Wildlife and Countryside LINK

CONSULTATION ON HM GOVERNMENT PLANNING WHITE PAPER

‘PLANNING FOR A SUSTAINABLE FUTURE’

Wildlife and Countryside Link Response

August 2007

Badger Trust

Bat Conservation Trust

buglife

BUTTERFLY CONSERVATION

Campaign to Protect Rural England

CBA COUNCIL FOR BRITISH ARCHAEOLOGY

Council for NATIONAL PARKS

Friends of the Earth

The Grasslands Trust for wildlife and people

THE HERPETOLOGICAL CONSERVATION TRUST

Open Spaces Society

The Ramblers

RSPB

THE wildlife TRUSTS

WOODLAND TRUST

CONSULTATION ON HM GOVERNMENT PLANNING WHITE PAPER 'PLANNING FOR A SUSTAINABLE FUTURE'

WILDLIFE AND COUNTRYSIDE LINK RESPONSE

Wildlife and Countryside Link (Link) brings together voluntary organisations concerned with the conservation and protection of wildlife, countryside and the marine environment. Our members practise and advocate environmentally sensitive land management, and encourage respect for and enjoyment of natural landscapes and features, the historic environment and biodiversity. Taken together, our members have the support of over 8 million people in the UK and manage over 476,000 hectares of land. Many of Link's members will be responding individually to this consultation. Our joint response therefore focuses on key issues of collective concern. It is supported by the following 15 member organisations:

- Badger Trust
- Bat Conservation Trust
- Buglife – Invertebrate Conservation Trust
- Butterfly Conservation
- Campaign to Protect Rural England (CPRE)
- Council for British Archaeology
- Council for National Parks
- Friends of the Earth
- The Grasslands Trust
- The Herpetological Conservation Trust
- Open Spaces Society
- The Ramblers' Association
- Royal Society for the Protection of Birds (RSPB)
- The Wildlife Trusts
- Woodland Trust

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1. Introduction

Link has been closely involved in the debate on the future of the planning system, including the reforms which led to the Planning and Compulsory Purchase Act 2004 and the Barker Review of Land Use Planning. We submitted comments on the Barker Review and have been engaged in discussions with officials and ministers over the contents of the Planning White Paper.

We are concerned that the Government's planning reforms threaten valuable landscapes, habitats, historic environments and local character, as well as restricting opportunities for the public to have a meaningful say at public inquiries on major infrastructure.

Our concerns have their origin in the Barker Review. Although this had a generally positive view of the importance of planning, it was still a narrowly focused economist's view of the world, using a selective evidence base. It was wrong to conclude that planning procedures, and protection of the environment, are a major constraint on the economy. Many other areas of public policy have a more direct impact on the drivers of productivity than planning. Indeed, planning supports the quality of environmental capital, which makes a substantial positive contribution to economic activity and quality of life[1].

Although the 2007 Planning White Paper does not adopt all of Barker's recommendations, its tone is deeply alarming. Despite many references to sustainable development, rhetoric about strengthening the economic pillar, implying that somehow the social and environmental pillars have become pre-eminent, does not fit our experience of the continuing loss or degradation of environmental resources. Promoting economic development, seemingly above all other sustainability considerations, is contrary to the principles of sustainable development, as outlined in the UK Sustainable Development Strategy and Planning Policy Statement 1.

Indeed, the overall thrust of the White Paper appears to be concerned with speeding up major planning decisions in favour of short-term business interests. The real purpose of planning, however, is to deliver long-term sustainable development in the wider public interest. The key issues and solutions we propose are intended to ensure that the planning system delivers environmentally sustainable outcomes, whether in the town and country planning regime or in planning for major infrastructure projects.

1.1 Summary of our key concerns

Of most concern to Link are the proposals for dealing with major infrastructure development, referred to in the White Paper as Nationally Significant Infrastructure Projects (NSIPs). In particular, we believe that the creation of a new Infrastructure Planning Commission (IPC), possessing far greater powers than any other decision making body in England, could lead to unsustainable and undemocratic future land use. We would, therefore stress the importance of embedding a statutory sustainable development duty into any new legislation for major infrastructure projects, which must be determined in accordance with proper environmental assessment.

[1] GHK Consulting, for RSPB, 2006, *A response to the Barker Interim Report – economic issues*.

In its current form, Link believes that the proposed planning reform package is unlikely to provide either greater certainty or quicker decisions, due to the likelihood of legal challenge over the status of National Policy Statements (NPS) and the fairness of new Inquiry rules. We question the sense in changing Inquiry procedures when new rules that were introduced for major infrastructure projects in 2005 have yet to be used.

Our key concerns can be summarised as follows:

- A sustainable development duty should apply to all individuals or organisations exercising functions in relation to Nationally Significant Infrastructure Projects (NSIPs).
- Strategic environmental assessment and where appropriate, strategic appropriate assessment, should be carried out for all National Policy Statements (NPSs). Applications for NSIPs must be subject to adequate environmental impact assessment (EIA).
- Link has serious reservations about the setting up of an Infrastructure Planning Commission (IPC). We believe it should not be given many of the powers proposed in the White Paper. In particular, Ministers should take the final decision on the consenting of NSIPs.
- The IPC could play a useful role in the scrutiny of NPSs, provided that it has proper expertise in ecological, marine, environmental and assessment issues. However, there is widespread support for the value of the Planning Inspectorate and particularly their perceived fairness and objectivity.
- The proposed arrangements for public consultation are plainly inadequate for the kind of site specific and influential NPSs proposed. They contain no measures which might actively encourage communities to participate in the shaping of decisions.
- Public Inquiry remains the best way of judging the merits of the scientific assessments of technologies and their interaction with a particular location. An NPS should not be so detailed as to prescribe particular technologies or places and Public Inquires must be free to test the validity of each proposal, guided by national policy but not restricted from exploring detailed impacts.
- Link objects to the proposal to consider raising EIA screening thresholds, in the absence of any information to suggest that the current thresholds are too low.
- Link objects strongly to the removal of the right to be heard at inquiry. Inquiry participants should be able to challenge the need for projects.
- Replacing the three specific consultation opportunities in LDF preparation with one broadly defined duty to ‘consult’, together with the removal of independent testing of the Statement of Community Involvement, represent a major step back for community participation and engagement.
- We are greatly concerned by the apparent ‘presumption in favour of development’ promoted by the White Paper.
- The Planning White Paper fails to recognise the potential impacts of its reforms on biodiversity and its ability to adapt to climate change.

PLANNING FOR NATIONALLY SIGNIFICANT INFRASTRUCTURE PROJECTS (CHAPTERS 2-5 OF THE WHITE PAPER)

2. Sustainable Development Duty for Nationally Significant Infrastructure Projects

Link believes that a sustainable development duty is a key environmental safeguard in proposals for planning Nationally Significant Infrastructure Projects (NSIPs).

2.1 Introduction

The environmental sector approaches the Planning White Paper with suspicion because of its origins in the Barker Review, which focused on economic development, used inappropriate language about sustainable development, and which had a questionable evidence base [2].

While there are elements of the White Paper's proposals for major infrastructure that we welcome (e.g. clear national policy and pre-application consultation), we are looking for environmental safeguards in any new system. Ensuring that decisions are environmentally sustainable is a key safeguard. We recognise that the White Paper contains much rhetoric about sustainable development (not least in its title, *Planning for a Sustainable Future*), and the concept is better expressed than the Barker Review, but this must be made operational through a sustainable development duty, which is missing from the proposals.

There is a variety of compelling reasons for introducing a sustainable development (SD) duty in new legislation, but critical is ensuring that projects provide environmentally sustainable solutions. The SD duty should apply to any person or body who exercises specific functions in relation to NSIPs. It should be accompanied by guidance on implementation in both National Policy Statements (NPSs) and decisions on individual projects. Assessment tools are a key means of implementing sustainable development. The SD duty should be monitored, and scrutiny provided by the Sustainable Development Commission and by Parliament.

