



Campaign to Protect  
Rural England

## **PLANNING ACT 2008**

### **A CPRE briefing on changes to planning for major infrastructure projects March 2009**

#### **Introduction**

1. The Planning Act gained Royal Assent on 26 November 2008. Much of the Act is concerned with new procedures for planning and approving major or ‘nationally significant’ infrastructure projects in the fields of energy, transport, water and waste. The Act also contains a number of other smaller-scale reforms to existing town and country planning legislation, particularly the Town & Country Planning Act 1990 and Planning & Compulsory Purchase Act 2004.

2. This briefing should be read as an early interpretation of how the Act may work and the opportunities to influence the new procedures associated with nationally significant infrastructure projects. Further details will emerge in secondary legislation to be issued throughout the year. This briefing material will also be held on CPRE’s Planning Help website. The web content will be updated to take account of the most significant secondary legislation as and when it comes into force<sup>1</sup>.

3. This briefing sets out CPRE’s key areas of interest in relation to two themes:

- **National Policy Statements (NPS)** on nationally significant infrastructure: the types of ‘infrastructure’ that NPSs will relate to and when specific NPSs are expected to be published; along with the key procedural opportunities that CPRE will have to influence specific NPSs.
- **Planning procedures for individual nationally significant infrastructure projects:** the role of the Infrastructure Planning Commission (IPC) and the procedures (particularly inquiries) it will work to, along with the scope for CPRE to influence IPC deliberations.

#### **National Policy Statements**

##### ***Development of National Policy Statements***

4. National Policy Statements (NPSs) are intended to be the primary consideration in decision-making on ‘nationally significant’ infrastructure projects. Projects are ‘nationally significant’ if they are in the fields of energy, transport, water and waste; and are above certain thresholds (see Annex A to this briefing). Up to twelve NPSs are expected to be produced (listed at Annex B to this briefing). Further types of energy or waste project could be covered by the new process in future, potentially including nuclear waste facilities.

5. Despite concerns about some of the detail, CPRE has welcomed NPSs in principle. We believe that there is potential for the NPS process to deliver beneficial changes in the process of policy-making. Ministers have stated: *‘We are not in the business of having just token consultation on the national policy statements. This will be a national debate about infrastructure that will serve the purposes of our communities for many years to come, and it must be seen to be real...we want the most fertile and the loudest public debate possible on*

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<sup>1</sup> For full details of secondary legislation connected with the Planning Act as it published, we suggest subscribing to the feed for new secondary legislation contained on the Office of Public Sector Information website ([www.opsi.gov.uk/legislation/whatsnew](http://www.opsi.gov.uk/legislation/whatsnew)).

*national policy statements.*<sup>2</sup> It will be a challenge to ensure that meaningful public involvement is achieved in practice.

6. CPRE aims to engage nationally in NPS consultations in a similar way to Planning Policy Statements and the development plan process regionally and locally. The ability of the public to influence NPSs is likely to depend on whether the process arouses interest in both the media and in Parliament, and the extent to which Ministers and civil servants are willing to consider a wide range of policy options as part of the process of preparing the NPS. If not pressured, Government may continue to make the most significant policy decisions elsewhere, with the development of NPSs being little more than a procedural formality. For example, the recent decision on the third runway at Heathrow was made far in advance of the production of the draft NPS on aviation. This raises serious questions as to the robustness of the procedure that NPSs will follow.

### ***Consultation and parliamentary procedures***

7. While addressed in the Act<sup>3</sup>, there is little detail as to how consultation and parliamentary procedures will work in practice beyond the need for the consultation to comply with the Government Code of Practice<sup>4</sup> which stipulates a minimum 12 week period for consultation. Ministers have stated that there is likely to be wide variation between different NPSs in terms of the levels of consultation and scrutiny required. The period of public consultation will run parallel with the period where a draft NPS is laid before Parliament with additional time made available for parliamentary scrutiny.

