Regulatory Policy Institute

Review of the Regulatory Impact Assessments accompanying the introduction of the Traffic Management Permit Scheme (England) Regulations 2007

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June 2008

The Institute welcomes general and specific support grants for its various activities. In this case, funding for the study was provided by the National Joint Utilities Group (NJUG).

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* I gratefully acknowledge helpful comments and suggestions from George Yarrow and Chris Decker on earlier drafts.

EXECUTIVE SUMMARY

The Traffic Management Act 2004 (TMA) provided for the introduction of a number of measures intended to address problems associated with urban and inter-urban congestion on the road network. This included providing the potential for permit schemes to be introduced by highway authorities such that street works (for example, utility repair work that involves occupation of some part of the highway) could not be undertaken without a permit, and a fee could be levied for the provision of such a permit. Secondary legislation was required in order to allow for the introduction of permit schemes, and more detailed enabling provisions were subsequently introduced under the *Traffic Management Permit Scheme (England) Regulations 2007* (hereafter referred to as 'the permit scheme regulations').

This report provides a review of the Regulatory Impact Assessment that was prepared by the Department for Transport (DfT) in the development of the permit scheme regulations. Some comments are also provided on the relevance that the issues raised in this review have for ongoing and future policy developments with respect to permit schemes.

The policy context and the role of Regulatory Impact Assessments

The fact that public awareness of congestion on the road network is 'high' in and of itself suggests that the development of policies related to street works and such congestion may be vulnerable to a certain type of *regulatory failure*. Specifically, when faced with an obvious and highly visible "bad" (such as congestion), the potential for public opinion to be a source of regulatory failure has been long recognised, and attempts to "do something" about congestion that relates to street works might be expected to generate some public support, almost irrespective of the less visible consequences. This suggests that the political constraints on the emergence of what might be ill-thought through policies may be less than would typically be the case, and thus that particular care in the development and assessment of relevant regulatory policies is likely to be merited.

A key intended role of the RIA process is, of course, to seek to counteract this kind of tendency. However, the effectiveness with which RIAs can be expected to play such a counteracting role is heavily dependent on the adequacy of the assessments that they contain.

Comments on the permit schemes RIA

We found the RIA that was produced in the development of the permit scheme regulations to exhibit numerous major failings, and to fall a long way short of providing an adequate and reliable assessment of the proposed regulatory change. Specifically, we found that:

i) **The relevant baseline for assessment is not adequately identified**. This is most obvious in relation to the lack of attention given to the impact of the Street Works (Registers, Notices, Directions and Designations) (England) Regulations 2007. The fact that these Regulations were due to come into force in 2008 was explicitly recognised at the beginning of the "Do nothing" section of the RIA,

however, no detail is provided in terms of how these regulations would change the regulatory environment. In the RIA that accompanied the Street Works (Registers, Notices, Directions and Designations) England Regulations 2007, DfT had identified these regulations as having a substantial impact on relevant information conditions and on the extent to which Authorities could reduce congestion through coordination activities. The lack of attention given to this factor in the Permit Schemes RIA was a major failing.

ii) **The policy problems to be addressed are not identified to a sufficient degree of detail**: The policy problems to be addressed are identified as relating to information provision, and the means that highway authorities have to influence/control street works activity. However, it is difficult to find any details at all in the 'Rationale for Government intervention' section that could be said to describe what the problems to be addressed might actually be. Thus, with respect to information provision, we are told that there are *"concerns"* with respect to accuracy, but the RIA identifies neither the form of relevant information problems, nor the types of street works that they relate to, nor why they have been able to persist, nor how material they can be expected to be. With respect to influence/control, the 'problem' is identified as arising from the fact that utilities have not had to seek permission to undertake street works, and can instead simply notify the relevant authorities. A requirement to get permission (to get a permit) in order to undertake street works may provide one means (i.e. be a potential option) by which specific identified problems could be addressed, but that stands to be assessed against other potential options by which those identified problems might be addressed. What is missing from the RIA is the specification and assessment of why and how it is that existing regulatory provisions (and those that were due to come into force) have not been (and would be unlikely to be) effective in this respect.

iii) **The extent to, and manner in, which underlying problems relate to the conduct of public sector highway authorities is almost wholly ignored**: One of the benefits attributed to the introduction of permits schemes is that it will require highway authorities to notify themselves of any road works that they intend to undertake themselves (and highway authority works are typically identified as giving rise to around the same level of congestion in aggregate as utility street works). It is, however, clearly the case that highway authorities could have already been collecting such 'internal' information within the existing legal arrangements. To the extent that the collection of this information could be expected to materially improve coordination (and thus reduce congestion), this implies performance failings within the relevant authorities. The potential for relevant "problems" to relate to failings in public sector service provision activities (for example, in relation to information gathering and processing) should have been explicitly recognised and assessed.

iv) **The introduction of Permit schemes (i.e. the preferred option) was the only option (aside from "do nothing") that was identified for assessment**: Where, as in this RIA, the policy problems to be addressed have not been clearly specified, the task of effectively identifying options is made much harder. In practice, however, notwithstanding this, the fact that only two options ("do nothing" and "permit schemes") were identified and assessed is very surprising.

That is, there would appear to be a whole range of relatively obvious alternative options that could have been identified, which would have included more incremental adjustments to the do nothing option (for example, options could have been developed that focused on the sanctions that are available in the face of insufficient information provision).

v) **The 'additionalities' that adoption of the permit schemes option gives rise to are not identified to a reasonable degree of detail**: Before one can move on to assess how, and how much, different parties might be affected by the adoption of a given regulatory option, it is necessary to identify the regulatory changes, or "additionalities" which, if implemented, that option would give rise to (note that the task here is not the identification of likely or potential outcomes – that comes later – it is rather the specification of how regulatory provisions would differ under each potential option). The task of specifying how the permit scheme option differs from the "do nothing" baseline is simply not completed to any reasonable degree in the RIA. The implications of this feed through to the assessment of permit fees, since this requires the identification of some level of "additional" costs – associated with the operation of the permit scheme - for recovery through permit fees.

vi) **The basis upon which the benefits estimates presented should be considered reasonable or likely is unsubstantiated**: The benefits estimates used in the RIA are presented as relatively 'low' percentage estimates of the total costs of the disruption caused by utility street works. This approach raises immediate difficulties, however, given the scale of the relevant congestion cost estimate used for utility street works: £4.3 billion. The difficulty here is that a context within which high £ million potential benefits can be generated through the application of relatively low percentage savings assumptions, may allow for significant expenditures to be inappropriately (i.e. too easily) treated as though likely to give rise to benefits. In practice, the RIA provides no detailed reasoning to underpin why it is that the benefits estimates that are used should be considered reasonable and likely to eventuate. Moreover, the context within which the benefits estimates should be understood is presented in an inappropriate and non-transparent manner.

vii) **The extent to which the identified costs should be considered reasonable and proportionate, given the relevant policy problems and alternative means by which they might be addressed, is not adequately considered**: Given the lack of options considered in the RIA, the principal assessments of the cost estimates for permit schemes are made in relation to estimates of potential benefit (discussed above). As a result, the extent to which the permit scheme option should be understood as well-targeted and proportionate means of (potentially) achieving those benefits is simply not adequately considered.

viii) **The potential for unintended negative impacts to arise – for example, from the inappropriate exercise by highway authorities of new powers – is not adequately addressed**: The RIA effectively assumes that the enhanced powers that are provided to authorities that adopt permit schemes will be effectively used, begging all questions about the actual capacities and incentives that will,

in practice, influence how such powers might be exercised. This type of reasoning is an example of what might be termed the "central planning fallacy". In many areas of government policy, planning constraints are seen as major obstacles to new investment. Thus, how planning processes work in practice is critical, but is simply not addressed in the RIA in any reasonable degree of detail. The permit scheme allows authorities substantial discretion and flexibility in respect of the implementation of the permit system. However, as in respect of discretion in the enforcement of regulation more generally, to be effective and ensure that this discretion is exercised appropriately, it is important that sufficient safeguards and oversight exist. This matter is not adequately addressed in the RIA.

Implications for ongoing and future policy developments

The introduction of particular permit schemes

It might be argued that the relevance of the above points is lessened to some extent by the fact that the permit scheme regulations were only enabling regulations, and thus that for any particular permit scheme to be introduced approval will have to be gained from the Secretary of State. While these individual applications by highway authorities need not *necessarily* suffer from any or all of the inadequacies of the RIA that are highlighted above, it is clear that the highway authority permit scheme consultations that we have seen do not fill the major analytical gaps that exist. This is not greatly surprising as the RIA provides an obvious benchmark for authorities. DfT was in a position to provide a clear example to highway authorities of what a reasonable assessment, with respect to permit schemes, would look like. Given available resources and likely competence with respect to impact assessment, this was – apart from anything else – a missed opportunity to improve the likely quality of the assessments to be produced by highway authorities, and to limit the extent of unnecessary duplication of effort.

Nevertheless, the fact that the Secretary of State has to approve proposed schemes does provide an opportunity for at least some of the failings of the permits schemes RIA identified above, such as the absence of proper identification of the baseline against which the assessment should proceed, to be addressed going forward.

The commitment to review the implementation of permit schemes after one year

The fact that that DfT have committed to reviewing the implementation of permit schemes after one year (albeit that there is some lack of clarity with respect to what 'after one year' means) is very much a positive. Moreover, the RIA explicitly notes that the performance of permit schemes will be evaluated against "*the current baseline*", and that the review will involve evaluating "*how schemes operated over different roads compare in delivering benefits i.e. highway authorities' operating schemes on certain categories of roads (e.g. traffic sensitive), compared to those operating over all roads"*. Whilst these look to be good intentions, it is difficult to understand how these matters – the definition of baseline position, and the identification and assessment of relevant contextual differences in street works

activity and highway authority conduct – were paid such little attention in the *ex ante* assessment provided in the RIA. Moreover, the fact that the RIA for the introduction of the permit schemes regulations did not properly define the baseline position against which this implementation review is to be conducted, raises obvious questions with respect to how effective this planned review can be expected to be.

PREFACE: ASSESSMENT CRITERIA

Three sources of evaluation criteria are relied upon in this and other Regulatory Policy Institute assessments of regulatory policy documents. They are:

Regulatory Impact Assessment Guidance

Guidance for regulatory impact assessment has been developed in a number of organisational and jurisdictional contexts, including the OECD, EU, and most of the member nations of those institutions. This guidance covers both technical aspects of the relevant policy analysis and aspects of the process by which policy is developed. As in many other policy development contexts, effective process and effective analysis are seen as complementary activities. The UK has been both an advocate and early adopter of the relevant principles.

Although guidance differs in some of its details among jurisdictions and implementations, there exist a number of core principles that are widely shared. These include the high importance of early and clear identification of relevant problems and issues that motivate the contemplation of new regulation; the clarification of relevant objectives; the construction and evaluation of multiple options including a 'do nothing' option; detailed assessment of the likely effects of implementing each option; consideration of the various risks that might be involved; testing for potential unintended consequences of regulation; consideration of equity and fairness issues; and the central importance of consultation, both as a means of acquiring and verifying information, and of discharging responsibilities owed to those who will potentially be affected by any exercise of public (monopoly) power that is in contemplation. Dimensions of policy assessment that have been considered important in UK government guidance, but which have sometimes not featured as prominently elsewhere include the evaluation of possible impacts on small businesses and on competition.