2.2 Rationale

A sustainable development duty in legislation for NSIPs is important for the following reasons, bearing in mind that this is not an exhaustive list:

- It is key to integrating, not balancing, sectoral interests, and ensuring that projects are more likely to be environmentally sustainable solutions
- It gives statutory bite to sustainable development in both policy-making and in deciding individual projects
- It helps to implement the UK Sustainable Development Strategy
- It provides legislative consistency with the Planning and Compulsory Purchase Act 2004 and the Planning etc (Scotland) Act 2006
- It provides a degree of legitimacy, in that it gives the environmental sector and local communities a degree of confidence that appropriate decisions will be made
- Recently created public bodies, such as Natural England, have been given a sustainable development duty

[2] *Deconstructing Barker,* CPRE, 2007; *Barkering up the Wrong Tree,* RSPB, 2007

2.3 Application

Firstly, who or what would a decision apply to? Other sustainable development duties apply either generally to a body (e.g. Natural England), or to a body in undertaking specific functions (e.g. regional assemblies in preparing regional spatial strategies, the Secretary of State in approving them, or Scottish ministers in preparing the National Planning Framework) (see Annex 1).

Under the White Paper proposals, both the Secretary(ies) of State and the Infrastructure Planning Commission (IPC) exercise decision-making functions, in respect of national policy statements and individual projects respectively. Link and the Planning Disaster coalition have serious reservations about the decision-making powers of the IPC, but even in an alternative scenario in which the IPC only makes recommendations to the Secretary of State, it would have an important function in the planning process.

It is therefore appropriate that a sustainable development duty applies to both the Secretary of State and the IPC, whatever the precise role of each. In fact the duty could be applied generally, as in the Planning and Compulsory Purchase Act 2004, to any person or body who exercises any specific function.

2.4 Implementation, monitoring and scrutiny

As with any planning decision, there is a hierarchical structure to decision-making for sustainable development, with the EU and the UK Sustainable Development Strategies providing an overarching policy framework. For NSIPs, the National Policy Statement (NPS) will provide the immediate policy context for individual sectors and decisions by the IPC. We have argued above that a sustainable development duty should apply to both NPSs and individual decisions.

However, as the IHPC report for Defra and the Sustainable Development Commission makes clear[3], a sustainable development duty on its own does not guarantee sustainable development will actually be delivered. How will it be implemented?

Guidance on implementing the duty has a key role to play. This might be either of a statutory or non-statutory nature. Under the Planning and Compulsory Purchase Act, this is provided by non-statutory planning policy (particularly, for England, PPS1 *Delivering Sustainable Development*, and for Wales, *Planning Policy Wales*). Under the Planning etc. (Scotland) Act 2006, this is provided by *Statutory Guidance on Planning and Sustainable Development* (draft, March 2007).

2.4.1 Guidance

Guidance is potentially needed at two levels. Firstly, for the relevant Secretary of State in preparing the NPS. We anticipate that, in any case, guidance will be needed on the form, content and minimum standards (such as on public participation) for NPSs. Guidance, which should be statutory, should include how sustainable development should be implemented through the NPS. Although it is expected that NPSs will vary widely according to the sector (for example, on how-locationally

[3] *Review of Statutory Sustainable Development Duties*, IHPC, January 2006

specific they will be), there must also be certain common standards. These should include the use of appraisal tools, as discussed below.

Guidance is also needed for the IPC, whatever role it plays in the decision-making process. It is particularly important that this guidance should include the appropriate use of tools such as Environmental Impact Assessment (EIA) and assessment under the Habitats Directive.

2.4.2 Assessment tools

It is essential that the NPS, setting the framework for NSIPs, be automatically subjected to strategic environmental assessment (SEA) during their drafting to shape the proposals as they are developed. This is vital to ensure conflicts with the Government's stated environmental obligations are minimised and to promote joined-up government. Environmental issues have been neglected by public policy-making in the past and even quite recently (for example in the Government's 2003 Airports White Paper). Effective SEA will ensure the NPSs set a framework for environmentally sustainable development and EIA will provide a further safeguard to prevent individual projects causing significant negative impacts.

Although there is little experience in England of subjecting high-level policy statements to SEA, Scotland is rapidly gaining experience, having carried out SEA of its National Transport Strategy, Marine Renewables policy and Climate Change Strategy very recently. The UK Government needs to communicate with the Scottish Executive to learn from their experience of carrying out a worthwhile SEA process for strategic plans.

The White Paper suggests that sustainability appraisal (SA) should be undertaken for NPSs rather than SEA. We would prefer an SEA approach to be undertaken, which concentrates primarily on environmental issues but looking at social and economic issues where they relate to the environment, as envisaged by the SEA Directive (for example, human health and resource use). Extending the range of issues assessed to cover all social and economic issues, while maintaining the rigour and depth of assessment expected for SEA, may prove to be too costly and time-consuming. Since the NPSs will be primarily produced in response to perceived economic and social needs, SEA is an entirely appropriate tool to ensure that at the same time, they avoid needless damage environmental assets.

In order that the purpose and process of EIA / SEA are properly understood and the results are adequately taken account of in decision-making, the individual or body taking the decision (whether Ministers, as we prefer, or the IPC) must have a good understanding of environmental assessment and how to use the results in their decision. The IPC secretariat needs to include expertise in EIA and SEA in order to ensure that the EIA and SEA requirements have been properly applied and to advise on issues such as data requirements. We would recommend employing staff with the Institute of Environmental Management and Assessment Registered and Principal EIA Practitioner status, as these provide a recognised measure of professional standards for EIA professionals.

Link also argues in section 5, that assessment of NPSs (as well as projects) under the Habitats Directive will be necessary in many cases. Here, we note that the Birds and Habitats Directives, and the network of Natura 2000 sites which they establish, are regarded at the EU level as a key component of the EU Sustainable

Development Strategy, and a key tool in achieving the EU target of halting biodiversity loss by 2010. It is therefore entirely appropriate to regard a form of strategic 'appropriate assessment' as a means of implementing sustainable development.

The body approving NSIPs should also take into account regional sustainable development data held by regional or sub-regional observatories, to see where the major changes, trends and challenges are.

2.4.3 Monitoring and scrutiny

Monitoring of the actual environmental impacts of NSIPs (as for social and economic impacts) is needed to assess progress towards sustainable development and to inform future decisions. Developers should be required to undertake environmental monitoring during construction and operational phases for this purpose. Information on projects approved should also be fed back to the regional observatories, helping to build the evidence base.

High quality SEA and EIA is essential to the process, so quality should be monitored by an independent body. The IPC should also be required to make an annual report on its decisions, including compliance with the sustainable development duty. Formal scrutiny of the sustainable development duty could be undertaken by the Sustainable Development Commission and by Parliament.

3. Infrastructure Planning Commission

Link objects to a number of the proposals contained within the Planning White Paper dealing with the determination of Nationally Significant Infrastructure Projects (NSIPs). In particular, Link is concerned that the creation of the Infrastructure Planning Commission (IPC), set up to determine applications for major infrastructure development, will place important decisions on the future use of land in this country into the hands of a small exclusive panel of unelected, unrepresentative and unaccountable individuals. This comes at a time when Government should be demonstrating greater leadership in the way we use and develop land to combat the effects of climate change.

Link considers that the IPC should not be given powers to make final determinations on applications for NSIPs. It should instead make recommendations to Government Ministers who would ultimately be responsible for decision-making. IPC recommendations should be made publicly available, in order to demonstrate fairness and transparency. The IPC could, however, have a useful scrutiny role in the production of NPS using established Examination in Public Inquiry procedures.

