due process and with regard to statutory consultation requirements, or did not adequately consider the responses to that consultation.

87 Section 13 of the Planning Act 2008 limits the scope of legal challenges to NPSs to judicial review actions made within 6 weeks of the designation of the NPS. This contrasts with the normal time limit for judicial review, of making the claim "promptly but in any case within 3 months". A judicial review action in relation to a designated NPS would need to demonstrate that the Secretary of State had failed to follow statutory procedures, or (in essence) that he had been so unreasonable or irrational in coming to his conclusions that no reasonable Secretary of State could have come to those conclusions.

88 The statutory requirement for pre-application consultation under the Planning Act also means that, where a person is against a HSR scheme, the scope for judicial review of the IPC on the basis of inadequate consultation by the promoter is likely to be wider than under the current TWA 1992 procedures, where consultation is only a matter of good practice and government policy. It is also likely that the IPC will examine very carefully whether consultation has been carried out by a promoter with genuine invitations for advice and genuine considerations of that advice.

89 Challenges to the genuineness of consultation (either undertaken by the Secretary of State on a draft NPS, or by a promoter at the pre-application stage) would seek to demonstrate that the *Gunning* criteria had not been followed. However, unless something had gone "clearly and radically wrong", the *Greenpeace* case indicates that currently the courts would be reluctant to intervene and accept that the consulting party has a broad discretion in carrying out the exercise.

90 This appears to be backed up by Walker J when, on 27 January 2009, he held that the Government consultation, *Eco-towns Living a Greener Future*, published in April 2008, was lawful[46]. Although the Court's full written judgment is not yet available, the Government is reported to have argued before the High Court that the eco-town selection process was still at a "formative stage" and that an "imperfect, flawed" consultation process "that could be improved upon" were insufficient grounds for intervention. Instead, the consultation process could only be in contention if it was judged to have gone "clearly and radically wrong". It appears that the Court accepted these arguments.

91 This is a developing area of law and the *Greenpeace c*ase, alongside the very full consultation requirements of the Planning Act 2008, emphasise that it will become more important under the Planning Act regime than under the current TWA regime to

[46] BARD Campaign v Secretary of State for Communities and Local Government [2009] EWHC B2 (Admin) (temp. ref.)

ensure that genuine consultation is undertaken, rather than just undertaking to follow a process.

Bircham Dyson Bell LLP
February 2009

APPENDIX A

SAMPLE CONSULTEE LIST – DFT CONSULTEES ON DRAFT LTP3 GUIDANCE

All local transport authorities

All Passenger Transport Executives (PTEs)

All Regional Development Agencies

All Regional Government Offices

All Regional Assemblies

AA Public Affairs

ACPO Operational Strategic Road Policing, Nottinghamshire Police

Advantage West Midlands

Age Concern

Association of British Insurers (ABI)

Association of Car Fleet Operators

Association of Chief Executives of Voluntary Organisations

Association of National Parks Authorities (ANPA)

Audit Commission

BRAKE

British Chambers of Commerce

British International Freight Association

British Motorcyclists Federation

British Parking Association

British Retail Consortium

British School of Motoring Ltd (BSM)

British Vehicle Rental & Leasing Association

British Waterways

Broads Authority

Buses & Rapid Transit – UK (BRT-UK)

Campaign for Better Transport

Campaign for National Parks

CBI

Chartered Institute of Logistics and Transport

City of London Corporation

Commission for Integrated Transport

Commission for Rural Communities

Commission for Racial Equality

Confederation of British Industry

Confederation of Passenger Transport UK

Convention of Scottish Local Authorities

County Surveyors Society

Council for National Parks

CPRE

Cyclists Touring Club

Disability Charities Consortium

Disability Rights Commission

Energy Saving Trust

English Heritage

English National Parks Authorities Association (ENPAA)

