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## NATIONAL INFRASTRUCTURE PLANNING REFORM

*Hereward Phillipot Q.C.*

*Hugh Flanagan*



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## Overview

### HPQC

- Introduction
- Government Objectives
- Key procedural themes identified by consultees
- Procedural issues: problems and suggested solutions

### HF

- Policy making, updating and challenge
- Co-ordination of decision-making
- Flexibility in DCOs
- DCO Drafting



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## Introduction

### Scope, Process and Timetable for the Review

- *“a full review of the end to end process and all its interactions”*
- MHCLG letter 21.6.21
  - Operational review/project acceleration
  - NPS updating
  - EIA/SEA reform
- Consultation 12.8.21 to 17.12.21
- Timetable to September 2023
  - Spring 2022 – formal consultation on proposed measures
  - Autumn 2022 – announcement of changes
  - September 2023 - improvements



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## Government Objectives (1)

### The National Infrastructure Strategy

- *“Fairer, faster, greener” or “Better, greener and faster”*
- Addressing issues that have held back UK infrastructure, incl. policy uncertainty
- Speeding up the planning system
- Simplifying and shortening the process to securing consent

### MHCLG Letter 21.6.21

- Adapting to new and novel types of project
- Clusters of NSIPs
- Volume of information
- Pattern of longer timescales and greater complexity



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## Government Objectives (2)

### The consultation document

- Accelerating NSIP applications
- Enhancing the examination and decision processes
- Removing obstacles to implementation
- Improving cross-government co-ordination
- Addressing limits on the capacity of participants in the process

### Comment

- The public interest importance of improving speed and predictability
- Implications for consideration of consultation responses (see also the DBEIS letter of 24.12.21 extending the reporting time for SZC)



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## Published Responses Considered

- National Infrastructure Planning Association (NIPA)
- The Infrastructure Forum (TIF)
- Historic England (HE)
- East Suffolk Council (ESC)
- Suffolk County Council (SCC)
- Wildlife and Countryside Link (WCL)
- Thames Crossing Action Group (TSAG)



## Key procedural themes identified

- No need for wholesale change, but there is room for improvement (NIPA)
- No case for significant change to the pre-application process (ESC)
- Engagement by some key statutory bodies is inadequate (NIPA, TIF, ESC, SCC, WCL)
- ISH held too readily, and have become ineffective and inefficient (TIF, ESC, SCC)
- The Hybrid Examination model should continue post-Covid (NIPA, TIF, ESC, SCC)
- ExA's approach to disputes and SoCG need adjustment (TIF)
- Insufficient scrutiny and time dedicated to key issues (NIPA, TIF, ESC, SCC)
- Knock-on implications for decision-making by the SoS (NIPA, TIF, ESC, SCC)



## Engagement by key statutory bodies

### Problems identified:

- Ineffective and inefficient engagement during pre-application process and examinations
- Causes:
  - Few requirements or incentives to fully and proactively engage
  - Lack of knowledge, experience and/or resources
  - Local politics

### Suggestions made:

- Investment in training
- Funding:
  - Govt. funding
  - PPAs (obligatory or clear guidance for promoters)
- Legal or policy *duty* to engage constructively (with costs consequences)





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## Issue Specific Hearings

### Problems identified:

- Unnecessary ISHs – should not be a default measure (ESC)
- Insufficient detail in agendas (TIF, ESC, SCC)
- Non-attendance by statutory bodies
- ExA time management harming the effectiveness and fairness of the process (TIF, TCAG)

### Suggestions made:

- More rigour in deciding whether ISHs are truly needed
- More detailed agendas, provided a.s.a.p.
- Independent assessment of the management and effectiveness of ISHs – to generate good practice guidance
- Stricter and more efficient management of ISHs

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## ExA approach to disputes and SoCG

### Problems identified:

- Deviation from the inquisitorial approach
- SoCG and the focus on reaching agreement
  - perceived reluctance to adjudicate, and preference for common ground
  - Unnecessary mitigation and control
  - The risks of a 'transactional' approach (TIF)
- Too many SoCG of doubtful utility

### Suggestions made:

- More proactive approach by ExAs to resolving disputes
- Firmer testing of IP's demands for mitigation
- More restrained approach to requiring SoCG

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## Insufficient time and scrutiny dedicated to key substantive issues