Principles of better regulation

As in relation to guidance, there are now multiple versions of the list of 'principles of better regulation'. In the UK the principles are, as explained (relatively informally) on the Better Regulation Executive website, as follows:

- *"Proportionality: policy solutions should be appropriate for the perceived problem or risk: you don't need a sledgehammer to crack a nut!*

- *Accountability: regulators/policy officials must be able to justify the decisions they make and should expect to be open to public scrutiny.*

- *Consistency: government rules and standards must be joined up and implemented fairly and consistently*

- *Transparency: regulations should be open, simple and user friendly. Policy objectives, including the need for regulation should be clearly defined and effectively communicated to all stakeholders.*

- *Targeting: regulation should be focused on the problem. You should aim to minimise side-effects and ensure that no unintended consequences will result from the regulation being implemented."*

Judicial standards

Judicial supervision of administrative processes has become an increasingly significant factor in public policy over recent years, particularly in the enforcement of competition law. A good example of the contribution of the courts to the setting of standards in assessment is the European Court of Justice's judgment in *Tetra Laval v Commission* (February 2005), which was concerned with a European Commission decision under the Merger Regulation and which stated, among other things, that:

"Whilst the Court recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the Community Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it."

In testing whether or not the requisite standard of analysis has been reached in a particular case, therefore, the following questions might be asked:

- Is the evidence relied upon factually accurate, reliable and consistent?

- Is it sufficiently comprehensive, or are there significant/substantial areas of evidence that are relevant to the assessment but which have not been considered?

- More specifically, have 'inconvenient facts' (i.e. evidence that might cast doubt on arguments/reasoning being presented) been neglected, ignored or avoided?

- Do the reasoning and conclusions 'flow from the facts'? That is, are the conclusions adequately substantiated?

In consequence of the increasing role of the courts, we expect, over time, that these quite basic evaluation criteria or standards will come to exert a greater influence on the conduct of regulatory policy assessments.

1. INTRODUCTION

The Traffic Management Act of 2004 (TMA) allowed for the introduction of a number of measures intended to address problems associated with urban and inter-urban congestion on the road network. The high level objective of the TMA was to equip both the Highways Agency and local authorities (hereafter 'authorities') with the powers to tackle congestion. In a nutshell, this included the introduction of powers in four key areas:

- To provide for the Highway Agency to develop its role as a 'network manager', empowering Traffic Officers to manage incidents on the trunk road network;

- To require local authorities to appoint a Traffic Manager whose responsibility it is to keep traffic flowing on roads in the area;

- To provide for a new regulatory regime for utility companies' street works; and

- To allow for more civil enforcement of parking and moving traffic offences.

The focus of this review is on the third of these measures, and in particular on the *Traffic Management Permit Scheme (England) Regulations 2007* (hereafter referred to as 'the permit scheme regulations'), the introduction of which was provided for under the TMA. Where an authority introduces a permit scheme under these regulations, street works cannot be undertaken without a permit, and the regulations provide for fees to be paid by utilities for such a permit.

This report provides a review of the Regulatory Impact Assessment that was prepared by the Department of Transport (DfT) to accompany the introduction of the permit scheme regulations. The structure of the review is broadly in line with that used in the RIA document itself (with this being broadly in line with the standard RIA template that applied at the time). Thus, we consider the document in terms of how it addresses the following steps in the assessment process:

i) Objectives: defining relevant objectives for the assessment;
ii) Background: description of the relevant context;
iii) Identification of the 'problem(s)' to be addressed;
iv) Options: identification of potential options for addressing the identified problem(s);
v) Impacts: detailed assessment of identified options, including through quantification of costs and benefits;
vi) Competition issues: Identification and assessment of potential impacts on competition;
vii) Enforcement, sanctions and monitoring;
viii) Review: provisions for subsequent review of implementation.

Before considering these aspects of the RIA document in detail, the following begins by highlighting a number of features of the policy context within which the permit

scheme arrangements were developed that are of particular relevance to the consideration of the adequacy of the RIA.

The materials that were examined in preparing this report include the following:

- The relevant legislation and regulations, including the NRSWA, the Highways Act and the TMA (2004), as well as the Street Works (Fixed Penalty) Regulation (2007) and the Street Works (Registers, Notices, Directions and Designations) Regulation (2007).

- The RIAs prepared as part of the Traffic Management Bill. This includes the overarching RIA as well as the draft final Permit Schemes Impact Assessment produced by the DfT in July 2007.

- The explanatory memorandum accompanying the introduction of the Traffic Management Permit Scheme Regulation (2007).

- The two proposals by authorities to introduce permit schemes which had been prepared at the time of writing: the Kent County Council Draft Permit Scheme proposal; and the draft London Permit Scheme consultation prepared by the London Permit Group.

- A study prepared by Professor Goodwin in 2005 titled: *Utilities' Street Works and the Cost of Traffic Congestion*.

The criteria used for the assessment have been developed on the basis of impact assessment guidance, better regulation principles, and judicial standards. Further details of these criteria are provided in the Preface.

2. THE POLICY CONTEXT: SOME PRELIMINARY OBSERVATIONS

The potential for policy development processes to be unduly permissive

Public awareness of street works and congestion

Public awareness of congestion on the road network is understandably high given the numerous negative direct experiences of such congestion that most will have had, including in contexts where street works were being undertaken. However, this factor, in and of itself, suggests that the development of policies related to street works and congestion may be vulnerable to a certain type of *regulatory failure*. Specifically, when faced with an obvious and highly visible "bad" (such as congestion), the potential for public opinion to be a source of regulatory failure has been long recognised, and attempts to "do something" about congestion might be expected to generate some public support, almost irrespective of the less visible consequences.

The point here is that if attempts to lessen the levels of congestion that stem from street works are likely to be perceived by many as "a good thing", then this suggests that the political constraints on the emergence of what might be ill-thought through policies may be less than would typically be the case, and thus that particular care in the development and assessment of relevant regulatory policies is likely to be merited.

Congestion cost levels

A similar point arises when one considers estimates of the costs of congestion. The Goodwin report notes that the total costs of congestion on UK roads (from all causes) is widely cited as around £20 billion per year, and that research suggests that utilities street works cause about 5% of that: i.e. about £1 billion per year. The RIA, based on estimates by Halcrow, uses a much higher figure than this in its assessment of benefits of reduced congestion, and assumes that the congestion costs caused by utilities street works amount to £4.3 billion per year. With respect to the difference between these £1 billion and the 4.3 billion estimates, the RIA notes that: "*Although there is a large variation, it does confirm that the economic cost of congestion has a significant impact on the operation of the road network*" (paragraph 67).

When considering developments in regulatory policy, however, the fact that such large magnitudes are being considered raises immediate potential difficulties. In particular, since even a very small percentage of £4.3 billion would be equal to a relatively large £ million number, assessments may be prone to too easily assuming that substantial £ million savings can be made. The argument here is not that substantial £ million savings are not possible – they may be. The difficulty is that a context within which high £ million potential benefits can be generated through the application of relatively low percentage savings assumptions, may allow for significant expenditures to be inappropriately (i.e. too easily) treated as though likely to give rise to benefits.

Thus, as with the public perception issues raised above, the scale of the congestion cost estimates may give rise to a tendency for the processes by which new regulations

are developed in relation to street works to be unduly permissive. A key intended role of the RIA process is, of course, to seek to counteract such tendencies. However, the effectiveness with which RIAs can be expected to play such a counteracting role is heavily dependent on the adequacy of the assessments that it contains. As will be highlighted below, the RIA for the permit scheme regulations had major shortcomings.

Some complicating factors

The regulatory framework as a moving target

The above points suggest that RIAs may have a particularly important role to play in policy development processes related to street works and congestion. However, when examining the relevant legislative and regulatory landscape, some immediate complicating factors can be identified. One such factor is that this landscape can be understood as something of a 'moving target'. In particular, the Traffic Management Act provided for a framework within which a range of different initiatives could be potentially developed, but once any given initiative has been developed (through the introduction of secondary legislation) this changes the background against which the desirability of developing other regulatory initiatives should be assessed, and potentially in material ways.

The implication of this for the relevant assessment processes is that particular care is needed when identifying the appropriate baseline or 'do nothing' position against which to evaluate potential options. As will be highlighted below, this is a major area of failing in the RIA.

3. DETAILED REVIEW OF THE REGULATORY IMPACT ASSESSMENT

3.1 Identification of the relevant policy objectives

The 'Objectives' sections of the draft RIA is limited to a singe paragraph, which reads as follows:

> *"The objective of introducing permit schemes is to positively control works related activities in the street that may cause disruption. This will allow better co-ordination and planning of activities, which should reduce the disruption and inconvenience that these activities cause, leading to reduced congestion and the realisation of associated social, economic and environmental benefits" (Paragraph 2).*

An immediate oddity of the above comment is that it identifies the 'positive control'[1] of works related activities in the street that may cause disruption as though it were an end to be pursued, rather than a potential means of meeting an end. Thus, the comment mistakenly treats something that might form part of a policy option ('positive control') as though it were a policy objective.

In practice, something much closer to a description of relevant policy objectives is included later in the "Rationale for Government intervention" section, when in Paragraph 15 it notes that the government considers that congestion and disruption arising from street works on highways could be minimised by ensuring that those activities:

- Do not take longer than necessary;
- Are planned and co-ordinated effectively;
- Are carried out in a manner which minimises disruption; and,
- Are properly publicised.

Whilst clearly relatively high level, these objectives look to provide a reasonable basis upon which the assessment could proceed. However, to understand properly the objectives against which policy options have been assessed it is important to consider also the following comment made at the end of the 'Background' section:

> *"DfT is committed to ensuring that the overall impact of the Traffic Management Act 2004 does not place unfunded costs on local government as a whole" (Paragraph 14).*

Although not presented in the 'Objectives' section, this comment clearly highlights the fact that the funding of any costs that arise from the introduction of provisions under the TMA was an important factor in terms of the policy objectives that influenced the assessment.

[1] What is meant by 'positive control' is considered further in Section 3.3 below.

3.2 The Relevant Background/Context

The "Background" section of the RIA is something of a hodgepodge, and much of the material provided would sit more properly in other parts of the impact assessment. In particular:

- Paragraph 3 reiterates the comment from the 'Objectives' section shown above, stating that: *"The intention is that a highway authority operating a permit scheme will be proactive…";*

- Paragraphs 9 and 13 provide some information on how the preferred option (i.e. permit schemes) would be implemented (e.g. "*The 200[7] Regulations and Statutory Guidance set out the procedure for highway authorities to apply to the Secretary of State to run a permit scheme…" (Paragraph 13)*);

- Paragraph 10 presents *"…key differences between permit schemes and the existing powers for managing activities on the street under NRSWA".* That is, it concerns the characteristics of a particular option that is to be assessed (not the relevant background against which that option, together with others, is to be assessed);

- Paragraphs 11 and 12 comment on the likely impacts of adopting the preferred option:

    - Paragraph 11 comments on who would be affected: "*Two types of bodies could be directly affected by the changes in the proposed regulations…"*

    - Paragraph 12 comments on how much they will be affected: *"The extent of the effect on these bodies will depend on the take up of permit schemes."*

- Paragraph 14 presents comments both on objectives (see the discussion above) and on issues concerned with the implementation of the preferred option (permit schemes).