Enterprise Privacy Group

Environment Agency

Equal Opportunities Commission

Federation of Small Businesses

Ford Motor Company Ltd

Forum of Private Business

Freight Transport Association

Friends of the Earth

Greenpeace

Highways Agency

IAM Motoring Trust

Imperial College London

Independent Transport Commission

Institute of Directors

Institute of Licensing

Institute of Plumbing and Heating

IPPR

Joint Committee on the Mobility of Blind and Partially-Sighted People

Joint Committee on the Mobility of Disabled People

Licensed Private Hire Car Association

Living Streets

Local Government Association

London Development Agency

London First

London Trams

Mobilise

Motorcycle Action Group

Motorcycle Industry Association

National Association of Estate Agents

National Association of Licensing & Enforcement Officers

National Association for Areas of Outstanding Natural Beauty (NAAONB)

National Council for Voluntary Organisations

National Parks Authorities

National Private Hire Association

National Society for Clean Air

National Society for Clean Air & Environmental Protection

National Taxi Association

Natural England

NHS confederation

North West Centre of Excellence

PACTS

Passenger Transport Executive Group (pteg)

RAC Foundation

RAC Plc

Rail Passenger Council

Retail Motor Industry Federation

Road Haulage Association

RoSPA

Royal Town Planning Institute

Scottish Government

Small Business Service

Social Market Foundation

Society of Motor Manufacturers & Traders

South East England Development Agency

South West of England Development Agency

Sustainable Development Commission

Sustrans

Tees Valley Joint Strategy Unit

TGWU

The Institute of Advanced Motorists

The Runnymede Trust

Town & Country Planning Association

Transport and General Workers Union

Transport for London

TSSA

TUC

UK Petroleum Industry Association

Welsh Assembly Government

Welsh Local Government Association

Women's National Commission

Yorkshire Forward

APPENDIX B

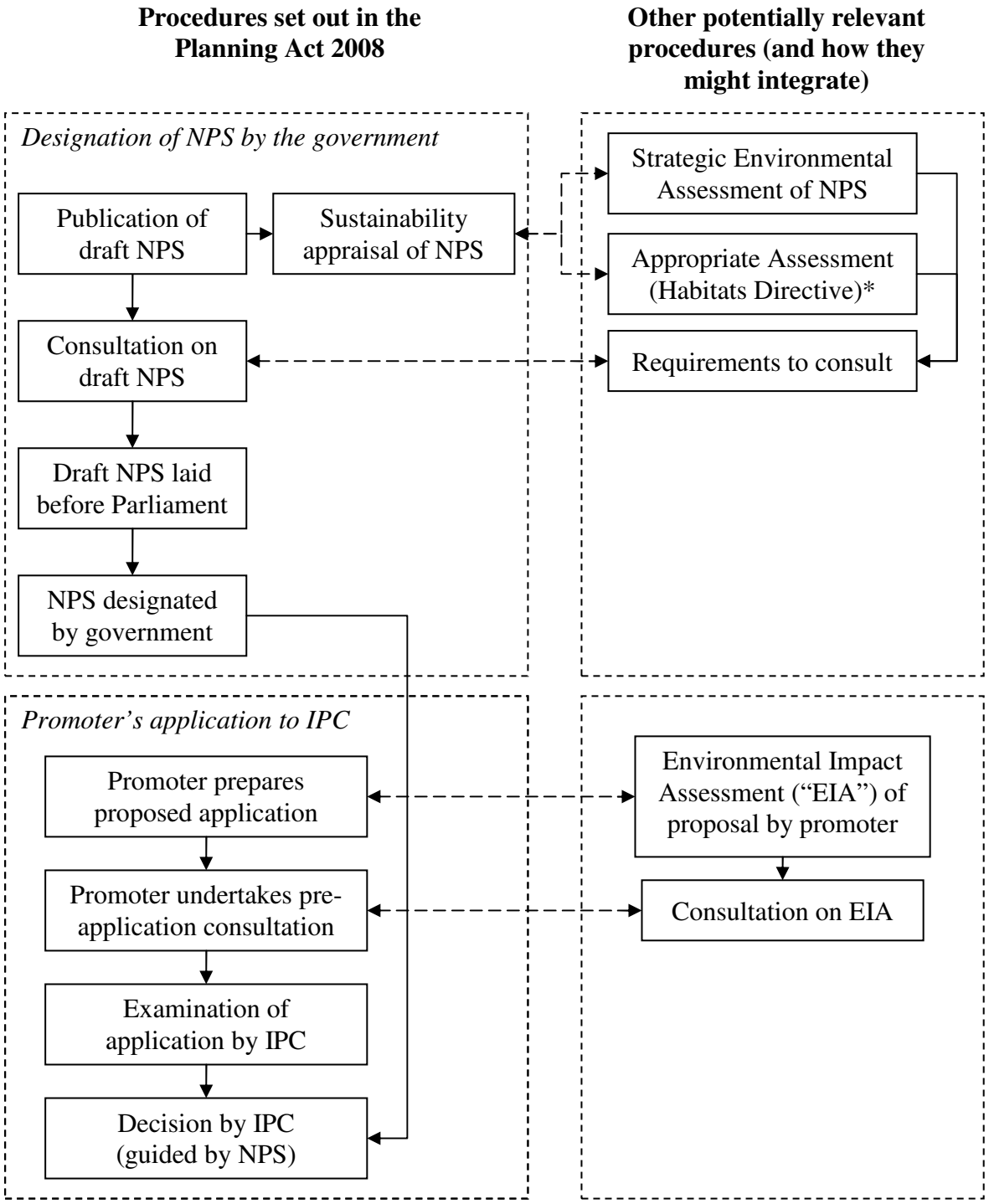
AUTHORISATION REGIMES – GLOSSARY

"Act"	The name given to the primary form of legislation when it has been passed by Parliament. In the UK Acts can be passed by the Parliament at Westminster (in relation to the UK) or by the Scottish Parliament (in relation to Scotland only).
"Bill"	The name given to an Act when it is being considered by Parliament in its draft form.
