HIGH SPEED TWO

ENVIRONMENTAL IMPACT ASSESSMENT AND CONSULTATION[1]

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Introduction

1. Although the first opportunity for objectors to HS2 to put their case in formal proceedings is likely to be before a Select Committee in Parliament, much work needs to be done well before that stage.
2. By the time a petitioner presents his or her case before the committee the principle of the Bill will have been established and it is likely to be too late to mount any effective challenge to the concept of a high speed rail link from London Euston to Birmingham.
3. As a result those who oppose the principle of the scheme, and I would suggest those who are concerned about the details, must engage with the process at the consultation stage; that, in effect, means before 29th July 2011.
4. In this paper I am will focus on two issues which aspects of the process, consultation and EIA. I also make reference to the requirements of the Habitats Directive. Papers provided by others will consider the next stages in the process.

Outline of the Process

5. The February 2011 consultation document "High Speed Rail: Investing in Britain's Future" the Government sets out the case for HS2, and seeks views on specific questions.
6. Consultation responses are required by 29th July 2011.
7. Following consideration of the consultation responses, a decision is to be made on whether to proceed with HS2 from London to the West Midlands[2].
8. In early 2012, following a decision to proceed with HS2, consultation on a more detailed compensation scheme for those living close to the route will take place, alongside consultation on safeguarding land[3].
9. The Government intend to deposit a hybrid Bill in October 2013 and to achieve Royal Assent at the beginning of 2015[4].

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[1] This paper has been prepared for a Seminar to be held at Landmark Chambers on 24th March 2011; it does not purport to provide a comprehensive guide to the HS2 consultation process, but to identify a number of practical points.
[2] High Speed Rail: Investing in Britain's Future; page 18 and Annex A paragraph 32
[3] High Speed Rail: Investing in Britain's Future; Annex A paragraph 32
[4] High Speed Rail: Investing in Britain's Future page 18

10. A hybrid Bill is "a public bill which affects a particular private interest in a manner different from the private interests of other persons or bodies of the same category or class."[5]
11. The House puts on records its support for the principle of the Bill at second reading and therefore there can be no challenge to the principle of the Bill. The terms of the resolution passed at second reading set out the principle of the Bill.
12. As a result of the hybrid Bill procedure, no effective challenge can be made to the route at the committee stage. Any objection based upon the principle or on alternative routes should be made at the consultation stage.
13. A second Bill is contemplated in the next Parliament for the second phase to Manchester and Leeds.

Consultation

14. The Government's proposals are set out in High Speed Rail: Investing in Britain's Future (February 2011) ("the Consultation Document").
15. The purpose of the consultation is said to be "to give people a chance to have their say"[6].
16. The seven specific questions on which the Government invites responses are set out at pages 25-26
17. Responses must be received by Friday 29th July 2011[7].

Legal Principles

18. If consultation is embarked upon it should be carried out properly.
19. In R v. North East Devon Health Authority ex parte Coughlan[8] Lord Woolf M.R., giving the judgment of the Court of Appeal stated:

108 It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken: R v Brent London Borough Council, Ex p Gunning (1985) 84 LGR 168 .

And at paragraph 112:

It has to be remembered that consultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice. Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this.

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[5] Speaker Hylton-Foster, as quoted at page 2 of the House of Commons Information Office Factsheet L5 – August 2010
[6] High Speed Rail: Investing in Britain's Future; paragraph 1.16
[7] High Speed Rail: Investing in Britain's Future; page 26
[8] [2001] QB 213 at paragraph 108

20. In R (on the application of Greenpeace) v. Secretary of State for Trade and Industry[9] Sullivan J considered a challenge to the Government's Energy Review. He held that the overriding requirement that any consultation must be fair is not in doubt, but what is fair and whether in particular fairness demands that new material which has been made available during the consultation period should be made available to consultees so that they have an opportunity to deal with it before a decision is taken depends upon the circumstances of the case[10].
21. At paragraphs 62 and 63 Sullivan J stated:

62.........................

A consultation exercise which is flawed in one, or even in a number of respects, is not necessarily so procedurally unfair as to be unlawful. With the benefit of hindsight it will almost invariably be possible to suggest ways in which a consultation exercise might have been improved upon. That is most emphatically not the test. It must also be recognised that a decision-maker will usually have a broad discretion as to how a consultation exercise should be carried out. This applies with particular force to a consultation with the whole of the adult population of the United Kingdom. The defendant had a very broad discretion as to how best to carry out such a far-reaching consultation exercise.

63 In reality, a conclusion that a consultation exercise was unlawful on the ground of unfairness will be based upon a finding by the court, not merely that something went wrong, but that something went " clearly and radically" wrong.