Whilst a number of the twelve paragraphs in the 'Background' section do provide some contextual material that is relevant and necessary to the assessment, very little detail is provided. Thus, whilst paragraph 4 highlights the existing legislative framework as being provided by the New Roads and Street Works Act 1991 (NRSWA), the Highways Act 1980 (the 1980 Act) and the Traffic Management Act 2004 (TMA), the relevant information provided in each case is very limited.

Paragraph 5 notes that the NRSWA places a duty on the highway authority (e.g. the relevant local authority) to co-ordinate works of all kinds on the highway, and a parallel duty on undertakers (e.g. a water company or other utility) to cooperate in this process. However, we are told nothing more about what in practice is required under these duties. Instead, Paragraph 5 simply goes on to provide some early indication of the problems that are later identified as providing a rationale for government intervention (e.g. "*NRSWA did not anticipate the scale of works following from the*

deregulation of the various utility sectors or the associated scale of co-ordination required").

Paragraph 6 turns to consider the Highways Act 1980, but simply states that, under the Act: *"…local highway authorities and the Highways Agency…are responsible for the maintenance and improvement of their respective roads and accordingly carry out various activities on these roads"*. The fact that the authorities who – under the NRSWA (see above) - have a duty to co-ordinate works on the highway, also have a duty to undertake such works is highly relevant to the assessment. How relevant this factor is, will, of course, depend on the relevant magnitudes, and, in particular, on the extent to which congestion is related to "maintenance and improvement" work on the road undertaken by highway authorities. Thus, one would expect this matter to be clearly addressed in the 'Background' section. This is particularly so as one of the differences between permit schemes and the NRSWA arrangements identified in Paragraph 10 is that "*highway authorities own works are included within the permit scheme*".

In practice, no details on the extent of highway authority works are provided in the background section, although later in the 'Economic benefits' assessment, it is noted that:

> *"Whilst no accurate figures are available for the number of works carried out by highway authorities (as against utilities), it is generally thought to be a similar number [as that for utility street works]" (Paragraph 74).*

This comment clearly highlights that there are major contextual issues to be addressed in relation to works carried out by highway authorities. This is most obviously the case because the level of such works (and the associated level of congestion) is considered to be of a similar magnitude to that of utility street works[2]. However, the fact that "*no accurate figures are available*" is also highly relevant, as it raises the obvious and important question: *why are the information conditions in relation to highway authority works so poor?* (an issue that is simply not addressed adequately anywhere in the RIA).

Paragraphs 7 and 8 in the 'Background' section go on to provide some information concerning the TMA. Paragraph 7 notes that "*The TMA introduced a network management duty on local traffic authorities to manage their road networks so as to facilitate the expeditious movement of traffic (including pedestrians)*". Paragraph 8 goes on to note the provisions of the TMA that provide a framework within which permit schemes could be developed and operated by highway authorities. The remainder of the material in the 'Background' section provides other comments related to permit schemes some of which were highlighted above.

What is most striking about this overview of the TMA is that is says nothing at all about other provisions of the TMA, including provisions for the development of other subsidiary regulations under the TMA. Most strikingly, the Background section makes no reference at all to provisions related to noticing and the introduction of fixed penalties. This is a remarkable omission, as these provisions are directly

[2] See, for example, the Goodwin Report.

relevant to the consideration and assessment of alternative options. Indeed this direct relevance is immediately clear from the opening paragraph of the description of the "Do Nothing" option provided later in the RIA, which reads as follows:

> *"The Street Works (Registers, Notices, Directions and Designations) England Regulations 2007 have been made and will come into force in 2008. They will apply to all statutory undertakes [sic] carrying out works in England. The replacement regulations aim to improve traffic flow through better planning, co-ordination and effective noticing arrangements for statutory undertakers' works, which should reduce the disruption and inconvenience that street works subsequently cause…" (Paragraph 25).*

It is manifestly clear that these regulations ('*The Street Works (Registers, Notices, Directions and Designations) (England) Regulations 2007*') form part of the relevant regulatory background against which the introduction of permit schemes should be considered, and thus that the provisions of these regulations should have been clearly set out in the RIA for permit schemes. This issue will be discussed further in the context of 'Options' below.

The above comments were primarily concerned with the legislative and regulatory background against which the relevant policy issues should be assessed. However, one would also have expected the 'Background' section to have provided some information concerning the nature of the activities that are identified as giving rise to policy problems: that is, street works. Whilst the term can provide a convenient shorthand expression, it is immediately clear form even a cursory examination of other background material that is publicly available that the term covers activities that have a range of differing characteristics. Moreover, at least some of these characteristics are of direct relevance to the evaluations in the RIA.

For example, the discussion of street works issues recorded in the transcript of a London Assembly Transport Committee meeting[3] held in January 2002 includes some comments on the different issues that arise in relation to different types of street works. The process by which major mains replacement activities are organised is identified by a representative of the Highways Management Team of the London Borough of Camden in a largely positive manner: *"generally that planning process works quite well"* (p5)[4]. These mains replacements are part of long term programmes that utilities undertake, and the implication of the comments of the London Borough of Camden representative referred to above is that pre-TMA processes of planning and coordination were at that time already relatively well developed.

The same Highways Management Team representative was asked whether permitting (i.e. the introduction of a permit scheme) will have any impact on those works which are undertaken with less than two hours notice, and replied in the negative. The key point here was that these 'less than two hours notice' works were likely to relate to necessary emergency works. The key impact that the changes brought in by the TMA might have were said – by this representative – as likely to relate to a 'middle range'

[3] London Assembly Transport Committee, Transcript of street works in London (Item 4), 17th January 2008, http://www.london.gov.uk/assembly/transport/2008/jan17/minutes/appendix1.pdf

[4] The statement referred to a major mains replacement programme that Thames Water was undertaking.

of street works, that fell neither into the major mains replacement type category (where long term planning and coordination activities already appeared to be well developed), nor into the emergency works category (where the potential for coordination was inevitably limited).

Clearly the above remarks are based on only a few comments from one representative of one Highways Management Team in a part of London. The key point, however, is that even from this one source, it is immediately clear that the policy issues that arise in relation to street works may differ markedly depending on the type of works under consideration. That is, differences between types of street works clearly represents a highly relevant contextual factor, and one would have thus expected some explicit treatment of this matter as part of the description of the 'Background' in the RIA.

3.3 Identification of the Problem(s)

After providing some general comments on objectives (which were discussed above), the 'Rationale for Government intervention' section goes on to identify two particular factors that are relevant to highway authorities' effectively carrying out their network management duties:

- Information provision issues: *"In order to co-ordinate effectively highway authorities need information on the activities to be carried out: i.e. location and duration of activity, and how extensive they will be. Information needs to be accurate and provided to the highway authority early enough to allow them sufficient time to consider how disruptive the activities are likely to be and if and how that disruption could be reduced" (Paragraph 16, emphasis added)*.

- Means to influence/control: *"Highway authorities also need means by which they can exercise influence or have control over activities, e.g. when or how the work is carried out, in order to minimise their impact" (Paragraph 17)*.

The above looks to provide a useful basis upon which the RIA could then have gone on to identify particular problems. In particular, one would have expected such comments as above to be followed by the identification of problems related to information provision, and – separately to this – problems related to the ability of highway authorities to influence or control street works activity. In practice, however, it is difficult to find any details at all in the 'Rationale for Government intervention' section that could be said to describe what the problems to be addressed might actually be.

Information provision

Nothing at all is said in relation to information provision failings in this part of the RIA. Some indication of where relevant problems are considered to arise can be found later in the description of the 'Do Nothing' option, where Paragraphs 29-30 read as follows:

> *"There are concerns that, while information is provided by utility promoters it is often inaccurate, for instance the wrong location is given for proposed activities, or is not given at all."*
>
> *"Currently utility promoters do not always notify highway authorities of changes to their original proposals except for revised duration estimates. This causes problems for effective planning and co-ordination making it more difficult for authorities to know whether other activities should be allowed to proceed"*

These comments are, however, extremely vague. We are told that there are *"concerns"* with respect to the accuracy of information provision, but one would expect some assessment of how well founded and material these concerns are. Thus, immediate questions that arise, and that one would have expected further examination and assessment of, include:

- To what extent does available evidence suggest that highway authorities are not being notified of changes to proposals, and being provided with inaccurate/incomplete information?; and,

- Why has it not been possible to adequately address such information failings within the existing regulatory arrangements?

Absent any attention to these and related questions, the RIA identifies neither the form of relevant information problems, nor why they have been able to persist, nor how material they can be expected to be.

The potential for highway authorities to influence/control works activity

In relation to the ability for highway authorities to influence or control activity, the 'Rational for Government intervention' section simply states that:

> *"The existing powers under the NRSWA have not proved sufficiently effective in this regard as the requirement is only for utility promoters to notify the authority of their intention to carry out an activity rather than requiring the permission of the highway authority to carry out the work. Under the permit schemes, all activity promoters will have to positively obtain a permit to carry out activities and comply with the conditions imposed by the permit authority" (Paragraph 17).*

There are manifold problems with the above comment. No detail at all is provided in terms of how the view that "*existing powers under the NRSWA have not proved sufficiently effective*" has been arrived at. As was noted above, the NRSWA places a duty on the highway authority to co-ordinate works, and a parallel duty on undertakers to cooperate in this process. One would expect some specification of why and how it is that these duties (and associated powers that have been granted under subsidiary legislation) have not been effective. Instead, the 'problem' is identified in terms of the absence of a feature which permit schemes would have: namely, the

failings are attributed to the fact that utilities have not had to seek permission to undertake street works, and can instead simply notify the relevant authorities.

This approach echoes that used in the Objectives section (noted above), where it was stated that: *"The objective of introducing permit schemes is to positively control works related activities in the street that may cause disruption" (Paragraph 3).* However, by effectively defining the 'problem' as being the absence of a central feature of the preferred option (the need to gain permission), the assessment suffers from a severe bout of presumptive reasoning. A requirement to get permission (to get a permit) in order to undertake street works may provide one means (i.e. be a potential option) by which specific identified problems could be addressed, but that stands to be assessed against other potential options by which those identified problems might be addressed.

More generally, the emphasis that is put on 'control' and in the identification of both relevant objectives and the problem(s) to be addressed in the RIA, is highly problematic, and indicative of an inappropriately binary view being taken of the relevant processes by which utilities and highway authorities interact in relation to street works. That is, the relevant issues concern the forms and extent of influence that different parties have on the undertaking of works activity on the highway, and on related reporting and co-ordination activities. Thus, in seeking to identify the problems to be addressed in this respect, what is needed is an identification of ways in which the current set of powers and constraints are giving rise to materially inefficient outcomes.

The following comment in the 'Do Nothing' section is useful to note in this context:

> *"...it is only where serious disruption is likely to occur that a highway authority can direct utilities as to the timing of works. In other circumstances, the activities may proceed even if the highway authority would prefer that they were delayed for network management reasons" (Paragraph 32).*

This comment recognises the existing arrangements that provide for highway authorities to influence street works, but effectively argues that the scope of situations in which a highway authority can direct utilities as to the timing of works is too limited. This is a much more promising basis upon which to identify relevant policy problems than that provided by Paragraph 17 of the RIA, which, as discussed above, simply draws a distinction between utility notification of works (under NRSWA) on the one hand and the requirement for permission (under permit schemes) on the other. In particular, the comment recognises the fact that highway authorities already have some degree of influence over street works, and thus focuses attention of the form and extent of that influence.

