Attaining the Age of Consents: Five Years of the Planning Act 2008

Matthew White*

Partner, Herbert Smith Freehills LLP

Introduction

The Planning Act 2008 received Royal Assent on November 26, 2008. Nearly five years later, the purpose of this paper is to review how the new system for consenting nationally significant infrastructure projects has performed so far, what lessons can be learnt from the experience to date, and what we might expect from the system in the future.

It was almost universally acknowledged before 2008 that the town and country planning system was not fit for purpose for major infrastructure projects. Heathrow Terminal 5 represents the genesis of the 2008 Act. Planning permission for T5 was granted in November 2001, eight years after the planning application was lodged and following an inquiry that sat for nearly four years. The project involved 37 different applications across 7 separate pieces of legislation. The total cost of the process was £84 million, of which approximately £18 million was borne by local and central government. The Secretary of State for Transport who granted that permission, Stephen Byers, referred to the process as "a lesson in how not to plan major infrastructure projects that are in the public interest" and the shadow Minister for Transport at the time, Eric Pickles, said it would be "remembered as the last hurrah of a cumbersome planning system".[1]

Similarly, the Sizewell B planning inquiry sat for 340 days and heard evidence from 195 witnesses, yet as few as 30 sitting days were spent examining evidence of the local impacts of the project. Two years of the inquiry were spent debating the contrasting merits and risks of nuclear power.

A pledge was made by the Government in July 2001 to improve this system, with Stephen Byers promising reforms to ensure that the approval in principle of major infrastructure projects would be a matter for Parliament and that up-to-date statements of Government policy should be in place before major projects are considered in the planning system, to reduce unnecessary debate at inquiry.[2]

The proposal for Parliament to approve the need for and location of projects in advance was, however, abandoned in July 2002.[3] Instead, the existing system was tweaked by the Planning and Compulsory Purchase Act 2004 and changes to the Inquiries Procedure Rules, the overriding purpose of which was to make public inquiries into major infrastructure projects more efficient.[4]

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[1] *Hansard*, November 20, 2001, Columns 177–182.

[2] *Hansard*, July 20, 2001, Columns 522W–524W. This announcement followed the DETR consultation paper *Modernising Planning—Streamlining the processing of major projects through the planning system* published in April 1999, which first set out the key principles that eventually underpinned the 2008 Act regime. The reforms were thus at least nine years in the making. For a comprehensive review of the background to the Planning Act 2008, see *Planning for a new generation of power stations*, Lindblom and Honey, [2007] J.P.L. 843.

[3] See *Sustainable Communities: Delivering through Planning*, ODPM, para.23. The Transport, Local Government and Regions Select Committee had expressed doubts about whether a Parliamentary procedure, which could last for a session, would in fact lead to a speeding up of the process. The Government recognised the Committee's concerns about the commitment on MPs' time, the supporting resources needed by Parliament and the principle of Parliament being involved in the detail of a development proposal, and decided not to pursue this element of the reforms.

[4] Planning and Compulsory Purchase Act 2004 s.44 inserted new ss.76A and 76B into the Town and Country Planning Act 1990, which entitle the Secretary of State to direct that an application of regional or national importance should be referred to him instead of being dealt with by the local planning authority. Such an application would then be governed by the Town and Country Planning (Major Infrastructure Project Inquiries Procedure) (England) Rules 2005 (SI 2005/2115). The Stansted Airport Generation 2 applications submitted in March and April 2008 were called-in under s.76A in July 2008, before being withdrawn by BAA in May 2010.

It wasn't until Kate Barker's Review of Land Use Planning was published in December 2006 that more radical reform was put back on the agenda. Barker was the first to recommend the creation of an independent planning commission to determine planning applications for major projects, alongside clearer statements of national policy by Government.[5] The Eddington Transport Study, also published in December 2006, reached the same conclusion that an independent planning commission should determine strategic transport projects.[6]

The Planning Act 2008 finally brought these proposals to fruition, with the creation of the Infrastructure Planning Commission, national policy statements, a unified consents regime and a streamlined examination process. The new system was intended to make the process faster, fairer and easier for people to get involved.

The IPC acted as an independent examining body for all applications for development consent and also decided those applications itself where a national policy statement was in place. Giving such power to an unelected quango did not sit well with the Coalition Government's localism agenda though, and the IPC was abolished on March 31, 2012. The examining functions of the IPC were transferred to the Planning Inspectorate and jurisdiction for decision-making was restored to the Secretary of State.

The transition from the IPC to PINS as examining authority has been largely cosmetic and has made little difference in practice, other than some necessary re-branding. The abolition of the IPC's role as an independent decision-maker is clearly more significant. This was one of the original key aims of the 2008 Act. At the time, the Executive Director of Planning at CLG, Bernadette Kelly, said this about giving decision-making powers to the IPC:

> "Although a new departure for planning, the concept of independent decision-making is well established elsewhere. Many decisions, once routinely taken by Ministers or on their behalf, are now taken by independent bodies: decisions on interest rates by the Monetary Policy Committee at the Bank of England; decisions on competition; decisions on the regulation of utilities and the financial sector; decisions on the availability of different forms of drug treatment. While many of these decisions are controversial and have wide-ranging implications for citizens, it is not obvious that devolving them to independent bodies has led to poorer decisions, or lower levels of public confidence in those decisions."[7]

One of the motivations for the establishment of the IPC was the desirability of separating the Secretary of State's dual roles as both policy maker and decision taker.[8] This perhaps manifested a residual political concern about Art.6(1) of the European Convention on Human Rights. It led to considerable opposition, however, from those who saw decision-making by an unelected body as anti-democratic because it undermined the accountability for such decisions to the public at large.[9]

The issue now appears to be closed and no one is clamouring for the IPC's jurisdiction to determine NSIP applications to be restored. It is interesting to note, however, that the Labour Party's recent review of infrastructure planning concluded that a new independent National Infrastructure Commission should

[5] *Barker Review of Land Use Planning—Final Report and Recommendations*, paras 3.12–3.19.

[6] *The Eddington Transport Study—Transport's role in sustaining the UK's productivity and competitiveness*, Vol.4, paras 5.126–5.130.

[7] *The Planning Bill: Implications of the Proposals for a New Regime for Major Infrastructure for Democracy and Delivery* [2008] J.P.L. OP11. Bernadette Kelly was writing on a personal basis.

[8] The final report of the *Barker Review of Land Use Planning* said: "Taking Ministers out of the decision-making process would also remove from the planning process any suggestion of bias and unfairness. There could, for example, be concerns about particular political interests or high-profile interest groups influencing decision-making under the current system, from which an Independent Planning Commission would be comparatively free." (para.3.13)

[9] In *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, Lord Nolan said: "To substitute for the secretary of state an independent and impartial body with no central electoral accountability would not only be a recipe for chaos: it would be profoundly undemocratic." The House of Lords held that the fact the Secretary of State made policy and applied that policy in particular cases prevented him from being an impartial tribunal for the purposes of art.6, but because any planning decision was subject to judicial review, the planning system as a whole was compatible with art.6. This conclusion was upheld by the European Court of Human Rights in *Holding and Barnes Plc v UK* (Application No.2352/02).

be established to reduce policy uncertainty, provide independent scrutiny of infrastructure policy and increase investor confidence. The idea is that this would not reduce democratic accountability, but would make it easier for politicians to take difficult decisions on controversial, technically complex issues which are vital to the country's economic success and where time horizons are well beyond the lifetime of any one Government.[10]

Overview of the New Consents Regime

Projects in the energy, transport, water, waste water and waste sectors which exceed the thresholds set out in the 2008 Act are deemed to be nationally significant infrastructure projects and it is now mandatory for them to be authorised under the new consents regime. Such projects require development consent under the 2008 Act. Applications for development consent are made directly to the Planning Inspectorate on behalf of the Secretary of State rather than to the local planning authority in the first instance. Development consent is granted by way of a single development consent order, in place of the range of consents that would previously have been granted under, for example, the Gas Act 1965, the Electricity Act 1989, the Pipelines Act 1962, the Transport and Works Act 1992 or the Town and Country Planning Act 1990. The need for those consents is disapplied by the 2008 Act.[11] Furthermore, provision can be made in the DCO itself for a range of other matters relating or ancillary to the development, such as compulsory purchase, interference with interests in or rights over land, the abrogation or modification of agreements relating to land, stopping-up or diverting highways, the creation of a harbour authority, etc.[12] It is also possible, with the consent of the body who would normally be responsible for the consent, for other consents such as environmental permits to be wrapped into the DCO;[13] and for deemed marine licences also to be included.[14]

Development consent orders may authorise not only the nationally significant infrastructure project itself, but also any development associated with that project, such as office accommodation, access roads, waste storage facilities etc.[15] But promoters are not under an obligation to include all such associated development in their applications for development consent; these elements of a project may continue to be authorised by traditional consent routes such as the Town and Country Planning Act 1990 if preferred.

Government policy on nationally significant infrastructure projects is set out in national policy statements, which describe the need for development and other general policy matters. An appraisal of the sustainability of the policy set out in the statement is carried out before an NPS is designated, to ensure compliance with the need for strategic environmental assessment.[16]

During the examination of an application for development consent, the examining authority may refuse to allow representations to be made at a hearing which relate to the merits of policy set out in a national policy statement.[17] Furthermore, when deciding an application for development consent, the Secretary of State may disregard representations that relate to the merits of such policy.[18]

The policy set out in an NPS may identify locations that are suitable (or unsuitable) for a specified description of development.[19] For example, the nuclear NPS identifies eight sites that the Government has determined are potentially suitable for the deployment of new nuclear power stations in England and

[10] *The Armitt Review—An independent review of long term infrastructure planning commissioned for Labour's Policy Review*, September 2013.
[11] Planning Act 2008 s.33.
[12] Planning Act 2008 Sch.5 and s.120.
[13] Planning Act 2008 s.150 and Infrastructure Planning (Miscellaneous Prescribed Provisions) Regulations (SI 2010/105).
[14] Planning Act 2008 s.149A.
[15] Planning Act 2008 s.115. Note, however, that in Wales associated development is limited to the carrying out or construction of surface works, boreholes or pipes associated with facilities for the storage of gas underground in natural porous strata.
[16] Planning Act 2008 s.5(3).
[17] Planning Act 2008 s.94(8).
[18] Planning Act 2008 s.106(1).
[19] Planning Act 2008 s.5(5).

Wales before the end of 2025: Bradwell; Hartlepool; Heysham; Hinkley Point; Oldbury; Sizewell; Sellafield; and Wylfa.[20]

To date, nine National Policy Statements have been designated under the 2008 Act. Six energy NPSs were designated on July 19, 2011:

- EN-1: Overarching energy;
- EN-2: Renewable energy;
- EN-3: Fossil Fuels;
- EN-4: Oil and Gas Supply and Storage;
- EN-5: Electricity Networks; and
- EN-6: Nuclear Power.

The Ports NPS was designated on January 26, 2012. The Waste Water NPS was designated on March 26, 2012. The Hazardous Waste NPS was designated on July 17, 2013.

A further three NPSs are proposed: National Networks (including rail and road); Aviation; and Water Supply. Drafts have not yet been published for consultation, although the National Networks NPS is due to be published later this year. In the case of the Aviation NPS, a draft is not expected until after the final report of the Davies Commission is published in summer 2015. No projects in the water supply sector have been notified to PINS yet and it is not clear when the Water Supply NPS will be published, if at all.

The new regime was "switched on" for the energy and transport sectors on March 1, 2010, for waste water in April 2011 and for hazardous waste in October 2011, meaning that applications for development consent are now mandatory within these sectors for projects in excess of the relevant thresholds, regardless of whether an NPS has been designated or not. The regime is not yet switched on for the construction or alteration of dams and reservoirs, or for developments relating to the transfer of water resources.[21]

Where an NPS has effect in relation to an application for development consent then the Secretary of State must decide the application in accordance with the relevant national policy statement, except to the extent that:

- it would lead to the United Kingdom being in breach of any of its international obligations;
- it would lead to the Secretary of State being in breach of any duty imposed on him by or under any enactment;
- it would be unlawful by virtue of any enactment;
- the adverse impact of the proposed development would outweigh its benefits; or
- any condition prescribed for deciding an application otherwise than in accordance with a national policy statement is met.[22]

Accordingly, there is a presumption in favour of the grant of development consent for any project that is in accordance with Government policy set out in a national policy statement.

When deciding an application the Secretary of State must also have regard to any appropriate marine policy documents, any local impact report, any matters prescribed in relation to the development and any other matters which the Secretary of State thinks are both important and relevant to his decision.[23]

Where no national policy statement has effect in relation to a project for which an application has been submitted, then the Secretary of State is only required to have regard to any local impact report, any prescribed matters and any other matters which he thinks are both important and relevant.[24] It is therefore clear that the advantages offered by the new regime are founded on national policy statements. Without

[20] *National Policy Statement for Nuclear Power Generation* (EN-6), Vol.I, Pt 4.
[21] i.e. those projects falling within Planning Act 2008 ss.27 and 28.
[22] Planning Act 2008 s.104.
[23] Planning Act 2008 s.104(2).
[24] Planning Act 2008 s.105(2).

an NPS in place, the principle of the project in question is open to debate during the examination and, more significantly, there will be no presumption in favour of the development. Given the scale of investment required, it would be a brave promoter who makes an application without an NPS which supports the development in question.

The 2008 Act requires extensive pre-application consultation to be undertaken by promoters, with a large number of statutory consultees as well as with local communities and the general public. Consultation is typically multi-stage and iterative, with the emphasis placed on consulting people at a sufficiently early stage in the project to allow them a real opportunity to influence the proposals. Before a promoter can commence consultation with local communities, it must consult relevant local authorities on a draft statement of community consultation, which sets out how the promoter proposes to consult those local communities.[25] This is, effectively, consultation on consultation.

A detailed consultation report must be submitted with every application for development consent. The report must demonstrate compliance with the complex and highly prescriptive statutory obligations relating to pre-application consultation and is one of the key documents considered by PINS when deciding whether or not to accept an application.[26]

Once an application has been submitted, the 2008 Act sets down a fixed timetable for most of the stages of the conduct of the application through to its determination. PINS has 28 days to decide whether or not to accept an application.[27] A deadline is then set by the promoter for relevant representations to be submitted.[28] Based on those representations, the Examining Authority will decide what are the principal issues arising from the application and then hold a preliminary meeting at which the format and timetable for the examination will be discussed.[29]

The examination stage itself must be completed within six months of the preliminary meeting.[30] The Examining Authority has three months to prepare a report and submit it to the Secretary of State recommending approval or refusal of the application.[31] The Secretary of State must then make a decision within three months of receipt of that report.[32]

The entire process should be completed within approximately 15–16 months from the submission of the application for development consent, although the deadlines for completion of the examination and for the final determination of an application can be extended by the Secretary of State.[33] The majority of applications determined to date have met the statutory timetable and this is seen as one of the key benefits of the new regime compared to what preceded it.[34]

It is for the Examining Authority to decide how to examine an application, but the 2008 Act provides that the examination is carried out primarily through written representations.[35] The process can be very labour-intensive for applicants, with the requirement to prepare detailed responses on very short notice to rounds of questions posed by the Examining Authority and by interested parties. Hearings on specific issues are only held where the Examining Authority decides it is necessary to receive oral representations in order to ensure adequate examination of those issues or that interested parties have a fair chance to put

[25] Planning Act 2008 s.47(2).
[26] Planning Act 2008 s.55(4).
[27] Planning Act 2008 s.55(2).
[28] Planning Act 2008 s.56(4). Section 56(5) requires the deadline to be not less than 28 days after the notification of the application. If the promoter chooses a longer period this will lengthen the overall timetable for the application.
[29] Planning Act 2008 s.88. There is no statutory deadline for the preliminary meeting to be held. However, the Secretary of State's expectation is that, in most cases, it should take place within a period from six weeks to two months from the promoter's deadline for the receipt of relevant representations. See *Planning Act 2008: Guidance for the examination of applications for development consent*, DCLG, April 2013, para.39.
[30] Planning Act 2008 s.98(1).
[31] Planning Act 2008 s.98(3).
[32] Planning Act 2008 s.107(1).
[33] Planning Act 2008 ss.98(4) and 107(3). The Secretary of State must make a statement to Parliament announcing the new deadline, which no doubt operates as a disincentive to doing so.
[34] See below.
[35] Planning Act 2008 s.87(1) and 90.

their case.[36] A compulsory acquisition hearing must be held if requested by any person who is interested in land that is proposed to be compulsorily acquired.[37] An open-floor hearing must also be held if any interested party wishes to be heard, which in practice means that every examination will include at least one such hearing.[38]

In order to minimise the length of hearings, the Examining Authority has wide powers to limit the persons and issues to be heard. In particular, it may refuse to allow representations which are considered to be irrelevant, vexatious or frivolous; which repeat other representations already made (including written representations); which relate to the merits of a policy set out in a national policy statement; or where they relate to compensation for compulsory acquisition.[39] The Examining Authority also has the power to exclude anyone from a hearing where they behave in a disruptive manner.[40]

Examinations are inquisitorial rather than adversarial. The Examining Authority will question witnesses and test the evidence itself and cross-examination will only be permitted where it is necessary to ensure adequate testing of any representations or that a person has a fair chance to put their case.[41]

The Secretary of State's decision to grant or refuse development consent is subject to challenge by way of judicial review, with a statutory challenge period of six weeks for any claim to be made, starting on the day the DCO is published or, if later, the day on which the statement of reasons for making the DCO is published.[42]

The new regime should therefore offer the following advantages:

- a faster consents process — due to the unification of consents regimes, the ability to wrap in associated development, a statutory timetable for determination, and the streamlined examination procedure;
- greater certainty for promoters — because National Policy Statements set policy in advance and issues of principle are not opened up and re-examined at a planning inquiry;
- a fairer examination system which is better equipped to balance national need and local impacts; and
- reduced costs for both the public and private sectors as a result of the above.

