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# A Guide to Transport and Works Act Procedures 2006

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## Front Cover

### A TWA Guide to Procedures

**Guidance on the procedures for obtaining orders under the Transport and Works Act 1992, relating to transport systems, inland waterways and works interfering with rights of navigation**

**Department for Transport**

**June 2006**

## Introduction

### Background and purpose

1. This booklet provides guidance on the procedures for obtaining orders under Part 1 of the Transport and Works Act 1992 ("TWA"). It replaces the one issued by the Department for Transport in July 2004, and takes account of changes in the procedures for applying for and objecting to orders that take effect on 11 September 2006. This Guide can be found on the Department's web site at [www.dft.gov.uk/strategy/twa](http://www.dft.gov.uk/strategy/twa).

2. Part 1 of the TWA applies to England and Wales. It enables orders to be made authorising:-

- the construction or operation of railways, tramways, trolley vehicle systems and other prescribed modes of guided transport (section 1);
- the construction or operation of inland waterways (section 3(1)(a)); and
- the carrying out of works, of a prescribed description, which interfere with rights of navigation in waters within and adjacent to England and Wales, up to the seaward limits of the territorial sea (section 3(1)(b)).

Orders made under the TWA may authorise matters ancillary to the above, such as the compulsory acquisition of land, the creation or extinguishment of rights over land, and the charging of tolls and penalty fares. The other modes of guided transport, and types of works interfering with navigation rights, which can be the subject of a TWA order have been prescribed by way of statutory instruments made under sections 2 and 4 respectively 1 .

## Who decides TWA Order applications?

3. Applications for TWA orders, other than ones relating solely to Wales, are made to, and determined by, the relevant Secretary of State. This is normally the Secretary of State for Transport, except that:-

- applications relating to inland waterways are the responsibility of the Secretary of State for Environment, Food and Rural Affairs; and
- applications relating to schemes that are for an energy purpose (such as an off-shore wind farm) are the responsibility of the Secretary of State for Trade and Industry.

4. Applications for orders relating solely to Wales are made to, and determined by, the National Assembly for Wales (referred to below as "the Assembly"). This is by virtue of the National Assembly for Wales (Transfer of Functions) Order 1999 (SI 1999 No. 672). If, however, an application relates to both England and Wales (for example, a proposed new railway straddling the border) it would fall to be determined by the relevant Secretary of State.

5. As the same procedures apply to TWA applications in England and Wales, references throughout this booklet to the "Secretary of State" should be taken to mean the Assembly in respect of cases relating only to Wales, unless otherwise specified. Where reference is made to guidance issued by government departments, please note that, for cases in Wales, there may be an equivalent Assembly document which should be referred to.

## The Applications Rules

6. There are statutory rules of procedure for making applications and for objecting to them. Currently, (as at June 2006) these are the Transport and Works (Applications and Objections Procedure) (England and Wales) Rules 2000 (SI 2000 No.2190), which are referred to below as "the 2000 Rules". However, as from 11 September 2006, these Rules will be replaced by the **Transport and Works (Applications and Objections Procedure) (England and Wales) Rules 2006** (SI 2006 No. 1466), subject to transitional provisions which are designed to ensure continuity of handling. These new Rules are referred to in this Guide as "the Applications Rules".

7. Where an application is made before 11 September 2006 and has not been determined by that date, the 2000 Rules will continue to apply to it until a decision is taken. All applications made on or after 11 September 2006 will be subject to the new Applications Rules. However, if before then an applicant or the Secretary of State has carried out a pre-application action under the 2000 Rules which could have been done under a corresponding provision in the Applications Rules, this will have effect as if it had been done under the new Rules (see paragraph 1.62).

8. The Applications Rules include a number of changes designed to improve the efficiency and effectiveness of the TWA process, and to improve public participation in it. Compared with the 2000 Rules, the new Rules require fuller information to be provided by applicants before and with applications. This is to make the proposals more readily understandable to those affected so as to lessen the scope for misunderstandings, and to reduce the need for the Department to spend time later on in the process

seeking more information from applicants. There are also changes to reduce bureaucracy, such as by providing for electronic transmission of documents, and to tighten up the procedure for exchanging written representations on cases that do not go to a public inquiry.

9. Bearing in mind that the 2000 Rules will continue to apply to applications made before 11 September 2006, guidance on those Rules can be found in the July 2004 version of this Guide which is still available on the DfT web site or from the Department's **TWA Orders Unit**, at the address given in **Annex 1**.  
SIs 1992/3230 and 3231; and SIs 1997/1951 and 2906.

## **The Inquiries Procedure Rules**

10. There are separate statutory rules of procedure relating to the holding of public local inquiries into TWA applications. These rules - which cover the procedures before, during and after an inquiry - are the **Transport and Works (Inquiries Procedure) Rules 2004** (SI 2004 No. 2018).

## **Available TWA guidance**

11. This Guide provides a full description of the TWA process from the preparation of an application through to its final determination by the Secretary of State or by the Assembly. Whilst it is intended primarily for the benefit of prospective applicants, it may also be of interest to those affected by proposed orders.

12. The Department for Transport has also issued a brief guide to TWA orders, which is mainly for the benefit of objectors and others who may simply require a quick overview of the TWA process. Copies of the brief guide can be obtained from the TWA Orders Unit, or it can be found on the Department's web site (paragraph 1 refers).

## **Model clauses**

13. As well as the imminent changes to the procedure rules, as mentioned above, prospective applicants should also be aware that the Department intends shortly to update the model clauses which are prescribed for use in drafting TWA orders (currently the Transport and Works (Model Clauses for Railways and Tramways) Order 1992 (SI 1992 No. 3270). The model clauses are advisory - that is, they do not have to be followed - as the provisions required in orders are likely to vary significantly from case to case. However, the Department is likely to look more critically at provisions which do not follow the model clauses and/or which are not well precedented. Moreover, the Department will expect applicants to explain any differences between the model clauses and the provisions included in a draft order in the "explanatory memorandum" which is required to be submitted with an application (see paragraph 3.5(b) in Part 3 of this Guide).

14. The Department is now at an advanced stage in finalising the new clauses, to take on board changes in law and policy since the model clauses were introduced. Once the new model clauses are ready, they will be prescribed by way of a statutory instrument. In the meantime, those preparing draft orders are advised to refer to the consultation paper which the Department issued in August 2004 (available on the DfT web site) and to consult the TWA Orders Unit if they are uncertain about the preferred drafting approach for particular model provisions.

15. Other secondary legislation made under the TWA will be relevant to certain applications: these are mentioned at appropriate points in the text with the appropriate SI number. The TWA and all of the SIs can be purchased from the Stationery Office or its accredited agents or may be accessed from its web site (<http://www.opsi.gov.uk>).

## The role of the TWA Orders Unit

16. The TWA Orders Unit in the Department for Transport (DfT) handles, from start to finish, all applications for TWA orders that require determination by the Secretary of State for Transport. Such applications should be addressed to the Secretary of State for Transport, c/o the TWA Orders Unit, and sent to the Unit's address at Annex 1 - which also gives relevant telephone enquiry numbers for the Unit.

17. As most applications for TWA orders require determination by the Secretary of State for Transport, the Unit oversees the operation of the TWA process generally, in liaison with other interested Departments and the Assembly. It therefore takes the lead role in advising on the procedures, working up proposed changes to the legislation and issuing relevant guidance.

18. Furthermore, the TWA Orders Unit carries out the **procedural** work on -

(a) transport applications in Wales and

(b) applications relating to inland waterways,

acting on behalf of the Assembly and Defra respectively. Therefore, whilst such applications should be made out to the National Assembly for Wales or the Secretary of State for Environment, Food and Rural Affairs, whichever is responsible for the decision, they should be marked for the attention of the TWA Orders Unit and sent to the address given in Annex 1.

19. In such cases, the Unit will liaise as necessary with the Assembly or Defra. It must be emphasised, however, that any decisions on these cases (including any key procedural decisions that may need to be taken, for example on whether an EIA is required or on whether a waiver should be given from any requirements of the Rules) are the responsibility of the Assembly or DEFRA. The Unit simply acts as their agent in carrying out the procedural work on these cases.

20. A different situation applies, though, to applications for works interfering with navigation rights which are for an **energy** purpose. Applications of this nature which relate to works within waters in or adjacent to England should be addressed to the Secretary of State for Trade and Industry, c/o the Offshore Renewables Consents Unit, DTI, 1 Victoria Street, London SW1H 0ET, who will process them from start to finish. If, however, an application relates to works for an energy purpose within waters in or adjacent to Wales, it should be addressed to the National Assembly for Wales, Planning Division, Cathays Park, Cardiff CF10 3NQ. (The Planning Division is the co-ordinating division in the Assembly for TWA issues, even though an application for an energy purpose may largely fall to be handled by the relevant energy branch OCTO).

21. A prospective applicant who is in doubt as to whom to apply in any particular case should consult the TWA Orders Unit.

**Note: Where this Guide refers to actions to be taken by the TWA Orders Unit, this should be taken to include the relevant teams in DTI and the Assembly in respect of applications for an energy purpose.**

## Scotland and Northern Ireland

22. The TWA does not apply in Scotland, where railway, tramway and other works may be authorised by way of a Private Bill introduced into the Scottish Parliament; or, in the case of a light railway project, by way of an order under the Light Railways Act 1896. The Scottish Executive intends, however, to establish, through a Transport and Works (Scotland) Bill, a similar ministerial order-making procedure in place of its Private Bill procedure. Anyone requiring up-to-date information on the proposed transport and

works legislation in Scotland should contact the Scottish Executive or access its web site.

23. Where a railway or other project straddles the border between Scotland and England, a Private Bill presented to the Westminster Parliament is likely to be a more appropriate means of obtaining the necessary authorisations than making separate applications for a TWA order (for that part of the scheme in England) and for a Scottish Bill or order (for that part in Scotland). Anyone proposing such a cross-border scheme is advised to make early contact with the TWA Orders Unit and with the Scottish Executive, in order to establish the most appropriate way of proceeding.

24. The TWA does not apply in Northern Ireland, where such works may be authorised by Private Bills, Orders in Council and subordinate orders.

## **Status of this booklet**

25. The guidance given in this booklet on the TWA procedures and on how they are intended to be applied is based on DfT's understanding of the statutory provisions and the principles underlying them, and on experience of best practice. It is intended to help applicants and others with an interest. However, no reliance should be placed on any legal interpretation given in this guidance, as only the courts can give an authoritative interpretation of the law. Applicants and other interested parties should seek their own independent legal advice where necessary. Should there be any inconsistency between the guidance in this booklet and the provisions in the TWA or relevant SIs (such as might arise from a subsequent change in the legislation) the latter must prevail.

26. Furthermore, as this booklet is essentially a procedural guide, it does not seek to discuss any particular central or local Government, or Assembly, policies that may be relevant to determining the merits of a TWA application. The relevant policies, and the weight to be attached to them, will vary from case to case. Each application must be looked at on its own merits in the light of the material circumstances and policies prevailing at the time. Any references in this booklet to policies are therefore either in general terms (such as likely sources) or relate to usual policy and practice in respect of matters of procedure.

27. The TWA Orders Unit will be glad to assist with any questions or requests for further information relating to the TWA and, where appropriate, to offer guidance on the associated rules and regulations (subject to the caveats mentioned above). The Unit will not, however, be able to discuss with enquirers the merits of any prospective or current TWA applications or give any indication as to the possible outcome. This is because of the need to protect the integrity and impartiality of the decision making process and to avoid prejudicing the Secretary of State's decision on any particular case. Moreover, it is for prospective applicants and their legal advisers to consider, in the first place, what statutory powers they may need to implement a scheme, and whether those powers can appropriately be given by way of a TWA order.

## **Part 1: General Principles**

### **Why seek a TWA order?**

1.1 Before the TWA came into force in January 1993, the guided transport and other schemes referred to in paragraph 2 of the Introduction were normally authorised by way of a Private or Local Act of Parliament. A TWA order can similarly grant rights and powers to the applicant of a private or local nature which are not available under the general law. As a consequence, it is very unlikely that Parliament would now entertain a Private Bill for matters that could be authorised by way of a TWA order.

1.2 The main distinguishing features of projects which require authorisation by a TWA order are, firstly, that they may involve the construction and/or use of works which affect public rights, such as a public

right of way over a highway or a right of navigation on a river or in the sea. An order can provide the statutory means by which such public rights may be extinguished or changed temporarily or permanently to accommodate the scheme - for example by diverting a public right of way or stopping up a street. Secondly, a TWA order can provide powers for the compulsory acquisition of land or rights in land, or for the extinguishment of or interference with private rights, such as a private right of way. Such powers may be essential where it is impracticable to acquire all of the land or rights needed for the scheme by agreement, or where statutory undertakers' equipment would be affected. Thirdly, a TWA order may be needed where the applicant wishes to transfer, alter or remove rights, powers or obligations which relate to the proposed scheme and which are contained in an existing Act or order.

1.3 Where works are to take place entirely on land owned by the scheme's promoters, statutory powers to undertake the works may not be necessary. However, even in these circumstances it may still be desirable to obtain a TWA order. The granting of statutory authority means that the works will enjoy the status of a statutory undertaking, for example in planning law, along with the privileges accorded by such status. An order also provides the applicant or undertaker (if different) with the defence of statutory authority against any actions for nuisance arising from the construction or operation (without negligence) of the works.

1.4 **The making of a TWA order does not itself confer planning permission for any development provided for in the order.** However, when applying for an order, the applicant can request the Secretary of State to deem the grant of planning permission by way of a direction under section 90(2A) of the Town and Country Planning Act 1990. Alternatively, planning permission, where required, can be sought separately from the local planning authority. Where an applicant applies for deemed planning permission at the same time as applying for an order, the Secretary of State would decide whether to issue a planning direction when determining whether or not to make the order. As a matter of policy, the Secretary of State would not make an order without issuing a planning direction where one has been sought, as consideration of the planning merits would be a part of the consideration of whether to authorise the scheme. Conditions may be attached to the planning direction. Similarly, if planning permission had been sought from the local planning authority for works contained in the draft order, the Secretary of State would wish to establish that such permission had been given before making the order. The advantages and disadvantages of the options of applying to the Secretary of State for deemed planning permission, or applying separately to the local planning authority, are considered in paragraphs 1.19-1.21 below.

1.5 With regard to any other statutory consents, permissions or licences that an applicant may require in connection with a proposed scheme, the TWA only disappplies the need to obtain consent under section 34 of the Coast Protection Act 1949, for any operations authorised by a TWA order. However, regulations have been made under section 15 of the TWA to assimilate procedures where the proposed works require listed building, conservation area or scheduled monument consent, or where the proposals in a draft TWA order would affect an inland waterway in certain ways covered by Part 7 of the Transport Act 1968. These regulations are explained in Part 7 of this Guide, which also gives guidance on the linkages with other consents and licences that may typically be required in connection with a TWA order application.

1.6 Whilst it may be possible, by virtue of section 5 of the TWA, for a TWA order to exclude (i.e. disapply) the statutory requirements for other related consents, licences etc., as a matter of policy the Secretary of State would only be prepared to agree to this in very exceptional circumstances (see paragraph 1.14). It would therefore be advisable to consult DfT's TWA Orders Unit (or other Department responsible for the decision) in advance about any such proposals. Orders which have been made and which include disapplication provisions should not be assumed to set precedents.

1.7 Schedule 1 to the TWA exemplifies those matters that may be included in an order made under section 1 or 3. A commentary on Schedule 1 is provided in **Annex 2**. If a prospective applicant is unsure whether a TWA order is required in respect of specific proposals, or whether certain matters might appropriately be included in an order, guidance may be sought on an informal basis from the TWA Orders Unit. It is,

however, ultimately the responsibility of promoters and their legal advisers to satisfy themselves that they have sought all the necessary statutory powers and approvals that are required in order to enable their proposals to be implemented lawfully. Whilst the TWA empowers the Secretary of State to make an order in respect of certain matters, it does not require a promoter to obtain an order, either for any particular matter, or at all. In other words, **the process of seeking and obtaining a TWA order is permissive, rather than obligatory**. Hence, the TWA does not include enforcement provisions in respect of failure to obtain a TWA order or to obtain certain powers under an order.

## What can be included in a TWA order?

1.8 The provisions of the TWA which relate to what may be included in an order are contained in sections 1 to 5 of, and Schedule 1 to, the Act. Section 7 relates to orders made on the Secretary of State's own volition, without an application, guidance on which is given at paragraphs 1.59 to 1.61 below.

1.9 The following is a list of the principal matters which may be contained in TWA orders made following an application to the Secretary of State:

- powers to construct and operate a railway, a tramway, a trolley vehicle system, or a guided transport system of a type which has been prescribed in an order made under section 2; or to carry out matters ancillary to the construction or operation of those transport systems;
- authority to construct and operate an inland waterway or to carry out matters ancillary to such construction or operation;
- authority to carry out and use works of a description prescribed by an order under section 4 which interfere with rights of navigation in the internal waters of England and Wales and up to the limits of territorial waters;
- the compulsory acquisition of land or rights in land required in connection with the proposed works;
- the creation, extinguishment, stopping up or diversion of rights of way, either temporarily or permanently. (In the case of permanent extinguishment of a public right of way, the Secretary of State must be satisfied under section 5(6) of the TWA that an alternative right of way will be provided **or** is not needed);
- the repeal or modification of agreements relating to land;
- the protection of the property or interests of any person - for example, a statutory undertaker;
- the introduction of a penalty fares scheme;
- a power to make byelaws;
- the transfer, leasing, discontinuance and revival of undertakings;
- the application, modification or exclusion of any statutory provision 2 which relates to any matter which could be included in an order made under section 1 or 3;
- the amendment, repeal or revocation of a statutory provision of *local* application, subject to the Secretary of State being satisfied that this is necessary or expedient in consequence of any provision of the order or otherwise in connection with the order.

1.10 The above is not an exhaustive list of matters which may be included in orders. Bearing in mind that Schedule 1 to the TWA only exemplifies such matters, the scope of orders is potentially very wide. For example, matters ancillary to the construction and operation of a guided transport scheme might include station car parks, park and ride sites and new or altered highways which are directly related to the scheme. Prospective applicants for proposals which involve interference with rights of navigation should note, however, that the TWA is more restrictive in respect of this type of works than for transport schemes and

inland waterways. This is because the operation of such works is not specifically mentioned in section 3(1)(b). Whilst it may reasonably be assumed that construction of works interfering with rights of navigation includes their operation (as being ancillary to the carrying out of the works) it may not be possible to make an order covering only operational matters in isolation. Orders may, however, be made which relate only to the operation of a transport scheme or an inland waterway or to matters ancillary thereto.

1.11 An order may, by virtue of section 5(2) of the TWA, relate to more than one scheme, system or mode of transport. This enables applications to be made for 'omnibus orders' dealing with unrelated proposals, for example a number of minor works which are not expected to be opposed. If one or more of the proposals was opposed but other proposals were unopposed, it would be possible for the Secretary of State (under section 13(3)) to split the proposed order into two or more separate orders. However, the splitting of orders in this way is liable to create significant administrative and legal difficulties, hence the use of omnibus orders is not generally encouraged. Furthermore, applicants are advised not to seek orders which provide for alternative forms of guided transport on the same route, or alternative routes for the same mode of transport, **unless** this is clearly justifiable in the particular circumstances. Normally, it would be preferable to deal with possible alternative modes and routes when consulting at the pre-application stage, and then to select one mode or route only for the TWA order, in order to remove uncertainty and possibly unnecessary blight.

1.12 An applicant who wishes to apply for an order relating to a mode of guided transport other than a railway, tramway or trolley vehicle system, or to works that would interfere with rights of navigation, should establish by reference to the section 2 orders (for guided transport) or the section 4 orders (for works interfering with rights of navigation) that the proposed system or works have been prescribed 3. The TWA Orders Unit should be consulted if the proposals have not been prescribed, or if there is some doubt about whether they are covered. The Secretary of State would be unable to make an order for a guided transport system or work interfering with navigation that has not been prescribed. If a further section 2 or 4 order is needed to cover the particular proposals, the order would need to be approved by Parliament under the affirmative resolution procedure (which means that it would have to be debated in both Houses). Allowing for the time needed to prepare draft provisions and to consult publicly on them, and for each House to approve the draft order, it is likely that this process would take many months. A TWA application could not properly be made before any necessary section 2 or 4 order had received Parliamentary approval and come into force.

2 any provision in an Act of Parliament or in an instrument made under an Act of Parliament, including a TWA order.

3 The section 2 orders made are The Transport and Works (Guided Transport Modes) Order 1992 (S.I.1992/3231) and The Transport and Works (Guided Transport Modes)(Amendment) Order 1997 (S.I.1997/1951). The section 4 orders made are The Transport and Works (Descriptions of Works Interfering with Navigation) Order 1992 (S.I.1992/3230) and The Transport and Works (Descriptions of Works Interfering with Navigation)(Amendment) Order 1997 (S.I.1997/2906).

## **What cannot be included in a TWA order?**

### **1.13 The following matters are considered to be outside the scope of TWA orders:**

- the amendment, repeal or revocation of statutory provisions of general (as distinct from local) application;
- the amendment, repeal or revocation of any statutory provision where this is not related to the proposals in the draft order;

- the application, modification or exclusion of any statutory provision where this is not related to any matter for which an order could be made under section 1 or 3;
- powers to acquire land that is not required for the proposed works or for ancillary works or matters;
- proposals for an order under section 3 where the Secretary of State considers that the primary object of the order could be achieved by means of an order under the Harbours Act 1964;
- provisions relating to matters that may be connected to the order scheme but which, because of their nature or extent, are not ancillary to the primary purpose of the order (e.g. a commercial development above a new railway station);
- provisions creating offences for which the maximum penalty on conviction would be greater than level 3 on the standard Home Office scale;
- the extinguishment of a public right of way without provision for a satisfactory alternative right of way, unless the Secretary of State is satisfied that provision of an alternative is not required;
- provisions relating to waterways which are of a kind excluded by section 5(7) of the TWA.

1.14 In addition, the following matters are **unlikely** to be approved in TWA orders on policy grounds, unless compelling reasons can be shown:

- the disapplication of consent requirements and safeguards established by Parliament in other legislation, for example controls in the Railways Act 1993 (as subsequently amended) relating to rail closure, licensing or access to rail facilities; or statutory controls to protect the environment or the built heritage. (See also paragraphs 1.6 and 2.77.)
- provisions relating to the carrying out of a scheme where the primary object of the order could be achieved under other legislation - for example a road bridge or tunnel across a river where requisite authority could be given under the Highways Act 1980; and
- proposals which could more properly be dealt with under other existing statutory procedures - for example the closure of an inland waterway or public right of way where no associated new works requiring a TWA order are proposed.

1.15 Prospective applicants are encouraged to study the Model Clauses (see paragraphs 1.45-1.47) and orders that have already been made to establish what provisions are likely to be acceptable from both a legal and policy perspective. It is important to bear in mind, however, that each order is considered on its own merits in the light of the circumstances relevant at the time, so a provision that has been accepted in one order will not necessarily be acceptable in a different order. Prospective applicants may wish to consult the TWA Orders Unit about any novel or unusual provisions before a TWA application is made.

## **Who may apply for a TWA order?**

1.16 The TWA does not restrict who may apply for an order or when an application may be made. Provided that the application is within the powers of the TWA and the applicant complies fully with the procedural requirements in the Applications Rules (and, for certain statutory bodies such as local authorities, with section 20 of the TWA) the application will be accepted. But the cost of promoting a scheme through the TWA process can be high, especially if a public inquiry is held. Prospective applicants should therefore be wary of proceeding unless they are reasonably confident that the proposals are supported (in principle at least) by local authorities and other key bodies. Opposition from persons directly affected by a proposed scheme can often be expected. But more widespread opposition in principle from within local communities and from public bodies might suggest that the applicant ought to carry out further consultations before proceeding. Applicants should also have sufficient finance for taking

an application through the TWA process or have secured guaranteed sources of finance to meet any costs that may arise. This is especially important for proposed major works that would be likely to cause considerable blight.

## **Planning Permission for TWA schemes**

1.17 Where a proposed TWA order would include provision for new works, or for a material change in the use of land, it is likely that planning permission would need to be obtained for such development, unless it is permitted development under the Town and Country Planning (General Permitted Development) Order 1995 (SI 1995/418). An exception would be proposed works in the sea which would fall outside the jurisdiction of the local planning authority. If in doubt, the local planning authority should be consulted.

1.18 By virtue of section 16 of the TWA, the Secretary of State may, when making an order, issue a direction under section 90(2A) of the Town and Country Planning Act 1990 deeming planning permission to be granted for any development authorised by the order. If the applicant wants the Secretary of State to grant deemed planning permission, this must be applied for at the same time as applying for the order. The application requirements are explained in Part 2. Alternatively, a prospective applicant may prefer to apply (separately) for planning permission to the local planning authority in advance of a TWA order application.

1.19 The main advantages of applying for deemed planning permission at the same time as applying for a TWA order are that:

- it avoids any duplication of documentation, newspaper and other public notices which would arise with separate TWA and planning applications;
- any objections to the order and to the granting of planning permission are considered by one determining authority at the same time; and
- for most linear projects, or other projects covering a wide area, it avoids the need for separate planning applications to be made to two or more planning authorities.

Applying for planning permission to the local planning authority in advance of a TWA application may nevertheless be preferred where the applicant wants the assurance of planning approval before proceeding to the more costly TWA process. This might apply particularly to private sector applicants and where only one local planning authority is involved.

1.20 The granting of planning permission in advance of a TWA application would not, however, reduce the procedural requirements under the TWA; nor would it necessarily limit the issues that can appropriately be considered in the context of the TWA order. For example, the applicant must provide an environmental statement with the TWA order application, where this is required by the Applications Rules, even if one was submitted earlier with the planning application. The Secretary of State must still assess the environmental impact of the project where it comes within Annex I or II of the EIA Directive (see paragraph 1.22 below) even if the local planning authority has already carried out such an assessment in determining a separate planning application.

1.21 Therefore, the fact that particular land use planning issues relating to the scheme may have already been considered by the local planning authority in determining a planning application does not mean that the Secretary of State cannot appropriately address such issues in considering whether to make a TWA order. There may well be an overlap in the issues which are relevant to the planning and TWA decisions respectively. Whilst the existence of a planning permission would be a material factor in considering the order, the Secretary of State would need to take due account of any objections made, and may need to address a wide range of issues and policies, in deciding whether it is in the public interest to grant all the

powers applied for in a TWA order. The Secretary of State would, however, be concerned only with those issues which are relevant to the particular powers being sought in the order.

## **Environmental Impact Assessment (EIA)**

1.22 The EIA Directive referred to above is Directive 85/337/EEC, as amended by Directives 97/11/EC and 2003/35/EC. The requirements of the EIA Directive have been applied to applications for TWA orders, mainly through the Applications Rules but also by Regulations (SIs nos. 1995/1541, 1998/2226, 2000/3199 and 2006/958) made under the European Communities Act 1972 which have amended the TWA itself. It is important to note that, under the Applications Rules, all applications for TWA orders which would authorise a project of a type listed in Annex I or Annex II to the Directive must include an environmental statement (ES), unless one of the following exceptions apply. The first exception is an Annex II project for which the Secretary of State has issued a "**screening decision**", confirming that an EIA is not required because the works would be unlikely to have a significant effect on the environment. Paragraphs 2.35 to 2.38 explain the process for obtaining a screening decision prior to making an application. The second exception is a project serving national defence purposes where the Secretary of State considers that the carrying out of an EIA would adversely affect those purposes, and has directed under rule 7(3) of the Applications Rules that an EIA is not required.

1.23 It is therefore important that a prospective applicant should establish, before applying for an order, whether or not the proposals comprise an Annex I or an Annex II project. If it is clear that the proposals are covered by Annex I, or that they are covered by Annex II and would be likely to have significant environmental effects, an environmental statement (ES) should be prepared. (There would, in this situation, be no point in applying for a screening decision.) If, however, the applicant considers that the proposals constitute an Annex II project but would be unlikely to have significant environmental effects, or if this appears to be marginal, a screening decision can be sought from the Secretary of State. The screening decision given by the Secretary of State would then determine whether or not an ES must be prepared.

1.24 If the proposals do not constitute an Annex I or Annex II project, there is no statutory requirement for an ES. A prospective applicant should nevertheless consider the desirability of providing, on a voluntary basis, a written appraisal of the likely environment effects if it is thought that the proposals might have a significant impact on the environment (see paragraph 2.31).

1.25 A prospective applicant may also seek an opinion from the Secretary of State as to what matters should be included in the ES, if one is required. This is referred to in the Applications Rules as a 'scoping opinion'. A request for a scoping opinion can be made at any time prior to the making of a TWA order application. If a prospective applicant intends to request a screening decision, and would also like a scoping opinion if an ES were to be required, it would probably be more convenient to seek a scoping opinion at the same time. The Secretary of State must give a scoping opinion if the applicant formally requests it. It is, however, up to the applicant to decide whether or not to request a scoping opinion. More detailed information about the procedure for applying for a scoping opinion is given in paragraphs 2.39 to 2.42.

1.26 In cases where an ES is or may be required, the applicant may, under the Environmental Information Regulations 2004 (SI 2004 No. 3391), require any public authority, as defined in those Regulations, to provide environmental information they hold, subject to the exceptions to disclosure set out in those Regulations. In addition, the applicant may request environmental information that is relevant to the preparation of the ES, or to any screening decision, from anyone listed in Schedule 5 to the Applications Rules who is not a public authority for the purposes of the 2004 Regulations. This can be done by serving a notice on them under rule 6 of the Rules. Further information about this procedure and, more generally,

about the preparation of an ES is given in Part 2.

1.27 It should be noted that, where an EIA is required, rules 7(1) and 10(2)(g) of the Applications Rules require an applicant to submit with the application "the applicant's statement of environmental information". This is defined in the Rules as a statement submitted by an applicant as an ES in relation to the application. The reason this term is used in some rules, whereas others (e.g. rule 11) refer to an ES, is simply to cover the possibility that what an applicant initially submits with the application as an ES might not actually meet the statutory requirements - for example, some of the information required by rule 11 might be missing. Strictly speaking, therefore, what the applicant submits as an ES only becomes such once all the requirements are met. However, for simplicity's sake, the guidance in this booklet refers only to the preparation and submission of an ES.

## **Planning Policies and Development Plans 4**

1.28 In determining an application for a TWA order to authorise works, and any related application for deemed planning permission, the Secretary of State will have regard to, amongst other things, relevant national, regional and local planning policies. Therefore, in drawing up works proposals, prospective applicants should pay particular attention to relevant national policy guidance and development plan policies, including those in regional spatial strategies and local development documents. In line with the plan led system for determining planning applications, projects that conflict with relevant policies in the development plan are unlikely to be authorised, unless material considerations indicate otherwise.

1.29 Prospective applicants are advised to consult the local planning authorities and other statutory and non-statutory organisations with relevant responsibilities and expertise at the formative stage of a project. They should seek to work with the local authorities and other key consultees in taking forward their project - see Part 2 for more detailed advice on pre-application consultation.

1.30 Where a relevant development plan is in draft form and is subject to consideration at a public inquiry before being formally adopted, a prospective applicant may wish to consider whether there may be benefit in delaying making a TWA application until that process has been concluded. This is not essential, however, and there may be circumstances where the applicant would not be willing or able to await the outcome of a separate planning process. Any public inquiry into a TWA order application will consider the planning merits of the proposals having regard to relevant published policies and plans, whether formally adopted or in draft form. Applicants should nevertheless be aware that, in deciding whether to make a TWA order, the Secretary of State might need to take into account any relevant development plan which is adopted after the application is made. Depending on timing, this could result in the need for a reference back to interested parties after the close of any inquiry into the proposed TWA order.

4 Under Part 2 of the Planning and Compulsory Purchase Act 2004, local plans, unitary development plans and structure plans have been replaced by local development documents.

### **Financial and Economic issues relating to TWA applications**

1.31 Applicants for TWA orders are required by rule 10(3) of the Applications Rules to submit with their application their proposals for funding the cost of implementing the order, including the cost of acquiring blighted land; and an estimate of the cost of carrying out any works that would be authorised by the proposed order. As this statutory requirement suggests, the capability of a scheme to attract the funding necessary to implement it is a relevant factor in the Secretary of State's decision, and it may be especially significant where major new works are proposed.

1.32 Persons affected by proposed TWA projects, especially those whose land would be compulsorily acquired, would expect the applicant to have the necessary financial resources to meet all statutory or other liabilities arising from the promotion of the application. They would also expect the applicant to be able to raise the necessary finance to implement the project if the TWA order were made. The Secretary of

State, in turn, would wish to be satisfied before making a TWA order that there was a reasonable prospect of the proposed powers being implemented. Consequently, in deciding whether to make a TWA order authorising works, the Secretary of State will wish to have regard to the applicant's prospects of funding the planning and construction of such works, including the payment of any statutory land compensation. This applies whether the project is to be financed entirely by the private or public sector or by a combination of the two.

1.33 It follows that, however the proposed works are to be funded, the applicant should be able to demonstrate that the proposals are capable of being financed in the way proposed. Depending on the size of the project and the nature and extent of the opposition to it, the applicant may need to provide a financial appraisal of the scheme for the purpose of any public inquiry and to be ready to respond to any questions about the project's financial viability.

1.34 The applicant will **not however be expected to have secured the necessary funds** to implement the proposed works before the TWA order is determined. It is accepted that the private sector may be unwilling to commit funds until the necessary statutory approvals have been granted. Furthermore, public funds - including EU grants - would not usually be committed until after the relevant powers to carry out a scheme are in place. Therefore, in the context of a TWA order, the Secretary of State's concern is to establish that a scheme is reasonably capable of attracting the funds required to implement it, rather than expecting funding to have been secured. An applicant should be able to provide evidence (whether at inquiry or otherwise) to enable the Secretary of State consider this matter. If this appeared not to be the case, this would suggest that the making of the TWA application was premature.

1.35 Local authorities (including PTAs and PTEs) who propose to apply for a TWA order for a scheme which requires funding through the Local Transport Plan process should refer to the draft "Guidance to Local Authorities seeking DfT funding for transport Major Schemes". The draft Guidance is currently the subject of consultation which closes on 7 July 2006. This document (which can be found on the Regional and Local Transport section of the DfT website) explains the Department's policy in relation to the funding of major projects and the process for securing funding approval.

1.36 If DfT funding is essential for a scheme to proceed, the authority should not apply for a TWA order until "Programme Entry" has been granted by DfT's Regional and Local Transport Policy Directorate. (N.B. "Programme Entry" is broadly the equivalent of "Provisional Approval" under the previous funding approval system.) Promoters should include confirmation of Programme Entry with the TWA order application, as part of the required information about how the scheme will be funded. **However, a decision to make a TWA order would not imply that any public monies needed to finance a scheme would necessarily follow.** The Department's subsequent funding decisions will depend on its assessment of the revised Major Scheme Business Case, which a local authority would normally submit once a TWA order has been made. This would include a revised assessment of the scheme's affordability and value for money.