Should the Government be mindful to take forward its current proposals, any new planning legislation must impose a statutory sustainable development duty on the Commission (see Section 2 of this response). Members of the Commission should be properly representative of sustainable development interests and include environmental, ecological, landscape and marine expertise.

With regards to the marine environment, we would like to state our objection to the proposal for the IPC to determine applications for major renewable energy developments where the bulk of the development is offshore. We would prefer to see the new Marine Management Organisation, proposed in the Marine Bill White Paper, deal with these applications.

Link is concerned that many NSIPs may be for carbon-intensive forms of development. The Government should consider whether the IPC should also be subject to a carbon duty, to ensure that decisions made do not breach emissions reductions targets. Such a duty must supplement rather than replace a sustainable development duty, which would provide a broad measure of protection for all environmental resources and would apply to all types of infrastructure projects.

It is not yet clear whether National Policy Statements will provide a strong and unambiguous policy steer to enable the IPC to make decisions based on sustainability criteria, need and environmental impact, including the effect of the proposed development on the achievement of national carbon reduction targets.

Most, if not all, applications dealt with by the IPC will require an Environmental Impact Assessment (EIA). The IPC must not consider any application until it has undergone thorough EIA, including ecological and landscape assessment where appropriate. It must reject applications that are not submitted alongside an Environmental Statement that meets all the requirements of the EIA Regulations[4]. The IPC needs to have the necessary expertise to judge whether the Environmental Statement is adequate.

[4] The Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 and related legislation such as that which applies to electricity projects, pipelines, etc

We object strongly to the removal of the right to an effective hearing at inquiry (see Section 4). The IPC should allow cross-examination by participants as the basis for oral examination rather than rely on direct questioning by the panel. We believe that inquiry participants should be able to challenge the need for projects, as the NPS may be deficient in this regard. There should be a fairer and more accessible opportunity for legal challenge to a decision of the IPC than via judicial review. We would suggest that a timescale of six weeks does not provide sufficient opportunity for members of the public, or other stakeholders, to instigate a challenge.

4. Public Participation and the Planning White Paper

Link is committed to a planning system which is fair, transparent and democratic for all participants and enshrines the objectives of sustainable development. While Government is free to set national objectives, the decision making process must provide for any proposals to be fully tested and for community views to be heard.

4.1 The participation and legitimacy test

The Government has committed itself to a participative decision making process both in the SD strategy and in the ODPM publication '*Public Involvement in Planning: the Government's Objectives*' (2004). This document provides a comprehensive discussion of the issues surrounding participation and particularly its contribution to local empowerment and the development of citizenship. Major infrastructure project reform should be tested by principles contained within this document. In particular, we should be clear of the vital distinction between consultation, which is essentially about communicating the results of decisions which have already been taken, and participation, which is meant to genuinely include people in the formulation of ideas and the development of proposals. Participation requires a range of operational principles and in particular honesty and responsibility by all participants.

National Policy Statements (NPSs) will have an unprecedented weight in the decision making process. The White Paper asserts that NPSs 'should be the primary consideration for the Commission in determining applications for development consent, i.e. that they should have more weight than any other statement of national, regional or local policy' (para 3.12). The implications of this ambition are wide ranging and would set up an NPS as having more weight than Planning Policy Statements or the Sustainable Development Strategy, or even a White Paper. The White Paper goes on to say that matters contained in NPSs need not be addressed again either in the planning application or at the inquiry stage.

It is hard to find a precedent for NPSs set out in the White Paper. These documents can best be described as a kind of 'super development plan' which even if not determinative, have overwhelming force in the decision making process. While the idea of national policy clearly expressed is desirable, the weight envisaged for NPSs requires specific measures to secure public legitimacy.

4.1.1 Public participation and legitimacy in National Policy Statements

While paragraph 3.22 commits Government to effective consultation, there is an urgent need to define in detail what this might mean. Without such details it is impossible to understand whether this will be an effective forum for the expression of community representations. This is critical because NPS decisions will impact directly on people's individual and property rights in ways unlike any other form of existing national policy. Paragraph 3.25 suggests that the standard would be the current Cabinet Office code of practice on consultation.

These current arrangements are for consultation and contain no measures which might actively encourage communities to participate in the shaping of decisions. For example, currently information and publicity about White Papers is not disseminated locally and many citizens are unaware of the process. There is no formalised mechanism for the meeting of community representatives, groups or individuals. Instead the debate on a White Paper is limited to key stakeholders with members of

the public having only one route to express their views by responding to the consultation in writing. This is plainly inadequate for the kind of site specific and powerful NPSs proposed.

Significantly the Cabinet Office's recent consultation on a review of these procedures makes clear that consultation is useful only where the policy process is already underway. "It therefore does not invite an open debate on very broad areas of public policy, nor does it empower those who participate with the final decision"[5]. The limited scope of the consultative process is not reassuring. Neither is the Cabinet Office proposal to reduce the 12 week consultation process to six weeks[6]. The Planning White Paper makes no reference to these proposals in its endorsement of the Cabinet Office standards. Link believes the idea of a six week consultation period for an NPS is wholly unacceptable.

4.1.2 The preparation of National Policy Statements

Chapter 3 of the White Paper makes clear that the relevant Government department will be responsible for preparing NPSs. They would have a time horizon of ten to fifteen years (para 3.31) and be reviewed every five years. Given the weight of an NPS, three important question flow from the proposals in addition to the issues of public participation discussed above:

1. What level of Parliamentary scrutiny will NPSs be subject to?
2. How can the content of an NPS be challenged if new evidence on, for example, climate change is produced?
3. Given that a site specific NPS is likely on occasion to engage both property rights and aspects of the Human Rights Act, how will the broad issues of right to a fair hearing be dealt with?

The White Paper does not provide a clear recommendation for a Parliamentary process. Paragraph 3.28 suggests that "examination by the relevant select committee" might be one option. Given the potential for an NPS to be site specific, the Parliamentary process would need to be extremely rigorous, involving committees in the full examination of a wide range of evidence including a range of individuals whose rights were affected by the NPS. These would create a demanding and ongoing workload for Parliament. An external examination of an NPS by the Planning Inspectorate may allow for a more manageable system. It would not, however, remove the need for a Parliamentary debate and vote in order to secure the democratic accountability of the process.

Paragraph 3.11 of the White Paper makes clear that the content of an NPS should not be reopened at the Public Inquiry. This places great pressure on the preparation of an NPS to consider all the relevant material issues including detailed scientific research on, e.g. nuclear safety. This process is characterised by significant scientific and technological change and development and the question arises as to how NPSs can be challenged when it contains out-of-date science and before it is scheduled for review. The White Paper suggests that new evidence would have to be presented to the Secretary of State and that they would consider whether a review was justified. How they would reach this judgement is not made clear. Link believes the Public Inquiry remains the best way of judging the merits of the scientific assessments of

[5] *Effective Consultation*, Cabinet Office, HMSO, 2007, para 1.12
[6] ibid, para 5.17

technologies and their interaction with a particular location. NPSs should not be so detailed as to prescribe particular technologies or places and Public Inquiries must be free to test the validity of each proposal, guided by national policy but not restricted from exploring detailed impacts.

4.1.3 National Policy Statements, site specificity, and the Human Rights Act

Paragraph 3.9 of the White Paper makes clear that national policy can make 'locationally specific' decisions on the future of infrastructure. There is an important parallel here with the passage of the Planning and Compulsory Purchase Act 2004, which created a statutory planning framework for the English regions. During this process it was made clear that regional plans (Regional Spatial Strategies or 'RSS') could not be site-specific because the preparation of these plans contains no statutory rights to object and be heard. This decision is reflected in PPS 11 on RSS.