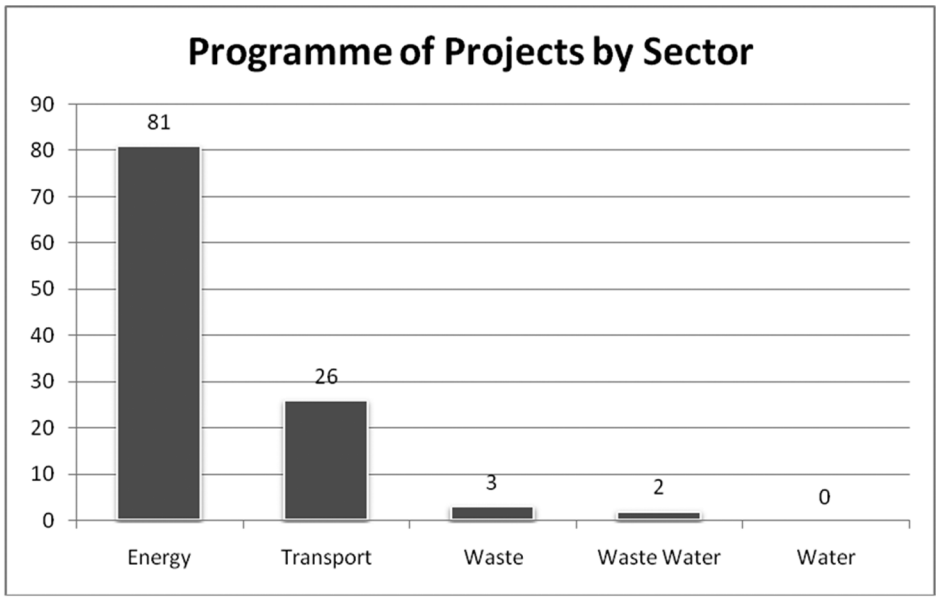
The remainder of this paper examines whether these advantages have been borne out by promoters' experience of the system to date and whether the system has helped to address the disincentive against infrastructure investment in the UK represented by the old planning system.

Review of Projects to Date

The Planning Inspectorate's website *National Infrastructure Planning* includes a Programme of Projects which lists all nationally significant infrastructure projects which have been notified to PINS by the promoter.

A total of 112 projects were listed on the website at the time of writing. 81 of these are in the energy sector; 26 are in the transport sector; 3 are in the waste sector; 2 are in the waste water sector; and none are in the water sector.

[36] Planning Act 2008 s.91.
[37] Planning Act 2008 s.92.
[38] Planning Act 2008 s.93.
[39] Planning Act 2008 s.94(8).
[40] Planning Act 2008 s.95(1).
[41] Planning Act 2008 s.94.
[42] Planning Act 2008 s.118(1).



The stage that each project has reached is summarised below.

18 projects were notified to PINS but then withdrawn before an application was submitted. The reasons for withdrawal vary, but include: a decision not to proceed following a spending review; the project no longer being deemed to qualify as an NSIP; or the project being reconsidered for various reasons.

Four projects were withdrawn after an application for development consent had been submitted. One of these was the Brig y Cwm energy from waste generating station, which was the third application for development consent to be submitted to the IPC. The applicant, Covanta, said its reason for withdrawing the application was due to circumstances relating to local authority procurement in Wales.[43]

55 projects (just under half of those notified to PINS to date) are still in the pre-application stage, with no application for development consent having been submitted to PINS yet.

9 applications have been accepted and are awaiting the commencement of examination.

10 applications are being examined at the moment.

4 applications have completed examination and are awaiting determination.

One application was refused by the Secretary of State: the Preesall Saltfield Underground Gas Storage project in Lancashire promoted by Halite Energy Group Ltd. The application was refused on April 9, 2013 despite a report by the Examining Authority recommending that development consent should be granted. The Secretary of State concluded that, in the absence of a pre-application geological assessment as required by NPS EN-4, he could not properly consider the suitability of the proposed underground gas storage project. He found that there was a clear gap in geological data contained in the application which meant that the applicant had failed to demonstrate the suitability of the geology of the site for salt cavern storage. The refusal has now been challenged by judicial review and the claim was granted permission to proceed on October 15, 2013.

11 applications have been granted development consent: one by the IPC before it was abolished and the remaining 10 by the Secretary of State.

[43] Following the withdrawal, the IPC awarded costs to various interested parties against Covanta from the date of the preliminary meeting (June 7, 2011) up to the withdrawal on October 24, 2011. The awards were on the basis that Covanta was aware of the procurement issues in April 2011 and there was no material change of circumstances during the examination period. Guidance has since been published by DCLG entitled *Awards of costs: examinations of applications for development consent orders*, DCLG, July 2013. See also below.

(a) **Rookery South Energy from Waste Generating Station.**

This is a 65MW energy from waste facility. The IPC decided on October 13, 2011 that development consent should be granted. However, the DCO needed to go through Special Parliamentary Procedure before taking effect, because the Order applies statutory powers to compulsorily acquire special category land. The DCO was laid before Parliament on November 29, 2011 and 39 petitions were deposited. Development consent was finally granted on March 26, 2013.[44]

(b) **Ipswich Rail Chord, Ipswich.**

This project involves the construction and operation of a new railway link, 1,415m long, linking the Great Eastern Main Line and East Suffolk Line railways. Development consent was granted on September 5, 2012.[45]

(c) **North Doncaster Rail Chord, Shaftholme, North Doncaster.**

This development comprises the construction of a new 3.2km long twin track railway which will span the East Coast Mainline Railway. Development consent was granted on October 16, 2012.[46]

(d) **Kentish Flats Extension, Kent.**

This development comprises the erection of 10–17 offshore wind turbines, underwater connections and export cabling, providing additional maximum installed capacity of up to 51MW. Development consent was granted on February 19, 2013.[47]

(e) **Brechfa Forest West Wind Farm, Carmarthenshire, Wales.**

This project comprises 28 onshore wind turbines with an installed capacity of between 56 and 84MW. Development consent was granted on March 12, 2013.[48]

(f) **Heysham to M6 Link Road, Lancaster.**

The Heysham to M6 link is a new dual carriageway road approximately 4.8km long and involves a fully remodelled junction 34 with new slip roads, a new bridge over the River Lune and a 600 space park and ride site. Development consent was granted on March 19, 2013.[49]

(g) **Hinkley Point C New Nuclear Power Station, Somerset.**

Hinkley Point C is a nuclear power station with two nuclear reactors capable of generating a total of up to 3,260MW of electricity, together with associated development. Development consent was granted on March 19, 2013.[50]

(h) **Galloper Offshore Wind Farm, 27km off the coast of Suffolk.**

This offshore generating station would involve the development of up to 140 wind turbines with a maximum capacity of 504MW. Development consent was granted on May 24, 2013.[51]

[44] The Rookery South (Resource Recovery Facility) Order 2011 (SI 2011/680).
[45] The Network Rail (Ipswich Chord) Order 2012 (SI 2012/2284).
[46] The Network Rail (North Doncaster Chord) Order 2012 (SI 2012/2635).
[47] The Kentish Flats Extension Order 2013 (SI 2013/343).
[48] The Brechfa Forest West Wind Farm Order 2013 (SI 2013/586).
[49] The Lancashire County Council (Torrisholme to the M6 Link (A683 Completion of Heysham to M6 Link Road)) Order 2013 (SI 2013/675).
[50] The Hinkley Point C (Nuclear Generating Station) Order 2013 (SI 2013/648).
[51] The Galloper Wind Farm Order 2013 (SI 2013/1203).

(i) **Triton Knoll Offshore Wind Farm, Greater Wash.**

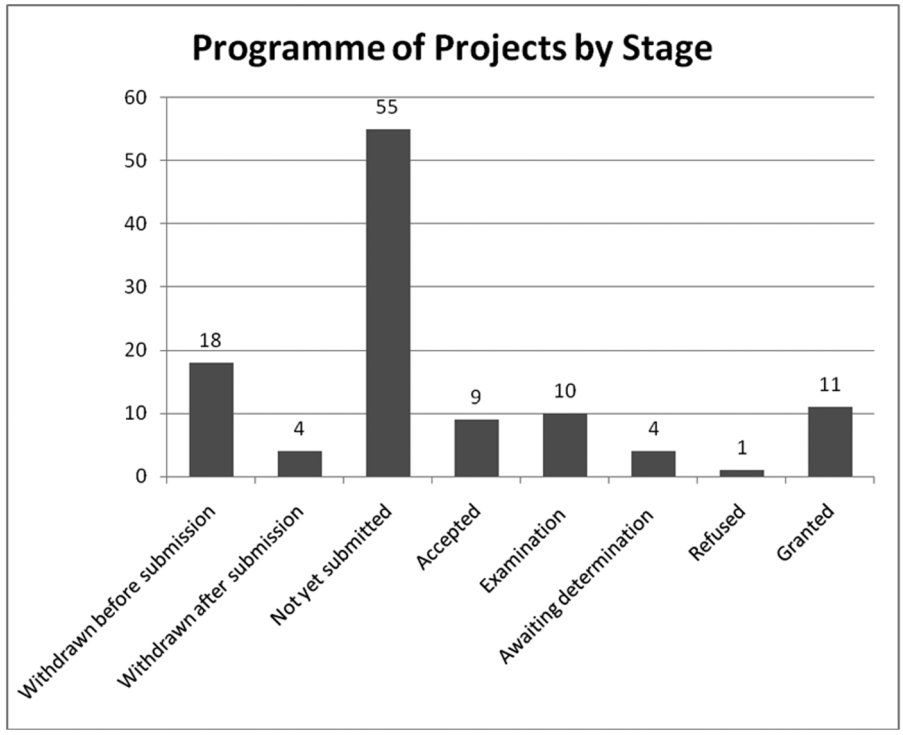
This comprises the construction and operation of up to 288 wind turbine generators with a capacity of up to 1,200MW, offshore substations, meteorological stations and underwater cabling to connect the turbines and substations. Development consent was granted on July 11, 2013.[52]

(j) **East Northants Resource Management Facility, 2.6km north of Kings Cliffe, East Northamptonshire.**

This project involves the alteration of existing, and the construction of new, facilities for the recovery and disposal of hazardous waste and disposal of low level radioactive waste. Development consent was granted on July 11, 2013.[53]

(k) **Port Blyth New Biomass Plant, Northumberland.**

This is a 99.9MW generating station, for which development consent was granted on July 24, 2013.[54]



Given that two of the main objectives of the 2008 Act were to streamline the consents process and to encourage infrastructure investment, what is striking about these figures is how few projects have completed their passage through the system so far. The IPC's workload was expected to comprise around 40–45

[52] The Triton Knoll Offshore Wind Farm Order 2013 (SI 2013/1734).
[53] The East Northamptonshire Resource Management Facility Order 2013 (SI 2013/1752).
[54] The North Blyth Biomass Power Station Order 2013 (SI 2013/1873).

large and complex projects per year, plus a number of smaller and more technical applications, but three and a half years after the new regime was "switched on" for energy and transport projects, only 11 applications have been approved.

Furthermore, all but two of the approved developments are relatively small in scale. These were hardly the sort of projects that led to the regime being set up in the first place and to describe them as "nationally significant" is a stretch. The exceptions are the Hinkley Point C new nuclear power station and the Triton Knoll Offshore Wind Farm, but putting those aside the remaining nine projects, if and when they are fully implemented, will only deliver the following:

- Up to 803MW of additional installed electricity generation capacity. In contrast, Kingsnorth coal-fired power station, which closed on March 31, 2013, had a generating capacity of 1,940MW alone.
- 4.6km of new railway track. Network Rail has a network of more than 15,000km of lines in total and invests more than £2bn of capital expenditure every year on network enhancements.
- 4.8km of new road. The total road length in Great Britain is estimated to be 394,000km.
- A new facility for the treatment and disposal of specialist wastes.

The possible factors that could explain this state of affairs are examined in the conclusions set out below.

Recent Changes to the Regime

The new regime has developed and evolved over the five years since the 2008 Act became law. The two main reasons for this were the election of the coalition government in May 2010, and the inevitable need to remedy flaws in the system which became apparent as projects progressed through the new statutory process.

The Localism Act 2011, which received Royal Assent in November 2011, introduced the most significant changes. As already mentioned, the Act abolished the IPC and transferred decision-making powers to the Secretary of State.[55]

All applications are now examined by PINS and determined by the Secretary of State. This has led to a slight lengthening of the overall timetable for applications from 12 to 15 months because in all cases three months is now allowed for the Secretary of State to consider the Examining Authority's report. However, the transition has been relatively seamless. This was helped by the fact that the key personnel remained largely unchanged: most of the IPC Commissioners were retained as Planning Inspectors and Sir Michael Pitt moved from being the Chair of the IPC to the Chief Executive of PINS.

Another change made by the 2011 Act, with the aim of improving democratic accountability, was the introduction of a requirement for NPSs to be approved by the House of Commons prior to designation.[56] The same Parliamentary ratification procedure also applies to amendments to designated NPSs.

Other notable changes made by the 2011 Act include:

- Changes to the pre-application process. The 2011 Act reduced the number of local authorities that must be consulted during the pre-application stage, a change that was largely welcomed. It also removed the requirement for the entire statement of community consultation to be published in a local newspaper.[57] This had previously resulted either in lengthy and expensive newspaper notices being published, or promoters preparing supporting documents which

[55] Localism Act 2011 Sch.13 and s.128.
[56] Localism Act 2011 s.130.
[57] Localism Act 2011 ss.133 and 134.

then meant that multiple documents had to be scrutinised to establish what was being proposed.

- Improvements to the powers to obtain information about land and access for surveys. The 2011 Act widened and clarified these powers, making it easier for promoters to obtain the information required to prepare their applications.[58]
- Relaxation of the acceptance criteria. Previously an application could only be accepted if it complied exactly with the statutory requirements and standards as to the form and content of applications. Acceptance is now permissible where the Secretary of State considers the application to be of a "satisfactory" standard.[59]
- The categories of interested parties who can participate in the examination have been amended and there is now also a right to opt out of being an interested party.[60] This addressed concerns that both promoters and PINS were being required, in order to ensure that they were not in breach of their statutory obligations, to continue to engage with persons who had demanded not to be contacted further.
- The introduction of a power for the Secretary of State to direct that a development should be treated as requiring development consent under the 2008 Act before any application under another regime has been made.[61] Originally, the Secretary of State could only make such a direction after an application had been submitted. In practice, this would have led to difficulties for promoters who would have had to submit an application under one regime that would also satisfy the requirements of the 2008 Act.
- The removal of the restriction on the Secretary of State from giving advice to applicants and other persons on the merits of an application.[62] One of the common criticisms of the IPC was that it was reluctant to give practical advice due to a fear that it would fall foul of this restriction. Since this change was made by the 2011 Act, there has been a noticeable improvement in the quality of advice provided by PINS on behalf of the Secretary of State, albeit this could also be attributable to PINS's greater understanding of, and growing confidence in, the regime as it has matured.

More recently, further reforms have been made by the Growth and Infrastructure Act 2013 ("GAIA"), which received Royal Assent on April 25, 2013. The Secretary of State now has the power to direct that business and commercial projects of a certain size and type are to be treated as NSIPs and therefore subject to the DCO process under the 2008 Act.[63]

GAIA also introduced a limitation on the need for Special Parliamentary Procedure ("SPP") for NSIPs.[64] Some clarifications on the use of SPP had been included in the 2011 Act, but GAIA went further than this. In particular, SPP is no longer required where local authorities and statutory undertakers have objected to their land being taken for open space land affected by an NSIP where there is no suitable replacement land and the delay caused by SPP would not be in the public interest, or where the land is being acquired for temporary purposes. There will, however, still be a need for SPP for compulsory acquisition of National Trust land.

[58] Localism Act 2011 ss.135 and 136.
[59] Localism Act 2011 s.137. See further below.
[60] Localism Act 2011 s.138.
[61] Localism Act 2011 s.132.
[62] Localism Act 2011 Sch13(1) para.10.
[63] Growth and Infrastructure Act 2013 s.26. See further below.
[64] Growth and Infrastructure Act 2013 ss.24 and 25.

GAIA also included an amendment to allow pre-2008 Act consents to be varied without the need to use the 2008 Act process;[65] and removed the requirement to obtain various additional consents and certificates when applying for development consent.[66]

Other changes to the regime have been brought about through amendments to the suite of infrastructure planning regulations made pursuant to the 2008 Act.[67] These new regulations clarified the application and examination fees charged by PINS; reduced the number of statutory bodies that must be consulted and notified about DCO applications; and removed certain consents from those that require the permission of the body that otherwise would have granted them before they can be included within a DCO. Important amendments have also been made to the environmental impact assessment and habitats assessment regimes for NSIPs.[68]

In October 2011, the process for making changes to a DCO was published through new regulations.[69] These regulations set out the procedures to be followed where a change to, or revocation of, a DCO is proposed after it has been made.[70]

Various orders have been made which amend the range of developments that will be caught by the regime, including in relation to overhead lines, waste water transfer or storage and electric lines.[71] The most recent order, published in July 2013, exempted minor railway and highways works from the NSIP regime.[72]

Finally, the National Planning Policy Framework was published on March 27, 2012. Paragraph 3 of the NPPF expressly states that it does not contain specific policies for nationally significant infrastructure projects. The document goes on to explain that applications for development consent are determined in accordance with the decision-making framework set out in the 2008 Act and relevant national policy statements for major infrastructure, as well as any other matters that are considered both important and relevant—which may include the NPPF itself.