22. In R (on the application of Hillingdon) v. Secretary of State for Transport[11] the High Court considered a challenge to decisions relating to a third runway at Heathrow airport.
23. The main complaint in relation to consultation was identified by Carnwath LJ at paragraph 29:

29 Consultation The main complaint is that the January 2009 decision was " fundamentally different from the subject matter of the consultation" , making the process " conspicuously unfair" (see R(Elphinstone) v Westminster CC [2008] EWHC 1287 paras 61-2, [2008] EWCA Civ 1069 para 63; R(Edwards) v Environment Agency Civ 877 paras 92-4). The claimants focus on three elements in the final decision which were not present in the Consultation document:

i) an entirely new target for aviation emissions to be capped in 2050 below 2005 levels;

ii) support only for expansion up to 605,000 ATMs, with a review in 2020;

iii) the introduction of a new " green slots" policy applying to any additional capacity at Heathrow. These are said to have been " entirely new factors" which produced " a fundamentally different" decision from that consulted upon.

24. Carnwath LJ also considered whether a decision to proceed with a proposal for a project, but which had no substantive effect, was susceptible to judicial review. After adopting Sullivan J's analysis of fairness in Greenpeace, he stated (at paragraph 69):

[9] [2007] JPL 1314
[10] [2007] JPL 1314 at paragraph 61
[11] [2010] EWHC 626 (Admin)

It is not simply the “ high-level” character of some of the policy judgments which limits the scope for review. I would also emphasise the preliminary nature of the decision. As I have said, any grounds of challenge at this stage need to seen in the context, not of an individual decision or act, but of a continuing process towards the eventual goal of statutory authorisation. A flaw in the consultation process should not be fatal if it can be put right at a later stage. There must be something not just “ clearly and radically wrong” , but also such as to require the intervention of the court at this stage. Similarly, failure to take account of material considerations is unlikely to justify intervention by the court if it can be remedied at a later stage. It would be different if the failure related to what I described in argument as a “ show-stopper” : that is a policy or factual consideration which makes the proposal so obviously unacceptable that the only rational course would be to abort it altogether without further ado.

25. Article 7 of the Aarhus Convention relates to plans programmes but provides an indicator as to the degree of consultation and participation that can be expected:

PUBLIC PARTICIPATION CONCERNING PLANS, PROGRAMMES AND POLICIES RELATING TO THE ENVIRONMENT
Each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public. Within this framework, article 6, paragraphs 3, 4 and 8, shall be applied. The public which may participate shall be identified by the relevant public authority, taking into account the objectives of this Convention. To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.

Issues to consider

Responses to the Consultation Document

26. Those opposed to the scheme should not feel constrained by the seven questions set out in the HS2 Consultation Paper – the purpose of the paper is said to be to give people a chance to have their say.
27. Any objections to the principle of the scheme should be made.
28. If alternative routes are to be promoted they should be set out as clearly as possible; if resources permit an appraisal of their environmental effects should be submitted (the level of detail required would be equivalent to that found in the Appraisal of Sustainability (“AOS”)).
29. The AOS should be scrutinised by those directly affected by the route to consider the scope and adequacy of the assessments.
30. Although there will be a further opportunity to respond to detailed consultation on a discretionary compensation support scheme[12], representations should be made on that and related issues.
31. Although some objectors may be reluctant to “show their hand” before presenting a petition on the Bill, it is my view that by the time the committee is sitting it will be too late to make any significant changes to the route and certainly too late to challenge the principle of the

[12] High Speed Rail: Investing in Britain’s Future; Appendix A paragraph 32

scheme. As a result opposition to the scheme and alternative routes should be put forward at the consultation stage.

32. It would also be wise to put forward more detailed points at the consultation stage – this may result in the suggestions being subject to environmental assessment and may well support a later argument before the committee/s.
33. Although Parliament is likely to be reluctant to make changes to the compensation code by amending the Bill, some committee members may be sympathetic to proposed changes. Experience on the Crossrail Bill suggests that the promoter is likely to seek to avoid petitions on those issues being debated. As a result early suggestions on changes to the code or on provisions for the discretionary scheme may pave the way for an effective petition at a later date.

Additional Consultation

34. There will be additional consultation on the discretionary compensation scheme and on safeguarding of land.
35. That consultation will offer further opportunities to participate.

Potential for Judicial Review

36. Once the Secretary of State has introduced a Bill there will be little opportunity to bring a challenge in the courts.
37. The Secretary of State has indicated that, following the consultation he will make a decision as to whether to proceed. That decision may be susceptible to judicial review. The reasons for the decision, the availability of additional material and the process of consultation (including making responses available to other participants) all merit careful analysis.
38. The prospects of succeeding on any application can only be considered once the consultation is complete and the decision made. If the grounds of challenge were based upon points which could be taken when presenting petitions, the Secretary of State may argue that the claimant has an alternative remedy. Any claim for judicial review would have to be focussed on the decision to proceed following the consultation.
39. Any claimant basing his or her case on the contention that the consultation was deficient by reason of unfairness, should be able to demonstrate that something went “clearly and radically” wrong, and that intervention by the court is justified at the stage when the challenge is made.

