EXECUTIVE NOTE

DRAFT THE TRANSPORT AND WORKS (SCOTLAND) ACT 2007 (INQUIRIES AND HEARINGS PROCEDURE) RULES 2007

1. The above instrument would be made in exercise of the powers conferred by sections 10(1) and (2) and 28(6) of the Transport and Works (Scotland) Act 2007 (asp 8). The instrument is subject to draft affirmative resolution procedure.

Policy

2. The Act places the Scottish Ministers at the heart of an order-making process for the authorisation of the construction or operation, or matters connected with the construction and operation of a guided transport system or an inland waterway. These rules regulate the procedures prior to, the conduct of proceedings during and the procedures after an inquiry or hearing held under section 9 of the Transport and Works (Scotland) Act 2007.

3. An inquiry is to be held where the nature and extent of the objections to a proposed order is such that the Scottish Ministers consider that it would be inappropriate to proceed by way of exchanges of written representations or an informal hearing. An inquiry may also be held if the Scottish Ministers have received a request from statutory objectors, as designated under section 9(4) of the Act, to hold an inquiry. An inquiry held before a reporter is a means of enabling persons with an interest in a scheme or proposal to present their case, orally and in writing, to test the arguments presented by others, within, importantly, a structured framework.

4. A hearing is more in the nature of a round-the-table discussion, with the reporter leading the discussion. Cross-examination is not permitted unless the reporter considers that it is required to ensure a thorough examination of the main issues. In practice, because of the nature of orders under the Transport and Works (Scotland) Act 2007 and the complex issues that are likely to arise (such as, for instance, compulsory purchase powers or noise concerns) there are likely to be few occasions where a hearing offers a more appropriate means of dealing with objections to an order under the Transport and Works (Scotland) Act 2007 than an inquiry.

Consultation

5. In accordance with section 10(5) of the Transport and Works (Scotland) Act 2007 the Scottish Ministers have consulted with the Council on Tribunals, a standing advisory body established under the Tribunals and Inquiries Act 1992, and the Council has consulted its Scottish Committee. The Committee commented favourably, in response to direct questions posed by the Scottish Government, on the value of including pre-inquiry provisions, further advised that timescales for the conduct of an inquiry or hearing could not be reduced further than those contained within the rules without prejudicing interested parties and argued for the retention of a statement of case in the interest of fairness.

6. The Scottish Government has not made any substantive change to the rules as drafted since, as the Committee advised; "*The rules as drafted are properly comprehensive; they cover all necessary processes but to be any more prescriptive would jeopardise the Reporter's impartial consideration of the facts as presented*".

7. A formal written consultation on the draft secondary legislation of Transport and Works (Scotland) Act 2007 was conducted between 2 July and 31 August 2007. There were nineteen respondents. A summary of all responses was published on 27 September 2007 on the Scottish Government website[1].

Financial Effects

8. An inquiry or a hearing will be conducted by reporters from the Directorate for Planning & Environmental Appeals. The costs of engaging a reporter's services for an inquiry or hearing were calculated within the Financial Memorandum[2] as being about £16,500 per application. A revision has occurred which now suggests their costs, on a daily rate, are £4000 for an inquiry or a hearing.

9. Historically the purpose of charging fees has been to obtain recompense for administering a consent process and apply a financial hurdle so as to prevent ill-thought or vexatious applications from coming forward. The legislation reflects the policy position of applying an up-front fee rather than seeking reimbursement of costs at the conclusion of the process. By having an up-front fee there are two clear benefits: one, promoters know from the outset what the charges will be and can build them into their financial plans and, two, such an approach alleviates the need for a bureaucracy to seek re-imbursement of any Scottish Government costs from the promoter.

10. It is acknowledged that such an approach could conceivably mean that actual costs borne by the Scottish Government may prove greater or lower than the fee level which the promoter is expected to pay since the likely duration of an inquiry or hearing will not be known when the application is made. The Scottish Government is of the view that a pragmatic position has been adopted which seeks to minimise administrative costs whilst maintaining the principle of having the promoter contributing at least in part to the expenses generated by the process.

11. In that light, there are provisions for the Scottish Ministers to charge a fee for the making of an application for an order of £10,000, if the applicant is a public or private sector body, and £1000 if they are a charity or are seeking to promote a project which relates to a heritage railway.

12. A regulatory impact assessment for secondary legislation under the Transport and Works (Scotland) Act 2007 has been produced and a copy accompanies this note.