The contents of the NPPF will therefore not be a principal consideration for NSIPs and will not cut across the primacy given to National Policy Statements by s.104 of the 2008 Act.

Thematic Review

Certain themes have emerged from experience of the Planning Act 2008 regime to date. From these themes, it is possible to identify 10 certainties that the system appears to be driving to achieve; and then use this as a basis for assessing how the system is performing and what risks continue to be faced by promoters of nationally significant infrastructure projects.

Certainty of regime

Section 14 of the Planning Act 2008 sets out 16 defined categories of NSIPs. The Secretary of State can order a new type of project to be added to the list, or vary or remove an existing project, and make further

[65] Growth and Infrastructure Act 2013 s.22 inserting a new s.237A into the Planning Act 2008.

[66] Growth and Infrastructure Act 2013 s.23, amending ss.127, 137 and 138 of the Planning Act 2008.

[67] Infrastructure Planning (Fees) (Amendment) Regulations 2013 (SI 2013/498), Infrastructure Planning (Prescribed Consultees and Interested Parties etc.) (Amendment) Regulations 2013 (SI 2013/522) and Infrastructure Planning (Miscellaneous Prescribed Provisions) (Amendment) Regulations 2013 (SI 2013/520).

[68] Infrastructure Planning (Environmental Impact Assessment) (Amendment) Regulations 2012 (SI 2012/787) and Conservation of Habitats and Species (Amendment) Regulations 2012 (SI 2012/1927).

[69] Infrastructure Planning (Changes to, and Revocation of, Development Consent Orders) Regulations 2011 (SI 2011/2055).

[70] See further below.

[71] The Overhead Lines (Exempt Installations) (Consequential Provisions) Order 2010 (SI 2010/29), the Infrastructure Planning (Waste Water Transfer and Storage) Order 2012 (SI 2012/1645) and the Planning Act 2008 (Nationally Significant Infrastructure Projects) (Electric Lines) Order 2013 (SI 2013/1479).

[72] The Highway and Railway (Nationally Significant Infrastructure Project) Order 2013 (SI 2013/1883).

provision, or amend or repeal existing provision, about the types of project within s.14.[73] Projects must, however, be within the fields of energy, transport, water, waste water or waste.[74]

Sections 15–30 then set out detailed qualifying criteria for projects to fall within the categories set out in section 14. For example, a generating station is only within section 14(1)(a) if it is, or when constructed or extended is expected to be:

(a) an onshore generating station in England or Wales and its capacity is more than 50MW; or
(b) an offshore generating station in the territorial waters of England or Wales or in a Renewable Energy Zone in relation to which the Scottish Ministers do not have any functions and its capacity is more than 100MW.

The Government's intention when setting these criteria was to try to define the types of project that were typically determined at the national level under the old planning regimes. During the Bill's progress through the House of Commons, the Parliamentary Under-Secretary of State for Transport, Jim Fitzpatrick, said:

> "It is important to make it clear, therefore, that the majority of projects that we define as nationally significant are those which have already been decided by Ministers. We have taken decision making away from local authorities only in the small number of cases in which there is a strong case. In most cases, given the national significance, we would have expected to call those in anyway."[75]

The statutory thresholds ought to make it straightforward to determine whether it is mandatory to obtain development consent for any given project. But in relation to particularly complex projects involving various different elements, it can be difficult to establish whether development is associated development (for which development consent is optional) or an NSIP in its own right (for which development consent is mandatory).

Guidance issued by the Government confirms that a single application can cover more than one project requiring development consent. Applicants are encouraged, as far as is possible, to make a single application where developments are clearly linked.[76] But it is necessary to identify in the application documents which elements of the project are being treated as associated development and which constitute NSIPs in their own right.

For example, one of the reasons given for initially deciding not to accept the application for development consent for the Daventry International Rail Freight Terminal was that PINS was not satisfied that off-site highway mitigation works forming part of the project did not qualify as NSIPs in their own right.[77]

Accordingly, the examples of associated development given in the annexes to the Government's guidance note on associated development are subject to the following warning:

> "These annexes should not be treated as an indication that the development listed in them cannot in its own right constitute a project, or an integral part of a project, for which obtaining development consent is mandatory under the Planning Act."[78]

Whether a project, or part of a project, qualifies as an NSIP can, in some cases, depend on who is promoting the project. For example, the construction of a gas pipeline will only be an NSIP if it is constructed by a gas transporter.[79] The construction or diversion of a gas pipeline by another promoter as

[73] Planning Act 2008 s.14(3).
[74] Planning Act 2008 ss.14(5) and (6). In addition, subs.(7) requires the project to be in England, its territorial waters or, in the case of an energy project, in a Renewable Energy Zone in relation to which the Scottish Ministers do not have any functions.
[75] *Hansard*, January 22, 2008, Col.302.
[76] *Planning Act 2008: Guidance on associated development applications for major infrastructure projects*, DCLG, April 2013.
[77] Letter dated November 28, 2012. See further below.
[78] *Planning Act 2008: Guidance on associated development applications for major infrastructure projects*, DCLG, April 2013, para.12.
[79] Planning Act 2008 s.20. By s.235 of the 2008 Act, "gas transporter" has the same meaning as in Pt 1 of the Gas Act 1986: see s.7(1) of that Act.

part of a wider project would merely be associated development, or would be outside the scope of the 2008 Act all together if it were being carried forward as a standalone project. Similarly, the construction or alteration of a railway is an NSIP only if the railway is or forms part of a network operated by an approved operator.[80]

Other projects have begun life under the Planning Act 2008, but then been withdrawn in order to proceed under the town and country planning regime instead. This is necessary where the range of issues being consulted on in the early stages of a project include matters that, once decided, will be determinative of whether it qualifies as an NSIP or not.

For example, phase 1 public consultation was carried out in accordance with the 2008 Act in relation to the Deephams Sewage Works Upgrade project before the promoter, Thames Water Utilities Limited, decided that the upgrade would be built within the boundaries of the existing sewage works site rather than on a replacement site. This meant that the project ceased to qualify as an NSIP and could be the subject of a conventional application for planning permission instead.[81]

These are complicated questions and they underline the importance of scoping out a project at its very earliest stages—certainly before consultation begins—by reference to the criteria in the 2008 Act.

The consequences for getting it wrong can be severe. Section 31 of the 2008 Act provides that development consent is required for development to the extent that the development is *or forms part of* an NSIP. If a decision is made that development consent is not required for development that turns out to form part of an NSIP, then carrying out that development will be a criminal offence.[82] The whole pre-application consultation process would need to be followed in order to secure development consent, which is likely to delay the implementation of the project.

Conversely, if a decision is made that development is a nationally significant infrastructure project when in fact it does not meet the statutory criteria, then considerable time, costs and resources will be needlessly spent complying with the prescriptive requirements of the 2008 Act regime only for an application ultimately not to be accepted by the Secretary of State.

Early engagement with PINS when scoping any project is therefore essential. In cases of ambiguity, it would be advisable to make a formal request for advice to be given by the Secretary of State pursuant to the power available to him under s.51(1)(a) of the 2008 Act.

The proliferation of consents required for major energy and infrastructure projects has also caused problems. One of the key aims of the 2008 Act was the creation of a single consents regime. Whilst some progress has been made towards this objective, it is clear that there are a large number of consents required for complex projects that remain outside the scope of the 2008 Act. Even where s.150 of the 2008 Act permits consents to be wrapped into DCOs, consenting bodies have seldom allowed them to be included. This combination of factors has undermined the streamlined approach that the regime set out to achieve.

This was recognised by the Government in September 2012, when it announced a commitment to expand and improve the one stop shop approach for non-planning consents for NSIPs. To deliver this commitment, a new Consents Service Unit, based in the Planning Inspectorate, became operational in April 2013.

The purpose of the Consents Service Unit is to deliver a more efficient and effective non-planning consents process for NSIPs in England (including off-shore projects within English waters). A dedicated contact works with the developer and the relevant consenting bodies to co-ordinate a logical and systematic

[80] Planning Act 2008 s.25. An approved operator is a person who is authorised to be the operator of a network by a licence granted under s.8 of the Railways Act 1993.

[81] The project is specifically identified as a potential NSIP in the National Policy Statement for Waste Water (March 2012), on the basis that an entirely new sewage treatment works might have been needed to be built. However, altering the existing sewage treatment works would not have the effect of increasing the capacity of the plant by more than a population equivalent of 500,000, meaning that the project now falls outside the threshold fixed in s.29(2)(b) of the 2008 Act.

[82] Planning Act 2008 s.160.

approach to the handling of a range of non-planning consents which are required in addition to the DCO, with a strong emphasis on the pre-application stage.

The aim is to ensure that the other 12 key separate consents which might be required alongside a DCO are dealt with in parallel with the DCO application.[83] The Unit will not, however, make decisions on issuing non-planning consents; the relevant technical expertise and resources will remain within the consenting bodies.

The Consents Service Unit will help developers better understand what consents are needed in addition to development consent and how they can be obtained, and the different requirements of each consenting process. This will be captured in a bespoke Consents Management Plan, which will identify key target dates, milestones and checkpoints in relation to the consents which are required. It will also identify any risks which may impact upon project schedules.

The Consents Service Unit will work alongside the Major Infrastructure and Environment Unit, which has a specific remit in relation to the Habitats and Wild Birds Directives and works with promoters to ensure that obligations under that legislation are properly met. Their work will also be reflected in any Consents Management Plan.

This is a free service open to promoters and is a very positive move in the light of Government guidance that encourages promoters, where possible, to include non-planning consents within the scope of an Order.[84]

Certainty of compliance

The 2008 Act has established a highly formalistic regime. Strict compliance with statutory requirements is necessary in order for an application to be successful.

Formalism in planning law is far from being a novel concept. A line of cases can be traced from *Western Fish Products Ltd v Penwith DC*,[85] through to *R. (on the application of Reprotech (Pebsham) Ltd) v East Sussex CC*,[86] *Henry Boot Homes Ltd v Bassetlaw DC*,[87] and beyond which demonstrates the importance of complying with statutory requirements as laid down by Parliament.

It is not permissible for planning authorities to provide extra statutory flexibility according to their own judgements, however well-intentioned they may be, due to the exigencies of public law. In the classic formulation of the law by Lord Scarman in *Pioneer Aggregates Ltd v Secretary of State for the Environment*:

> "… if the statute law covers the situation, it will be an impermissible exercise of the judicial function to go beyond the statutory provision by applying such principles merely because they may appear to achieve a fairer solution to the problem being considered. As ever in the field of statute law it is the duty of the courts to give effect to the intention of Parliament as evinced by the statute, or statutory code, considered as a whole."[88]

[83] These are listed in Annex 1 to the *Consents Service Unit for Nationally Significant Infrastructure: Prospectus for Developers*, The Planning Inspectorate, April 2013. They are as follows: a licence under reg.53 of the Conservation of Habitats and Species Regulations 2010; a licence under s.10 of the Protection of Badgers Act 1992; a licence under reg.49 of the Offshore Marine Conservation (Natural Habitats etc) Regulations 2007; an environmental permit under the Environmental Permitting (England and Wales) Regulations 2010; a licence under s.16 of the Wildlife and Countryside Act 1981; a licence under ss.24 or 25 of the Water Resources Act 1991; a consent under ss.32, 109 or 164 of, and under byelaws made under paras 5, 6 or 6A of Sch.25 to the Water Resources Act 1991; a consent under s.166 of the Water Industry Act 1991; an authorisation under reg.8 of the Persistent Organic Pollutants Regulations 2007; a notice of determination of a reference by a sewerage undertaker under Ch.3 of Pt 4 of the Water Industry Act 1991; a consent under s.23 of the Land Drainage Act 1991; and notices under s.95 of the Energy Act 2004.

[84] *Guidance on the pre-application process*, DCLG, January 2013, para.19 states: "Where an applicant proposes to include non-planning consents within their Development Consent Order, the bodies that would normally be responsible for granting these consents should make every effort to facilitate this. They should only object to the inclusion of such non-planning consents with good reason, and after careful consideration of reasonable alternatives."

[85] [1981] 2 All E.R. 204.

[86] [2003] 1 W.L.R. 348.

[87] [2002] EWCA Civ 983.

[88] [1985] 1 A.C. 132 at paras 141A–C.

Nevertheless, it is not generally a requirement of public law that every single formality must be followed in order for an administrative decision to be valid. Adopting such an approach risks causing prejudice to the otherwise diligent applicant for a minor procedural oversight. It is incumbent on public authorities to balance the need for administrative formality against the unfairness that could follow from an overly rigid application of statutory requirements.

This is particularly important in relation to the Planning Act 2008. It is a complex regime, so the risks of minor oversights are that much higher; but it also handles large applications, so the consequences of requiring overly prescriptive compliance are that much more serious. Furthermore, it is not just the requirements of primary and secondary legislation that must be complied with.

Section 50 of the 2008 Act entitles the Secretary of State to issue guidance about how to comply with the pre-application requirements set out in Ch.2 of the Act.[89] Subsection (3) requires applicants to have regard to any guidance issued under s.50.

Section 37(4) of the 2008 Act entitles the Secretary of State to issue guidance about how the requirements for an order granting development consent are to be complied with.[90]

Section 37(5) allows the Secretary of State to set standards for the preparation of a document required to accompany an application for development consent; the coverage in such a document of a matter falling to be dealt with in it; and all or any of the collection, sources, verification, processing and presentation of information required to accompany an application.

The Secretary of State may only accept an application for development consent if he concludes that, among other things:

(a) the applicant has, in relation to a proposed application that has become the application, complied with the pre-application procedure set out in Ch.2 of Pt 5 of the 2008 Act; and

(b) the application (including accompaniments) is of a standard that the Secretary of State considers satisfactory.[91]

When deciding whether the applicant has complied with pre-application procedure, the Secretary of State must have regard to the extent to which the applicant has had regard to any guidance given under s.50.[92]

When deciding whether the application is of a satisfactory standard, the Secretary of State must have regard to the extent to which the application complies with any standard set under s.37(5); and the extent to which any applicable guidance given under s.37(4) has been followed.[93]

Guidance and standards issued under ss.37 and 50 therefore have quasi-statutory status. The range of matters to which an applicant must pay close attention when preparing an application for development consent is very considerable as a result.

The Planning Inspectorate has also issued detailed advice notes on the preparation and submission of application documents and preparing the draft order and explanatory memorandum.[94] Whilst these notes have no statutory status, they are a clear indication of the policies that the Secretary of State will apply when, for example, deciding whether or not to accept an application. As the introduction to Advice Note 6 states:

[89] The following guidance has been published under s.50: *Planning Act 2008: Guidance on the pre-application process*, DCLG, January 2013.

[90] So far as the writer is aware, no such guidance has been issued, nor any standards under s.37(5). Whilst *Planning Act 2008: Application form guidance*, DCLG, June 2013 includes advice on producing a draft DCO, it is not expressly stated to have been issued under s.37 of the 2008 Act. PINS has issued advice in *Advice note six: Preparation and submission of application documents, June 2012* and *Advice note thirteen: Preparation of a draft order granting development consent and explanatory memorandum*, April 2012, but these have no statutory status. The main requirements are therefore set out in the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 (SI 2009/2264).

[91] Section 55(3), Planning Act 2008.

[92] Section 55(4), Planning Act 2008.

[93] Section 55(5A), Planning Act 2008.

[94] Advice Note 6, June 2012; and Advice Note 13, April 2012.

"Applications that are poorly organised and presented could be at greater risk of not being accepted for examination."

Three of the applications for development consent that have not been accepted for examination illustrate the way in which compliance standards, both statutory and non-statutory, are being enforced by PINS.

(a) Western Power Distribution's application for an electric line connection to Maesgwyn Wind Farm was not accepted by the IPC on August 31, 2010.[95] The IPC was unable to conclude under s.55(3)(b) of the 2008 Act that the application complied with s.37(3) (form and contents of applications) because the application was not accompanied by a book of reference, statement of reasons or a funding statement despite including compulsory purchase powers. The IPC was also unable to conclude under s.55(3)(d) of the 2008 Act that guidance then in force in relation to the preparation of application documents had been followed; and the IPC considered that the draft DCO had been prepared with insufficient rigour in a number of respects, the cumulative effect of which was that the draft order was insufficiently clear, complete and accurate. Finally, the IPC was unable to conclude under s.55(3)(e) of the 2008 Act that the applicant had complied with pre-application procedure. The IPC was of the view that the form of the draft order submitted could, if remedied during the examination, result in a proposal to authorise development materially different from that upon which statutory pre-application procedure had been carried out. The application was subsequently withdrawn.

(b) The Daventry Rail Freight Terminal application was not accepted by PINS on November 28, 2012. The Secretary of State considered under s.55(3)(f) of the 2008 Act that the application (including accompaniments) was not of a standard that was satisfactory and, under s.55(3)(e), that the applicant had not complied with the pre-application requirements set out in Ch.2 of Pt 5 of the 2008 Act. The way in which the application plans were structured, the project described in the draft DCO and the way in which the DCO provisions were explained in the explanatory memorandum made it difficult to understand what the applicant was seeking consent for. No adequate explanation was given as to why certain of the off-site highway mitigation works were considered not to be NSIPs in their own right. And the environmental statement submitted with the application did not clearly identify the project, reflecting the uncertainty about the scope of the project for which development consent was sought. The application was resubmitted to PINS on February 22, 2013 and accepted for examination on March 20, 2013.