## Transport Policies and Local Transport Plans

1.37 As well as having regard to relevant planning policies, prospective applicants for new transport systems should pay particular attention to the Government's transport policies (and, for schemes in Wales, to any transport policies adopted by the Assembly), to any relevant regional transport strategy and to relevant local transport plans (LTPs). LTPs are 5-year plans prepared by local transport authorities which set out integrated transport policies for their area and which provide the basis for the allocation of resources for local transport capital expenditure.

1.38 If a scheme is granted Programme Entry through the LTP process, this would be without prejudice to a subsequent decision on any TWA order application in respect of that scheme. If a scheme promoted by a

local authority is intended to be funded wholly or partly by local revenue charging, this should also be made clear when the TWA application is made.

## Land Acquisition and Blight

1.39 As explained earlier, an applicant can seek compulsory land acquisition powers in a TWA order where such powers are required to enable the proposed works or ancillary matters to be carried out. The exercise of compulsory purchase powers will be time limited (normally to 5 years for transport schemes: any longer period would require exceptional justification in view of the blight and uncertainty that this could cause). Before confirming such powers, the Secretary of State will wish to be satisfied that there is a compelling case in the public interest for taking away a person's land or rights in land, and that all the land in question is required for the scheme. Relevant advice on the use of compulsory purchase powers can be found in Circular 06/2004 issued by the former Office of the Deputy Prime Minister and entitled "Compulsory Purchase and the Crichel Down Rules."

1.40 An applicant for a TWA order may seek to acquire specified land within defined limits of deviation or specified parcels of land (or a combination of the two). The former approach is normally appropriate for linear works. Whatever approach is adopted, the applicant must be prepared, and able, to justify all compulsory land acquisition.

1.41 Applicants should be aware of and understand the statutory blight and compensation provisions. By virtue of section 16(2) of the TWA, any land to be acquired compulsorily under powers in the draft order is made subject to the blight provisions in the Town and Country Planning Act 1990 **with effect from the date of the application**. Applicants should ensure therefore that they have adequate financial resources to fund land compensation payments. The Secretary of State may refuse to make an order if the applicants were unable to demonstrate they were able to meet their statutory obligations in this matter.

1.42 In the case of railway works or works related to other guided transport systems, the Noise Insulation (Railways and Other Guided Transport Systems) Regulations 1996 (SI1996/428) may apply. Applicants should understand how all of the relevant statutory provisions might impact on the project and in what circumstances they might be liable to pay compensation under the statutory codes. More advice on this is contained in Part 2.

## Safety of Transport Systems

1.43 The current arrangements (as at [June 2006]) for securing the safe operation of transport systems are set out in the Railways and Other Transport Systems (Approval of Works, Plant and Equipment) Regulations 1994 (SI 1994/157). Under these Regulations, Her Majesty's Railway Inspectorate in the Office of Rail Regulation (ORR) is responsible for approving new railways, tramways and certain other guided transport systems (but not guided busways) before they are brought into use. These arrangements are to be replaced with effect from 1 October 2006 (or 1 October 2008 for heritage railways and tramways) by provisions in the Railways and Other Guided Transport Systems (Safety) Regulations 2006 (SI 2006/599) which will require, in certain cases, the establishment of a safety verification scheme before new or altered vehicles or infrastructure are placed in service. (N.B. The 2006 Regulations do not apply to trolley-vehicle systems or to guided busways; and in respect of high-speed railways forming part of the Trans-European Rail System in the UK, the requirements for ORR authorisation are set out in the Railways (Interoperability) Regulations 2006 (SI 2006/397).) Prospective applicants are advised to consult ORR before applying for a TWA order about whether any part of the proposed transport system would require ORR approval or a safety verification scheme approved by an independent assessor.

1.44 In relation to a proposed new railway, if the system would involve the construction of a level

crossing, ORR should be consulted at an early stage to ascertain whether they consider that there are exceptional circumstances which would justify providing a level crossing as opposed to a bridge or tunnel. If a level crossing were considered acceptable by ORR then they would require that, if the TWA order authorising the system were made, the protection arrangements for the level crossing should be prescribed subsequently by way of an order made under the Level Crossings Act 1983, as amended by the Level Crossings Regulations 1997 (SI 1997 No. 487). For an existing level crossing (whether or not it is in use), protection arrangements may be authorised, and current ones disapplied, by means of an order under the 1983 Act. If that is the only authority required, it would not be necessary to apply for a TWA order.

## **Model Clauses for Orders and General Drafting Principles**

1.45 It is the responsibility of an applicant and its legal advisers to ensure that an order is drafted in such a way that, if made, it would confer the powers needed to implement the scheme in question. In order to assist applicants in drafting TWA orders, and to help achieve uniformity in approach, model clauses have been prescribed by Order 5 for railways and tramways. These are currently being revised - see paragraphs 13-14. The railway and tramway model clauses may also be appropriate for other types of guided transport, such as a guided busway, where similar provisions are likely to be required. Applicants for inland waterway schemes or for works interfering with rights of navigation may also be able to adopt relevant provisions from the model clauses and from the most recently made orders for similar projects.

1.46 When drafting an order for a railway or tramway scheme, applicants are advised to refer in the first instance to the draft new model clauses. They should also consider recently made TWA orders which may contain more up to date versions of 'standard' provisions. Applicants should, however, bear in mind that each application has to be considered on its own merits in the light of the particular circumstances arising: provisions which suit one application in one set of circumstances will not necessarily suit another.

1.47 Where it appears from a scrutiny of recent orders and/or the proposed new model clauses that there have been fundamental changes in content, drafting style or layout of provisions with very similar objectives, the normal presumption should be that the most recent version of the clause should be followed. Such changes may have arisen, for example, from developments in relevant legislation or policy or in the preferred approach towards drafting statutory instruments.

1.48 Generally, the Secretary of State will expect provisions in TWA orders to be drafted in a modern style which is clear and concise, and which avoids anachronistic legal expressions, Latin words and phrases, ambiguity, unnecessary repetition and unduly long sentences and paragraphs. In this regard, applicants should pay close attention to the drafting principles set out in the Statutory Instrument Practice Note 4/05 available from Her Majesty's Stationery Office (at [www.opsi.gov.uk](http://www.opsi.gov.uk)). Some general suggestions on the drafting of TWA orders are given at **Annex 3**.

1.49 These drafting considerations should also be drawn to the attention of other parties such as statutory undertakers who may ask an applicant to include in a draft order provisions to protect their interests. It is important that any protective provisions which it is wished to include in a Statutory Instrument should reflect modern SI drafting practice. Furthermore, the Secretary of State would wish to be satisfied not only about the suitability of the way that protective provisions are drafted but also that the protection being sought could not reasonably be achieved by non-statutory means, such as by a written contract or agreement.

5 The Transport and Works (Model Clauses for Railways and Tramways) Order 1992 (SI 1992/3270).

## **Consulting the Department on Draft Orders**

1.50 Applicants are required by rule 5 of the Applications Rules to send to the Secretary of State (in practice the TWA Orders Unit) at least 28 days before application is made a draft of a proposed order **and** a draft explanatory memorandum explaining the purpose and effect of the order provisions. Applicants are encouraged to do this at the earliest stage possible, especially where novel provisions are proposed or where an applicant may have doubts about powers. (NB: should an applicant wish to submit an initial draft of an order to the Unit for preliminary comments in advance of a rule 5 reference, perhaps because of doubt over certain provisions, this would be acceptable; but it would be helpful if this were accompanied by a clear explanation of the provisions on which the Unit's comments are particularly sought.)

1.51 The purpose of sending a draft order to the Unit before an application is made is to enable the Unit to give early consideration to whether the provisions are consistent with current policy and legislation, are suitably drafted for a statutory instrument, and would be within the powers of the TWA. The draft explanatory memorandum should, therefore, draw attention to novel or unusual provisions and to significant departures from the model clauses, with an explanation of the reasons for such provisions. Any comments offered by the Unit on such matters would be entirely without prejudice to the Secretary of State's consideration of any subsequent application. Moreover, the Unit will not under any circumstances be able to comment on, or enter into discussion of, the merits of the application proposals. Further guidance on the rule 5 provisions is given in Part 2.

## **Handling of Objections to Order Applications**

1.52 The procedures for making objections to, or representations about, TWA order applications are explained in Part 4. Where objections are made, the Secretary of State must decide whether to hold a public local inquiry or a hearing before an inspector, or to invoke the written representations procedure (which simply involves exchanges of correspondence between the applicant and objectors, with no oral hearing). The Secretary of State must, however, hold an inquiry or hearing if a "statutory objector" wishes their objection to be referred to an inquiry or hearing. Statutory objectors include any local authority for an area in which any works in the draft order would be carried out, and any owner, lessee, tenant or occupier of land to be compulsorily acquired (see also paragraph 4.15). Subject to the rights of statutory objectors, it is for the Secretary of State to decide whether to proceed by inquiry, hearing or written representations.

## **Electronic communication**

1.53 In the interests of efficiency, both the Applications Rules and the Inquiries Procedure Rules for TWA cases allow for the use of electronic communication (such as e-mail or CD-ROM) in relation to the serving of notices or documents for the purposes of those Rules. The arrangements for this - including certain qualifications - are described in more detail in Parts 3 and 4 of this Guide. Anyone wishing to use an electronic means of communication should, however, note that they must obtain the prior consent of the recipient of a notice or document to the use of electronic transmission. The recipient is entitled (subject to the provisions of the relevant Rules) to require a hard copy of a notice or document served electronically and may, if they so wish, revoke their consent to electronic transmission of notices or documents.

## Schemes of National Significance

1.54 Section 9 of the TWA sets out special procedures which apply where the Secretary of State (or, for schemes wholly in Wales, the Assembly or the Secretary of State) is of the opinion that an order contains **proposals of national significance**. In such cases, the proposals must be referred to Parliament for approval (to the principle of a scheme) before the application can go forward for more detailed consideration at a public inquiry. Only if both Houses of Parliament approve the proposals which are the subject of the application, by passing a resolution that has been moved by a Government Minister, will the Secretary of State be able to make the TWA order. Hence, if either House fails to pass the resolution, the order could not be made. Further details of the section 9 process are given in Part 6.

## TWA Orders relating to Wales

1.55 As explained in the Introduction, where the works or other matters which are the subject of an application relate wholly to Wales, the order falls to be determined by the National Assembly for Wales. However, except where the project is for an energy purpose, the TWA Orders Unit will deal with the processing of such applications on behalf of the Assembly up to the opening of any inquiry or hearing into the proposed order; or, if no inquiry or hearing is held, the time when it would be possible for a determination to be made. The prospective applicant for such an order may wish to consult the TWA Orders Unit in advance about the detailed arrangements for making the application, including the proper addressing of the application and related notices and the appropriate means of paying the application fee.

1.56 An application for a TWA order that would authorise works or other matters relating to England and Wales would be determined by the relevant Secretary of State. He or she would, however, need to obtain the agreement of the Assembly before determining to make such an order. The Secretary of State would, in any event, wish to consult the Assembly, even if minded not to make the order.

1.57 It should also be noted that the Assembly does not have **the powers to make:**

- orders under sections 2 and 4 of the Act, prescribing modes of guided transport and descriptions of works interfering with navigation rights;
- procedure rules under sections 6, 7(4) and 10 of the Act;
- model clauses under section 8; and
- regulations to assimilate procedures under section 15.

It is therefore the responsibility of the Secretary of State to make such statutory instruments in respect of both Wales and England. However, before making any rules or regulations or model clauses under (b) to (d) above which would have effect in Wales, the Secretary of State is required to obtain the agreement of the Assembly.

1.58 The functions exercisable by the Assembly for schemes of national significance under section 9 are explained in Part 6. Full details of the TWA functions transferred to the Assembly are contained in the National Assembly for Wales (Transfer of Functions) Order 1999 (SI 1999 No. 672).

## Orders made on the Secretary of State's own volition

1.59 Under section 7 of the TWA, the Secretary of State may make orders under section 1 or 3, in respect of a limited range of matters, **without an application having been made**. Those matters are:

- the construction or operation of a railway, tramway or other guided transport system for naval, military, air force or other defence purposes ;
- the suspension or discontinuance of railway or other undertakings in the interests of safety;
- the making safe or removal of works that have been abandoned or neglected by an undertaker; and
- the repeal or revocation of spent statutory provisions (for example because the undertaking to which the provisions apply no longer exists).

1.60 In regard to (a) above, where an order is for a military transport system for defence purposes the Secretary of State for Defence would "promote" the order (this particular power has not been devolved to the Assembly in relation to such proposals in Wales). An order in respect of any of the other matters would be initiated and determined by the appropriate Secretary of State or, in respect to Wales, the Assembly. An order to suspend, discontinue, make safe or remove works can only be made where such action is necessary or expedient in the interests of safety. The Secretary of State would only be likely to take such action where nobody else was able or willing to do so.

1.61 The procedures that the Secretary of State would have to apply in such cases are set out in rule 20 of and Schedule 7 to the Applications Rules. Any public inquiry into the proposed order would be held under the Inquiries Procedure Rules. In the case of matters listed under (b) or (c) above, the Secretary of State may seek to recover from the owner or operator of the works (or, in the case of insolvency, the administrator or receiver) the costs incurred in making the order and implementing its provisions.

## **Transitional arrangements**

1.62 Rule 3 of the Applications Rules provides for transitional arrangements which are designed to ensure continuity of handling, thereby avoiding the problems that would arise from changing to different procedures in mid-stream. Under these arrangements, the 2000 Rules (SI 2000/2190) will continue to apply in respect of any application made under the 2000 Rules which has not been determined by [xx September 2006]. Furthermore, if before making an application under the new Applications Rules an applicant or the Secretary of State has already carried out an action under the 2000 Rules which could have been done under a corresponding provision in the new Rules, this will have effect for the purposes of the new Rules. For example, if an applicant has published a local newspaper notice of an intended application as required by the 2000 Rules before [xx September 2006] but applies on or after that date, it will not be necessary for the applicant to re-publish that notice to comply with the equivalent provision in the new Rules. A similar situation could arise if, e.g., the Secretary of State has given a scoping opinion under the 2000 Rules before the new Applications Rules take effect. This is to avoid unnecessary duplication of action.

1.63 Should the situation arise where an applicant has, before making an application on or after [xx September 2006], voluntarily taken an action that is not required under the 2000 Rules but is to become a requirement under the new Applications Rules - for example, the voluntary submission of a pre-application draft order and explanatory memorandum, before it becomes a statutory requirement - the Secretary of State would be prepared to consider sympathetically a request for a waiver (under rule 18) from the equivalent provision in the new Applications Rules. This would avoid the same action having to be taken twice, where this is considered unnecessary (e.g. because circumstances have not changed significantly in the meantime.)

## Part 2: Pre-application Stage

### Introduction

2.1 This Part of the Guide explains the statutory procedures that prospective applicants must comply with **before** making a TWA application. It also provides advice on what prospective applicants should do on a non-statutory basis at the pre-application stage and draws attention to a number of matters that they should consider in preparing an application.

2.2 It is very clear to the Department, from its experience of handling TWA applications, that the carrying out of wide and thorough consultations in advance of an application is a crucial part of the whole authorisation process; and it will usually follow that the larger and more contentious a scheme is, the more extensive the pre-application consultation should be. A comprehensive consultation exercise, involving an open and constructive dialogue with those likely to be affected, can provide helpful feedback into the design development process, which can lead to desirable changes being made; help to allay fears and suspicions that can sometimes arise simply from lack of information about what is proposed; and can help greatly to limit the objections arising once an application is formally made. Generally speaking, a thorough consultation exercise before an application is made will be likely to repay 'with interest' the investment of resources involved.

2.3 Promoters of major infrastructure projects may wish to study the "Code of Practice on the Dissemination of Information during Major Infrastructure Developments" issued by the former DETR in October 1999. The purpose of the Code is to ensure that people are given as much information as possible at all stages of a development. Whilst it was drawn up for Government projects, it is also commended to local authorities and private sector developers who may be promoting major infrastructure projects.

### Consultation - General

2.4 Before embarking on the statutory pre-application procedures, all prospective applicants are advised to consult thoroughly on their proposals with relevant statutory authorities, with statutory utilities whose services may be affected, and with all other persons likely to be affected by the proposals. The larger the project is, the more critical it is to engage properly with such authorities and affected persons. Experience has shown that it can be easy for applicants to under-estimate the amount of opposition engendered by TWA projects, especially those involving linear works through residential areas and/or town or city centres. Engaging in a constructive dialogue during the formative stages of a project, and being seen to be listening to objections, can often significantly reduce the size and strength of opposition. (Very often, objections are made to a TWA order, which are later withdrawn, simply because the objector has not had a clear understanding of what the project entails; and this can often include statutory bodies and public utilities as well as private individuals.) Even where consultations fail to satisfy some objectors, as is always likely to be the case where private interests are adversely affected, the applicant will at least be better informed about the nature of the objections and therefore better placed to respond to them later (for example, at a public inquiry).

2.5 Consultation can take many forms, such as informal discussions with officers of statutory bodies and with local residents, more formal written consultations, public exhibitions and meetings, information leaflets, websites, etc.. For a typical linear project, the applicant may first wish to publish route alignment options before settling on a preferred route in the light of consultation responses. The consultation process does not lend itself therefore to a rigid regulatory approach. But failure to carry out adequate consultations or to take into account issues or concerns raised increases the risk of the TWA application not succeeding.

At the very least, inadequate consultation is likely to result in a greater number of objections and hence a more drawn out process before the application is determined. Experience suggests that if meaningful discussions with concerned parties (including statutory undertakers) are left until **after** an application has been made, this can lead to requests to the Secretary of State to delay progressing the case until negotiations have been concluded; or result in a public inquiry being held where it might have been avoided; or lead to the inquiry taking an unnecessarily long time. It is therefore likely to be counter-productive to take forward a TWA application without first having undertaken an extensive consultative process.

2.6 Who should be consulted, and what type of consultation is most suitable, will depend to a large extent on the size and nature of the project. Those who are applying for the first time may find it helpful to ask previous applicants about their experiences. Where an application would involve new works, it will usually be desirable to consult the local planning authority and, if different, the local authority where the proposed works would be carried out, at the earliest possible stage. Such consultations might usefully focus on how the proposals relate to relevant local, regional and national development policies and plans. Applicants who intend seeking deemed planning permission when applying for an order are also advised to discuss proposed planning conditions with the local planning authority, including the matters to be reserved for the authority's subsequent approval, as the applicant must provide statements on these matters when applying for an order (rule 10(6) refers). The authority may also wish to ask the applicant to prepare a code of construction practice. A prospective applicant should also consult the relevant parish council (in England) or community council (in Wales) in regard to any matters of local interest.

2.7 Closer to the time of application, the applicant may wish to discuss with the local authority such matters as the choice of venues for depositing application documents, the choice of local newspapers for publishing notices of the application (see Part 3) and the number of copies of the application documents the authority would need for internal use and for consultation with parish or community councils. Local authorities should, for their part, consider at what stage before a TWA application a scheme should be added to their register for land searches; this should normally be done no later than 4 weeks before the application is made.

2.8 Prospective applicants are also advised to consult at an early stage all those who, in addition to the local authority and parish or community councils, **would be entitled to receive a copy of the application and supporting documents or a notice of the application**, as set out in Schedules 5 and 6 to the Applications Rules. (If those persons are not consulted about a proposed application, the applicant will have to explain why this was not done in the consultation report which must accompany the application under rule 10(2)(d) - see paragraph 3.5(d).) For example, where works in marine waters are involved, **Defra** would wish to be consulted at a very early stage on the proposals and on the Environmental Statement, as it can take a considerable amount of time to assess properly the effects on the marine environment (and there may be a related need for a licence under the Food and Environment Protection Act 1985 - see Part 7). Applicants may also wish to consult the relevant Government Office for the Region for information on any national or regional planning, transport or other policies that might be relevant to the proposed project. For consultation with Government Offices on public funding for the project see also paragraph 2.12.

2.9 Applicants and their advisers who are unfamiliar with the procedures may find it helpful to discuss procedural and timing matters with officers of the TWA Orders Unit. The Unit will not be able to comment on the merits of the scheme or give any indication as to the prospects of it being approved; nor would they wish to receive a private presentation on the scheme, in order not to compromise their impartiality. Officials will however be able to offer procedural guidance which may help the prospective applicant to take forward the application and to make informed choices. **It is in any event very useful for the Unit to know the likely timing of future TWA applications, to assist in planning its future**

**workload.**

## **Who else should be consulted?**

2.10 Bearing in mind the very wide range of matters that might be included in a TWA order, it is only possible to provide some general guidance on those (in addition to those named in Schedules 5 and 6 to the Applications Rules) whom it would be prudent to consult prior to making an application. Much will depend upon the nature and effects of the proposals as to which persons or authorities should be consulted and at what stage. The local authorities may be able to provide helpful advice, in particular regarding relevant local community organisations and interest groups. In some cases, local pressure groups may be formed as a result of the proposed project. Applicants should be alive to the formation of new interest groups and should seek to maintain regular contact with them. It is important also that local communities are kept informed of significant developments in working up a scheme. **Openness can build confidence and trust, whereas secrecy may fuel suspicion and hostility.** Prospective applicants for larger, more contentious schemes may find it worthwhile to establish a telephone hotline for the purpose of handling public enquiries and/or to provide up-to-date information on the Internet.

2.11 Prospective applicants should also consider which national or regional organisations are likely to have a relevant interest and should therefore desirably be consulted at the pre-application stage. A list of organisations (not already mentioned in Schedule 5 or 6, or only mentioned in regard to different circumstances) who should be consulted prior to making an application for an order, depending on the particular nature of the works, is set out in **Annex 4**. Prospective applicants should note that this is not an exhaustive list. There may well be others who should be consulted in particular cases.

2.12 Where it is intended to finance a scheme wholly or partly from public funds, **the relevant Government Office and/or the relevant policy division** in the Department concerned (**or the Assembly, for schemes in Wales**) should be consulted at a very early stage. They will be able to explain what sources of funding might be appropriate, what the applicant will need to do before making any formal application and how and when such an application should be made. See also paragraphs 1.31 to 1.38, especially if it is wished to bid for funds for a scheme through a Local Transport Plan.

2.13 Where the project would involve the compulsory acquisition of land or rights in land, the prospective applicant should normally consult the **owners, lessees, tenants and occupiers** of such land at an early stage. The timing and nature of such consultation will need careful consideration according to the particular circumstances of the project. In many cases this should best be undertaken prior to any public announcement of the intended location or alignment of the project. Before the TWA application is made it will almost certainly be necessary to make direct contact with the owners, lessees and tenants of land proposed to be compulsorily acquired, for the purpose of compiling the book of reference (see paragraph 2.60 below). The prospective applicant may also want to gain temporary access to certain land in order to carry out soil surveys. Any such access prior to the making of the order would have to be obtained by agreement with the landowner.

2.14 It would also be prudent to consult the owners and occupiers of land which would be affected by the proposed works but which is not itself subject to compulsory purchase. This should include, but not necessarily be confined to, persons living in properties close to the proposed development. (Some of these may, in any event, be entitled to receive a notice of application under paragraph 16 of Schedule 6 to the Applications Rules, if the applicant considers that they are likely to be entitled to make a claim under section 10 of the Compulsory Purchase Act 1965 for a reduction in the value of their land because of the proposed works.) A street-running tramway scheme, for example, may have effects during construction and/or in operation on residential properties and businesses located in roads that link to, or cross, the actual line of route. Meetings with residents will enable the prospective applicant to explain the likely

effects of the scheme on the persons concerned and to answer any points raised. It is possible that additional mitigation measures (such as noise barriers or new planting) may be agreed as a consequence of discussions with landowners. Such measures should be included in the environmental statement.

Prospective applicants should also consider whether there are persons or bodies using the land with the owner's consent (for example, a restoration or conservation body) who may not properly be regarded as "occupiers" as such, but who should desirably be consulted.

2.15 In selecting a route or location for a works project, prospective applicants should pay special attention to local and national land use policies as set out in the relevant local development plan, regional planning guidance and planning policy guidance notes and statements. The relevant local authorities and Government Office for the Region (or the Assembly for schemes affecting Wales) should be able to offer advice on relevant policies. It is of course for applicants to decide upon their preferred scheme in the light of relevant policies and to defend their choice. Sometimes that preferred choice may be in accordance with some policies but conflict with others, and the Secretary of State will in due course have to make a judgement on where the balance of public advantage lies. Generally, though, applicants should seek to avoid where possible (or have compelling justification for) carrying out works on environmentally sensitive sites, or so near to them that they are adversely affected, including in particular:

- European sites or European marine sites (as defined in regulations 2(1) and 10(1) of the Conservation (Natural Habitats, &c.) Regulations 1994) 6 ;
- Areas of outstanding natural beauty designated by order made by the Countryside Agency (for England) or Countryside Council for Wales (for Wales) under the Countryside and Rights of Way Act 2000 ("the 2000 Act");
- Land designated as Green Belt in a development plan;
- Land in a National Park, within the meaning of the National Parks and Access to Countryside Act 1949 ;
- Land within the Broads as covered by the Norfolk and Suffolk Broads Act 1988;
- Sites of Special Scientific Interest which have been notified under section 28(1) of the Wildlife and Countryside Act 1981 ("the 1981 Act");
- Land which is subject to a nature conservation order under section 29(3) of the 1981 Act;
- National Trust land;
- Open space, common and other land to which section 19 of the Acquisition of Land Act 1981 applies (and which by virtue of section 12 of the TWA would be subject to special parliamentary procedure (SPP) if it were to be acquired compulsorily without suitable land being offered in exchange);
- Marine Nature Reserves designated under section 36 of the Wildlife and Countryside Act 1981;
- Ramsar sites;
- National nature reserves designated under section 35 of the Wildlife and Countryside Act 1981; or
- Sites used by species protected by statute, in particular those listed at Annex IV to the Habitats Directive.

2.16 Applicants should also seek to avoid, so far as practicable, proposing works which would involve the demolition or alteration of, or damage to the setting of:

- a property on the World Heritage List kept under article 11(2) of the 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage;
- a listed building or any building situated within a designated conservation area under the Planning (Listed Buildings and Conservation Areas) Act 1990; or

- a scheduled monument within the meaning of the Ancient Monuments and Archaeological Areas Act 1979.

2.17 The local planning authority should be able to offer advice in selecting suitable route alignments or locations for proposed schemes. The authority may also be able to identify environmentally sensitive areas, such as archaeological sites, of which the applicant may be unaware. If, after considering the options, a prospective applicant can see no reasonable alternative to encroaching on an environmentally sensitive site, the local planning authority and the relevant environmental or heritage statutory agencies should be consulted at an early stage, with a view to discussing how the effects on the site might be minimised. Any proposed mitigation measures should be included in the environmental statement.

2.18 Finally, applicants should be aware that MPs with a constituency interest and, in Wales, Members of the Assembly who represent areas involved, may wish to make representations to the Secretary of State in support of, or in opposition to, a proposed order. In the case of a scheme of national significance, the constituency MPs could play an influential role in the debate and vote in the House of Commons. Applicants are therefore advised to seek to involve relevant MPs and, in Wales, Assembly Members in the consultation process at an appropriate stage. For larger schemes this might take the form of a presentation of the proposals.

## Exchange land

2.19 If the proposals would necessitate the compulsory purchase of 210 square metres or more of common or open space coming within section 19 of the Acquisition of Land Act 1981, the applicant should seek suitable land of comparable quality to give in exchange. Any exchange land must be no less in area than the common or open space to be acquired and must also be equally advantageous, normally to existing users or in some cases to the wider public. Analogous provisions in paragraph 6 of Schedule 3 to the 1981 Act apply to compulsory acquisition of new rights over a common or open space. The local planning authority may be able to assist in this matter. Where exchange land is to be provided - or if the area of the land to be taken is less than 210 square metres or is required for the widening or drainage of an existing highway - the applicant can apply for a certificate under section 19 and/or Schedule 3. In respect of land in England, an application for a certificate relating to **open space** should be made to the relevant Government Office for the Region; and an application relating to a **common** should be made to DEFRA's Environmental Land Management Division (in Zone 1/14, Temple Quay House, 2 The Square, Temple Quay, Bristol BS1 6EB). Applications relating to land in Wales should be made to the Planning Division of the Assembly in Cathays Park, Cardiff.

2.20 Prospective applicants should not underestimate the importance of thoroughly addressing any open space and common land issues at a very early stage. Some TWA applications have suffered serious delays very late on in the process because these issues were not satisfactorily resolved much sooner. For example, if an application for a certificate under section 19 and/or Schedule 3 is made long after the TWA order application, this might lead to a separate public inquiry being held after a TWA inquiry, thereby delaying the TWA decision. It is important to bear in mind that if an appropriate certificate is not given, for example because suitable exchange land cannot be identified, the TWA order would have to be subject to Special Parliamentary Procedure (SPP) by virtue of section 12 of the TWA. SPP would apply also if inalienable National Trust land were to be acquired compulsorily and the National Trust maintained an objection after the TWA order granting compulsory purchase powers was made. SPP is explained further in Part 6 but, generally speaking, it is something that most applicants would wish to avoid, because of the delay and uncertainty it can bring (see paragraph 6.31).

## **Blight and Compensation Arising from Compulsory Land Acquisition**

2.21 As explained in Part 1, the blight provisions in the Town and Country Planning Act 1990 (TCPA) take effect from the date an application for a TWA order containing compulsory purchase powers is made to the Secretary of State. 'Blight' essentially describes the situation where the market value of land or property falls as a result of a proposed compulsory purchase. In such circumstances the owner(s) may be unable to sell the property at all or may only be able to sell it at a price below its value prior to the publication of the proposals. If, once a TWA application is made, the owner-occupiers of a property subject to compulsory purchase find that they cannot sell it at its previous market value, they can serve a blight notice on the applicant. This requires the applicant to purchase the property at the 'unblighted' value whether or not the order is eventually made. The Lands Tribunal settles disputes as to valuations or to the validity of the blight notice (following the serving of a counter notice by the applicant). The categories of persons who may serve blight notices upon the applicant are, broadly speaking, resident owner-occupiers and owner-occupiers of small businesses or agricultural land.

2.22 The statutory blight provisions are set out in sections 149 to 171 of and Schedule 13 to the TCPA. The provisions cover eligibility and the procedures for serving blight notices and counter notices. Anyone contemplating serving a blight notice is advised to seek help from a suitably qualified professional, such as a surveyor or a solicitor. A series of booklets giving guidance on compulsory purchase and compensation are obtainable from DCLG Publications, PO Box No 236, Wetherby, West Yorkshire LS23 7NB (fax 0870 1226 237) and from the DCLG website.

2.23 The provisions contained in Part 1 of the Land Compensation Act 1973 also apply to TWA orders. In summary, these provisions enable property owners to claim compensation for injurious affection where no part of their property is required for the development but its value is depreciated by physical factors caused by the use (but not the construction) of the works. These are noise, vibration, smell, fumes, smoke, artificial lighting and the discharge on to property of any solid or liquid substance. Depreciation is assessed by reference to prices current on the first claim day, which is 12 months and 1 day after the completed works are first used.

2.24 The Noise Insulation Regulations mentioned in paragraph 1.42 impose a duty on the authority responsible for constructing a new railway, tramway or other guided transport system to provide noise insulation to eligible residential buildings or to make a grant in respect of the cost of providing such insulation. A discretionary power to provide such insulation or to pay such a grant is given to the responsible authority where an existing system is altered.

2.25 Broadly speaking, to be eligible for insulation or a grant, the building must be located within 300 metres of the works and must be subject to a predicted noise level increase of at least one decibel as a result of the movement of vehicles using the transport system. The noise level must also be greater by the same margin than the noise level existing before the new works were constructed and be not less than a level of 68 decibels in daytime and 63 decibels at night. The authority responsible for the works must prepare a map and/or list identifying every building for which the authority is under a duty to provide insulation or pay a grant. The authority must make an offer in writing to the owner, lessee or occupier of every eligible building, relating to the carrying out of insulation work or payment of a grant. Fuller information on eligibility and procedures is contained in the Regulations.

2.26 If the amount of compensation for land subject to compulsory purchase, or arising from injurious affection caused by the operation of works, cannot be agreed between the parties, the Lands Tribunal will determine disputed claims and decide on the amount of compensation in accordance with the principles of the compensation code. This code has been developed over the years and is principally set out in the Land Compensation Acts of 1961 and 1973, the Compulsory Purchase Act 1965, the Planning and Compensation Act 1991 and the Planning and Compulsory Purchase Act 2004. Owners of property

subject to compulsory purchase under a proposed TWA order are broadly entitled to the amount that they would have got by selling the property on the open market **had the acquiring authority not proposed to carry out the scheme that is the subject of the order**. They are additionally entitled to compensation for any reasonable expenses (e.g. costs of conveyancing and removals) or losses (to a trade or business) incurred as a direct result of the compulsory purchase. There is entitlement to advance payment of compensation where the acquiring body takes possession of the property before the conveyance takes place.

2.27 The DCLG booklets mentioned in paragraph 2.22 above (which are amended when significant legislative changes are made) provide further general information on compulsory purchase and land compensation matters. This is, however, a complex area, which can lead to protracted negotiations, and anyone whose property is subject to proposed compulsory purchase is recommended to seek professional advice. Where compensation becomes payable, any professional fees reasonably incurred in preparing and negotiating a claim will normally be repaid by the acquiring authority.

2.28 It is possible that a TWA applicant may be prepared to offer compensation arrangements which go, or appear to go, beyond the strict statutory entitlement (e.g. by agreeing to purchase land adjacent to, but not required for, the works if certain criteria apply; and/or by agreeing to purchase property in the future if a scheme goes ahead, but at a price agreed now, subject to index-linking). Again, property owners are advised to take professional advice before entering into any legally binding agreements.

## **Environmental Statements - General**

2.29 By virtue of rule 7 of the Applications Rules, an ES must be provided with all applications for TWA orders unless the order would:

- (a) not authorise a project of a type mentioned in Annex I or Annex II to the EIA Directive (paragraph 1.22 refers); or
- (b) authorise a project covered by Annex II to the Directive but which the Secretary of State has decided (by means of a 'screening decision') would not have a significant environmental impact; or
- (c) authorise a project serving national defence purposes and the Secretary of State considers that carrying out an EIA of the works would have an adverse effect on those purposes, and has directed that an EIA is not required.

For the purposes of the Directive, a 'project' means the execution of construction works or of other installations or schemes, or other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources. Hence, it is not **only** proposed works that might be covered by the Directive. For example, a project might include a material change in the use of land. **The Applications Rules reflect this possibility, by defining "works", for the purposes of the EIA-related provisions in the Rules, as including any matter that may be authorised by an order.** Applicants will therefore need to consider whether their proposals, even if they do not make provision for works, might nevertheless amount to a project for the purposes of the Directive. However, in the TWA context, it is most likely to be works proposals that would be covered by the Directive.

2.30 If what is proposed in a draft order would constitute a project within the meaning of the Directive, the prospective applicant should establish at the earliest practicable stage whether an EIA is required, and hence whether an ES would need to be provided. Aside from any project serving national defence purposes where the Secretary of State has directed that an EIA is not required, if the proposed project is of a type falling within Annex I to the Directive (e.g. the construction of a long-distance railway line), the applicant **must** provide an ES; and where the proposed project is of a type falling within Annex II, an ES must be provided **unless** the Secretary of State has made a screening decision that an EIA (and hence an ES) is not required. The applicant for an order authorising a project falling within Annex II will therefore

need to decide whether to apply to the Secretary of State for a screening decision or whether to provide an ES anyway. It is expected that, in order to avoid unnecessary delay, applicants for a project falling within Annex II would only wish to go through the screening process if they consider that the project would have no significant impact on the environment.