What is wholly missing, however, is any assessment of the potentially problematic situations referred to: for example, how frequently do they give rise to material problems?; under what circumstances do they arise?; etc. That is, one would expect some specification of contexts in which street works might give rise to a level of disruption that is considered sufficient by highway authorities to merit a direction (such that the timing (etc.) of the works was amended) but that do not satisfy the 'severe disruption' criteria referred to. No such assessment is provided in the RIA.

Lack of powers vs implementation issues

It is notable, here, that the above section was concerned with the view that highway authorities may lack adequate powers such that they cannot effectively carry out their coordination activities. However, it is important also to consider the manner in and extent to which authorities use those powers that they do have available to them.

It is notable in this context, that one of the benefits attributed to the introduction of permits schemes is that:

"the part of the highway authority discharging the network management duty function will benefit from improved information as a result of the obligation on highway authorities to obtain permits in respect of their own works" (Paragraph 35).

It is, however, clearly the case that highway authorities could have already been collecting such 'internal' information within the existing legal arrangements. To the extent that the collection of this information could be expected to materially improve coordination (and thus reduce congestion), this implies performance failings within the relevant authorities (since the level of works information that it was collecting from in relation to its own activities would have been inefficiently low).

The more general point here is that the potential for "problems" to relate to failings in public sector service provision activities should be explicitly recognised. In effect, it is being assumed that the enhanced control that is being provided to the authorities will be effectively used, begging all questions about the actual capacities and incentives that will, in practice, influence how such control might be exercised. This type of reasoning is an example of what might be termed the "central planning fallacy".

3.4 Identification of policy Options

The "Options" section identifies two basic policy options to be assessed: "Do nothing" and "Permit schemes", before considering alternative approaches that might be taken in relation to the specific aspects of the development of permit schemes (for example, the approach to be taken to the allowable level of permit fees). This latter material is discussed a little later.

The specification of what each option entails: the significance of the 'do nothing' option.

In order to assess genuinely different potential policy options, it is necessary first to identify and – at least to a reasonable degree – specify, what those options would entail. Put simply, it is necessary to identify first what it is precisely that is being assessed against what benchmark.

The first key step in this process is the proper identification of the "Do Nothing" option, since this is (typically) the baseline against which other options are to be assessed. Once the baseline has been specified, it is possible to identify how other

options differ from it – that is, what changes, or "additionalities" would other options introduce relative to the "do nothing" baseline.

It should be stressed that, at this "identification of policy options" stage of the assessment, the issue is not to identify costs and benefits that given options might give rise to. That is, the task is not the identification of likely or potential outcomes – that comes later. Rather, the task is to specify with a reasonable degree of precision how regulatory provisions would differ under each potential option.

The above points have been stressed because this task of specifying options, and of identifying how they differ from one another, has simply not been completed to any reasonable degree in the RIA. In line with comments made earlier, a major problem arises from the lack of attention given to regulatory changes that were already due to be coming into force, and that could be expected to materially affect the assessment. Most importantly, the fact that the Street Works (Registers, Notices, Directions and Designations) England Regulations 2007 were already due to be coming into force in 2008, meant that there would necessarily be significant changes to the regulatory arrangements under the "do nothing" option.

As was highlighted in the discussion of the Background section above, the fact that these Regulations were due to come into force in 2008 was explicitly recognised at the beginning of the "Do nothing" section of the RIA. However, no detail is provided in terms of how they would change the regulatory environment. In practice, this change appears to be highly significant.

The most significant change that these Regulations introduce appears to be an increase in the notice period required for some street works, including importantly "minor works", which are described in the RIA that accompanied the Regulations as: *"Works, other than immediate or major works, where the planned duration is 3 days or less"*. It is notable that this definition of minor works looks to fit, to a reasonable degree, with the reference to a 'middle range' of street works noted above. In any event, it is clear that the Street Works (Registers, Notices, Directions and Designations) England Regulations 2007 were intended to result in a significant change in the information conditions that Authorities would face when seeking to undertake their network management coordination role.

The lack of attention to this matter in the Permit Schemes RIA is particularly striking given the extent of the gains that the DfT attributed to the change being introduced in the RIA that accompanied the Street Works (Registers, Notices, Directions and Designations) England Regulations 2007. Thus, as Paragraph 30 of that RIA stated:

*"The benefit arising from Section 59 of NRSWA (improved coordination arising from a longer notice period as set out in regulations 8 and 9 of the Street Works (Registers, Notices, Directions and Designations) Regulations 2007) is estimated to be about 5% **(valued at £214m)**" [emphasis added]*.

That is, the longer notice periods introduced by these regulations were thought likely to reduce the Halcrow estimate of the delay costs imposed by street works by 5%, with this estimated as equivalent to £214m per year. To put this figure in some context, it can be noted that the highest potential benefit figure presented in the Permit

Schemes RIA – which is based on the highest assumption for the resultant reduction in congestion (10%), and the highest assumed percentage of street works requiring permits (30%) – was £129m per year.

Thus, by the DfT's own reckoning, the Street Works (Registers, Notices, Directions and Designations) England Regulations 2007 should have a substantial impact on relevant information conditions and on the extent to which Authorities can reduce congestion through coordination activities. The lack of attention given to this factor in the Permit Schemes RIA, and its implications for the assessment of the "do nothing" option, is manifestly a highly material omission.

The identification of only two options

The above comments focused on the lack of attention given to the specification of the two basic options considered in the RIA: do nothing, and the introduction of permit schemes. However, that fact that the RIA did only identify and seek to assess the likely impacts of two options, is, in and of itself, striking.

It is unsurprising that failings with respect to the identification of potential policy options will often accompany poorly identified problems. That is, if the policy problems to be addressed have not been clearly specified (and as was highlighted above, they were not in the permit scheme regulations RIA), then the task of effectively identifying options is made much harder. This raises standard questions of targeting and proportionality – those being two principles of better regulation.

In practice, even given the lack of adequate attention given in the RIA to the identification of the problems to be addressed, the fact that only two options were identified and assessed is very surprising. That is, there would appear to be a whole range of relatively obvious alternative options that could have been identified, which would have included more incremental adjustments to the do nothing option. Thus, for example, if the sanctions available in the face of insufficient information provision were considered too weak (as is implied by Paragraph 35, for example), then potential options could have been developed that sought to target this identified issue for attention.

It is also notable here that one of the principal benefits of the permit scheme over the existing framework under the NRSWA identified in the RIA is that it will require highway authorities to notify themselves of any road works that they intend to undertake. When considered in the context of the assessment of the impacts of the introduction of new/additional regulations, this implies that one of the primary arguments being presented for introducing a new regulation in this area is to compel local authorities to better organise and coordinate their own activities. This approach appears to be an inefficient and cumbersome method for ensuring that local authorities better manage the road networks and congestion in their areas, and other options to address this problem clearly could have been identified and subsequently assessed.

Permit schemes

The discussion of permit schemes option begins by noting that permit schemes will not be mandatory, and that they are likely to only be of most benefit only to those authorities with high levels of congestion. This is somewhat odd given the preceding discussion which explicitly listed the limitations associated with the existing NRSWA framework (noted above).

Taken together, these statements suggest that for a number of authorities the limitations of the current NRSWA framework – such as identified problems related to the timing and accuracy of information and the requirements for authorities to notify their own street works – are considered insufficient to merit the mandatory application of the permit schemes. In simple terms, this appears to imply that the 'do-nothing' option is considered to continue to be appropriate and remain 'fit for purpose' for a number of authorities. If this is the case, however, one would have expected some assessment of the conditions under which the introduction of permit scheme might and might not be considered likely to be a desirable policy outcome.

Notwithstanding this point, for those authorities for which the 'do nothing' option is not considered to be appropriate, the draft RIA notes three potential benefits of the introduction of the permit scheme:

i) The network management duty function will benefit from the improved information as a result of the obligation on highway authorities to obtain permits for their own works;

ii) The quality of information provided will improve in view of the improved sanctions available – especially as an application can be declined if the information is insufficient;

iii) The authority will have the power to attach conditions to all types of activities, which should assist in management and coordination.

Finally, the draft RIA notes that because the new functions associated with the permit schemes will take additional resources, that authorities should be able to charge fees for operating the permit system.

When considering the potential benefits of the permit scheme over the 'do-nothing' approach, the question of enforcement immediately arises. Put another way, given that similar powers to attach conditions to notifications and to impose sanctions potentially exist under the current NRSWA framework (and will continue to apply for those authorities that do not adopt the permit scheme) the potential benefits of the permit scheme are unclear *in the absence of further information as to proposed enforcement/implementation.*

Thus, even if the change in the information conditions that highway authorities would be likely to face as a result of the introduction of a permit scheme had been adequately identified (something that - as will be clear from earlier comments - we consider the RIA fell a long way short of doing), a reasonable assessment of the likely benefits of this option would need attention also to focus on what the authorities can be expected to do with any additional information that is obtained. It cannot simply be reliably assumed that the potential benefits from permits will naturally flow as a

consequence of the authority having more information and an ability to impose sanctions. This issue of the linkage between the introduction of permits and expected outcomes recurs throughout the draft RIA, and is systematically not adequately addressed.

(a) The setting of permit fees

The draft RIA then considers what fees should be paid by utility companies for permits, noting that Ministers had decided that fees should not be paid by authorities for their own activities.

According to the TMA, the fees should be set so as to not exceed the costs of operating the permit scheme. In terms of what constitutes 'prescribed costs' the relevant regulations note that:

> The prescribed costs are described in the Regulations as '*that proportion of the total costs incurred by the Permit Authority in connection with operating a permit scheme attributable to the costs of operating that scheme in relation to statutory undertakers*'.[5]

Fees are to be set in advance of the costs being determined, and are therefore estimates of the costs of operating the permit scheme. The draft RIA notes that it anticipates that adjustments 'may be made' in subsequent years to offset any surplus/deficit between the estimated and actual costs. Finally, the draft RIA notes that when considering applications to operate a permit scheme:

> *…the Department will aim to ensure that authorities set permit fees at a level intended to cover only their prescribed costs.*

Two options are presented in the draft RIA for how the permit fees should be set within this framework:

1. Standard permit fee model

2. Maximum permit fee model

Once again, it is notable that the consideration of both of these options is very limited in the draft RIA; limited to four paragraphs (half a page of text) in total. Under the standard permit fee model, a national fee structure – which would apply across all the authorities that operated a permit scheme – would be applied. The draft RIA notes that the potential benefit of such a national structure would be greater certainty for utility companies. However, it then notes that because different authorities have different operational costs across their road networks, it may exclude some authorities from operating a permit scheme as the 'standard fee' will be too low to recover sufficient costs of operating the scheme. In addition, it is noted that such an approach may lead to some authorities over-recovering revenue.

[5] Paragraph 42 Department of Transport 'Draft Final Regulations Impact Assessment', 19 July 2007 < http://www.dft.gov.uk/consultations/aboutria/ria/pddraftregria>

The preferred approach presented in the draft RIA is the use of a maximum fee model which caps the fee level in the permits schemes regulations and statutory guidance. Under this approach, when applying to operate the permit scheme an authority has to provide evidence to the Secretary of State to justify the levels of fees proposed in operating a scheme in their area.

A major limitation in the assessment of the appropriateness of different approaches to the setting of permit fees is the limited information provided in the draft RIA regarding the *cost drivers* associated with operating a permit system. In the absence of such information it is difficult to assess the extent to which costs might be expected to differ across authorities, and to identify options that might take these differences into account and address concerns with respect to 'under' and 'over' recovery of revenue.