Environmental Impact Assessment

The Legal Requirements

40. Article 1(5) of Directive 85/337 as amended (“the EIA Directive”) provides:

This Directive shall not apply to projects the details of which are adopted by a specific act of national legislation, since the objectives of this Directive, including that of supplying information, are achieved through the legislative process.

41. The scope of Article 1(5) was considered by the ECJ in World Wildlife Fund (WWF) and others v. Autonome Provinz Bozen[13] ("Bozen"). The Court held:

56 Article 1(5) provides that the Directive is not to apply 'to projects the details of which are adopted by a specific act of national legislation, since the objectives of [the] Directive, including that of supplying information, are achieved through the legislative process'.

57 That provision accordingly exempts projects envisaged by the Directive from the assessment procedure subject to two conditions. The first requires the details of the project to be adopted by a specific legislative act; under the second, the objectives of the Directive, including that of supplying information, must be achieved through the legislative process.

....

60 It is only by complying with such requirements that the objectives referred to in the second condition laid down by Article 1(5) can be achieved through the legislative process. If the specific legislative act by which a particular project is adopted, and therefore authorised, does not include the elements of the specific project which may be relevant to the assessment of its impact on the environment, the objectives of the Directive would be undermined, because a project could be granted consent without prior assessment of its environmental effects even though they might be significant.

61 That interpretation is borne out by the sixth recital in the preamble to the Directive, which states that development consent for public and private projects which are likely to have significant effects on the environment should be granted only after prior assessment of the likely significant environmental effects of those projects, and that this assessment must be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the people who may be concerned by the project.

62 It follows that the details of a project cannot be considered to be adopted by a Law, for the purposes of Article 1(5) of the Directive, if the Law does not include the elements necessary to assess the environmental impact of the project but, on the contrary, requires a study to be carried out for that purpose, which must be drawn up subsequently, and if the adoption of other measures are needed in order for the developer to be entitled to proceed with the project.

42. The Article 1(5) exemption was also considered in Luxembourg v. Linster[14]. The ECJ held:

53 According to the sixth recital in the preamble to the Directive, the assessment must be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the people who may be concerned by the project in question.

54 Thus, it is only where the legislature has available to it information equivalent to that which would be submitted to the competent authority in an ordinary procedure for authorising a project that the objectives of the Directive may be regarded as having been achieved through the legislative process.

[13] Case C-435/97

[14] Case C-287/98

43. Article 6 provides for consultation and Article 8 requires the results of consultation to be taken into account in the development consent procedure.
44. The approach to be taken when assessing linear projects was considered by Advocate General Gulmann in Bund Naturschutz in Bayern e.V. and Richard Stahnsdorf and others v Freistaat Bayern, Stadt Vilsbiburg and Landkreis LandshutCase C-396/92[15]:

71. ....

The subject-matter and content of the environmental impact assessment must be established in the light of the purpose of the directive, which is, at the earliest possible stage in all the technical planning and decision-making processes, to obtain an overview of the effects of the projects on the environment and to have projects designed in such a way that they have the least possible effect on the environment, That purpose entails that as far as practically possible account should also be taken in the environmental impact assessment of any current plans to extend the specific project in hand.

72. For instance, the environmental impact assessment of a project concerning the construction of the first part of a power station should, accordingly, involve the plans to extend the station' s capacity fourfold, when the question of whether the power station' s site is appropriate is being assessed.

Similarly, when sections of a planned road link are being constructed, account must be taken, in connection with the environmental impact assessment of the specific projects of the significance of those sections in the linear route to be taken by the rest of the planned road link.

45. Those observations made by the AG were considered by the ECJ, who decided that they did not have to make a ruling on the third question; however they expressed no disagreement with the AG.
46. Standing Order 27A(1) (House of Commons Standing Orders for Private Business)[16]:

27A.*—(1) Subject to paragraph (8) below, in the case of a bill authorising the carrying out of works the nature and extent of which are specified in the bill on land so specified, there shall be deposited on or before 4th December in the Private Bill Office and at the public departments at which copies of the bill are required to be deposited under Standing Order 39 (Deposit of copies of bills at Treasury and other public departments, etc.), either—*

(a) a copy or copies (as specified by paragraph (2) below) of an environmental statement containing, in relation to the works authorised by the bill

(i) the information referred to in Part II of Schedule 4 to the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (S.I. 1999, No. 293) (referred to below as "Schedule 4"), and so much of the information referred to in Part I of that Table as is reasonably required to assess the environmental effect of the works and as the promoters can reasonably be expected to compile; or

(ii) such of that information as the Secretary of State may in any particular case direct, or

(b) a copy or copies (as so specified) of a direction by the Secretary of State that no such statement is necessary in relation to the works authorised by the bill.