2.31 Where a project does not fall within either Annex I or II to the Directive, there is no statutory requirement for an ES to be produced, and no screening decision would therefore be required. It does not necessarily follow from this, however, that the proposals would have no significant environmental effects. Furthermore, whether or not an ES is necessary, the Secretary of State would be obliged to consider any relevant environmental issues that were raised during consideration of the application. Prospective applicants are therefore advised to consider whether a proposal which is outside the scope of the Directive might nevertheless have significant environmental effects; and, if so, whether it might be in their own interests to provide on a voluntary basis a written appraisal of the environmental effects. Applicants might consider this to be a worthwhile, and ultimately cost-effective, means of persuading potential objectors, and later on the Secretary of State, that they had carefully considered the environmental aspects before making the application, and had taken steps to avoid or minimise any adverse effects on the environment.

2.32 Unlike the EIA Regulations relating to planning applications 7, the Applications Rules do not lay down criteria and thresholds for TWA cases below which an EIA (and hence an ES from the applicant) is not required. As explained above, **any** TWA project falling within Annex II to the Directive requires an EIA unless the Secretary of State determines otherwise by way of a screening decision, or directs that an EIA is not required because this would have an adverse effect on national defence purposes. Each request for a screening decision is considered on a case-by-case basis, taking account of the views expressed by the statutory consultees.

2.33 In a marginal case, where a prospective applicant is not sure whether or not to apply for a screening decision, they may wish to seek an early, informal opinion from the local planning authority and/or the statutory environmental authorities. This might lead the applicant to form the view that an ES should be prepared, without applying for a screening decision.

2.34 The exemption referred to in paragraph 2.29 (c) above in relation to national defence projects (which is derived from the EIA Directive) is likely to be used only sparingly in situations where to comply with the normal EIA requirements on public participation would compromise national defence interests. In those circumstances, however, the decision-maker would still have to have regard to environmental issues in coming to a decision.

## **Environmental Statement - Request for Screening Decision (Rule 7)**

2.35 At any time prior to the making of a TWA application relating to a project covered by Annex II to the Directive, the applicant may ask the Secretary of State for a decision as to whether or not an EIA is required - a **screening decision**. Any request for a screening decision must include a plan identifying the land affected by the works, a brief description of the nature and purposes of the proposed works and a brief description of the possible effects on the environment of the works. (In this regard, applicants should bear in mind the extended definition of "works" for the purposes of rule 7 and other EIA-related provisions - paragraph 2.29 above refers.) Other information may be provided at the applicant's discretion.

2.36 On receipt of a request for a screening decision, the Secretary of State will notify the applicant in writing within 28 days if he/she requires any additional information for the purposes of making a decision. The applicant must then provide the Secretary of State with such of the additional information as the applicant is reasonably able to supply. If the applicant is unable to provide some or all of the additional information, a written explanation must be given of why this is so.

2.37 Before giving a screening decision, the Secretary of State must consult every relevant local planning authority or (as the case may be) the relevant coastal authority; the Environment Agency; English Nature and the Countryside Agency for applications affecting land or tidal waters in or adjacent to England; the Countryside Council for Wales for applications affecting land or tidal waters in or adjacent to Wales; and any other body designated by statute as having specific environmental responsibilities which the Secretary of State considers is likely to have an interest in the application. In the case of a proposed project within tidal waters which would require a licence under Part 2 of the Food and Environment Protection Act 1985 (FEPA), he or she must also consult the Secretary of State for Environment, Food and Rural Affairs. Those consulted by the Secretary of State must, within 28 days, provide a written opinion as to whether, in their view, the works in question should be subject to EIA.

2.38 The Secretary of State is required to notify the applicant of a screening decision not later than 42 days after receiving the applicant's request (or 42 days after receiving any additional information that the Secretary of State has required). If the decision is that the project should be subject to EIA (in which case the applicant must provide an ES with the application) the Secretary of State must give reasons for that decision with the notice. In making the screening decision, the Secretary of State must take into account the selection criteria set out in Annex III to the Directive. These criteria are reproduced in **Annex 5**. If the Secretary of State considers that the project would be likely to have a significant effect on the environment, an EIA will be required. (Note: the Secretary of State may, under rule 26, extend any of the above-mentioned periods should this prove necessary).

## **Environmental Statement - Request for Scoping Opinion (Rule 8)**

2.39 At any time prior to making a TWA application, the applicant may ask the Secretary of State to give an opinion in writing as to the information to be provided in the ES - a **scoping opinion**. A request for a scoping opinion must include the same information as with a request for a screening decision - see paragraph 2.35. Other information may be provided at the applicant's discretion, as with a request for a screening decision. Consequently, if the applicant intends to request both a screening decision and, in the event of an EIA being required, a scoping opinion, it may well be convenient to seek both at the same time, rather than sequentially.

2.40 On receipt of a request for a scoping opinion, the Secretary of State will notify the applicant in writing within 28 days if any additional information is required to enable an opinion to be given. Before giving a scoping opinion, the Secretary of State must consult the applicant and the same bodies which the Secretary of State has to consult in connection with a request for a screening decision, as set out in paragraph 2.37 above.

2.41 In forming a scoping opinion, the Secretary of State must take into account the specific characteristics of the works in question and of the works of the type concerned; and the environmental features likely to be affected by the project. The Secretary of State is required to notify his/her scoping opinion to the applicant in writing not later than 42 days from receipt of the request; or, where additional information has been required, 42 days after receipt of such further information. Exceptions to this time limit apply where the applicant requests a scoping opinion at the same time as requesting a screening decision, or after requesting a screening decision but before that decision has issued. In that case, the Secretary of State's scoping opinion must be notified to the applicant not later than 42 days after the screening decision. The giving of a scoping opinion does not mean that the Secretary of State cannot require further information later from the applicant in regard to the ES - paragraph 2.48 refers.

2.42 The Secretary of State will, in forming a scoping opinion, have particular regard to the advice received from the statutory consultees referred to above. As views must first be obtained from these consultees, the Secretary of State may not necessarily be in a position to issue a scoping opinion within 42

days from receipt of the applicant's request. Rule 26 enables the Secretary of State to allow further time for the taking of any step he/she is required to take, and this rule might need to be invoked if any of the consultees were not to reply promptly. **Applicants are therefore advised to consult those consultees directly on the scoping of the ES at an early stage, before invoking (or deciding whether to invoke) the formal procedures in rule 8.** If, after doing so, the applicants still wished to obtain a scoping opinion from the Secretary of State, they would then be able to submit a draft scoping report which took account of the views of consultees, which should help to ensure a speedier response to the Secretary of State's own consultations. Alternatively, an applicant might decide at that stage not to seek a formal scoping opinion. It should however be noted that a scoping opinion given by the Secretary of State provides a statutory basis for the content of the ES supplied with the application - see paragraph 2.48 below.

## **Provision of Environmental Information**

2.43 Under the Environmental Information Regulations 2004 [§](#) , a prospective applicant may request from a public authority (as defined in those Regulations) environmental information which the authority holds. Examples of public authorities covered by the Regulations are local planning authorities, English Nature, the Countryside Agency, the Countryside Council for Wales and the Environment Agency. Subject to certain exceptions as set out in those Regulations, the authority concerned must make available the environmental information requested within 20 working days of receiving the request. The authority may charge a reasonable amount for making the information available.

2.44 In addition, under rule 6 of the Applications Rules, prospective applicants may at any time serve a notice on any person named in column (2) of Schedule 5 to the Rules, requesting environmental information relevant to their application. The recipient of a notice must provide the applicant with any information they have and which either they or the applicant consider relevant to a subsequent screening decision or to the preparation of an Environmental Statement. The applicant must pay the recipient's reasonable costs of providing the information. If the recipient fails to provide the information requested in the notice within 28 days from receipt, the Secretary of State may (if so requested by the applicant) direct the recipient to supply it forthwith. Where a recipient may have difficulty in providing all the necessary information within 28 days, it should explain this to the applicant as early as possible, and enquire whether the applicant would be prepared to afford a longer period before requesting a direction from the Secretary of State.

## **Environmental Statement - Preparation and Content**

2.45 The rules relating to EIA seek to ensure that the preparation of the ES, whilst the responsibility of the applicant, is a collaborative exercise involving all of the relevant environmental agencies. In preparing an ES, applicants are advised to consult not only those mentioned in rule 8(4) but also any other persons/bodies who are likely to have knowledge or information that can assist in preparation of the ES, such as (where relevant) those organisations listed in Annex 4. The timing of consultations is a matter for the applicant but their usefulness is likely to be maximised if they take place at the formative stage of the project. Any potentially significant environmental problems are best uncovered before applicants firm up their proposals. Discussions with both statutory and non-statutory environmental organisations should ideally be on-going with a view to seeking as much agreement as practicable between the parties (for example on the baseline environmental conditions, on the impacts of possible options, and on suitable mitigation measures) before the ES is finalised.

2.46 There is no prescribed form of an ES but there are statutory requirements relating to its content. These are set out in rule 11 and are reproduced in paragraphs 1 to 5 in **Annex 6**. The question of possible

alternatives (e.g. alternative site locations or route alignments) may figure prominently in the consultations held with local planning authorities and the statutory environmental bodies. Applicants are obliged by rule 11 to outline the main alternatives they have studied and to indicate the main reasons for their choice, taking account of environmental effects. If an applicant has not considered any alternatives, the Secretary of State would expect to see compelling reasons given in the ES to explain why this had not been done.

2.47 Applicants should bear in mind that alternative route alignments for linear schemes, or alternative locations for ancillary facilities, are often put forward by objectors. In considering a TWA application, the Secretary of State's concern is to establish whether the particular proposals submitted for approval are acceptable. If they are, the Secretary of State is not required to determine whether or not there might be a better alternative. But that does not mean that the presentation of evidence by objectors on possible alternatives would necessarily be ruled out as irrelevant. If, for example, it were clear that a particular route chosen (or part of it) would give rise to significant environmental damage, and an objector were able to demonstrate that an alternative alignment could meet the scheme's objectives without causing such damage, the Secretary of State might consider that to be a reason for modifying or rejecting the submitted proposals (whether modification would be appropriate would depend upon how substantial the changes would be). As it is usually inquiry cases where alternatives are presented, it will be for the Inspector in the first instance to consider whether it would be appropriate to allow the giving of evidence on possible alternatives. Applicants should, however, bear in mind when preparing an ES that if they can demonstrate that they have properly considered possible alternatives, and can present a convincing case for their preferred choice of route or location having regard to the environmental effects, then this might well limit the scope of, or need for, subsequent discussion of alternatives.

2.48 The ES must also include so much of the information specified in Schedule 1 to the Applications Rules as is relevant to the proposed project. The information referred to in Schedule 1 is also set out at **Annex 6** to this Guide. A checklist of the range of issues that may need to be considered by applicants in preparing the ES is provided at **Annex 7**. The checklist may help the applicant to determine the scope of the ES, in consultation with the local planning authority and other environmental bodies. It may also be a useful reference in the context of any request to the Secretary of State for a scoping opinion. **Where the Secretary of State has given a scoping opinion in relation to a TWA application, the ES need include only the information specified in that opinion.** (rule 11(3)). However, it is possible that environmental issues not covered by the scoping opinion may become issues of concern later. Rule 8(8) makes clear that the giving of a scoping opinion does not preclude the Secretary of State from requiring the applicant to provide further information in connection with the ES submitted with an application relating to the same, or substantially the same, project to which the scoping opinion applied.

2.49 An important obligation on applicants when producing an ES is the need to describe the measures proposed to be taken to avoid, reduce and (if possible) remedy any **significant** adverse effects on the environment. This is likely to form a key element of the consultations that are undertaken with affected persons and with environmental bodies when the proposals are being formulated. The proposed mitigation measures are also likely to be an important issue in consideration of the application. Furthermore, in giving a determination to make a TWA order in respect of proposals that require an EIA, the Secretary of State is required by section 14(3AA) of the TWA (inserted by the Transport and Works (Assessment of Environmental Effects) Regulations 1998) to describe in the decision notices the main measures to be taken to avoid, reduce and, if possible, remedy the major adverse environmental effects. With this in mind, it would assist consideration of the draft order if the ES were to categorise the degree of adverse effects on the environment expected to arise from the proposals. Also, although not a mandatory requirement, it is helpful for photographs to be provided with an ES, to show locations which are liable to change as a consequence of the proposals.

## **Environmental Statement - Provision of Further Information (Rule 17)**

2.50 Applicants should bear in mind that any failure to comply fully with the statutory requirements relating to the production of an ES will almost certainly cause delays later. If the Secretary of State considers that an ES provided with an application does not contain all the required information, the applicant will be directed to supply the necessary additional information. Even if the Secretary of State is satisfied that the ES meets the statutory requirements, he/she may direct an applicant to provide further information concerning any matter which is required to be, or may be, dealt with in an ES. In either case, the direction would specify what further information is required. Any further information will need to be publicised, allowing 42 days for further representations. In addition, where an applicant voluntarily provides further environmental information after applying for a TWA order, the Secretary of State may require the applicant similarly to publicise that information and allow 42 days for representations to be made on it. More detailed information on rule 17 is given in paragraphs 3.43 to 3.47.

## **The Habitats Directive**

2.51 Where a project would be likely to have a significant effect on any site protected under Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora ("the Habitats Directive"), that effect must be considered before the Secretary of State decides whether to make a TWA order authorising the project. The Conservation (Natural Habitats, &c.) Regulations 1994 (S.I. 1994 No. 2716) have transposed the requirements of the Habitats Directive into UK legislation. Regulation 10 lists the types of site which are protected - referred to in the Regulations as a "European site". The procedures for assessing the implications of a project for a European site are set out in regulations 48 and 49. Guidance about the Government's policies on the conservation of the natural heritage is contained in Planning Policy Statement 9: Biodiversity and Geological Conservation.

2.52 In the context of TWA order applications, the Secretary of State is the "competent authority" who is required to make an "appropriate assessment" of the implications of a project for a European site in the circumstances where the project is likely to have a significant effect on the site and is not directly connected with or necessary to the management of the site. Under regulation 48, if an appropriate assessment is necessary, the Secretary of State is required to consult English Nature (or, for projects in Wales, the Countryside Council for Wales) for the purposes of the assessment. This would normally be done as soon as possible after receipt of a TWA order application.

2.53 Although appropriate assessment is not the same as EIA, where an order application for a project which might have an impact on a European site is to be accompanied by an ES, it would be helpful if the ES included under a specific subject heading the information necessary to enable that impact to be assessed. In these circumstances, it would be sensible for the prospective applicant to consult the relevant nature conservation body at an early stage about the scope of the information to be included in the ES in relation to the European site. The ES submitted with the application should be sufficient to enable the conservation body to say whether the project would be likely to have a significant impact on the European site and, if so, sufficient for the purposes of an appropriate assessment.

2.54 If the information included in an ES were insufficient for the purposes of an appropriate assessment (where required) the Secretary of State would ask the applicant to provide the additional information needed. Other parties would have to be allowed an opportunity to consider such additional information and this might delay the progress of the application.

2.55 If the result of an appropriate assessment were that the project would adversely affect the integrity of a European site, the Secretary of State could agree to the project only if there were no alternative solution and the project had to be carried out for imperative reasons of overriding public interest, including reasons

of a social or economic nature. In certain circumstances, those reasons must relate to human health, public safety or beneficial consequences of primary importance to the environment (regulation 49 refers).

## **Plans, Sections and Book of Reference (Rule 12)**

2.56 The applicant must prepare **plans, sections and cross-sections** of any proposed works (which should be taken to include both new works and the demolition or alteration of existing works). The plans, sections and cross-sections must be provided in accordance with the prescribed scales set out in rule 12(1) and (3), unless the Secretary of State has given a direction under rule 12(6) to vary the prescribed scales, where he is satisfied that it is appropriate to do so in a particular case. All such plans must contain a reference to the National Grid base or, where this is not practicable, to the latitude and longitude of the site of the proposed works. Where the draft order is to include a power to make lateral deviations from a centre line of any proposed works (other than within the boundaries of a street) the limits of deviation must be shown on the plan required under rule 12(1)(a). No plan is required to be submitted with an application for a TWA order which would authorise only the transfer of an undertaking. It would, nevertheless, be helpful for all concerned if applicants were in those circumstances to provide a map with their application to show the location of the undertaking the subject of the proposed order.

2.57 Where the order would authorise the compulsory acquisition of land, or the right to use land, or to carry out protective works to buildings, or the compulsory extinguishment of easements and other private rights over land (including private rights of navigation over water) rule 10(4) requires the applicant to provide a **land plan**, as prescribed by rule 12(5), and a **book of reference** as prescribed by rule 12(8) (see paragraph 2.60 below). Although it could not be acquired compulsorily, land in which there subsists a Crown interest and is required for the purposes of the order must be shown on the plan. Whilst rule 12(5) enables the applicant to include the details of land to be acquired or used on the same plan as that required under rule 12(1)(a), this should only be done if all of the necessary information would be shown clearly. A plan as described in rule 10(5) must be prepared where a public right of way over a footpath, bridleway, cycle track or byway would be diverted or extinguished as a consequence of the proposed order.

2.58 Where the proposed order provides for works to accommodate an owner or occupier of land adjacent to a proposed transport system or inland waterway, or for works ancillary to the construction of a transport system, inland waterway or works interfering with rights of navigation, such works need not be shown in detail on the plans and sections required under rules 12(1) and 12(3). Applicants must however give such indication of these works as is reasonably practicable (rule 12(9)) and the works must be shown on the plans and sections required under rules 10(3)(b) and 12(1) and (3).

2.59 **It is important that the information provided on all plans and sections is accurate and clearly presented.** Although there is no requirement to provide these documents in colour, the applicant should ensure that they can be readily interpreted. Key features, such as any limits of deviation of the works and the precise boundaries of each plot of land to be compulsorily acquired, should be clearly delineated on the relevant plans. Plans and sections should be drawn to a larger scale than the minimum prescribed if this is necessary to achieve reasonable clarity and accuracy. It is open to applicants, if they wish, to show their plans and sections in draft form to the TWA Orders Unit before finalising them, in order to check that these would be in an acceptable form if submitted with an application.

2.60 Paragraph 2.57 above describes the circumstances in which a **book of reference** must be provided with the application. In accordance with rule 12(8), this must contain the names of all those who were, at the beginning of a period of 28 days ending on the date of the application, owners, lessees, tenants (whatever the tenancy period) or occupiers of land which it is proposed will be subject to:

- compulsory acquisition;
- rights to use land (including the right to attach brackets or other equipment to buildings); or
- rights to carry out protective works to buildings.

The terms "owner" and "occupier" must be interpreted as specified in rule 4. The book of reference must also contain the names of all persons entitled to enjoy easements and other private rights over land (including private rights of navigation over water) which it is proposed to extinguish and the names of any others whom the applicant would be required to give a notice to treat if proceeding under section 5(1) of the Compulsory Purchase Act 1965.

2.61 Although Crown land cannot be acquired compulsorily, the book of reference must include the owner of any Crown interest in land that the applicant wants to use for the purposes of the order. The book of reference must also identify various categories of land with special characteristics, in particular environmentally sensitive areas and heritage sites. These are listed in rule 12(8)(e).

2.62 For each plot of land shown in the book of reference which is intended to be used for all or any part of the proposed works, the area in square metres of that plot must be given. It might be possible to use the aggregate area of land shown in the book of reference, after conversion to hectares, as the basis for calculating the TWA application fee - see Part 3. This will depend upon whether the aggregate area of land shown in the book of reference equates to the aggregate area of land on which it is intended to carry out works (which could be the case where compulsory purchase provisions would apply to the whole of the land required for the works).

2.63 A fictional extract from a book of reference is given in **Annex 8**. The persons listed in the book of reference should be correct at a date no earlier than 28 days before the application is made. Applicants are not required to include the name of any owner etc. of land who cannot be ascertained after diligent enquiry. They must however indicate in the book of reference that this information has, or might have, been omitted. Applicants should make all reasonable enquiries for the purpose of obtaining the information required for the book of reference.

## **Draft order (Rule 5)**

2.64 The order, if made, will set out in a statutory instrument what precisely has been authorised (and, either expressly or by implication, what has not been authorised). If it were subsequently wished to add to, or amend, those statutory provisions, a further order would probably be required (unless this could be achieved by other legislative means). It is vital therefore that applicants consider very carefully, before making an application, what powers they require to enable them to implement a proposed scheme. For railway and tramway projects, the model clauses for railways and tramways (mentioned in Part 1) offer a useful starting point. Applicants may however need to adapt the wording of certain of these model clauses to reflect the provisions in orders that have been made. For applicants of other types of project, such as works interfering with navigation, a recently made order for a similar scheme may offer the most appropriate model. Attention is drawn to the advice given in paragraphs 1.45 to 1.49 and in Annex 3 about the drafting of orders and to the request at paragraph 3.5(a) that draft orders be prepared on the Stationery Office statutory instrument template. This can be found at [www.opsi.gov.uk/si/template](http://www.opsi.gov.uk/si/template).

2.65 It is the responsibility of applicants to ensure that the draft order submitted with an application would provide them with all the necessary powers to carry out their proposals. Although the Department scrutinises draft orders, it cannot 'second guess' what powers a promoter might need to implement a project; and model clauses and examples of made orders cannot provide more than a guide to the sort of powers that an applicant may need. Applicants may require powers for a particular proposal that are unprecedented, or they may need to amend or modify the application of a model provision for the

purposes of that project. Applicants are therefore advised to arrange for an order to be drafted by a person with the necessary legal expertise.

2.66 Prospective applicants are required by rule 5 to send to the Secretary of State at least 28 days before an application is made a draft of the proposed order, together with a draft explanatory memorandum explaining the purpose and effect of the order provisions (see paragraph 3.5(b)). This is to enable the TWA Orders Unit to give early consideration to the draft order and to comment on it before the application is made (see below). If an applicant amends a draft order between sending it to the Unit and making the application, there is no obligation to send the amended draft to the Unit under rule 5, unless the applicant considers that the changes substantially alter the nature or effect of the proposed order.

2.67 Applicants should bear in mind that, if a draft order is submitted on or close to the minimum of 4 weeks before an application is made, the Unit is unlikely to be able to comment in detail on all the order provisions before it is submitted with the application. In those circumstances the Unit will aim to offer comments as soon as possible before the application is made on any significant issues arising, for example, any draft provisions that appear to be outside the powers of the Act or which appear to be unusual and may require special justification. Where practicable, applicants are encouraged either to send their draft orders to the Unit for the purposes of rule 5 some time before the minimum 4 week period, or to show their draft orders to the Unit on an informal basis at an earlier stage of preparation. This should allow the Unit an opportunity to comment on a wider range of issues, such as policy considerations affecting draft order provisions, whether there are any relevant precedents that an applicant could usefully refer to, and matters of general drafting style and presentation. **At whatever stage the Unit comments on a draft order, its comments will be without prejudice to the Secretary of State's eventual determination of the order, if applied for.**

## Application for Planning Direction

2.68 Where the applicant for an order also wishes to apply for a direction from the Secretary of State under section 90(2A) of the Town and Country Planning Act 1990 - which, if given, would deem the grant of planning permission for development provided for in the order - the TWA order application will need to be accompanied by:-

- a written request specifying the development for which the planning direction is sought;
- a statement of any proposed planning conditions;
- a statement of any matters intended to be reserved for subsequent approval by the local planning authority; and
- in respect of those matters not to be so reserved, such further documents as have not otherwise been submitted with the application and which are necessary to support the request for a planning direction.

2.69 Prospective applicants should establish, following consultation with the local planning authority, **which matters they want to reserve (or accept should be reserved) for subsequent approval** by that authority, should deemed planning permission be granted. Applicants are not obliged to reserve any matter: they can make a fully detailed application. But it would be unusual if at least some of the details (for example, relating to design of buildings and landscaping) were not to be reserved for later approval. Applicants should provide a level of documentation commensurate with the planning direction they are seeking. The fewer the matters that are to be reserved for later approval by the local planning authority, the more detailed the level of documentation, including plans and sections of the works, should be. Applicants should also bear in mind that, where they are proposing to reserve some matters for later local

approval, the Secretary of State will still need to be satisfied that he/she has sufficient information to be able properly to assess the potential **environmental effects** of the proposals.

2.70 It will also normally be desirable for an applicant to discuss with the local planning authority, before submitting a request for a planning direction, **the planning conditions to be attached to any such direction**. As explained in paragraph 2.68 above, the applicant must provide a statement of any proposed planning conditions when applying for the TWA order. It is unlikely that the Secretary of State would issue a planning direction without attaching any conditions to it, even if the proposals were fully detailed. Although not obligatory, it will usually be helpful (and may save time later on in the process) if the list of proposed planning conditions provided by the applicant had previously been discussed and agreed with the local planning authority (and perhaps with other relevant consultees, such as the Environment Agency). Attention is drawn to Department of the Environment Circular 11/95 (Welsh Office Circular 35/95) on the use of conditions in planning permissions, which sets out general principles and gives examples of 'model' conditions.

2.71 The Secretary of State's normal practice in TWA cases is to require any approved development to be commenced within 5 years from when the related order takes effect. A longer period would only be considered in the most compelling circumstances. If an applicant considers that there are strong grounds in a particular case for allowing a longer period than 5 years, the reasons for this should be forwarded with the request for a planning direction.

## **Other directions, consents or licences required with the order**

2.72 Prospective applicants should consider carefully what further statutory consents, approvals etc. would be required to enable them to implement their proposals. Whilst it has not been possible to make the TWA process a 'one-stop shop', certain statutory requirements that would otherwise apply have been modified or disapplied by the Act directly or have been assimilated by regulations made under section 15. These matters are summarised below - but are dealt with in more detail in Part 7.

2.73 Where works are authorised by TWA order that would normally require the **Secretary of State's consent under section 34 of the Coast Protection Act 1949**, section 19 of the TWA in effect disapplies that requirement. So it is not necessary for the applicant to seek such consent separately (see also Part 7).

2.74 Where the proposed works require **hazardous substances consent**, section 18 of the TWA inserts section 12(2A) into the Planning (Hazardous Substances) Act 1990. This enables the Secretary of State to direct that hazardous substances consent shall be deemed to be granted (subject to any specified conditions) where a TWA order includes any provision that would involve the presence of a hazardous substance for which such a consent is required. Rule 10(7) sets out the application requirements in such cases.

2.75 If the proposed works would affect a listed building, such as would require an application to the local planning authority for **listed building consent** under the Planning (Listed Buildings and Conservation Areas) Act 1990, section 17 of the TWA amends section 12 of the 1990 Act to the effect that any such application is automatically "called-in" for determination by the Secretary of State when the TWA order application is made. The same process of automatic call-in applies where any related application for **conservation area consent** is made. The procedures for dealing with associated applications for listed building and conservation area consent have been assimilated with the TWA process by regulations made under section 15 of the TWA 9. These assimilation regulations also cover related applications for **scheduled monument consent**, which do not need to be called in as they are made direct to a Secretary of State (for Culture, Media and Sport). Details of these procedures are given in Part 7.

2.76 Regulations have also been made under section 15 of the TWA to assimilate procedures where a TWA order would affect an inland waterway in a way which would require an order under section 104,

105 or 112 of the Transport Act 1968 10 . These procedures are also explained more fully in Part 7.

## **Disapplication of statutory provisions in a TWA order**

2.77 As mentioned in Part 1, a TWA order may contain provisions modifying or excluding any statutory provision of general application which relates to any matter for which an order could be made under section 1 or 3. However, as a matter of policy, the Secretary of State would be unlikely to accept such provisions if the applicant was simply seeking to avoid having to comply with a separate, and custom-made, statutory control process approved by Parliament. Examples are:-

- the railway closure procedures and other regulatory controls under the Railways Act 1993 as amended by the Transport Act 2000 and the Railways Act 2005;
- listed building, conservation area and scheduled monuments consent;
- any relevant health or safety controls;
- any approval required under building regulations;
- the requirement in regard to works in the sea and other tidal waters (which may include certain inland waterways) for a licence under the Food and Environment Protection Act 1985 ('FEPA'). Such licences are administered by the Department for Environment, Food and Rural Affairs (or the National Assembly for Wales) to whom a separate application should be made - see also Part 7.

2.78 A possible exception might be where the relevant determining authority under the other legislation is satisfied that an equivalent degree of protection and consultation can be secured through the TWA process. It is suggested that prospective applicants should consult the relevant determining authority under the other legislation about any proposed provision in a draft order that would apply, modify or exclude any legislation of general application.

## **Waivers from complying with the Applications Rules (Rule 18)**

2.79 An applicant may, at any time before or after making a TWA application, make a written request to the Secretary of State for a direction that certain rules shall not apply, or shall apply in part only, to the application. The rules concerned are 5 (pre-application draft order and explanatory memorandum), 9 (form of application), 10 (documents accompanying applications, but not the ES or any EIA screening decision or scoping opinion) and 12 to 15. The Secretary of State cannot issue a waiver direction in respect of other rules.

2.80 Before making a request under rule 18, the applicant should first establish that the particular rule provision applies to the proposals in the intended (or made) application and places a duty on the applicant to comply with it. Where the provision does apply but the applicant considers that it is **impossible, impracticable or unnecessary** to comply with it, a request should be made in writing to the Secretary of State for a waiver direction. **Reasons for the request must be given.** A clear explanation at the outset will avoid the need for the Department to seek further information and will hence save time.

2.81 Where the Secretary of State is satisfied that it is impossible, impracticable or unnecessary for the particular rule (or part of it) to be complied with, he/she may direct that the provision shall not apply or shall apply in part only. If appropriate, the applicant may be directed to comply with the rule at such later date as specified in the direction.

2.82 Although rule 18 provides for a waiver request to be made at any time, in practice the applicant should normally submit such requests **before** making a TWA application. A post-application request for a waiver direction might however arise where, for example, the applicant has inadvertently not complied

with a rule requirement - or perhaps tried to comply with it but found it impossible or impracticable to do so - and, as a consequence, it has become impossible to comply with it because a specified deadline has since passed. An example might be a failure to serve a notice under rule 15 on an owner or occupier "forthwith" after the application had been made. In such a situation, the Secretary of State would consider any such request on its merits in the light of the relevant circumstances, including whether or not any person might have suffered substantial prejudice as a consequence of the failure to comply with a particular provision.

## **Applications for orders by local authorities**

2.83 By virtue of section 20 of the TWA, where the power of a body to promote or oppose Bills in Parliament is subject to any condition, the power to apply for, or oppose, a TWA order is subject to a like condition. Under section 239 of the Local Government Act 1972, local authorities, other than parish or community councils, have powers both to promote and to oppose Bills. Parish and community councils may only oppose (not promote) Bills. Hence, an effect of section 20 is that parish and community councils may oppose but not promote TWA orders, and other local authorities may promote and oppose such orders. However, before a local authority can apply for, or oppose, a TWA order, it must comply with the conditions set out in section 239 of the 1972 Act. See also paragraph 4.7 in respect of objections by a local authority.

## **Pre-application newspaper notice**

2.84 The applicant must arrange for the first of two local newspaper notices of the intended application to be published not more than 14 days before, and not later than, the date of the application (rule 14(2)). Where the notice is to be published in a local newspaper circulating in Wales, it must be published in Welsh as well as in English. The full requirements are explained in Part 3.

6 SI 1994/2716 as amended by SI 2000/192.

7 The Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 - SI 1999/293.

8 S.I.2004/3391.

9 The Transport and Works Applications (Listed Buildings, Conservation Areas and Ancient Monuments Procedure) Regulations 1992 (S.I.1992/3138).

10 The Transport and Works Applications (Inland Waterways Procedure) Regulations 1993 (S.I.1993/1119).

# **Part 3: The Application**

## **Introduction**

3.1 When prospective applicants have completed all of the necessary and recommended pre-application procedures and actions (and proposed sources of funding have been established) they should be ready to submit a formal TWA application to the Secretary of State. This Part of the Guide explains the procedures relating to the making of a TWA application, in particular the documents that must be provided and the notices that must be placed or served. It also deals with the related making of an application for a planning direction under section 90(2A) of the Town and Country Planning Act 1990 ("TCPA"); but not with the steps to be taken where the proposals in the draft order require consents, permissions, licences or orders under other Acts. These are covered in Part 7.

## Form of the TWA application (Rule 9)

3.2 There is no prescribed form for applying for a TWA order. Applications for orders must be made in writing and addressed to the Secretary of State who would be responsible for determining the order (see paragraph 3 of the Introduction), or to the National Assembly for Wales in respect of orders relating solely to Wales. The application must be signed by:

- the applicant or, where the applicant is a body corporate, by a director, the secretary or a duly authorised officer of that body; or
- the applicant's authorised agent.
- "Director" in relation to a body corporate whose affairs are managed by its members means a member of that body.

3.3 Although the application must be addressed to the relevant Secretary of State, or to the Assembly as appropriate, it should be sent c/o the particular team which will be responsible for processing the application, giving their full address, in order to avoid unnecessary delays. **In all cases apart from those relating to projects for an energy purpose, this will be the TWA Orders Unit in DfT:** the present address of the Unit is given in Annex 1, but as this is always liable to change, applicants are advised to check with the Unit before applying that this address is still correct. Applications relating to energy projects, such as offshore wind farms, should be sent directly to DTI's Offshore Renewables Consents Unit or to the Assembly's Planning Division, depending upon whether the scheme is within waters in or adjacent to England or Wales.

3.4 As the application - including all the associated documents - is likely to be bulky, the applicant may prefer to arrange for delivery by hand. In that event, it would be helpful if the TWA Orders Unit (or other prospective recipient of the application) could be given advance warning of the date and, ideally, the approximate time of delivery of the application. The Unit can advise on the current arrangements for receipt of documents at the building where the Unit is located.

## Documents accompanying applications (Rule 10)

3.5 The applicant must provide **three copies of (the letter) of application** and **four sets of every document** submitted with the application. The documents that **must** be provided are:

(a) A **draft of the proposed order**. (Although not a statutory requirement, it would be helpful if applicants were to provide both a hard copy of the draft order and an electronic version, whether this be on a disk or by e-mail. This will save time later on if amendments are subsequently made. The electronic version of a draft order should preferably be prepared on the Stationery Office template for statutory instruments, which can be found at [www.opsi.gov.uk/si/template](http://www.opsi.gov.uk/si/template).)

(b) An **explanatory memorandum** which explains the purpose and effect of each article and schedule in the draft order. The memorandum should explain clearly and concisely in relation to each article and schedule why the provisions are considered necessary in the circumstances of the application and what they are intended to achieve. Applicants should draw particular attention to any provision which is not in the model clauses or which differs significantly from the model clause on which it is based. In those cases, the explanation should make clear why the non-standard provision is considered justified (if there are relevant precedents, it would be helpful if these were cited) and any notable effects, such as the dis-application of other statutory procedures. The main purpose of this requirement is to assist the Secretary of State's consideration of the draft order and to limit the time spent later on seeking explanations for particular provisions.

