Planning Act 2008

Guidance on the pre-application process

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Department for Communities and Local Government

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Introduction

1. The 2008 Planning Act ("the Planning Act") created a new development consent regime for nationally significant infrastructure projects in the fields of energy, transport, water, waste water, and waste. These projects are commonly referred to as major infrastructure projects and will be throughout this document. They are large scale developments, both onshore and offshore, such as new harbours, power stations (including wind farms), and electricity transmission lines. The Planning Act sets out the thresholds above which certain types of infrastructure development are considered to be nationally significant and require development consent. Through the Localism Act 2011 ("the Localism Act") the Government made significant changes to the regime by abolishing the Infrastructure Planning Commission and transferring responsibility for decision making to the Secretary of State[1]. The relevant provisions of the Localism Act were commenced on 1 April 2012 and where this guidance refers to the Planning Act, unless otherwise stated, it should be read as the Planning Act as amended by the Localism Act.

2. The Secretary of State is legally responsible for accepting and examining applications. However, the Government has delegated this responsibility to the Planning Inspectorate ("the Inspectorate") who allocate appointed persons to act as the Examining Authority for individual applications. In England, the Inspectorate examines applications for development consent from energy, transport, waste, waste water and water sectors. In Wales, it examines applications for energy and harbour development, subject to detailed provisions in the Planning Act. Where this guidance refers to the Secretary of State, users should bear in mind that, in practice, the Inspectorate will carry out functions on the Secretary of State's behalf (with the exception of decision-making). All communications should be directed to the Inspectorate in the first instance.

3. This guidance is part of the package of statutory instruments and guidance for the Planning Act and the major infrastructure sections of the Localism Act. This guidance relates to both Chapter 1 (applications) and Chapter 2 (pre-application procedure) of Part 5 of the Planning Act. Under section 50(3) of the Planning Act, applicants

[1] 'Secretary of State' in this document should be read as 'the Secretary of State with responsibility for the relevant policy area'. Applications relating to energy projects will be decided by the Secretary of State for Energy and Climate Change; those relating to transport by the Secretary of State for Transport, hazardous waste by the Secretary of State for Communities and Local Government and those for waste water and water supply will be a joint decision by the Secretary of State for Communities and Local Government and the Secretary of State for the Environment.

must have regard to this and any other guidance published which covers the pre-application procedure for major infrastructure applications.

4. Part 5 of the Planning Act sets out statutory requirements for applicants to engage in pre-application consultation with local communities, local authorities, and those who would be directly affected by the project. The front-loaded emphasis of consultation in the major infrastructure planning regime is designed to ensure a more transparent and efficient examination process.

5. The Inspectorate has published a set of Advice Notes that applicants may find helpful, as they provide advice and information on a range of issues arising throughout the application process. These have been cross referenced through this guidance document.

6. Nothing in this guidance should be taken as indicating that any requirement of planning law or any other law may be overridden. The guidance does not in any way replace the statutory provisions of the Planning Act or the Localism Act nor does it add to their scope. Only the courts can give an authoritative interpretation of these Acts. Users of this guidance must take their own professional and legal advice about its implementation. If required, the Inspectorate can provide independent, advice on specific planning matters at pre-application stage, but this will be without prejudice to any decision on whether a project will be accepted for examination or not.

What is this guidance about?

7. This guidance sets out the requirements and procedures for the pre-application process and consultation where an application is to be made for consent for a major infrastructure project. This guidance therefore aims to:

- advise users of the regime on the processes involved in the pre-application stage;
- guide applicants as to how the pre-application requirements of the Planning Act should be fulfilled and provide some advice on best practice;
- inform other users of the regime, including consultees, of their roles in the pre-application process and to let them know what is expected of applicants at this stage;

- help ensure that the system is transparent and accessible to all.

8. This guidance covers the main pre-application processes leading up to the submission of the application and associated documents to the Secretary of State. It also provides advice on producing a draft Development Consent Order[2], as this may be shaped by the pre-application consultation process. Applicants are advised to read this guidance in conjunction with the other guidance and advice[3].

Who is this guidance aimed at and why?

9. This guidance is mainly aimed at applicants, to assist them in undertaking the pre-application requirements placed on them by the Planning Act. It is also intended that this guidance serve as the first reference point for all users of the regime, including local authorities and other statutory consultees, so that all parties know what is expected from them during the pre-application stage of the process.

The pre-application consultation process

10. Pre-application consultation is a key requirement for applications for Development Consent Orders for major infrastructure projects. A significant part of this document is therefore dedicated to this process. Effective pre-application consultation will lead to applications which are better developed and better understood by the public, and in which the

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2 The Development Consent Order is a document that provides the consent for a project once a decision on an application has been reached. In most cases, an Order will be made as a statutory instrument. Applicants will submit a draft of the Order as part of their application. However, the decision on whether to accept the application for examination will be based on the extent to which the applicant has complied with the provisions in section 37 and Chapter 2 of Part 5 of the Planning Act, not on the merits of the draft Order.

3 *Planning Act 2008: Guidance on associated development applications for major infrastructure projects*;

Planning Act 2008: Application Form Guidance;

Planning Act 2008: Guidance for the examination of applications for development consent;

Planning Act 2008: Guidance related to procedures for the compulsory acquisition of land;

Planning Act 2008:The Infrastructure Planning (Fees) Regulations 2010 guidance.

important issues have been articulated and considered as far as possible in advance of submission of the application to the Secretary of State.[4] This in turn will allow for shorter and more efficient examinations.

11. The early involvement of local communities, local authorities and statutory consultees at this stage can bring about significant benefits for all parties:

- it allows members of the public to influence the way projects are developed and how they are integrated into the community, by providing feedback on potential options, providing them with an opportunity to shape the way in which their community develops;
- it helps local people understand better what a particular project means for them, so that concerns resulting from misunderstandings are resolved early;
- it allows an applicant to obtain important information about the economic, social and environmental impacts of a scheme from consultees, thus helping applicants to identify as early as possible those project options which are unsuitable and not worth developing further;
- it enables potential mitigating measures to be considered and, in some cases, built into the project before an application is submitted;
- it may identify ways in which the project could, without significant costs to promoters, support wider strategic or local objectives.