Since the proposals are currently vaguely drawn and untested, it is not possible to give a definitive judgement about compliance with Article 6 of the Human Rights Act. However, there are important parallels with the development of case law around the existing planning system. Although the law is not settled it is already possible to discern some strands of accepted jurisprudence that make the approach being proposed in this consultation risky enterprise. Those include:

- Plan-making can engage civil rights in certain circumstances;
- In such cases the plan-making processes must be Art. 6 compliant;
- The precise cases in which the plan-making process will engage civil rights has not been determined and may vary depending on a number of circumstances;
- In cases where Art. 6 rights are engaged the Courts will have particular regard to the question of whether third parties were given a formal right to be heard by way of oral hearing and an opportunity to cross-examine. Those features have been held to be particularly important in findings that aspects of the plan-making system are compliant; "*The inquiry process itself allows for evidence, cross-examination and oral and written representations…The exercise by the local authority of a discretionary power to hold a further inquiry is an important part of the process*." [7]

In certain cases and for certain people the plan-making processes will engage Art. 6(1) rights and it will be necessary for the appropriate authority to ensure that their processes do comply with Art. 6(1) without which compliance they will be at serious risk of successful judicial review challenge. The uncertainty created by the absence of a clear right for objectors to be heard in any of the 'national level' policy documents clearly increases this risk.

In addition case law has established that, where a planning decision - including a decision on the principle of a development approval - turns on the resolution of purely factual disputes, an affected person is entitled to have that dispute resolved by an independent fact finder able to offer full procedures commensurate with the task, such as come with a planning inquiry before an inspector[8]. It appears it is almost inevitable that in the formulation of a national statement of need or strategic assessment that these kinds of factual disputes will arise.

[7] Bovis Homes Ltd -v- New Forest D C, 2002 EWHC 483, 2002 WL 347039, para. 329
[8] See, for example, Friends Provident -v- SSE [2001] EWHC Admin 820, 19th October 2001

Link acknowledges that the lack of comprehensive rights to be heard in relation to current national policy such as planning policy statements (PPS) is justified because no part of these documents has the legal weight of a development plan. They are high-level, non site specific documents. The NPS is very different. It can be a site specific document which clearly forms part of the development consent process. In both form and character it is much closer to the scope of a development plan and therefore much more likely to engage with the provisions of Article 6.

4.1.4 So what should NPSs deal with?

National policy should form the context within which a final planning decision is taken and as such should be fundamental to the debate at planning inquiry. National policy should then help to inform any subsequent inquiry into proposed major infrastructure. It should exclude site-specific matters (which should be dealt with at Public Inquiry) dealing with general issues of whether such development is necessary in the UK and if so, the criteria for its provision.

4.1.5 Safeguards on the NPS process

If the Government is determined to prepare NPSs that are site specific then the following minimum safe guards would need to be in place:

1. Issues and options stage where full consideration of alternatives takes place which satisfies the SEA Directive. This would require direct participative techniques applied to those communities affected as well as wider opportunities for public response through traditional and e-media.
2. Publication of draft NPSs.
3. Formal period of representations and objections. Anyone who makes a representation will have a right to be heard as with normal plan making.
4. Examination where representations can be heard, best delivered by the Planning Inspectorate.
5. Parliamentary approval.

4.2 Participation and the IPC

Paragraph 5.18 of the White Paper sets out that the IPC will have a far-reaching and unprecedented range of powers with final decisions not directly overseen by Ministers. Link believes the IPC is one of, if not the, most powerful decision making bodies in the UK context to make site specific decisions without direct accountability to Parliament or the electorate. The power of the IPC is manifest in a number of complex ways but principally there are concerns about three issues:

- Its power over legislation and Compulsory Purchase Orders
- Its very wide discretionary power of how and who to involve in any examination of a proposal
- The lack of direct accountability for individual decisions

There may be merit in the establishment of a new body to decide on NSIPs. It is worth noting, however, that there is widespread support for the value of the Planning Inspectorate and particularly their perceived fairness and objectivity. The Planning Inspectorate provides for community representation to be heard in a fair and sensitive environment valuing the diversity and expertise which many local people bring to this arena.

The removal of a direct line of democratic accountability to the final decision of the IPC is also worrying. An argument has been put forward that since national policy would be an expression of ministerial will, that final decisions would benefit from this indirect accountability. This argument only stands if an NPS was both site specific and wholly determinative, a status which raises all the legal and moral issues discussed above. The question remains as to how a non site specific statement can offer accountability to a final decision it did not deal with in detail. There is also the question of how decisions made contrary to that policy, for sound planning reasons, would be accountable in any form to Parliament. While ministerial involvement is perceived by some as undesirable political involvement in decisions, it is a vital anchor for public legitimacy.

4.3 The limitation of Public Inquiries

The Planning White Paper contains a wide range of limitations on what evidence and who can appear at Public Inquiries. As a result of the weight of the NPS, paragraph 3.11 of the White Paper is clear that "There should therefore be no need for inquiries on individual applications for development consent to cover issues such as whether there is a case for infrastructure development, what that case is, or the sorts of development most likely to meet the need for additional capacity, since this will already have been addressed in the national policy statement". In addition, strong limitations are on who can give evidence and in what format. Wide ranging discretion is afforded to the IPC to decide:

- If it is necessary to have an oral hearing (see diagram on page 38)
- Which witnesses to call (paragraph 5.31)
- How they should give evidence in person (paragraph 5.31)
- Whether witness can cross examine (paragraph 5.32)

In addition the White Paper proposes that 'the majority of evidence, given its likely technical nature, should be given in writing' (paragraph 5.31).

4.3.1 Removing the right to be heard

One of the critical issues of dispute about the conduct of inquiries is the issue of a right to be heard by local people. It is important to recognise that such a right is being positively removed in the proposed new planning regime. This conclusion is important for legal and moral reasons. The current regime for conducting inquiries is quite different and on the whole sounder. This regime is embodied in the Major Infrastructure Projects inquiry rules 2005 (SI 2005 2115). These rules incorporate some significant reform measures but included a right to be heard. This right is qualified and has been evolved through custom and practice. There is no right enshrined in primary legislation. Instead the system operates as follows:

- Rule 6 of the 2005 Inquiry makes clear that anyone may register to be a major or ordinary participant at an inquiry.
- Once having registered formally as a participant Rule 15 makes clear that those bodies will have a right to be heard.

In short the right is qualified in the sense that an individual must opt in at the beginning. Having once 'opted in' a participant has additional opportunities to exercise the right to be heard. In explaining, rule 19 of SI 2115 Circular 07/2005 makes clear that major participants have an "entitlement to cross-examine".

The rules and guidance also afford discretion to the inspector to hear anyone who has not formally registered in the process but wishes to be heard. Paragraph 44 of the circular makes clear "in practice anyone who wishes to appear at an inquiry will usually be allowed to do so"

The difference between the existing and proposed regimes is striking and the implications far reaching. Firstly, a right has been removed. Secondly, the replacement, the open floor session, is no more than a repackaging of the existing discretion of the inspector to hold a session which is less formal. Thus major losses of participative rights are in no way compensated for by any of the new measures. As a result it is simply factually incorrect to suggest that the new regime enhances public participation.

4.3.2 Presumption in favour of development

The first chapter of the White Paper appears to endorse Sir Rod Eddington's recommendation that there should be a presumption in favour of Nationally Significant Infrastructure Projects (NSIPs) "so long as they are consistent with national policy statements, and compatible with EU law and the European Convention on Human Rights" (box 1.3), a phrase which is repeated several times throughout the document, especially paras 5.39 – 5.48 ('The decision stage'). We strongly disagree that these should be the only grounds on which a NSIP, once identified in a National Policy Statement, could be rejected. It risks rendering whatever little community consultation takes place almost meaningless. Communities and interested parties must be given the opportunity to raise objections and concerns, and have the confidence that these will be taken into account and will have an influence when the final decisions are made. Furthermore, the presumption in favour of NSIPs may conflict with existing legislation where there is a duty to consult with user groups and the public, for example the Transport & Works Act 1992.