(c) The Rampion Offshore Wind Farm application had to be withdrawn in January 2013 when it emerged that there had been a number of omissions in respect of the applicant's s.42 consultation. PINS had carried out initial checks of the Consultation Report and had identified a procedural flaw related to the applicant's requirements under s.55(3)(e) of the 2008 Act, i.e. a failure to comply with pre-application procedure. This defect presented a risk that the application would not be able to satisfy all of the acceptance tests under s.55 of the 2008 Act. The applicant chose to withdraw the application in order to remedy the defect by carrying out further consultation with a number of prescribed consultees who were missed from the original s.42 consultation. The application was then resubmitted and was accepted by PINS on March 25, 2013.

[95] This was unfortunate given that it was the first application for development consent to have been submitted under the Planning Act 2008. Western Power Distribution confirmed to the IPC by email on April 1, 2011 that they would not be submitting a further application for development consent.

The Localism Act 2011 set out to relax the acceptance criteria for NSIP applications. Applications can now be accepted where the Secretary of State considers them to be of a "satisfactory" standard.[96] This replaced the previous provisions that an application could only be accepted if it complied with requirements as to form and contents and with any standards set, and for the applicant to give reasons for any failure to follow applicable guidance.[97]

But the requirement to comply with pre-application guidance remains, and the failure to comply with guidance and standards in relation to application documents will still be taken into account by the Secretary of State when deciding whether or not to accept an application for development consent. So it remains to be seen whether the likelihood of applications being rejected for minor technical deficiencies has been reduced; and whether greater flexibility will be afforded to applicants in the future.

Certainty of integrity

The 2008 Act permits PINS (on behalf of the Secretary of State) to give advice about applying for or making representations about a DCO application.[98] This is an important power which has been widely used by promoters and other persons interested in the regime.

For the first few months after its creation, the IPC was reluctant to give any such advice and a common response to a request for help was to state that promoters should seek their own legal advice. This was particularly unhelpful when the regime was in its infancy and uncertainty surrounded the interpretation of the statutory requirements. It reduced confidence in the regime and may partly explain why so few applications were submitted when the new system was switched on.

As the regime began to bed in and familiarity increased, there was a notable improvement in the quality of advice provided by the IPC. This improved even further following the 2011 Act's transfer of power to the Secretary of State and the removal of the restriction on the giving of advice on the merits of an application, as mentioned above.

One element of the system which continues to trouble those seeking advice is the statutory requirement for all advice to be made publicly available on the PINS website.[99] This means that parties need to weigh up in advance the pros and cons of seeking advice in light of the fact that both the question and response will be published. For instance, should a promoter wish to discuss with PINS the possibility of making changes to a submitted application, this would alert those interested in the application that changes might be made and could potentially undermine the submitted scheme.

Nevertheless, the advice log on the website is a helpful source of information for other parties and minimises the need for the same question to be asked of PINS multiple times by different parties. More importantly, the requirement to publish all advice demonstrates the transparency and openness of the regime. In addition to the publication of advice, all application and project documents are made available on the website, including interested party representations, notes and audio recordings of hearings and all correspondence between PINS, the applicant and other parties. This helps to maintain the integrity of the regime and is an extension of the general trend in the planning system to move away from the consideration and processing of applications behind closed doors.

Certainty of participation

The 2008 Act regime is heavily front-loaded, with significant emphasis placed on finalising projects at the pre-application stage. The extensive pre-application consultation that must be carried out is not merely

[96] Planning Act 2008 s.137.
[97] Planning Act 2008 ss.55(3)(b) and (d).
[98] Planning Act 2008 s.51.
[99] Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 reg.11.

a formality and careful attention will be paid to the applicant's consultation report. This was demonstrated by the Secretary of State's refusal to accept the original Daventry International Rail Freight Terminal and Rampion Offshore Wind Farm applications on the basis that, amongst other things, the applicants had failed to carry out adequate consultation.[100]

Once an application has been submitted, there is very limited opportunity to make changes to it. The aim of the regime is to ensure that promoters spend sufficient time at the pre-application stage developing their proposals so that by the date of submission of the application, the scheme has been fully worked up and consulted upon.

Pre-application consultation is often carried out in multiple phases and can take place over several years. For many projects, the pre-application stage is significantly longer than the examination and decision stages, raising the risk of "consultation fatigue". For example, the pre-application consultation for the Hinkley Point C project ran for three years and involved four stages of formal consultation. This is in contrast to the 12 months between the start of the examination in March 2012 and the grant of development consent in March 2013.

The rigid adherence to the statutory timetable for the examination of applications and the Secretary of State's reluctance to extend it has led to concern that insufficient time is dedicated to a thorough consideration of the proposals at the examination stage. If the examination is merely a tick box exercise, with PINS rushing through the motions of accepting representations and holding hearings, this would fall short of the right to genuine public participation in decision-making required by the Aarhus Convention.

But the focus on front-loading means that key issues should already have been dealt with before an application is submitted, so that by the examination stage it is possible to focus on the remaining outstanding matters in dispute. Public participation in the formulation of the proposals occurs not just during the examination stage but, more importantly, during the extensive pre-application stage. Despite the right under s.93 of the 2008 Act for interested parties to be heard at an open-floor hearing, it is at the consultation stage of a project where third parties have the greatest ability to influence the ultimate outcome of a project.

Regardless of the length and quality of consultation, some interested parties will feel that their concerns were not adequately addressed by the applicant at the pre-application stage and therefore rely on the examination as an opportunity to voice their concerns. Interestingly, once the adequacy of consultation has been confirmed and the application is accepted by the Secretary of State, relatively little attention is thereafter paid to what was done at the pre-application stage and there appears to be something of a disconnect between the two stages.

Whether or not the above concerns have any merit is yet to be tested by the courts. For the time being, promoters would be well advised to ensure that they take it upon themselves to be as open and transparent as possible and address all key issues up front at the pre-application stage. This will reduce the number of remaining issues to be considered during the examination and will in turn maximise the time that can be dedicated within the statutory timetable to a thorough consideration of those issues, including sufficient time for genuine public participation.

Certainty of project

Once an application has been submitted, there is only limited scope to change the project for which development consent has been applied for. In the early days of the 2008 Act regime, the IPC took a very strict line against the possibility of post-submission amendments to an application, both in its advice notes and in its web-log of advice to applicants. Their Advice Note 6 (since superseded) stated:

> "Once an application has been submitted and accepted, there will only be limited opportunity to submit any additional or amended information. In particular, there is little or no scope for the

[100] See further above.

acceptance of any material revisions to a scheme during the examination of its application. Therefore, applicants need to ensure that their proposals are sufficiently developed prior to formal submission to the IPC, taking account of the relevant legislation, regulations, rules and guidance."

The reasons for this strict position appeared to lie with the enhanced pre-application consultation requirements of the 2008 Act and the desire for promoters to ensure they had settled on their final project proposals before submitting an application. The Government no doubt had one eye on the strict time limits for processing applications and the risk of those time limits being breached under the weight of amendment applications.

In the writer's submission, this stance was plainly not fair to applicants and potentially had the effect of leaving the IPC and applicants in the indefensible position of being unable to allow revisions to a project even if the revisions were of benefit to all parties involved. It was widely considered by practitioners that this stance was out of line with the approach taken in other statutory regimes (and supported by case law) and did not recognise the duty owed to applicants to:

"… avoid the need for a fresh application, with the extra delay, expense and, in some cases, extended blighting effect that this may entail."[101]

The House of Lords in *Oxfordshire County Council v Oxford City Council* held that the touchstone consideration for any decision maker in determining whether to consider an amended application is to ensure that the public benefit in administrative efficiency and speed of decision making is balanced against the need to ensure fairness. In that case, an issue had arisen as to whether it was possible for an application to register land as a village green under the Commons Act 1965 to be amended to include areas of land not included in the original application. Lord Hoffman said:

"… it seems to me that the registration authority should be guided by the general principle of being fair to the parties. It would be pointless to insist upon a fresh application (with a new application date) if no prejudice would be caused by an amendment, or if any prejudice could be prevented by an adjournment to allow the objectors to deal with points for which they had not prepared."[102]

This principle is recognised by practice in relation to applications for planning permission under the Town and Country Planning 1990 and under the Transport and Works Act 1992. Dealing with the importance of flexibility in cases of proposals to modify a planning application, Elias J. stated in *British Telecommunications v Gloucester City Council*:

"If the law were too quick to compel applicants to go through all the formal stages of a fresh application, it would inevitably deter developers from being receptive to sensible proposals for change … I would add that of course the interests of the public must also be fully protected when an amendment is under consideration."[103]

The position in relation to Transport and Works Act Orders (on which much of the 2008 Act regime is based) is set out in the non-statutory guidance contained in the Department for Transport's *Guide to Transport and Works Act Procedures 2006* as follows:

"Aside from the ES, it is recognised that an applicant may wish to submit to the Secretary of State after an application has been made - perhaps as a result of negotiations with objectors - information additional to that submitted with the application; or amendments to a document or documents previously submitted with the application, including the draft order itself. Where this can properly

[101] *Guidance to Transport and Works Act Procedures* 2006, para.3.48.
[102] [2006] UKHL 25, per Lord Hoffman at [61].
[103] [2001] EWHC Admin 1001.

be done, it can avoid the need for a fresh application, with the extra delay, expense and, in some cases, extended blighting effect that this may entail. With this in mind, the Secretary of State would normally be prepared to accept for consideration additions and/or amendments where he or she is satisfied that:

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

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

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

If any of the above conditions were not met, it is likely that a fresh application would be required."[104]

The ability to make changes to a Transport and Works Act Order is not completely unconstrained however. The guidance goes on to state that:

"Although applicants may therefore be allowed to make additions and amendments to an application on the basis set out above, they should nevertheless make every effort to keep post-application changes to a minimum. Bearing in mind the extra costs and delays that might arise, applicants will wish to satisfy themselves before making an application that all of the documentation is as complete and accurate as practicable. It is recognised however that changes can sometimes arise from discussions with objectors, and that incorporation of such changes could help to remove objections and/or avoid the need for a fresh application."[105]

In light of the generally recognised duty to ensure that applicants are not unnecessarily required to go to the expense of submitting a new application; and the obvious potential for major infrastructure developers to need to make changes to their application post-submission through no fault of their own, there was a clear need to clarify the scope and procedure for applicants to make post-submission amendments to applications for development consent.

This clarification came not under statute or regulations, but in a letter dated November 18, 2011 from Bob Neill MP, then Parliamentary Under Secretary of State at the Department for Communities and Local Government, to Sir Michael Pitt, then Chair of the IPC. In that letter, the Minister explains the main consideration for the IPC as follows:

"I agree that where the Examining Authority determines that proposed changes to an application post submission are such that they effectively constitute a new application, they should not be accepted. Any decision on materiality, including the point at which the materiality of proposed changes reach this threshold, is for the Examining Authority to make …"

The Minister went on to state that he was entirely supportive of the IPC's earlier decision not to accept proposed changes to Covanta Energy's DCO application for the Brig y Cwm project.[106] After referring to the importance of applications being as well prepared as possible before they are submitted, he said:

[104] Para.3.48.
[105] Para.3.51.
[106] Covanta had proposed to reduce the amount of material to be excavated from the site in order to reduce the number of lorry movements taking spoil to landfill. This would have resulted in the ground levels within certain parts of the site being increased by up to 3m from those shown in the original application.

> "However, from time to time, it may become necessary to make material changes to an application after submission through no fault of the applicant, for example where the regulatory environment changes, or information comes to light which could allow the impacts of the project to be reduced. Given this, it is important that the major infrastructure regime allows material changes to be made post application in certain circumstances."

The power to accept material changes derives from s.114(1) of the Planning Act 2008, which permits the decision-maker to make a development consent order in different terms to those applied for. The Minister noted, however, that the power provided by that section is limited in a number of ways:

> "If the Examining Authority decides to consider material changes to an application as part of the examination, the Examining Authority will need to act reasonably, and in accordance with the principles of natural justice. In particular the principles arising from the Wheatcroft case must be fully addressed, which essentially require that anyone affected by amended proposals must have a fair opportunity to have their views heard and properly taken into account regarding them."

The Minister explained that the Examining Authority will be in a position to determine what procedure it is appropriate to follow on a case by case basis. This, he said, should be done in accordance with the principles of fairness and reasonableness, and specifically the principles set out in *Bernard Wheatcroft Ltd v Secretary of State for the Environment*.[107]

The Minister has therefore adopted the same principles in relation to material changes to DCO applications as are generally applied in relation to the amendment of planning applications made under the Town and Country Planning Act 1990.

The courts have usually taken a pragmatic approach to the amendment of planning applications. Despite there being no statutory basis for allowing such amendments, the courts have recognised that a developer should not be required to submit a new planning application for every change it wishes to make to a proposed development, and that such changes are part and parcel of the common practice of negotiations between the applicant, the planning authority and third parties during the application process.

However, this pragmatism must be balanced against the need to ensure that no one with an interest in the development is prejudiced by allowing the changes to be made. The planning authority should therefore assess whether the proposed changes are of such significance as to compel the submission of a fresh application in order for the proposed development to be considered fairly and appropriately.

In *Wheatcroft*, Forbes J. said that the true test is whether the effect of the changes is to allow development that is in substance not that which was applied for. Both the interests of the applicant and potentially interested members of the public must be borne in mind in making this assessment. Forbes J. held that the main, but not the only, criterion on which the assessment must be based is:

> "… whether the development is so changed that to grant it would be to deprive those who should have been consulted on the changed development of the opportunity of such consultation."

There is no black and white threshold where amendments pass into this category. Instead, local planning authorities have wide discretion to accept amendments. By applying the same test in relation to amendments to DCO applications, the Government has given the Examining Authority the same broad discretion in relation to amendments to DCO applications. The courts will generally not interfere with the exercise of that discretion, unless the result is so perverse or irrational that no reasonable decision-making authority could have acted in that way.

In relation to planning applications, provided the proposed amendments do not amount to a substantially different development, the risk of causing unfairness to those who have a legitimate interest in the

[107] (1982) 43 P. & C.R. 233.

development by not submitting a new application can ordinarily be overcome by the local planning authority undertaking consultation on the amendments with all those interested parties who were consulted on the original planning application.[108] This limits the scope for the eventual planning permission to be challenged by an aggrieved third party.

The same approach could be adopted in relation to DCO applications, although the number of consultees would of course be considerably larger compared to a planning application.

A number of cases decided since *Wheatcroft* have followed the test laid down by Forbes J.[109] Two general principles can be drawn from the caselaw in relation to amendments made prior to the grant of planning permission. First, that minor changes to an application are acceptable up to the point where they result in permission being sought for a substantially different development to that which was the subject of the original planning application. Secondly, that it is the entitlement of interested parties to be consulted on substantial changes to an application that is the primary factor in determining whether the magnitude of those changes has gone beyond the point where they can be accommodated by private arrangement between the applicant and the planning authority.

Forbes J. ended his judgment in *Wheatcroft* with the following statement:

> "I might add that I have come to my general conclusion with a certain degree of satisfaction, as it seems to me to permit a welcome degree of flexibility in the conduct of planning applications and appeals while at the same time maintaining adequate safeguards for the interests of those in whose favour the provisions for consultation were enacted."

This moment of self-congratulation may be excused on the basis that the decision has stood for 30 years with little need for any further judicial gloss. The application to the DCO regime is potentially more complicated however. In *British Telecommunications*, Elias J. said:

> "It is inevitable in the process of negotiating with officers and consulting with the public, that proposals will be made or ideas emerge which will lead to a modification of the original planning application. It is plainly in the public interest that proposed developments should be improved in this way. If the law were too quick to compel applicants to go through all the formal stages of a fresh application, it would inevitably deter developers from being receptive to sensible proposals for change."[110]

Whilst the judge considered changes to be a natural consequence of consultation, this has to be considered in the context of a planning system where that consultation continues *after* a planning application has been submitted. In contrast, the 2008 Act is predicated on extensive front-loaded pre-application consultation, the purpose of which is to refine and perfect the development proposals, and which is meant to end when the DCO application is submitted for examination.[111]

In fact, in *British Telecommunications*, Elias J drew a distinction between amendments to a planning application yet to be determined, and amendments made on appeal.[112] In the latter case, he said, it would not be possible to comply with the statutory requirement for further consultation,[113] and:

[108] In *British Telecommunications* however, Elias J. accepted that there were exceptional cases where full consultation would not obviate the need for a fresh application, such as where legislation has been introduced which would catch a fresh application but not an amendment, so that only a fresh application would allow the proposed development to be considered fairly and appropriately. This needs to be considered carefully in relation to the evolving consenting regime for NSIPs.

[109] See, for example, *Breckland DC v Secretary of State for the Environment and Hill* (1992) P. & C.R. 34.

[110] *British Telecommunications v Gloucester City council* [2001] EWHC Admin 1001 at [33].

[111] Thus in relation to the Brig y Cym project, the IPC concluded that the proposed amended scheme "would be substantially different" to that originally applied for and therefore refused to accept the amendments, even though this would have meant a reduction in the environmental impacts of the project. Costs were later awarded against Covanta, partly on the ground that, although the introduction of changes could be reasonable in some circumstances, in this case requesting material changes during the examination was unreasonable behaviour because the issues that the changes sought to address had been raised during pre-application consultation.

[112] *British Telecommunications v Gloucester City council* [2001] EWHC Admin 1001 at [40].

[113] Although consultation clearly could take place as part of the appeal process if the Secretary of State were minded to allow it.

> "Not surprisingly, therefore, the question whether an amendment can be fairly and appropriately allowed in that context will be wholly different to the same question when posed by the planning authority itself at a stage when no permission has been granted and further consultation is possible."