12. The pre-application consultation process is crucial to the effectiveness of the major infrastructure regime. Without adequate consultation, the subsequent application will not be accepted when it is submitted. If the Secretary of State determines that the consultation is inadequate, he or she can recommend that the applicant carries out more consultation activity before the application can be accepted. Once a scheme is in examination there is limited scope to make changes to what has been included in the draft Development Consent Order. This is why it is important that issues are made known and explored during pre-

[4] Applicants may wish to refer to the annexe to Advice Note 6 published by the Inspectorate, which contains an application checklist: http://infrastructure.planningportal.gov.uk/wp-content/uploads/2012/05/an6_annexe_Section_55_Acceptance_of_Applications_Checklist.doc

application consultation and prior to finalising the application version of the draft Order.

13. Compliance with this guidance alone will not guarantee that the Secretary of State will conclude that the applicant has complied with the pre-application consultation requirements introduced by the Planning Act. However, where an applicant has complied with all statutory requirements[5] and applicable guidance, and where the applicant is satisfied that they have consulted as widely as is appropriate for the scale of the project, an applicant can reasonably expect that an application will not be rejected on the grounds of inadequate consultation. Where applicants have not been able to comply with this guidance for some reason, they should consider providing comments in their consultation report. Where local authorities are not content with the consultation approach taken, their views should be set out in any adequacy of consultation representation they make. This will aid the decision on whether to accept the application.

14. In brief, during the pre-application stage applicants are required to:

- notify the Secretary of State of the proposed application;[6]
- identify whether the project requires an environmental impact assessment; where it does, confirm that they will be submitting an environmental statement along with the application, or that they will be seeking a screening opinion ahead of submitting the application;[7]
- produce a Statement of Community Consultation, in consultation with the relevant local authority or authorities, which describes how the applicant proposes to consult the local community about their project and then carry out consultation in accordance with that Statement;
- make the Statement of Community Consultation available for inspection by the public in a way that is reasonably convenient for people living in the vicinity of the land where the development is

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5 See in particular: Part 5, Chapter 2 of the Planning Act and The Infrastructure Planning (Environmental Impact Assessment) Regulations 2009; The Infrastructure Planning (Applications: Prescribed Forms and Procedures) Regulations 2009 and The Infrastructure Planning (Miscellaneous Prescribed Provisions) Regulations 2010.

6 See Section 46 of the Planning Act.

7 See Regulation 6 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009.

proposed, as required by section 47 of the Planning Act and Regulations[8];

- identify and consult statutory consultees as required by section 42 of the Planning Act and Regulations;
- set a deadline of a minimum of 28 days by which responses to consultation must be received;
- have regard to relevant responses to publicity and consultation;[9]
- publicise the proposed application in accordance with Regulations;
- prepare a consultation report and submit it to the Secretary of State.[10]

15. The requirements of the Planning Act form the basic framework for the pre-application consultation process. The Government recognises, however, that major infrastructure projects and the communities and environment in which they are located will vary considerably. A 'one-size-fits-all' approach is not, therefore, appropriate. Instead, applicants, who are best placed to understand the detail of their specific project, and the relevant local authorities, who have a unique knowledge of their local communities, should as far as possible work together to develop plans for consultation. The key aim should be to ensure that the amount of consultation undertaken, and who is consulted, should be in proportionate to the size and scale of project and where its impacts will be felt.

16. The Planning Act also permits relevant local authorities to make representations to the Secretary of State about the adequacy of consultation, to which he or she must have regard but which will not be the sole consideration for determining whether an application should be accepted for examination.

17. Consultation should be thorough, effective and proportionate. Applicants will have their own approaches to consultation and already

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8 Including: The Infrastructure Planning (Environmental Impact Assessment) Regulations 2009; The Infrastructure Planning (Applications: Prescribed Forms and Procedures) Regulations 2009 and The Infrastructure Planning (Miscellaneous Prescribed Provisions) Regulations 2010.

9 See Section 49 of the Planning Act.

10 See Section 37 of the Planning Act.

have a wealth of good practice on which to draw. For example, larger, more complex applications will usually need to go beyond the statutory minimum timescales laid down in the Planning Act to provide enough time for consultees to understand project proposals and formulate a response. Many proposals will require detailed technical input, especially regarding impacts, so sufficient time will need to be allowed for this. Consultation should also be sufficiently flexible to respond to the needs and requirements of consultees, for example where a consultee has indicated that they would prefer to be consulted via email only, this should be accommodated as far as possible.

Who should be consulted?

18. The Planning Act requires certain bodies and groups of people to be consulted at the pre-application stage, but allows for flexibility in the precise form that consultation may take depending on local circumstances and the needs of the project itself. Sections 42-44 of the Planning Act and secondary legislation[11] set out details of who should be consulted, including local authorities, the Marine Management Organisation (where appropriate), other statutory bodies, and persons having an interest in the land to be developed.[12] Section 47 in the Planning Act sets out the applicant's statutory duty to consult local communities. In addition, applicants may also wish to strengthen their case by seeking the views of other people who are not statutory consultees, but who may be significantly affected by the project.

Statutory bodies and other relevant groups

19. The Planning Act and associated Regulations set out the statutory consultees and prescribed people who must be consulted during the pre-application process. Many statutory consultees are responsible for consent regimes where, under Section 120 of the Planning Act, decisions on those consents can be included within the decision on a Development Consent Order. 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. It is therefore

11 The Infrastructure Planning (Applications: Prescribed Forms and Procedures) Regulations 2009.

12 See the Inspectorate's Advice Note 3: http://infrastructure.planningportal.gov.uk/wp-content/uploads/2012/05/Advice-note-3v3.pdf

important that such bodies are consulted at an early stage. In addition, there will be a range of national and other interest groups who could make an important contribution during consultation. Applicants are therefore encouraged to consult widely on project proposals.