(c) A **concise statement of the aims of the proposals** to which the application relates. The purpose of this statement is to give interested parties a brief and easily digestible overview of the aims of the project, which will enable them readily to understand its essential nature and purpose. This should in turn help to reduce the scope for misunderstandings about the project, which might otherwise lead to unnecessary objections. It follows that an unduly long or complex statement of aims is likely to defeat its essential purpose. It should normally be sufficient (even for very large projects) for the statement to be no more than two or three sides of paper, explaining in simple, non-technical language the overall aims of the project. If an applicant wished, voluntarily, to produce more substantial explanatory material about their proposals, it would probably be better to do this in a separate supporting document with a different title.

(d) A **report summarising the consultations that have been undertaken**. This must include confirmation that the applicant has consulted all those named in Schedules 5 and 6 to the Applications Rules who are entitled to receive a copy of the application or a notice of it; or, if any of those persons have not been consulted, an explanation of why not. The format of the report is not otherwise prescribed in rule 10, but applicants are advised to provide a concise summary (perhaps in tabular form) of who has been consulted, when, and the issue(s) on which they have been consulted. This new requirement is intended to reinforce the importance of meaningful pre-application consultation by applicants: it will, for example, expose to public scrutiny the nature and extent of consultation that has been undertaken. As explained in Part 2 of this Guide, thorough pre-application consultation can reduce the risk of delays later on in the process, for example arising from discussions with objectors which could have been conducted at an earlier stage.

(e) If the applicant is not an individual or company regulated by the Companies Act 1985, a **declaration as to the status of the applicant**.

(f) A list of any **consent, permission or licence required under other enactments** in connection with the powers applied for in the order and which at the date of the application have been sought or which have been obtained or refused. The applicant must specify from whom each relevant consent, permission or licence is or was required, the date of the application for (or, if applicable, the grant or refusal of) the consent, permission or licence, and the reference number of the application.

(g) A copy of any **screening decision** made by the Secretary of State under rule 7 and of any **scoping opinion** given under rule 8; and, where the project is subject to EIA, the applicant's **statement of environmental information** (i.e. an ES - see paragraph 1.27). The matters that must be included in the ES are set out in rule 11 (1). The information specified in Schedule 1 to the Applications Rules must also be included in the ES, to the extent that it is relevant to the project, unless the scope of the ES has been determined by a scoping opinion given by the Secretary of State under rule 8.

(h) A copy of any **waiver direction** given under rule 18.

3.6 Applicants must also submit with an application their **proposals for funding the cost of implementing the provisions in the draft order** and, in particular, for funding the cost of acquiring any land which is blighted within the meaning of section 149 of the TCPA. The proposals need only provide a broad indication (rather than a precise breakdown) of how the cost of implementing the project, including land compensation payments, would be financed. If public funding in any form is intended, the applicant should state what proportion of the total cost this would represent. It would not be necessary for the applicant to be able to show that all of the finance was in place (see paragraph 1.34).

3.7 Where the draft order contains proposals to carry out **works** (which should be taken to include both new works and works to alter or demolish existing works) the applicant must in addition submit:

(a) The relevant **plans and sections** described in paragraphs (1) and (3) of rule 12.

(b) An **estimate of the cost of carrying out the proposed works**, in the form set out in Schedule 3 to the Applications Rules (or as nearly in that form as circumstances permit).

3.8 Where the provisions of the draft order would authorise the compulsory acquisition of land, the right

to use land, the right to carry out protective works to buildings or the compulsory extinguishment of easements or other private rights over land (including private rights of navigation over water), the applicant must provide a **land plan** and a **book of reference**. The requirements for the land plan are set out in rule 12(5) and the requirements for the book of reference in rule 12(8) (see also paragraphs 2.56 to 2.63 above). Although not a statutory requirement, submission of an electronic version of the book of reference would be helpful, to assist in identifying statutory objectors.

3.9 Where the draft order provides for **the extinguishment or diversion of rights of way** over a footpath, bridleway, cycle track or byway, the applicant must submit a **map** of a scale not smaller than 1:2500 on which the path, way or track concerned is clearly delineated. In the case of a diversion of a right of way the map must show clearly the new path, way or track.

3.10 Where the applicants want the Secretary of State to give a **direction under section 90(2A) of the TCPA that planning permission shall be deemed to be granted for the proposed project**, they must submit with the order application:

- (a) a request in writing specifying the development for which the direction is being sought;
- (b) a statement of any proposed planning conditions (this should preferably reflect the outcome of consultation with the local planning authority and other relevant statutory bodies);
- (c) a statement of any matters that are intended to be reserved for subsequent approval by the local planning authority (again, preferably taking into account consultation with that authority); and
- (d) in respect of those matters which are **not** intended to be reserved for subsequent approval by the local planning authority, such further documents to those already being submitted with the order application as are necessary to support the request for a planning direction.

3.11 If the applicant seeks a direction from the Secretary of State, under section 12(2A) of the Planning (Hazardous Substances) Act 1990, **that hazardous substances consent shall be deemed to be granted**, the documents and information prescribed in rule 10(7) must be submitted with the application.

3.12 If the Secretary of State considers that any of the information submitted with an application is not adequate for its purpose (other than deficiencies in the ES, which are covered by rule 17) he/she may within 28 days of receiving the application direct the applicant, under rule 10(9), to provide further information and to comply with any of the publicity requirements under rules 13 and 14 (see paragraphs 3.23 to 38 below). Where the Secretary of State requires more information because of the inadequacy of an application, he/she may not be in a position to progress the application further until the deficiency has been made good and the public has had a reasonable period of time to consider and make representations on the new information. This will depend upon the nature of the deficiency.

## **Fees for applications (Rule 19 and Schedule 4)**

3.13 The applicant must pay a fee to the relevant Secretary of State (or, for an application relating solely to Wales, to the National Assembly for Wales) upon the making of an application for a TWA order. This is intended to reflect the Secretary of State's (or the Assembly's) costs in processing the application through to a determination of the order. The current scale of charges is set out in Schedule 4 to the Applications Rules. For orders authorising works, the charges relate to the size of the proposed project and whether compulsory land acquisition is required. The fee must be calculated in accordance with Part 2 of Schedule 4. The TWA Orders Unit would be pleased to assist with any queries on the calculation of the fee.

3.14 The fee should not be enclosed with the order application but should be submitted (preferably by electronic transmission) directly to the relevant Accounts Office - or to Dept. B in the National Assembly for Wales, as appropriate - on the same day as the application. Before making an application, an applicant may wish to consult the TWA Orders Unit on the current address of whichever is the appropriate

Accounts Office, and on any other requirement relating to the submission of the fee.

3.15 Should an application be withdrawn within the time limits specified in paragraph (4) of rule 19, the Secretary of State may, upon request, repay to the applicant such portion of the fee as he/she considers appropriate. Repayment of part of the fee may similarly be made where proposals of national significance are not approved by Parliament. Where any such request is made, and the circumstances described are met, the relevant Department (or the Assembly) will wish to assess the costs so far incurred by them in processing the application in order to calculate how much of the fee should be returned. If, for example, the processing costs which had already been incurred were to exceed the fee paid, then no refund would be made. The scale of charges set out in the Applications Rules is kept under review and adjusted as and when this is considered necessary.

## **Electronic transmission of notices and documents (Rule 27)**

3.16 Rule 27 relates to the service of notices, and provides that any notices or documents required or authorised to be served or sent under the Applications Rules may either be sent by post or, subject to certain qualifications, by electronic transmission. (This does not preclude delivery by other means, including by hand.) The following guidance focuses on electronic transmission and the qualifications that apply to its use. It should be borne in mind that those who make full use of these provisions could save themselves much time and expense in the long run.

3.17 "**Electronic transmission**" is defined in rule 4 as meaning a communication transmitted by means of an electronic communications network (for example, by e-mail) or by other means but while in electronic form (for example, a disk). The definition has deliberately been couched in broad terms, with the aim of embracing changes in technology.

3.18 The service or sending of a notice or other document by way of electronic transmission will meet the requirements of the Applications Rules **provided** that the recipient has consented to this in writing (which is defined as including electronic transmission). If, however, a recipient notifies the sender **within 7 days** of receiving a document that they require a paper copy of all or part of it, the sender is required to provide a paper copy as soon as reasonably practicable.

3.19 The requirement for the prior consent of the recipient is to ensure that documentation is not conveyed electronically unless the recipient is content with this arrangement, which is likely to depend upon the facilities available to them. This means that the onus is on the sender in the first instance to make enquiries with prospective recipients to establish whether they are content with this arrangement. However, it is expected that, generally speaking, the work involved in making such initial enquiries should be greatly outweighed by the savings (in cost and time) in being able to transmit documents electronically, many of which are likely to be quite substantial in size; and this is something that applicants in particular may wish to establish with those entitled to receive notices and documents well before the application is made.

3.20 It may be, though, that even where a recipient has confirmed that he or she is content to receive certain documents electronically, they may find upon receipt that either they cannot access the documentation at all for some reason, or that they experience difficulty in accessing some of it satisfactorily (e.g., a detailed plan or drawing). To cover this possibility, rule 27(3) gives the recipient the opportunity, within 7 days, to require a paper copy of all or any of the documentation.

3.21 If a person is prepared to consent to receiving **any** documentation under the Applications Rules by electronic transmission, this would avoid the need for the sender to obtain consent at several different stages (in advance of each requirement to send or serve a notice). Any such agreement would not prevent the operation of rule 27(3) if, for the sort of reasons mentioned above, the recipient subsequently wanted to obtain a paper copy of any document (or part of it) received electronically. It is possible, though, that

somebody who may have agreed to accept electronic transmission might subsequently have good cause to revoke their consent - perhaps, in the case of an individual, because they no longer have access to a computer. In that event, they can give notice revoking their consent, which will take effect on a date specified in the notice, being not less than 7 days after the date on which the notice is given.

3.22 Similar provisions apply under the separate procedure Rules which relate to public inquiries into TWA order applications. These are described in Part 4. Please note that, if somebody has consented to receiving notices or documents electronically under the Applications Rules, and the Secretary of State subsequently decides to hold a public inquiry into the application, that consent would not also apply for the purposes of the Inquiries Procedure Rules. A further consent might therefore be required, if an applicant wishes to send inquiry documents electronically. However, applicants may anticipate this by seeking a consent (from a prospective recipient) that will clearly apply to both sets of Rules.

### **Deposit of Application Documents with Others (Rule 13)**

3.23 The applicant must serve a copy of the application and all or some of the accompanying documents on a number of others, as detailed below. All recipients of these documents must also receive a statement giving the capacity (or capacities) in which they are being served, the expiry date for objections and the address to which any objection should be sent. By virtue of rule 13(5), the applicant is not obliged to serve more than one copy of each document on anyone. Also, by virtue of rule 13(6), **the applicant is not obliged to serve a document (or relevant part of it) on anyone who would be entitled under rule 13 to receive it but who has confirmed in writing (including by e-mail) to the applicant that they do not wish to be served a copy.** Applicants are advised to consider making maximum use of this provision, by acting pro-actively in seeking confirmations, in order to save unnecessary time and expense in serving documents on persons who do not require them. For example, with a long linear project, a local authority or objector in one area may not be interested in receiving documents relating to the impacts of the proposals in another area.

3.24 All documents served under rule 13 must be served **forthwith** after the making of the application. Since this implies immediacy of action, it would be prudent to take this to mean that the documents should be served either on the same day as the application is submitted to the Secretary of State or, if that is not practicable, the following day.

3.25 The following must receive one copy of the application and of **every** document required to be submitted with it (subject to the above-mentioned qualification in rule 13(6)):

- (a) every local authority in whose area a transport system, inland waterway or other works to which the application relates is or are (or would be) situated ("local authority" for this purpose is defined in rule 4);
- (b) every relevant coastal authority (as defined in rule 4 - this applies only where the application relates to works situated, or proposed to be carried out, in tidal waters outside the administrative boundary of any local authority in England or Wales);
- (c) the library of the House of Commons and, unless the Secretary of State directs otherwise, the library of the House of Lords;
- (d) Trinity House (but only where the application relates to works that would interfere with rights of navigation).

3.26 Where the application is for an order authorising works or other matters specified in any of the categories in column (1) of the table in Schedule 5 to the Applications Rules, the applicant must serve on those named against the relevant category in column (2) a copy of the application and the **"relevant documents"**. The relevant documents are specified in rule 13(8). In all cases, these include the draft of the proposed order, the memorandum explaining the purpose and effect of the order provisions, the concise statement of aims, the summary of consultations, any waiver direction and such of the plans and sections

of any proposed works as would be relevant to the particular recipient. Other application documents, such as the ES, are required to be served only as specified in rule 13(8). (**Note: where under paragraph 1 of column (2) of Schedule 5 documents are to be deposited with the Secretary of State for Transport, but marked for the attention of the Maritime and Coastguard Agency, applicants are asked to send the documents directly to the Agency.**)

3.27 In addition to the requirement to serve documents on those named in Schedule 5, the Secretary of State may also require the applicant to serve a copy of the application and the relevant documents on any other body which is designated by statute as having specific environmental responsibilities and which is likely to be interested in the application. Applicants are therefore advised to consult the TWA Orders Unit sufficiently in advance of the date of application (for example, when they submit their draft order under rule 5) to check whether in the circumstances of their proposals there are any other such bodies which should be included in the distribution of application documents.

## Publicity for application (Rule 14)

3.28 The applicant must arrange for a notice relating to the application to be published in the London Gazette. This notice must be published forthwith after the application has been made and must contain the following information:

- the name of the applicant and the address to which all requests for further information, notices or other documents required to be served upon the applicant should be sent;
- to whom the application has been made;
- a statement as to whether the application is subject to EIA;
- a summary of the main proposals;
- the location of any proposed works; and
- the address to which objections or other representations should be sent and the expiry date for objections.

3.29 A similar notice must be published **in Lloyd's List** if the applicant is so directed by the Secretary of State. Such a direction would only be given in regard to an application for an order under section 3(1)(b) - works interfering with rights of navigation - and then only if the Secretary of State considered it appropriate to do so. This would be likely to depend on the nature and scale of the proposed works.

3.30 The applicant must also arrange for a notice to be published, in the form of Form 1 in Schedule 2 to the Applications Rules, **in a local newspaper** circulating in the area or each area in which the application proposals are intended to have effect. This notice must be published on two separate occasions. The first notice must be published not more than 14 days prior to the date of the application and not later than the actual application date. The second notice must be published not later than 7 days after the date of the application. The choice of local newspaper(s) is left to the discretion of the applicant, although the local authority may be able to offer advice. Where the application relates to works situated, or proposed to be carried out, in tidal waters (and outside the area of a local authority) the local newspaper must circulate in the area of each relevant coastal authority. Where the provisions of the draft order relate to Wales, the local newspaper notices must be published in both English and Welsh - rule 4(3) refers.

3.31 Hence, where an application contains proposals affecting a wide geographical area, the applicant would need to publish notices in several newspapers circulating in different localities. In such cases, though, the notice need only summarise the provisions in the draft order which are relevant to the area in which the newspaper circulates (rule 14(5) refers). This summary should include a brief description and location of any works relevant to the area.

3.32 Where an application relates to works or other matters specified in column (1) of the table in Schedule 6 to the Applications Rules, the applicant must serve (forthwith after making the application) a notice on those named in column (2) of the table. **(Note: where paragraph 6(i)(a) of column (2) applies, the notice should be sent directly to the appropriate regional office of the Highways Agency.**

Otherwise, unnecessary delays are likely to occur). This notice must state the capacity (or capacities) in which the recipient is being served and contain the following information:

- (a) the name of the applicant;
- (b) to whom the application has been made and the address to which objections or other representations should be sent;
- (c) a statement as to whether the application is subject to an EIA;
- (d) a concise summary of the matters for which provision has been made in the draft order and including, where applicable, a statement that an application for deemed planning permission or deemed hazardous substances consent has been made;
- (e) the names of all places within the area to which the proposals in the draft order relate (or as close as reasonably possible to that area), where a copy of the application and the accompanying documents may be inspected free of charge at all reasonable hours until the expiry date for objections; and
- (f) a statement that, until the expiry date for objections, objections or other representations may be made in writing to the Secretary of State at the address mentioned in paragraph (b), stating the grounds for the objection or representation.

3.33 In regard to (e) above, the places where the application and accompanying documents are made available for inspection is left to the discretion of the applicant. A building to which the public has access for other purposes, such as a town or village hall or a public library, should be suitable. It must be possible for the documents to be inspected at all reasonable hours from the date of the application up to the close of the objection period. Ideally, this should be every weekday during normal working hours and should include at least two evenings up to 8.00pm or at least 4 hours on two or more Saturdays or Sundays. The times when the documents are available for inspection should be given in all of the statutory notices. The documents should be accessible to persons in wheelchairs and with walking difficulties. Furthermore, the facilities provided for inspecting documents should enable interested persons properly to examine the plans and other documents in reasonable comfort and quietude. The local authority should be able to advise on suitable places in the locality.

3.34 The applicant must **supply a copy of the application and of any document that has to accompany it to any person who requests a copy**, subject to the payment by that person of a reasonable charge. Applicants are advised to ensure that a reasonable supply of copy documents is available, with arrangements in place for their purchase, from the moment that they can be requested. "A reasonable charge" is not defined in the Rules as this will depend upon the circumstances, but in the Department's view the charge should do no more than cover the costs incurred by the applicant in providing the copy of the document(s), such as printing or photocopying costs and any postage and packing. Such charges should not seek to recover initial set up or production costs incurred by the applicant, but should relate to the additional unit costs. Applicants are also advised to consider the possibility of making application documents available in electronic format or through the Internet. The applicant must ensure that information about how to obtain copies of the application and accompanying documents is displayed at every place at which such copies are made available for inspection.

3.35 Where the order applied for contains proposals to carry out works, the applicant must display a **notice in the form of Form 2 in Schedule 2** to the Applications Rules on, or as close as reasonably practicable to, the site of any proposed works. The notice must be displayed in a place where it would be accessible to the public. Where the proposed order makes provision for linear works exceeding 5 kilometres (km) in length, the applicant must display a notice at intervals of not more than 5km along the

whole of the route, except where this is impracticable due to the land in question being covered by water (for example where the works involve laying a cable or pipeline in the sea).

3.36 If a provision in the draft order would authorise:

(a) the extinguishment or diversion (either permanently or temporarily) of a public right of way, or  
(b) the stopping-up or diversion of a street, or a restriction on the use of a street by any person or traffic, whether permanently or, in the case of a street specifically named in the draft order, temporarily; the applicant must display **a notice in the form of Form 3 in Schedule 2** to the Applications Rules on the right of way or street. The notice must be displayed at, or as close as is reasonably practicable to, each point of extinguishment, diversion, stopping-up or restriction.

3.37 Where the order application provides for the discontinuance of all railway passenger or tramway services from any station, or on any line, to which the closure provisions in the Railways Act 1993 (as amended) apply, the applicant must display **a notice in the form of Form 4 in Schedule 2** to the Applications Rules at every station to be closed and at every station directly served by an advertised service running from any station to be closed.

3.38 The public notices described at paragraphs 3.35 to 3.37 above must be **displayed forthwith after the order application is made**. The applicant must also use best endeavours to ensure that every notice continues to be displayed in a legible form until the expiry date for objections. Applicants are therefore advised to place notices in clear plastic wallets and to visit regularly the places where they have been posted to check that they are still there and have not been defaced.

## Notices to owners and occupiers (Rule 15)

3.39 The applicant must serve **a notice in the form of Form 5 in Schedule 2** to the Applications Rules **upon all those named in the book of reference**, except the applicant and the owner of any Crown interest.

3.40 In any case where the name of any person has not been ascertained after diligent enquiry (see rule 12(10)), the applicant must serve a notice in the form of Form 5 in the manner provided for by section 66(4)(a) and (b) of the TWA. This means that the notice may be addressed to the "owner" or, as the case may be, "occupier" of the land as described in the notice; and that the notice may be served either by delivering it by hand to a person who is, or appears to be, resident or employed on the land, or by leaving it conspicuously affixed to a building or object on the land. **All notices served under rule 15 must be served forthwith after the TWA application has been made.**

3.41 Where not obliged to do so under paragraph 7 or 16 of Schedule 6 to the Applications Rules, the applicant may nevertheless consider it prudent (and courteous) to notify owners and occupiers of land adjoining or close to any proposed works and who may be affected during construction of the works or when the works come into use. Examples are:

(a) Owners and occupiers of land along the banks of a river which would be subject to works interfering with rights of navigation on that river.

(b) Owners and occupiers of land close to a proposed new railway or tramway who are likely to be significantly affected by the construction or operation of the scheme, such as by noise or vibration, by visual intrusion, by movement of construction traffic, by related road works etc..

(c) Persons who would retain private rights of access over a level crossing where its status would be changed from a public highway to an accommodation and occupation crossing. Such persons should be notified of any duties that might be placed on them as a result of the provisions in the draft order, such as any duty to close the crossing barrier or gate.

Depending on the effects of the proposal on the recipients, the notice might be in the form of Form 2 or Form 5 in Schedule 2, or in the form of the notice to be served on persons named in Schedule 6.

## **Evidence of compliance with Rules 13, 14 and 15 (Rule 10(8))**

3.42 As soon as practicable after the date of the application, the applicant must submit to the Secretary of State evidence, in the form of an affidavit, of compliance with the requirements of rules 13, 14(1) to (8) and 15. The applicant must exhibit to the affidavit one copy of each of the notices placed in newspapers and in the London Gazette (and Lloyd's List if applicable) in accordance with rule 14. The affidavit should be in the form of a written statement describing the action which has been taken to comply with the rule, sworn before a solicitor or Commissioner for Oaths by the person who has executed the rule requirements. Where two or more persons have undertaken such execution, separate affidavits should be supplied for each person concerned.

## **Further documents, information and notices (Rule 17)**

3.43 Where the Secretary of State considers that the applicant's ES does not include all of the information required in order properly to constitute an ES for the purposes of the application, he/she must direct the applicant to provide the necessary additional information. Before giving such a direction, the Secretary of State would take into account the requirements of rule 11 and any scoping opinion given under rule 8. Furthermore, even if the Secretary of State is satisfied that the applicant has submitted an ES which meets the statutory requirements, he/she may nevertheless direct the applicant to provide such further information as specified in the direction which is required to be, or may be, dealt with in the ES.

3.44 Where the Secretary of State gives a direction requiring additional information relating to the ES, the applicant must comply with the requirements of the direction within the period specified in it (or, if no period is specified, as soon as is reasonably practicable).

3.45 The applicant must supply 4 sets of the additional information to the Secretary of State and publish a notice in the form of Form 6 in Schedule 2 in local newspapers circulating in the areas to which the information is relevant. (If practicable, this should be the same local newspaper(s) as contained the notices of the application.) The applicant must serve a copy of the information on each person who, in accordance with the Rules, was served with a copy of the applicant's ES. The applicant must also provide a copy of the additional information, or any part of it, to any person who requests it, subject to the payment by that person of a reasonable charge.

3.46 The Secretary of State may direct the applicant to produce such evidence as may reasonably be required to verify any information contained in the applicant's ES or in any further information which has been provided as a consequence of a direction given by the Secretary of State.

3.47 Where an applicant **voluntarily** submits further environmental information to the Secretary of State after an order application has been made, the Secretary of State may require the applicant to carry out the steps described in paragraph 3.45 above. The Secretary of State would do this where he/she considered it necessary to publicise new environmental information in the same way as that submitted with the application, in order to comply with the public participation requirements of the EIA Directive.

## **Additions and amendments to documents post-application**

3.48 Aside from the ES, it is recognised that an applicant may wish to submit to the Secretary of State after an application has been made - perhaps as a result of negotiations with objectors - information additional to that submitted with the application; or amendments to a document or documents previously submitted with the application, including the draft order itself. Where this can properly be done, it can avoid the need for a fresh application, with the extra delay, expense and, in some cases, extended blighting effect that this may entail. With this in mind, the Secretary of State would normally be prepared to accept

for consideration additions and/or amendments where he or she is satisfied that:-

(a) the modifications did not contain (expressly or by implication) a proposal to authorise the compulsory acquisition of land, or the right to use land, or the compulsory extinguishment of easements or other private rights over land (including private rights of navigation over water) which was not included in the application;

(b) the modifications (taken together, if there were several of them) would not change the essential nature of the proposal submitted to the Secretary of State so as to amount, in effect, to a substantially different proposal. This would be a matter of fact and degree, having regard to the nature of the modifications in relation to the originally submitted proposals; and

(c) the interests of other parties would not be prejudiced by acceptance of the amendments or additional information (taking account of what opportunity to comment had been, or might reasonably be, given to other parties who might have an interest - see paragraph 3.49 below).

If any of the above conditions were not met, it is likely that a fresh application would be required.

3.49 Before submitting an additional or amending document, applicants may wish to consult the TWA Orders Unit on whether the Secretary of State would be likely to accept such a document. Even if that were so, natural justice might well require that the requested change be brought to the attention of other parties who had already registered an interest in the proposals and any others who might be affected by the proposed change. If the changes arose before an inquiry (or if an inquiry was not going to be held) the applicant would probably be asked to serve the additional or amending documentation on those named in rule 13 and Schedule 5; and, depending upon the nature of the changes, the applicant might also be asked to comply with one or more of the publicity requirements in rule 14. When serving the document or publishing or placing any notices, the applicant would be expected to give notice that the period for receipt of objections to the document would be 6 weeks from the date the document was submitted to the Secretary of State.

3.50 Where an applicant wishes to submit changes, or provide additional information, at a public local inquiry, it will usually be for the Inspector to consider whether to allow the submission of such new material, although in cases of doubt he or she may wish to seek the opinion of the Secretary of State. The Inspector will wish to ensure, if necessary by adjourning the inquiry, that other parties at the inquiry are given an adequate opportunity to consider the fresh documentation; and he may consider that wider publicity should be given. The Secretary of State may also wish to consider after the inquiry whether any additional publicity ought to be given in order to ensure that any persons likely to be affected by the change - who might not have appeared at the inquiry - have had an adequate opportunity to comment.

3.51 Although applicants may therefore be allowed to make additions and amendments to an application on the basis set out above, they should nevertheless make every effort to keep post-application changes to a minimum. Bearing in mind the extra costs and delays that might arise, applicants will wish to satisfy themselves before making an application that all of the documentation is as complete and accurate as practicable. It is recognised however that changes can sometimes arise from discussions with objectors, and that incorporation of such changes could help to remove objections and/or avoid the need for a fresh application.

## **Waiver of requirements in the Rules (Rule 18)**

3.52 As explained in paragraphs 2.79 to 2.82, an applicant may, either before or after making an application, ask the Secretary of State to direct under rule 18 that certain requirements of the Applications Rules shall not apply (or shall apply in part only). Before giving such a direction, the Secretary of State would have to be satisfied that compliance was impossible, impracticable or unnecessary. Where the time for compliance with a rule requirement has passed - for example, a notice has not been served "forthwith"

after the date of the application - the Secretary of State would consider whether (having regard to the explanation from the applicant and the interests of other affected parties) it would be reasonable to give such a direction. If so, the Secretary of State may, if the applicant had not already taken steps to remedy the earlier non-compliance, attach a condition to any such direction requiring the applicant to comply with the relevant rule provision by a specified date.

## **Acknowledgement of application by Secretary of State**

3.53 The TWA Orders Unit\* will acknowledge in writing the receipt of the application as soon as possible (\* for the purposes of this paragraph and following ones, this should be taken to include any other team which might be processing the application.) By virtue of section 6(1) of the TWA, the Secretary of State cannot make an order under section 1 or 3 unless an application has been made in accordance with the Applications Rules - save for where the Secretary of State wishes to make an order pursuant to section 7 (see paragraphs 1.59 to 1.61). Therefore, one of the first tasks of the Unit upon receipt of an application is to check, so far as they are able, that it complies with the Rules. The letter of acknowledgement will state whether or not the application appears to comply with the Rules. If it appears not to comply, reasons for reaching that view will be given. The Secretary of State will not wish to take forward the processing of an application if it appears that the statutory requirements have not been complied with.

3.54 An acknowledgement indicating that the applicant **appears** to have complied with the Rules, and that the application may therefore be progressed, should not be regarded as a definitive statement that the Rules have been complied with. It would not, for example, rule out the possibility of a legal challenge to the validity of the order, if made, under the provisions of section 22 of the TWA - see Part 5. It is therefore the responsibility of the applicant to ensure that every requirement of the Rules that applies to the application is met or, if not, is covered by a waiver direction under rule 18. Although the TWA Orders Unit may be able to spot obvious errors such as a failure to serve a notice, or discrepancies in the documentation provided, it will not be possible to check the accuracy of every detail of an application, and applicants **should not rely on the Unit to find any errors**.

3.55 Applicants are required by rule 10(8) to submit, as soon as practicable after making an application, evidence by affidavit of compliance with rules 13, 14(1) to (8) and 15, together with supporting documentation (paragraph 3.42 refers). The TWA Orders Unit will send a further letter of acknowledgement at this stage, along the lines of paragraph 3.53 above.

3.56 Where an applicant has, perhaps through an administrative oversight, failed to comply with a requirement in the Rules, a waiver direction may be sought from the Secretary of State under rule 18 (paragraphs 2.79 to 2.82 and 3.52 refer). An example might be where an applicant had overlooked the need to serve a notice or documents on a particular person, and there was still time to put the error right without substantially prejudicing anyone's interests. Although it is possible in this way for an earlier failure to comply with the Rules to be remedied without having to start the application process all over again, a direction would not be given if such remedial action would be likely to cause substantial prejudice. The Secretary of State would therefore have regard to factors such as the nature and extent of the failure to comply with the Rules, and whether an omission had been discovered at such a late stage that the interests of the person(s) affected had been substantially prejudiced by what had already taken place.

## **Consultation on applications**

3.57 The TWA Orders Unit may wish to consult (so far as is considered appropriate) within its own Department and with other Government Departments and the relevant Government Office on the application. The applicant will, however, be responsible for sending the application and specified documents to Government bodies to the extent that this is required by the Applications Rules.

3.58 Normally, it is expected that an applicant would have sought to resolve any substantive points at issue with another Government Department (including an Executive Agency of a Department, such as the Highways Agency) before an application is made. However, if following an application a Government Department has continuing concerns about the proposals, it would be open to that Department to make an objection or other representations to the Secretary of State. In that case, the representations would be copied to the applicant, so that they can properly be taken into account. In some cases, the applicant and the Department or Agency might be able to agree that the concerns of the latter could be largely or wholly overcome by a suitable amendment of the draft order, or by a planning condition. But if the Department or Agency maintains an objection, this does **not** mean that the Order cannot be made. The final decision rests with the relevant Secretary of State, who will be concerned to ensure that all applications are considered fairly and impartially, on their individual merits.

3.59 In cases where the application is referred to a public local inquiry, the Government Department or Agency in question would be an "official body" for the purposes of the Inquiries Procedure Rules. In this capacity, the Department or Agency would submit an "official case" to the Secretary of State setting out its evidence in regard to the application. It would then be able to appear at the inquiry; and indeed would have to appear if required to do so by the Secretary of State, the applicant or a "statutory objector". The latter term is explained in Part 4. More detailed information on the procedures for inquiries is also given in Part 4.

## **Development likely to have significant environmental effects in another part of the United Kingdom or in another State (Rule 16)**

3.60 Additional procedural requirements arise where it appears to the Secretary of State that the application relates to a project which would be likely to have significant effects on the environment in another Member State 11 or in Wales (or England as regards a project in Wales), Scotland, Northern Ireland, the Isle of Man or any of the Channel Islands. Such requirements would apply also where another Member State whose environment is likely to be significantly affected by the proposed project requests information relating to the application. The procedural requirements are set out below.

3.61 Where the proposals would be likely to have significant effects on the environment in Wales (or England as regards a project in Wales), Scotland, Northern Ireland, the Isle of Man or any of the Channel Islands, the Secretary of State may direct the applicant to publish specified information about the application in newspapers circulating in the place in question.

3.62 Where the proposals would be likely to have significant effects on the environment in another Member State, or that State requests information relating to the application, the Secretary of State must send to the State the following information:

- (a) a description of the proposed works, together with any information the Secretary of State has in connection with the application as to the possible significant effects of the works on the environment of the State in question; and
- (b) information on the nature of the decision which might be taken.

The Secretary of State must give the State in question a reasonable time in which to indicate whether it

wishes to participate in the procedure for considering the application. The Secretary of State must also direct the applicant to take such steps as he/she considers necessary to ensure that the public (in England and/or Wales) is informed that the project is likely to have significant effects on the environment of another Member State and that rule 16 applies.

3.63 Where the Member State indicates that it does wish to participate in the procedure, the Secretary of State must, as soon as reasonably practicable, send to that State:

- a copy of the application;
- a copy of the ES; and
- any relevant information regarding the procedure for considering the application and for undertaking an EIA of the project.

The Secretary of State must also:

(a) arrange for the information and documents which have been sent to the Member State to be made available, within a reasonable time, to the environmental authorities designated by that State under Article 6(1) of the Directive and to members of the public in the territory of the State likely to be significantly affected;

(b) ensure that those authorities and members of the public concerned are given an opportunity, before any order is made, to forward to the Secretary of State, within a reasonable time, their opinion on the information supplied;

(c) consult the Member State in question about any potential significant effects of the project on the environment of that State, the measures envisaged to reduce or eliminate such effects and any other matters relating to the project as may be relevant to that State; and

(d) provide, in agreement with the other State, a reasonable period of time for such consultations to take place before determining whether or not to make the order.

3.64 The Secretary of State must subsequently inform the Member State of his/her decision on the application. That State must be sent a statement of:

(a) the content of the decision and any conditions attached to it;

(b) the main reasons for the decision and considerations on which it was based, including the public participation process; and

(c) a description, where relevant, of the main measures that the applicant is required to take to avoid, reduce and, if possible, remedy any major adverse environmental effects of the works.

3.65 Although it would probably be rare that a TWA project in England or Wales would have significant effects on the environment in another Member State, where this does (or seems likely) to arise it is important that the applicant consults the TWA Orders Unit at the earliest practicable stage. This will enable early discussions to take place with the other State, with a view to agreeing the detailed arrangements for implementing the necessary consultation and notification procedures. Otherwise, substantial delays could arise in processing the application after it is made.

11 "Member State" includes a state which is a contracting party to the Agreement on the European Economic Area signed in Oporto on 2 nd May 1992 (Cm 2073), as adjusted by the Protocol signed at Brussels on 17 th March 1993 (Cm 2183).

## Part 4: Handling of Objections

### Introduction

4.1 This Part explains the process of making objections or other representations to a TWA order application. It covers the handling of such objections and other representations by the Secretary of State, including the procedures that need to be followed where a public local inquiry or a hearing is held, or where the written representations procedure is adopted.

### Objections and other representations: general (Rule 21)

4.2 The statutory notices published or sent by the applicant under rule 14 will inform the public of the application; of where to send objections or other representations about the proposed order; and of the date by which they must be made. "Other representations" should be taken to cover letters of support for the application and letters that offer neutral views i.e. are neither supportive of nor opposed to the application. Statutory consultees who are entitled to receive some or all of the application documents will similarly be informed about how and by when to make objections or other representations by the statement the applicant is required to send with such documents. Notices will state where copies of the application and accompanying documents may be inspected free of charge.