In adopting the maximum permit fee model the draft RIA notes that this approach avoids the negative aspects of the 'standard fee model'. However, it notes that under the maximum fee approach:

> *There could be a temptation for authorities to bid up to the maximum level but it is anticipated that this will not happen given that the Secretary of State must approve schemes before they come into effect (and has power to vary them).*

This approach to the setting of permit fees affords the local authority substantial discretion. Good regulatory practice suggests that it is important that discretion is constrained in various ways and exercised within an effective framework of oversight and accountability. However, the explanation of the oversight arrangements presented in the draft RIA for the setting of permit fees provides little confidence in this respect. For example, there is a lack of clarity and detail in terms of:

- The level of detail at which the Secretary of State will review the permit requests?
- What processes and criteria will be adopted in such a review?
- What factors and metrics will be taken into account?
- Whether a common systematic approach will be adopted in the consideration of applications?

Thus, there is very little detail on *how* this review process will be undertaken in practice.

(c) Types of permit schemes

The next section of the draft RIA considers the potential options for the different types of permit schemes that could be introduced by authorities, identifying two potential options: a non-standard permit scheme, and a standard permit scheme.

Non-standard permit schemes

The draft RIA notes briefly that the relevant provisions of the TMA provide flexibility in respect of the 'form' that the permit scheme can take, noting that it is possible to be *'prescriptive or non-prescriptive in relation to the content of individual permit schemes'*.[6]

In dismissing the possibility of this option, the draft RIA notes that such a non-prescriptive approach could lead to utilities having to adapt their operations to accommodate the specific requirements of individual schemes, and that this could result in significant complications and additional running costs.

Whether or not this is likely to be the case is difficult to assess from the draft RIA as the discussion of this option is extremely limited; two small paragraphs and with no underlying analysis.

Standard permit schemes

The preferred approach presented in the draft RIA is for the use of a standard permit scheme across all of the authorities that seek to implement the permit system. However, precisely what is meant by 'standard' is unclear from the draft RIA. The draft RIA sets out the following criteria relating to standardisation of the process:

> *...the process for applying for a permit and which activities are covered by schemes will have certain common features in all areas where a permit scheme is intended to operate. As well as providing consistency across permit schemes it will maintain some features in common with the noticing regime.*[7]

Beyond the requirement for a standard process for applications the extent of standardisation envisaged is unclear. For example, in discussing the standard model the draft RIA notes that individual authorities will have discretion in respect of any conditions attached to permits; such as the dates on which the activity can take place and the way in which the activity is carried out.

3.5 The Assessment of Impacts

The draft RIA identifies five potential benefits associated with better control of the activities carried out on the street:

i. Maximised use of existing network, making journeys more predictable and faster and therefore improving available productive time;

ii. Reductions in pollution with benefits to air quality and other environmental benefits;

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[6] Paragraph 50 Department of Transport 'Draft Final Regulations Impact Assessment', 19 July 2007 < http://www.dft.gov.uk/consultations/aboutria/ria/pddraftregria>

[7] Paragraph 52 Department of Transport 'Draft Final Regulations Impact Assessment', 19 July 2007 < http://www.dft.gov.uk/consultations/aboutria/ria/pddraftregria>

iii. More efficient and reliable business deliveries

iv. Easier and more time efficient access to destinations

v. More reliable public transport, which will in turn attract more users.

The discussion of these general benefits then concludes by distinguishing these benefits from those that can be achieved under the NRSWA noticing system, noting that:

> *The fundamental difference between a permit scheme and the noticing system is that a permit scheme enables the highway authority to be proactive, to take charge and effectively manage and co-ordinate all activities (both utility and its own) on its roads. This will enable better planning and co-ordination of activities and build good working relationships between authorities and utilities. It is this shift in responsibility, along with the new powers, that will enable all of the stated benefits to occur.*

The RIA thus frames the benefits of the permit scheme at a very general level. Moreover, as has been emphasises in earlier sections, the presumption adopted when assessing the benefits is that the 'shift in responsibility' and new powers will automatically lead to all of the benefits being achieved.

The draft RIA then goes on to provide a quantitative assessment of the potential economic benefits associated with the introduction of the permit scheme. It begins this assessment by noting the following:

> *The key benefit to be derived will be from reduced disruption on the road network. It is not possible to quantify the exact economic benefits at this stage, as this will depend upon how widespread the operation of permit schemes is, and how effective they prove in reducing disruption levels.*

The assessment of the economic benefits then considers studies of the potential level of disruption that is attributable to street works. It refers to a Halcrow study for the DfT which estimated the costs of disruption by utility works at £4.3 billion in 2002/03. It also refers to a study by Professor Phil Goodwin which estimated the costs of congestion associated with street works at £1 billion or less. The DfT adopts the Halcrow estimate (of £4.3 billion) for the remainder of the assessment of economic benefits. The stated reasons for this are that the estimates are considered more robust because they draw upon a larger disaggregated database.

The analysis also notes a significant discrepancy between the Halcrow estimate of the number of street works undertaken annually (estimated at 1.2 million) and the estimate of street works estimated by NJUG (estimated at 2.4 million works per year). The Halcrow estimate is adopted for the purposes of the assessment of economic benefits.

The draft RIA combines the Halcrow estimates of the number of street works undertaken annually with estimates of the average costs of disruption per day (£/day)

to arrive at its estimate of the total cost of congestion attributable to street works (£4.3 billion).

We have not examined the derivation of the underlying Halcrow, NJUG or Goodwin figures referred to above, and thus have no specific comments on them. However, it is clear, even from the above discussion, that the differences between the various estimates are extremely large: the Halcrow estimate of total congestion costs (that is used by DfT for its benefits assessment) is more than four times higher than the figure presented in the Goodwin report; the NJUG estimate of the number of street works undertaken annually is double the Halcrow estimate (which DfT used). The magnitude of these differences strongly suggests that there is considerably uncertainty with respect to the relevant figures, and that this uncertainty may have a highly material bearing on quantitative assessments of costs and benefits.

In order to generate quantitative assessments, it is, of course, necessary to identify particular figures to be used. Thus, there is nothing problematic about DfT having proceeded to estimate benefits on the basis of the Halcrow figures. Major difficulties arise, however, from the fact that DfT only considered the Halcrow figures in its quantitative assessments. When faced with significant uncertainty with respect to relevant input figures, one would expect some assessment of the sensitivity of results to the use of different input figures. Thus, whilst it may have been judged that the Halcrow figure of £4.3 billion was more robust than the Goodwin figure of £1 billion, that does not justify the lack of any account having been taken of the potential for relevant costs to be lower than £4.3 billion. Sensitivities typically stand to be assessed even when one can be relatively confident with respect underlying estimates. Their assessment is of particular importance when there are major uncertainties and/or differences in view to contend with (as in this case).

The RIA, however, simply moves on to estimating the possible direct economic benefits of the introduction of the permit schemes, using the Halcrow figures referred to above. The benefits estimates that are presented in the RIA are shown in Table 1 below.

Table 1: Benefits estimates presented in Paragraph 72 of the Permit Scheme Regulations RIA

% reduction in congestion	**Benefit for % of street works requiring permits**		
	1%	*10%*	*30%*
1%	£0.43m	£4.3m	£12.9m
2%	£0.86m	£8.6m	£25.8m
5%	£2.15m	£21.5m	£64.5m
10%	£4.3m	£43.0m	£129.0m
The above estimate is based on 1.2 million works a year			

The columns consider the extent to which permits may actually be required, although the basis for considering 1%, 10% and 30% is not made clear (presumably these figures are intended to reflect a range of reasonable expectations with respect to the likely adoption of permit schemes by highway authorities). The rows in the table consider different percentage reductions in congestion costs between 1% and 10%.

Given an assumed percentage reduction in congestion costs, and an assumed percentage of street works that require a permit, a benefit figure is calculated by reference to the Halcrow estimate of £4.3 billion[8] as the cost of congestion caused by street works. Thus, for example, if a 10% reduction in congestion costs is assumed to have been achieved in relation to the introduction of permit schemes for 10% of street works, it is assumed that the total benefit is a 1% (i.e. 10% *10%) reduction in this £4.3 billion figure – that is, £43 million.

Before considering the above figures further, it is useful to consider the assessment of costs in the RIA. The table below shows the cost estimates that are presented in Annex B of the RIA, together with the benefits estimates that were made in relation to an assumed 3% reduction in congestion costs as a result of permit scheme introduction. The 3% benefits case is shown as this is explicitly referred to in the weighing of costs and benefits in the main text (for example, in Paragraph 103).

Table 2: Excerpt from the cost-benefit comparison shown in Annex B of the Permit Scheme Regulations RIA

	% of street works that require permits		
	1%	*10%*	*30%*
Total expected benefits of 3% congestion costs reduction	**£1,290k**	**£12,900k**	**£38,700k**
Invoice costs	£240k	£2,400k	£7,200k
Permit handling costs	£240k	£2,400k	£7,200k
Permit fees	£729k	£7,290k	£21,870k
Total expected costs of permits	**£1,209k**	**£12,090k**	**£36,270k**

Very limited information is provided on the derivation of the cost estimates, so it is difficult to comment of the figures in much detail. The figures include an estimate of the additional costs that the introduction of a permit scheme may result in for utilities, and an estimate of the additional costs for highway authorities, with the latter shown as 'permit fees' (presumably on the basis that these fees are intended to recover such additional costs). The utility costs are broken down as between invoice costs and permit handling fees, and in each case the figures shown have been informed by NJUG estimates. The figures indicate that around 60% of costs are thought likely to fall, in the first instance, on highway authorities.

Perhaps the main point of note with respect to these cost figures is simply that they indicate that the introduction of permit schemes could give rise to substantial additional costs. Thus, where it is assumed that 30% of street works require permits, the estimates costs are shown as £36 million per annum, with around £22 million of this accounted for by additional highway authority costs that would be recovered through permit fees. Thus, irrespective of how these costs may relate to estimated benefits, it is important to recognise the materiality of the resource implications under consideration, as this can help focus attention of questions of proportionality, and

[8] Whilst the Halcrow estimate of the total costs of congestion related to utility street works is shown in Table 2 of the RIA as £4,360 million, the figures from Table 3 of the RIA – that are commented on above – appear to use a rounded figure of £4,300 million.

whether similar benefits might be achievable at lower costs. Such matters are not, however, adequately recognised in the RIA.

Instead, as in Paragraph 103, attention turns quickly to the comparison between costs and benefits. The 3% benefits case referred to above is introduced in this context, presumably as it gives rise to figures that exceed the cost estimates shown above by a relatively small margin. On this basis, it is argued, as in Paragraph 73, that: "*If the introduction of permits was to deliver just a 3% reduction in congestion then the benefits would outweigh the costs*" (emphasis added).

The word "just" was underlined (by us) in the above excerpt because it seeks to put the 3% benefits estimate in context, and in particular suggests that this magnitude of benefit is not particularly large, and thus implies that it should be considered likely to be achievable. The apparent conservativeness of the figure ("just a 3% reduction") is emphasised by reference to a larger Halcrow estimate as follows:

> *"Halcrow estimate that the increased powers from the TMA and NRSWA may provide a 10% improvement in the overall delay cost arising from street works" (Paragraph 73).*

While we haven't examined the detail of this Halcrow estimate, the usage made of it in the permit schemes RIA nevertheless appears to be highly problematic. In particular, it is clear that DfT have explicitly used this 10% Halcrow figure in other contexts in ways that have a material bearing on how it might be reasonably interpreted in the context of assessing permit schemes.