20. From time to time a body may cease to exist but for legislative timetabling reasons, may still be listed as a statutory consultee. In such situations the Secretary of State will not expect strict compliance with the statutory requirements. Applicants should identify any successor body and consult with them in the same manner as they would have with the original body. Where there is no obvious successor, applicants should seek the advice of the Inspectorate, who may be able to identify an appropriate alternative consultee. Whether or not an alternative is identified, the consultation report should briefly note any cases where compliance with statutory requirements was impossible and the reasons why.

21. Applicants will often need detailed technical input from expert bodies to assist with identifying and mitigating the social, environmental, design and economic impacts of projects, and other important matters. Technical expert input will often be needed in advance of formal compliance with the pre-application requirements. Early engagement with these bodies can help avoid unnecessary delays and the costs of having to make changes at later stages of the process. It is equally important that statutory consultees respond to request for technical input in a timely manner. Applicants are therefore advised to discuss and agree a timetable with consultees for the provision of such inputs

Local Authorities

22. The Planning Act recognises the key role that local authorities play as bodies with both expert knowledge of the local community and with responsibility for place shaping in the local area. This is why there is a two-fold requirement on applicants for consulting local authorities:

- for advice on how best to consult affected local communities; and
- on the project, generally, in the local authority's role as a statutory consultee in its own right.

Consultation with Local Authorities on the Statement of Community Consultation

23. Local authorities have considerable expertise in consulting local people. They will be able to draw on this expertise to provide advice to applicants on the makeup of the community and on how consultation

might best be undertaken. In addition, many authorities will already have a register of local interest groups, and should be able to readily provide applicants with an appropriate list of such groups for the purposes of consultation.

24. The applicant has a duty under section 47 of the Planning Act to prepare a Statement of Community Consultation, and then to conduct its consultation in line with that statement. Before doing so, the applicant must consult on their Statement of Community Consultation with each local authority in whose area the proposed development is situated. This may require consultation with a number of different local authorities, particularly for long, linear projects. In this situation, the local authorities in question should, as far as practicable, co-ordinate their responses to the applicant. This will ensure that the consultation proposals set out in the Statement are coherent, effective, and work across local authority boundaries.

25. Even where it is intended that a development would take place within a single local authority area, it is possible that its impacts could be significantly wider than just that local authority's area - for example if the development was located close to a neighbouring authority. Where an applicant decides to consult people living in a wider area who could be affected by the project (e.g. through visual or environmental impacts, or through increased traffic flow), that intention should be reflected in the Statement of Community Consultation.

26. In its role as a consultee on the Statement of Community Consultation, the local authority is not expected to provide a view on the project itself, but to focus on how the applicant should consult people in its area. The Planning Act requires local authorities to respond to the applicant's consultation on their proposed Statement of Community Consultation within 28 days of receipt of the request. However, prior to submitting their draft Statement of Community Consultation applicants may wish to seek to resolve any disagreements or clarifications about the public consultation design. An applicant is therefore likely to need to engage in discussions with local authorities over a longer period than the minimum requirements set out in the Act.

27. The role of the local authority in such discussions should be to provide expertise about the make-up of its area, including whether people in the area might have particular needs or requirements, whether the authority has identified any groups as difficult to reach and what techniques might be appropriate to overcome barriers to communication. The local authority should also provide advice on the appropriateness of the applicant's suggested consultation techniques and methods. The local authority's aim in such discussions should be to ensure that the people affected by the development can take part in

a thorough, accessible and effective consultation exercise about the proposed project.

28. Topics for consideration at such pre-consultation discussions might include:

- the size and coverage of the proposed consultation exercise (including, where appropriate, consultation which goes wider than one local authority area);
- the appropriateness of various consultation techniques, including electronic-based ones;
- the design and format of consultation materials;
- issues which could be covered in consultation materials;
- suggestions for places/timings of public events as part of the consultation;
- local bodies and representative groups who should be consulted;
- timescales for consultation.

29. It is expected that in most cases applicants and local authorities will be able to work closely together and agree on the local consultation process. Where significant differences of opinion persist between the applicant and local authority (or authorities) on how the consultation should take place, the Inspectorate may be able to offer further advice or guidance to either party. However, such advice will be without prejudice to any later decision on whether to accept or reject an application for examination.

30. Where a local authority raises an issue or concern on the Statement of Community Consultation which the applicant feels unable to address, the applicant is advised to explain in their consultation report their course of action to the Secretary of State when they submit their application.

31. Where a local authority decides that it does not wish to respond to a consultation request on the Statement of Community Consultation, the applicant should make reasonable efforts to ensure that all affected communities are consulted. If the applicant is unsure how to proceed, they are encouraged to seek advice from the Inspectorate. However, it is for the applicant to satisfy themselves that their consultation plan allows for as full public involvement as is appropriate for their project

and, once satisfied, to proceed with the consultation. Provided that applicants can satisfy themselves that they have made reasonable endeavours to consult with all those who might have a legitimate interest or might be affected by a proposed development, it would be unlikely that their application would be rejected on grounds of inadequate public consultation.

Local authorities as statutory consultees

32. Local authorities are also themselves statutory consultees for any proposed major infrastructure project which is in or adjacent to their area. Applicants should engage with them as early as possible to ensure that the impacts of the development on the local area are understood and considered prior to the application being submitted to the Secretary of State.

33. Local authorities will be able to provide an informed opinion on a wide number of matters, including how the project relates to local development plans. Local authorities may also make suggestions for requirements to be included in the draft Development Consent Order. These may include the later approval by the local authority (after the granting of a Development Consent Order) of detailed project designs or schemes to mitigate adverse impacts. It will be important that any concerns local authorities have on the practicality of enforcing a proposed Development Consent Order are raised at the earliest opportunity.

34. The local authority in whose area a proposed project is located or an authority adjoining the project will be invited by the Secretary of State to submit a local impact report once the application has been accepted for examination. The local impact report will allow local authorities to set out details of their views on the likely effect of the development on the local area and community.