8. As a result of pressure from CPRE at Commons Report stage, the Government has committed to allow Parliament a further 6 to 8 weeks after the close of the public consultation on a draft NPS to monitor the response to the consultation. This should allow the outcome of the public consultation to inform a parliamentary resolution or the recommendations of any Select Committee (see box below for more details). This could be a key point at which to campaign to influence the development of policy. This depends upon whether the media takes an interest in the NPS process; and also on whether parliamentarians (i) will consider an NPS to have important political ramifications and (ii) are open to analysis of the issues provided by environmental NGOs and the public.

### ***'Appraisal of sustainability'***

9. Ministers have stated that 'appraisals of sustainability' of NPSs will incorporate the requirements of the EU Directive on Strategic Environmental Assessment (SEA), where these apply. Appraisals will generally be published at the same time as the relevant draft NPS is issued for public consultation. CPRE intends to examine closely how these appraisals of sustainability are conducted to see what kind of effect they have on policy development. Ministers are required to pursue the objective of sustainable development in preparing NPSs, in particular 'having regard to the desirability of' good design and adaptation to and mitigation of climate change<sup>5</sup>. This duty is open to interpretation, however, and could be difficult to enforce in any meaningful way.

### ***Will NPSs specify locations or sites for development?***

10. The most controversial NPSs, on aviation and nuclear power, are expected to designate general 'locations' as suitable for infrastructure development, without addressing the detail of specific sites, in a similar fashion to 'key diagrams' in Regional Spatial Strategies. This is unsurprising as the likely locations for both types of development are already well known.

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<sup>2</sup> Baroness Andrews, House of Lords Hansard, 14 October 2008.

<sup>3</sup> Sections 7 and 9 of the Act.

<sup>4</sup> Available at [www.berr.gov.uk/files/file47158.pdf](http://www.berr.gov.uk/files/file47158.pdf).

<sup>5</sup> Section 10 of the Act.

Potentially, however, all NPSs could designate suitable ‘locations’ for development. In such cases, the Secretary of State will also have to take ‘appropriate steps’ to publicise the draft NPS locally, and under Section 8 will be required to consult relevant local authorities (including National Park Authorities) in deciding what is ‘appropriate’ in this context.

## **Relationship of National Policy Statements to existing policy**

### ***Existing policy statements on major infrastructure***

11. . Some existing statements of Government policy, such as the Air Transport White Paper, do not meet the appraisal or consultation requirements for NPSs. Yet there were indications at the early stages of the Bill that such statements could become NPSs without significant change. A key success for CPRE in our work on the Bill relates to Section 12 of the Act, where the Government was pressurised to accept that current statements of national policy, before they could be adopted as NPSs, would have to undergo consultation, appraisal of sustainability, parliamentary scrutiny, and an explanation of how the policy takes account of Government policy on climate change. This may help bring about a renewed public debate over Government policies on airport expansion and other areas likely to have a significant impact on the countryside, such as high voltage electricity transmission networks.

### ***Planning Policy Statements (PPSs)***

12. A key concern for CPRE is how NPSs will relate to existing PPSs and guidance notes (PPGs), particularly PPG2 (Green Belts) and PPS7 (nationally designated landscapes), as well as to development plans. We raised this issue prominently at the outset in evidence to the Public Bill Committee and in briefing material. There have been encouraging statements from Ministers in this regard. In House of Commons Committee in January 2008, the then Minister, Jim Fitzpatrick MP, stated that NPSs will reflect existing Green Belt policy. In November 2008, Baroness Andrews stated that the ‘major development test’ in National Parks and Areas of Outstanding Natural Beauty, set out in paragraph 22 of PPS7, would be relevant to NPSs produced under the Act. These points will need to be pressed strongly as there is no clear guarantee that Ministers will take policies in existing PPSs into account, or avoid using the NPS process to water down established principles.

13. Statutory bodies, including the Environment Agency and Natural England, are listed among bodies that will have a right to be consulted in draft secondary regulations under Section 7 (4) of the Act, along with regional planning bodies and local planning authorities<sup>6</sup>.