Thus, in the RIA that accompanied the introduction of the *Street Works (Registers, Notices, Directions and Designations) Regulations 2007*, the following reference is made to the Halcrow 10% figure (part of which was cited earlier in order to emphasise the importance of these Regulations to the assessment of the "do nothing" option for the permit schemes RIA):

> *"Halcrow were also commissioned to consider the level of benefits that the TMA and its amendments of NRSWA could deliver. With appropriate application of all the powers available to the street authorities, through these Regulations and other powers of direction, Halcrow consider that there could be a 10% reduction in the delay costs imposed by street works… The benefit arising from Section 59 of NRSWA (improved coordination arising from a longer notice period as set out in regulations 8 and 9 of the Street Works (Registers, Notices, Directions and Designations) Regulations 2007) is estimated to be about 5% (valued at £214m)" (Paragraph 30).*

So, the 10% Halcrow benefit estimate related to a broad range of changes, and some these changes were already due to come into place (at the time the permit scheme regulations were being assessed). Moreover, the specific changes to be brought about by the *Street Works (Registers, Notices, Directions and Designations) Regulations 2007* had already been identified by DfT as accounting for about 50% of the Halcrow benefits estimate. Thus, to avoid double counting, one would expect explicit recognition of this fact, and indeed of the extent to which the 10% estimate could be understood as likely to be achievable in the context of permit schemes, to have been

related to these other changes. In particular, it would appear that that part of the Halcrow potential benefits estimate which could reasonably be related to the introduction of permit schemes would amount, at most, to around 5% (i.e. half of the 10% estimate cited in the RIA).

Instead, the permit schemes RIA simply presents the Halcrow 10% figure as though this was an appropriate means of putting its 3% assumed level of benefits (that were identified as necessary to outweigh the estimate of costs) into context. The lack of transparency that this part of the permit scheme RIA exhibits thus represents extremely poor regulatory practice. When the Halcrow estimate is put more appropriately into context, the 3% figure immediately starts to look quite high. For example, if around half of the estimate can be reasonably related to one other specific set of Regulations, then the achievement of 3% benefits would seem to require that permit schemes were able to provide at least 60% of the remaining benefit identified by Halcrow in relation to those street works for which permits are required (i.e. 3% out of the 5% referred to above).

Moreover, the excerpt from the *Street Works (Registers, Notices, Directions and Designations) Regulations 2007* RIA explicitly indicates that the Halcrow estimate was made conditional on "*appropriate application of all the powers available to the street authorities"*. That is, the benefits estimate is dependent on appropriate implementation and enforcement by highway authorities, and as has already been emphasised, given the relevant context, it cannot be simply assumed that this condition will hold to a reasonable degree.

3.6 Competition Assessment

The general approach to the competitive assessment adopted is to determine whether or not the relevant utility companies operate local or regional monopolies and then to assume that because of this the impact on competition will be limited. The only possible competitive impact identified is in the telecommunications sector. Given that competition between network operators is – for the most part - much more significant in the telecommunications sector than in other utilities, then the particular identification of this sector looks appropriate.

Paragraph 117 notes that scheme operators would be expected to deal with permit applications on a non-discriminatory basis, and that whilst it is possible that some businesses may incur greater costs in setting up new systems to improve the management of their activities, it is unlikely that such costs will be sufficient to have implications for competition. However, it should be recognised that permit schemes could clearly have markedly different economic effects on different companies that were being treated in a wholly non-discriminatory manner. The key issue that one would have expected the RIA to have examined in this respect is new entry, since that may involve particularly significant street works activity associated with the laying of a new network.

That is permit schemes would be expected to raise the costs of entry, and one would thus have expected the competition assessment to considered this issue. In practice, the key issues are likely to relate to the efficiency of the conduct of highway

authorities in their issuing of permits, and their associated charging levels. That is, it may be that a higher cost of entry is justified in a context of the efficient coordination activity, but equally it may be that specific permit schemes unnecessarily and inefficiently raise the cost of entry. Thus, the efficiency of the permit scheme arrangements is likely to be an important factor with respect to potential impacts on competition.

3.7 Enforcement, sanctions and monitoring

The RIA notes that the permit scheme regulations provide the authorities with a number of sanctions in order to achieve compliance with the permit schemes. For example, it notes that Regulation 19 provides for it to be a criminal offence to undertake works without a permit, and allows for a fine of £5000. In addition, Regulations 21 to 28 allow for the issuance of Fixed Penalty Notices for criminal offences, which allows for the payment of a penalty amount of £300 - £500.

In reviewing these sanctions, the question once again arises of what the differences are between the provisions of the NRSWA and the new Regulation. In the case of the ability to levy a fine for works undertaken without a permit, a similar provision exists under the noticing framework of the NRSWA. For example, section 55 of the NRSWA requires at least 7 days notice of any proposed street works, and sub-section (5) of that provision states:

> *(5) An undertaker who begins to execute any works in contravention of this section commits an offence and is liable on summary conviction to a fine not exceeding **[**level 4 **]** on the standard scale.*

Similarly, the ability of authorities to levy fines for contravention of the conditions imposed under the permit scheme is not dissimilar to the requirements under section 56(3) of the NRSWA which allows for the undertaker to fine for contraventions of directions given by street authorities under this provision. *The Street Works (Fixed Penalty) (England) Regulations 2007* are also of some relevance here, since changes in the penalty arrangements were already due to be coming into force when the permit schemes RIA was being undertaken, and thus should have been taken into account in the definition of the "do nothing" baseline.

4. FURTHER COMMENTS ON SOME OF THE KEY ISSUES IDENTIFIED

This chapter provides further comments on a number of the key issues that were identified in the previous section.

4.1 'Additionality' of permit schemes over the existing NRSWA provisions

One of the key overarching stated objectives for the introduction of the permits scheme is to allow for the better coordination and planning of activities. However, this raises an immediate question of whether such better coordination and planning could equally be achieved under existing legislation and regulations. Put simply, the question here is: how does the permit scheme provide for better coordination and planning over and above the provisions that already exist?

In the explanatory memorandum to the permit schemes regulation five differences between the existing powers and the permit schemes are identified, these include (emphasis added):

i. **authorities can be more proactive** in the management and control of activities taking place on the highway; **permit schemes may be envisaged as schemes to book occupation** of the street for specified periods for a specified purpose **rather than the NRSWA system** whereby the **promoters** are **entitled to occupation of the street and must simply notify** the highway authority of their intentions;

ii. highway authorities **own works are included within the permit scheme**;

iii. **conditions may be attached to permits which impose constraints** on the way that **work is carried out** and the information is provided, and can **allow the authority to direct the timing of activities;**

iv. the control that **permit authorities have over variations to the permit conditions,** particularly in the circumstances of **extensions of time**, give greater opportunity to deliver completion dates; and

v. **a permit fee will be payable by the statutory undertakers**. This fee will relate to the proportion of total costs incurred by a Permit authority that are attributable to statutory undertakers only. (i.e. the fee payable will not cover the cost of highway authorities own works.)

Two questions immediately arise when considering these stated 'additions': how do they relate to the powers that already exist under the existing law?, and how, in practice, will they operate differently from the existing law? This second point is of particular importance as a review of the key piece of legislation relating to street works – the New Roads and Street Works Act (1991) (NRSWA) – suggests that a number of similar provisions already exist under that legislation: this suggests that to be effective, and meet the stated overarching objectives, the *implementation* of the permit schemes regulations will be of particular importance.

To highlight this point further, it is useful to consider the existing powers and provisions of the NRSWA, a brief summary of which is contained in Appendix 1. It can be noted that the following provisions already exist under the current NRSWA framework:

- It is an offence under the NRSWA to undertake street works without a licence, and the authorities have an ability to fine for contraventions;[9]

- Authorities are required to maintain a register which contains, among other things, information about street works including descriptions of such works.

- Undertakers are required to provide advance notice of the works to the street authority, and different periods of notice may be prescribed for different types of work. Any undertaker who fails to comply with the duties under this provision can be fined.

- Where serious disruption is likely, authorities can direct when street works are to be undertaken, and undertakers can be fined for contraventions of directions given by street authorities under this provision.

- Authorities can restrict street works where works have recently been undertaken

- A street authority is required to use its best endeavours to coordinate the execution of works of all kinds (including works for road purposes) in the streets for which they are responsible. In addition, if it appears to the Secretary of State that a street authority are not properly discharging their general duty of co-ordination, he may direct the authority to take such steps as he considers appropriate for the purpose of discharging that duty.

- Authorities have an ability to fine if works not undertaken within given reasonable time period.

- The Secretary of State can make provision by regulation requiring that an undertaker pay to the highway authority a charge determined, in the prescribed manner, by reference to the duration of the works.

This brief comparison of the existing law under the NRSWA and the proposed additional provisions and powers in the permit schemes regulation suggests that the differences between the two pieces of legislation may not be great.[10] For example, the requirement to book occupation can be seen as similar to the requirement under the NRSWA to apply for a licence to occupy the street and to provide a defined level of notice. Similarly, the ability to attach conditions to permits, and, to have control over

[9] This appears to be actively pursued, for example, see the recent press release from Transport for London prosecuting Thames Water for unauthorised street works.
< http://www.tfl.gov.uk/corporate/media/newscentre/archive/6918.aspx>

[10] For this reason perhaps, the proposed London permit scheme notes that similar concepts to the NRSWA will continue to be used in a number of key areas. London Councils TEC 'London Permit Scheme – Appendix 1' 12 March 2008, point 1.4

variations of permits, is arguably similar to the provisions of the NRSWA (such as section 56) which allow for directions to be given to the undertaker as to when and where works can be undertaken.

The key point here is that – as was emphasised above - before one can properly assess alternative options, it is necessary to define - with a reasonable degree of precision – how those options differ. Both the NRSWA and the permit scheme regulations include provisions that affect information provision and highway authority powers in relation to street works. To assess adequately the likely impact of the proposed changes, the differences between these provisions, and how they could be expected to operate in practice, needed to be examined in some detail. As was highlighted above, this was of particular importance in a context where the NRSWA arrangements were already due to be materially changed as a result of secondary legislation that had been brought forward following the TMA – in particular, *The Street Works (Registers, Notices, Directions and Designations) (England) Regulations 2007.*

4.2 Efficiency of street works

One of the stated high-level objectives of the introduction of permits is to encourage utilities to undertake their activities more efficiently. For example, paragraph 104 of the Draft RIA notes that:

> *Different fee levels provide the permit authority with an opportunity to encourage utility companies to carry out activities in a less disruptive and quicker way. If it were possible to reduce the duration of an activity (for instance so that it lasted nine rather than 11 days) then this might mean it would be come under a lesser activity category in Table 3, i.e. "standard" rather than "major" activity, in which case, the fee which the undertaker had to pay would also be lower.*

Underlying this statement there appear to be two presumptions being made. First, that utility companies have an ability to determine the length of time associated with the street works that they undertake, such that they can potentially convert a 'major' activity to a 'standard' or 'minor' activity in some circumstances. Second, that street works are currently being undertaken inefficiently – taking longer than they should be – and that there is scope for utility firms to reduce works significantly, by up to two days as noted in the example presented.