Persons with an interest in land

35. Applicants will also need to identify and consult people who own, occupy or have another interest in the land in question, or who could be affected by a project in such a way that they may be able to make a claim for compensation. This will give such parties early notice of projects, and an opportunity to express their views regarding them.[13]

[13] See the Inspectorate's Advice Note 4: http://infrastructure.planningportal.gov.uk/wp-content/uploads/2012/03/Advice-note-4.pdf

Local communities

36. Local people have a vital role to play at the pre application stage. People should have as much influence as is realistic and possible over decisions which shape their lives and communities. It is therefore critical that they are engaged with project proposals at an early stage. Because they live, work and socialise in the affected area, local people are particularly well placed to comment on what the impact of proposals on their local community might be; or what mitigating measures might be appropriate; or what other opportunities might exist for meeting the project's objectives.

37. In consulting on project proposals, an inclusive approach is needed to ensure that different groups have the opportunity to participate and are not disadvantaged in the process. Applicants should use a range of methods and techniques to ensure that they access all sections of the community in question. Local authorities will be able to provide advice on what works best in terms of consulting their local communities given their experience of carrying out consultations in their area.

38. Applicants must set out clearly what is being consulted on. They must be careful to make it clear to local communities what is settled and why, and what remains to be decided, so that expectations of local communities are properly managed. A short document should be prepared by applicants specifically for local communities, summarising the project proposals and outlining the matters on which the view of the local community is sought. It should also describe the key elements of the project, and explain what the potential benefits and impacts of the projects might be. The document should be written in clear, accessible, and non-technical language. Applicants should be ready to make it available in formats appropriate to the needs of people with disabilities if requested. There may be cases where documents may need to be made bilingually (for example, Welsh, in applications affecting Wales), but it is not the policy of the Government to encourage documents to be translated into non-native, foreign languages.

39. Applicants are required to set out in their Statement of Community Consultation how they propose to consult those living in the vicinity of the land, but they are encouraged to consider consulting beyond this where they think doing so may provide more information on the impacts of their proposals (e.g. through visual impacts or increased traffic flow).

40. The Statement of Community Consultation should act as a framework for the community consultation generally, stating where and when events will be taking place. The Statement of Community Consultation should be made available online, at any exhibitions or other events

held by the applicants and should also be placed at appropriate local deposit points (e.g. libraries, council offices) and sent to local community groups as appropriate.

41. Applicants are required to publicise their proposed application under section 48 of the Planning Act. Regulation 4(2) of the Infrastructure Planning (Applications: Prescribed Forms & Procedure) Regulations 2009 sets out the detail of what this publicity must entail. This publicity is an integral part of the local community consultation process. Where possible, the first of the two required local newspaper advertisements should coincide approximately with the beginning of the consultation with communities. However, given the detailed information required for the publicity in secondary legislation, aligning publicity with consultation may not always be possible, especially where a multi-stage consultation is intended.

Offshore Projects

42. Different impacts and issues will need to be considered by applicants for offshore projects in comparison to those which are land-based. In the context of this guidance, "offshore" refers to an area that is outside the seaward boundary of a local authority's area.

43. Applicants have a statutory duty to consult any local authority in whose land a project is sited. So, where an offshore project also features land-based development, the applicant should treat the local authority where the land-based development is located as the main consultee for the Statement of Community Consultation. The applicant is also advised to consider seeking views on the Statement of Community Consultation from local authorities whose communities may be affected by the project, for example visually or through construction traffic, even if the project is in fact some distance from the area in question. In addition, applicants may find it beneficial to discuss their Statement of Community Consultation with any local authorities in the vicinity where there could be an effect on harbour facilities.

44. For projects which do not feature any terrestrial development, there are no statutory requirements to consult specific local authorities. Local authorities are therefore not required to respond to any consultation requests, regardless of whether they relate to the proposed statement of community consultation or to the project itself. Nonetheless, where they are consulted, local authorities are expected to respond where they consider offshore projects may impact on their communities.

45. Applicants should ensure they consider all the potential impacts on communities which are in the vicinity of the proposed project. These

are unlikely to affect all communities to the same degree but might include potential visual, environmental, economic and social impacts.

46. Where the location of a proposed offshore project is such that the impacts on communities are likely to be very small or negligible, applicants are still expected to inform relevant coastal authorities and communities of the proposed project, and give them a chance to take part in any consultation. When deciding who to consult in these situations, applicants are encouraged to think laterally, by, for example, identifying nearby local authorities with busy harbours, active fishing or sailing / water-sports communities or key local environmental groups.

47. Where there are no obvious impacts on local communities, applicants should consult the local communities closest to the proposed project. It may be that there are impacts which are not immediately obvious but which a consultation can identify. Equally, local communities may have concerns, for example, about environmental impacts, and open engagement with the applicant will allow them the chance to express their concerns and to understand how these concerns are being addressed. The level of interest shown by local authorities and communities will dictate the degree and depth of consultation required. It may be that for certain offshore projects, the consultation process with local communities can be undertaken at a focused and proportionate way, and therefore completed within the minimum statutory timescales required by the Planning Act.

48. Ultimately, applicants for offshore projects should take a pragmatic approach, consulting in proportion to the impacts on communities and the size of the project, whilst ensuring that relevant local communities are kept informed about the proposals and offered the chance to participate in shaping them. Applicants should use this as a guiding principle for consultation together with the statutory requirements as set out in the Planning Act. Provided they do this, and fully explain their approach in the consultation report which accompanies their application, the expectation is that their application will not be rejected on the grounds of insufficient public consultation.

49. In addition to relevant local authorities and their communities, prospective applicants for development consent for certain types of projects are required to consult and engage with the Marine Management Organisation.[14] They will be also be able to advise on what, and with whom, additional consultation might be appropriate.

[14] See the Inspectorate's Advice Note 11, Annex B: http://infrastructure.planningportal.gov.uk/wp-content/uploads/2012/04/Advice-note-11-Annex-B-MMO.pdf

Additional guidance is available from the Inspectorate on transboundary consultations[15].

When should consultation take place and how much is enough?

50. To realise the benefits of early consultation on a project, it must take place at a sufficiently early stage to allow consultees a real opportunity to influence the proposals. But equally, consultees will need sufficient information on a project to be able to recognise and understand the impacts.