"Private Bill"	A Bill that is being promoted by a body other than central government (note that Parliament will not normally allow a Private Bill to be considered where there is an alternative authorisation route available, e.g. the Planning Act 2008 or the Transport and Works Act 1992). (Private Bills should not be confused with Private Members' Bills, which are not relevant to HSR.)
"Public Bill"	A Bill that is normally promoted by central government (e.g. the Bill for the Planning Act 2008 was a Public Bill).
"Hybrid Bill"	A Bill that is being promoted by central government but affects private interests in a particular way, for example by authorising the compulsory acquisition of land (e.g. the Bill for the Crossrail Act 2008 was a Hybrid Bill).
"Scottish Hybrid Bill"	A Hybrid Bill promoted by the Scottish Government in the Scottish Parliament (note that this procedure is not currently available, but we understand that the standing orders of the Scottish Parliament are to be amended during 2009 to allow for the promotion of Scottish Hybrid Bills).
"Public Act"	An Act the Bill for which was considered by Parliament under either Public Bill or Hybrid Bill procedures.
"Private Act" or "Local Act"	An Act the Bill for which was considered by Parliament under the Private Bill procedure
"the Planning Act 2008"	A Public Act of the UK Parliament which provides for the authorisation of certain major infrastructure projects by way of an application to the Infrastructure Planning Commission ("IPC") which must be decided in accordance with relevant National Policy Statements

	("NPSs").
"the Transport and Works Act 1992" ("TWA 1992")	A Public Act of the UK Parliament which provides for the authorisation of certain major infrastructure projects in England and Wales by way of a Transport and Works Act Order ("TWAO") made by the Secretary of State (usually for Transport) following an application made by the body promoting the project.
"the Transport and Works (Scotland) Act 2007" ("TAWS 2007")	An Act of the Scottish Parliament that provides for the authorisation of certain major infrastructure projects in Scotland by way of an Order made by the Scottish Ministers following an application made by the body promoting the project.

APPENDIX C

PLANNING ACT 2008 – SEQUENCE OF KEY PROCESSES



* See footnote 18 for an explaination of "appropriate assessment".