14. It is also possible that some NPSs may not be comprehensive, overarching documents. Some Government departments appear to envisage them more as guidance notes for the IPC which will cross-reference existing PPSs and other relevant information (which could include development plans) that the IPC will need for their deliberations. Ministers have also stated, however, that: ‘*we intend that the text of the NPSs will give a strong steer to the IPC to consider placing strict requirements on the promoter, which are akin to planning conditions, where appropriate, in order to restrict and mitigate the levels of nuisance caused.*’<sup>7</sup>

15. Finally, the Act includes provision for judicial review of an NPS in a number of circumstances:

- Actions or omissions of the Secretary of State in preparing or reviewing an NPS.
- A decision by the Secretary of State to review, or to not review all or part of an NPS.
- A decision by the Secretary of State, following a review, to either amend an NPS, withdraw its designation as an NPS, or leave the NPS as it is.

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<sup>6</sup> See the CLG consultation, ‘Consultation on the list of statutory consultees for National Policy Statements’ published at [www.communities.gov.uk](http://www.communities.gov.uk), January 2009.

<sup>7</sup> Baroness Andrews, House of Lords Hansard 16 October 2008.

- A decision by the Secretary of State to suspend the operation of an NPS pending the completion of a review.

16. In such cases a claim form for judicial review must be filed as promptly as possible and within six weeks. In general, the use of judicial review should be considered very much as a last resort as it is risky, expensive and often does not solve the problem that has prompted the action, even where a claim is successful. For more details of how the judicial review process works, see the briefing *Judicial Review and Planning Decisions*, issued jointly by CPRE and the Environmental Law Foundation.

#### **Involving Parliament in the scrutiny of an NPS**

The Planning Act does not require Parliament to scrutinise a draft NPS, nor does it specify a set period of time that Parliament will have to carry out any scrutiny. The time that Parliament will have will be set by Government in individual Standing Orders for each NPS. It is likely to be difficult for the public to become involved at the Parliamentary stage. One possible route would be to make any concerns known about a draft NPS as soon as possible after the launch of a consultation draft. These concerns could be communicated directly to the Chair of the relevant Select Committee (for example, the Transport Committee in the case of the NPS on aviation), requesting that the Committee launches an inquiry into the draft NPS if appropriate, and that such an inquiry investigates these concerns directly.

It may well be appropriate as a rule to press for a full inquiry, as (i) all NPSs will be concerned with projects that entail wide-ranging environmental impacts; and (ii) an inquiry presents opportunities for cross-examination of project promoters by parliamentarians. Later opportunities for cross-examination at the project stage are likely to be much more curtailed than under present planning procedures (see paragraphs 25-27 below). Select Committees could also be asked to highlight issues on which the Infrastructure Planning Commission (IPC) should cross-examine promoters at the project stage.

The Government has indicated that Parliament would also be given time for a debate after a Committee reports. It is unclear as to whether a debate would take place before or after the Government had responded to the report. In cases where a draft NPS was particularly controversial, there would be clear advantages in the debate taking place after the Government response. The Government would be under pressure to be more responsive to the points made in the Select Committee report, as Parliament would be able to express a view on how far the Government had addressed the issues raised by the Select Committee.

The decision on whether and when a debate happens is likely to be made by the Government in the relevant Standing Order (see above). Ministers may well need to be pressured to agree to such a process. But Government has emphasised that Parliament should ultimately make the decision on how it scrutinises a draft NPS. If you are concerned about a draft NPS you can write to your MP calling for a debate on the Government's response to the NPS as well as for scrutiny. You may need to do this before the Standing Order is laid before Parliament. It is also possible, however, that a recommendation from a Select Committee could carry sufficient weight, even where the Government has not made provision for a debate after laying its response to the Select Committee before Parliament.

#### **Planning procedures for individual nationally significant infrastructure projects**

17. The Act brings in three major changes to planning procedure for individual nationally significant infrastructure projects:

- decisions on applications for new development will be taken by a new Infrastructure Planning Commission (IPC) rather than Ministers or local planning authorities as at present, provided an up to date NPS is in place;

- the IPC will examine applications in line with new procedures which will emphasise the use of written representations, and seek to minimise the need for issues to be examined through cross-examination at public inquiries; and
- applications made to the IPC will be for a ‘development consent order’, which will combine a grant of planning permission with a range of other separate consents, such as listed building consent. The Secretary of State also has powers to direct that any application for any consent within the range can become an application for development consent to be directed to the IPC, provided the application is for development in England relating to energy, transport, water or waste<sup>8</sup>.