A planning appeal is a better comparator for DCO applications than a planning application for that reason. There is a greater risk that allowing amendments to a DCO application would, in Elias J.'s words, "sidestep the rights of third parties" because, unlike with planning applications, the consultation and refinement phase of a DCO application is supposed to occur prior to submission and not after it.

This suggests that, applying the *Wheatcroft* principles to DCO applications results in a narrower scope for changes to be made than in relation to planning applications.

Nevertheless, it would be odd if the acknowledged need for flexibility and pragmatism were abandoned completely in relation to DCO applications. To do so would fail to recognise the interests of the promoter in having the DCO application dealt with by the system fairly and efficiently, as well as the greater public interest in not overburdening the planning system with endless iterations of the same development projects.

The letter from Bob Neill MP implicitly recognises this and states that accommodating changes[114] will help to protect the many billions of pounds in investment, so important to the UK economy, represented by the cases expected to come forward over the next several years.

To balance the need for third party rights to be protected even though consultation on the application has ended, the Minister states in his letter that it may be necessary for the examination to be extended in order to allow interested parties to be consulted on the proposed changes and for anyone who isn't an interested party, but who nevertheless wishes to make representations regarding the amended proposals, to be treated as if they were.

The following practical guidance can be deduced from the Minister's letter and the related caselaw and practice under the town and country planning regime.

(a) If the effect of the proposed material amendment is to allow development that is in substance not that which was applied for, then the amendment will not be permitted at all. Consulting third parties will not serve to make any material amendment in this category acceptable.

(b) A judgement on this issue of substance needs to be made by reference to the particular element of the development in question, not the project as a whole. For example, the significance of a material amendment to off-site associated development should be judged by reference to that site and not the whole project.

(c) The decision on substance is ultimately a matter of discretion for the Examining Authority. Provided that discretion is not exercised irrationally, the courts will not interfere.

(d) Where a proposed amendment passes the substance test, it should not be assumed that it will automatically be accepted under the *Wheatcroft* principles. The key issue is whether it would prejudice any person who may want to make representations on the acceptability of the amendment.

(e) If it can be shown that the amendment could not possibly prejudice anyone because, for example, it is so minor, then there should be no need for consultation on the amendment to be carried out. The letter from Bob Neill MP only applies the *Wheatcroft* principles to "material" amendments. Non-material amendments should be capable of being made simply with the agreement of the Examining Authority.

(f) Material amendments that only have beneficial impacts may nevertheless still need to be consulted upon if those impacts are significant.

[114] But only changes that are not so substantial that they constitute a new application, and then only "in certain circumstances".

(g) It ought to be possible to avoid prejudice to interested parties in relation to the majority of material amendments that pass the substance test and which would not affect anyone who was not previously affected by the proposals, provided adequate consultation is carried out.

(h) The scope to carry out effective and fair consultation on a material change to a DCO application is narrower than in relation to a planning application. It is likely that the examination would need to be extended to allow for this to occur.

(i) Consultation will always be required where a material amendment affects someone who was not previously affected by the DCO application (i.e. someone who isn't already an interested party).

(j) If there is any doubt about whether a proposed amendment would prejudice anyone if they were not consulted on the amended proposals, then consultation ought to be carried out in order to reduce the risk of future legal challenges.

(k) The later in the examination process that an amendment is sought, the less likely it is that adequate consultation can be carried out without duplicating issues already addressed in the examination, and the Examining Authority is therefore likely to be increasingly reluctant to allow amendments as the examination progresses.

(l) Where there have been material legislative changes to the consenting regime for NSIPs since the DCO application was submitted, a fresh application may be required in order for changes to be considered fairly and appropriately. Full consultation on the changes would not overcome this requirement.

(m) Even if all of the above guidance is followed, the letter from Bob Neill MP only refers to material changes being allowed "in certain circumstances". The Examining Authority retains discretion to refuse changes if it considers there are good reasons not to permit them. Changes are more likely to be allowed if they can be presented on a "no fault" basis (e.g. due to regulatory changes, discussions with interested parties or an otherwise unforeseeable change in circumstances), rather than as a change of mind or oversight by the promoter.

(n) Only amendments to the development proposed in the DCO application fall to be considered under the *Wheatcroft* principles. Changes to the manner in which development will be carried out do not need to follow a formal amendment process, although there is a separate need for such changes to be environmentally assessed and, in appropriate cases, for additional environmental information to be submitted to the Examining Authority.

It remains to be seen how the compromise set out by Bob Neill MP fares in practice. The letter has no formal status, but can be expected to be followed by PINS and by the Secretary of State.

Power exists for the Secretary of State to make provision regulating the procedure to be followed if the decision-maker proposes to make an order granting development consent on terms which are materially different from those proposed in the application.[115] DCLG has confirmed that it does not plan to make further regulations under this power however. It therefore appears that the current situation will remain the status quo for the foreseeable future.

Certainty of process

The examination process operates in stark contrast to a planning inquiry. Instead of each party putting its case through evidence presented by witnesses, the examination is fundamentally a written process led by the Examining Authority. Hearings are focused on answering questions prepared in advance by the Examining Authority, with very little advocacy or cross-examination.

[115] Planning Act 2008 s.114(2).

The Examining Authority is keen for agreement to be reached between the parties and typically encourages the early submission of statements of common ground which are then updated as issues are resolved throughout the examination period. In practice, this often involves considerable work drafting and negotiating agreed requirements and obligations to address issues between the parties in order to present the Examining Authority with an agreed solution. This provides benefit for the parties in that there is some certainty that the agreed solution will be taken forward by the Examining Authority into its recommendation.

The Examining Authority will set out lists of issues to be discussed at issue specific hearings and the format of the hearings is to work through these issues. Although oral advocacy and cross-examination are rare, the Panel's questions are generally incisive and detailed, so it is important to have both legal representation and technical experts available to respond quickly to these points. Repetition of points made in written submissions is actively discouraged. It is only where there is some outstanding disagreement between the parties that there is any substantive discussion and the Examining Authority will typically ask for this to be followed up by a written submission and preferably an agreed position. The Examining Authority also issues rounds of questions, directed at both the applicant and other parties, where it considers that further explanation or evidence is required. Responding to these questions can involve significant work in preparing updated assessments at short notice.

The Examining Authority will confine its consideration to the project that is the subject of the promoter's application rather than any alternatives raised by local people or other interested parties. This means that even if alternatives were raised in consultation, where the promoter has decided not to take them forward there is no real opportunity for objectors to pursue those alternatives during the examination.

The emphasis on written submissions and discouragement of repetition makes for efficient hearings and a transparent examination process provided that parties can keep up with the volume of submissions. Members of the public may be left with the feeling that the scope of the examination was too narrow and key issues were not sufficiently interrogated. However, the Examining Authority's report will address the issues raised or, if not, explain why they were outside the scope of the examination.

This process is perhaps less inquisitorial than was originally anticipated, and more of an exercise in achieving consensus between the parties wherever possible.

Certainty of outcome

The greatest achievement of the new regime, in the writer's view, is the adoption of National Policy Statements specifying Government policy on nationally significant infrastructure projects. As mentioned above, where a relevant NPS is in place there is a presumption in favour of the grant of development consent for any project that is in accordance with the policy set out in it. This brings clear benefits for promoters. The increased certainty of outcome is extremely valuable for promoters expending significant resources in bringing forward a development consent application and in seeking funding for the project.

By setting out the need for the project, National Policy Statements have also helped to address two key failings of the preceding planning regimes. The first is that examination time is no longer taken up hearing from interest groups who wish to give evidence on why particular types of infrastructure should not be authorised as a matter of principle. It is clearly more appropriate that such debates are held and settled once and for all at the national level, before applications for specific projects are submitted. This allows examination time for individual projects to be dedicated to the merits of the actual project itself, and also reduces delay and uncertainty.

Secondly, the decision-making process, whilst recognising local impact issues, is no longer dominated by them without a counter-balancing regard to the national need for the type of infrastructure in question. This was a particular concern of wind farm developers who regularly face substantial local opposition, often backed by local authorities.

Some National Policy Statements, such as the Nuclear NPS, are also site-specific. This brings even greater certainty for promoters and it removes the need for inquiry time to be spent debating the suitability of the proposed location for the project.

There have been concerns that the existence of National Policy Statements does not sit comfortably with the coalition government's localism agenda. However, all NPSs are subject to public consultation prior to designation, sometimes involving multiple rounds of consultation.[116] Additionally, the coalition government sought to increase democratic accountability through the Localism Act 2011 by introducing a requirement for ratification by the House of Commons prior to designation.[117]

Another criticism of National Policy Statements is that the Government is too slow in designating them. For example, nearly two years elapsed between the Government consulting on a draft of the Hazardous Substances NPS and laying it before Parliament in June 2013, and three NPSs still have not been published.[118]

But this could be seen as a demonstration of the care and consideration taken by the Government when producing these statements. This is borne out by the fact that there have been no successful challenges of any of the National Policy Statements designated to date. Greenpeace's challenge of the Nuclear NPS on the ground that it was premature in the light of the Fukushima incident in Japan in March 2012 was refused.[119]

In order to ensure that National Policy Statements continue to bring the benefit of increased certainty of outcome, the Government must ensure that it keeps under review those statements that have been designated[120] and continues to assess the need for further statements to be published.

Certainty of timing

The 15–16 month statutory timetable for determining applications has largely been adhered to so far. Where delays have occurred, they have not been significant in the context of the overall timescale of an NSIP application. These delays have tended to arise from specific issues with the particular projects in question, rather than a failure on the part of the Examining Authority or Secretary of State to stick to the prescribed timetable.

The examination period itself has been extended only once, for the Brig y Cwm project. The timetable was extended by two months to allow time for consultation on the changes requested by the applicant. Other applications have had more minor changes accepted without extension to the timetable. The other two examples of delay in the decision making process were the Examining Authority's recommendation on the Kentish Flats application, which was delayed by just over a week due to a delay in receipt of the examination fees, and the Able Marine Energy Park project, which had its decision deadline extended by two months in May 2013, by another month in July 2013 and then by a further four months on 28 August 2013 when a "minded to approve" letter was issued.[121] For the Kentish Flats decision, DECC carried out a month long consultation (on updated environmental information) after receiving the Examining Authority's recommendation, but this did not delay the eventual decision.

The *quid pro quo* for this efficient examination process is the extensive pre-application consultation that must be carried out by promoters. This means that the pre-application stage tends to be much longer than the decision making stage, and is more significant in determining the overall length of the consenting

[116] Planning Act 2008 s.5(4).
[117] Planning Act 2008 s.9.
[118] See above.
[119] The writer understands that Greenpeace has now launched a judicial review of the costs award made against it in respect of the unsuccessful challenge.
[120] Pursuant to Planning Act 2008 s.6.
[121] The Secretary of State set a new deadline for his decision of December 18, 2013 subject to receiving satisfactory evidence in relation to the "substantial risk" identified by Natural England that ecological compensation measures will not work; and assurance from the applicant that the project will not jeopardise any future operations of the Killingholme Branch railway.

process. The pre-application stage is led by the promoter, which gives some control over timing. However, there are external constraints such as the length of time needed to complete the environmental impact assessment and to reach agreement as far as possible with statutory consultees.

The formal component of public consultation can be relatively short with a minimum 28-day period for public consultation following a 28-day period of consultation with local authorities on the statement of community consultation.[122] However, promoters need to keep in mind the need to demonstrate adequacy of consultation and the duty to take account of responses.[123] Therefore in practice a much longer period of engagement including informal consultation and numerous rounds of formal consultation may be required. Unexpected delays can arise where responses to consultation or changes in circumstances require material changes to the proposals, leading to further consultation.

At the other end of the process, Special Parliamentary Procedure also has the potential to cause significant delays. The Rookery South decision was delayed by approximately 15 months as a result of triggering this procedure. However, the scope of application of this procedure has been narrowed by the Growth and Infrastructure Act 2013. Promoters may have some degree of control over whether this procedure is likely to be triggered as they can weigh up the cost of designing the project to avoid triggering the procedure (by not applying to compulsorily acquire the relevant types of land or, where applicable, providing replacement land) against the cost of the likely delay caused by the need to go through the procedure.

Finally, as with all planning decisions, there is a risk of challenge in the courts. Appeals and possible references to Europe could delay a project for years. Challenges to projects to date are explored in the following section.

Certainty of decision

Due to the small number of projects that have so far completed the NSIP consenting process, there is limited experience of the decision and post-decision stages.

The Examining Authority will reach its own conclusions on the form of the DCO. Although it is unlikely to recommend changing aspects which are agreed between the parties, where disagreement remains at the end of the examination, the parties will not know what approach will be recommended until after the Secretary of State's decision is published.

The Secretary of State is not bound to follow the recommendations of the Examining Authority.[124] Where the Secretary of State differs on a matter of fact or takes into account new evidence and is therefore disposed to disagree with the Examining Authority's recommendation, the Secretary of State must give the parties the opportunity to make representations.[125]

The Secretary of State may also amend the DCO and substitute drafting without consulting the parties. Although such changes should not be material, they may in practice have operational impacts. The only opportunity for changes to be made immediately following publication of the order is in relation to "correctable errors". Otherwise, any changes will need to be applied for through the changes procedure, which is likely to take up to three months for non-material changes and a year for material changes.[126]

In theory, once the Secretary of State has granted consent and the development consent order has come into force,[127] development can commence (subject to discharging any pre-commencement requirements).

[122] Planning Act 2008 ss.42, 47 and 48 and Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 reg.4.
[123] Planning Act 2008 s.49.
[124] By way of an example, see above in relation to the Preesall Gas Storage project.
[125] Infrastructure Planning (Examination Procedure) Rules 2010 r.19.
[126] See further below.
[127] Typically this is 21 days after the order is made but in some cases it has been the next day and for Rookery South there was a delay of 15 months for the special parliamentary procedure process.

However, there is a six-week window for legal challenges to be brought. Challenges may only be made by way of judicial review.[128]

If a decision of the Secretary of State is quashed, under the examination procedure rules it will not always be necessary to re-start the entire process. Instead, under r.20, the Secretary of State may write to the relevant parties inviting representations for the purposes of the Secretary of State's further consideration of the application. This procedure is yet to be tested but would save a considerable amount of time compared with submitting a new application.

Three of the 11 development consent orders which have been made to date have been challenged by judicial review: Rookery South, Hinkley Point C and the Heysham to M6 link road. In addition, the refusal of development consent for the Preesall gas storage project has been challenged.

At the time of writing, none of these cases has been decided so it is not yet possible to say how significant this back end of the DCO process will prove to be. The extent to which judicial review will influence the overall success of the new regime is considered further below.

Certainty of compensation

One of the advantages of the 2008 Act regime is the ability to include powers of compulsory acquisition in a development consent order.[129] Section 125 of the Planning Act 2008 applies the procedure set out in Pt 1 of the Compulsory Purchase Act 1965 to the compulsory acquisition of land, with certain amendments.

Sections 126(2) and (3) of the 2008 Act state that a development consent order may not include provision the effect of which to modify or exclude the application of a compensation provision (i.e. a statutory provision which relates to compensation for the compulsory acquisition of land), except to the extent necessary to apply the provision to the compulsory acquisition of land authorised by the order.

Compensation is therefore governed by the Compensation Code that will be familiar to practitioners already.

When preparing an application for an order containing powers of compulsory acquisition, promoters must ensure that they comply with the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009.[130] In particular, there is a requirement for an application to include a statement of reasons and a statement to explain how the proposals for compulsory acquisition will be funded.

Guidance issued by DCLG says that the funding statement should provide as much information as possible about the resource implications of both acquiring the land and implementing the project for which the land is required.[131]

There is no specific mention in the 2008 Act, the 2009 Regulations, or the DCLG guidance of the need for promoters to secure the payment of compensation. But, despite this, it has become a clearly established requirement for there to be a parent company guarantee or other form of assurance of the availability of funds for compensation. For example, Covanta Holding Corporation agreed to provide a parent company guarantee in relation to all compensation payable as a result of the exercise of compulsory purchase powers for the Rookery South project. This was secured by a unilateral development consent obligation dated July 8, 2011.

The Examining Authority had queried the adequacy of resources available to the applicant to fund any compensation payments. By a letter sent in May 2011, Covanta sought to reassure the IPC that the parent companies of the applicant would ensure that it was in a position to make all relevant compensation payments and that this would be achieved "by appropriate intra-group arrangements to cover such liabilities at the relevant time," but that such arrangements were not appropriate or necessary in advance. In the

[128] Planning Act 2008 s.118.
[129] Planning Act 2008 Sch.5 Pt 1 para.1 and ss.120(3) and 122–134.
[130] SI 2009/2264.
[131] *Planning Act 2008: Guidance related to procedures for compulsory acquisition of land*, DCLG, September 2013, para.17.

Examining Authority's Decision and Statement of Reasons it was explained that, having originally read the applicant's Funding Statement submitted with the DCO application, the Panel considered "the position was inadequate in terms of ensuring that the resources of Covanta Holdings would in fact be available to the Applicant".

A parent company guarantee was thus requested, and provided, during the examination itself by way of a letter issued by the Examining Authority requesting further information from the applicant.[132] The letter said:

> "The Examining Authority would wish to see an executed parent company guarantee supported by a unilateral obligation to secure its enforceability prior to the close of the compulsory acquisition hearing."

Had such a guarantee not been provided, it is possible that the IPC would not have been able to conclude that adequate documentation was in place to support a compelling case for the grant of compulsory acquisition powers.

In relation to Hinkley Point C, a parent company guarantee was secured by way of a unilateral development consent obligation dated September 13, 2012.[133] The obligation prevents EDF Energy from exercising any powers of compulsory acquisition authorised by the development consent order unless the guarantee has been completed and provided to the relevant local authorities.