APPENDIX D

SUMMARY OF THE STRATEGIC ENVIRONMENTAL ASSESSMENT PROCESS

1 An SEA is defined as a process comprising the following four elements[47]:

(a) preparation of an Environmental Report on the likely significant effects of the draft plan or programme and reasonable alternatives, taking into account the objectives and geographic scope of the plan (according to the Government's comments, "sustainability appraisals" may also in addition include social and economic effects);

(b) carrying out consultation on the draft plan or programme and the Environmental Report;

(c) taking into account the Environmental Report and the results of consultation in decision-making; and

(d) providing information when the plan or programme is adopted and showing how the results of the environmental assessment have been taken into account.

2 Thus, an SEA is more than just the environmental report, but encompasses the whole process and includes duties with regard to consultation. By being subject to a statutory requirement to be consulted on, the information in it, and the proposals being consulted upon, should be presented in such a way that it is adequate for consultation purposes and allows consultees to make appropriate responses.

3 Further details as to consultation are set out in the 2004 Regulations, which applies to the SEA of all draft plans and programmes across the UK, other than those which are solely within Scotland or Wales (or Northern Ireland). After the preparation of the Environmental Report (but prior to the adoption of the draft plan to which it relates):

(a) a copy of the Environmental Report should be sent to each Consultation Body[48]; and

(b) the Environmental Report should be published more generally and those likely to be affected by, or to have an interest in it, invited to express their opinion on it, setting out the period within which opinions must be sent.

4 A set period of time for consultation is not prescribed by the Regulations, rather they provide that the consultation period must be of such length to ensure that the

[47] The SEA Directive does not use the term "SEA" but uses the definition "environmental assessment".

[48] In relation to England, Natural England, English Heritage, and the Environment Agency; to Scotland, the Scottish Ministers, SEPA, and Scottish Natural Heritage; to Wales, the National Assembly for Wales, and Countryside Council for Wales.

Consultation Bodies and the public consultees are given an "effective opportunity" to express their opinion.

5 Once the final plan (in this case, the NPS) is adopted:

(a) a statement has to be prepared and published describing how environmental considerations have been integrated into the plan, how the Environmental Report has been taken into account, how opinions expressed in response to consultation on it have been taken into account, and the measures that are to be taken to monitor the significant environmental effects of the implementation of the NPS; and

(b) monitoring of the significant environmental effects has to be conducted by the responsible authority, in this case the DfT.

APPENDIX E

PLANNING ACT 2008 – PRE-APPLICATION REQUIREMENTS

<table>
<tr><td>1</td><td colspan="2">The promoter must consult with each relevant local authority about what is to be in the Local Community Consultation Statement.</td></tr>
<tr><td>2</td><td colspan="2">The promoter publicises the Local Community Consultation Statement, and must consult in accordance with it.</td></tr>
<tr><td>3</td><td colspan="2">The promoter supplies to the IPC the information it will provide for the Pre-Application Consultation.</td></tr>
<tr><td>4</td><td>The promoter carries out the Pre-Application Consultation with the following persons:
(c) such persons as may be prescribed by regulations;
(d) relevant local authorities;
(e) the Greater London Authority, if applicable; and
(f) a Category 1 Person, Category 2 Person, and Category 3 Person.</td><td>The promoter publishes a notice about the Proposed Application, inviting responses within a specified deadline.</td></tr>
<tr><td>5</td><td colspan="2">In deciding whether or not to make the actual application in the same form as the Proposed Application, the promoter must have regard to:
(a) responses from the Pre-Application consultation;
(b) responses generated from following its consultation procedures in the Local Community Consultation Statement; and
(c) responses received from the publication of the notice about the Proposed Application.</td></tr>
<tr><td>6</td><td colspan="2">As part of the actual application, the promoter must prepare a Consultation Report setting out how it has complied with the requirements at 1 – 5 above.</td></tr>
<tr><td>7</td><td colspan="2">The IPC has 28 days from receipt of the purported application to decide whether or not to accept the application, having regard to (among other matters) whether the pre-application consultation has complied with statutory requirements.</td></tr>
<tr><td>8</td><td colspan="2">If the application is accepted, the promoter must give notice of the application to the parties consulted during the Pre-Application consultation, and publicise the application in a manner to be prescribed by regulations. The notice must specify the period within which objections and other representations to/on the application can be received by the IPC.</td></tr>
</table>