### ***The IPC***

18. The IPC has been designed as a non-departmental public body whose role will be to supervise and decide applications for nationally significant infrastructure projects. This includes giving advice about either applying for, or making representations on, applications for development consent. The IPC is expected to contain up to 35 commissioners consisting of, in the words of Ministers, ‘independent experts across a wide range of competences’, along with a larger secretariat. The Government expects the IPC to be involved with an average of 45 applications per year. Currently, applications for nationally significant infrastructure projects are decided by either the Secretary of State or the relevant local planning authority.

19. CPRE has a number of grave concerns about the IPC model, as set out in the Act. In particular, we doubt whether it will be seen as sufficiently independent of Government or accountable to the public. The Government has undertaken to review the operation of the IPC no later than two years after its establishment. If the review discovers problems, the Government would use powers contained in the Act to direct that a wider range of applications are referred to the Secretary of State rather than the IPC. The Secretary of State already has powers to examine and decide an application where an NPS or any part of it has become out of date, or where defence and national security is involved.

### ***Consultation before an application is submitted***

20. Potential applicants for a nationally significant infrastructure project will organise a consultation before an application is submitted. This is additional to the consultation that the IPC will organise once an application is submitted (see the section on development consent orders below).

21. There are two distinct stages to the pre-application procedure. The first requires the applicant to consult relevant local authorities<sup>9</sup> and any persons with an interest in the land, and secondary regulations may spell out further categories of people. Second, applicants are required to prepare a statement, in consultation with relevant local authorities, on how they will consult ‘people living in the vicinity of the land’ (the precise meaning of this is not defined in the Act); and then consult these people in line with the statement. Secondary regulations will set out further requirements for publicising proposed applications, and the amount of time that the public will have to respond to a pre-application consultation. Applicants are required to ‘have regard’ to any representation received within the set deadline. The Government has placed a great deal of emphasis on the creation of a statutory duty of pre-application consultation by the developer. CPRE has no issue with pre-application consultations taking place or being a legal requirement, provided the IPC also consults on the final application once it is received.

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<sup>8</sup> See Section 33 of the Act for the full range of consents that can be included in a development consent order, and Section 35 for details of the direction power.

<sup>9</sup> Section 43 states that a ‘relevant’ local authority is one in whose area the proposed development will take place, along with all other local authorities who have a common border with this local authority.

22. Local groups should take the pre-application consultation stage seriously, and raise any issues at it that they would intend to pursue with the IPC later on. It is important to note that the IPC can ignore representations that relate to the merits of policies in an NPS, which will cover issues such as the need for a proposed development (see below). It is therefore likely to be most fruitful to concentrate representations at the pre-application stage to the possible environmental impacts of the proposal on the site and local area. If an issue of local impact is raised at the pre-application stage in line with the consultation process, which the developer then fails to properly address, then the IPC is much more likely to need to address it through a full inquiry rather than merely relying on written representations.

### ***Examination of nationally significant infrastructure projects***

23. Details of consultation that the IPC is to carry out on individual infrastructure project proposals will be contained in regulations to emerge later in the year. These consultations will take an essentially similar form to current consultation procedures for planning applications submitted to a local planning authority, but the IPC is also required to invite relevant local authorities to submit a 'local impact report' (see below).

24. The IPC, like a local planning authority, will maintain a public register of applications it has received. Members of the public will be able to examine the applications and accompanying documents, as well as reports of pre-application consultations (see above).

25. The IPC will have wide-ranging control over the examination of each application, including deciding the principal issues to be examined. It will also have the discretion to decide whether cross-examination of evidence will take place at hearings.