4.3 Rule 21 of the Applications Rules requires objections and other representations to be made in writing to, and received by, the Secretary of State **not later than the expiry date for objections** ("in writing" includes by e-mail). The expiry date for objections, which must be specified in the public notices, **must be no less than 42 days from the date of the application**. It is therefore open to applicants to afford a longer period than 42 days; and this is commended where the objection period would coincide with a public holiday period.

4.4 The letter or e-mail **must state the grounds of the objection or other representation**. It is not sufficient merely to object to or to support an application without giving at least one reason for doing so. Where no grounds are given, the TWA Orders Unit will write to the person concerned with an invitation to make good the omission.

4.5 The letter or e-mail **must also indicate who is making the objection or other representation and provide an address to which any related correspondence should be sent**. The reasons for this are self-evident. Unless the name and address of the person making the objection or representation is made known to the Secretary of State, it will not be possible to acknowledge receipt and to explain the next steps; and the person who wrote the letter would not then be able to have the objection or representation considered. The prescribed notice also asks those who respond by e-mail to give a postal address, as this may be required later in the process for the delivery of documents relating to the application.

4.6 By virtue of section 10(3) of the TWA, the Secretary of State may disregard an objection that appears to him/her to be frivolous or trivial or to relate to matters of compensation that would be determined by the Lands Tribunal. Where **petitions** are lodged with the Secretary of State, whilst the person(s) who submitted the petition will be treated as an individual objector or supporter, others who sign the petition will not be so treated for the purposes of the Applications Rules or the Inquiries Procedure Rules. However, assuming the petition contains the grounds of the objection or other representation, it will be taken into account by the Secretary of State in determining the application.

4.7 Where an authority which is subject to the provisions of section 239 of the Local Government Act 1972 wishes to lodge an objection but is unable to comply with the requirements of that section before the expiry date, it may forward a holding objection. This should set out the initial views of the relevant

officers or committee, subject to endorsement by a meeting of authority members. The authority should submit its formal objection as soon as practicable after the resolution required under the 1972 Act has been passed. Pending formal endorsement, the holding objection will be treated as an effective objection for the purposes of the Rules if it meets the requirements of rule 21(1).

4.8 Where the applicant has, pursuant to rule 17, submitted additional information relating to the ES, any objection or other representation about such information will be treated as an objection or other representation for the purposes of the Applications Rules, provided it is submitted to the Secretary of State not later than 42 days after the date that the further information is supplied to the Secretary of State, or the last date on which a newspaper notice relating to the information is published, whichever is the later.

## **Notice of objections and other representations (Rule 22)**

4.9 The Secretary of State must provide the applicant with a copy of every objection or representation as soon as reasonably practicable after it has been received. In practice, the TWA Orders Unit will normally forward objections and representations in batches at intervals of not longer than 7 days.

4.10 The Unit will acknowledge receipt of all objections and other representations, and will normally ask the objectors and those making representations whether they would wish to appear at a public inquiry should one be held. The acknowledgement letter will explain that statutory objectors (see paragraph 4.15 below) have a right to be heard. The letter will contain the reference number given by the TWA Orders Unit to the objection or representation, which should be quoted in all subsequent correspondence. A representation containing any adverse comment about the proposals will usually be treated as an objection, even if the representation is generally supportive of the proposals.

4.11 As soon as reasonably practicable after the expiry date for objections, the Secretary of State must provide the applicant with a list of the objections and other representations received. The list must contain the names and addresses of the objectors and those who made representations, together with the reference number given to the objection or representation.

4.12 Under a new provision in rule 22(3), the Secretary of State may, on request, provide any person with a copy of any objection or representation made by someone else. This could, for example, assist interested parties in establishing which other parties hold common views, with whom they may wish to collaborate in presenting their case. Before exercising this discretionary power, though, the Secretary of State will wish to be reasonably satisfied that any such request is for a legitimate purpose relating to the TWA process.

## **Secretary of State's decision on whether to hold a public inquiry (Rule 23)**

4.13 If upon the expiry of the period for submitting objections or representations no objections have been received (or objections are made but later withdrawn) and the application is therefore unopposed, the Secretary of State may proceed to determine whether the order should be made. The absence of objections does not mean, though, that the Secretary of State will necessarily make the order in the form applied for (or at all). As the determining authority, the Secretary of State must still be satisfied that the provisions in the draft order are appropriate and justified. If not so satisfied, the Secretary of State may wish to seek further information from the applicant before proceeding to a decision.

4.14 If any objections are received - excluding any which are subsequently withdrawn or which appear to the Secretary of State to be frivolous or trivial or to relate to assessment of compensation - and the proposals in the draft order are not, in the Secretary of State's opinion, of national significance (see Part 6), he/she will consider the objections in one of three possible ways:

- by causing a public local inquiry to be held;
- by affording the opportunity of a hearing; or
- by exchanging written representations between the parties.

4.15 An inquiry or hearing **must** be held, however, if a "statutory objector" informs the Secretary of State in writing that they want their objection to be referred to an inquiry or hearing. The categories of persons who must be classed as statutory objectors have been extended by amendments which have been made to section 12 of the Acquisition of Land Act 1981 by section 100(5) of the Planning and Compulsory Purchase Act 2004. In the light of those amendments, a **statutory objector** is an objector who falls in one of the following categories:

- (a) a local authority for the area in which any works authorised by the proposed order would be carried out;
- (b) an owner, lessee, tenant (whatever the tenancy period) or occupier of land subject to compulsory purchase powers in the proposed order;
- (c) a person to whom the applicant would be required to give a notice to treat if proceeding under section 5(1) of the Compulsory Purchase Act 1965; or
- (d) a person who the applicant thinks (after making diligent inquiry) is likely to be entitled to make a claim for compensation for injurious affection under section 10 of the Compulsory Purchase Act 1965, if the order were made and the scheme implemented.

Thus, in addition to relevant local authorities and owners etc. of land which would be compulsorily acquired, statutory objectors include those who may be entitled to claim compensation either because they own rights in the land to be acquired which would be interfered with, or because the value of their land may be reduced as a result of works carried out on other land which is to be compulsorily acquired under the proposed order.

4.16 Where the Secretary of State decides to hold an inquiry or hearing - whether because a statutory objector wishes to be heard or because of the nature and extent of objections - written notice of this decision must be given by **the operative date**. This is the date falling 28 days after the expiry date for objections **or** such later date as the Secretary of State may specify. The requirements for such notices are explained more fully in paragraphs 4.47 (for inquiries) and 4.33 (for hearings).

4.17 The Secretary of State may wish to allow himself/herself more time to take a decision on procedures, by specifying a later operative date, in the following circumstances:

- (a) where the issues raised and the extent of objections would not normally warrant holding an inquiry or hearing, but one or more statutory objectors wished to be heard; and the applicant felt there was a reasonable prospect of being able to secure withdrawal of those objections by negotiation; or
- (b) where the range and nature of objections would warrant holding an inquiry or hearing but the applicant felt there was a reasonable prospect of obtaining the withdrawal of a sufficient number by negotiation to justify deferring a decision on which procedure should be used; or
- (c) where the decision on whether to hold an inquiry or hearing, instead of written representations, was a marginal one and the applicant felt there was a reasonable prospect of securing the withdrawal of a sufficient number to affect that decision; or
- (d) where the Secretary of State has required an applicant to provide and publicise further information under rule 10(9) because of the inadequacy of any of the application documents (see paragraph 3.12 above); or
- (e) where an applicant has decided to submit additional or amending application documents which the Secretary of State considers should be advertised to give the public time to make representations on the new material.

The TWA Orders Unit will notify all persons who have made objections or representations whenever a

new operative date is specified.

4.18 In any of the circumstances described at (a) to (c) above, the Secretary of State would normally be prepared, at the applicant's request, to specify a later operative date to allow time for the applicant to negotiate with each of the objectors. The position would be reviewed before the new operative date, taking into account progress made by the applicant in securing the withdrawal of objections. The operative date might be deferred more than once, at the request of the applicant, if the Secretary of State was satisfied that there was a reasonable prospect of avoiding a public inquiry or hearing. But he/she would not wish to continue to defer the operative date if there appeared to have been little or no progress in the negotiations and an inquiry or hearing seemed inevitable. Similarly, the applicant could at any time before the operative date is reached ask the Secretary of State to decide whether to hold an inquiry or hearing or to proceed by written representations, for example if insufficient headway was being made in the negotiations to justify delaying any longer the taking of a decision on the procedure.

4.19 Where the Secretary of State has **not** given statutory notice of an inquiry or hearing by the operative date (and the application does not contain proposals which he considers to be of national significance), the objections will be dealt with by the written representations procedure (see paragraphs 4.20 to 4.28).

## **Procedure by written representations (Rule 24)**

4.20 Where objections have been made to a TWA order application, but there are no statutory objectors who wish to exercise their right to be heard, the Secretary of State must decide whether it would be appropriate to determine the order application by way of exchanges of written representations, or whether the case would more suitably be resolved by way of an inquiry or hearing. In reaching this decision, regard would be had to the number of objections made and to the nature and complexity of the issues raised. An application is more likely to be suited to the written representations procedure if it does not involve many objectors and if the issues raised are relatively straightforward and can reasonably be tested by exchanges of written evidence. The written representations procedure is, however, unlikely to be suitable if there is a significant number of parties involved and/or there are a wide range of issues, particularly if these are technical or complex in nature and likely to require the calling of expert witnesses or a desire to cross-examine.

4.21 Where the written representations procedure is used, the Secretary of State must notify the applicant and all those who have made (and not withdrawn) objections or other representations. The applicant must submit to the Secretary of State representations on each objection by not later than 28 days after the date of the notification (NB: in relation to this and other time limits mentioned below, the Secretary of State may specify a later date under rule 26, if this were considered justified). Not later than 7 days after receiving the applicant's written representations, the Secretary of State must serve on each objector a copy of those representations that relate to his/her objection. Objectors will be afforded the opportunity of replying in writing (or by e-mail) to the Secretary of State within 21 days.

4.22 Where the Secretary of State receives no reply from an objector within the prescribed period he/she may proceed to a decision on the order application, unless the Secretary of State considers that he/she does not have sufficient information for the purposes of that decision. Where, however, the Secretary of State receives a reply from an objector, a copy of this must be served on the applicant within 7 days of receipt. If the applicant wishes to send to the Secretary of State further written representations on any reply from an objector, the applicant must do so within 14 days of receipt of that reply.

4.23 At the end of that period of 14 days, the Secretary of State may proceed to a decision on the order application, unless the Secretary of State considers either that he/she does not have sufficient information for the purposes of that decision, or that any further representations received from the applicant raise a new matter which may affect that decision and on which an objector should be given the opportunity to

comment.

4.24 Where, in the circumstances described in paragraphs 4.22 and 4.23, the Secretary of State requires more information from the applicant or an objector for the purposes of making a decision on the order application, he/she must notify the applicant and the objector of this in writing. The Secretary of State must similarly notify the applicant and objector if he/she decides to give a further opportunity to an objector to comment on any further representations from the applicant, as referred to in paragraph 4.23. In both cases, the Secretary of State must specify the period within which any further information or comments are to be submitted.

4.25 When the Secretary of State receives any information or comments, as referred to in paragraph 4.24, he/she must consider whether or not to allow a further opportunity for the applicant or objector to consider that information or those comments. If the Secretary of State does allow such an opportunity, he/she must specify the period within which any further comments are to be made. In order to ensure a suitably disciplined and efficient process, the Secretary of State would not allow a protracted series of exchanges if it appeared that any further representations were merely repeating earlier points or raising irrelevant issues, and therefore not adding to consideration of the case.

4.26 The written representations process would end when the Secretary of State was satisfied that the information provided was sufficient to enable a properly considered decision to be reached on the application and that all parties had had a fair opportunity to consider and comment on that information. Applicants and objectors should also be aware that in making a decision on an order application, **the Secretary of State would be entitled under rule 24(12) to disregard any written representations or other material which had not been sent to him/her within any of the time limits referred to in the previous paragraphs.**

4.27 Once the exchanges of written representations are concluded, the Secretary of State would then normally proceed to determine the application. He or she may, however, before coming to a decision, ask an Inspector to undertake a site visit and provide a report, if it were felt that this would assist in determining the matter. This site visit might either be accompanied by the parties or unaccompanied, although if it is accompanied the Inspector would not be able to listen to representations on the merits of the case.

4.28 Applicants and objectors should also be aware that the Secretary of State may, on request, provide any person with a copy of any representations or other material sent to him/her as part of the written representations process. In considering such a request, the Secretary of State would wish to be assured that the request was for a legitimate purpose relating to the TWA process.

## Hearings

4.29 The Secretary of State may arrange for a hearing to take place for the purpose of considering objections to an application for an order. Hearings, which are often held for planning appeals, are designed to enable parties to present their case fully and fairly in a more relaxed and less formal atmosphere than at an inquiry. A hearing is more in the nature of a round-the-table discussion, with the Inspector (or other person appointed by the Secretary of State) leading the discussion. In practice, because of the nature of TWA orders and the complex issues that can often arise, there are likely to be few occasions where a hearing offers a more appropriate way of dealing with objections to a TWA order than a public inquiry or the written representations procedure.

4.30 Where it is decided to hold a hearing, the spirit of the Town and Country Planning (Hearings Procedure) (England) Rules 2000 (SI 2000 No. 1626) will be applied, so far as appropriate. The hearing would be conducted by a person appointed for the purpose by the Secretary of State. This would normally be an Inspector selected by the Planning Inspectorate Agency (PINS) although, in theory, it could be

anyone whom the Secretary of State considered was suitable.

4.31 In appropriate circumstances, a hearing has the following potential advantages over an inquiry:

- a more relaxed and less formal atmosphere;
- it could probably be arranged more quickly (assuming a suitable person to conduct the hearing is available);
- fewer procedural requirements prior to a hearing than to an inquiry;
- likely to be shorter and therefore less costly for the parties involved.

4.32 On the other hand, a hearing is unlikely to be appropriate where:

- there is a considerable number of objections;
- there are objections to compulsory acquisition of land;
- a party wishes to cross-examine another party;
- the issues are numerous and/or complex.

4.33 Where the Secretary of State decides to hold a hearing, the applicant and every objector will be informed in writing that the objections will be dealt with by this method. This will be the 'starting date' for the purposes of the hearing process. Such notice must be served not later than 28 days after the expiry date for objections (unless the Secretary of State has specified a later operative date for the purposes of the Applications Rules - see paragraph 4.16). The applicant and objectors will be advised of the requirements, but the main features to note are as follows. References below to "the Inspector" should be taken to include any other person who may be appointed to conduct the hearing:-

- i. Those who wish to participate in the hearing will be asked to provide a 'hearing statement' within 6 weeks of the starting date. This is a statement containing full particulars of the case the person intends to put forward at the hearing and any documents referred to.
- ii. The parties may provide comments on each other's statements within 9 weeks of the starting date. Also, the Secretary of State may require a party to provide further information about any matter contained in their hearing statement.
- iii. The Secretary of State will aim to hold a hearing within 12 weeks of the starting date unless this is impracticable, and will give not less than 4 weeks' written notice of the date, time and place for the hearing. The venue will be arranged in consultation with the applicant, but it should be conducive to a round-the-table discussion (e.g. a Council Chamber is unlikely to be appropriate).
- iv. The applicant will be required to publish a notice of the hearing in one or more local newspapers not less than 2 weeks before the date fixed for the hearing.
- v. The Secretary of State will submit every objection and representation to the Inspector. As for an inquiry, the TWA Orders Unit would forward to the Inspector a full set of the application documents and any other relevant material.
- vi. The Inspector will determine the procedure at the hearing. The Inspector will lead the discussion and will not permit cross-examination unless he or she considers that this is necessary to enable thorough examination of the issues - in which case, the Inspector would need to consider whether it would be more appropriate to close the hearing and hold an inquiry instead.
- vii. At the start of the hearing, the Inspector will identify the main issues to be considered and any matters on which he or she requires further explanation. This does not, however, preclude the parties from raising other issues.
- viii. The parties may present their case through an agent or adviser, but such representation should not be essential. As with an inquiry, the Inspector may refuse to permit, or curtail, the giving of evidence which

is irrelevant or repetitious.

ix. If appropriate, the Inspector may adjourn the hearing to the application site to conclude the discussion.

x. The procedure after a hearing will be similar to that following an inquiry. The Inspector will provide a report in writing to the Secretary of State.

4.34 As with inquiries, the parties will normally be expected to meet their own costs associated with appearing at the hearing, although applicants will in addition meet the administrative costs of the proceedings, including the salary and expenses of the person appointed to conduct it and the accommodation. The Secretary of State does, however, have the discretion under section 250(5) of the Local Government Act 1972, as applied by section 11(5) and (6) of the TWA, to award costs where, for example unreasonable behaviour by a party at a hearing causes another party to incur unnecessary expense. The basis on which an award of costs in connection with a TWA inquiry or hearing may be made and the procedure for applying for an award are described at paragraphs 4.122 to 4.128.

## **Procedures applying to inquiries - general**

4.35 The following paragraphs describe the procedures that apply where the Secretary of State decides that a public local inquiry should be held into an application for a TWA order. This will arise where the nature and extent of the objections to a proposed order is such that the Secretary of State considers that it would be inappropriate to proceed by way of exchanges of written representations or an informal hearing. A public local inquiry before an Inspector is a means of enabling persons with an interest in a scheme to present their cases orally, and to test the arguments presented by others, within a structured framework.

4.36 The inquiry process is governed by statutory procedure rules made by the Lord Chancellor. The relevant statutory rules are **the Transport and Works (Inquiries Procedure) Rules 2004** (SI 2004 No. 2018). **References to rules or rule numbers in the remainder of Part 4 are to those Rules** unless otherwise stated. (N.B. These Rules would also apply to any application which had been considered at an inquiry under the Transport and Works (Inquiries Procedure) Rules 1992 (SI 1992/2817) if the decision on that application were quashed by a Court.)

4.37 Once the decision has been taken to hold an inquiry, the Planning Inspectorate (PINS) will select an Inspector for that purpose. In order to maintain the Secretary of State's impartiality in the proceedings, and to maintain the independence of the Inspectorate, the Secretary of State will have no role in the selection of the Inspector. PINS will select an Inspector whom they consider to be an appropriate person to hold the particular inquiry in question. This may or may not be somebody with previous experience of conducting TWA inquiries. In the case of an application for an order authorising a very large and controversial scheme, a Deputy Inspector or one or more Assistant Inspectors might be appointed to provide support to the Inspector.

4.38 PINS might decide that the proposals in the application require the appointment of an **Assessor**. This would apply where it was considered that the Inspector needed the services of a person with specialist expertise in a particular field. A typical example might be where the proposed works require listed building consent and it is considered desirable to appoint an Assessor to advise the Inspector on the listed building aspects. This would however depend upon the Inspector's own expertise. Where an Assessor is appointed, he or she will usually, at the invitation of the Inspector, ask questions at the inquiry on the specialist matter in question; and will normally write a separate report afterwards, which the Inspector will append to his or her own report.

4.39 The Inspector may want a **Programme Officer** to be appointed to assist with the running and organising of the inquiry. If so, the Programme Officer will be appointed at an early stage after an inquiry is announced in order to assist the Inspector with certain pre-inquiry activities, such as organising the documentation, helping with the organisation of a pre-inquiry meeting and receiving pre-inquiry proofs of

evidence. At the inquiry itself, the Programme Officer will be expected to establish and maintain a library of inquiry documents for inspection and copying. (A reasonable charge might be made for providing copies of any document.)

4.40 The applicant is responsible for appointing the Programme Officer. But it is important that whoever is appointed is (and is seen by others to be) fair and impartial in the way they exercise their duties, as well as having the necessary organisational skills. **It is therefore important that the person selected must not have been directly involved in any way with the applicant's proposals or otherwise appear to lack the necessary impartiality.** Ideally, the Programme Officer should have previous experience of working in this capacity. PINS can provide a list of persons who have previously worked in this field but the applicant would need to check their suitability and availability. Once appointed, the Programme Officer must work for, and be **solely responsible to, the Inspector**, and treat all parties to the inquiry even-handedly. A note giving guidance on the role of the Programme Officer can be obtained from PINS and is available on their website ([www.planning-inspectorate.gov.uk](http://www.planning-inspectorate.gov.uk)).

4.41 By virtue of section 11(5) of the TWA, the Secretary of State **may (and in practice will) recover from the applicant his/her costs arising from the inquiry.** These costs comprise the salary and expenses of the Inspector and any Assessor or Assistant Inspector; and (except where such costs are incurred directly by the applicant) the costs of the Programme Officer and any other supporting staff, and of the hire of the accommodation and any equipment, such as a photocopier, required for the inquiry. The salary costs and expenses will include the Inspector's preparation time for the inquiry, any pre-inquiry meeting, the inquiry itself and the time required to write the Inspector's report of the inquiry (including any separate report by the Assessor). Applicants will be invoiced after the Inspector's report has been received by the Secretary of State (that is, once the full inquiry costs are known).

4.42 It is for the Secretary of State to determine the **location of the inquiry**, in consultation with the applicant. In practice, the onus will normally be on the applicant in liaison with PINS to identify a suitable venue, or venues, for the inquiry (and, if agreed, to arrange its hire) and to provide all of the essential inquiry facilities. The venue might be a town or village hall or a hotel or conference centre offering suitable accommodation as close as reasonably practicable to the location of the proposed works. The building should be reasonably well served by public transport and be accessible to all members of the public, including those with disabilities or walking difficulties. Adequate car-parking facilities should be located adjacent to the building or within reasonable walking distance. Where the application relates to major linear works covering a wide geographical area, more than one venue may be required in order to ensure that participants do not have to make unreasonably long journeys. Further guidance on the accommodation and facilities required for an inquiry can be obtained from PINS and is available on their website.

4.43 The Secretary of State must also, under the Rules, consult the applicant about the **timing of the inquiry**. This is likely to be done soon after the decision to hold an inquiry. PINS will need to be consulted on the timing of the inquiry, having regard to the availability of a suitable Inspector (and any required assessor).

4.44 The Inquiries Procedure Rules set quite a demanding pre-inquiry timetable. If practicable, the inquiry must open not later than 22 weeks after the date when the Secretary of State gives notice of the intention to hold an inquiry, or not later than 8 weeks after the conclusion of any pre-inquiry meeting held under rule 6. Applicants should consider carefully whether such a timescale would enable them properly to carry out all of the statutory pre-inquiry procedures. They should also allow themselves sufficient time before the inquiry to complete negotiations with objectors. To minimise the length, and hence the cost, of the inquiry, it would be advisable for applicants to try to seek the withdrawal of as many objections as possible (or at least to try to narrow down the grounds of objection) before the inquiry opens. Similarly, applicants are advised to use the pre-inquiry period to establish the main points of disagreement with the

principal objectors, and to establish where there is common ground that is not in dispute.

4.45 If the applicant is not confident of completing all of these activities within the statutory timetable, it would be advisable to ask the Secretary of State (at the earliest possible stage) to set a later date for the commencement of the inquiry. The pre-inquiry timetable would then be adjusted to reflect the longer timescale.

## **Inquiries - Application of Rules (IP Rule 4)**

4.46 If the application that is to be referred to an inquiry relates solely to Wales, it falls to be determined by the National Assembly for Wales. Rule 4 clarifies that, in this situation, references in the Rules to "the Secretary of State" shall be taken to mean the Assembly.

## **Preliminary action to be taken (IP Rules 4 and 5)**

4.47 Where the Secretary of State intends to cause an inquiry to be held, written notice of this must be given to the applicant, to each statutory objector, to any statutory body which has objected, and to any official body (i.e. a Minister or a Government department or its executive agencies) which has made an official representation. In practice, notice that an inquiry is to be held will be given to all those who have made objections or other representations about the application. Except in the case of a scheme of national significance, or where the Secretary of State has allowed more time to decide on the next step, **written notice of the intention to hold an inquiry must be given not later than 4 weeks after the expiry date for submission of objections**. This notice is the "**relevant notice**" and the date of the notice is the "**starting date**" for the purpose of the subsequent statutory pre-inquiry timetable, including the provision of statements of case (see below). The timing and location of the inquiry will usually be announced at a later stage, once the arrangements have been made in consultation with the applicants and PINS.

4.48 Where an **official body** has made a written objection or representation, it is required under rule 5 to serve a written statement of its evidence in regard to the application (known as an "**official case**") upon the Secretary of State, the applicant and any statutory objector within 6 weeks of the starting date.

## **Special procedure for major inquiries (IP Rule 6)**

4.49 The procedures in rule 6 (and in other rules where they cross-refer to rule 6) are intended to apply only to **major inquiries**. The application of this rule will therefore be exceptional. What constitutes a "major inquiry" is not defined in the Rules. Rather, it will be for the Secretary of State to judge whether, because of the extent of interest in a particular inquiry, these procedures would be a more suitable means of handling the case. A relevant consideration may be whether the TWA application is linked to a planning application or appeal which is subject to corresponding procedures in the inquiries procedure rules for major planning cases.

4.50 The trigger for application of the special rule 6 procedures is when the Secretary of State causes a pre-inquiry meeting to be held under rule 6(1). It is important to note the distinction here with the more typical situation where *the Inspector* calls a pre-inquiry meeting under rule 8. Where the Secretary of State decides to invoke rule 6, he or she must serve with the relevant notice a notification of the intention to cause a meeting to be held, a **statement of matters** (see paragraph 4.65) and a **registration form** (see below). The applicant must then publish, not later than 3 weeks after the starting date, a notice of the Secretary of State's intention to cause a pre-inquiry meeting to be held in a local newspaper circulating in the area (or each of the areas) in which the proposals contained in the application would have effect. This notice must include the text of the statement of matters and state that persons interested in participating in

the inquiry should obtain a copy of the registration form from the Secretary of State.

4.51 The registration forms are simply intended to give the Secretary of State some very basic information about those who wish to participate in the inquiry, and their interests, such as will assist in making effective arrangements for a major inquiry. The information in question is set out at rule 6(2) and includes contact details for the person or body registering; whether they have any land interest which is affected by the proposals; and whether they are likely to want to play a major part in the inquiry or, if not, whether they wish to give oral evidence or to rely on written representations. Completion of the form will not, however, oblige or commit somebody to attend the inquiry when it is subsequently arranged. The form will include the address to which, and the date by which, completed forms are to be returned.

4.52 The applicant must, in a rule 6 case, serve on the Secretary of State and on each statutory objector an **outline statement** within 8 weeks of the starting date. This is a written statement of the principal submissions which the applicant proposes to put forward at the inquiry, and must include the text of any official case upon which the applicant wishes to rely. In that event, a copy of the statement must be served on the official body concerned. It should be noted that the requirement for an outline statement is additional to, and not instead of, the requirement for a full **statement of case** under rule 7 (see paragraphs 4.56 to 4.64 below). However, in a rule 6 case, the applicant's statement of case would have to be served no later than 4 weeks after the conclusion of the pre-inquiry meeting(s).

4.53 Any statutory objector and any other person who has notified the Secretary of State of an intention or wish to appear at the inquiry may also be required to serve, within 8 weeks of being so required, an outline statement on the Secretary of State and on any other person specified. The requirement to provide an outline statement would normally be included with the Secretary of State's letter giving the relevant notice of the intention to hold an inquiry. Again, the provision of an outline statement by an objector or other party would not override any requirement for a full statement of case under rule 7.

4.54 The **pre-inquiry meeting** - or the first such meeting if there is more than one - must be held not later than 16 weeks after the starting date, or such later date as the Secretary of State might specify. The Secretary of State must give at least 3 weeks' notice of the date, time and location of the meeting to the applicant, to each statutory objector and to any other person whose presence at the meeting seems to be desirable. (This would include any person who had served an outline statement on the Secretary of State.) The applicant may be required to place public notices and publish local newspaper notices about the date, time and location of the meeting.

4.55 It would be open to the Inspector, where rule 6 applies, to hold a further meeting and to give suitable notice of it. The agenda for the meeting or meetings would be similar to that for a pre-inquiry meeting held under rule 8 - see paragraph 4.68 onwards. However, where a pre-inquiry meeting is held under rule 6, the Inspector must (by virtue of rule 9) propose a timetable for the proceedings at, or at part of, the inquiry; and specify the dates by which any proof of evidence and summary must be sent. The Inspector must then arrange, after the meeting, for the timetable to be sent to the Secretary of State for approval; and, following such approval, for a copy of the timetable to be sent to every person entitled to appear at the inquiry. The Inspector may subsequently vary that timetable, but can only do so before the start of the inquiry with the approval of the Secretary of State.

## **Service of statements of case (IP Rule 7)**

4.56 Except where rule 6 applies (see above), the applicant is required to provide a statement of case not later than 6 weeks after the starting date, or such later date as the Secretary of State may specify. Other parties who have said they wish to give oral evidence at the inquiry will be required to provide a statement of case within 6 weeks of being so required, or such later date as may be specified. **Persons who serve statements of case when required to do so by the Secretary of State (or outline statements where**

**rule 6 applies) are entitled to appear at the inquiry.**

4.57 A "**statement of case**" is a written statement containing full particulars of the case which a person proposes to put forward at the inquiry. It must also contain a list of any documents which that person intends to refer to or put in evidence. Applicants must include in their statement of case the reasons for submitting the application. They must also specify in their statement the locations where, and times when, the public may inspect and (subject to a reasonable charge) take copies of any document or statement served under rule 7.

4.58 Applicants must serve their statement of case on the Secretary of State, on each statutory objector, and on each person who is required to serve a statement of case, not later than 6 weeks after the starting date (or not later than 4 weeks after the conclusion of the last pre-inquiry meeting in a rule 6 case) **unless** the Secretary of State specifies a later date. The Secretary of State will, under rule 7(3), notify the applicant of the name and address of each person who has been required to serve a statement of case.

4.59 In addition to a statement of case, applicants must serve on the Secretary of State a copy of every document, or the relevant part of any document, which they intend to refer to or put in evidence to the inquiry. They must also serve on the Secretary of State a copy of the notice they are required to serve on those to whom they send their statement of case. This notice must give the names of all places, within each area in which the application proposals would have effect (or as close as reasonably possible to any such area), where a copy of every document or relevant extract which the applicant intends to refer to or put in evidence may be inspected free of charge at all reasonable hours until the start of the inquiry. It follows that the applicant will need to provide copies of these documents for public inspection from the date when the above notice is served on statutory objectors. The locations chosen for this purpose should preferably be those where the application documents were made available for public inspection.

4.60 The Secretary of State may require any statutory objector or any other person who has given notice of an intention or wish to appear at the inquiry to serve a statement of case on the Secretary of State, the applicant and any other person specified in the notice. The statement of case must be served within 6 weeks of the notice (or such later date as may be given in the notice). In practice, the Secretary of State will usually give notice of the requirement to provide statements of case with the letter announcing the intention to hold an inquiry. Any person who has expressed a wish to give oral evidence at the inquiry will normally be required to provide a statement of case. The provision of a statement of case by an objector will give that person an **entitlement** to appear at the inquiry (otherwise, unless they are a statutory objector, their appearance would be at the Inspector's discretion).

4.61 Any person who provides a statement of case must also serve on the Secretary of State and on the applicant a copy of every document or the relevant part of any document which that person intends to refer to or put in evidence to the inquiry - unless a copy of that document has already been made available for inspection by the applicant.

4.62 When required by notice in writing from the Secretary of State or the Inspector to do so, any person who has served a statement of case must provide such further information about the matters contained in the statement as the Secretary of State or the Inspector may specify. That person must, at the same time as providing this further information, copy the information to any other person who was served with that person's statement of case.

4.63 The applicant must give any person, on request, a reasonable opportunity to inspect and, where practicable and subject to payment by that person of a reasonable charge, take copies of any statement or document which has been served on or by the applicant under rule 7. This would include any statement of case or statement of matters.

4.64 Any person who has served a statement of case and who wishes to comment on somebody else's statement should, under rule 7(8), send such comments to the Secretary of State, the applicant and the person whose statement they are commenting on by not later than 6 weeks before the start of the inquiry.

It is up to individual parties whether they wish to do this, or whether they would prefer to save any further comments for their proofs of evidence, or for the inquiry itself. Should a party choose not to provide further comments under this provision, it would not be inferred that they had nothing more to say. It should, however, be borne in mind that the pre-inquiry procedures are designed to ensure maximum disclosure of information and encourage meaningful negotiations before the inquiry starts, so that the inquiry can be conducted efficiently and effectively. There is no tactical advantage to be gained from deliberately holding back important information until the inquiry starts (or until shortly before then).

## **The Secretary of State's Statement of Matters (IP Rule 7)**

4.65 Except where rule 6 applies, the Secretary of State is required to serve on the parties a "**statement of matters**" within 12 weeks of the starting date. This is a statement of the matters about which the Secretary of State particularly wishes to be informed for the purposes of his or her consideration of the order. The statement is likely to reflect the main issues arising from the objections and representations, divided into suitable themes, although it could refer to any other matter about which the Secretary of State particularly wishes to be informed. This might include points arising from the draft order about which the Secretary of State requires further information even though no party has taken issue with them. It should be noted in this respect that the inquiry will be into the order application, rather than being exclusively into objections, and the Secretary of State will be looking to the inquiry to provide the information needed to come to a well-informed decision. The statement of matters does not preclude the Inspector from hearing evidence on any other matter that he or she considers to be relevant.

## **Provision of documents to the Inspector**

4.66 Rule 25 of the Applications Rules requires the Secretary of State to submit every objection and representation made under rule 21 of those Rules to the inquiry Inspector. This must be done as soon as it is reasonably practicable to do so - which, in practice, would be shortly after the Inspector is appointed.

4.67 The following documents would also be submitted to the Inspector by the Secretary of State:

- a copy of the application and all accompanying documents;
- a copy of every statement of case served under rule 7;
- the statement of matters; and
- such further documents or information as appear to be relevant or which the Inspector has requested. (For example, where a scheme is of national significance, a copy of the Hansard record of the parliamentary debates would be provided.)

## **Pre-inquiry meetings (IP Rule 8)**

4.68 The principal purpose of a pre-inquiry meeting is to discuss the **practical arrangements** for the inquiry. It is an opportunity for the Inspector to meet the applicant and other persons who wish to appear at the inquiry, in order to explain/discuss matters relating to the organisation, conduct and timetabling of the inquiry. Such matters may include:

- inquiry accommodation and facilities;
- timetable for the proceedings at the inquiry including dates and sitting times;
- order of appearances;
- establishment and/or clarification of main areas of agreement and disagreement;

- timetable for preparing and serving of proofs of evidence;
- numbering system for inquiry documents.

The Inspector **will not, however, hear any evidence on the merits of the case**. Although parties who wish to appear at the inquiry are not obliged to attend any pre-inquiry meeting that is held, their attendance is likely to be of considerable benefit to them and to the Inspector.

4.69 Except where rule 6 applies, the Inspector is not under a duty to hold a pre-inquiry meeting.

However, experience suggests that a pre-inquiry meeting is likely to be held for most TWA inquiry cases. The Inspector must arrange for not less than 2 weeks' notice in writing of such a meeting to be given to:

- (a) the applicant;
- (b) each statutory objector;
- (c) any other person who, at the date of the notice, is known to be entitled to appear at the inquiry - that is, those persons who have served a statement of case; and
- (d) any other person whose presence at the meeting appears to the Inspector to be desirable.