The need for security is understandable. Article 1 of the First Protocol of the European Convention on Human Rights provides:

> "Every natural and legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and the general principles of public international law."

This provision would be breached if the owner of compulsorily acquired property is not properly compensated for its full market value. It is therefore reasonable for the decision-maker to require some reassurance that the promoter will not depart from the European Convention before being satisfied that the compulsory purchase powers may be granted.

The Rookery South documentation has no cap or deadline limiting liability under the parent company guarantee, but the Hinkley Point C guarantee is subject to a limit of £10 million and is limited in duration to 15 years from the date the DCO was made or, if earlier, the date the DCO is quashed, cancelled, revoked or expires prior to the exercise of the compulsory purchase powers.

In relation to the Hinkley Point C application, the Examining Authority reported that:

> "The Applicant has taken expert advice on the likely cost of implementing the proposed development, including the cost of construction and the funding of the necessary land acquisition. The Applicant has assessed the commercial viability of the proposed development in the light of this information and, if development consent is granted, the development of Hinkley Point C would be funded by a cash call process governed by the Shareholders Agreement. It concludes that the availability of funding would not be an impediment to the implementation of development or to the acquisition of land deemed necessary."[134]

The Examining Authority concluded:

> "The parent company guarantee in the sum of £10 million was provided by the Applicant … and, on the basis of such funding security being in place, we consider the Funding Statement and subsequent

[132] Pursuant to r.17 of the Infrastructure Planning (Examination Procedure) Rules 2010.
[133] See paras 7.34–7.36 of the *Panel's Report to the Secretary of State* dated December 16, 2012.
[134] *Panel Report*, para.7.35.

> proposed documentation as set out above adequate to support a compelling case for the grant of compulsory acquisition powers."[135]

The sum of £10 million was not interrogated during the examination, and reliance was placed on the promoter's evidence that this represented the maximum amount of compensation that would be payable (including a contingency). Interestingly, the Panel's recommendation on the request for compulsory purchase acquisition powers states that the Examining Authority was satisfied that the funding was adequate and secure *so far as may be achieved under the Planning Act 2008*.[136] This may acknowledge a limitation on what can be accomplished under the regime.

Projects that were consented under the regimes that preceded the 2008 Act generally did not carry the burden of a requirement for compensation to be secured by the promoter. This innovation therefore marks a break with the hitherto established practice for compulsory purchase in relation to energy and infrastructure projects.

It also contrasts with the position in relation to development consent obligations. The package of obligations agreed in relation to Hinkley Point C was valued in excess of £100 million. The majority of these obligations are unsecured, the exception being the obligation to reinstate the site if the project is abandoned before completion. This distinction can be rationalised by the fact that there are—usually—no human rights directly involved in the mitigation of planning impacts. But from the perspective of a local resident at least, the position would appear to be incongruous.

Promoters will nevertheless continue to be reluctant to enter into further security arrangements at the decision stage. Until the Final Investment Decision Date ("FIDD"), projects are not fully funded. Since the grant of development consent is likely to be one of the conditions precedent for FIDD, the ability to make financial commitments during the examination will be inhibited. For projects to remain financially viable, any such commitments will necessarily have to be capped and contingent, to the extent that they are in fact made at all.

This is borne out by the consolidated funding statement submitted by Galloper Wind Farm Limited on October 29, 2012, which includes a review of compensation arrangements for NSIPs and concludes:

> "… GWFL considers that the Covanta Rookery South approach is unique in its acceptance of an unlimited PCG (or any other form of uncapped security). GWFL expects that other NSIP promoters are extremely unlikely to be able to secure parent company authorisation to such a proposal on future NSIPs. Therefore GWFL does not consider that the Covanta Rookery South approach is likely to become established practice; the insistence of such unlimited guarantees could even deter promotion of projects requiring CPO from being brought through the Planning Act 2008 system."[137]

Future Issues

The new system is largely operating effectively. However, drawing on the themes and experiences described above, it is possible to identify some issues that the system is struggling to cope with already and predict some issues that are likely to be faced by promoters in future. This section will examine those issues, identify what changes are needed to make procedures more effective, and consider whether, overall, the system is fit for purpose.

[135] *Panel Report*, para.7.85.
[136] *Panel Report*, para.7.105.
[137] *Galloper Wind Farm Ltd, Consolidated Funding Statement* (October 29, 2012), para.4.7.

Changes to consented projects

This paper has already examined in some detail the scope for making changes to an application for development consent before it is determined. The boundaries for such changes being permitted are set out in the letter from Bob Neill MP dated November 18, 2011. Given the formality afforded to the rest of the system for NSIPs, it is incongruous for this important issue to be dealt with in a letter which has no formal status and could, presumably, be withdrawn at any time.[138] But the status quo does at least appear to be workable in practice.

In contrast, the legal position on changes to a project following the grant of development consent is both formal and highly prescriptive. Section 153 of, and Sch.6 to, the 2008 Act contain the relevant powers for changes and revocations; and the Infrastructure Planning (Changes to, and Revocation of, Development Consent Orders) Regulations 2011[139] set out the relevant procedures.

The changes are divided into those which are "non-material" and those which are "material". It is for the Secretary of State to decide whether the changes applied for are non-material, and therefore whether those changes can be made using the non-material changes procedure, having regard to the effect of the changes (together with any previous non-material changes made) on the original DCO.

What is a *non-material* change is otherwise not defined in the 2008 Act, but the Act does state that the power to make non-material changes includes the power to:

(a) impose new requirements in connection with the development that is the subject of the DCO; and
(b) remove or alter existing requirements.

The non-material change procedure could, for example, be used to vary or substitute approved plans with plans which are not materially different from the originals (and so allow minor design changes). By definition such non-material changes would not require the submission of an updated environmental statement. Therefore, the non-material change procedure could be used to implement very minor design changes.

On receipt of a valid application, the Secretary of State must publicise that application and unless in each case he is satisfied that it is not necessary to do so, the Secretary of State must then consult each person who has the benefit of the DCO, each person who was a statutory consultee for the original application and any other person he thinks appropriate.

The notice must be published for two successive weeks and give 28 days from the date of the last notice for responses to be made.[140] Therefore a minimum of a month and a half should be allowed, but in practice this is likely to be two months from the application date.

Although there is no prescribed time limit for the Secretary of State to reach his decision, this process is unlikely to be time consuming given that any non-material changes would have to be minor in nature. Therefore, it is possible that a non-material change could be approved within three months.

The Secretary of State may make *material* changes to, or revoke, a DCO, either following receipt of an application or of his own accord. The 2008 Act provides that material changes include:

(a) the removal or alteration of buildings or works (but this does not affect any buildings or other operations carried out in pursuance of the DCO before the power is exercised);
(b) the discontinuance of a use of land;
(c) the imposition of specified requirements in connection with the continuance of a use of land;
(d) the imposition of new requirements in connection with the development; and

[138] Although this would potentially give rise to an interesting claim for judicial review based on breach of a legitimate expectation.
[139] SI 2011/2055.
[140] Regs 6(a) and (h).

(e) the removal or alteration of existing requirements.

This power would need to be used to effect any changes to a DCO which could not be made under the power to make non-material changes. For example, any change that would give rise to significantly different environmental effects (such that an updated environmental impact assessment would be required) would be material.

The applicant will be required to carry out a pre-application process that is comparable to that required for the original DCO application. This will be a significant endeavour, taking some months to complete, and is not to be taken lightly. The applicant must consult:

(a) the statutory consultees who were consulted about the original application;
(b) relevant local authorities;
(c) other relevant statutory authorities;
(d) persons with an interest in the land to which a proposed application relates;
(e) the person who has the benefit of the DCO (if not the applicant);
(f) the MMO where relevant; and
(g) any other person the Secretary of State requires the applicant to consult, unless the Secretary of State is satisfied in any case that consultation with any such person is not necessary and publishes its reasons for not consulting such a person on the PINS website.

The applicant will be required to notify the Secretary of State of its proposed application by sending to it the pre-application consultation material. The applicant will also be required to produce a statement of community consultation ("SOCC") explaining how it will consult the local community. As already happens with DCO applications, the applicant will be required to consult the relevant local authority about the SOCC in advance. The applicant must publish the SOCC and carry out consultation in accordance with it.

The applicant will be required to publicise a proposed application in the same manner as the original application was publicised. As with DCO applications, there will be a duty on the applicant to take account of responses to the consultation and publicity before submitting the application.

The overall time for this would be a minimum of two and a half months. This is to allow 28 days (minimum) for consultation with the local authorities on the SOCC,[141] time to take their comments into account and publish the SOCC and then a minimum of 28 days to carry out the consultation with the local community.[142] The minimum of 28 days of consultation with statutory consultees could be carried out in parallel.[143]

The application must include an environmental statement unless the Secretary of State issues an opinion that an environmental impact assessment is not required. An application for a material change will be treated as a "subsequent application" as defined in the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009. The effect of this will be that the Secretary of State must not grant consent for a material change unless he has either taken the environmental information into account, or he has adopted a screening opinion to the effect that an updated environmental statement is not required. It can be assumed that most material changes are likely to require EIA, although it should be possible to limit the scope of the EIA to the material change itself plus cumulative effects with the project as a whole.

Once the application has been made, the applicant must notify those persons that were consulted at the pre-application stage. The applicant must also publicise the application. The format for this notification and publicity will broadly follow that for the pre-application stage. If the applicant proposes to acquire

[141] Reg.13(3).
[142] Reg.14(2)(i).
[143] Reg.11.

more land by compulsory acquisition, then it will be a requirement to notify persons interested in that land. 28 days must be given for relevant representations to be made.[144]

Before the Secretary of State makes his decision on an application, the applicant must follow an examination procedure. The procedure will broadly follow that specified in the Infrastructure Planning (Examination Procedure) Rules. The Panel will need to consider the application documents and the relevant representations. They are given 21 days to do this. 21 days' notice must then be given for the preliminary meeting.[145] This could combine the 21 days' notice for people to request hearings.[146] Therefore, from the submission of the application to the preliminary meeting would be approximately three months.

There must be a round of written representations and a round of comments. 21 days is allowed for the written representations, but there are no specific timescales for comments or any questions or further information requested by the Examining Authority.[147] If any person requests an open-floor hearing, this must be held with not less than 21 days' notice.[148] In theory, the examination could therefore take just less than two months if no further information is requested and the minimum two rounds are included, but it seems likely that the Panel would have questions or allow for another round of responses so three months is a realistic minimum estimate. Deadlines for the completion of the examination and the making of the decision are the same as for a DCO examination.

Section 104 of the Act, setting out what the Secretary of State must have regard to when deciding an application for a DCO, will apply to decisions. Therefore, as a minimum, this process would take approximately 10 months to a year from the start of consultation depending on how quickly consultation and application documents can be produced and the issues that arise from consultation or during the examination. If the Examining Authority and Secretary of State used the maximum time allowed for the examination and decision making periods, the process could be extended by up to six months.

Whilst this procedure provides certainty over the ability to make changes to a DCO after it is made, it is clear that the process will not be simple. Effectively, an applicant must go through the same steps as were followed when the original DCO application was made. This will be time-consuming and costly, even if the pre-application consultation can be limited to a single stage.

So far as the writer is aware, no applicant has yet applied for either a non-material or a material change. Where project modifications are necessary, it seems inevitable that the boundaries between non-material and material changes will be tested. In relation to material changes, it is unfortunate that a more streamlined procedure could not have been adopted under the 2008 Act. Applications can be expected to be few and far between as a result, and limited to changes that could not have been foreseen at the time of the application.

This places even greater weight on the need to secure appropriate consents in the DCO in the first place, and for the project design to have advanced to a sufficient stage to ensure that the required flexibility is built into the DCO.[149] Relying on the change procedure to accommodate any future evolution of the project would be a false economy of time and effort, and is very likely to lead to delays during construction works.

[144] Reg.20(2)(j).
[145] Reg.28(3).
[146] Reg.36(1).
[147] Reg.31(4).
[148] Reg.36(6).
[149] Flexibility remains subject to the overriding need for the full range of environmental impacts of the project to be capable of being assessed. See Advice Note Nine, *Using the "Rochdale Envelope"*, IPC, February 2011.

Preliminary works

A DCO can provide authorisation not just for the NSIP itself, but also for associated development, i.e. development which is necessary for the development and effective operation to its design capacity of the NSIP.[150]

But seeking development consent for associated development is optional, not mandatory. If it suits the promoter to obtain separate consents for other elements of the project, either in advance of or in parallel with obtaining development consent for the NSIP, this remains permissible. Government guidance states that:

> "It is for applicants to decide whether to include something that could be considered as associated development in an application for development consent or whether to apply for consent for it via other routes."[151]

Thus EDF Energy obtained planning permission at Hinkley Point C under the Town and Country Planning Act 1990 for preparatory works to make the site ready for the main excavation, including the clearance of vegetation, installing haulage roads, securing the site, utility connections and earthworks to level the site.[152] A Harbour Empowerment Order was also obtained under the Harbours Act 1964 for the construction of a temporary aggregates jetty.[153] The rationale for these consents was to enable works to start on site in advance of securing development consent for the main project works.

Works can only be consented in this way if they do not form part of the NSIP itself. In the case of Hinkley Point C therefore, preliminary works could only be consented to the extent that they fell outside the scope of the "construction or extension of a generating station" for the purposes of s.14(1) of the 2008 Act.[154]

In a letter from Steve Quartermain at DCLG and Mark Higson at DECC to all local authorities dated July 16, 2009, the following advice was given in relation to preliminary works applications at potential new nuclear sites:

> "Subject to the legal framework, local authorities should have confidence in considering such applications on their merits, including consideration of the need for an environmental impact assessment for the works in question and whether to grant consent. Local authorities may decide that such consent should potentially be granted on the basis that any preliminary works carried out will be removed if the subsequent application to the IPC is turned down or if, within a specified time, no application is made."

The price for securing advance consents for preliminary works is therefore likely to be that the works must be carried out on risk and removed if no development consent order is subsequently forthcoming. This will limit the usefulness of the procedure for many promoters.

It may also be necessary for the environmental statement submitted with any preliminary works application to include a cumulative impact assessment of the works together with the NSIP.[155]

Multiple consents can cause difficulties in the drafting of a DCO. The promoter may wish to include authorisations for the preliminary works in the DCO itself in the event that those works have not been completed in advance of the DCO being granted. The requirements in the DCO are likely to be different

[150] But see fn.15 above in relation to Wales.
[151] *Planning Act 2008: Guidance on associated development applications for major infrastructure projects*, DCLG, April 2013, para.8.
[152] Planning permission 3/32/10/037 granted by West Somerset DC on January 27, 2012.
[153] The Hinkley Point Harbour Empowerment Order 2012 (SI 2012/1914).
[154] See *R. (on the applciation of Redcar and Cleveland BC) v SSBERR* [2008] EWHC 1847 (Admin) per Sullivan J. at [20]–[24], where it was held that a generating station could be distinguished from other ancillary elements of the development for the purposes of the Electricity Act 1989.
[155] See *R. (on the applciation of Save Britain's Heritage) v Secretary of State for Communities and Local Government* [2013] EWHC 2268 (Admin).

to the conditions in the advance consents however, since the works will be carried out as part of a larger project rather than on a standalone basis.

In such circumstances, the practicalities of enforcement and the shortcomings of the common law position on overlapping consents mean that it is necessary to ensure there is an explicit workable interface between any preliminary works consents and the DCO.[156] This is likely to be a complex undertaking. In relation to Hinkley Point C, a transition procedure was included in the DCO whereby EDF Energy can serve notice that works will cease to be carried out under preliminary works consents and will thereafter be carried out under the DCO instead. This provides the necessary certainty as to the constraints under which the works are being carried out.[157]

It is arguable that subdividing and duplicating projects in this way undermines one of the key objectives of the 2008 Act regime: the unified consents regime. But the long lead-in time for projects means that promoters will be keen to do anything they can to get on site early if they are confident that their application for development consent will ultimately be successful. National policy statements provide that necessary degree of confidence and, in the case of new nuclear at least, the need for urgent delivery also provides direct encouragement. Far from undermining the system, preliminary works applications should be seen as a validation of it.

Local authorities

It is acknowledged that preliminary works applications can, however, increase the burden on local planning authorities. Authorities have found it difficult to adjust to their reduced status under the 2008 Act regime. They have no decision-making powers, nor are they responsible for publicity or consultation. They have the same status at the examination as any interested party. They can, but do not have to, produce a local impact report.[158] Local planning policies have no formal status in the determination of applications for development consent.[159] Authorities receive no specific fees or funding for their participation in the application process.

This could be seen as being at odds with the Government's wider localism agenda. In these circumstances, it is perhaps understandable that authorities have jumped on preliminary works applications as a means to bolster their influence over NSIPs. In particular, it is through these applications that local planning authorities have the greatest ability to extract valuable planning obligations from promoters.

Negotiating planning obligations is tightly constrained by Regulation 122 of the Community Infrastructure Levy Regulations 2010.[160] Obligations must be necessary to make the development acceptable in planning terms, directly related to the development and fairly and reasonably related in scale and kind to the development. Whilst Regulation 122 does not apply to applications for development consent, the same legal principles will be applied by the Secretary of State when considering proposed obligations relating to an NSIP.