26. The IPC will be expected to rely largely on the consideration of written representations, and it will also have powers to disregard representations that it considers '*vexatious or frivolous; relate to the merits of policy set out in a national policy statement; or relate to compensation for compulsory acquisition of land or of an interest in or right over land*' (Section 87). The presumption in the original Bill against cross-examination was, however, removed as a result of pressure from CPRE and other environmental groups. The IPC's powers of examination will be subject to any rules that the Lord Chancellor may make, and also, the IPC will have to have regard to any guidance issued by the Secretary of State.

27. CPRE remains concerned that one possible effect of these reforms could be to discredit the planning process, which could result in affected communities resorting more to judicial review and/or direct action. Cross-examination of the evidence of promoters by CPRE and others has played a vital role in highlighting flaws in the detail of environmentally damaging proposals, such as the recent proposal for a container port at Dibden Bay. We also do not believe that issues relating to the overall need for the proposed development (which is expected to be dealt with at the NPS stage) on the one hand, and its impact on a specific site (to be dealt with at examination stage) on the other, can be separated from each other as easily as has been assumed. We suspect that, in practice, there will be some (though limited) scope for discussion of national policy issues at examination stage. At the same time, we also recognise that sensible limits can usefully be placed on the use of cross-examination. Scope for planning inspectors to control the management of an inquiry and exclude irrelevant or repetitious evidence is already established in procedure.

28. Campaigners who believe that cross-examination of evidence relating to a nationally significant infrastructure project is necessary should look to influence the Parliamentary stage of the relevant NPS in the first instance. If this opportunity has passed, the next important opportunity is at the time that an application for development consent has been lodged. At this

point the IPC has to invite all ‘relevant’ local authorities to submit a local impact report<sup>10</sup>. It is currently unclear as to what status the report would have in terms of the IPC’s examination of the application; for example whether the IPC would need to take account of it in deciding the issues to be discussed at a hearing. Although it is not required to make a decision in accordance with the report in the same way as it is required to with the NPS, the IPC must have regard to this report, as well as to the relevant NPS, in deciding the application<sup>11</sup>.

29. Local campaigners can, at the point an application is submitted to the IPC, make a representation, raising particular issues of concern, to ‘relevant’ local authorities calling for them to reflect such concerns in the local impact report. It may also be worth calling on the local authorities to state in their respective reports that they would want particular issues of local impact to be analysed through cross-examination, and properly addressed by the IPC through conditions if development consent is granted. Doing so could well increase the chance that the IPC will reflect these concerns at any hearing or inquiry. A separate representation to the IPC would also be necessary at the point of the application being submitted. This should ideally be consistent with any representation made to a local authority.

### ***Development consent orders***

30. A consent by the IPC of an application for development made to it will take the form of a ‘development consent order’, which will combine a grant of planning permission with a range of other separate consents<sup>12</sup>, such as listed building consent. A development consent order can also include rights to compulsorily purchase land. There are also special procedures relating to cases such as commons, National Trust land, and land protected under the Green Belt (London & Home Counties) Act 1938.

31. The IPC will have scope to apply, modify or exclude legislation in a development consent order. CPRE remains concerned about the sweeping nature of these powers. If the IPC uses this power, then it will have to send a draft of the order to the Secretary of State, who will be able to specify changes to the order within a 28 day time limit. The order will also have to be issued as a statutory instrument, and therefore laid before Parliament.

32. A development consent order can also confer ‘statutory authority’ for carrying out development, an automatic defence against claims for statutory nuisance. Such powers already exist for railway-related development. CPRE is concerned about extending the scope of this power to energy and waste schemes. We worked jointly with Environmental Protection UK and others to highlight the potential problems this could cause, and were successful in persuading the Government to retain rights to claim compensation for those whose land is affected by a project.

33. Developers will also not benefit from the defence of statutory authority where they have breached the terms of a development consent order. This makes it important to consider what kind of conditions might need to be attached in the event that the IPC grants consent for a proposed development, and to look for these to be reflected in the local impact report (see above). Ministers have also stated that *‘we want the IPC to look specifically at the potential for noise, vibration, emissions, light pollution, smoke, smells, insects and so on to require that the potential for such nuisances is as low as possible, if not eliminated altogether. Requirements to control nuisances will be particularly important where they may be a risk to*

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<sup>10</sup> Section 60 of the Act. ‘Relevant’ local authorities mean the local authority or authorities within whose area the development is proposed, and all other local authorities that have a common boundary with it. The Government stated in the House of Lords Committee stage of the Act that such authorities include higher-tier county authorities as well as district-level planning authorities, in areas where there is a two tier system of local government.