Issues to Consider

[15] At paragraphs 71 and 72

[16] The House of Lords Standing Orders Relating to Private Business contain a similar provision at standing order 27A

47. There can be little doubt that the first condition in Article 1(5) of the EIA Directive will be met – the details of the project will be adopted by a specific legislative act. The second condition needs to be considered more carefully – will the objectives of the Directive, including that of supplying information, be achieved through the legislative process?
48. Standing Order 27A make provision relating to the form of an ES, namely that it is to provide the information referred to in Schedule 4 of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 ("the 1999 EIA Regulations"), but little guidance on the procedure to be followed.
49. Standing Order 27A requires that an ES be deposited shortly after the Bill is deposited. The effect of Standing Order 27A is that the promoter will be required to provide an ES in a form similar to that which would be required if a project obtained consent by the grant of a planning permission.
50. No further provision is made in the standing orders to ensure that the other elements of the assessment required by the EIA Directive are carried out, such as:
    a. Consultation with authorities likely to be concerned by the project by reason of their specific environmental responsibilities (Article 6(1))
    b. The public should be given an early and effective opportunity to participate in the environmental decision making procedures (Article 6(4)
    c. The results of consultations and information gathered pursuant to Articles 5, 6 and 7 must be taken into consideration in the development consent procedure (Article 8).
51. I anticipate that the promoter may chose to consult with authorities likely to be concerned by the project by reason of their specific environmental responsibilities, and with the public in order to avoid any argument that the Article 1(5) exemption does not apply. However objectors should monitor the process with some care.
52. The ES will be deposited shortly after any hybrid Bill is deposited.
53. Those petitioning against the Bill will have the opportunity to make representations on the ES. Those without locus standii to present a petition cannot do so; they may still wish to make comments on the ES.
54. No doubt those concerned about the environmental effects of the project will wish to study the ES and make representations on it. Representations may focus on the effects on the interests of those making the representation, but they should also consider whether the ES contains all the necessary information. The following issues may be of general interest:
    a. Is the route to the West Midlands an inevitable part of a larger project. What is the significance of the route from London to the West Midlands in relation to the second phase of the route to Manchester and Leeds. Do the principles set out by the Advocate General in the Bavarian Roads case apply? Should the ES contain an assessment of phase 2?
    b. Is the assessment of alternatives adequate? Have realistic alternatives put forward by objectors at the consultation stage been considered?
    c. Have indirect secondary and cumulative effects been considered? Will the project attract ancillary developments?[17] Have the effects of those developments been assessed?

[17] See paragraph 2.1 of the EU Commission Guidelines for the Assessment of Indirect and Cumulative Impacts as well as Impact Interactions (May 1999)

55. If an objector considers that the ES is deficient he or she may wish to take the point when presenting a petition, or if he or she does not have locus standii to make a petition, the only alternative may be to make a complaint to the European Commission.

The Habitats Directive

56. A Habitats Regulations Assessment Screening was undertaken in tandem with the options sifting process[18], and can be found at Appendix 4 to the Appraisal of Sustainability ("AOS").
57. The conclusion of the report was:

"An AA is not considered necessary for any of the Natura 2000 sites considered potentially vulnerable (i.e. within 10km of) the proposed route or the main alternatives."[19]

58. The approach taken to Habitats Regulations assessment requires careful consideration. If the route changes, or if there is a real risk[20] of a significant effect on a European site, notwithstanding the fact that it lies more than 10km from the proposed route, such a point should be made in the consultation process.

Conclusion

59. If an objector waits until the time for depositing his or her petition, he will have lost many opportunities to participate in the process.
60. An objector may wish to:
    a. Respond to the consultation
    b. Consider whether any decision to proceed with the HS2 project is susceptible to judicial review.
    c. Petition against the Bill.
    d. Consider whether the ES deposited with the Bill provides the necessary information.
    e. Participate in any consultation on the ES.
61. For those who wish to object to the principle of the scheme and/or its route, they should act before the 29th July 2011.

Neil Cameron QC 21st March 2011

[18] Appraisal of Sustainability 7.4.12

[19] Habitats Regulations Screening Assessment, Appendix 4 to the AOS, paragraph 6.1.2

[20] In R(Morge) v. Hampshire CC [2010] EWCA Civ 608, Ward LJ stated (at paragraph 80) in relation to EIA – "*Thus " likely" connotes real risk and not probability*". The decision in Morge was upheld in the Supreme Court, although permission to appeal on the EIA point was refused and therefore not considered by the Supreme Court. Although the relevant passage of Ward LJ's judgment related to EIA not the Habitats Directive, the conclusion reached was derived from the ECJ's analysis of the Habitats Directive in Waddenzee [2005] Env. L.R. 14.

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