Transport Directorate
November 2007

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[1] http://www.scotland.gov.uk/Publications/2007/09/Transport

[2] http://www.scottish.parliament.uk/business/bills/66-tranworks/b66s2-introd-en.pdf see paragraph 116

Transport and Works (Scotland) Act 2007

Composite regulatory impact assessment of rules and regulations under the Transport and Works (Scotland) Act 2007.

Transport and Works (Scotland) Act 2007 (Applications and Objections Procedure) Rules 2007
Transport and Works (Scotland) Act 2007 (Inquiries and Hearings Procedure) Rules 2007
Transport and Works (Scotland) Act 2007 (Consents under Enactments) Regulations 2007

13. Title of proposals

13.1 This is a composite regulatory impact assessment of rules and regulations under the Transport and Works (Scotland) Act 2007: those being rules and regulations being Applications and Objections Procedure Rules 2007, Inquiries and Hearings Procedure Rules 2007 and Consents under Enactments Regulations 2007.

14. Purpose and intended effect

(i) *Objectives*

14.1 The rules and regulations made under the Transport and Works (Scotland) Act 2007 (the "TAWS") and as detailed above set out the procedures for the making of applications for Orders under Part 1 of the TAWS and for making and considering objections and representations in respect of those applications, and assimilation of procedures for other consents.

(ii) *Background*

14.2 TAWS Orders are the means of authorising the construction and operation of railways, tramways, other guided transport systems, trolley vehicle systems and canals. Applications are made by promoters of schemes (either public authorities or private concerns) to the Scottish Ministers. The Scottish Ministers may also at their own volition promote schemes.

14.3 The nature and size of schemes could vary considerably. They could range from a small scale heritage railway through to a major heavy rail scheme, with light rail, trams and guided bus schemes somewhere in between.

(iii) *Rationale for government intervention*

14.4 In previous years promoters of schemes were required to seek a Private Bill of the Scottish Parliament. That mechanism was viewed by many, including the Scottish Parliament as being unwieldy, time-consuming and inappropriate. The TAWS remedies procedural deficiencies identified in the Private Bill process in respect of transport related developments. The TAWS also replaces the need for applications for a Light Railway Order – the current mechanism for authorising a heritage railway.

14.5 Since the Applications and Objections Procedure Rules provide a regulatory framework for making and considering applications for TAWS Orders and subjecting

them to public scrutiny, the statutory procedures must operate effectively, efficiently and fairly if decisions are to be taken promptly, while being sound and well-informed. The rules fully respect human rights and ensure that the environmental effects of schemes are to be properly considered.

14.6 The rules place great emphasis on process efficiency; an efficient process is in everybody's interests. It is important for promoters, who will be keen to get on with implementing their schemes. It is also important for objectors to schemes, who are faced with uncertainty and possible blighting of their property while a decision is awaited. Moreover, in terms of the general public interest, an efficient TAWS approval system can help to ensure that important improvements to Scotland's public transport infrastructure are delivered within a reasonable time-scale.

14.7 The Inquiries and Hearings Procedure Rules regulate the procedures prior to, the conduct of proceedings during and the procedures after an inquiry or hearing held under section 10 of the TAWS. The objective is to allow statutory objectors an opportunity, which is both fair and public, for a detailed examination by means of an inquiry or hearing of an application by an independent reporter. By having rules there is conformity and understanding for all parties taking part in the examination process.

14.8 In respect of the regulations relating to Consents under Enactments the policy objective is to ensure that permissions and consents that may be required for a particular development can, as far as possible, be considered and granted at the same time as the TAWS Order for the proposed development is being considered and approved, and in so doing make for an efficient process.

15. Consultation

(i) Within government

15.1 Internal consultation within the Scottish Government has been extensive throughout the Administration's various directorates, including transport, planning, environment and justice. Consultation has also been undertaken with Scottish Government agencies, namely, Historic Scotland and Transport Scotland.

(ii)Public consultation

15.2 A consultation paper[3] was published on the Scottish Government's website on 4 July 2007 and invited views by 31 August 2007. A wide range of organisations were notified of the consultation exercise. These included all Local Authorities, both National Park Authorities, every regional transport partnership, all relevant Government agencies, business and environment interests as well as legal firms and representative bodies that expressed an interest during the passage of the TAWS.

15.3 Nineteen responses were received to the consultation. A summary of all responses was published on 27 September 2007 on the Scottish Government website[4]. In the light of the consultation the Applications and Objections Procedure Rules were

[3] http://www.scotland.gov.uk/Publications/2007/07/consultation

[4] http://www.scotland.gov.uk/Publications/2007/09/Transport

strengthened to improve the consultation requirements placed on applicants with a greater requirement to consult with a wider range of consultees in respect of particular types of works in particular circumstances. As a consequence of respondents' comments it was decided that a fee should be applied to an application for a TAWS Order.