4.4 The value of public scrutiny in testing evidence

Experience shows that detailed public scrutiny leads to both the avoidance of projects that are unsound and to the improvement of those that go ahead. The Nirex RCF proposal was challenged, in the face of the status quo, by a detailed scientific case drawn together by the objectors. This case was accepted and the project did not go ahead. It is better for a project to be scrutinised in order that mistakes can be avoided at the planning stage.

Reform could improve the process of major public inquiries but this reform needs to be based on balanced objectives including genuine public participation. There should be urgent consideration of a range of measures including the funding of third parties in inquiries to create greater access and equality. Government should be aware that the risks of undermining legitimate public participation in the planning process will be that communities are forced to abandon a system from which they feel excluded, leaving them little option but to take direct action. This happened with the "Roads to Prosperity" roads programme of the 1990s, leading to much greater delay and cost, not least within the criminal justice system.

4.4.1 Article 6 and the Right to be Heard

A number of Human Rights Act (HRA) Article 6 issues are raised by the proposals to limit the evidence heard in Public Inquiries. The White Paper (para 3.11) makes clear that the intention would be to create a presumption that there should not be detailed oral evidence at inquiry on issues dealt with in national statements. We acknowledge that this is not a prohibition but it is a very clear and direct obligation on members of the IPC. However, in practice if a lay person wishes to give evidence on need, safety or high-level environmental considerations it is difficult to see how this could be prevented. An inspector would have to refuse to hear such evidence and this directly impacts on the individual's rights to a fair hearing. Since it is practically impossible to separate out principle from detail, it follows that it is highly dubious to expect individuals to be silenced when they move away from the draconian limitations on the evidence implied by the recommendations of the White Paper.

There is an equally worrying implication that inquiries might be invitation only. This would not satisfy the requirements of natural justice, property rights or the HRA. For reasons set out above, the examination of RSS is only legally safe because it cannot make site specific allocations.

In relation to participation it is worth setting out what Link believes the foundational principles of effective participation are. First, participation is a different concept to consultation and the words cannot be used interchangeably. The former idea is active and empowering, the latter passive. Second, and most importantly, public participation must be founded on a rights based approach to command any credibility with the public.

Any 'opportunity' for participation or even consultation that remains at the complete discretion of the decision maker is not a right for obvious reasons. The idea of a right to be heard in planning decisions in enshrined in section 19 of Planning and Compulsory Purchase Act 2004 and is a long established idea in planning decision making. The rights based approach is the only option which commands the confidence of the public and has a number of advantages over the Planning White Paper system:

- It avoids endless challenges to the exercise of discretion by the IPC based on who they will and will not hear evidence from
- It builds confidence in the public's mind that its voice cannot be simply ignored in the debate
- It secures compliance for those cases and individuals which may engage HRA Article 6 or basic property rights in relation to Compulsory Purchase Orders.

4.5 Summary and conclusions

As a general rule of good governance the greater the power of a body exercising functions on behalf of the state, the greater the need for robust safeguards. In summary, we have a very powerful new decision making body (perhaps without precedent) which operates in the context of strongly directive NPSs which may be site specific. At the same time there is a clear reduction in both accountability and participation. These two ideas are separate but related and both have to operate to construct a robust and legitimate system. There is no doubt that direct accountability for individual decisions is now removed from the process since Ministers have no direct involvement in this process. The fact that NPSs may have some form of

Parliamentary approval does not compensate for this in any way because the final decision may depart (so we understand) from the contents of an NPS.

Link is concerned that accountability, participation and redress are, as a minimum, maintained at their current basic level and that taken together they can be seen to systematically provide safeguards to the new powers of the IPC. In practice we believe this would require:

- A right to be heard at an IPC inquiry
- A right to be heard into the preparation of site specific NPS
- Direct accountability of IPC decisions to Ministers.

The process of determining the location of new major infrastructure facilities should be based on the principles of an open, participative and transparent process which is clearly accountable and impartial. Managerial rather than structural reform of the inquiry process is likely to be the most effective method of increasing efficiency. However, significant change is needed to enable many more ordinary participants to engage in the decision-making process. In this regard we urge that consideration be given to the limited funding of third parties in order that they can gain full access to the decision making process.

Link is not opposed to clear statements of national policy which can assist the debate into the determination of specific developments. However, national policy statements should not attempt to restrict the debate at local inquiries nor should it be prepared in such an outdated and regressive manner. Opportunities must be created for the proper testing of national policy by an independent body in an arena which affords clear individual rights to participate. In this regard we strongly suggest a re-examination of the powers and procedures to hold Planning Inquiries Commissions which could both deal with high level policy and hold fully open Public Inquiries.

5. UK Habitats Regulations implications for the Planning White Paper

In relation to appropriate assessment under the Conservation (Natural Habitats, &c.) Regulations 1994 with regard to NPSs and proposals submitted to the IPC, Link would like to see;

- Strategic Appropriate Assessment of all National Policy Statements (NPS)
- Ecological expertise for the Infrastructure Planning Commission (IPC)
- Recognition that inquiries may have to consider need and alternatives

5.1 National Policy Statements (NPS)

If an NPS is to be used by the IPC in decision making then it will have to contain a sufficient level of detail to influence the location of Nationally Significant Infrastructure Projects (NSIPs). Given that the NPS will carry so much weight in determining the IPC's decision and is the only viable mechanism for taking Ministers' (elected representatives) considerations into account, having a vague NPS that lacks detail would simply lead to an unelected body having greater scope in their decision making. Should these policy statements promote localities, either specifically or in more general terms, and these proposals are likely to have a significant effect on Natura 2000 sites they will require an Appropriate Assessment (AA). Given the information available it would seem that many of the NPSs will have significant effects on Natura 2000 sites and therefore will require an AA.

Link agrees with the statement in paragraph 5.48 that stipulates that the IPC would be required to apply the tests of the Habitats Directive in reaching its decision. However, we are concerned that a NPS could help in identifying whether there was 'overriding public interest' for the proposed development. Under this scenario, applications for major development would not be considered by the IPC on their individual merits, and site-specific features of biodiversity importance would fail to be taken into account.

If the NPS makes provision for a NSIP in an area that has Natura 2000 sites in the vicinity then the need for the appropriate assessment is apparent. However, it is also very likely that many, even the less locationally specific, NPSs should be subject to appropriate assessment. This is because they will have a direct influence on the siting of a development through their policies, even if they are not providing exact locations. For example, if a statement suggests that four new ports are needed but does not say where they should be, there are still only a certain number of viable locations (e.g. coastal, viable transport infrastructure) for these ports, and some of the four will be likely to have a significant effect on a Natura 2000 site. This approach is compatible with that taken for the assessment of regional spatial strategy (RSS) policies which although not site specific, still make provisions for land use development and therefore must undergo appropriate assessment if required.

5.1.1 Assessment of Alternatives

Should the competent authority, after undertaking an AA, be unable to ascertain no adverse effect on the integrity of the SPA, then under Article 6 (4) of the Habitats Directive, consent can only be given if the competent authority is satisfied that there are no alternative solutions and that there are imperative reasons of overriding public interest for the project.

5.1.2 Alternative Solutions

If a project is likely to have an adverse effect upon a Natura 2000 site it will have to be proven that no alternative solutions exist. This assessment is not simply limited to alternative locations.