APPENNDIX F

PLANNING ACT 2008 – 3-STAGE PROCESS FOR CONSIDERATION OF AN APPLICATION BY THE IPC

Stage 1 – Preliminary Meeting

The Examining Authority must make an initial assessment of the application, after which it must hold a meeting and invite the promoter and other interested parties to attend. The purpose of that meeting is for the parties to make representations as to how the application should be examined, and any other purposes specified in subsequent rules. The timing of this preliminary meeting is important, as provisions as to the length of the examination, and the date by which the Examining Authority should make a decision on the application, are triggered when this meeting is held. Although the Act does not provide for a deadline by when the preliminary meeting must be held, it does provide that any rules made in subsequent secondary legislation must include provision as to the timing of the Examining Authority's initial assessment and the preliminary meeting.

Stage 2 – the Examination

As a general rule, the examination of every application is to take the form of the consideration of written representations. This rule is subject to three exceptions which allow a "hearing" to be held[49]:

(a) where the Examining Authority decides that oral representations about a particular issue are required to ensure adequate examination of it or to ensure that an interested party has a fair chance to put forward its case;

(b) where land is being compulsorily acquired, any person affected by the proposed compulsory acquisition can request a "compulsory acquisition hearing"; or

(c) if any interested party so requests, the Examining Authority must hold an "open floor hearing" where an interested party can make oral representations.

In practical terms, as it will be likely that at least one objecting party will request one, a hearing is most likely to take place for all applications. It should be noted that a "hearing" is not the same as the traditional public inquiry process, whereby each party has the right to cross-examine each other's witnesses. It is for the Examining Authority to decide whether a person making oral representations at a hearing (i.e. giving evidence) may be questioned by another party (i.e. cross-examined). In considering whether to allow cross-examination, the Examining Authority must apply the principle that oral questioning of a party is to be undertaken *by the Examining Authority*, other than where it considers that questioning by another party is necessary to ensure adequate testing of evidence or to ensure that a person

[49] Ss 89 - 91

has a fair chance to put its case. The Examining Authority is under a duty to complete its examination by the end of 6 months from the date of the preliminary meeting.

Stage 3 – Decision by the IPC

The Examining Authority[50] is under a duty to make its decision on the application by the end of 3 months beginning from the date of the completion of the examination. The Examining Authority may extend this period, subject to notifying the Secretary of State of the reasons for doing this[51]. There are other exceptional circumstances where the decision date may be extended beyond the default 9 month position, such as where the Secretary of State suspends the examination due to changes in circumstances that he believes requires the relevant NPS to be reviewed before the decision is made, or where the Secretary of State intervenes in the application and directs that it should be referred to him for certain specified reasons[52].

[50] Where a NPS in relation to the application is not in place, the Examining Authority can only make a report to the Secretary of State with recommendations, and the Secretary of State must make the decision.

[51] Section 107.

[52] Sections 108-113.

APPENDIX G

GUIDE TO THE TRANSPORT AND WORKS (SCOTLAND) ACT 2007

Introduction

An order made under the Transport and Works (Scotland) Act 2007 ("TAWS") is intended to be the usual method of authorising various developments such as a new railway (which starts and ends in Scotland), a tramway system, other forms of guided transport systems and inland waterways (e.g. canals) in Scotland. The powers that can be given under a TAWS order can be very wide-ranging. Although a TAWS order does not in itself grant planning permission, the applicant may simultaneously ask the Scottish Ministers to grant planning permission for the development. Applications for TAWS orders have to follow a set procedure which invites those directly affected, as well as the wider public, to give their views on the proposals.

The TAWS procedure

The Promoter of a development must first develop a proposal and consult with affected parties and statutory bodies. This consultation can take many forms, such as informal discussions with officers of statutory bodies and local residents, more formal written consultations, public exhibitions and meetings, information leaflets, websites, etc. Applications for TAWS orders, and objections to them, must follow the Transport and Works (Scotland) Act 2007 (Applications and Objections Procedure) Rules 2007 ("the Applications and Objections Rules**"**). These rules set out a list of bodies with whom the Promoter is expected to engage in consultation. In the course of determining the most appropriate setting and to develop and refine plans, the Promoter may seek access to land.