15.4 The Inquiries and Hearings Procedure Rules did not stimulate much comment as consultees were content with the proposals, and therefore no substantive changes were required or made.

15.5 Some respondents to the consultation suggested that other consent regimes should be considered for incorporation within the Consents under Enactments Regulations. Whilst the Scottish Government welcomes endorsement of its approach to incorporate appropriate consents, directions and licences within the authorisation process, so as to provide a comprehensive one-stop shop, it had originally considered and subsequently rejected for legal and operational reasons many of the additional consents proposed by the respondents. The Scottish Government, however, intends to assess the effectiveness of the legislation in addressing the proposed set of consents and then in the light of review is prepared to consider the future inclusion, if appropriate, of other consents, directions and licences in due course.

15.6 The Scottish Government is very grateful to all those who have provided comments and observations in response to the consultation exercise.

16. Options

16.1 Two options have been identified:

Option 1 - Do nothing. Clearly this is not a realistic option; rules and regulations provide a structure that ensures conformity and understanding for all parties engaged in the process.

Option 2 – Provide a set of rules and regulations that ensure efficient, fair and consistent procedures that deliver swift decisions but without sacrificing the quality of decisions and the ability of interested parties to make their views known. This is the preferred option.

17. Costs and benefits

17.1 The bodies and individuals likely to be affected are those that can make applications (which might include, for example, local authorities or Network Rail); those whose interests are affected by a proposed development (which might include, for instance, owners and occupiers of land); those who are required to be consulted on matters arising from a proposed application (which might include bodies such as Scottish Natural Heritage or the Scottish Environment Protection Agency etc.); and the Scottish Ministers who will take an active role in administering the process.

17.2 The rules and regulations will affect everyone directly involved in the TAWS application process as well as the interests of the public at large and are intended to

benefit all interested parties, whether they are for or against a proposed project or scheme.

17.3 The Applications and Objections Rules have been designed to ensure equity and fairness in the TAWS procedures by ensuring that all interested parties, regardless of their status and their interest in the application, are given a full and fair opportunity to participate in the consideration of applications, in accordance with the principles of natural justice and the need to arrive at well informed decisions. All parties will continue to be treated equally fairly, and the Rules will deliver benefits to everyone involved in the TAWS application process. It is not considered that the Rules will bring disproportionate benefits or have disproportionate effects on any particular groups. (Neither, for the reasons given above, will the new Rules have any race or gender equality impacts).

17.4 The changes in procedures are intended to benefit everyone involved in consideration of a TAWS application. As explained above more efficient procedures will be in the interests of applicants and all other interested parties, whether they be for or against the scheme, as prompt decisions will reduce delay and uncertainty - including the possible blighting effects of proposed schemes on local residents and businesses.

17.5 From the point of view of the wider public interest, TAWS decisions are likely in general to lead to quicker delivery of infrastructure projects which can be important to the economic, social and environmental well-being of the country. Quicker decisions may also, potentially, reduce the costs of implementing schemes (many of which are largely publicly funded).

17.6 It is estimated that, all other things being equal, the changes could lead to savings on decision times compared to the Private Bill process, although much will continue to depend upon the quality of applications.

17.7 At the same time, the rules and regulations will not in any way lessen the very careful consideration that is to be given to the economic, social and environmental impacts of each individual application. On the contrary, when compared to the previous Private Bill process the fuller information that will need to be provided with applications, and the increased provision for public participation, will help to ensure that such issues are fully examined.

17.8 It is therefore considered that, in overall terms, the measures under the TAWS process to improve the efficiency and effectiveness of the authorisation of developments are capable of bringing significant economic, social and environmental benefits. Although these benefits are likely to vary so much from case to case (depending upon the size and nature of the project, the savings achieved in a particular case and a range of other factors) that they cannot readily be quantified.

17.9 It is recognised that the measures contained within the Applications and Objections Rules are liable to result in some extra compliance cost for promoters at the front end of the application process, as they will need to provide fuller information at the early stage. However, as the provision of fuller information at the beginning of the process, as part of a more 'front-loaded' approach, is designed to reduce the need

for promoters to spend much time later on in responding to queries from the Scottish Government (or in clarifying matters with objectors) the impact of those measures on promoters should, in cost terms, be broadly neutral.

17.10 The measures should not result in any extra costs on objectors or other interested parties. Whether, and to what extent, objectors and others choose to involve themselves in the TAWS process is, of course, very much a matter for them. It should be noted that the £20 charge which was also applied to any person raising an objection to a Private Bill proposal will not apply under the rules.