In practice, the TWA Orders Unit will normally provide details of the time and location of any pre-inquiry meeting when giving notice of the date and place of the inquiry. Generally, the aim will be to give as much notice as possible of the meeting, notwithstanding the minimum requirement of 2 weeks' notice. Very exceptionally, though, there might be good reason for calling a meeting at short notice, for example if a follow-up meeting is required to deal with unfinished business. Also, in practice, notice of the meeting will normally be given to all those who have expressed a wish to appear at the inquiry, whether or not they fall within any of the above categories.

4.70 The Inspector will preside at the pre-inquiry meeting, and will determine the matters to be discussed and the procedure to be followed. The Inspector may require any person who is behaving in a disruptive manner to leave; and may refuse that person permission to return or to attend any further meeting, or may allow that person to return or attend only under certain specified conditions.

## **Inquiry timetable (IP Rule 9)**

4.71 As previously explained, the Inspector must arrange a timetable for a major inquiry to which rule 6 applies. In any other case, the Inspector **may** arrange a timetable for the proceedings at the inquiry, and may subsequently vary that timetable. The Inspector will decide whether it would be helpful to produce a timetable in a particular case, having regard to such factors as the likely length of the inquiry and the number of persons appearing. Where a timetable is prepared, or is subsequently varied, the parties will be notified. The Inspector may specify in the timetable a date by which any proof of evidence and summary required by rule 16 should be submitted.

## **Assessors (IP Rule 10)**

4.72 In some cases, an assessor may be appointed to assist the Inspector. The role of the assessor will be to advise the Inspector on certain specialist matters on which the assessor has expertise (for example, listed building matters or other specialist environmental matters). Whether or not an assessor is required will depend upon the issues arising and the Inspector's own expertise.

4.73 Where an assessor is appointed, the name of the assessor and the matters on which he or she is to advise the Inspector will be notified to those entitled to appear at the inquiry (rule 10). The assessor may, at the Inspector's discretion, ask questions at the inquiry; and the assessor will normally make a report to the Inspector after the inquiry on the matters on which he or she was appointed to advise. Where the assessor does provide a report, this will be appended to the Inspector's own report, and the Inspector's

report will state how far he or she agrees or disagrees with the assessor (rule 20).

## **Technical advisers (IP Rule 11)**

4.74 The Secretary of State may, in a major inquiry case to which rule 6 applies, appoint a technical adviser. Such an appointment may be made if it appears to the Secretary of State that evidence to be given to the inquiry is, or is likely to be, of such a technical or scientific nature that the inquiry would be conducted more efficiently and expeditiously if an expert assessment of that evidence were to be made. In practice, the Secretary of State is unlikely to make such an appointment unless requested by the Inspector to do so.

4.75 Where a technical adviser is appointed, the applicant may be required to publish a local newspaper notice stating the name of the adviser and the evidence that he/she is to assess. The technical adviser will be required to assess the evidence in question and to report his or her assessment to the Inspector, identifying any areas of disagreement between the parties and giving the adviser's own view of the significance of the disagreement. The Inspector will then arrange, within 7 days, for the report to be sent to persons entitled to appear at the inquiry. The adviser will be required to give evidence on his or her report to the inquiry and will be subject to cross-examination to the same extent as any other witness.

4.76 There are therefore key differences between the role of a technical adviser and the role of an assessor. Whereas an assessor is appointed to assist the Inspector and may ask questions at the inquiry at the Inspector's discretion, and will usually write a report **after** the inquiry which is appended to the Inspector's own report, a technical adviser would provide a report either before or during the inquiry, give evidence on it to the inquiry, and be liable to be cross-examined on it by the parties.

4.77 An appointment of a technical adviser is likely to be exceptional, and it is recognised that care would need to be taken to avoid any conflicts of interest (which might arise if a potential adviser was closely associated with any of the parties to the inquiry). Where such an appointment is made, it will be for the Inspector to judge, when preparing a report to the Secretary of State, how much weight he or she wishes to attach to the views of the technical adviser, compared to the views of any expert witnesses representing the parties. Nevertheless, in appropriate circumstances an independently commissioned technical adviser may be able to help the efficient conduct of the inquiry by providing an expert, impartial assessment of complex, technical evidence.

## **Mediation (IP Rule 12)**

4.78 It is also open to the Secretary of State in a major TWA inquiry case to appoint a mediator who has been suitably trained in mediation techniques. Such an appointment may be made if it appears to the Secretary of State that there is an absence of agreement between those entitled to appear at the inquiry on a relevant matter; that the inquiry would be conducted more efficiently and expeditiously if agreement could be reached on that matter, or the disagreement could be narrowed down; and that such a result could be achieved by mediation.

4.79 The Secretary of State cannot, however, make such an appointment without first consulting such persons entitled to appear at the inquiry as he or she considers appropriate. In practice, this would include those who are in disagreement and who it is intended to subject to mediation. It is unlikely that the Secretary of State would wish to proceed with mediation if this was opposed by those who would be expected to partake in the mediation process - perhaps because they were already in close negotiation and were producing an agreed statement of common ground. On the other hand, it may be possible for a meaningful mediation to take place between some of those in disagreement, if they were willing to co-operate.

4.80 Where a mediator is appointed, the Secretary of State may require the applicant to publish a local newspaper notice giving the name of the mediator and the matter on which he/she is to mediate. The procedure for the mediation will be determined by the mediator. Within 7 days of the conclusion of the mediation the mediator must give the Inspector a report describing the procedure and its outcome, which the Inspector will then send to all those entitled to appear at the inquiry. At the inquiry, the Inspector will permit any person entitled to appear to address him/her on the mediator's report, but *the mediator will not give evidence to the inquiry*. This reflects the nature and integrity of the mediation process and the role of the mediator.

### **Date and notification of inquiry (IP Rule 13)**

4.81 The timing of the inquiry has been referred to in paragraph 4.44. If it is not practicable to hold the inquiry no later than 22 weeks after the starting date (or 8 weeks after any pre-inquiry meeting held under rule 6) the Secretary of State must fix a starting date at the earliest practicable later date.

4.82 The location for the inquiry has also been discussed earlier (paragraph 4.42). Where the Secretary of State is satisfied, having regard to the nature of the application, that it is reasonable to do so, he or she may direct that the inquiry be held in more than one location. This is most likely to apply where the application relates to a linear project covering a wide geographical area. Normally, the inquiry would take place at one, reasonably central and convenient location. But if objections are received from persons who live some distance from this location and who wish to appear at the inquiry, the Secretary of State may consider that the inquiry should also be held at a location more convenient for such objectors.

(Alternatively, the Inspector might decide later on that the inquiry should be adjourned to another location.)

4.83 The Secretary of State is required to give not less than 6 weeks' notice of the date, time and place of an inquiry to every person who is entitled to appear at the inquiry, unless a lesser period is agreed with the applicant and each statutory objector. In practice, the TWA Orders Unit will give notice of the date, time and location of the inquiry as soon as practicable after this has been decided following consultation with the applicant and PINS.

4.84 The Secretary of State may subsequently change the date fixed for the start of the inquiry, but must give at least 6 weeks' notice of the revised date, unless a lesser period is agreed with the applicant and each statutory objector. The Secretary of State may also change the time and place for holding the inquiry, in which case he or she must give such notice of the change as appears to be reasonable.

4.85 Unless the Secretary of State directs otherwise, the applicant must, not later than 2 weeks before the start of the inquiry:

- (a) post a notice of the inquiry in a conspicuous place or (in the case of an application for an order making provision for land based linear works of greater than 5 kilometres in length) at intervals of not more than 5 kilometres, on or as close as reasonably practicable to the land to which the powers sought in the application relate;
- (b) post a notice of the inquiry in one or more places where public notices are usually posted in the area (or each of the areas) to which the powers sought in the application relate; and
- (c) publish a notice of the inquiry in one or more local newspapers circulating in the area (or areas) in which the proposals contained in the application would have effect.

4.86 The notices referred to at (a), (b) and (c) above must contain a statement of the date, time and place of the inquiry and of the relevant section of the TWA under which the application was made. The notices must also include a sufficient description of the proposals in the application to identify the location of the land to which they relate, with or without reference to a specific map. (The description previously used in the notice of the application given in Form 2 in Schedule 2 to the Applications Rules might be suitable for

this purpose.) Where an inquiry is to be held at more than one venue, the advance notices requirements apply in respect of each venue; and the notices should refer to the relevant part of the application which is to be discussed at each particular venue (rule 13(7) refers).

### **Appearances at the inquiry (IP Rule 14)**

4.87 Rule 14(1) provides that the following persons have a statutory entitlement to appear (i.e. give oral evidence) at the inquiry:

- (a) the applicant;
- (b) any statutory objector;
- (c) any other person who has served a statement of case under rule 7 (or an outline statement under rule 6).

In addition to those entitled to appear at the inquiry, the Inspector may permit any other person to appear. The Inspector may not withhold such permission unreasonably. Persons entitled or permitted to appear may do so on their own behalf or be represented by any other person.

### **Representation of official bodies at the inquiry (IP Rule 15)**

4.88 Where an official body has provided an official case, it must arrange for a representative to attend the inquiry if it receives, not later than 4 weeks before the date fixed for the start of the inquiry, a written request for such attendance from the Secretary of State, the applicant or any statutory objector.

4.89 The representative of an official body who attends the inquiry will give evidence and be subject to cross-examination to the same extent as any other witness. However, this representative is not required to answer any question which, in the opinion of the Inspector, is directed to the merits of government policy or, in the case of an inquiry into a scheme of national significance, the merits of a resolution passed by each House of Parliament.

### **Proofs of evidence (IP Rule 16)**

4.90 Any person entitled to appear at the inquiry who proposes to give, or call another person to give, evidence at the inquiry by reading a proof of evidence, must send a copy of that proof to the Inspector not later than 4 weeks before the start of the inquiry (unless the Inspector sets a different deadline in any inquiry timetable prepared under rule 9 - see below). Furthermore, if the proof of evidence contains more than 1500 words, a summary of it must be sent with the full proof - in which case, only the summary can be read at the inquiry unless the Inspector permits or requires otherwise.

4.91 The Inspector is likely to wish to discuss the arrangements for submission of proofs and summaries at the pre-inquiry meeting, where one is held. Where an inquiry is to be long-running, the Inspector might wish to relate the timetable for submission of proofs and summaries to when a particular topic is to be discussed at inquiry, rather than to the opening of the inquiry. That is, however, a matter for the Inspector's judgement.

4.92 When sending a proof and (if required) a summary to the Inspector, the applicant must at the same time send a copy to each statutory objector and to every other person entitled to appear at the inquiry. Any other person who sends a proof and summary to the Inspector must at the same time send a copy to the applicant.

4.93 Subject to the paragraph below, the applicant and any other person submitting a proof must send with it a copy of the whole, or the relevant part, of any document referred to in the proof, unless that document or part document has already been made available for inspection alongside the statements of case.

4.94 If, however, any person confirms to the applicant that they do not wish to be sent a copy of any proof, summary, or other document (or part of it) that they would otherwise be entitled to receive under this rule, the applicant will not be required to send it. This provision could be especially advantageous to applicants in respect of linear projects covering a wide area, where persons or bodies with an interest in one part of the scheme may have little or no interest in other parts of the scheme (and may be keen to avoid 'information overload'). Also, applicants and others may find it prudent to provide with their statement of case as many as possible of the documents they expect to refer to in the proof, as this will minimise the requirement to serve such documents on other persons when sending the proof to them.

4.95 The applicant must give any person who so requests it a reasonable opportunity to inspect and, where practicable and on payment of a reasonable charge, take copies of any document sent to or by the applicant under rule 14.

### **Statements of common ground (IP Rule 17)**

4.96 A statement of common ground is a written statement prepared jointly by the applicant and any other party who wishes to participate in the inquiry, which contains **factual** information agreed between those persons about any proposal which is the subject of the application. The preparation of such statements in regard to TWA inquiries is entirely voluntary as (unlike in planning inquiries) there are not two 'principal parties' who can be required to produce such a statement. However, the inclusion of agreed material in a statement of common ground should result in shorter proofs of evidence and shorter inquiries (by avoiding time being spent presenting oral evidence on key factual matters which are not in dispute) and their use is therefore strongly encouraged.

4.97 A statement of common ground should complement the proofs, and both should be received by the Inspector no later than 4 weeks before the inquiry. Therefore, where it is intended to produce such a statement, the parties in question should aim to meet some time in advance of then to try to narrow down the areas of dispute and agree on what should go in the statement. It is the responsibility of the applicant to send the statement to the Secretary of State and to afford any person who so requests a reasonable opportunity to inspect it and (on payment of a reasonable charge) take copies.

4.98 Those producing a statement of common ground should aim to keep it factual and to avoid opinion and comment (which might be shared by the parties who have produced the statement but disputed by others). For example, an applicant and a local authority might wish jointly to prepare a statement which covers matters such as factual information about the site and its surroundings (including present and, where relevant, past uses), the precise nature of the proposal, relevant planning and transport policies in development and transport plans etc.. (It might also be useful for the statement to identify matters on which agreement has not proved possible.)

4.99 Evidence on technical matters and topics that rely on basic statistical data can often be fruitful areas for pre-inquiry agreement. For example, relevant traffic evidence may be simplified and the issues refined by a pre-inquiry agreement with the highway authorities on matters such as traffic flows, design standards, and the basis for forecasting impacts of the scheme on traffic flows. Other examples of topics where a degree of factual agreement might be possible include the pattern and frequency of public transport provision (depending upon the nature of the scheme), applicable air quality standards, acceptable noise impact thresholds, nature conservation survey data etc..

4.100 Although the preparation of such statements is voluntary for TWA inquiries, they have been provided for in the Rules in order to give a formal recognition to them, to provide a structured framework for when they should be sent to the Inspector and for making them available for inspection, and, generally, to help encourage their use.

## Procedure at the inquiry (IP Rule 18)

4.101 The procedure at the inquiry is determined by the Inspector, except to the extent indicated below. The Inspector will normally set out the arrangements and procedures for the inquiry, including the order in which evidence is to be given, at the beginning of the inquiry. The applicant must appear first and have the right of final reply unless, with the consent of the applicant, the Inspector determines otherwise. Other persons entitled or permitted to appear are heard in such order as the Inspector determines. As well as the applicant, statutory objectors and persons who have submitted a statement of case or outline statement are entitled to call evidence. The applicant and statutory objectors are entitled to cross-examine persons giving evidence. Otherwise, the calling of evidence and the cross-examination of witnesses are at the Inspector's discretion.

4.102 The Inspector may proceed with an inquiry in the absence of any person entitled to appear. It is the responsibility of all parties to ensure that they and their witnesses are available at appropriate times throughout the inquiry, having regard to any timetable set by the Inspector (as may subsequently be varied) and to progress during the inquiry. Any person who intends to attend only a part of an inquiry and who wishes to check on progress should contact the Programme Officer.

4.103 The Inspector has the power under rule 18(4) to refuse to allow the giving or production of evidence, the cross-examination of persons giving evidence or the presentation of any other matter which, in the Inspector's opinion, is **irrelevant** or **repetitious**. This is to avoid time being taken up unnecessarily at the inquiry. However, where the Inspector refuses to permit the giving of oral evidence for these reasons, the person wishing to give evidence may submit to the Inspector in writing any such evidence or other matter before the close of the inquiry.

4.104 The Inspector may also refuse to permit cross-examination, or require it to cease, if it appears to the Inspector that permitting the cross-examination or allowing it to continue would mean that the timetable he or she had prepared would not be met. It is not, however, intended for this power to be used in a way that would deny anybody the opportunity of a fair hearing. Inquiry Inspectors are well aware of the need to comply with the principles of natural justice and obligations under the Human Rights Act. It would be for the Inspector to judge whether use of this power might be appropriate in any particular inquiry. But this might for example be where an Inspector thought that a party was being unduly long-winded in a cross-examination, to an extent that was unfair on other parties.

4.105 As already noted (paragraph 4.90 above) only the summary of a proof of evidence can be read at the inquiry unless the Inspector permits or requires otherwise. Nevertheless, where a person gives evidence by reading a summary, the whole proof and any documents referred to in it would be treated as tendered in evidence. That person would then be subject to cross-examination on the proof to the same extent as if it were evidence given orally. The only exception would be where a person notifies the Inspector of a wish to rely on the contents of the summary only, and withdraws the proof of evidence.

4.106 Where the applicant has not provided facilities enabling persons appearing at the inquiry to take or obtain copies of documents open to public inspection, the Inspector may direct the applicant to provide such facilities. This would be subject to the persons who take or obtain such copies paying a reasonable charge to the applicant. In practice, applicants should ensure in advance that copying facilities are available at the inquiry venue, and should therefore not have to be directed by the Inspector.

4.107 The Inspector may require any person who is behaving in a disruptive manner to leave the inquiry. It is for the Inspector to decide whether to allow that person to return; and, if so, whether this should only be on specified conditions. However, any person who is required to leave would be able to submit to the Inspector, in writing, any evidence or other matter before the close of the inquiry. Under section 250 of the Local Government Act 1972, as applied by section 11(5) of the TWA, the Secretary of State has the power to award costs where unreasonable behaviour causes another party to incur unnecessary expense

(see paragraphs 4.122 to 4.128 below on awards of costs).

4.108 The Inspector may allow any person to amend or add to a statement of case so far as may be necessary for the purposes of the inquiry, subject to giving every other person entitled to appear at the inquiry an adequate opportunity of considering any new matter or document (if necessary by adjourning the inquiry). The Inspector may also take into account any written representations or evidence or any other document that he/she receives from any person before the inquiry opens or during the inquiry, subject to disclosure at the inquiry. These would then be treated as inquiry documents and would form part of the material to be taken into account by the Inspector. It would be open to anyone to comment in writing or orally, at the Inspector's discretion, upon such representations, evidence or documents. The Inspector would not, however, be able to take into account any written representations, evidence or documents submitted after the inquiry is closed. **Any person who wishes to submit representations or other information after an inquiry has closed should send them in writing to the Secretary of State c/o the TWA Orders Unit.** Part 5 explains how post-inquiry representations are dealt with.

4.109 The Inspector may from time to time adjourn an inquiry, but in practice would be likely to do so only where there were compelling reasons. This might arise where, for example, important new evidence was raised or otherwise came to light during the inquiry, and parties needed time to consider and respond to it. Or the Inspector might take the view that a dispute between certain key parties could be resolved during an adjournment, so as to avoid difficulties for those considering the case after the inquiry. The Inspector would normally announce before the adjournment the time, date and place of the resumption of the inquiry. Otherwise, the Inspector would give such notice of the resumption as he or she considered reasonable and appropriate.

4.110 Any person who makes a closing submission at the inquiry is required to provide a copy of it to the Inspector before the close of the inquiry. This can be of particular assistance to an Inspector in writing a report to the Secretary of State, which will include a summary of the parties' main arguments. A copy of a closing submission should not, however, be submitted to the Inspector after the inquiry has formally closed.

## Site inspections (IP Rule 19)

4.111 The Inspector may make an **unaccompanied** inspection of any site to which the application relates without giving prior notice to the applicant or to other persons entitled to appear at the inquiry. Such an inspection may be **before or during** the inquiry. An unaccompanied inspection would be done from the public highway or other land to which the public has access. Private property would not be entered without the owner's permission.

4.112 The Inspector may also make an **accompanied** site inspection, in the company of a representative of the applicant and statutory objectors, **during or after** the inquiry. The Inspector must make such an inspection if so requested by the applicant or by any statutory objector. Such a request would need to be made before or during the inquiry. Where an accompanied site inspection is to take place, the Inspector must announce the date and time at the inquiry. The Inspector would not be obliged to defer an accompanied inspection because the applicant or any statutory objector was not present at the appointed time.

4.113 It is important to note that an accompanied site inspection must not be used by any party as an opportunity to make representations to the Inspector about the merits of a case, outside of the proper inquiry forum. Although an Inspector may wish to establish certain features of the site and its surroundings in conjunction with the parties, he or she will be concerned to observe the principles of natural justice at all times, and will not wish to enter into any discussion on the merits of the case.

## Procedures after the inquiry

4.114 There are various provisions in rules 20 to 22 which relate to procedures after an inquiry. These are dealt with in Part 5 of this Guide. However, the following important provisions, which appear in rules 23 and 24, relate to **all** stages of the inquiry procedure.

### Allowing further time (IP Rule 23)

4.115 The Secretary of State may at any time allow further time for the taking of any step which is required or enabled to be done under the Inquiries Procedure Rules. This could apply either to a step which is to be taken by any of the parties or it could apply to a step which the Secretary of State is required to take.

4.116 As a general principle, the Secretary of State would not wish to extend any of the time limits set out in the Rules without very good reason, as otherwise this would undermine the objectives of those time limits and the discipline that they seek to impose. Furthermore, where a time limit commonly applies to a number of people (for example, a requirement to provide a statement of case within 6 weeks) it could be unfair to make an exception for one party without doing the same for all, which could then threaten the timing of subsequent steps. Nevertheless, it is recognised that from time to time there may be a very convincing reason to extend a time limit, in the interests of ensuring a smooth and efficient inquiry process for that particular case. This might arise where, for example, there is good reason to suppose that allowing a bit more time for something to be done before an inquiry could save more time later, at the inquiry itself. This would, however, be the exception, and the Secretary of State would wish to look critically at any request to extend a time limit.

### Electronic transmission of documents (IP Rule 24)

4.117 Rule 24 relates to the service of notices, and provides that any notices or documents required or authorised to be served or sent under the Rules may either be sent by post or - subject to certain qualifications - by electronic transmission. (This does not preclude delivery by other means, including by hand). The following guidance focuses on electronic communication and the qualifications that apply to its use. Please note also the comments about electronic transmission of documents in paragraphs 3.16 to 3.22 above in connection with the Applications Rules.

4.118 "**Electronic transmission**" is defined in the Rules as meaning a communication transmitted by means of an electronic communications network (for example, by e-mail) or by other means but while in electronic form (for example, a disk). The definition has deliberately been couched in broad terms, with the aim of embracing changes in technology.

4.119 The service or sending of a notice or other document by way of electronic transmission will meet the requirements of the Rules **provided** that the recipient has consented to this in writing (which includes by electronic transmission). If, however, a recipient notifies the sender **within 7 days** of receiving a document that they require a paper copy of all or part of it, the sender is required to provide a paper copy as soon as reasonably practicable.

4.120 Applicants in particular may find it useful to establish with other parties at an early stage in the inquiry process (if this has not already been done) whether a person is prepared to consent to receiving **any** documentation under the Rules by electronic transmission. This would avoid the need for the sender to obtain consent at several different stages (in advance of each requirement to send or serve a notice). Any such agreement would not, however, prevent the operation of rule 24(3) if the recipient subsequently wanted to obtain a paper copy of any document (or part of it) received electronically. Please note also that

if a person has **only** given consent to receive documents electronically for the purposes of the Applications Rules, and not for the purposes of the Inquiries Procedure Rules, a further consent would be required from that person under IP rule 24.

4.121 The Rules also provide that anyone who has agreed to accept electronic transmission revoke their consent - perhaps, in the case of an individual, because they no longer have access to a computer. In that event, they can give notice revoking the agreement, which will take effect on a date specified in the notice, being not less than 7 days after the date on which the notice is given.

## **Inquiries and hearings - awards of costs**

4.122 Normally, parties are expected to meet their own expenses in attending an inquiry or hearing. However, the Secretary of State has the discretionary power to make an order as to the costs of parties at an inquiry or hearing - in effect to award costs to a party against another. This power is contained in section 250 of the Local Government Act 1972, as applied by section 11, subsections (5) and (6), of the TWA. The Secretary of State may also make an order as to costs where arrangements are made for an inquiry or hearing but it does not take place. It should be noted that the Secretary of State determines only whether costs should be awarded and whether a partial or full award should apply. He or she does not decide on the actual amount of the costs to be paid.

4.123 Guidance on awards of costs is given in Department of Transport Circular 3/94 (ISBN 0 11 551289 6). In summary, there are two circumstances where a party to an inquiry or hearing would be likely to be granted an award of costs against another party. These are:

(a) where a party is found to have behaved unreasonably and has thereby caused another party to incur unnecessary expense;

(b) where a statutory objector successfully opposes the compulsory acquisition of his or her land or rights in land (in whole or in part).

4.124 Examples of unreasonable conduct (category (a) above) and of any qualifying criteria attached to costs awards are set out in the above-mentioned Circular. Provided that parties comply with the procedural requirements and otherwise behave reasonably, they should have no fear of costs being awarded against them on this ground. It should be borne in mind, though, that behaviour before an inquiry is as relevant in this regard as behaviour at the inquiry itself. In particular, parties should be aware that the procedure rules are designed to secure maximum disclosure and exchange of information before the inquiry or hearing takes place, so that the proceedings can be conducted efficiently and effectively. Any attempt by a party to gain a tactical advantage by deliberately withholding evidence until the inquiry or hearing opens is not only doomed to fail - as the Inspector must give others the opportunity of considering the new evidence - but it could lead to an award of costs if, for example, the Inspector considered it necessary to adjourn the inquiry as a result.

4.125 An application for an award of costs on grounds of unreasonable behaviour should normally be made to the Inspector before the close of the inquiry or hearing. The Inspector would then be able to set aside time, probably at the end of the inquiry or hearing, to consider the costs application and any submissions by the party against whom the application has been made. Also, the Inspector will be able to make a report and recommendation on the costs application to the Secretary of State when submitting a report on the inquiry or hearing. Any person who applies for costs after the close of the inquiry or hearing will be expected to show good reason for not having applied at the inquiry or hearing. If the costs application arises from the late cancellation of an inquiry or hearing, it should be made immediately to the Secretary of State; or, if some delay is unavoidable, within 4 weeks of receiving confirmation of cancellation. It will then be dealt with on the basis of written exchanges.

4.126 Where a statutory objector opposes compulsory purchase provisions at a public inquiry or hearing,

and that opposition proves to be successful, an award of costs in favour of the objector and against the applicant for the TWA order would normally be granted by the Secretary of State, unless there were exceptional reasons for not doing so. In this situation, the statutory objector should not need to apply for costs, as the Secretary of State will write to the parties concerned. A partial award may be granted where a TWA order is made but excludes part of a statutory objector's land which was subject to compulsory acquisition.

4.127 It should be borne in mind that whilst Circular 3/94 gives guidance on awards of costs in regard to TWA applications - including examples of where costs may be likely to be awarded and the criteria that should normally be met - the Circular does not have the force of law, and the Secretary of State does have a wider discretion to award costs under section 250 of the 1972 Act. The Secretary of State would therefore wish to consider any costs application on its own merits, against the policy set out in the Circular. It might be concluded, for example, that although the criteria in the Circular were not strictly met in a particular case, the circumstances arising were so closely analogous as to merit an award of costs. An example might be where somebody successfully opposes compulsory purchase provisions at a hearing rather than at a public inquiry. In that situation, whether the application was considered at an inquiry or hearing is held should not matter. The Secretary of State does not, however, have the power to award costs in regard to a TWA application which has been dealt with by exchanges of written representations.

4.128 Any person who is awarded costs by the Secretary of State should submit details of their costs to the person against whom the award was granted. The Secretary of State has no further jurisdiction at this stage. If the parties cannot agree on the amount of costs to be recovered, either party can refer the disputed costs to a Costs Officer or Costs Judge of the High Court Costs Office for a detailed assessment. A guidance note is available from the TWA Orders Unit.

## Part 5: Determination of Applications

### Introduction

5.1 This Part deals with the process leading up to a decision by the Secretary of State on an application for an order, following the close of an inquiry or hearing or the completion of the written representations procedure (or where the order is unopposed). The guide timescales for this process are given. The sections quoted in the headings below are sections of the TWA.

5.2 Where the application relates to **proposals or works wholly within Wales**, the National Assembly for Wales will determine whether to make the order (and to grant any related request for deemed planning permission). As elsewhere, references in this Part to "the Secretary of State" mean the Assembly for such cases. Any applications involving **proposals or works relating to both England and Wales**, for example a railway straddling the border, would fall to be determined by the Secretary of State. However, he or she is required, before making any such order, to secure the agreement of the Assembly (and would in any event wish to consult the Assembly before deciding a scheme which would have significant effects in Wales). Applications relating solely to England will be decided by the relevant Secretary of State, as clarified in the Introduction.

#### **Policies and procedures relating to decisions (Section 13 )**

5.3 The Secretary of State must decide whether or not to make an order giving effect to the proposals concerned. If an order is to be made, this may be with or without modifications to the draft submitted by the applicants - although if the Secretary of State wishes to make modifications that would substantially change the proposals, affected parties must be given a prior opportunity to comment (see paragraph 5.6). Where the applicant has also applied for a planning direction under section 90(2A) of the Town and

Country Planning Act 1990 (TCPA), the Secretary of State will make a determination of that application at the same time. It will normally follow that if the decision is to make the order, a planning direction deeming the grant of planning permission would be issued. The Secretary of State will give notice of his/her determination by way of a **decision letter**, which will give the full reasons for making or refusing the order. Where there is a related application which falls to be determined by another Secretary of State - for example, a linked application for listed building consent which would be determined by the Secretary of State for Communities and Local Government - the decision letter on that other application will usually issue simultaneously.

5.4 The Secretary of State could determine not to make an order if he or she considered that any of the objects of the draft order could more appropriately be achieved by other means such as a different statutory procedure. However, it is hoped that the Secretary of State would not need to refuse an order on these grounds if the applicant had consulted the TWA Orders Unit before making the application and taken account of any guidance or comments received. Alternatively, it may be suggested to an applicant after an application has been made that a TWA order is inappropriate, and they may be invited to withdraw the application.

5.5 The Secretary of State may make a determination in respect of only some of the proposals applied for, while making a separate determination in respect of, or deferring consideration of, other proposals. So, if for example the order application was an "omnibus" one, for several discrete projects, the Secretary of State might decide to make an order in respect of one project but not the other. Alternatively, a determination could be made in respect of some of the provisions in advance of determining the remaining provisions. This means the Secretary of State could make two or more orders on a single application. This power might, for example, be used where objections were received to only one of two separate projects. But the splitting up of a determination in this way would be very exceptional. It would be unlikely to be used where proposals, although apparently different, were mutually inter-dependent, or otherwise raised overlapping issues which needed to be dealt with in tandem, and where one decision might pre-empt another; or where splitting up the determination would be likely to cause added delays and complications. Applicants are advised to consult the TWA Orders Unit before proceeding with an application for an "omnibus" order. Normally, where a promoter wishes to apply for powers for wholly unrelated proposals, it will be better - both for the handling of the procedures and in order to avoid confusing the public - to make separate applications.

5.6 If the Secretary of State proposes to make an order with modifications which would, in his or her opinion, amount to a **substantial change** in the proposals, the Secretary of State must, under section 13(4):

- notify any person who appears likely to be affected by the modifications;
- give that person an opportunity of making representations about the modifications within such period as may be specified; and
- consider any representations received.

Although the Secretary of State implicitly has the power to make substantial amendments to a proposed order, it would not be appropriate to make changes that were so substantial that the Secretary of State would in effect be approving a fundamentally different proposal from the one that had been applied for. If it were considered that the proposal as submitted was seriously flawed, and that it could only be put right by making changes that would result in a fundamentally different proposal, then the proper course would be to turn down the application. Where the Secretary of State does propose to make substantial changes to the proposals that have been applied for, it is likely that a "minded to" letter would be issued, explaining what decision the Secretary of State was minded to take on the order application and giving the full

reasons for this.

## **Unopposed orders**

5.7 Where no objections have been made to an order, or any that were made have been withdrawn, the Secretary of State should be able to proceed to determine the order (unless, for example, there is a related application under other legislation which requires parallel consideration and which has raised objections). It does not follow, however, that because there is no opposition to a proposed order the Secretary of State will not wish to make any modifications to it. Nor should it be assumed that the Secretary of State will necessarily make the order. It will still need to be considered whether the provisions in the draft order (and any proposed planning conditions, if deemed planning permission has been sought) are appropriate and justified. This may require a reference back to the applicants if the Secretary of State is unclear on the purpose and effect of any of the provisions.

## **Orders subject to written representations procedure**

5.8 The procedure for exchanging written representations (for opposed orders which do not require an inquiry or hearing) is described in Part 4. In these cases, the application will be determined when the Secretary of State is satisfied that the exchanges between the applicant and objectors have produced all of the information needed for the purposes of a decision. If necessary, an Inspector or a Departmental official will visit the site and provide a report.

## **Orders subject to an inquiry**

5.9 After the close of the inquiry, the Inspector must submit a written report to the Secretary of State, containing his or her conclusions and recommendations (rule 20 of the Inquiries Procedure Rules). In the unusual situation of the report not including any recommendations, the Inspector must give reasons in the report for not doing so.

5.10 Any Assessor who was appointed may make a report in writing to the Inspector in respect of the matters on which the Assessor was appointed to advise. The Assessor's report must be appended to the Inspector's own report, which must state how far the Inspector agrees or disagrees with the Assessor's report. The reasons for any disagreement must be included in the Inspector's report.

5.11 After receiving the Inspector's report, the Secretary of State will need to consider whether or not he/she agrees with the conclusions and recommendations contained in it. Unless outstanding matters that may affect the decision are left unresolved (for example, because the Inspector was not sufficiently informed on a key matter at the inquiry, or because circumstances have changed materially since the close of the inquiry), the Secretary of State should be able to proceed to a determination.

5.12 Written representations are sometimes received by the Secretary of State after the inquiry. Experience suggests that in most instances these are unlikely to add anything material to the arguments presented to the inquiry in a way that would affect the outcome; and the Secretary of State would not wish to unnecessarily prolong the decision process by referring such correspondence to other parties for comment. He or she may, under rule 20(4) of the Inquiries Procedure Rules, disregard any written representations, evidence or other document received after an inquiry. The Secretary of State would nevertheless wish to consider whether any post-inquiry representations contain new evidence that might be significant enough to lead to a different decision. In that very exceptional situation, it would be necessary, in the interests of natural justice and informed decision making, to refer back to the parties.

5.13 Rule 20(5) provides, in particular, that if the Secretary of State is disposed to disagree with the

Inspector's recommendation as a result of:

- (a) differing from the Inspector on any matter of fact mentioned in, or appearing to be material to, a conclusion reached by the Inspector; or
- (b) taking into consideration any new evidence or new matter of fact (not being a matter of government policy);

a reference back to the parties must take place. The Secretary of State must notify the applicant and any other persons specified in inquiry rule 14(1) who appeared likely to be affected and who had appeared at the inquiry, of the disagreement and the reasons for it. Those persons must be afforded the opportunity of making written representations within 3 weeks of the date of the notification, or, if the Secretary of State has taken into consideration any new evidence or new matter of fact (not being a matter of government policy), of asking within that period for the inquiry to be re-opened.

5.14 In the circumstances described above, or if the Inspector's report had left a matter unresolved which in the Secretary of State's opinion was material to the decision, the Secretary of State may conclude that the most practicable and effective way of taking matters forward would be to issue a letter setting out the decision that he or she was **minded** to take on the order on the basis of the information so far available (a "minded to" letter). Where the Secretary of State was minded to disagree with any of the Inspector's conclusions or recommendations, this letter would give the reasons for this.