This does not leave room for authorities to seek what are commonly referred to as community benefits. These are generalised benefits which are not directly related to the actual impacts of the project (as opposed to the perceived impacts), but seek to recognise the wider role of the local community in hosting a project which may not provide particular local benefits but is nevertheless in the national interest. Payments are

[156] See *Pilkington v Secretary of State for the Environment* [1973] 1 W.L.R. 1527. It is unacceptable that *Pilkington* represents the prevailing legal position on overlapping consents. Applying principles arrived at in relation to the construction of three post-war bungalows on an agricultural smallholding, to the delivery of complex masterplans and nationally significant infrastructure projects, unsurprisingly gives rise to difficulties. A statutory election procedure which also allows separate parts of projects to be governed by separate consents (so-called "drop-in" applications) is sorely needed.

[157] This is of particular importance given the criminal sanctions for breach of DCO requirements.

[158] Planning Act 2008 s.60.

[159] Regardless of what the policies themselves may state. They can only be taken into account as matters which the Secretary of State thinks are both important and relevant to his decision.

[160] SI 2010/948.

therefore intended both to compensate and incentivise the host community and to address pre-existing social and economic issues that are of more importance to that community even if not directly caused or impacted by the project itself.

Such payments are generally sought outside the planning regime, since they go beyond what can be demanded as a matter of law by the decision-maker pursuant to section 106 of the 1990 Act. The payments should not be treated as a material consideration in the determination of the underlying application.

A precedent exists in relation to onshore wind, where RenewableUK, the trade and professional body for the UK wind and marine renewables industries, has published a protocol which provides for payments of at least £1,000 per megawatt of installed capacity per annum in relation to all projects of 5MW and above in England.[161]

DECC has recently announced that it expects the onshore wind industry to adopt a revised protocol which includes an increase in the recommended community benefit package to £5,000 per megawatt of installed capacity per annum for the lifetime of the windfarm.[162]

Whether or not such payments are made within or without the planning system, and regardless of whether they are treated as a material consideration or not, in the writer's view they represent a dangerous weakening of the long-standing principle that planning consents should not be bought or sold.[163] If the Government considers community benefits to be necessary and appropriate, then their calculation and payment should be legitimised through regulations or primary legislation.[164]

This has been recognised in the new nuclear sector, where the Government has recently announced a new package of benefits for the communities that host any new nuclear power stations. The total package will be proportionate to the amount of energy the power station generates, up to a value of £1,000/MW per annum for up to 40 years. In the case of Hinkley Point C, the Government has calculated that this could amount to approximately £128 million.

Announcing the community benefits package on July 17, 2013, Michael Fallon MP, the Minister of State for Energy, said in a written ministerial statement:

> "The community benefit package recognises the role of communities that are being asked to host such large infrastructure projects that will contribute significantly to national energy generation and growth, and the reduction of the UK's carbon emissions. … These funds are specifically intended to benefit the local communities who are hosting new nuclear power stations and the Government fully expects that the local authorities will involve their communities in developing their spending plans, with Government also providing assistance and support in its development."

The package will be delivered in two phases: the business rates retention arrangements introduced by the Government in April 2013 for the first 10 years; and then over the period 2030–2060 DECC will fund annual payments of equivalent amounts. Payments will therefore be funded by central Government rather than by the promoter.

This is a more appropriate solution than the current state of affairs. It will hopefully (in the new nuclear sector at least) bring an end to informal negotiations outside the planning system, which are highly questionable in legal terms and do not provide the transparency, integrity and rigour that ought to be expected of the planning system. They also increase the risk of judicial review, particularly where payments would amount to very large sums over the lifetime of a project.

[161] *A Community Commitment: The Benefits of Onshore Wind*, Renewable UK, February 2011.

[162] *Onshore Wind Call for Evidence: Government Response to Part A (Community Engagement and Benefits) and Part B (Costs)*, DECC, June 2013.

[163] This is illustrated by comments made by Nick Boles MP in January 2013 in relation to the cash incentives available to communities (from CIL receipts) to accept new housing in their area. During an interview on the BBC's *Newsnight*, Mr Boles jokingly referred to the policy as "bribes" and "Boles' bungs" and suggested communities might use the funds to build a new swimming pool or village hall.

[164] Precedent does exist for this on a project-specific basis—see, for example, the Zetland County Council Act 1974, which provided for disturbance receipts in relation to the Sullom Voe north sea oil terminal.

A voluntary package has also been announced recently for communities near shale gas sites.[165] It will be interesting to see whether other sectors follow suit.[166]

Impact of the new EIA Directive

Proposals by the European Commission to amend the EIA Directive will affect the future scope of environmental impact assessment in relation to NSIPs.[167] One of the intentions of the proposals is to strengthen rules for the contents of environmental statements, to ensure better decision-making and avoid environmental damage.

Environmental impact assessment already plays a significant role in the consenting process for NSIPs. The preparation time for an environmental statement can be two or more years and defining the scope of the project is not always straightforward, particularly where there are preliminary works applications to consider.[168]

The contents of an environmental statement will be extended to cover what the Commission describes as "new environmental issues" such as impacts on human health and climate change and risks due to accidents or disasters, both man-made and natural. This will be of particular importance in relation to new energy projects such as nuclear and shale gas; and projects with particular impacts on climate change such as airport expansions.

The proposals also bring into focus the interplay between the EIA regime and the separate regulatory processes for health and safety consents. Health impact assessments do not currently have to be included in environmental statements; any requirement to include highly sensitive quantitative risk data would require a step change in information disclosure by promoters.

Such a change would also raise the difficult question of how to deal with perceived impacts. It has long been established in planning law that public perceptions of danger and risks to human health can be a material planning consideration, although this alone would rarely amount to a good reason for refusal of planning permission.[169] In *Trevett v Secretary of State for Transport, Local Government and the Regions*, a case concerning telecommunication masts, Sullivan J. (as he then was) held that it would be:

> "… erroneous to assert … that merely because there are perceived risks to health, that justifies a refusal of planning permission without any regard to the extent as to which those fears are objectively justified in the circumstances of the particular case and given the particular characteristics of the site in question."[170]

Environmental impact assessments are only required to address actual impacts, not the anticipation of impacts which may or may not eventually arise. The grey area, if the EIA Directive is amended as proposed, is whether those impacts should include the actual impacts on human health caused by perceived risks which are not objectively justified. This raises difficult questions about scientific evidence and cognitive dissonance.

The proposed amendments to the EIA Directive will also require monitoring arrangements to be adopted by promoters, with the purpose of assessing the implementation and effectiveness of mitigation and

[165] The package comprises £100,000 per well site where hydraulic fracturing takes place and one per cent of revenues if commercial production goes ahead.

[166] It will also be interesting to see whether the emerging field of human rights in business influences this issue. See the *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UN Human Rights Council, June 2011. The European Commission published guidance for companies in the oil and gas sector on meeting the UN guiding principles in June 2013.

[167] *Proposal for a Directive of the European Parliament and of the Council amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment*, European Commission, October 26, 2012.

[168] See above.

[169] See *Newport BC v Secretary of State for Wales* [1998] Env. L.R. 174.

[170] [2002] EWHC 2696 Admin at [25].

compensation measures. In addition, there will need to be a post-project analysis of the adverse effects of the project on the environment, to cover both the construction and operational phases.

The mandatory assessment of reasonable alternatives to the project will be introduced; and environmental statements will need to be prepared or verified by accredited and technically competent experts.

The Commission's impact assessment concludes that some aspects of these proposals will have moderate or high costs to developers. Apart from the direct costs, and in view of the burgeoning European jurisprudence in this area, the greatest impact of the proposals will be the increased risk of judicial review from challenges to environmental statements.

The adoption of a new Directive will require the consent of all member states and the changes are therefore unlikely to come into effect until 2014 at the earliest. But in view of the fact that NSIPs have a long lead time, and environmental impact assessments may be prepared over several years, promoters in the early stages of their project preparation will need to take the new requirements into account now, to avoid environmental statements being found to be deficient later on.

Extending the regime to the real estate sector

In June 2013, the Government published its response to a consultation launched at the end of 2012 on proposals to extend the regime for NSIPs to business and commercial projects.[171] The Government has concluded that six broad categories of development should be able to use this regime:

(a) offices and research and development;
(b) manufacturing and processing;
(c) warehousing, storage and distribution;
(d) conference and exhibition centres;
(e) leisure, tourism and sports and recreation; and
(f) aggregate and industrial minerals.

The Government has highlighted football stadiums, car plants and exhibition centres as the sorts of developments that would benefit from these proposals.[172] However, we will have to wait until draft regulations are published in October to find out exactly which projects will be included. The Government does not intend to set statutory thresholds in secondary legislation, but will publish a policy document setting out the factors that the Secretary of State will take into account, including indicative thresholds. Whilst these thresholds will not be set in stone, the Secretary of State will not generally expect to receive requests for a direction for development below the thresholds, nor for any projects in London that would not be of potential strategic importance under the Town and Country Planning (Mayor of London) Order 2008.[173]

The aim of the changes is to enable developers of relevant projects to "opt-in" to the NSIP regime where the projects are of national significance. Unlike those projects that currently fall within the NSIP regime, use of the 2008 Act for business and commercial projects will not be mandatory. A promoter who wishes to opt-in will need to submit a request to the Secretary of State, who must be satisfied that the project is one of national significance before directing that it will be dealt with under the 2008 Act.

These changes are part of the Government's package of planning reforms intended to improve economic growth. The first step towards extending the regime to business and commercial projects was taken in the Growth and Infrastructure Act 2013. Section 26 of that Act amended s.35 of the 2008 Act to allow the

[171] *Major infrastructure planning: extending the regime to business and commercial projects—Summary of responses and government response*, DCLG, June 2013.
[172] *Fast-track planning opens to more business*, DCLG news release, June 21, 2013.
[173] SI 2008/580.

Secretary of State to direct that business or commercial projects of a prescribed description may be treated as development for which development consent is required.

There are obvious limitations on the extent to which the Government's proposals will have an impact on the real estate sector. First, retail projects will not be included. The Government believes it is appropriate that large retail-led developments normally remain with local planning authorities for determination, in recognition of the town centre first policy set out in the National Planning Policy Framework, which makes clear that local planning authorities should recognise town centres as the heart of their communities and pursue policies to support their viability and vitality.[174]

However, many developments may include an element of retail as part of the overall project. The Secretary of State will therefore consider requests for a direction where retail is not the primary element but is associated development.

Secondly, housing will be excluded as a prescribed form of business and commercial development. Concerns were expressed during the consultation that many schemes, which would otherwise be considered of national significance, will not be able to access the regime if they include a small element of housing; and that many large schemes rely on the housing element to secure the necessary finance. Notwithstanding those concerns, the Government concluded that planning for housing and the determination of planning applications for housing development is a primary role of local councils and it would not be appropriate to remove this responsibility from them. The Growth and Infrastructure Act 2013 therefore provides that the Government cannot prescribe housing as a form of business and commercial development.

The Planning Act 2008 already prohibits the construction or extension of one or more dwellings from being consented as associated development alongside a nationally significant infrastructure project.[175] Residential development is therefore in a different category to retail development in that mixed-use developments which include residential proposals can never be the subject of a direction, even where the residential is only a secondary element of the proposals.[176]

Only where the residential element of the proposals does not qualify as "dwellings" will the scheme be capable of being consented as an NSIP. The definition of "dwellings" was recently considered by Cranston J. in *R. (on the application of Innovia Cellophane Ltd, Innovia Films Ltd) v The Infrastructure Planning Commission*.[177] This was a judicial review of the IPC's decision of April 19, 2011 to grant consent under s.53 of the 2008 Act for EDF Energy to enter land for the purpose of carrying out surveys and other visits preliminary to their application to use the land for workers' accommodation during the construction of the Hinkley Point C nuclear power station.

Cranston J. noted that "dwellings" was not defined in the 2008 Act and he therefore relied on *Gravesham Borough Council v Secretary of State for the Environment*,[178] in which the issue was whether a weekend and holiday chalet was a dwelling house for the purposes of the General Development Order 1977. In that case, McCullough J. said that a dwelling house was a building of a particular kind. He then examined various circumstances where a building was a dwelling house and said:

> "All are buildings that ordinarily afford the facilities required for day-to-day private domestic existence. This characteristic is lacking in hotels, holiday camps, hostels, residential schools, naval and military barracks and similar places where people may eat, sleep and perhaps spend 24 hours a day. Quite clearly, none of these is a dwelling house."[179]

[174] Para.23.
[175] Planning Act 2008 s.115(2)(b).
[176] The residential elements could be disaggregated from the remainder of the project, but this is unlikely to be attractive to promoters.
[177] [2011] EWHC 2883 (Admin)
[178] (1982) 47 P. & C.R. 142.
[179] (1982) 47 P. & C.R. 142 at 146.

That analysis was endorsed by the Court of Appeal in *Moore v Secretary of State for the Environment*.[180] Cranston J. found it striking that the statutory context there was quite different than in the *Gravesham* case, but the same meaning was given to the term. He therefore held that dwelling house has a well-established meaning in the planning legislation and is distinct from hostels and other forms of non-permanent accommodation which is not self-contained:

> "In my opinion, the statutory object and Parliamentary intention confirm that this is the correct interpretation of the term dwelling in section 115 of the 2008 Act. As already explained the 2008 Act aimed to create a streamlined, efficient and predictable planning system for nationally significant infrastructure projects. One way it did this was by rationalising the development consent regimes to create, as far as possible, a single consent regime with a harmonised set of requirements and procedures. That key purpose is given effect to in section 115(1) by permitting applications for development consent to cover not just the nationally significant infrastructure project itself but also associated development such as, as in this case, the specially built, temporary campus type accommodation for the large number of workers needed for its construction. To allow the local planning authority to determine the issue of this accommodation would lead to the piecemeal consent system which the 2008 Act was intended to overcome."[181]

The case provides scope for some mixed-use real estate projects to be the subject of a direction bringing them within the 2008 Act regime. Hotels, conference facilities and hostels are clearly not excluded. Certain categories of student housing, holiday accommodation, retirement homes and sheltered housing will not be either, depending on the extent of catering facilities provided. But there remain a number of grey areas that may have to be tested by the courts, such as live-work units and serviced apartments.

Thirdly, there will be no national policy statement for business and commercial development. Consequently, there will be no clear policy framework for decisions, less policy support for compulsory purchase and, crucially, no presumption in favour of the grant of consent for projects pursuant to s.104 of the 2008 Act. Given the wide range of developments which could be included within the new commercial or business category, and the focus on providing this as an opt-in route for developers with the vast majority of business and commercial applications remaining with local authorities for decision, the Government concluded that the case for one or more national policy statements was not strong. The National Planning Policy Framework, together with other relevant considerations such as local plan policies, will instead provide the policy framework for decision making. By removing one of the key benefits of the regime, the attraction for developers to opt-in is reduced significantly. The Government has said that it will keep this position under review however.[182]

Notwithstanding these shortcomings, there are significant advantages to using the NSIP regime in appropriate cases, due to the statutory timetable which ensures that decisions will be made within 12 months of the start of the examination; and the one-stop shop approach which means that complex projects requiring various different approvals can be consented in a single process.

In the writer's opinion, the 2008 Act regime will be attractive to applicants in the following circumstances.

(a) Where the project faces significant local opposition or a hostile local planning authority and is therefore likely to be refused at the local level.

[180] (1998) 77 P. & C.R. 114.
[181] At para.28.
[182] 42 per cent of those who responded to the Government's consultation disagreed with the proposal not to have an NPS for business and commercial projects. 35 per cent agreed and 23 per cent did not respond to the question.

(b) Where the project is controversial or involves issues of more than local importance, meaning that it is at high risk of being called-in by the Secretary of State and determined at the national level in any case.

(c) Where a long application process is expected, due to the complexities of the application or lack of local authority resources, and the 2008 Act regime is likely to deliver a faster decision than an application made under the 1990 Act.

(d) Where several approvals, across different consenting regimes, need to be obtained for the project. In particular, powers of compulsory purchase can be included in the development consent order, obviating the need for a separate CPO inquiry.

(e) Where the project straddles two or more local authorities, leading to a risk of different decisions being made by different authorities, or applications proceeding according to different timetables.

Whether promoters actually embrace the regime will depend on the extent to which they consider the advantages are outweighed by the extensive consultation that must be carried out before an application for development consent is submitted. Many developers will be put off by the significant expenditure and resources required at such an early stage of a project. Whilst the statutory timetable increases certainty and can reduce the time taken to get to a decision, the need to prepare for hearings and respond to questions and comments within a very tight timetable can place a very heavy burden upon the applicant's personnel and resources. In practice, however, it is the exclusion of mixed-use developments that presents the greatest inhibition on the usefulness of this enlargement of the regime.

The proposals have also increased the tension between national and local government. The Government believes that it is positive to offer the choice of using the new regime for the largest, most significant and complex schemes on an opt-in basis. But a number of local authorities responded to the Government consultation to say that extending the regime to business and commercial schemes was contrary to the Government's localism policy. This tension will be particularly evident in section 106 negotiations for projects directed into the 2008 Act regime.

Other extensions to the regime

The Government announced in June 2013 that it had decided not to include new coal schemes, onshore oil and gas schemes in the current extensions to the regime. Proposals for shale gas development will therefore continue to be determined by the relevant minerals planning authority under the town and country planning regime for the time being. The Government concluded that extraction has yet to take place at a commercial scale in this country and, as it develops, the Government will ensure that an effective planning system is in place. The first step in this process was the publication of planning guidance in July.[183]

It is likely that the Government will keep this position under review and could reconsider including shale gas in the regime in future if development is blocked by local authorities. Under the current legislation, the Government could in any case direct that a specific project should be determined under the NSIP regime if it considers that the project is of national significance.[184]

The "opt-in" approach to business and commercial projects could usefully be extended to energy and infrastructure projects on the margins of the existing thresholds. It would be helpful if promoters of projects just under the threshold could chose to opt in to the regime; and if promoters of projects just over the threshold could chose to opt out. A margin of, say, 10 per cent either side of the relevant threshold would allow flexibility without unduly affecting certainty.