The Promoter then submits an application to the Scottish Ministers for a TAWS order and notifies those directly affected that the application has been made. The application must be advertised in local newspapers and the Promoter must arrange for the application and supporting documents to be made available to the public for inspection. If the proposal involves construction works, notices must also be posted at the site and along the route of the works. The Promoter must also send a notice to all owners and occupiers affected by the proposed compulsory purchase of property and to others listed in the Applications and Objections Rules.

On receipt of the application, the Scottish Ministers initiate a period of at least 6 weeks to enable any person, who wishes to, to make an objection or to provide comment. This is known as the 'objection period'.

A 'statutory objector' is normally someone whose land, or rights in land, may be acquired compulsorily under the TAWS order, and who makes an objection. Any local authority, National Park authority, regional transport partnership for the area or navigation authority concerned with waters affected by a works, is also a statutory objector.

In light of the objections and representations received, the Scottish Ministers may choose one of the following methods to consider the matters raised. But if no matters are raised and the

Scottish Ministers believe they have all the relevant information, they may decide to progress straight to a decision.

Written correspondence procedure – is likely to be applied by the Scottish Ministers where there are relatively few objections, no statutory objectors who wish to be heard or if the matter does not appear to raise complicated issues. It is considered a quicker method and therefore less costly. Everyone involved is informed that the case is proceeding in this way and the Promoter is asked to comment on each objection within 28 days. The objector then has 21 days to respond if the objector so wishes and the Promoter is then given 14 days to respond. The Scottish Ministers do not expect this process to be prolonged due to repetitive exchanges between the parties.

Hearing – is likely to be held where the application is considered to be relatively straightforward or where the written procedure is not appropriate although it will not be held if there are a number of objections or there are complicated issues which need testing by cross-examination. The hearing, which is held in public and is led by a Reporter, is designed to allow a structured discussion of the key points of the application, albeit in a slightly less formal manner than a public inquiry. Cross-examination is not permitted unless the Reporter considers it necessary to examine the main issues thoroughly. The Reporter must then provide the Scottish Ministers with a report giving recommendations as to whether the order should be made or refused.

Public local inquiry – is the legal process to consider those applications which have attracted a significant number of objections, any of which are from a statutory objector, or there are technical or legal issues surrounding the application that can only be satisfactorily addressed through the presentation of oral evidence. Cross-examination is permitted. A Programme Officer is usually appointed to help the Reporter in the inquiry. Statements of case are submitted by all those who wish to give evidence and the Reporter will have received a Statement of Matters from the Scottish Ministers listing all the issues they wish to be informed about. If the order application comes with a request for planning permission, this is considered at the same public local inquiry.

The procedures for a hearing and a public local inquiry are set out in the Transport and Works (Scotland) Act 2007 (Inquiries and Hearings Procedure) Rules 2007.

Once the Scottish Ministers believe they have all relevant information available to make a decision, they will decide the application (and any associated request for planning permission). They can decide either to make the order as applied for or with amendments, or to refuse the application. The decision, with reasons, must be set out in a decision letter which is sent to all parties involved. If a public inquiry was held, the Reporter's conclusions and recommendations will be included with the decision letter and will also be placed on the internet. A notice will be posted in *The Edinburgh Gazette* and the Promoter is required to place a notice in the local newspaper.

In certain cases, where a proposal is of national significance, the order requires the approval of the Scottish Parliament before it can come into force. A development is of national significance if it is described and defined in the National Planning Framework and the Scottish Parliament, as part of its review of the National Policy Framework, will have an opportunity to debate the merits and principles of the development.

Once a decision has been made (and approved in the case of those requiring Parliamentary approval) any person can seek to challenge the decision, within the statutory challenge period of six weeks, before the Court of Session.

The expectation is that most applications will take less than nine months from application to decision. Clearly, however, major technical projects which generate substantial interest may take considerably longer.