<sup>11</sup> Section 104.

<sup>12</sup> Section 33 of the Act.

*health.*<sup>13</sup> Local planning authorities will police the implementation of conditions and also have enforcement powers against (i) development requiring development consent but for which no order is in force, and (ii) breaches of the terms of an order.

34. Finally, the Act includes provision for judicial review, allowing the questioning of the following events in relation to a development consent order:

- An order granting development consent, or a subsequent order correcting errors in, making changes to, or revoking the original order.
- A refusal to grant development consent.
- An IPC decision to refuse to accept an application for development consent.
- Anything else done, or omitted to be done, by the Secretary of State or the IPC in relation to an application for development consent, but not including failing to decide the application.

CPRE

February 2009

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<sup>13</sup> Baroness Andrews, House of Lords Hansard 16 October 2008.

## **ANNEX A**

### **Thresholds for infrastructure projects that will be considered by the IPC (Sections 14 to 30 of the Planning Act 2008)**

#### Power stations:

- in England or Wales; minimum 50 megawatts (MW) generating capacity if onshore; minimum 100 MW if offshore

#### Electric lines:

- in England or Wales, including lines that run into (but not within) Scotland
- above ground, minimum 132 kilovolts (kV) capacity

#### Underground gas storage / liquefied natural gas (LNG) facilities / gas reception facilities

- in England and Wales; minimum 43 million cubic metres working capacity or 4.5 million cubic metres maximum flow rate

#### Pipe-lines:

- in England; minimum 800 millimetres diameter and minimum 40 kilometres (km) length

#### Highways:

- in England; trunk roads and motorways where the Secretary of State is or will be the highways authority

#### Airports:

- in England; will be capable of handling a minimum 10 million passengers per year or 10,000 movements of cargo
- extensions will need to increase airport capacity by at least 10 million passengers per year or 10,000 movements of cargo

#### Harbours:

- in England and Wales; for container ships, a minimum 500,000 twenty-foot equivalent units (TEU); for roll on roll off (ro-ro) ships, minimum 250,000 units; for facilities for cargo ships of any other description, minimum 5 million tonnes.

#### Railways:

- Wholly in England; part of the railway network

#### Rail freight interchanges:

- in England; at least 60 hectares in area; at least 4 trains per day, from more than one consigner and consignee

#### Dams and Reservoirs:

- in England; more than 10 million cubic metres for new developments
- an increase of more than 10 million cubic metres for extensions

#### Transfer of water resources:

- in England; more than 100 million cubic metres per year; not piped drinking water

#### Waste water treatment plants:

- in England; capacity exceeding a population equivalent of 500,000

#### Hazardous waste facilities:

- in England; if landfill or deep geological storage, 100,000 tonnes per year; in other cases, 30,000 tonnes per year

## Annex B

### List of proposed National Policy Statements (NPSs)

Gov Dept	National Policy Statement	Status	Completion date	Consultation date	Location specific
Department for Energy and Climate Change (DECC)	New Nuclear Power	Being drafted & assessed	End 2009	Late summer 2009	Yes
	Overarching Energy	Being drafted	End 2009	June 2009	No
	Fossil Fuel Electricity Generation	Being drafted	End 2009	June 2009	Possibly
	Renewable Electricity Generation	Being drafted	End 2009	Late 2009 after overarching energy	Yes
	Gas Supply Infrastructure	Being drafted	End 2009	Late 2009	Yes
	Electricity Networks	Being drafted	End 2009	June 2009	Possibly
Department for Transport (DfT)	Aviation	?	2011	2011	Yes
	Ports	?	End 2009	June 2009	No
	National Networks (Rail & Road)	?	End 2009	Late summer 2009	No

(Source: Planning Bill Regulatory Impact Assessment and contact with relevant officials)