51. Applicants will often also require detailed technical advice from consultees and it is likely that their input will be of the greatest value if they are consulted when project proposals are fluid, followed up by confirmation of the approach as proposals become firmer. In principle, therefore, applicants should undertake initial consultation as soon as there is sufficient detail to allow consultees to understand the nature of the project properly.

52. To manage the tension between consulting early, but also having project proposals that are firm enough to enable consultees to comment, applicants are encouraged to consider an iterative, phased consultation consisting of two (or more) stages, especially for large projects with long development periods. For example, applicants might wish to consider undertaking informal early consultation at a stage where options are still being considered. This will be helpful in informing proposals and assisting the applicant in establishing a preferred option on which to undertake formal statutory public consultation.

53. Where an iterative consultation is intended, it may be advisable for applicants to carry out the final stage of consultation with persons who have an interest in the land[16] once they have worked up their project proposals in sufficient detail to identify affected land interests.

54. The timing and duration of consultation will be likely to vary from project to project, depending on size and complexity, and the range and scale

15 Transboundary consultations are those which involve another country. For advice, see the Inspectorate's Advice Note 12: http://infrastructure.planningportal.gov.uk/wp-content/uploads/2012/03/Advice-note-12.pdf

16 As set out in section 44 of the Planning Act 2008.

of the impacts. The Planning Act provides for a minimum 28 day period for consultation. It is expected that this may be sufficient for projects which are straightforward and uncontroversial in nature. But many projects, particularly larger or more controversial ones, may require longer consultation periods than this. Applicants should therefore set consultation deadlines that are realistic and proportionate to the proposed project. It is also important that consultees do not withhold information that might affect a project, and that they respond in good time to applicants. Where responses are not received by the deadline, the applicant is not obliged to take those responses into account.

55. Applicants are not expected to repeat consultation rounds set out in their Statement of Community Consultation unless the project proposals have changed very substantially. For example, where proposals change to such a large degree that what is being taken forward is fundamentally different from what was consulted on, further consultation may well be needed. This may be necessary if, for example, new information arises which renders all previous options unworkable or invalid for some reason. When considering the need for additional consultation, applicants should use the degree of change, the effect on the local community and the level of public interest as guiding factors.

56. Where a proposed application changes to such a large degree that the proposals could be considered a new application, the legitimacy of the consultation already carried out could be questioned. In such cases, applicants should undertake further re-consultation on the new proposals, and should supply consultees with sufficient information to enable them to fully understand the nature of the change and any likely significant impacts (but not necessarily the full suite of consultation documents), and allow at least 28 days for consultees to respond.

57. If the application only changes to a small degree, or if the change only affects part of the development, then it is not necessary for an applicant to undertake a full re-consultation. Where a proposed application is amended in light of consultation responses then, unless those amendments materially change the application or materially changes its impacts, the amendments themselves should not trigger a need for further consultation. Instead, the applicant should ensure that all affected statutory consultees and local communities are informed of the changes.

58. Consultation should, however, also be fair and reasonable for applicants as well as communities. To ensure that consultation is fair to all parties, applicants should be able to demonstrate that the consultation process is proportionate to the impacts of the project in the

area that it affects, takes account of the anticipated level of local interest, and takes account of the views of the relevant local authorities.

The consultation report and responding to consultees

59. Applicants are required under section 37 of the Planning Act to produce a consultation report alongside their application, which details how they have complied with the consultation requirements set out in the Act.

60. The Secretary of State will consider this report when deciding whether or not the applicant has complied with the pre-application consultation requirements, and ultimately, whether or not an application can be accepted.

61. Therefore, the consultation report should:

- provide a general description of the consultation process undertaken;
- set out specifically what the applicant has done in compliance with the requirements of the Planning Act, relevant secondary legislation, this guidance, and any relevant policies, guidance or advice published by Government or the Inspectorate;
- set out how the applicant has taken account of any response to consultation with local authorities on what should be in the applicant's statement of community consultation;
- set out a summary of relevant responses to consultation (but not a complete list of responses);
- provide a description of how the application was influenced by those responses, outlining any changes made as a result and showing how significant relevant responses will be addressed;
- provide an explanation as to why responses advising on major changes to a project were not followed, including advice from statutory consultee on impacts;
- where the applicant has not followed the advice of the local authority or not complied with this guidance or any relevant advice note published by the Inspectorate, provide an explanation for the action taken;

- be expressed in terms sufficient to enable the Secretary of State to fully understand how the consultation process has been undertaken and significant effects addressed. However, it need not include full technical explanations of these matters.

62. It is important that those who have contributed to the consultation are informed of the results of the consultation exercise; how the information received by applicants has been used to shape and influence the project; and how any outstanding issues will be addressed before an application is submitted to the Inspectorate.

63. As with the consultation itself, it is likely that different audiences will require different levels of information. The local community may be particularly interested in what the collective view of the community is and how this has been taken into account. Consultees with technical information will require more detailed information on what impacts and risks have been identified, and how they are proposed to be mitigated or managed.

64. The consultation report may not be the most appropriate format in which to respond to the points raised by various consultee groups and bodies. Applicants should therefore consider producing a summary note in plain English for the local community setting out headline findings and how they have been addressed, together with a link to the full consultation report for those interested. If helpful, this could be supplemented by events in the local area.

65. Response to points raised by consultees with technical information is likely to need to focus on the specific impacts for which the body has expertise. The applicant should make a judgement as to whether the consultation report provides sufficient detail on the relevant impacts, or whether a targeted response would be more appropriate. Applicants are also likely to have identified a number of key additional bodies for consultation and may need to continue engagement with these bodies on an individual basis.

The 'Adequacy of Consultation' representation

66. Before a decision can be made on whether to accept an application for examination, local authorities may make representations to the Secretary of State concerning the adequacy of the applicant's consultation. The Inspectorate will write to relevant local authorities when an application has been received to ask for their comments on the adequacy of the applicant's consultation. The Secretary of State must have regard to these representations. Any representation must

be limited to how the applicant has carried out the consultation. Local authorities need to ensure that they have suitable arrangements in place to respond to the request for comments on adequacy of consultation.