5.15 Where the Secretary of State was not disposed to disagree with the Inspector on the basis of the information available but nevertheless considered:

- (a) that further information was needed from the applicant and/or other relevant persons in regard to a material issue; or
- (b) that persons affected should be given the opportunity to make representations on any material new evidence or matter of fact (see paragraph 5.12 above);

a letter would be sent to appropriate persons, setting out what further information was required or, as the case may be, inviting comments on the new evidence or matter of fact. The letter would set a date by when a reply was required and would be copied to all persons appearing to the Secretary of State to be affected by the issue in question. Depending on the circumstances, a "minded to" letter might be used as a means of securing such information. Before making a final decision on the order, the Secretary of State would consider whether any further information or representations received should be copied to other parties with a further invitation to comment.

5.16 The Secretary of State would have to **re-open** the inquiry in the circumstances described in paragraph 5.13 above if asked to do so by the applicant or by a statutory objector within 3 weeks of the date of the notification. The Secretary of State might re-open the inquiry in other circumstances, but would only wish to do so where it was impracticable to deal with the matter by written representations.

5.17 Where an inquiry is re-opened, the Secretary of State must send to the persons specified in inquiry rule 14(1) who appeared at the inquiry a written statement of the matters with respect to which further evidence is invited. The minimum period of notice for the re-opened inquiry would be 4 weeks. The Inspector appointed for the re-opened inquiry would usually be the person who conducted the original inquiry, unless that was impracticable or impossible (e.g. because the original Inspector had retired).

## Orders subject to a hearing

5.18 The Inspector or other person appointed to hold the hearing would submit a report to the Secretary of State containing his or her conclusions and any recommendations. Assuming that there was no need to refer back to the parties after the hearing (see next paragraph) the Secretary of State would proceed to determine whether or not to make the order in the light of the report of the Inspector or other appointed person.

5.19 As with an inquiry report, the Secretary of State would not be bound to accept the recommendation contained in the report. If, however, he or she was minded to disagree with the recommendation because of a disagreement over a material matter or fact, or as a result of taking into consideration new evidence received after the hearing, a similar practice would be followed as set out at paragraph 5.13 above. Similarly, the Secretary of State would wish to invite comments from the parties if a matter was left unresolved which was material to the decision, or if it was otherwise considered that further information was needed in order to arrive at a properly informed decision.

## **Publicity for making or refusing orders (Section 14)**

5.20 In all cases, regardless of the procedure followed, the Secretary of State's decision will be announced by way of a decision letter that gives the full reasons for the decision. Section 14(1) requires the Secretary of State, as soon as practicable after determining whether to make the order, to:

- (a) give notice of the determination to the applicant and to every statutory objector who made an objection which was referred to an inquiry or hearing; and
- (b) publish a notice of the determination in the London Gazette.

Under section 14(2), the notice given to the applicants and others (that is, the decision letter) must include the reasons for the decision and the considerations on which it is based, information about the public participation process and information about the right to challenge the validity of the decision and the procedures for doing so.

5.21 Where the application relates to an order which would authorise an Annex I project in the EIA Directive or an Annex II project that would have significant environmental effects, the notices under paragraph 5.20 above must also state that, before the Secretary of State made the determination, he or she:

- considered the ES;
- complied with any obligations under section 10 in respect of any valid objection made that related to the ES; and
- considered, or referred to an inquiry or hearing, any representation made (not being an objection) which related to the ES.

5.22 Where an order **is to be made**, the Secretary of State's decision notice must give such particulars of the terms of the order as the Secretary of State considers appropriate and the name and address of the applicant. If the order would authorise an Annex I project or an Annex II project that would have significant environmental effects, the notice must also include a description of the main measures to avoid, reduce and, if possible, remedy the major adverse environmental effects (if any) of the project.

5.23 In all cases, the applicant must publish a notice of the determination in a local newspaper circulating in the area (or each of the areas) in which the proposals in the order application are, or were intended, to have effect. The notice must state: the terms of the Secretary of State's decision; that the notice under section 14(1)(a) (that is, the decision letter) gives the information required by section 14(2); and where copies of the decision letter may be obtained. A model form of notice for this purpose is provided at **Annex 9**. The notice should be published as soon as practicable after the applicant receives the Secretary of State's decision letter.

5.24 In practice, the Secretary of State would in all cases send a copy of the decision letter to all statutory objectors, to all other persons who appeared at an inquiry or hearing or whose objections were considered under the written representations procedure, and to anyone else who specifically requests a copy.

5.25 In an inquiry case, the applicant will be sent a copy of the Inspector's report (and any assessor's report) with the decision letter, and all persons who appeared at the inquiry will be sent a copy of the

Inspector's conclusions and recommendations with the decision letter. Furthermore, under inquiry rule 21, any statutory objector must be supplied with a copy of the Inspector's report if they apply to the Secretary of State in writing within 4 weeks of the date of the decision. In practice, any objector who requests a copy of the full report would be supplied with one - although, depending upon its length, this may be subject to payment of a reasonable charge covering copying, postage and packing. It is also the usual DfT practice to put Inspectors' reports (once published) on to its web site. Any person who wishes to inspect the documents appended to an Inspector's report should apply in writing to the Secretary of State within 6 weeks of the decision.

5.26 Where the Secretary of State's decision is to make the order, the actual making (i.e. signing) of the order will usually take place shortly after the issue of the decision letter. This is to allow time for publication of the notice in the London Gazette. The order will then come into force on a later date specified in the order, which will usually be 21 days from when the order is made.

5.27 As soon as practicable after the making of an order, the applicant must deposit:

- (a) in the office of the Clerk of the Parliaments a copy of the order and of any plan or book of reference prepared in connection with the application for the order; and
- (b) with each district council, London borough council and the Common Council of the City of London in whose area any works authorised by the order would be carried out, a copy of each of the documents referred to in (a), or so much of them as is relevant to such works.

A council with whom documents are deposited must make them available for inspection, free of charge, at all reasonable hours (section 14(8) refers).

5.28 Where any plans or the book of reference were revised before the order was made, the documents deposited with the council must be the latest version. In practice, the applicant would need to deposit the book of reference and plans that have been certified by the Secretary of State as copies of those referred to in the order as made. A standard provision in the order would require the applicant to submit the final versions of these documents for certification as soon as practicable after the making of the order.

5.29 Where the applicant has also applied for a related listed building, scheduled monument or conservation area consent, or requires a certificate in respect of open space, the decision(s) on any such application(s) would, in England, fall to DCLG to issue on behalf of the Secretary of State for Communities and Local Government. The normal practice is for any linked decisions to issue, by way of a separate decision letter, on the same day as the decision on the order. This ensures consistency of Government decision-making and avoids any risk of one decision pre-empting the other.

5.30 If the applicant for the TWA order has also applied for a planning direction under section 90(2A) of the TCPA, or a direction deeming the grant of hazardous substances consent, the same Secretary of State who is responsible for determining the order will announce a decision on the related direction in the decision letter on the order. The decision letter will also set out any conditions to be attached, if the direction is to be given. However, as the direction cannot be issued before the order is made, the direction will normally be sent to the applicant, and copied to the local planning authority, on the same day as the order is made (assuming that the Secretary of State so decides). The direction will include the conditions to be attached to the granting of deemed planning permission (or deemed hazardous substances consent).

## **Validity of orders (Section 22)**

5.31 The Secretary of State's decision is final unless it is set aside by the High Court. Any person who is aggrieved by an order under section 1 or 3 may challenge the validity of the order, or of any provision contained in it, on the ground that:

- (a) it is not within the powers of the TWA, or
- (b) any requirement imposed by or under the TWA or the Tribunals and Inquiries Act 1992 12 has not

been complied with.

Any such legal challenge should be made, by application to the High Court, within the period of 42 days from the day on which the notice of the determination required by section 14(1)(b) is published in the London Gazette.

5.32 Upon such application, the High Court may by interim order suspend the operation of the TWA order, or of any provision contained in it, either generally or in so far as it affects any property of the person applying to the Court, until the final determination of the Court proceedings. The High Court may also quash the order or any provision contained in it, either generally or in so far as it affects the property of the applicant, if the Court is satisfied that the order or any provision in it is not within the powers of the TWA, or that the interests of the applicant have been substantially prejudiced by a failure to comply with any requirement imposed by or under the TWA or the Tribunals and Inquiries Act.

5.33 Where a statutory right of challenge is not available - for example, because the Secretary of State has decided not to make an order - an aggrieved person may seek permission to initiate judicial review proceedings, if appropriate. It is suggested that anybody who is contemplating applying to the High Court to challenge the validity of an order, or applying for leave to judicially review a decision not to make an order, seeks legal advice.

## **Re-determination**

5.34 If the Secretary of State's decision on a TWA order application which has been subject to an inquiry is quashed by a court, rule 22 of the Inquiries Procedure Rules sets out the procedure that would need to be followed. The Secretary of State would send to the persons entitled to appear at the inquiry and who appeared at it a statement of the matters on which further representations are invited, and afford them the opportunity (within 3 weeks) of making written representations on those matters or asking for the inquiry to be re-opened. The Secretary of State would then consider whether to re-open the inquiry. At least 4 weeks' notice of a re-opened inquiry would need to be given, otherwise the usual publicity requirements for an inquiry set out in rule 13 would apply. If a decision is quashed where an inquiry has **not** been held, the Secretary of State would decide upon an appropriate procedure to follow.

## **Guide timescales for determinations**

5.35 There are no mandatory time limits within which the Secretary of State must make or refuse a TWA order. There are many factors which can influence how long an application remains at the 'decision stage', including whether or not the Secretary of State needs to refer back to parties for further information or comments. Every endeavour is made to determine applications within the timescales given below and, where at the beginning of the decision stage the Secretary of State has all the information needed to decide an application, these targets are regularly achieved. However, it is important to realise that in cases where these targets have not been met it has usually been because, for reasons outside the Secretary of State's control, he/she does not have all the information needed for the decision. This has happened, for example, where applicants have decided at a late stage in the process to amend their proposals and other parties have had to be given an opportunity to consider those changes; or where outstanding agreements essential to a scheme have not been concluded; or where other necessary consents or certificates have not been sought at a sufficiently early stage in the TWA process.

5.36 In each of the following situations, the target timescale should be taken to mean either the time taken to issue a decision letter or, if the Secretary of State considers it necessary to issue first a "minded to" letter inviting further representations, the time taken to issue that letter.

(a) where no objections have been made to the application	Not later than 3 months after the end of the objection period
(b) where objections are made to the application, but all such objections are withdrawn	Not later than 3 months after the date on which the last objection is withdrawn
(c) where the application is subject to the written representations procedure	Not later than 4 months after the conclusion of the exchanges of written representations
(d) where a hearing has been held into the application	Not later than 4 months after the date on which the person who conducts the hearing submits a report to the Secretary of State
(e) where a public inquiry has been held into the application	Not later than 6 months after the date on which the inquiry Inspector submits a report to the Secretary of State

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## Part 6: TWA Orders and Parliament

### Introduction

6.1 TWA orders are normally determined by the Secretary of State without any statutory requirement for scrutiny by Parliament. The order itself is made by the Secretary of State in the form of a Statutory Instrument but it is not subject to either the annulment or the affirmative parliamentary procedure. However, Parliament would have a statutory role in the TWA order making process in the following two circumstances:

- i. where the application relates to proposals which, in the opinion of the Secretary of State, are of national significance; and
- ii. where special parliamentary procedure (SPP) applies.

This Part of the Guide explains the procedures that would apply in these two situations. In addition, attention is drawn to paragraph 22 of the Introduction in regard to railways and other projects which straddle the border between England and Scotland, where Parliamentary approval through the private bill procedure is likely to be required.

### Schemes of National Significance

6.2 By virtue of section 9 of the TWA, if the Secretary of State considers that an application relates, wholly or in part, to proposals of national significance, he or she must refer the proposals to Parliament for approval, under the procedures set out below. This gives Parliament the opportunity to consider whether to endorse (in principle) schemes which are of importance to the country as a whole before the proposals are examined in greater detail at a public local inquiry. If both Houses of Parliament were to pass resolutions approving the proposals, this would not mean that the Secretary of State would have to make the order applied for. He or she could still decide, following a public inquiry, not to make the order, or to make it with modifications. If, however, Parliament were **not** to approve the proposals, the Secretary of State would be unable to make the order applied for, so the application could not be progressed any

further. Hence, although the Parliamentary motions would be to "approve" the proposals, the real effect of the procedure is to give Parliament a right of veto, rather than a power of approval.

6.3 There are no statutory criteria relating to what would constitute a scheme of national significance. The Secretary of State must decide this on a discretionary basis. But, as a rough guide, it is likely that such schemes would involve substantial works and land use over a wide geographical area. They would also be likely to have significant environmental effects over a large part of England and/or Wales and to give rise to a large number of representations. Such schemes may be self-evidently of national significance - for example a major new railway line crossing a large part of the country. Other schemes may be more borderline, and the issues raised in the objections and other representations may be a factor in judging whether the scheme is of national (rather than regional or local) significance.

6.4 Where an application is to be referred to Parliament, the Secretary of State must publish a notice in the London Gazette identifying the application and the proposals which in his opinion are of national significance. This notice must be published **before the end of 56 days** beginning from the date on which the application is received. This would allow the Secretary of State time to have regard to objections and representations made by the normal expiry date for objections (42 days from the date of the application) before coming to a view on the significance of the scheme. But where the scheme was self-evidently of national significance, the notice might be published shortly after the making of the application. It is likely that the applicant would be consulted about the precise wording of the notice, in particular with respect to the description of the proposed project, as this would need to be reflected in the wording of the parliamentary motion - see below.

6.5 Although the Secretary of State would not be able to decide formally whether an application was of national significance until it was actually made, Ministers may wish to reach a provisional view prior to an application. The prospective applicant for an order which might qualify as a scheme of national significance is advised to consult the TWA Orders Unit at the earliest opportunity with details of the proposed project. It may be in the applicant's own interests to know as early as possible whether the application would be likely to be subject to consideration by Parliament.

6.6 Where the Secretary of State forms the opinion that the proposals in an application are of national significance, he or she must on the day of publication of the London Gazette notice, or as soon as practicable thereafter:

- (a) publish a similar notice in a local newspaper circulating in the area (or each of the areas) in which the proposals contained in the draft order are intended to have effect; and
- (b) send a copy of the notice to the applicant and to all statutory objectors.

Clearly, for a scheme of national significance, several newspapers would need to be used for this purpose. The Secretary of State may decide to select the same newspapers that the applicant used to publicise the application. In practice, the Secretary of State would also normally copy the notice under (b) to all persons who object to, or make representations about, the application.

6.7 The next step would be for arrangements to be made for the necessary parliamentary debates. By virtue of section 9(4), such debates could not take place until **more than 56 days** have elapsed from the date of the publication of the London Gazette notice mentioned above. There would (subject to paragraph 6.10 below) be one debate in each House of Parliament on a motion moved by a Government Minister. The motion must identify the proposals which, in the Secretary of State's opinion, are of national significance. This means in effect that the description of the scheme in the motion should be the same as that contained in the published notices.

6.8 The Secretary of State would be unable to make an order that has been subjected to the section 9 process unless each House of Parliament passes the motion mentioned in the previous paragraph. So as to secure a clear outcome, the motion would need to be framed in terms of inviting the House in question to approve the proposals. This would not necessarily mean that the Minister moving the motion would speak

in support of it. The Minister might support or oppose the motion or might adopt a neutral stance. The Minister would, in any event, wish to avoid any suggestion that the Secretary of State had a closed mind in regard to a decision on the order (if the application were to proceed beyond the parliamentary stage) as a final decision could only be reached after a full investigation of all the detailed and local impacts at a public inquiry.

6.9 The detailed case for the scheme would be likely to be made by a backbencher in the House of Commons and, in the Lords, by a Peer who was not a Government Minister. The applicant should therefore secure at least one MP and Peer to advocate the scheme. They would need to be sufficiently well briefed to be able to answer any detailed points about the scheme during the debates. Although Parliament is in effect being asked to approve the principle of the proposals, this does not mean that the debates will exclude detailed aspects.

6.10 If either House votes against the motion, the Secretary of State would be unable to make the order, and there would therefore be no point in the application being progressed any further. The applicant would in these circumstances be invited straight away to withdraw the application, failing which the Secretary of State may determine not to make the order.

6.11 The gap of over 56 days between the publication of the London Gazette notice and the parliamentary debates allows time for MPs and Peers to familiarise themselves with the proposals. This will apply in particular to MPs with a constituency interest in the proposals who, in controversial cases, may be lobbied by persons in their constituency who are affected by the proposed scheme. Supporters of the scheme may also be expected to undertake lobbying activities. MPs and Peers would have access to the application documents through the parliamentary libraries. In addition, the TWA Orders Unit would provide a briefing note on the proposed project, including a summary of the objections and representations made to the Secretary of State.

6.12 Unless the application commands wide support within Parliament, the prospects of the resolutions being approved in each House may depend upon whether the Government supports the proposals in principle. Ministers might however be unwilling to express a view for or against a scheme until its likely effects, during construction and in operation, are clearly understood. They will also be mindful of the Secretary of State's quasi-judicial role in determining whether the order should be made, should Parliament endorse the scheme in principle, and hence the need to avoid pre-judging the eventual outcome.

6.13 The timing of the debates would be a matter for agreement between the Government and parliamentary authorities, having regard to parliamentary rules of procedure and past precedents. It is likely that the House of Commons would hold its debate before the House of Lords because of the strong constituency interest in such cases. The Lords would then only debate and vote on the proposed scheme if the motion was approved in the Commons. It should not be assumed that the Lords would necessarily approve a scheme that had been approved by the Commons.

6.14 Assuming both Houses pass resolutions approving the proposals, the application would go forward for further consideration at a public inquiry. It is virtually certain that, for proposals of national significance, there would be sufficient statutory and other objections for the Secretary of State to be obliged to take this step. The Secretary of State's written notice of the intention to hold an inquiry must be given not later than 4 weeks after the date on which the parliamentary resolution was passed in each House (or if, as would be likely, there are two such dates, the later of them).

6.15 The TWA Orders Unit will notify interested parties of the arrangements for the inquiry. If the scheme is linear in nature, more than one inquiry venue might be needed in order to ensure that the inquiry was reasonably accessible to those who wished to participate. The inquiry Inspector would be supplied with a copy of the Official Reports containing the debates in each House on the proposed scheme.

6.16 The rules governing the procedure at the inquiry would be substantially the same as for other

inquiries. The one additional provision is that a person appearing at the inquiry to give evidence and to be cross-examined on an official case would not be required to answer any questions which, in the Inspector's opinion, were directed to the merits of the resolution passed by Parliament.

6.17 The principles of natural justice which underlie the provisions in the Inquiries Procedure Rules would apply as much to inquiries into proposals of national significance as to other TWA inquiries. The Inspector will wish to examine all relevant issues and will decide who should be permitted to appear and what evidence to allow. It should not be assumed therefore that the Inspector would disallow evidence relating to the principle of the scheme, even if such evidence appeared to have been considered by each House of Parliament when voting on the resolutions. The distinction between matters of principle and detail may be very difficult to draw and the Inspector would be unlikely to disallow evidence unless it was clearly irrelevant or repetitious.

6.18 It would be for the Inspector, in the first instance, to decide what weight to attach to Parliament's resolutions approving the proposals. Both the Inspector, in making a recommendation, and the Secretary of State, in making a determination, would be bound to have regard to Parliament's resolutions. Nevertheless, the Inspector could recommend against making the order, and/or the Secretary of State could decide not to make it, after considering all the detailed effects of a scheme.

6.19 Where the Secretary of State was minded to make the order but with modifications that would cause the provisions of the order to be inconsistent with the proposals in the resolutions approved by Parliament, he or she would need to invite each House to approve new resolutions relating to such modifications. The Secretary of State would not be able to seek such approval without first:

- (a) notifying each person who appears likely to be affected by the modification;
- (b) giving such persons an opportunity of making representations about the proposed modifications within such period (being not less than 3 weeks) as may be specified in the notice; and
- (c) considering any representation made.

6.20 With the above requirements in mind, the Secretary of State would be likely to describe the proposals in the application in broad terms when first framing the London Gazette notice and the resolutions at the earlier stage. The resolutions in each House would need to be the same in regard to their description of the proposals.

6.21 Where the application relates to **a scheme or proposals wholly within Wales**, a decision to refer the application to Parliament under the provisions of section 9 may be taken either by the Secretary of State or by the National Assembly for Wales. Responsibility for publishing or serving notices of the decision may also be taken by the Secretary of State or the Assembly. However, the functions of the Minister of the Crown under section 9(4) and (5) in regard to the moving of the parliamentary motion have not been devolved to the Assembly. As would apply to any order relating wholly to Wales, the eventual decision on whether to make the order would be taken by the Assembly.

6.22 Where the application relates to **a scheme or proposals straddling the border between England and Wales**, only the Secretary of State would be able to decide whether to refer the application to Parliament. He or she might however wish to consult the Assembly about such a decision, particularly if a substantial part of Wales (or an environmentally sensitive site in Wales) was affected. The Secretary of State must obtain the agreement of the Assembly before deciding to make an order relating to a scheme of national significance that would authorise works in Wales as well as England.

## Special Parliamentary Procedure

6.23 By virtue of section 12(1) of the TWA, where any order made under section 1 or 3 authorises the compulsory acquisition of:

- (a) National Trust land which is held inalienably (as defined in section 18 of the Acquisition of Land Act 1981) and the Trust has not withdrawn its objection by the time the order is made; or
- (b) any land forming part of a common, open space or fuel or field garden allotment (as defined in section 19 of the 1981 Act) and the Secretary of State has not certified that he/she is satisfied that land will be given in exchange which is at least the same size and is equally advantageous, or that the other circumstances set out in section 19(1) of the 1981 Act apply,

the order will have to be subject to special parliamentary procedure (SPP). **It is therefore important that applicants should draw the attention of the TWA Orders Unit to any application for an order which, if made, would require SPP.**

6.24 An order that is subject to SPP is laid before Parliament **after** the order has been made by the Secretary of State. (This is in contrast to the section 9 procedure where Parliament is involved early on in the process, before an inquiry is held.) The Secretary of State must publish a notice in the London Gazette of the intention to lay the order before Parliament not less than 3 days before the order is laid. When the order is laid, it must be accompanied by a certificate stating that the procedural requirements of the TWA have been met in regard to the publication of notices, consideration of objections etc.

6.25 The order lays in Parliament for 21 days during which time objectors may petition against it. At the end of the petitioning period, the Chairman of Ways and Means (House of Commons) and the Lord Chairman of Committees (House of Lords) must report whether any petitions have been received and, if so, whether they comply with the relevant Standing Orders and with the provisions of the Statutory Orders (Special Procedure) Act 1945 (as amended by the Statutory Orders (Special Procedure) Act 1965). They must also report whether the petitions are for amendments to the order or of general objection i.e. against the principle of the order. Not later than 7 days following the presentation of any petition to Parliament, the applicant for the order or other supporter of the order, may present memorials objecting to the petition on various grounds. The two Chairmen must decide whether any objection to the petition(s) should be accepted.

6.26 Where, in the opinion of the Chairmen, a petition presented as one of amendment would involve modifications to the order that would in effect negate its main purpose, they will certify the petition as one of general objection. By virtue of section 12(2) of the TWA, a petition cannot be certified as valid if it is:

- (a) a petition of general objection and the order relates to proposals of national significance that have been approved by resolutions of each House of Parliament; or
- (b) a petition for amendment and any such amendment would, in the opinion of the Chairmen, be inconsistent with proposals of national significance that have been approved by resolutions of each House of Parliament.

6.27 Once the report of the two Chairmen is made, there is a further period of 21 days during which either House may resolve that the order be annulled or that any petitions of general objection should not be referred to a joint committee of MPs and Peers. If the order is annulled it becomes void. If the order is not annulled and there are no petitions remaining that must be referred to a joint committee, the order would, by virtue of section 12(3) of the TWA, come into operation at the end of this 21-day period.

6.28 Otherwise, all valid petitions, including petitions of amendment, would automatically be referred to a joint committee. Where this applies, the Committee will consider the order and the petitions and report to Parliament, by laying a copy of their report before both Houses. On a petition of amendment, the Committee may report that the order be approved with or without amendments. On a petition of general objection, the Committee may report that the order be approved (with or without amendment) or that it be

not approved.

6.29 Where the Committee reports that the order be approved without amendment, it comes into operation from the date of their report. Where the report is for the order to be approved subject to amendments, it would come into force (as amended) on such date as the Secretary of State may prescribe by notice.

Alternatively, the Secretary of State may withdraw the order or, under the provisions of section 6 of the 1945 Act, may introduce a Bill to confirm the order in its unamended form. The Secretary of State might also decide to introduce a confirming Bill where the joint committee reports, on a petition of general objection, that the order be not approved.

6.30 A confirming Bill is a public Bill and would be subject to an expedited procedure. Unless there were outstanding petitions for amendment which had not been dealt with by the joint committee, the Bill would be deemed to have passed through all its stages up to and including the committee stage in both Houses. Where an order is confirmed by an Act of Parliament, by virtue of section 12(3)(b) of the TWA, section 22 of the TWA (enabling persons to challenge in the High Court the validity of the order) is disapplied. In other cases where SPP has applied, a legal challenge under section 22 may be made not later than 42 days after the order has come into force - section 12(3)(c) refers.

6.31 It will be appreciated from the above that SPP can be a difficult and time-consuming procedure that can introduce uncertainty and delay even after all the statutory TWA procedures have been gone through and the Secretary of State has decided to make an order. **It is important, therefore, that applicants for a scheme which involves the compulsory purchase of open space or any of the other special categories of land referred to in paragraph 6.23 above should consider very carefully - at the earliest possible stage - whether they can provide exchange land for the land that is to be lost, or can otherwise take steps to avoid the need to go through SPP (such as by acquiring land by agreement, or by avoiding the need to purchase National Trust property which is held inalienably). Experience suggests that even where SPP is not eventually required, delays by applicants in resolving issues relating to required areas of open space and common can sometimes cause serious delays later on in the decision process.**

## Part 7: Assimilation of Procedures

### Introduction

7.1 As explained in Part 1, a TWA order under section 1 or 3 may not provide all the necessary statutory authorisations to enable the proposals in the order to be implemented. It may be necessary for other consents, permissions etc. to be obtained, which might be done either in advance of or alongside the TWA order. This Part of the Guide looks at how other authorisations might be obtained in tandem with a TWA order.

7.2 Sections 16 and 18 of the TWA ensure that the applicant for an order may at the same time apply to the Secretary of State for deemed planning permission or hazardous substances consent. Section 19 disapplies the requirement to obtain the Secretary of State's consent under section 34 of the Coast Protection Act 1949 in relevant cases.

7.3 Section 15 provides a more general power for the Secretary of State, by regulations, to assimilate procedures under other legislation with those under the TWA to enable the applicant to obtain other necessary orders, consents, permissions or licences at the same time, or in parallel with, the section 1 or 3 order. This Part describes the two regulations - relating to listed buildings and inland waterways - that have been made under section 15 to date. Certain other consents and licences where assimilation of procedures does not apply are also mentioned.

**Note:** Where procedures for related applications are assimilated, or are otherwise run in tandem, this does not mean that those applications will necessarily be decided by the same Secretary of State as would decide the TWA order application. For example, an application for listed building consent or conservation area consent that is linked to a TWA application will fall to be decided (in England) by the Secretary of State for Communities and Local Government. However, a related application for deemed planning permission would be determined by the same Secretary of State as would decide the TWA order application.

## **Listed Building, Conservation Area and Scheduled Monument consent**

7.4 The Ancient Monuments and Archaeological Areas Act 1979 ('the 1979 Act') provides specific controls, over and above any planning permission requirements, in respect of works to scheduled monuments. Similarly, the Planning (Listed Buildings and Conservation Areas) Act 1990 ('the 1990 Act') includes specific controls in respect of works to buildings that are listed as being of special architectural or historic interest, and to buildings in designated conservation areas. Where the proposals in a draft TWA order include works that would affect a scheduled monument, listed building or conservation area in a way that would require a consent under either the 1979 or the 1990 Act, the applicant for the order would need to make a separate application for such consent. In the case of **scheduled monument consent** ('smc') the application would be made to the Secretary of State for Culture, Media and Sport or, for works in Wales, the National Assembly for Wales. The application for **listed building or conservation area consent** ('lbc' or 'cac') would be made to the appropriate local planning authority.

7.5 As explained earlier in this Guide, section 17 of the TWA introduced section 12(3A) to the 1990 Act, the effect of which is to "call-in" for determination by the Secretary of State for Communities and Local Government any undetermined application to the local planning authority for lbc or cac where such consent is required in consequence of proposals included in an application for a TWA order. Call-in would apply whether that consent application was made before or after the order application. By virtue of Regulations made under section 15 of the TWA - **the Transport and Works Applications (Listed Buildings, Conservation Areas and Ancient Monuments Procedure) Regulations 1992** (S.I.1992/3138 - "the 1992 Regulations") - the procedures set out in those Regulations would apply to the application for smc, lbc or cac if such application is made not later than 10 weeks after the date of the application for the TWA order. Even where the application for smc, lbc or cac is made later than 10 weeks after the order application, the Secretary of State could still direct that the 1992 Regulations should apply if this was considered appropriate. If no such direction were issued, the normal procedures under the 1979 or 1990 Act and the related regulations would apply to the smc, lbc or cac application.

7.6 The 1992 Regulations would not apply where the applicant has obtained smc, lbc or cac in advance of applying for the TWA order, or where such consent has been refused before the date of the TWA application. If the local planning authority were to refuse lbc or cac before a TWA application is made, any subsequent appeal to the Secretary of State for Communities and Local Government against that refusal would, if practicable, be considered in parallel with the related TWA application.

7.7 In practice, if the authority to whom the consent application was made (the Secretary of State for smc or the local planning authority for lbc or cac) was aware that a TWA application was imminent, they might in practice defer reaching a decision until the TWA application was made and automatic call-in of the consent application applied. Particularly in regard to controversial applications, the determining authority might consider that the case for granting or refusing smc, lbc or cac should be considered in parallel with the case for the works that require such consent.

7.8 Where the 1992 Regulations apply to a smc, lbc or cac application, the procedures relating to the making of such an application in the 1979 Act and the 1990 Act (and in the regulations made under those

Acts) are modified in ways summarised below. Where the Secretary of State causes a local inquiry to be held into an application for a TWA order and an inquiry is also to be held into a related application for smc, lbc or cac, the inquiries would be held concurrently unless the Secretary of State considered it inappropriate to do so and gave a direction to this effect. Any such inquiries held concurrently would be subject to the TWA Inquiries Procedure Rules.

7.9 The modifications to the 1990 Act and the Planning (Listed Buildings and Conservation Areas) Regulations 1990 (S.I.1990/1519) are set out in Schedule 1 to the 1992 Regulations. The modifications to the 1979 Act and the Ancient Monuments (Applications for Scheduled Monument Consent) Regulations 1981 (S.I.1981/1301) are set out in Schedule 2 to the 1992 Regulations. The effects of the modified procedures are summarised below.

7.10 The applicant for lbc or cac must, not more than 14 days before and not later than the date of the application, publish a notice in a local newspaper circulating in the area in which the relevant building is, or buildings are, located. The notice must indicate the nature of the works that are the subject of the lbc or cac application. It must also name all of the places in the area where a copy of the application, and of all plans, drawings, sections and other materials submitted with it, may be inspected free of charge at all reasonable hours during a period specified in the notice, being not less than 42 days from the date of the application. This should be the same places where the TWA application documents are, or have been, made available for public inspection.

7.11 The local newspaper notice for a lbc or cac application should state to whom the application has been, or is to be, submitted and the address to which any objections or representations should be sent. The application should be made to the local planning authority but any objections or representations should be addressed, for works in England, to the Secretary of State for Communities and Local Government c/o the relevant Government Office, and for works in Wales to the National Assembly for Wales. Further details on these addresses can be obtained from the TWA Orders Unit, the Government Office or the Assembly. The notice may be combined with the local newspaper notice required in respect of the TWA application. In practice, this would only be possible where the applicant submits a lbc or cac application on the same day as the TWA application or up to 14 days earlier.

7.12 Where, under the Applications Rules, notice of the TWA application is required to be served on the owner of a listed building, scheduled monument or building in a conservation area, the applicant may give notice of the application for lbc, smc or cac in a combined notice. It should be noted however that the wording of the modified certificates set out in paragraph 2(7) of Schedule 1 and paragraph 2(6) of Schedule 2 to the 1992 Regulations provide only for the situation where the application for lbc, cac or smc is made on or before the date of the TWA application.

7.13 The local planning authority retains responsibility for posting notices of an application for lbc or cac on or near to the building or buildings affected. These notices must contain the same information as is required for the local newspaper notices. The notices must be displayed for not less than 7 days during the 42 days allowed for making objections to, or representations about, the application.

7.14 Where any lbc, cac or smc applications are assimilated (in terms of procedure) with a TWA application, the definition of an "owner", for the purposes of those applications, is that which applies under the TWA. This is to ensure that the notices to be served in relation to the application for lbc, cac or smc are served on the same persons as for the TWA application.

## Inland Waterways Procedures

7.15 Part 7 of the Transport Act 1968 ('the 1968 Act') enables certain types of proposal affecting an inland waterway to be authorised by order made by the Secretary of State. The proposals for which an order may be made are set out in sections 104(3), 105(3) and 112 of the 1968 Act. They are:

- (a) to change the status of a British Waterways Board ('BWB') waterway between the categories 'commercial', 'cruising' and 'remainder' (reclassification to 'remainder' would remove the BWB's duty to maintain the waterway for navigation);
- (b) to change the BWB's maintenance obligations to reflect changes in craft design and in the use of its waterways;
- (c) to extinguish rights of navigation and maintenance obligations on canals (as defined in subsection (6) of section 112) which are not comprised in the undertaking of the BWB.

The procedure for obtaining these orders is set out in Schedule 13 to the 1968 Act.

7.16 Where any proposal in an application for a TWA order would affect an inland waterway in any of the ways described above, authority to implement such a proposal would need to be granted by an order under Part 7 of the 1968 Act. This is because section 5(7) of the TWA prevents the Secretary of State from making a section 1 or 3 order that would remove or alter the relevant requirements under the 1968 Act. Regulations have been made under section 15 of the TWA to enable the separate order applications under the TWA and the 1968 Act to be considered concurrently.