17.11 It is acknowledged that under the Private Bill process charitable concerns were charged £1250 and other promoters £5000 for the making of an application with the possibility of additional charges being applied for such matters as publishing the Bill and the holding of an inquiry. The Applications and Objections Rules provide for a fee (payable to the Scottish Ministers) of £10,000 to be applied, in respect of an application for a TAWS order by a public or private sector body, and £1000 if they are a charity or are seeking to promote a project which relates to a heritage railway.

17.12 The purpose of a fee is twofold, firstly, to obtain, in part, recompense for administering a consent process and secondly to apply a financial hurdle so as to prevent ill-thought or vexatious applications from coming forward.

17.13 In the Financial Memorandum to the then Bill fee levels were not discussed; though it was stated that it was likely that promoters would be charged a fee that would meet the cost of holding an inquiry conducted by the reporter's unit.

17.14 The legislation reflects the policy position of applying an up-front fee rather than seeking reimbursement of costs at the conclusion of the process. By having an up-front fee there are two clear benefits: one, promoters know from the outset what the charges will be and can build them into their financial plans and, two, such an approach alleviates the need for a bureaucracy to seek re-imbursement of any Scottish Government costs from the promoter.

17.15 It is acknowledged that such an approach could conceivably mean that actual costs borne by the Scottish Government may prove greater than the fee level which the promoter is expected to pay since the likely duration of an inquiry will not be known when the application is made. It is believed, however, that this is a pragmatic position in that it seeks to minimise administrative costs whilst maintaining the principle of having the promoter contributing, at least in part, to the expenses generated by the process.

17.16 In terms of the overall picture, when account is taken of the potential benefits of quicker decisions arising from the implementation of the rules and regulations, as referred to above, it is considered that the new procedures should bring significant net cost benefits. As previously mentioned, though, these cannot readily be quantified as the size and nature of TAWS cases and the time taken to go through the TAWS process are liable to vary enormously.

18. Small/Micro Firms Impact Test

18.1 Small businesses, in the form of heritage railway operators, are likely to be applicants for TAWS Orders, although such applications will probably be of a small scale and relatively uncontentious (for example, a heritage railway company may seek authority to have a disused railway line transferred to them and to carry out some consequential works). More typically, small businesses are likely to be involved in TAWS cases as objectors to schemes, because of concerns about the potential effect of the construction or operation of a scheme on their business.

18.2 As the Applications and Objections Rules will apply equally to all applicants and to all persons who wish to object to, or make other representations about, applications, the above appraisal of costs and benefits will similarly apply to small businesses. For those who wish to object to or support a scheme, the procedures will not in any way prevent the opportunity for them to make their views known. Indeed, the requirement for promoters to provide comprehensive information in support of their applications and to engage in extensive consultation should make them well-placed to make informed comments.

18.3 For those who are promoting a heritage railway interest or hold charitable status the cost impacts of the proposals will be in terms of (a) having to provide fuller information with an application but (b) lower application fees. In regard to (a), the amount of extra information required is likely to be relatively small for a heritage railway scheme. Moreover, the impact of any extra cost involved at the application stage will be outweighed by savings later and by the benefit of receiving prompt decisions. In regard to (b), there is a decrease in fees. Those promoting a heritage railway interest would have required a Light Railway Order, which applied a fee of £5000 plus £1000 for each 0.5 hectares, or part thereof, in excess of 0.5 hectares if compulsory purchase powers were required and £750 plus £250 for each 0.5hectares , or part thereof in excess of 1 hectare where either land is owned by the applicant or an access arrangement is in place with the land owner. As advised in paragraph 5.11 charitable concerns were charged £1250 under the Private Bill process: an application under the TAWS by a charity or in respect of a heritage railway interest will be £1000.

19. Legal Aid Impact Test

19.1 Assistance by Way of Representation and Civil Legal Aid are not generally available for the type of inquiry that will be conducted under the TAWS and therefore there will be no impact on the Legal Aid fund.

20. "Test Run" of business forms

20.1 Copies of forms to be used under the TAWS procedure were included within the consultation exercise and met with approval. A minor modification to improve clarity on some forms has been made in the light of comments from consultees.

21. Competition assessment

21.1 It is not considered that the rules raise any competition issues as the rules apply equally to all applicants and any other persons engaged in the process.

22. Enforcement, sanctions and monitoring

22.1 Responsibility for ensuring compliance with statutory procedures rests with the TAWS Unit, established within the Transport Directorate.