67. Local authorities will already have been consulted on the content of the applicant's Statement of Community Consultation. Therefore, any 'Adequacy of Consultation' representation should be in response to that document. It will be for the local authority concerned to decide what it includes in any such representation, but it is generally expected to cover situations where:

- the local authority wants to set out that there was agreement with the content of the Statement of Community Consultation, and that the applicant then consulted in accordance with that statement; or

- there was disagreement with the content of the Statement of Community Consultation, and the applicant then consulted in accordance with the disputed statement; or

- there was agreement on the content of the Statement of Community Consultation, but the applicant did not subsequently consult in accordance with that statement.

68. It is important to stress that pre-application consultation is a statutory duty for applicants, and it should, as this guidance makes clear, be carried out to a certain standard. Issues about the adequacy of consultation should be considered prior to the Inspectorate (on behalf of the Secretary of State) accepting an application for examination. Where any interested party feels that consultation was inadequately carried out, they should approach the applicant in the first instance. If consultees remain unsatisfied, they should make a complaint to the relevant local authority (who can consider this complaint as part of their representation to the Secretary of State on the adequacy of consultation), or the Secretary of State (through the Inspectorate). Any complaint should be made promptly following the close of consultation, to ensure that it is received not later than the point at which an application is submitted to the Secretary of State. In all cases, the final decision as to whether pre-application consultation was adequately carried out rests with the Secretary of State.

69. Separately, where someone believes they have identified an issue which has not been adequately addressed by the applicant, despite raising it with them as part of their consultation exercise, they may wish to make a written representation about the issue once the application

has been accepted. This will ensure the issue is considered during the examination.

Environmental Impact Assessment

70. Most major infrastructure projects will fall within the scope of the Environmental Impact Assessment Directive, and will require an Environmental Statement to be prepared and submitted as part of the application[17]. At an early stage the applicant needs to either inform the Secretary of State of their intention to submit an Environmental Statement along with its application, or where the developer is unsure whether an Environmental Statement is needed, that they intend to seek a screening opinion. A screening opinion should be sought as early as is possible for the environmental effects of the proposed development to be properly considered. The Secretary of State can also, through a scoping opinion, advise applicants on the content of any required Environmental Statement. The scoping opinion will be based on advice received from statutory consultees and other relevant organisations.

71. For major infrastructure projects, the Environmental Impact Assessment process is governed by the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009. These Regulations ensure that the pre-application publicity and consultation requirements for the Environmental Impact Assessment process are consistent with those of the Planning Act:

- Regulation 10 requires that the applicant's Statement of Community Consultation must state whether the project falls within the scope of the Directive, and if it does, how the applicant intends to publicise and consult on the preliminary environmental information;

- Regulation 11 requires that publicity of project proposals under section 48 of the Planning Act must also encompass the requirements of the Environmental Impact Assessment process.

72. To ensure consultation is meaningful, the pre-application consultation process for major infrastructure projects requires applicants to give

[17] Additional advice on the preparation of the Environmental statement can be found in the Inspectorate's Advice Notes 3 and 7: http://infrastructure.planningportal.gov.uk/wp-content/uploads/2012/05/Advice-note-3v3.pdf ; http://infrastructure.planningportal.gov.uk/wp-content/uploads/2012/03/Advice-note-7v2.pdf

consultees as much information as possible on the characteristics of the proposed project. However, it is unlikely that applicants will be in a position to share their environmental statements during the consultation process. It is also unlikely that this would be the most appropriate way to present the potential environmental impacts and mitigation steps to all consultees.

73. For the pre-application consultation process, applicants are advised to include sufficient preliminary environmental information to enable consultees to develop an informed view of the project. The information required will be different for different types and sizes of projects and it may differ depending on the audience of a particular consultation. The preliminary environmental information is not expected to replicate or be a draft of the environmental statement. However, if the applicant considers this to be appropriate (and more cost-effective), it can be presented in this way. The key issue is that the information presented must provide clarity to all consultees. Applicants should be careful not to assume that non-specialist consultees would not be interested in any technical environmental information. It is therefore advisable to ensure access to such information is provided during all consultations.

Habitats Regulations Assessment

74. When considering whether a project has the potential to significantly affect the integrity of a site protected under the Habitats Regulations[18] or any Ramsar site, the applicant must provide a report (normally in the form of a Habitats Regulations Assessment), with the application showing the site(s) that may be affected together with sufficient information to enable the decision maker to make an appropriate assessment, if required.

75. It is the applicant's responsibility to consult with the relevant statutory bodies and, if they consider it necessary, with any relevant non-statutory nature conservation bodies, in order to gather evidence for the Habitats Regulations Assessment. This consultation should take place as early as possible in the pre-application process. One way of doing this is for an applicant to agree an evidence plan.[19] In due course the Secretary of State will also need to be satisfied with the conclusions, having regard to the views of the nature conservation bodies. Where

[18] The Conservation of Habitats and Species Regulations 2010.

[19] http://www.defra.gov.uk/publications/2012/09/28/habitats-evidence-plans/ See also Inspectorate's Advice Note 10: http://infrastructure.planningportal.gov.uk/wp-content/uploads/2012/10/Advice-note-10-HRA.pdf

time allows, the Inspectorate will comment on the draft report in advance of formal submission of the application. Further advice on Habitats Regulations Assessments for major infrastructure projects is available from the Inspectorate's Advice Note 10.[20]

Drafting the Development Consent Order

76. Applicants are responsible for ensuring they submit a well written draft Development Consent Order ("Order") as part of their application. Whilst the content of a specific Order will depend on the project, the general considerations should be similar. When drafting an Order, applicants should ensure they consider every phase of the project and seek the views of relevant local authorities and other statutory consultees. Given that many Orders will be made as Statutory Instruments (see paragraphs 84-84 below), applicants should be satisfied that they have arrangements in place for appropriate specialist advice when drafting the Order.