7.17 These regulations are entitled the **Transport and Works Applications (Inland Waterways Procedure) Regulations 1993** (SI 1993/1119). They amend the procedures for making orders under the 1968 Act to provide for the applicant for the TWA order to initiate procedures under the 1968 Act instead of the Secretary of State. The applicant should read the Regulations in conjunction with Schedule 13 to the 1968 Act to ascertain the full requirements, but the most important provisions are summarised below:

- i. The applicant must submit a draft of the proposed order under the 1968 Act with the application for the TWA order.
- ii. Before submitting the draft order under (i), the applicant must make a written request to the Secretary of State for a determination as to which organisation (or organisations) appears to be representative of persons using the relevant inland waterway or canal and on whom the applicant would be required to serve any document in accordance with the Regulations. The Secretary of State must make such a determination within 28 days of receiving the request. Account would be taken of whether the proposed order would be made under section 104(3), 105(3) or 112 of the 1968 Act.
- iii. The applicant must, forthwith after submitting a draft of the proposed order to the Secretary of State, send a copy of the draft order and a notice containing the information specified in (a) to (d) below to every organisation as determined by the Secretary of State under (ii) and to the Inland Waterways Amenity Advisory Council (IWAAC). The information in question is -
  - (a) the name of the applicant;
  - (b) the names and addresses of the departments to whose Secretaries of State a draft of the proposed order under the 1968 Act and an application for a TWA order have been submitted;
  - (c) a concise summary of the proposals contained in the application for the TWA order;
  - (d) a statement that within a period specified in the notice (being not less than 42 days) any person may object to the making of the proposed order under the 1968 Act by writing to the Secretary of State at the address specified stating the grounds of objection.
- iv. The applicant must publish, forthwith after submitting the draft order under section 104(3), 105(3) or 112 in respect of any waterway, a notice of such submission in the London Gazette and a national newspaper. The notice must contain the same information as in (iii)(a) to (d) above. It must also give the names of all places, within (or as close as reasonably practicable to) the area in which the waterway is

situated, where a copy of the draft of the proposed order may be inspected free of charge at all reasonable hours during a period specified in the notice (being not less than 42 days from the date of submission of the proposed order to the Secretary of State). The national newspaper notice must have appended to it a copy of the London Gazette notice that the applicant has published in connection with his application for the TWA order.

v. The applicant must publish a notice, containing the same information as in the London Gazette notice, in one or more local newspapers circulating in the area in which the waterway is situated. Two such notices must be published, the first not more than 14 days before and not later than the date of the submission of the proposed order, and the second not later than 7 days after such date.

vi. The applicant must arrange for a notice, containing the same information as in the London Gazette notice, to be displayed in one or more places adjacent to the waterway.

vii. The applicant must submit to the Secretary of State evidence by affidavit of compliance with paragraphs 2, 3, 4 and 5(1) of Schedule 13 to the 1968 Act (as amended by the Regulations) not later than 14 days after submission of the draft order.

viii. The Secretary of State must consider every written objection to the proposed order and, if an inquiry is held into the order, must consider the Inspector's report.

ix. Where the Secretary of State causes an inquiry to be held into the application for a TWA order and into the proposed order under the 1968 Act, such inquiries would be concurrent unless the Secretary of State considered this to be inappropriate. The concurrent inquiries would be held under the TWA Inquiries Procedure Rules.

x. The Secretary of State is empowered to recover his/her costs in connection with any inquiry held to consider the proposed order under the 1968 Act and to award costs on a similar basis as for TWA inquiries. The applicant would therefore be expected to meet the costs of the inquiry.

xi. Where the proposals require the making of an order under the 1968 Act and the holding of an inquiry in connection with that order is obligatory (by virtue of paragraph 5(2)(a) or 5(2)(b)) the categories of persons who have a right, under section 11(4) of the TWA, to have their objections to a section 1 or 3 order referred to an inquiry or hearing are extended to include:

(a) any local authority that has objected to the TWA order;

(b) the Environment Agency;

(c) any organisation appearing to the Secretary of State to represent a substantial number of persons using the waterway for navigation on the date when the TWA application was made.

## **Food and Environment Protection Act 1985**

7.18 Where an application is made for a TWA order which, if made, would authorise the carrying out of works in the sea and other tidal waters (which may include certain inland waterways) the applicant may require a licence under section 5 of the Food and Environment Protection Act 1985 ('FEPA'). A licence is required for the deposit of substances and articles in the sea. The applicant should discuss this matter directly with the relevant Marine and Waterways Division in the Department for Environment, Food and Rural Affairs **well in advance** of any TWA application. Whilst the respective procedures under the FEPA and the TWA are not sufficiently similar to make their assimilation a practical proposition, it may nevertheless be appropriate for the FEPA licence and TWA order to be applied for and considered in parallel (indeed, the degree of mutual inter-dependency between the two may dictate that this is the only sensible way of proceeding in a particular case).

## **Coast Protection Act 1949**

7.19 Where an application is made for an order under section 3(1)(b) seeking approval to undertake works that would interfere with rights of navigation, the usual requirement to obtain a consent from the Secretary of State under section 34 of the Coast Protection Act 1949 ('the 1949 Act') is disapplied by section 19 of the TWA. The Secretary of State may however require the TWA order to include the tidal works provisions that are normally attached as conditions to the granting of section 34 consents. These include a requirement that detailed plans and sections of the works are approved by the Secretary of State before any tidal works are carried out. Ports Division in DfT should be consulted about the Secretary of State's requirements in relevant cases.

7.20 For many tidal works, section 34 consent (combined possibly with a FEPA licence and any necessary consent from the Crown Estate) may be sufficient statutory authority for the project to proceed. As the procedures would be less onerous than under the TWA, the promoter may wish to explore the section 34 route first in consultation with Ports Division. There may, however, be reasons for a promoter to conclude that the TWA route would be more appropriate - for example, because of the size and nature of the proposed works; or the need to modify or repeal other local legislation; or the desire to obtain the protection against claims for nuisance that a TWA order can give.

## **Consents under the Electricity Act 1989**

7.21 Where a proposed TWA order contains provisions for works that would ordinarily require consent under section 36 of the Electricity Act 1989, it is suggested that the applicant seeks guidance from DTI on whether it would be appropriate to seek to exclude (i.e. disapply) this requirement in the order itself. Furthermore, if a scheme involves the construction of a generating station in the sea to produce renewable energy, e.g. from wind or tidal power, the applicant should also consider whether they need to apply for a TWA order if the only reason for doing so is to obtain statutory authority for interfering with rights of navigation. Under section 36A of the Electricity Act 1989 (inserted by section 99 of the Energy Act 2004) an applicant for a section 36 consent may also apply to the Secretary of State for Trade and Industry for a direction extinguishing, suspending or restricting the exercise of rights of navigation affected by the proposed generating station. This could obviate the need for a TWA order.

7.22 By virtue of the Overhead Lines (Exemption) Regulations 1992 (SI 1992 No. 3074), consent under section 37 of the 1989 Act would not be required for the installation of an electric line above ground in accordance with an order made under an Act of Parliament (which would include a TWA order) or for the purposes of a tramway or trolley vehicle system or other guided transport system prescribed under section 2 of the TWA.

## **Licences under the Habitats Regulations**

7.23 In certain circumstances, works provided for in a draft TWA order can give rise to the need for a licence to be obtained from DEFRA under regulation 44 of the Conservation (Natural Habitats, &c.) Regulations 1994 - for example, because the works would damage or destroy a breeding site or resting place of a European protected species, such as bats or great crested newts. Before giving a licence, DEFRA would wish to consult English Nature and would need to be satisfied that certain strict criteria were met. Applicants would need to show, for example, that there were imperative reasons of overriding public interest for the damage or destruction, that there was no satisfactory alternative, and that the authorised action would not be detrimental to maintenance of the population of the species. Licences may be given subject to conditions.

7.24 Prospective applicants for a TWA order should therefore ensure that their environmental statement carefully addresses any potential impacts on a protected species and, as may be necessary, includes appropriate mitigation measures. In particular, applicants should establish whether there is, or is likely to be, a need for a licence to be obtained under the 1994 Regulations. If that is the case, it is very unlikely that the Secretary of State would agree to make a TWA order in advance of a licence application being made. It is the normal practice of DfT and DEFRA to ensure that decisions on related TWA order and licence applications are taken concurrently. This is because:-

- the Secretary of State needs to be satisfied, before making a TWA order, that he has full information about the significant environmental effects of a scheme, including the proposed measures to mitigate the adverse effects. If an applicant requires a licence from DEFRA but is not in a position to apply for one because insufficient survey information is available, or the mitigation measures have not been defined, then it is similarly very unlikely that the Secretary of State will have sufficient information to determine the TWA order application;
- if the Secretary of State were to make a TWA order in advance of determination of the related licence application, that decision could be seen as prejudicial to DEFRA's consideration of the licence;
- the Secretary of State would wish to be satisfied before making a TWA order that there is a reasonable prospect of the scheme going ahead. This means establishing that implementation of the scheme is unlikely to be blocked by any impediments such as the need for another consent or licence.

## **Annex 1: TWA orders unit**

The address of the TWA Orders Unit (as at the date of publication of this Guide) is:

The TWA Orders Unit  
Department for Transport  
9th Floor, Southside  
105 Victoria Street  
London SW1E 6DT

The Unit may be contacted on the following telephone numbers:

020 7944 3196  
020 7944 6912  
020 7944 2474  
020 7944 4506  
020 7944 3293  
020 7944 2487  
020 7944 2488  
020 7944 2483

The Unit may be e-mailed at [transportandworksact@dft.gsi.gov.uk](mailto:transportandworksact@dft.gsi.gov.uk) or faxed on 020 7944 9637.

## **Annex 2: Commentary on Schedule 1 to the TWA**

Schedule 1 to the TWA gives examples of matters that may be included in orders made under section 1 or 3. These examples cover the range of provisions that are most likely to be required by applicants. The list is illustrative rather than exhaustive, but prospective applicants may wish to consult the TWA Orders Unit about any proposed provision that is not, or does not appear to be, included in Schedule 1 and which is not precedented. Many of the matters exemplified are dealt with in the Model Clauses. A commentary on each

matter listed in Schedule 1 follows.

Paragraphs 1 and 2 exemplify the various types of works that may be authorised in a section 1 or 3 order. The descriptions are wide ranging and would encompass works that are ancillary to the primary purpose of the order (for example, an access road to a proposed railway station, or a park and ride site to be provided for a new tramway system). Most orders will contain powers to carry out works, but this is not necessarily the case.

*Paragraph 3* provides for orders to sanction the acquisition of land, whether by agreement or compulsorily. Where land is to be acquired compulsorily, the Secretary of State would wish to be satisfied that the public benefits outweighed any private disbenefits. This is especially important in view of provisions in the Human Rights Act 1998 which provide (amongst other things) that no one shall be deprived of his possessions except in the public interest.

*Paragraph 4* provides for orders to authorise the creation or extinguishment of rights over land, including rights of navigation over water, either compulsorily or by agreement. "Over" includes in or on land. This power is widely drawn because of the multitude of rights and interests in land that may be affected by a works proposal, especially one of a linear nature. Where, for example, a proposed railway crosses a public right of way, it may be necessary to stop up the right of way or to divert it (by the construction of a bridge or underpass). The power to extinguish a public right of way is however restricted by section 5(6). This provides that a section 1 or 3 order shall not extinguish a public right of way over land unless the Secretary of State is satisfied that an alternative right of way has been or will be provided, or that one is not required. If an alternative is to be provided, the Secretary of State would wish to be satisfied that it will be a convenient and suitable replacement for existing users.

*Paragraph 5* provides for orders to authorise the abrogation or modification of agreements relating to land. Works proposals will often have implications for private agreements about the use of land, such as the location and use of statutory undertakers' equipment or the use of private accommodation crossings over railways for access purposes.

*Paragraph 6* provides for orders to confer on persons providing transport services the right to use the systems belonging to others. This sort of provision appeared in local Acts prior to railway nationalisation in order to sanction through running rights in the public interest on competing railways. The regulatory provisions in the Railways Act 1993 probably render such a provision redundant for railways, but it may arise in other contexts.

*Paragraph 7* covers provisions in orders that protect the property or interests of any person (commonly known as "protective provisions"). These might relate to protection of the applicant's transport system or to the property or interests of persons affected by proposed works, such as statutory undertakers' equipment or the interests of the highway authority.

*Paragraph 8* provides for orders to impose and exclude obligations or liabilities in respect of any acts or omissions. An applicant may, for example, wish to impose or exclude duties or liabilities relating to the carrying out or use of authorised works.

*Paragraph 9* provides that orders may sanction the making of agreements to secure the provision of police services. Such matters would normally be dealt with other than by way of a TWA order, but might possibly be appropriate to a TWA order where a statutory body requires express authorisation to enter into such an agreement.

*Paragraph 10* covers the carrying out of surveys and the taking of soil samples. The order would be able to sanction such matters without requiring the prior agreement of the landowner, although compensation would be payable. However, the carrying out of surveys etc. **before** the order is made would have to be by agreement with the owner.

*Paragraph 11* covers provisions relating to the payment of compensation. Compensation provisions will typically be required where private rights or interests in land are intended to be acquired compulsorily, or

where the exercise of powers in the order would be liable to cause loss or damage to a person.

*Paragraph 12* provides for orders to sanction the charging of tolls, fares (including penalty fares) and other charges. It also enables orders to create summary offences in connection with non-payment of the toll, fare etc., or in connection with a person's failure to give his/her name and address where a penalty fare provision applies. Section 5(5) precludes the imposition on persons convicted of a summary offence of a term of imprisonment or of a fine exceeding level 3 on the standard Home Office scale.

*Paragraph 13* enables orders to provide for the making of byelaws and for their enforcement, including the creation of summary offences. This provision may, for example, be required to regulate the use of transport systems and the conduct of passengers. The order would normally provide a byelaw making power and for the actual byelaws to be confirmed by the Secretary of State.

*Paragraph 14* covers provisions as to the payment of rates. This is, however, seldom likely to be necessary.

*Paragraph 15* provides for orders to authorise the transfer, leasing, discontinuance and revival of undertakings. A provision in an order authorising a subsequent transfer or lease of an undertaking may be required where the applicant wants to be able to transfer or lease to another person the powers to construct and/or operate a transport system, and relevant property, after the order takes effect. In that situation, the Secretary of State may (and normally will) require such a transfer or lease to be subject to his prior consent, so that he can satisfy himself as to the suitability of the transferee to take on the relevant powers, rights and responsibilities. The discontinuance or revival of an undertaking may require an order to revoke or modify provisions relating to that undertaking in an Act or a previous TWA order.

*Paragraph 16* covers provisions in orders for disputes to be settled by arbitration. This would be needed for disputes that might arise from, or in connection with, the proposals authorised by the order, other than those relating to land compensation, which would be dealt with by the Lands Tribunal. It would be unusual for the Secretary of State to be the arbitrator (see note below). Such a person would normally be appointed by an appropriate professional body, such as the Institution of Civil Engineers.

**Note:** If a prospective applicant wishes to impose any obligation or responsibility on the Secretary of State in an order - whether as an arbitrator or as the person responsible for determining a particular type of appeal - this should (not least as a matter of courtesy) be discussed with the relevant Department in advance. **It should not be assumed that the Secretary of State would be able or willing to take on the role in question**, even if such a provision is preceded in earlier Acts or orders. The relevant Department (or Departments) may not have the expertise or the resources to take on the new responsibility in question. A critical view would also be taken of any provisions that sought to impose fresh obligations on magistrates courts.

*Paragraph 17* provides that orders may include the imposition of a requirement to obtain the Secretary of State's consent. As well as in regard to a transfer of powers as mentioned above, such a provision may be appropriate, for example, to regulate specified matters relating to the carrying out of the works authorised by the order.

## **Annex 3: General pointers on the drafting of TWA orders**

### **1. Modern style and general principles**

Applicants are advised to avoid the use of:

- redundant legal expressions such as "hereinafter", "therewith", "aforesaid"; and Latin or other foreign phrases. Even if this results in the use of more words the meaning is likely to be clearer;
- ambiguous phrases like "as may be", which could have different interpretations, that is, "as possible" or "as reasonably possible";
- unnecessary repetition of phrases, if they can be explained once in an interpretative provision;
- "except where the context otherwise requires" at the opening of interpretative provisions, unless there are specific instances in a draft order which warrant that provision. If the general definition does not work in all instances, it may be an indication that extra definitions should be provided;
- double negatives, where possible;
- provisions which would amount to excessive sub-delegation by, for example, purporting to enable a person to alter the effect of an order without going through the process of applying for an amending TWA order.

Definitions should be applied consistently throughout an order. It is preferable to avoid giving the same term a different definition in different places as this causes confusion.

It is also important to check that protective provisions drafted by others fit in (as far as possible) with the terminology and style of the rest of the draft order and are suitable for a statutory instrument.

Applicants should keep up to date with advice given in Statutory Instrument Practice notes, where relevant to TWA orders, which are published by Her Majesty's Stationery Office and are available at <http://www.opsi.gov.uk>.

## **2. Appropriate layout**

Lengthy and detailed protective provisions are better located in Schedules than in the body of an order, with a separate Schedule for each protected party.

Italic cross-headings should be used to break up material.

Paragraphs should be kept as short as possible.

Breaking up ideas into shorter sentences makes it easier to check that provisions work properly and avoid ambiguity.

Sub-paragraphs "(a)", "(b)", "(c)" etc. should appear only after introductory words and a dash.

Use of "above" and "below" in cross-referring to other articles and paragraphs in an order is unnecessary.

If any provision in an order is to be qualified, the qualification should appear in a free-standing paragraph rather than adding a proviso in a tailpiece.

References in provisions to other articles of a draft order and to sections or Schedules of Acts should include the heading of the relevant article, section or Schedule in brackets.

## **3. Dates and time limits**

Applicants should draft provisions about dates and time limits precisely, in order to avoid ambiguity. Such provisions should make clear how to calculate the starting and the closing date of any specified period and whether those dates are included in or excluded from the calculation.

#### 4. Is material appropriate for an order?

If matters set out in protective provisions can be adequately handled by contractual arrangements rather than by provisions in an order, they should be dealt with in that way. It is recognised, however, that there may be reasons why the inclusion of matters in protective provisions is considered necessary or helpful. For example, if an order includes a power for an undertaking to be transferred to an unspecified third person, including protective provisions in the order ensures the continued effect of that protection in the event of a transfer. It is also common to include protective provisions where the proposals in an order could affect the statutory powers and obligations of another body in order to secure the withdrawal of their objection. **Applicants should explain the justification in each case for protective provisions as part of the explanatory memorandum required under rule 10 of the Applications Rules (see paragraph 3.5(b) in Part 3 of the Guide). This will enable the Department to assure itself that they are within the Secretary of State’s powers under the TWA and are for a proper purpose.**

#### 5. Novel material

If novel provisions are included in a draft order, including departures from the TWA Model Clauses, their purpose and effect should be explained in the explanatory memorandum required under rule 10 of the Applications Rules (see paragraph 3.5(b) in Part 3 of the Guide).

#### 6. Need for standard punctuation

Applicants should refer in the first instance to the latest version of the TWA Model Clauses to see the Department’s preferences in respect of punctuation. In particular, sub-paragraphs should conclude with a semi-colon. If there are full-out words at the end, either a semi-colon or a comma may be used. But, whatever option is chosen, it should be used consistently throughout the draft order.

The use of indents and hanging indents should follow the standard approach illustrated in any recent Act, but use of the Stationery Office template in preparing a draft order should ensure that the proper current convention is used.

### Annex 4: List of non-statutory consultees

	CONTENT OF APPLICATION	CONSULTEE
1	Works involving new or modified passenger transport services	Disabled Persons Transport Advisory Committee Any local consultative body representing recognised transport users groups
2	Works or other proposals relating to inland waterways	Association of Waterways Cruising Clubs Residential Boat Owners Association British Marine Industries Federation
3	Works affecting land protected under section 6(1)(b) of the Green Belt (London and Home Counties) Act 1938	The London Green Belt Council Open Spaces Society Ramblers Association

<b>4</b>	Works affecting green field sites	Campaign to Protect Rural England Campaign for the Protection of Rural Wales Country Land and Business Association The relevant County Wildlife Trust Royal Society for the Protection of Birds Town and Country Planning Association
<b>5</b>	Works affecting commons, open spaces and allotments (as defined in section 19(4) of the Acquisition of Land Act 1981)	The relevant County Wildlife Trust Open Spaces Society Ramblers Association Royal Society for the Protection of Birds
<b>6</b>	Works affecting or adjoining land belonging to the National Trust	The National Trust
<b>7</b>	Works affecting agricultural land	Country Land and Business Association National Farmers Union
<b>8</b>	Works affecting the foreshore, river estuaries or river banks	The relevant County Wildlife Trust Royal Society for the Protection of Birds
<b>9</b>	Works interfering with rights of navigation for sea-going vessels	British Marine Industries Federation Chamber of Shipping Royal Yachting Association
<b>10</b>	Works affecting conservation areas, listed buildings and scheduled monuments	Joint Committee of the National Amenity Societies
<b>11</b>	Works affecting other nationally important buildings or monuments or sites of archaeological interest registered in County Sites & Monuments Records (SMRs)	In or adjacent to England, English Heritage In or adjacent to Wales, the National Assembly for Wales (Cadw) and the Royal Commission on Ancient and Historical Monuments in Wales
<b>12</b>	Works affecting the townscape	Civic Trust Royal Town Planning Institute Commission for Architecture and the Built Environment In Wales, the Design Commission for Wales
<b>13</b>	Railway Preservation Schemes	Heritage Railway Association
<b>14</b>	Tramway Projects	National Tramway Museum
<b>15</b>	Works affecting coastal waters	Marine Conservation Society National Federation of Fishermen's Organisations

## **Annex 5: Selection criteria for screening decisions**

### **1. Characteristics of projects**

The characteristics of projects must be considered having regard, in particular, to:

- (a) the size of the project;
- (b) the cumulation with other projects;
- (c) the use of natural resources;
- (d) the production of waste;
- (e) pollution and nuisances;
- (f) the risk of accidents, having regard in particular to substances or technologies used.

### **2. Location of projects**

The environmental sensitivity of geographical areas likely to be affected by projects must be considered, having regard, in particular, to :

- (a) the existing land use;
- (b) the relative abundance, quality and regenerative capacity of natural resources in the area;
- (c) the absorption capacity of the natural environment, paying particular attention to the following areas:
  - i. wetlands;
  - ii. coastal zones;
  - iii. mountain and forest areas;
  - iv. nature reserves and parks;
  - v. areas classified or protected under Member States' legislation; special protection areas designated by Member States pursuant to Directive 79/409/EEC 13 and Directive 92/43/EEC 14 ;
  - vi. areas in which the environmental quality standards laid down in Community legislation have already been exceeded;
  - vii. densely populated areas;
  - viii. landscapes of historical, cultural or archaeological significance.

### **3. Characteristics of the potential impact**

The potential significant effects of projects must be considered in relation to criteria set out under 1 and 2 above, and having regard in particular to:

- (a) the extent of the impact (geographical area and size of the affected population);
- (b) the transfrontier nature of the impact;
- (c) the magnitude and complexity of the impact;
- (d) the probability of the impact;
- (e) the duration, frequency and reversibility of the impact.

13 O.J. No. L 103, 25.4.1979, p.1. (Relates to the conservation of wild birds).

14 O.J. No. L 206, 22.7.1992, p.7. (Relates to the conservation of natural habitats and of wild fauna and flora).

## **Annex 6: Information to be included in environmental statements**

### **(rule 11 of, and Schedule 1 to, the Applications Rules 2006)**

#### **The Environmental Statement (ES) must include the following:**

- (1) A description of the project comprising information on the site, design and size of the proposed works.
- (2) A description of the measures proposed to be taken in order to avoid, reduce and, if possible, remedy any significant adverse effects on the environment of the proposed works.
- (3) The data required to identify and assess the main effects which the proposed works are likely to have on the environment.
- (4) An outline of the main alternatives to the proposed works studied by the applicant and an indication of the main reasons for his choice, taking into account the environmental effects 15 .
- (5) A non-technical summary of the information provided under paragraphs 1 to 4 above.

The ES must also include so much of the information specified below as is relevant to the proposed works (subject to any scoping opinion given by the Secretary of State under rule 8 16 ).

6. A description of the project, including in particular:

- a. a description of the physical characteristics of all of the works covered by the application and the land-use requirements during the construction and operational phases;
- b. a description of the main characteristics of the production processes, for instance, the nature and quantity of the materials used;
- c. an estimate, by type and quality, of expected residues and emissions (water, air and soil pollution, noise, vibration, light, heat, radiation and any others) resulting from the operation of the project.

7. A description of the aspects of the environment likely to be significantly affected by the project, including, in particular, population, fauna, flora, soil, water, air, climatic factors, material assets (including the architectural and archaeological heritage), landscape and the inter-relationship between the above factors.

8. A description of the likely significant effects of the project on the environment, which should cover the direct effects and any indirect, secondary, cumulative, short-term, medium-term and long-term, permanent and temporary, positive and negative effects of the project, resulting from:

- (a) the existence of the project,
  - (b) the use of natural resources, and
  - (c) the emission of pollutants, the creation of nuisances and the elimination of waste,
- and the description by the applicant of the forecasting methods used to assess the effects on the environment.

9. A non-technical summary of the information provided under paragraphs 6 to 8 above.

10. An indication of any difficulties (technical deficiencies or lack of know-how) encountered by the developer in compiling the required information.

15 Applicants are advised to interpret this requirement as applying not just to any alternatives to the entire project they may have considered, but also to any alternative site locations or route alignments they have studied.

16 Where the Secretary of State has given a scoping opinion, the ES in relation to that application need include only the information specified in that opinion (rule 11(3) of the Applications Rules). This does not, however, preclude the Secretary of State from requiring an applicant to provide further information under rule 8(8).

## **Annex 7: Checklist for use in preparing an environmental statement (es)**

The following is a checklist of the range of issues that applicants may need to cover in their ES. Not all of the matters would need to be included in every case - and their significance will vary from case to case - but the checklist may help applicants to determine the scope of their ES, in consultation with the local planning authority, the other statutory environmental organisations and other appropriate persons.

### **1. Information describing the project**

Purpose and physical characteristics of the project, including details of proposed access and transport arrangements, numbers to be employed and where employees would come from.

Land use requirements and other physical features of the project during construction and in operation (and, if appropriate, after the use has ceased).

Production processes and operational features of the project, including

- Types and quantities of raw materials, energy and other resources consumed;
- Residues and emissions by type, quantity, composition and strength including:

discharges of water

emissions to air

noise

vibration

light

heat

radiation

deposits/residues to land and soil

others

Summary of main alternative sites or routes considered and reasons for final choice, having regard to the environmental effects.

### **2. Information describing the site and its environment**

**Physical features of the site and its surrounding environment**, including:

- Proximity and numbers of persons in the area(s) where the project would be constructed and used;
- Flora and fauna (habitats and species) with particular reference to protected species and their habitats;
- Soil: agricultural quality (using DEFRA grading), geology and geomorphology;
- Water: aquifers, water courses, shoreline, including the type, quantity, composition and strength of any existing discharges;
- Air: climatic factors, air quality etc.;
- Architectural and historic heritage, archaeological sites and features, and other material assets;
- Landscape and topography;
- Recreational uses;
- Any other relevant environmental features.

The **policy framework** including all relevant statutory designations such as national nature reserves, sites of special scientific interest, national parks, areas of outstanding natural beauty, heritage coasts, regional parks, country parks, designated green belt, local nature reserves, areas affected by tree preservation orders, water protection zones, nitrate sensitive areas, conservation areas, listed buildings, scheduled ancient monuments and designated areas of archaeological importance. References should be made to relevant national policies (including Planning Policy Statements and Planning Policy Guidance notes) and to regional and local plans and policies (including approved or emerging development plans and local transport plans).

Reference should also be made to any relevant international designations, for example a European site or European marine site (as defined in regulations 2(1) and 10(1) of the Conservation (Natural Habitats, &c.) Regulations 1994.

NB:- It would be helpful if photographs could be included with the ES to show those existing conditions which are liable to change significantly as a consequence of the proposed scheme, with appropriate use made of artistic impressions or computer generated images to illustrate the proposed changes.

### **3. Assessment of Effects**

The assessment of the effects of the project in construction and in use include direct and indirect, secondary, cumulative, short, medium and long term, permanent and temporary, positive and negative effects.

For effects on **human beings, buildings and man-made features:**

- Change in population arising from the project and consequential environmental effects
- Visual impacts on the surrounding area and landscape
- Levels and effects of emissions during normal operation of the project
- Levels and effects of noise from the project
- Effects on local roads, rights of way and transport
- Effects on buildings, the architectural and historic heritage, archaeological features and other human artefacts, including any effects arising from pollutants, visual intrusion or vibration.

For effects on **flora, fauna and geology:**

- Loss of, and damage to, habitats and plant and animal species - with particular reference to the impact on any affected protected species
- Loss of, and damage to, geological, palaeontological and physiographic features
- Disruption to geomorphological processes
- Other ecological consequences.

For effects on **land:**

- Physical effects e.g. change in local topography, effect of any earth-moving on stability, soil erosion etc.
- Effects of chemical emissions and deposits on soil of site and surrounding land
- Land-use and land resource effects including quality and quantity of agricultural land to be taken and the effect of severance, sterilisation of mineral resources, effect on surrounding land uses and waste disposal.

For effects on **water**:

- Effects on drainage pattern in the area
- Changes to other hydrographic characteristics e.g. ground water level, water courses, flow of underground water
- Effects on coastal or estuarine hydrology
- Effects on coastal processes e.g. sediment transport and tidal currents
- Effects of pollutants, waste etc., on water quality.

For effects on **air and climate**:

- Level and concentration of chemical emissions and their environmental effects
- Particulate matter
- Offensive odours
- Any other atmospheric or climatic effects.

For **indirect or secondary effects** arising from the project:

- Traffic impacts
- Effects from extraction and consumption of materials, waste, energy or other resources
- Effects of ancillary works e.g. new roads, sewers, power lines, pipelines, and telecommunications
- Effects on other existing or proposed development
- Secondary effects resulting from the interaction of separate direct effects listed above.

Generally:

- Reversibility, or otherwise, of potential impacts
- Any risks and uncertainties associated with baseline information and impact prediction.

#### **4. MITIGATING MEASURES**

Where significant adverse effects are identified, descriptions of the measures to be taken to avoid, reduce or remedy those effects. Examples are:

- Site planning
- Technical measures such as

(i) process selection

(ii) recycling

(iii) pollution control and treatment

(iv) containment e.g. bunding of storage vessels

(v) noise insulation

- Aesthetic and ecological measures such as

(i) mounding

(ii) design, colour etc.

(iii) landscaping

- (iv) tree planting
  - (v) preserving particular habitats or creating alternative ones
  - (vi) safeguarding of historic buildings, ancient monuments and other historic or archaeological remains.
- An assessment of the likely effectiveness of mitigating measures, including any associated risks and uncertainties.

## 5. RISKS OF ACCIDENTS AND HAZARDOUS DEVELOPMENT

Where the proposed project would involve materials that could have a harmful environmental effect in the event of an accident, the ES should include an indication of the preventive measures that would be taken so that such an occurrence would be unlikely to have a significant adverse effect. This could, where appropriate, include reference to compliance with relevant requirements in or under the Health and Safety at Work etc Act 1974.

The Applications Rules require the applicant to notify the Health and Safety Executive and the hazardous substances authority (as defined in the Planning (Hazardous Substances) Act 1990) where the proposed order would involve the carrying out of an operation that requires hazardous substances consent under the 1990 Act.

Wherever possible, the risk of accident and the general environmental effects of the project should be considered together.

## Annex 8: Content of Book of Reference

No. on plan (1)	Extent and description of the land or property (2)	Freehold owners or reputed freehold owners (3)	Lessees or reputed lessees (4)	Tenants and Occupiers <u>17 18</u> (5)	Remarks including special category land <u>19</u> (6)
1	205 sq. metres House, garden and garage known as 9 Farm Drive, Oakland, Barsetshire BA5 1DB	Avinder Patel		Avinder Patel	Listed building Grade II
2	20 sq. metres Part of rear garden of 47 Ramsdale Road, Oakland, Barsetshire BA2 4QC	James Harrison Anne Harrison		James Harrison Anne Harrison	
3	850 sq. metres North-east corner of Crest Common, Millfield, Wessex WE21 4AE	Wessex County Council		Wessex County Council	Common land

4	1975 sq. metres Pasture land forming part of Longbottom Farm, Farthing Lane, Chelshurst, Wessex, WE5 7CB	Mendels Farm plc	John Davies	John Davies	
5	214 sq. metres Land adjoining River Trout at Troutbeck Hall, Near Throwton, Barsetshire, BA10 2DR	Marek Polanski		Frank Fisher Lucy Smith	SSSI
6	1213 sq. metres House and garden known as Cave Cottage, Theo Street, Windhaven, Wessex WE1 2AA	The Environment Agency	Paula Davis	Paula Davis David Goldberg	Crown land
7	77 sq. metre drainage pipeline over common land and public footpath at Horsfield Park, St John's Rise, Windhaven, Wessex WE9 3HY	Wessex County Council		Wessex County Council	Common land and public footpath
8	124 sq. metres Part of garden Brevett House, Lime Close, Lee, Barsetshire BA4 2EH	Adenike Ogunro		Adenike Ogunro	

17 To include persons with rights and easements to be extinguished.

18 Names of statutory undertakers who have been served with notice of application under rule 15 of the Applications Rules may be listed at the end of the Book of Reference, except where the undertaker has a proprietary interest in land subject to acquisition, which should be shown as above.

19 Any land in which there is a Crown interest and which is specified in rule 12(8)(d) to be identified in this column.

## **Annex 9: Model decision notice for applicants**

### **1. WHERE AN ORDER IS TO BE MADE**

**[INSERT NAME OF APPLICANT]**

#### **TRANSPORT AND WORKS ACT 1992**

Notice is hereby given under section 14(4) of the Transport and Works Act 1992 ("the Act") that the Secretary of State for Transport has determined under section 13(1) of the Act to make [with modifications] the [*insert title of Order*] ("the Order"). The Order was applied for by [*insert name and address of applicant*].

The Order will authorise [*describe briefly the main effect of the Order*]. Copies of the Order, once made, may be obtained from the Stationery Office or through booksellers.

The Secretary of State has, pursuant to section 14(1)(a) of the Act, given notice of his determination by way of a decision letter dated [ ], copies of which may be obtained from the TWA Orders Unit, Department for Transport, Zone 9/2, Southside, 105 Victoria Street, London SW1E 6DT. That letter gives the reasons for the determination and the considerations upon which it is based; information about the public participation process; and information regarding the right to challenge the validity of the determination and the procedures for doing so. It also describes the main measures to avoid, reduce and, if possible, remedy any major adverse environmental effects\*.

[\* omit if not applicable, e.g. because no ES required].

**[Insert appropriate name/title on behalf of the applicant]**

## **2. WHERE AN ORDER IS NOT TO BE MADE**

**[INSERT NAME OF APPLICANT]**

### **TRANSPORT AND WORKS ACT 1992**

Notice is hereby given under section 14(4) of the Transport and Works Act 1992 ("the Act") that the Secretary of State for Transport has determined under section 13(1) of the Act not to make the proposed [*insert proposed title of order*]. The proposed order was applied for by [*insert name and address of applicant*].

The Secretary of State has, pursuant to section 14(1)(a) of the Act, given notice of his determination by way of a decision letter dated [ ], copies of which may be obtained from the TWA Orders Unit, Department for Transport, Zone 9/2, Southside, 105 Victoria Street, London SW1E 6DT. That letter gives the reasons for the determination and the considerations upon which it is based; information about the public participation process; and information regarding the right to challenge the validity of the determination and the procedures for doing so.

**[Insert appropriate name/title on behalf of the applicant]**