22.2 There are no criminal sanctions for non-compliance with the procedure rules. However, a failure to comply with the statutory procedures could lead to a legal challenge in the Courts, if it resulted in substantial prejudice to a party's interests. Furthermore, promoters will be aware that any failure on their part to comply with the statutory requirements (such as those relating to the making of applications and serving of notices) could, if this results in corrective action having to be taken, lead to unnecessary delays in processing their application.

22.3 The operation of the new procedures will be closely monitored by the TAWS Unit and the rules and regulations will be subject to ongoing monitoring and review.

23. Implementation and delivery plan

23.1 The intention is that the rules and regulations will come into force on 28 December 2007. However, in order to ensure continuity, any outstanding applications which have not been determined under the Light Railways Order procedures at that date will continue to be subject to those procedures.

23.2 The Scottish Government has implemented the rules and regulations at the earliest practicable date in order to ensure that the desirable efficiency improvements over the Private Bill process are introduced as soon as possible.

23.3 Full guidance will be given on the new procedure on its introduction by way of comprehensive material, which is to be published and also made available on the Scottish Government's web site. The Scottish Government has also produced a much shorter, user-friendly guide to procedures, which is mainly for the benefit of potential objectors. The TAWS Unit will also be conducting workshops with key stakeholders prior to and shortly after commencement in order to familiarise those parties with the new procedure.

24. Post-implementation review

24.1 Under section 21 of the TAWS the Scottish Ministers are obligated to prepare a report by 1 October each year reviewing the operation of the preceding year up to an including 31 July.

24.2 That report will be published and a copy will be laid before the Scottish Parliament. It is also expected that the relevant Scottish Parliamentary committee will review the report and, if appropriate, call the Scottish Ministers to provide comment.

24.3 TAWS Unit administrators have included within their work programme the need to conduct a formal review at least every 3 years on the effectiveness and appropriateness of the rules although if there were any significant defects in the rules these would be addressed urgently.

25. Summary

25.1 The Applications and Objections Rules are intended to provide a welcome benefit to all parties concerned, whether they are promoters, objectors or those with other interests in schemes by strengthening consultation, the provision of relevant information and a straightforward approach to the making and handling of objections and representations.

25.2 The Inquiries and Hearings Procedure Rules seek to provide a swift, comprehensive and independent examination of issues raised by an application by means of an inquiry or hearing.

25.3 The Consents under Enactments Regulations ensure that permissions and consents that may be required for a particular development can as far as possible be considered and granted at the same time as the order for that particular development is being considered and approved and in so doing make for an efficient process.

In summary:

- There will be a modest increase in staff costs to the Scottish Government in administering the TAWS process and the provision of reporters to conduct inquiries and hearings. Additionally, Historic Scotland will be consulted on a promoter's environmental impact assessment as well, should it arise, providing an assessment to inform the granting of listed building consent or conservation area consent. The impact, however, on Historic Scotland will be minimal.
- There may be a modest increase in costs to promoters in having to engage more comprehensively in consultation and publicity of proposals, and provide a wider range of information than would have been the case under the Private Bill process. The increased investment at the start of the process ought to reduce the number of objections to an application, and generate greater certainty and direction around the formal examination and assessment of the proposal.
- The impact on Scottish Natural Heritage and the Scottish Environmental Protection Agency will be cost neutral. These bodies will be called on in relation to a promoter's environmental impact assessment. However the provision and scrutiny of the promoter's statement on environmental information in advance of the making of an application will reduce their engagement over the life-span of the project.
- The impact on other statutory bodies who must be consulted by the promoter according to the type of application will not be significant. The extent to which these bodies engage with the promoter can be largely determined by their own internal priorities and resources. Whilst the Scottish Government appreciates the limited resources of some of these bodies, particularly voluntary/membership-based bodies, because of their specific function, the Scottish Government does not expect their input to be required on a regular or frequent basis and therefore does not expect significant demands to be placed on them in terms of engaging with applicants.
- The impact on local authorities and National Park authorities will similarly not be significant for the various reasons as outlined above.
- In respect of the impact on the public the Scottish Government has provided a process that provides the public with meaningful opportunities to influence the design and development of the proposed project. Although the decision to pay for

legal representation is entirely voluntary, the Scottish Government expects that the conduct of inquiries and hearings as set out in the Inquires and Hearings Procedure Rules will reduce the inclination to require or acquire legal representation.

26. Declaration and publication

'I have read the Regulatory Impact Assessment and I am satisfied that the benefits justify the costs.'

Signed by the Responsible Minister ……

Minister for Transport, Infrastructure and Climate Change

Date ……..

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