77. Applicants may find it helpful to undertake early informal discussion with a range of parties on the content of the draft Order. Where felt necessary, local authorities may suggest appropriate requirements to be included in the draft Order. These may be similar to conditions attached to a grant of planning permission. They could include the later approval (after the granting of an Order) by the local authority of detailed project designs or schemes to mitigate adverse impacts.

78. However, the Planning Act provides a wide scope for requirements to be included as the applicant thinks necessary and they need not be limited to conditions which could have been imposed under pre-existing regimes. Other statutory consultees, such as other licensing bodies, may also wish to include licensing and discharging provisions, for example. The Inspectorate is able to offer without prejudice advice to applicants on the draft Order, in advance of formal submission of the application. In all cases, it is the applicant alone who is responsible for ensuring the Order is suitable and meets their own requirements. Further detail on what may be included in an Order can be found in section 120 of the Planning Act.

79. Applicants are free to set out their Order in a manner of their choosing, subject to the conditions of the Planning Act. But they may wish to draw upon previous and ongoing applications as a point of reference

[20] http://infrastructure.planningportal.gov.uk/wp-content/uploads/2012/10/Advice-note-10-HRA.pdf

and other relevant guidance and advice[21]. Applicants are required to submit an explanatory memorandum as part of the application pack, setting out the reasons behind the drafting of specific provisions in their Order.

80. A draft Order may include, but need not be limited to:

- A full description of the proposed development;
- Any associated development, where allowed for under the Planning Act;
- Terms to apply, modify or exclude a relevant statutory provision;
- The period of validity for the Order;
- Details of timings for any phased aspects of the development;
- Conditions stipulated by other licensing bodies;
- Details of any impact mitigation activities;
- Provisions to compulsorily acquire land;
- The authorisations necessary to implement the development, as well as provisions removing the need to obtain particular additional authorisations post consent (subject to the approval of the licensing body). Applicants are encouraged to include these, where possible, to take advantage of the benefits of aligning other consents within the order. Those responsible for non-planning authorisations and consents should support such an approach wherever possible.
- Any necessary requirements, along with the mechanisms for discharging these, including the responsible authority and any appeal mechanisms;

[21] Applicants may find it helpful to refer to Advice Note 6, preparation and submission of application documents as published by the Inspectorate and Advice Note 13, preparation of a draft order granting development consent and explanatory memorandum: http://infrastructure.planningportal.gov.uk/wp-content/uploads/2012/06/Advice-note-6-version-5.pdf ; http://infrastructure.planningportal.gov.uk/wp-content/uploads/2012/03/Advice-note-13.pdf

- Provisions dealing with any transfers of liabilities and benefits of the Order or any specific provisions of the Order.

81. Applicants with projects that will take a considerable amount of time to be completed are likely to want to allow for some degree of flexibility in the Order, for example to allow them to take advantage of future, as yet unknown, technological developments, the requirements of occupiers (for example, of rail freight interchanges), and capacity considerations. This poses specific challenges, as the draft Order needs to be detailed enough to allow the Secretary of State to make an informed and balanced decision on the benefits of the project and its impacts.

82. Where applicants identify aspects of their proposed project where they want this flexibility, they may wish to include provisions in the Order concerning the discharging of particular finalised aspects of the project and the nomination of a specific discharging authority. Applicants should ensure that they have consulted with the proposed authority about their proposals and they should include a rationale for their approach along with their application, for example in their consultation report or explanatory memorandum. It may be more appropriate for particular types of projects to adopt the Rochdale Envelope approach (see paragraph 85 below).

83. There may be circumstances where despite extensive consultation, the applicant is unable to determine a preferred option for a particular aspect of a development. This may happen, for example, where consultees differ in support of one or more options or there is no other overriding factor for determining between them. Equally, the best option in environmental assessment terms will not always equate with the option favoured by the local community. There will be benefits to all parties in being able to consider the balance of arguments for and against options in these circumstances. Therefore, it is permissible to include more than one option in the draft Order, and to allow the issue to be explored as part of the examination of the application, provided that:

- all options have been fully consulted on;

- that the environmental impacts for all such options have been fully considered and assessed and included within the Environmental Statement submitted with the application;

- where relevant, that the options are included in ‘land plans’ and the ‘book of reference’ for the purposes of compulsory acquisition;

- where relevant, that the options are included in the draft DCO, and shown on the 'works plans'.

- applicants have ensured that they have included a rationale as to why it has not been possible to finalise the option prior to submission of the application;

- this mechanism is not used to include within an application options which effectively constitute different projects, or as a substitute for proper options appraisal.

A Development Consent Order as a Statutory Instrument

84. Applicants may find it necessary to apply, modify or exclude a statutory provision as part of their draft Development Consent Order. If this is the case, the draft Order has to be made as a statutory instrument.

85. The Secretary of State will need to confirm that the application, modification or exclusion of a statutory provision in the Order do not contravene European Community law or any Convention rights. It may therefore be necessary to amend the draft Order to ensure that no contraventions arise.

Considering cumulative impacts

86. Applicants should consider the potential cumulative impacts on an area as a result of increasing development in the proposed area, as well as those developments which are:
    - in the process of being built;
    - permitted application(s), but not yet implemented;
    - submitted application(s) not yet determined;
    - projects on the National Infrastructure's programme of projects;
    - identified in the relevant development plan (and emerging development plans - with appropriate weight being given as they move closer to adoption) recognising that much information on any relevant proposals will be limited, and
    - identified in other plans and programmes (as appropriate) which set the framework for future development consents/approvals, where such development is reasonably likely to come forward.

87. It may not always be easy for applicants to assess potential impacts fully due to lack of available information. In such circumstances, applicants should take a pragmatic approach when determining what is feasible and reasonable. They should satisfy themselves that they have made all reasonable efforts to identify the main impacts and to

include mitigation measures in their draft Order. There may be occasions when projects assessed for cumulative impacts will not ultimately be built - so only those identified through scoping opinion, or for which development consent has been granted or applied for, should reasonably be considered. As with the parameters for the Rochdale Envelope, applicants should fully explain their options to the Secretary of State as part of their application. National Policy Statements[22] provide a useful overview of common impacts and ways of mitigating them.