### Problems identified:

- Too much time spent on process, procedure, basic information and the peripheral
- Too much time on 'standard' DCO drafting
- Key substantive issues under-explored and/or unresolved at the close of examination
- ExARs leaving gaps for the SoS to fill

### Suggestions made:

- Pre-examination hearings to explain the basic architecture of the application (TIF)
- Focus time in ISHs on the ExA's major issues
- Model DCO provisions and more detailed guidance on drafting



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## Knock-on implications for decision-making

### Problems identified:

- Growing pattern of delay
  - Substantive causes: HRA, Air Quality etc.
  - Limitations in the ExAR (unresolved issues, lack of engagement etc.)
  - The need for more information, and a fair process
- Additional burden on IPs (ESC, SCC)
- Errors and Judicial Review

### Suggestions made:

- Reform of the examination process (see above)
- Formalised procedure for submitting additional information post-examination



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## Themes from consultation responses – substantive issues:

1. Policy
2. Coordination in the NSIP process
3. Flexibility in DCOs
4. DCO drafting



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## Theme 1: policy

- **Reasons why NPSs may become out of date:** environmental concerns, markets, technology, wider policy and legal framework
- **Need for up to date NPSs**
  - Widespread agreement on this
  - A policy-led infrastructure system?
  - At the heart of the PA 2008 regime
  - Enables predictability of outcome and investor confidence
  - Reduces debate at examination



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- Reduce risk of legal challenge, both to made DCOs and to failure to review:
  - **Drax Power** [2021] EWCA Civ 43 (challenge to DCO on basis that NPS out of date)
  - **Energy NPSs**: Good Law Project challenge (2020) to failure to review Energy NPSs
  - **National Networks NPS**: Transport Action Network challenges (2020-21) to failure to review the National Networks NPS, and subsequently to failure to suspend the NPS pending review



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- **Examples:**
  - **Energy NPSs**: 2011; suite currently being reviewed (nb EN6 nuclear hived off)
  - **Waste water NPS**: 2012; expectation for 5 year review (1.1.5), but none yet
  - **Water resources NPS**: draft consulted upon 2019. 'Government aims to lay the final NPS in autumn 2019 ...'





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- **TIF response:** if regular updating not practical, consider adopting overarching NPS which can be kept up to date, with annexes if necessary. Compare NPPF and PPG which both have come to be updated frequently.
- **NIPA response:** consider review every 5 years, aligned with National Infrastructure Strategy publication
- **Adequacy of NPSs:**
  - Consistency between NPSs
  - Problem areas, especially clear policy on alternatives

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## Theme 2: coordination

- **Competing schemes and applications:**
  - Practical arrangements for comparative assessment and conjoined examination? (TIF response)
  - Absence of guidance creates issues for promoters, host authorities and stakeholders wishing to engage
- **Examples**
  - Northampton Gateway (DCO made) and Rail Central (withdrawn)
  - Heathrow R3: Heathrow Airport Ltd and Arora Group
  - EA1N / EA2 examinations: identical panels and joint hearings. ESC response: led to efficiencies and understanding of in-combination effects

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- **Clustering, especially East Anglian coast energy projects**
  - Strains on LPAs and communities
  - Complexity and vulnerability of in-combination assessments
  - Difficulties in joined-up decision making
  - ESC: at least three offshore windfarms seeking to deliver kittiwake compensation, with a need to avoid over or uncoordinated compensation (which can sterilise areas for other development)
  - SCC: a more strategic planning regime is needed in the area, both for generation and transmission

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### Theme 3: flexibility

- **In the DCO**
  - TIF: ever greater requirements from ExA for fixed details in applications - unnecessary, unrealistic, and can lead to examinations dominated by detail
  - DCOs should be understood as consenting framework, promoted off back of outline engineering design
  - Unduly inflexible consent limits scope for beneficial project and mitigation development

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- **Post-DCO**

- Dissatisfaction with regime for making amendments
- One material amendment application in 13 years (Able Marine Energy Park)
- Difficulty leads to suboptimal work-arounds (TIF)
- Time taken to process and determine applications for non-material amendments excessive (TIF)

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## Theme 4: DCO drafting

- **Corrections:** consider issuing DCOs that are to be made in draft, to allow errors to be corrected and reduce need for correction orders (of which there have been a lot)
- **Model provisions:**
  - Bring them back?
  - Would improve quality and consistency
  - Would reduce effort and examination time spent on detailed drafting and unpredictability of individual ExA preference

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## Q&A



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## Thank You

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