The alternative solutions test is a strict one, concerned with clearly demonstrating the genuine lack of less damaging alternatives. The Government has made it clear that the alternatives considered should be "credible and feasible".[9] These may include:

- A different site to deliver the desired development e.g. sites for onshore wind power are very likely to exist in a wide range of less damaging locations;
- A different method to deliver the need, e.g. use of Combined Heat and Power or wind energy, rather than a tidal barrage;
- Redrafting the NPS objective(s) and the resulting policy framework;
- The "do-nothing" option.

The "do nothing" option should always be considered and will act as a true test of whether the proposals of the NPS are needed to deliver the defined public interest objectives. It will also provide the government with a baseline from which it can assess the effects of other alternatives being considered[10].

The area of search may have to be quite wide. It is Government policy, in line with European Commission advice, that the search for alternative solutions is wide and they may be located in different regions or even countries[11].

We also remind the Government that the European Commission document *Managing Natura 2000 sites - The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC* states that:

It should be stressed that the reference parameters for such comparisons deal with aspects concerning the conservation and the maintenance of the integrity of the site and of its ecological functions. In this phase, therefore, other assessment criteria, such as economic criteria, cannot be seen as overruling ecological criteria.

Therefore, the considerations of alternatives cannot, under the Directive, be restricted to economic criteria.

SEA is a helpful tool in providing a comprehensive analysis of alternatives. The SEA Directive requires that 'reasonable alternatives' to the plan or programme are identified, described and evaluated. SEA of NPSs may provide a useful starting point for examining alternative solutions under the Habitat Regulations (such as obviating the need), not just alternative technologies or locations for development.

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[9] See paragraph 51 of the Secretary of State for Transport's decision letter on the Dibden Bay Container Terminal proposal, 20 April 2004.
[10] See section 5.3.1 of *Managing Natura 2000 sites.*
[11] See paragraph 51 of Secretary of State for Transport's decision letter on the Dibden Bay Container Terminal proposal, 20 April 2004.

5.1.3 No alternative and imperative reasons of overriding public interest (IROPI)

Given the location of many internationally protected sites and the preferred location of some NSIP proposals, it is possible that some proposals will be unable to be brought forward without the risk of adversely affecting the integrity of a Natura 2000 site. However, even if there are no viable alternative solutions, Article 6 (4) of the Habitats Directive still requires that IROPI is demonstrated.

For the NPS to demonstrate IROPI it must take the following into account. *Managing Natura 2000 sites - The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC* states that IROPI test must do the following:

*(a) The public interest must be **overriding:** it is therefore clear that not every kind of public interest of a social or economic nature is sufficient, in particular when seen against the particular weight of the interests protected by the directive (see, for example, its fourth recital stating 'Community's natural heritage')*

It is clear then, that only a very select number of cases will be able to qualify under the IROPI test.

*(b) In this context, it also seems reasonable to assume that the public interest can only be overriding if it is a **long-term interest**; short-term economic interests or other interests which would only yield short-term benefits for society would not appear to be sufficient to outweigh the long-term conservation interests protected by the directive.*

The Planning White Paper suggests a ten to twenty-five year forward horizon for NPSs. If the NPS is likely to cause an adverse effect on a Natura 2000 site, a time horizon of ten years would seem to be insufficient for justifying IROPI. If the IROPI case is being brought forward for an NPS then a longer time horizon will be required.

5.2 Appropriate assessment and the IPC

As the Appropriate Assessment of the NPS will have to defer some issues relating to specific impacts that can only be addressed in detail at the scheme level, a further appropriate assessment will also be required at the scheme level when the project is submitted to the IPC. As a competent authority, the IPC will require expert knowledge and training in order to be able to undertake the adequate appropriate assessment of NSIPs. This will involve a detailed examination of ecological impacts on Natura 2000 sites.

Link welcomes the provision that sets out the need for the IPC to consider EU Directives as well as the NPSs when considering an application. However, we feel that these issues should be dealt with, in terms of justification or avoidance, in as much detail as possible at the strategic level first. Only in this way will the certainty and speed of the process be improved.

However, if the NPSs have not been subject to an adequate appropriate assessment and the proposals may have an adverse effect on the integrity of a Natura 2000 site, then the examination of need and alternative solutions will be open to question at the inquiry phase. This should be of particular concern to the Government as limiting these discussions at the inquiry phase is cited as a key driver for this reform.

THE TOWN AND COUNTRY PLANNING SYSTEM (CHAPTERS 6-9 OF THE WHITE PAPER)

6. Environmental information and environmental impact assessment

The Planning White Paper makes a number of proposals that have implications for environmental impact assessment (EIA) and the availability of environmental information in decision-making. Link believes that EIA and strategic environmental assessment (SEA) are overwhelmingly beneficial processes that help protect our best environmental assets and involve communities in decisions that affect their lives. Adequate and appropriate information about the environmental implications of planning applications is essential for sound decision-making. Some of the proposals are of serious concern.

6.1 Environmental information

The White Paper proposes examining the information requirements for planning applications. This is a response to the Barker Review's suggestion that too much information is demanded with planning applications.

Even for proposals that do not require EIA, it is essential that information on the environmental implications is available to support sound decision-making. Local authorities are best placed to make judgements on the environmental information needed to adequately assess each individual planning application. We would be concerned about any proposal that sought to remove this discretion. The Standard Application Form now being rolled out will ensure some consistency across the country whilst giving the flexibility to require additional information where necessary to adequately judge an application.

6.2 EIA Screening

The White Paper also proposes investigating the raising of screening thresholds used to determine whether EIA is required. This responds to the Barker Review's suggestion that EIA is unduly burdensome, but presents a number of problems. The proposal is apparently designed to reduce the administrative burden on local planning authorities (LPAs) and developers. This implies that the current Schedule 2 thresholds are causing LPAs to be swamped with unnecessary requests for screening opinions and that waiting for a screening opinion is a major cause of delay to developers.

The UK Government has set the thresholds at levels it believes exclude only those projects likely to have minor environmental effects. The Government has failed to present any evidence that, a) seeking or providing screening opinions for projects that are clearly outside the scope of the EIA Directive causes a major burden to both developers and planning authorities, or b) that the screening thresholds in the EIA Regulations are set at such a low level that raising them would not pose a risk of projects caught by the EIA Directive (having likely significant environmental effects) failing to be screened.

We do not believe that the screening opinion process is a major cause of delay to developers or causes an undue burden on LPAs. In fact, we believe that raising

screening thresholds without any evidence that it is safe to do so could have potentially serious environmental consequences. It would also increase the risk of the UK being found non-compliant with the Directive. Link therefore strongly objects to this proposal.

It is important to note that the forthcoming revised EIA Circular, which was subject to public consultation in 2006, will no longer promote 'indicative' thresholds. This should reduce confusion with the thresholds contained in the Regulations. Instead, authorities are encouraged to use checklists to decide whether projects are likely to have significant effects, which will promote more robust and auditable decision-making.

EIA could be improved in several ways that do not risk legal non-compliance or environmental damage. Scoping remains a voluntary stage in the EIA process, despite a recent study finding that a majority (67%) of LPAs thought that scoping yields beneficial effects on the quality of the Environmental Statements (ESs) subsequently submitted[12]. Local authority capacity and expertise on EIA needs maintaining and improving. A recent study found that 10% of planning authorities may never have dealt with an EIA application and 50% have only limited experience[13]. A statutory EIA review system could be introduced to reduce the number of poor quality EIAs, which often slow down the planning process. An independent body to carry out this function (as exists in the Netherlands) was recommended by the Royal Commission on Environmental Pollution (RCEP) study on Environmental Planning. Such a body could provide a more rigorous check on the assessment process through evaluating ESs and providing good practice guidance.