Flexibility on the detail of the proposal (the "Rochdale Envelope")

88. The term "Rochdale Envelope" refers to the additional flexibility given to certain applications under the Planning Act, particularly in those cases where there are good reasons why the details of the whole project are not available at the time of submitting the application.

89. It is expected that draft Development Consent Orders submitted will generally closely reflect the actual final development. However, there may be times where a degree of flexibility is required, over and above the situation described in paragraphs 77-78. For example, the Overarching National Policy Statement for Energy[23] identifies the use of the so called Rochdale Envelope approach as a suitable way forward in these circumstances.

90. The principles of the Rochdale Envelope are that where there are clear reasons why it would not be possible to define a project fully in the short term (thereby delaying significantly the submission of an application) then applicants should be afforded a degree of flexibility, within clearly defined and reasonable parameters. These parameters should be no greater than the minimum range required to deliver the project effectively and applicants will have to justify these parameters to the Secretary of State when they submit their application. Care should be taken to ensure that the proposed parameters are not so great that they effectively may give rise to a separate project.

91. The use of the Rochdale Envelope approach does not remove the onus on applicants to submit as detailed as possible project proposals in their application, and it should certainly not be an excuse for an unnecessary degree of flexibility. The Inspectorate and the Secretary

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22 For more information, see: http://infrastructure.planningportal.gov.uk/legislation-and-advice/national-policy-statements/

23 http://www.decc.gov.uk/assets/decc/11/meeting-energy-demand/consents-planning/nps2011/1938-overarching-nps-for-energy-en1.pdf

of State will need to be satisfied that, given the nature of the project, they have full knowledge of the likely significant effects on the environment. In particular, care should be taken to ensure that the likely environmental effects, within the defined parameters, are assessed and, where possible, mitigated against. It is accepted that it may not always be possible to assess every impact and so it may be appropriate to consider a 'worst-case' scenario which can serve as an overarching reference point for mitigating actions. In addition where it is considered that too much flexibility has been used, and therefore there is uncertainty as to the likely significant effects, then more detail can be required or consent can be refused.

92. Applicants should satisfy themselves that they have provided enough information and in the clearest manner possible for the Secretary of State to make a full assessment of the impacts of the proposed project. To aid this, it may be practical to set out the project proposals in terms of minimums and maximums, to better illustrate the scale of the parameters and the likely effects for different scenarios.

The Secretary of State's acceptance of applications

93. Before an application can be accepted, the Planning Act requires that the Secretary of State must be satisfied that the applicant's pre-application consultation has complied with the provisions in the Act. The Secretary of State's judgement on this will be based on:

- whether the procedure set out in the Planning Act has been complied with;
- the extent to which the applicant has had regard to this guidance;
- any other statutory guidance published by the Secretary of State;
- the applicant's consultation report;
- any representation from the relevant local authority as to whether the applicant has complied with sections 42, 47 and 48 of the Planning Act (the adequacy of consultation report).

94. In particular, applicants should be able to demonstrate that they have acted reasonably in fulfilling the requirements of the Planning Act, to take account of responses to consultation and publicity. The Government recognises that applicants and consultees will not always

agree about whether or how particular impacts should be mitigated. The Secretary of State is unlikely to conclude that the pre-application consultation was inadequate (on the basis that particular impacts had not been mitigated to an appropriate degree) if the applicant has acted reasonably.

95. The Planning Act specifies that the Secretary of State must decide whether or not he or she will accept an application within 28 days of receipt.

96. Ultimately it is in the applicant's interest to ensure that the application is as well prepared as possible in advance of submission to the Secretary of State, to ensure that examination of the application is as straightforward as possible. Under-prepared applications are likely to lead to longer and more complex examinations; and therefore higher costs for applicants.

Annex:

Relevant provisions of the Planning Act

Section 41: defines some of the terms used in the chapter covering pre-application procedures.

Section 42: places a duty on the applicant to consult certain bodies about a proposed application:

- The Marine Management Organisation, where relevant;
- parties specified in secondary legislation (as set out in the Infrastructure Planning (Applications: Prescribed Forms & Procedure) Regulations 2009);
- relevant local authorities (defined in section 43);
- the Greater London Authority if the land is in Greater London;
- people within the categories set out in section 44.

This list does not mean that other parties should not be consulted; it merely identifies certain parties that an applicant is legally obliged to consult before they submit an application.

Section 43: defines what a local authority is for the purposes of section 42 i.e. any local authority in whose area proposed development would be sited and neighbouring authorities sharing a boundary. The definition includes National Park authorities and the Broads Authority.

Section 44: provides a list of categories of people who should be consulted under s.42(d), including owners, tenants, lessees or occupiers of the land, people with an interest in the land or with the power to sell, convey or release the land, or people who could have a claim for compensation as a result of the development going ahead.

Section 45: sets out a timetable for consultation under section 42, consisting of a 28 day minimum period within which responses to the consultation must be received.

Section 46: requires the applicant to send to the Secretary of State the same information the applicant would need to send to consultees under section 42, before section 42 consultation begins.

Section 47: requires the applicant to consult the local community. The applicant must draw up a statement explaining how it intends to carry out consultation with the people who live in the vicinity of the land it wants to develop. Before drawing up the statement, the applicant must consult the relevant local authority (or authorities if the land needed for the project crosses local authority boundaries) about what the statement should say. The local authority then has 28 days to reply to the applicant.

The applicant must:

- have regard to any responses from the local authorities about the statement when preparing it;

- having prepared the statement, then make the statement available for inspection by the public in a way that is reasonably convenient for people living in the vicinity of the proposed project, publish a notice in a newspaper circulating within the area of the land he wants to develop stating where and when the statement may be inspected, and publish the notice in such other manner as may be prescribed;

- carry out the consultation as laid out in its statement.

Section 48: requires the applicant to publicise the proposed application in accordance with secondary legislation (see the relevant provisions of the Infrastructure Planning (Applications: Prescribed Forms & Procedure) Regulations 2009), and include a deadline for receipt of responses to publicity.

Section 49: requires the applicant to have regard to the relevant responses to all consultation and publicity under sections 42, 47 and 48.