The key issues that arise here concern materiality. That is, while there are no doubt some circumstances in which the duration of street works could be reduced such that a different category of assessment (and permit fees) applied, the key questions to be assessed concern likely magnitudes – to what extent can street works be expected to fall sufficiently close to the boundary between two charging categories such that shifting between those categories is a viable option, and to what extent can the permit charging arrangements actually be expected to give rise to such shifting. In considering these matters it is important to recall two more general points: first, the nature of street works activity, and, second that any street works represent a private cost to utility companies.

As acknowledged in the draft RIA, it is clearly the case that in the majority of cases street work activity represents a necessary obligation for utility companies to ensure the maintenance of functioning and safe and efficient network services. That is, in most cases utility companies are required by law to maintain the network infrastructure to a particular standard. It follows therefore, that the ability of utility companies to not engage in street works, or to decide to convert a 'major' street work to a 'standard' activity is in most cases likely to be subject to limitations.

Moreover, it must be recalled that street works represent a private cost to utility firms. These are not activities that they would otherwise engage in absent customer or regulatory requirements. As such, given that they are a 'cost' to a utility firm, they would already have strong private incentives to limit the extent of that cost. The extent to which permit fees can be expected to materially affect utility incentives and give rise to significant – and efficiency enhancing - changes in conduct, cannot simply be assumed. Aside from anything else, the generation of more efficient outcomes effectively rests on the highway authority being skilled in the development of incentive schemes (since the hypothesised changes in behaviour represent utility responses to the incentive conditions introduced by permit schemes). This raises more general issues of competence (in the carrying out of complex activities) to which we now turn.

4.3. Competency of authorities to act as network mangers

One of the stated purposes of the introduction of the permit schemes regulation is to allow highway authorities to better fulfil their 'network manager' function in respect of the road networks in their areas. While, in principle, this could lead to the better coordination of activities and allow for the more expeditious use of the road network, in practice, there are at least two issues which could potentially arise in respect of the fulfilment of this function.

The first is in regard to the competency of authorities to act as network managers. At a general level, as those involved in network activities will attest: the role of 'network manager' is typically both complex and evolving in nature. One lesson from the experience in other network sectors is that effective coordination involves more than simply collecting large amounts of information. Rather the real complexity – and therefore competency in execution – arises with what is then done with this information. In simple terms, effective network management is determined by the ability of the relevant processes and procedures to use this information in ways that maximise the use of the network. As drafted, the RIA focuses primarily only on the first of these tasks; the collection of additional information (albeit in an extremely general and vague manner). However, what is less clear from the RIA is an understanding of the processes and procedures that will be employed by authorities to execute their network manager function; *what will be done with this information once collected*.

This is of particular relevance because, as noted above, authorities already have a general responsibility to coordinate the execution of all works on the streets for which they are responsible under the NRSWA. Given that this coordination function already exists in some form, it can be inferred that this function has not been adequately

fulfilled in the past. This then raises a key question, which recurs throughout this report: how precisely will the introduction of the permit scheme lead to better co-ordination of activities?

A second issue associated with the role of authorities as network managers is the potential for conflicts of interest to arise given the different roles that authorities have, in particular given their network coordination role, and their role as a major user, and contributor to congestion, on the relevant road network. It is well understood from network industries more generally, that such conflicts can potentially arise when the same organisation which coordinates the use of the network, is in itself a major user of that network (and the emphasis typically put on the separate identification and regulatory treatment of "system operation" activities on electricity networks provides a clear example of this). Whether conflicts of interest would be likely to arise in practice, and have material effects, is unclear. However, when there is a significant possibility of such conflicts arising, it should be emphasised that the first key issue for relevant assessment process is that this possibility is clearly recognised (effort can then be put into specifying the ways in which such conflicts might arise and give rise to material effects).

4.4 Discretion and 'flexibility' afforded to authorities

The regulations allow authorities substantial discretion and flexibility in respect of the implementation of the permit system. For example, the draft RIA notes at a number of points that the TMA allows for flexibility in respect of the form of permit scheme that is adopted. In addition, paragraph 87 of the draft RIA allows authorities the flexibility to design their schemes to allow for discounts from the maximum fee levels, in part to offer incentives for certain behaviours on the part of utility companies.

This flexibility in implementation is presumably premised on the need to allow permit schemes to be accommodated within the specific operational and cost conditions of a particular authority. However, as in respect of discretion in the enforcement of regulation more generally, to be effective and ensure that this discretion is exercised appropriately, it is important that sufficient safeguards and oversight exist. In a nutshell, good regulatory practice requires that discretion be constrained within a process that allows for effective oversight.

The issue of the degree of constraint or oversight on the exercise of this discretion is of particular importance here because the authorities' discretion relates, in part, to the setting of permit fees, which represents a source of revenue for authorities. Put simply, the authorities are being afforded flexibility to determine the level of revenue that they obtain from utilities in determining the fees charged for permits.

As was discussed above, the 'temptation' for authorities to bid permit fees up to the maximum level is expressly acknowledged in the draft RIA.[11] The RIA presents the proposed maximum fee levels per permit shown below:

[11] Paragraph 49, Department of Transport 'Draft Final Regulations Impact Assessment', 19 July 2007 < http://www.dft.gov.uk/consultations/aboutria/ria/pddraftregria>
Draft RIA

Table 3: Proposed maximum fee levels per permit or Provisional Advance Authorisation (as shown in Paragraph 86 of the Permit Scheme Regulations RIA)

Activity type	*Road category 0-2*	*Road category 3-4*
Application fee for major activity permit (covering Provisional Advance Authorisation)	£105	£75
Major Activity permit issue fee	£240	£150
Standard Activity permit issue fee	£130	£75
Minor Activity permit issue fee	£65	£45
Immediate Activity permit issue fee	£60	£40
		Provisional advance authorisation
Category 0,1 and 2 and traffic sensitive street		£40
Category 3 and 4 non traffic sensitive streets		£35

Although these fees are intended to be the maximum levels, it is notable that in the first permit scheme application - that by Kent County Council – the proposed levels of permit fees are very similar to those shown above. The table below shows a number of the fees proposed by Kent County Council, and presents the difference between that fee level, and the maximum proposed level shown in the RIA, in brackets. The differences from the maximum proposed level thus look to be limited.

Table 4: Proposed permit fee levels by Kent County Council
Differences between maximum fees and proposed fees are shown in brackets

Activity type	*Road category 0-2*	*Road category 3-4*
Major Activity permit issue fee	£240	£148(£2)
Standard Activity permit issue fee	£130	£74(£1)
Minor Activity permit issue fee	£65	£45
Immediate Activity permit issue fee	£53(£7)	£39(£1)

Source: Kent County Council, Table 7, page 92

Of course, it is possible that this level of fees may be justified. The key issues, however, concern the recognition of the potential tendency for fee levels to be set close to the maximum, and the specific arrangements by which this tendency is taken into account. The RIA appears to take the view that this will not be a major issue in practice because the Secretary of State must approve permit schemes before they come into effect. However, this automatically raises the question of the type and level of oversight that will be exercised by the Secretary of State in assessing applications for permit fees. On this issue, the draft RIA does not provide any detailed information about the process by which applications will be assessed, nor the methodology that will be employed, to examine where the permit fees are appropriate, noting only that:

> *When applying to the Secretary of State to operate a permit scheme, an authority must provide evidence to justify their operating a scheme. In so doing they must quantify the benefits (social, economic and environmental) that they expect to be realised.*[12]

The potential wide discretion afforded to authorities in setting permit fees, coupled with the limited information in the draft RIA about how the oversight of the exercise of such discretion will be effected, is amplified by the relatively loose language employed throughout the draft RIA when referring to how the Secretary of States will discharge its oversight function. For example, paragraphs 31 and 53 note that:

> *When considering applications the Department* ***will aim to ensure*** *that authorities set permit fees at a level that does not exceed the prescribed costs ie the costs of operating the permit scheme in relation to undertakers only.*
>
> *The Secretary of State* ***will seek to ensure*** *that only authorities which demonstrate the ability to operate an effective permit scheme (working within the Regulations and having had regard to the Statutory Guidance) will be granted approval.*

The key point here is that terminology such as 'will aim to' or 'will seek to' is being used in the context of an oversight role for the Secretary of State which has not been discussed in any detail. This can lead to a perception that the substantial discretion afforded authorities will not be subject to detailed or systematic analysis.

4.5 Logic of the central proposition linking permits to reductions in congestion

The draft RIA identifies three high-level differences between the permit system and the noticing system, which it argues will facilitate the better management and coordination of the road network. These are that the permit scheme will allow the authorities to be:

i. proactive
ii. to take charge; and
iii. effectively manage and coordinate activities.

However, what is not clear from the draft RIA is precisely how these aspirations will be transposed into practical action by authorities. The draft RIA appears to suggest that the shift in responsibility for coordination alone under the permit system will *naturally* lead to lower congestion on the road network, noting that:

> *It is this shift in responsibility, along with the new powers, that will enable <u>all</u> of the stated benefits to occur.*[13](emphasis added)

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[12] Paragraph 44, Department of Transport 'Draft Final Regulations Impact Assessment', 19 July 2007 < http://www.dft.gov.uk/consultations/aboutria/ria/pddraftregria>

[13] Paragraph 65, Department of Transport 'Draft Final Regulations Impact Assessment', 19 July 2007 < http://www.dft.gov.uk/consultations/aboutria/ria/pddraftregria>

At other points, the discussion in the draft RIA comments to some extent on how the permit system will provide additional, and more accurate, information to authorities, and that this will allow them to better coordinate their activities.[14] However, as discussed above, the draft RIA does not then go on to explain in any detail how the additional information obtained under the permit system will be used to allow for the better coordination and management of the road network. Once again, the presumption appears to be that better coordination and management will necessarily flow from having better information, irrespective of how that information is actually used in practice.

The key point being made here is that the underlying reasoning linking the shift in responsibility under the permit scheme, and the obtaining of more information, to the achievement of lower levels of congestion on the road network from better managed street works is significantly under-developed in the RIA. The position adopted seems to be one of asserting on the need for a shift in responsibility/more information and then naturally assuming that this will automatically lead to a reduction in congestion attributable to street works.

Put simply, giving more power to planners cannot be assumed to lead to automatic benefits. In many areas of government policy, planning constraints are seen as **major obstacles** to new investment. Thus, how planning processes work in practice is critical (and, as has been argued, this is simply not addressed in the evaluations). Further, the granting of extra powers to authorities tends to require the establishment of greater safeguards – on the basic principle that extra power comes with extra responsibilities and with a need for additional checks and balances. Such safeguards will, however, add to the complexity of the arrangements, and this type of effect should be explicitly factored into proportionality assessments.