6.3 Summary and recommendations

The Government needs to ensure that planning applications for projects that are likely to have significant environmental effects are subject to adequate and robust EIA. Applications for other projects need to provide sufficient information on their environmental implications. Instead of the changes proposed, Link suggests the following actions:

Investigate the case for making formal scoping a mandatory step in EIA. Scoping ensures that the key issues for the consenting decision are identified, thereby setting the framework for a focused Environmental Statement. Developers must be encouraged to engage key consultees such as wildlife and countryside groups, early in the EIA process.

Develop and promote better EIA training opportunities for local authority planners (eg effective screening and scoping), particularly tailored towards planners in authorities that deal with EIA applications infrequently. Training is needed to ensure that when faced with a potential EIA application, all local authority officers can make high-quality decisions with confidence.

Encourage stakeholders to continue sharing examples of good practice. In this regard, the forthcoming CLG revised Circular and accompanying good practice guide ("Environmental impact assessment: a guide to good practice and procedures") are

[12] Communities and Local Government 2006 Evidence review of scoping in environmental impact assessment. EIA Centre, University of Manchester, and Land Use Consultants. DCLG, London.
[13] Note on environmental impact assessment for local planning authorities. DCLG website accessed 25.06.07 at http://www.communities.gov.uk/index.asp?id=1143273

very welcome. Good practice EIA is rarely successfully challenged and can provide financial benefits to the developer as well as environmental benefits and improved community relations.

Consider introducing a statutory EIA review system. This would minimize the variation in standards of EIA that are accepted by different local authorities. It would reduce the scope for inadequate EIAs and enhance the potential for achieving the environmental and financial benefits of a good practice approach. The Government has not so far progressed RCEP's recommendation for an EIA review body. Link suggests this idea be reconsidered.

Properly engage the environmental assessment and NGO communities in any further proposals for change. Both environmental assessment practitioners and NGO representatives have first-hand knowledge of the current issues and challenges through their work in carrying out EIAs or reviewing documents such as Environmental Statements. They are therefore well-placed to advise on the workability and likely effectiveness of any changes.

7. Public Participation in the LDF process

The Planning White Paper proposes changes to the scope of the statutory opportunities for community engagement in local plan making. It proposes to replace three specific opportunities introduced in the Planning and Compulsory Purchase Act 2004 with one broadly defined duty to 'consult'. The right to be heard once having objected to the plan would remain.

The White Paper states: 'During this period [Plan formulation] there would be a statutory requirement to consult and engage with those bodies and individuals the authority considers appropriate and to a degree proportionate to the scale of the matters covered by the Development Plan Document in a form somewhat akin to the current regulation 25. The formal statutory requirement to consult on preferred options would be revoked.' (para 8.13).

In addition, the Local Government White Paper has already announced that Statements of Community Involvement will no longer to be subject to independent testing by the Planning Inspectorate (a measure which requires changes to primary legislation). As a consequence no member of the public will have a right to object and be heard regarding the standards of participation in their local area. Taken together this is a major step back for community participation and engagement

In setting the context for this debate it is important to recognise that there is no evidence base whatsoever to support the White Paper assertion that the current structures have led to a 'shallow process driven approach to consultation' (para 8.12). Where participation has not been delivered successfully this relates largely to resources and skills.

The lack of any dialogue in the development of the White Paper proposals is in stark contrast to the challenging but collaborative process undertaken around the 2004 Act. The settlement reached during this process was of vital importance and should not be unpicked without careful re-examination. Three central ideas were reflected in the Work Stream 4 report commissioned on community participation by the then ODPM.

1. We should move to a more empowering model of planning based on participation rather then consultation.
2. We should move away from an objection led system to plan making by encouraging early engagement so that communities can properly shape proposals.
3. We should create robust and statutory opportunities for community participation to balance out the vastly increased legal power of regional plans where there is no right to be heard by communities.

What is so damaging about the current proposal is that they remove important safeguards for community participation and replace them with a process which is vaguely defined and almost completely at the discretion of Local Authorities. Incrementally this will deliver a system in which community participation is at risk of becoming increasingly marginalised.

The White Paper states: 'These proposals allow greater flexibility to local planning authorities to develop their own engagement and consultation strategies that are most applicable to local circumstances' (para 8.15). The discretion afforded to

Local Authorities to innovate is only welcome when it builds upon a foundation of minimum standards of participation. The function of the three statutory stages of consultation and right to object to Statements of Community Involvement (SCIs) were designed to provide just such a minimum. Nothing in these measures prevented Local Authorities from delivering innovative participative techniques or joining up community participation in planning with other strategies.

The inherent vagueness and informality of the new duty to consult will mean that good Local Authorities will find it hard to justify resources for specific participative techniques since they are not obliged by law to deliver them. Poorly performing Local Authorities will be able to construct an SCI with minimum standards, choose only to speak to establish stakeholders and provide only minimum resources. A vaguely defined and discretionary system is also likely to be much more confusing to the public and commercial sectors unless it is set in a clearly defined statutory framework.

All of this impacts on the legitimacy of planning and sends a strong cultural message than in order to deliver speedy plan preparation we need to reduce community participation. Significantly this is likely to move us back to a system in which people simply wait to object to the plan on the basis that early engagement is simply not worthwhile.

8. Presumption in favour of development

The Planning White Paper appears to introduce a 'presumption in favour' of development in town and country planning. In particular, Link is concerned about the statement in paragraph 7.44:

The General Principles will in future make it clear that, in determining planning applications, local planning authorities must pay full regard to the economic, as well as the environmental and social, benefits of sustainable new development.

Combined with the chapter heading 'Positive Planning for Economic Development', it is difficult to see how these recommendations add up to anything other than the 'presumption in favour of development' proposed by Kate Barker. This represents a fundamental shift in the priorities of the planning system towards a concept clearly rejected in the reforms of 2004. Link strongly resisted this concept, and it is not a feature of PPS1.

In principle, we object to the idea because a presumption in favour of development undermines the neutrality of a system designed to deliver sustainable development and not just economic growth. It will also encourage speculative behaviour by developers to produce proposals that have not been tested on sustainable development criteria or by participative processes.

Link strongly objected to Kate Barker's explicit recommendation for a presumption in favour of development where the existing plan is out of date or indeterminate. While these words are not used in the White Paper, it does seem clear that the concept remains. It is therefore very disappointing that no consultation questions accompany paragraphs 7.36 – 7.65 of the White Paper, as these contain far-reaching proposals that would radically alter the current priorities of the planning system.

There is a clear implication that some of the principles of sustainable development are to be considered 'more equal than others' and that the planning system is being deliberately tilted towards economic development and growth at any cost. This is contrary to the principles of sustainable development, outlined in PPS1, which seeks to integrate objectives and recognise that we must live within environmental limits. It is our belief that while planning authorities need to be aware of economic considerations in policy making, there should only be a limited role for market signals in planning decisions. In short, we believe that there should be no change to the current legal and policy framework and no presumption in favour of development.

9. Biodiversity

Link has concerns that the Planning White Paper fails to recognise the potential impacts of its reforms on biodiversity and its ability to adapt to climate change. Proposals such as the raising of EIA screening thresholds (see Section 6) and the presumption in favour of development (see Section 8) threaten to undermine existing policies to protect threatened species and habitats, and to negate international measures to combat climate change.

9.1 Planning, biodiversity and climate change

The planning system is one of the main mechanism by which the UK delivers its international commitments to conserve biodiversity, and also has a crucial role to play in allowing species to adapt to the effects of anthropogenic climate change. Existing Government policy explicitly acknowledges the importance of planning in the attainment of environmental goals, stating that *'The planning system has a significant part to play in meeting the Government's international commitments and domestic policies for habitats, species and ecosystems'*[14].

Good planning integrates economic, social and environmental considerations, to reach development solutions which can justifiably be termed sustainable. Any proposals to reform the planning system must take into account this important and wide-ranging role and avoid impacting negatively upon the strong environmental benefits that can be achieved by planning.