[183] *Planning practice guidance for onshore oil and gas*, DCLG, July 2013. The guidance supplements the minerals planning policy set out in paras 142–149 of the NPPF.

[184] Planning Act 2008 s.35.

Other extensions to the regime seem unlikely for the foreseeable future. Furthermore, the use of hybrid bills for major linear projects such as HS2 and Crossrail looks set to continue, not least due to the number of local authorities that would otherwise be involved in these schemes and the increased consultation burden that this would involve under the 2008 Act.

Discharging requirements

One of the aspects of the regime that is still to be properly tested is the discharge of requirements under a development consent order. Section 120(1) of the 2008 Act provides that an order may impose requirements in connection with the development for which consent is granted. Section 120(2) states that the requirements may in particular include requirements corresponding to conditions which could have been imposed on the grant of any permission, consent or authorisation which would have been required for the development under the predecessor planning regimes.

Local planning authorities are responsible for enforcing requirements. However, the 2008 Act is silent as to where responsibility resides for the discharge of requirements which involve the subsequent submission of details for approval. The Infrastructure Planning (Model Provisions) (England and Wales) Order 2009[185] provided for details to be submitted to the IPC for approval. Following the abolition of the IPC, this is no longer possible and it is therefore up to the promoter to identify particular bodies as the discharging authority when preparing the draft DCO.

In the majority of cases it will be the local planning authority or highway authority that is given this responsibility, rather than the Secretary of State.[186] But there are no provisions in the 2008 Act, nor in secondary legislation, dealing with:

(a) time limits;
(b) the payment of fees; or
(c) an appeal process for the refusal or non-determination of applications for the discharge of requirements.

This contrasts with the town and country planning regime, which specifically provides for all of the above in relation to the discharge of planning conditions.

The solution adopted by EDF Energy in the Hinkley Point C development consent order was to include a bespoke mechanism expressly dealing with all of these matters.[187] Without such a mechanism, there would be no certainty over the timescale for approvals and there would be a risk that the project could be delayed if approvals—many of which are relatively minor in nature—were not issued in a timely manner. The DCO must also address fees expressly, because authorities cannot lawfully require payment for performing a statutory duty in the absence of statutory authority.[188]

The Hinkley Point C order provides as follows:

(a) A distinction is made between "major detailed requirements" (equivalent to reserved matters applications under the town and country planning regime) and "minor detailed requirements" (equivalent to all other approvals or consents required under planning conditions in the town and country planning regime).

[185] SI 2009/2265.
[186] But it would be appropriate for marine requirements to be discharged by the Marine Management Organisation and for certain environmental requirements to be discharged by the Environment Agency.
[187] See Sch.14 to the Order.
[188] See *Attorney-General v Wilts United Dairies Ltd* (1922) 38 T.L.R. 781 and *McCarthy & Stone (Developments) Ltd v Richmond upon Thames LBC* [1992] A.C. 48.

(b) The discharging authority is given five weeks to discharge minor detailed requirements and eight weeks to discharge major detailed requirements, unless otherwise agreed with the promoter.

(c) Consultees, including the Environment Agency and Natural England, are given 21 days to respond to relevant applications arising from requirements.

(d) The scale of fees payable for the discharge of requirements mirror those payable under the Town and Country Planning (Fees for Applications and Deemed Applications) Regulations 1989.[189]

(e) There is a right to appeal against refusal, non-determination, the discharge of requirements subject to conditions, and a request for further information that is considered not to be necessary.

(f) Appeals are to be dealt with by a written representations process, which is to be completed as soon as reasonably practicable. The Secretary of State rejected submissions that appeals should be subject to a maximum period for their determination.

(g) Appeals are to be determined by a person appointed by the Secretary of State and his decision will be final and binding on the parties, subject only to judicial review.

(h) The costs of the person appointed to determine an appeal are to be paid by the applicant, unless any alternative direction is made having regard to Circular 03/2009.

Such a mechanism is permitted pursuant to s.120(5)(c) of the 2008 Act, which allows an order to include any provision that appears to the Secretary of State to be necessary or expedient for giving full effect to any provisions of the order.

These arrangements were accepted by the Examining Authority and by the Secretary of State. The Panel's Report to the Secretary of State said that the right of appeal was considered to be vital.[190] Future projects can therefore be expected to adopt an equivalent mechanism.

A further proposal for there to be deemed approvals under the DCO was also explored at the Hinkley Point C examination, to deal with the situation where the discharging authority simply fails to deal with an application. There are precedents for this approach under other consenting regimes. For example, s.110(2)(b) of the Water Resources Act 1991 provides that consent under section 109 (structures in, over or under a main river) may not be unreasonably withheld and shall be deemed to have been given if it is neither given nor refused within two months.

Concerns were expressed during the examination that any requirements which address impacts on European protected habitats should not be the subject of deemed approvals; and that this would potentially lead to a breach of the habitats regulations. A similar point could be made in relation to any requirements intended to constrain the development within the parameters of the environmental impact assessment.

The Examining Authority did not accept that the DCO should provide for deemed approvals, concluding in the Panel's Report as follows:

> "We consider this proposal to be draconian. If, for instance, the Applicant applies to a private householder for permission to station apparatus on the householder's land (for example to measure noise or air quality) and the householder fails to respond within 28 days, or fails to state the grounds on which he or she disapproves, we do not consider that the Applicant should be entitled to station their apparatus on the land willy-nilly."[191]

It therefore appears unlikely that deemed approvals will be permitted in relation to future projects.

[189] SI 1989/193.
[190] See paras 8.100–8.115 of the *Panel's Report*.
[191] See para.8.115 of the *Panel's Report*.

Criminal liabilities

Failure to obtain development consent where required, or the breach of any terms of a development consent order without reasonable excuse, is a criminal offence.[192] This is a change from some of the consenting regimes that the 2008 Act replaced: failure to obtain planning permission is not in itself an offence, for example. It becomes an offence only if a person fails to comply with an enforcement notice.

The criminal law standard of proof—beyond reasonable doubt—will apply to any criminal proceedings; rather than the balance of probabilities that applies to breaches of planning control under the town and country planning regime.

In theory, any person could bring a prosecution but it is only local planning authorities who are given powers to investigate suspected offences. The 2008 Act gives them powers to enter land, to require information, to serve notices of unauthorised development and to obtain injunctions.[193]

Guidance previously given to local authorities stated that enforcement action should only be taken where expedient; and suggested that whether it is an offence for development not to be built in precise accordance with a DCO is a matter of proportionality, the discretion of the local planning authority and where the public interest lies.[194]

That guidance has, however, been cancelled and not yet replaced. There is accordingly no guidance for local planning authorities on how to exercise their enforcement powers under the 2008 Act. The NPPF does not contain specific policies in relation to NSIPs, but in the absence of any other guidance, para.207 of the NPPF provides that:

> "Effective enforcement is important as a means of maintaining public confidence in the planning system. Enforcement action is discretionary, and local planning authorities should act proportionately in responding to suspected breaches of planning control."

The lack of guidance is of some concern, and it can be expected that the Government will address this lacuna once projects begin to be implemented. In particular, where controversial projects have been opposed by the local planning authority, the promoter faces the prospect of being prosecuted for small deviations from any requirements unless the concept of proportionality is consistently adopted. This will be of particular relevance in relation to any future airport expansions in the south east, where local planning authorities are almost universally opposed to development.

During the progress of the Planning Bill through Parliament, Lord Patel of Bradford said:

> "Where a breach of the terms of an order granting development consent is identified, we would expect the local authority to discuss this with the promoter and agree what steps should be taken to remedy the breach. Local authorities are not unused to enforcement and we are confident that when investigating possible offences under the Bill, they will continue to use good common sense. … The offence is not one of strict liability and a prosecuting authority would be mindful of this before commencing proceedings. As a consequence, I would not expect a promoter to be found guilty of an offence for a minor or accidental breach except where they had failed to rectify that breach. I would also expect promoters of such large-scale projects to be fully reputable, and no doubt they will take the terms of an order extremely seriously."[195]

Given the scale and complexity of some of the projects in contemplation, and the need for foreign investment for them to be viable and deliverable, this reliance on "good common sense" is unlikely to

[192] Planning Act 2008 s.161.
[193] Planning Act 2008 ss.163–173.
[194] *Planning Act 2008—Guidance for Local Authorities*, DCLG, March 2010, Annex B.
[195] *Hansard*, October 20, 2008, Cols 992–993.

provide sufficient reassurance. International investors will not have the confidence to back projects if they are worried about potential criminal liabilities.

Conclusions

The grant of development consent for a project on the scale of Hinkley Point C means that a significant hurdle for the new system has been overcome. But too few projects, and in particular too few large and complex projects, have been through the system to make an accurate judgement on whether it is fully fit for purpose.

In view of the number of projects that were expected when the new regime was first established, it is disappointing that nearly five years after the 2008 Act was passed, only 11 development consent orders have been made. Furthermore, so far as the writer is aware, none of these projects has actually been implemented to date. There are a number of factors that could explain this state of affairs:

(a) Promoters rushed to get applications through the old planning system before it was replaced, seemingly on the basis of "better the devil you know than the devil you don't", meaning that there was a lull in applications in the early years of the 2008 Act.

(b) Pre-application consultation requirements mean that applications take a long time to prepare, resulting in a time-lag before the system reaches full output capacity. The number of applications in the pipeline seems to support this.

(c) There is very limited scope for amending applications after submission, meaning that promoters are diligently perfecting projects on the gentle tributaries of pre-application consultation before they join the raging river of the examination process. The serious commitment required to get an application to the submission stage means that fewer applications are submitted and then withdrawn compared with under the old system.

(d) Many promoters waited until the new system was better established, mistakes had been made by their competitors, and teething problems had been resolved, before submitting applications. The precedents that have been established by the early schemes have made applications cheaper and easier to prepare, with fewer risks involved.

(e) Many major projects are being consented under different consents regimes all together, such as the hybrid bills promoted for Crossrail and HS2.

(f) There remains uncertainty about the risk of further policy changes, particularly in the energy sector. This is exacerbated by knowledge that there are differing views not only between the Government and the opposition, but also within the coalition government itself. Change of law risk is always one of the most difficult issues to overcome on major infrastructure projects.

(g) But most pertinently, we have spent the last five years in a prolonged economic depression with very significant public sector spending cuts and private sector deleveraging, both resulting in reduced infrastructure investment.

For these reasons, it would not be accurate to judge the performance of the 2008 Act on the experience to date, over what on any analysis has been an abnormally turbulent period. There are long lead-in times for energy and infrastructure projects. We are only really just beginning to see plans progressing through the system and it is reasonable to assume that the number and scale of NSIP applications are still some way from reaching peak levels.

How the system performs in relation to the current Thames Tideway Tunnel project will therefore be closely observed, as will the nascent enlargement of the regime into the real estate sector. If developers of commercial and business projects adopt the regime, it will be a sure sign of its success. The real test, however, is likely to be future proposals for new airport runways in the south east which, unlike new

nuclear projects, are strongly opposed by local communities and local authorities. This will escalate the existing tension in the system between localism and national decision-making.

Some more minor irritations still exist within the system. For example:

(a) The National Infrastructure Planning website is a source of valuable information and is an essential resource to follow proceedings during the examination process. But it is far from user-friendly and documents are sometimes all but impossible to locate. Urgent action is required to make the website fit for purpose.

(b) There are some obvious gaps in the canon of guidance and advice published by the Government. Guidance to local planning authorities on enforcement and the discharge of requirements and obligations would be welcome, for example. Some of the existing guidance is now out of date and replacing it is inexplicably slow. DCLG consulted on draft replacement guidance on compulsory purchase in April 2012, but the final version wasn't published until September 2013.

(c) The Planning Inspectorate can be diffident at times and reluctant to give specific advice in response to specific queries. This is frustrating for promoters seeking clear and certain guidance on how best to proceed, particularly in the pre-application stage. The new power to give advice on the merits of an application should be used more proactively.

(d) Some application documents have been criticised for being too long or overly detailed, but this is often a reaction to guidance from the Planning Inspectorate that promoters must reach their own conclusions about what to include. With few precedents to rely on, it is unsurprising that early applications have been prepared on a defensive basis. This should improve as the number of applications increases.

(e) The requirement for preliminary environmental information to be provided at the pre-application stage, and the scope of that information, remains unclear. There is a need for guidance to be published to help promoters assemble this information and to prevent opportunistic legal challenges.

(f) During examinations, the agenda for hearings are often published with too little notice. With the number of questions sometimes running to three figures, more notice would lead to more productive evidence sessions and better engagement from local residents and other stakeholders. At present, hearings can feel more like an exercise in achieving consensus than a forensic examination of the key issues; and there is insufficient scope for third parties to influence the design or outcome of the project once the examination has begun.

A DCLG review of the major infrastructure planning process will take place later this year. This will not be a major shake-up of the system and will focus on how to improve procedures through "tweaks" to the existing system.

That must be right. Despite the minor issues mentioned above, the system is fundamentally sound and represents a major improvement to what preceded it. The early years have shown solid growth and teething problems have largely been overcome. Those projects that have entered the system are being processed according to the ambitious application timetable originally set by the Government, which is an achievement in itself. And national policy statements represent a quantum leap forward in establishing the necessary certainty for investment decisions in energy and infrastructure projects to be made with confidence. They are far and away the most obvious and enduring success of the new system.[196]

Unsurprisingly, it is where there has been practical experience of the new regime on projects across different sectors that the system is running relatively smoothly. National policy statements; pre-application consultation; application documents; examinations; and the decision stage can all now be regarded as

[196] The importance of national policy statements to the new system is vividly demonstrated by the absence of a robust policy framework for airport expansion. The policy vacuum acts as a major disincentive to any significant investment in UK airports, which will prevail until after the next general election in May 2015 and probably into early 2016.

well-established. There is a widespread view that these parts of the system are perhaps gold-plated or over-engineered, but that is the price to be paid for the fixed examination timetable. As practice develops and procedures become more widely understood, they will be rationalised and efficiencies will be found. The pre-application process can be expected to become faster, simpler and more effective.

It is the parts of the system that have not yet been properly tested where the question marks really remain: the discharge of requirements and obligations by local planning authorities, the overly complex procedure for making changes to projects after the grant of development consent; the application of the criminal enforcement regime; and the impact of legal challenges.

Judicial reviews are a particular concern in view of the endemic delays in the listing of cases in the Administrative Court. There is little point in having a streamlined planning process for NSIPs, with a fixed examination timetable of one year, if judicial reviews then take six to nine months to be listed and more than a year to be finally disposed of.

It is therefore to be welcomed that the Ministry of Justice is consulting on the creation of a Specialist Planning Chamber in the Upper Tribunal, and the transfer of planning judicial reviews and statutory challenges to it.[197] This would see specialist planning judges deployed to the Lands Chamber and would allow planning cases to be better prioritised and determined more quickly.

The Government is also seeking views on whether there should be further restrictions on the extent to which local authorities can challenge decisions on nationally significant infrastructure projects. The Government's view is that all parts of the public sector have a responsibility to spend taxpayers' money wisely, including by using alternative dispute mechanisms wherever possible, rather than recourse to expensive legal proceedings.

In the writer's view, the Government should act swiftly to give effect to these proposals. Otherwise, in view of the significant number of claims that have already been made in relation to the handful of projects granted consent to date, it is likely that judicial reviews will end up playing a more significant role in the approval and delivery of NSIPs than the planning process itself.

We are living in an era when root and branch structural planning reform takes place as frequently as Chelsea Football Club changes its manager.[198] But even against this backdrop of turmoil, the 2008 Act stands out as a genuine revolution in the way that planning applications for major energy and infrastructure projects are prepared, assessed, determined and implemented.

When the 2008 Act passed on to the statute book, the Housing and Planning Minister at the time, John Healey, said:

> "If we are to be competitive in the global economy and have a good quality of life, it is clear we need a better system for planning and building the infrastructure the country needs. The [Infrastructure Planning Commission] will be a faster and fairer system that is important for delivering these improvements, and with up to £50bn worth of investment in the pipeline, is vital to help drive economic growth and recovery. It will also help meet our targets towards becoming a low carbon country, with a new generation of investments essential to the future of the country."

Half a decade later, it is all too easy to take cheap shots at those objectives. The Infrastructure Planning Commission has been abolished, infrastructure investment is stuck in the pipeline, economic growth and recovery remain stubbornly elusive and progress towards becoming a low carbon country is slow. But to blame planning failures on the planning system itself would be a mistake, albeit a mistake frequently

[197] *Judicial Review—Proposals for further reform*, Ministry of Justice, September 2013.

[198] In case you were wondering, Chelsea has had eight different managers in the period since the Planning Act 2008 received Royal Assent. In the same period, there have only been three Secretaries of State for Communities and Local Government but primary legislation in relation to the planning system has included the Planning Act 2008, the Housing and Regeneration Act 2008, the Climate Change Act 2008, the Local Democracy, Economic Development and Construction Act 2009, the Marine and Coastal Access Act 2009, the Localism Act 2011, the Enterprise and Regulatory Reform Act 2013 and the Growth and Infrastructure Act 2013.

committed by Government for political expediency.[199] To the extent that objectives have not been achieved, this is more attributable to policy and economics than to the underlying planning regime.

So we may not have reached the age of consents for NSIPs just yet. The system is growing up, but we face a few more difficult years of adolescence before it might be said that it is fully mature.

[199] An equivalent argument would be to blame obesity on the rules for gym membership.