4.6 Identification of the cost drivers associated with the permit schemes

According to the relevant provisions of the TMA, the fees that can be charged for the issuing of permits under the scheme must be related to the underlying costs associated with the operation of the permit system in respect of statutory undertakers. As noted in paragraph 42 of the draft RIA:

> *The TMA requires that the Secretary of State must try to ensure that the fees payable do not exceed such costs of operating the scheme as may be prescribed. The prescribed costs are described in the Regulations as 'that proportion of the total costs incurred by the Permit Authority in connection with operating a permit scheme attributable to the costs of operating that scheme in relation to statutory undertakers'*

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[14] Paragraphs 28 and 29, Department of Transport 'Draft Final Regulations Impact Assessment', 19 July 2007 < http://www.dft.gov.uk/consultations/aboutria/ria/pddraftregria>

This immediately raises the question of what the likely costs – and more importantly *cost drivers* – associated with the operation of the permit schemes are likely to be. The draft RIA does not identify the potential cost drivers, and associated level of expected costs in any detail. However, it does at one point indicate that the costs may be limited to changes to running a central IT system.[15] In addition, it notes that because many authorities may already be using an IT system which can accommodate permits, in many cases there will be no additional costs associated with the introduction of the permit system:[16]

> *Permits schemes will impose additional costs on utility activity promoters who have to apply and pay for permits to carry out their activities in the street.*
>
> *It will not be mandatory for highway authorities to run permit schemes, nor do we expect all highway authorities would wish to do so. Those authorities that choose to run schemes (if approved by the Secretary of State by Order) may incur additional costs even though they will not pay a fee for their own permits. These costs would result from the improved communication internally within the authority including running a central IT system. However we would expect that many authorities are doing this already (see paragraph 30 above). Such that there may be no additional costs.*

Taken together these paragraphs appear to suggest that for many authorities there will be 'no additional costs' associated with the operation of the permit system. Moreover, reading this alongside the requirement noted above that permit fees do not exceed the costs of operating the permit scheme, this implies that the draft RIA contemplates that for 'many authorities' there will be no additional costs associated with the permit system, and therefore the level of permit fees should be very low (or zero).

[15] The London Permit Scheme also notes that "some costs associated with a permit scheme are fixed: e.g. purchasing IT equipment and software" London Councils TEC 12 March 2008, point 43

[16] Paragraphs 81 and 82 Department of Transport 'Draft Final Regulations Impact Assessment', 19 July 2007< http://www.dft.gov.uk/consultations/aboutria/ria/pddraftregria>

5. IMPLICATIONS FOR ONGOING AND FUTURE POLICY DEVELOPMENTS

The introduction of particular permit schemes

It might be argued that the relevance of the many failings of the permit scheme regulations RIA that have been highlighted in this review is lessened to some extent by the fact that the permit scheme regulations were only enabling regulations, and thus that for any particular permit scheme to be introduced, approval will have to be gained from the Secretary of State. These individual applications by highway authorities need not *necessarily* suffer from any or all of the inadequacies of the RIA that are highlighted above, and, moreover, could potentially fill some of the major analytical gaps that have been highlighted.

However, since these applications will be directed to DfT, the RIA provides an obvious benchmark for authorities. DfT was in a position to provide a clear example to highway authorities of what a reasonable assessment, with respect to permit schemes, would look like. Given available resources and likely competence with respect to impact assessment, this was – apart from anything else – a missed opportunity to improve the likely quality of the assessment to be produced by highway authorities, and to limit the extent of unnecessary duplication of effort.

The fact that the Secretary of State has to approve proposed schemes does, nevertheless, provide an opportunity for at least some of the failings of the permits schemes RIA identified above, such as the absence of proper identification of the baseline against which the assessment should proceed, to be addressed going forward. However, whilst we have not reviewed these documents in detail, we note that the consultation documents that – at the time of writing – had been published in relation to the proposed London and the Kent County Council permit schemes clearly do not address the many gaps and failings of the permit scheme regulations RIA that have been identified in this report. That is, the highway authority consultation documents that we have seen do not provide a good substitute for the assessment that was lacking in the permit scheme regulations RIA.

The commitment to review the implementation of permit schemes after one year

The RIA notes that the operation of the permit schemes regulation will be reviewed after one year of operation to assess whether 'the permit schemes are delivering the expected benefits'. Specifically, it is noted that:

> *The review will evaluate the performance of permit schemes against:*
>
> - *the current baseline;*
> - *highway authorities not operating permit schemes;*
> - *how schemes operated over different roads compare in delivering benefits i.e. highway authorities' operating schemes on certain categories of roads (e.g. traffic sensitive), compared to those operating over all roads;*

and in particular will have regard to the appropriateness of permit fees set.

The fact that that DfT have committed to reviewing the implementation of permit schemes after one year (albeit that there is some lack of clarity with respect to what 'after one year' means) is very much a positive. Moreover, the RIA explicitly notes that the performance of permit schemes will be evaluated against "*the current baseline*", and that the review will involve evaluating "*how schemes operated over different roads compare in delivering benefits i.e. highway authorities' operating schemes on certain categories of roads (e.g. traffic sensitive), compared to those operating over all roads"*.

While these look to be good intentions, it is difficult to understand how these matters – the definition of baseline position, and the identification and assessment of relevant contextual differences in street works activity and highway authority conduct – were paid such little attention in the *ex ante* assessment provided in the RIA. Moreover, the fact that the RIA for the introduction of the permit schemes regulations did not properly define the baseline position against which this implementation review is to be conducted, raises obvious questions with respect to how effective this planned review can be expected to be.

Nevertheless, the planned review would provide an opportunity for a review to be undertaken that is much more systematic and detailed than the RIA was, and that could include following:

- To better define and make clear what the basis for the estimation of the costs associated with the operation of the permits scheme are – the relevant baseline of costs. This should include the clear identification of the relevant cost drivers underlying the operation of the permits scheme.

- In areas where the permits scheme has been introduced, to examine in detail what impacts this has had on the volume and nature of utility works undertaken. For example, whether it has had any appreciable effect on the average length of time that street works are undertaken. More generally, a comparison should be made of whether there is any significant change in the recorded levels of traffic congestion in the areas where the permits scheme operates. In short, to examine whether, in fact, is it actually the case that the expected reduction in congestion attributable to utility street works has been achieved following the introduction of the permits scheme. The proposed introduction of specific Quality Permitting Assessments (QPAs) as part of the London permits scheme should, if used effectively, contribute to any such assessment of the impacts of the permits regulation.[17]

- To examine whether the permits scheme has been effectively implemented by authorities. For example, to identify the extent to which authorities operating the permits scheme are maintaining appropriate registers of works undertaken (that include their own works). In addition, this should provide an opportunity to examine how the authorities are discharging their network management

[17] London Councils TEC 'London Permit Scheme – Appendix 1' 12 March 2008, point 3.2

duty, for example, by clearly identifying the processes and measures that have been introduced to effectively use the additional information that is obtained through the operation of the permits scheme.

- To clearly outline what oversight and review measures are being employed by the Secretary of State to assess initial applications under the permits scheme – including how the proposed maximum level of permit fees is assessed. In addition, it should provide an opportunity to present detailed information regarding how the Secretary of State has reviewed, and intends to review, fee levels.

- To examine the extent to which the operation of the regulation has given rise to unintended consequences. For example, whether the 'shift in responsibility' associated with the introduction of the permits scheme has had any unintended impacts on the ability of utility firms to coordinate and undertake their works in an efficient manner. It should also provide an opportunity to examine if there have been any competitive impacts on suppliers of utility services in different areas that were not foreseen in the draft RIA.

APPENDIX 1: BRIEF SUMMARY OF KEY PROVISIONS OF NRSWA

Granting of licences for works

- (sections 50 and 51) That street authority may grant licences in relation to street works and that it is an offence to undertake such work in the absence of such a licence

Need to maintain a register of all street works

- (section 53) That street authorities shall keep a register which contains, among other things, information about street works including descriptions of such works. Moreover, that the Secretary of State may make regulations requiring the registration of particular information as prescribed, and requiring the payment of a fee for the registration of any information of any prescribed description.

Need to provide advance notice of street works to facilitate coordination

- (section 54) This requires that in such cases as prescribed an undertaker proposing to undertake street works shall give prescribed advance notice of the works to the street authority; that different periods of notice may be prescribed for different descriptions of work; that the notice shall state the date on which it is proposed to begin the works and shall contain such other information as may be prescribed..

  In addition, sub-section 54(4) notes that:

  After giving advance notice under this section an undertaker shall comply with such requirements as may be prescribed, or imposed by the street authority, as to the providing of information and other procedural steps to be taken ***for the purpose of co-ordinating the proposed works with other works of any description proposed to be executed in the street.***

  Finally, under (5) of this provision allows for any undertaker who fails to comply with the duties under this provision to be fined.

At least 7 days notice required by undertakers

- (section 55) Requires that an undertaker who seeks to do works such as breaking up or opening a street, or any sewer or drain or tunnel under it give at least 7 working days notice to the street authority. In addition, it notes that different periods of notice may be prescribed for different descriptions of work.

  Critically, sub-section 55(3) requires that the notice shall state the date on which the works shall begin **and shall contain any other information as prescribed.**

Where serious disruption is likely: can direct when street works are to be undertaken

- (section 56) This section appears of particular relevance to the ability of a street authority to co-ordinate works and notes that:

  If it appears to the street authority—

  (a) that proposed street works are likely to cause serious disruption to traffic, and
  (b) that the disruption would be avoided or reduced if the works were carried out only at certain times or on certain days (or at certain times on certain days),

  the authority may give the undertaker such directions as may be appropriate as to the times or day (or both) when the works may or may not be carried out.

  In addition, sub-section (3) allows for the undertaker to fine for contraventions of directions given by street authorities under this provision.

Can restrict street works where works have recently been undertaken

- (section 58) This section once again reinforces the ability of the street authority to coordinate the timing of major street works, it states that where it is proposed that substantial road works be carried out in a highway, that the street authority may by notice restrict the execution of street works during the prescribed period following the completion of those works.

Requirement of street authority to coordinate the execution of works

- (section 59) This section is key to the coordination function of the street authority:

  (1) ***A street authority shall use their best endeavours to coordinate the execution of works of all kinds (including works for road purposes) [and the carrying out of relevant activities] in the streets for which they are responsible****—*

  (a) in the interests of safety,
  (b) to minimise the inconvenience to persons using the street (having regard, in particular, to the needs of people with a disability), and
  (c) to protect the structure of the street and the integrity of apparatus in it.

  (2) That duty extends to co-ordination with other street authorities where works ***[*** *or relevant activities* ***]*** *in a street for which one authority are responsible affect streets for which other authorities are responsible.*

  (3) The Secretary of State shall issue or approve for the purposes of this section codes of practice giving practical guidance as to the matters mentioned above; and in discharging their general duty of co-ordination a street authority shall have regard to any such code of practice.

(4) ***If it appears to the Secretary of State that a street authority are not properly discharging their general duty of co-ordination, he may direct the authority to supply him with such information as he considers necessary to enable him to decide whether that is the case and if so what action to take.*** *The direction shall specify the information to be provided and the period within which it is to be provided.*

(5) If after the end of that period (whether or not the direction has been complied with) it appears to the Secretary of State that the authority are not properly discharging their general duty of co-ordination, ***he may direct the authority to take such steps as he considers appropriate for the purpose of discharging that duty.*** *The direction shall specify the steps to be taken and the period within which they are to be taken, and may include a requirement to make a report or periodic reports to the Secretary of State as to what steps have been taken and the results of taking them.*

Ability to fine if works not undertaken within given reasonable time period

- (section 66) This section requires that an undertaker executing street works shall undertake the works as is reasonably practicable. Moreover, where an undertaker fails to do so they are deemed to be committing an offence and liable to a fine.

  In addition, where an undertaker executing street works creates an obstruction for a longer period than is reasonably necessary, the street authority may be notice to take such reasonable steps as are specified in the notice to mitigate or discontinue the obstruction.

- (section 74) This allows a highway authority (following permission from the Secretary of State) to charge undertakers where the duration of works exceeds the prescribed period, and where the works are not completed within a reasonable period.

- (section 74A) Allows for the Secretary of State to make provision by regulation requiring that an undertaker to pay to the highway authority a charge determined, in the prescribed manner, by reference to the duration of the works.