Link is concerned that in aiming to favour short-term economic interests within the planning process, the White Paper threatens to jeopardise the longer term economic benefits arising from the protection of biodiversity and landscape.

9.2 Biodiversity protection

Any proposals to reform the planning system must retain explicit measures to protect species and habitats, only recently introduced through *Planning Policy Statement 9: Biodiversity and Geological Conservation*. PPS9 promotes within planning the delivery of sustainable development, and the conservation and enhancement of England's wildlife and geology, alongside rural renewal and urban renaissance. It promotes the key role of planning in ensuring sustainable development, through *'ensuring that biological and geological diversity are conserved and enhanced as an integral part of social, environmental and economic development, so that policies and decisions about the development and use of land integrate biodiversity and geological diversity with other considerations.'*[15]

The White Paper includes a number of proposals that are likely to undermine the existing policy framework for biodiversity protection. This will in turn compromise the Government's ability to deliver on its international biodiversity commitments. The Convention for Biological Diversity, to which the UK government is a signatory, includes commitments such as the need to *'establish protected areas to conserve biological diversity while promoting environmentally sound development around*

[14] *Planning Policy Statement 9: Biodiversity and Geological Conservation*, ODPM, 2005, p.2
[15] ibid

these areas' and to *'Rehabilitate and restore degraded ecosystems and promote the recovery of threatened species'*[16].

In 2002 the Parties to the Convention committed themselves ***'to achieve by 2010 a significant reduction of the current rate of biodiversity loss at the global, regional and national level as a contribution to poverty alleviation and to the benefit of all life on Earth'*.** Only with the retention of robust environmental protection policies such as PPS9 and their delivery through an effective planning system can the UK Government hope to report back to the EU favourably on its attempts to conserve biodiversity.

Link echoes the concerns of the Royal Commission on Environmental Pollution about proposals to further reform the planning system, highlighted in its recent report *The Urban Environment*[17]. Not only was it noted that the Barker Review had failed to adequately assess the environmental implications of its proposals, but it stated that *'a stronger presumption in favour of development…appears to contradict existing policy (as expressed in PPS1 and the UK's various sustainable development strategies) that environmental, social and economic goals should be pursued in an integrated way that contributes to sustainable development'*.

The Commission concluded its section on planning by recommending that *'central and local government ensure that environmental constraints are recognised and respected by the planning system and by policies for urban areas'*.

9.3 Making space for wildlife in a changing climate

The proposals included in the White Paper, through promoting economic interests over those of the environment or society at large, are likely to undermine efforts to create space to help nature adapt to climate change. The planning system should also better recognise that this is a win-win situation with the ecosystem services that this sort of protection provides.

Climate change will impact upon habitats and the species they support, by disrupting species life cycles, altering interactions between species, and necessitating species either adapt or move to more suitable climatic and habitat conditions. Examples of climate-induced impacts that can already be observed include beech trees suffering from increased periods of summer drought stress, particularly in South East England, while oak is generally coming into leaf three weeks earlier than the 1950s with knock-on effects on insects and birds.

The cumulative impact of climate-induced stress on the future composition of habitats is uncertain, but they will certainly be different from today and may well be less diverse as the wildlife they support struggles to adapt to rapid change. Research programmes like MONARCH (Modelling Natural Resource Responses to Climate Change), undertaken by the Environmental Change Institute at Oxford, have used models to analyse the impact on future locations of suitable 'climate envelopes' for a number of species. Results indicate how species will need to move in response to climate change, in order to remain in suitable climatic conditions. When this is coupled with the problems of a drastically altered and fragmented landscape, the future for wildlife looks increasingly threatened.

[16] *Sustaining Life on Earth*, CBD, 2000, p9
[17] Published in March 2007.

Link suggests that as well as giving wildlife a better chance of survival, creating and restoring a more sympathetic landscape will improve the environmental services on which humans depend, and reduce the impacts of climate change. For example, there is clear evidence that when water catchments are denuded of their vegetation cover in winter through the intensification of land use, flash flooding and soil erosion are often the result. By working with nature, adaptation strategies attempt to reduce the frequency and intensity of these events.

Surface drainage water from the built environment is normally discharged into the public sewers, flooding the system at times of high storm flow. Sustainable Urban Drainage Systems (SUDS) allow the water to be collected in features where it can drain away naturally, while also adding to the visual interest and biodiversity value of urban areas.

Adaptation strategies aim to reduce the damage from climate change and increase the resilience of ecosystems and society to its unavoidable effects. Adaptation strategies can realise short-term benefits as well as longer-term advantages. For instance, it may be that the creation of floodplain woodland can bring almost immediate biodiversity and flood management gains.

A frequent response to the call for adaptation action is that it is difficult to plan future action in the face of uncertainty.

9.4 Summary and conclusions

Link believes that the Government, and all those in a position to influence land use policy, must take action to deliver adaptive action with great urgency. This includes:

- Regional and national spatial planning must protect the environment and take account of the effects of climate change both now and in the future, while maximising the opportunities for creating landscape scale changes to benefit both wildlife and humankind. Strategic Environmental Assessment and Sustainability Appraisal must therefore form a fundamental part of the planning process.
- Ensure that the delivery of the Water Framework Directive, which focuses on managing whole catchments rather than individual water bodies, helps to create landscapes that benefit both wildlife and society, for example, the development of floodplain woodland and Sustainable Urban Drainage Systems (SUDS).
- Protect all semi-natural habitats, as well as designated sites, rather than just a representative sample of sites.
- Take account of the need for all semi-natural habitats planted with non-native conifers to be restored, where any significant relict features survive.
- Ensure that development is not approved on land where habitat creation should be undertaken to put biodiversity on a more sustainable footing. This is of greatest importance where it would extend existing ancient or semi-natural habitats.
- Increase the resilience of semi-natural habitats by allocating space for habitat creation which would act as a buffer from negative edge effects caused by development and other intensive land uses.

- Increase the ability of biodiversity to move across landscapes by making the intervening land use (such as built development, agriculture or forestry) between semi-natural habitats more biodiversity-rich rather than simply physically linking them.
- Integrate the needs of landscape scale action for biodiversity with those of development at every scale to deliver wider benefits, for example, in relation to soil conservation, cooling, air and water quality, flood alleviation, high quality food, health, employment and recreation.

Annex 1

Three examples of recent sustainable development duties

General purpose

'Natural England's general purpose is to ensure that the natural environment is conserved, enhanced and managed for the benefit of present and future generations, thereby contributing to sustainable development.'

Natural England and Rural Communities Act 2006, s. 2(1)

Sustainable development

(1) This section applies to any person who or body which exercises any function –
    (a) under Part 1 in relation to a regional spatial strategy;
    (b) under Part 2 in relation to local development documents;
    (c) under Part 6 in relation to the Wales Spatial Plan or a local development plan.
(2) The person or body must exercise the function with the objective of contributing to the achievement of sustainable development
(3) For the purpose of subsection (2) the person or body must have regard to national policies and advice continued in guidance issued by –
    (a) the Secretary of State for the purposes on subsection (1)(a) and (b);
    (b) the National Assembly for Wales for the purposes of subsection (1)(c).

Planning and Compulsory Purchase Act 2004, s. 39

Sustainable development: exercise of functions by Scottish Ministers

(1) This section applies to the Scottish Ministers in the exercise of their functions of preparing and revising the National Planning Framework.
(2) The Scottish Ministers must exercise those functions with the objective of contributing to sustainable development.
(3) In construing the expression "sustainable development2 for the purposes of this section, regard may be had to any guidance issued, for the purposes of section 3E, under subsection (3) of that section.

Planning etc. (Scotland) Act 2006, s.3D