

# IPC Infrastructure Planning Commission

## IPC GUIDANCE NOTE 2 ON PREPARATION OF APPLICATION

### DOCUMENTS UNDER S37 OF THE PLANNING ACT 2008

7 December 2009

#### **Introduction by the Chair of the IPC**

The Planning Act 2008 (“Act”) has transformed the arrangements for obtaining development consent for nationally significant infrastructure projects (“NSIP”). The new regime offers advantages for all concerned, including improved opportunities for the public, local authorities, consultees and objectors to get involved and have their say.

This guidance is about preparing the documents that must be submitted with an application for development consent. Promoters need to encourage and listen to a large number of people and organisations when developing their proposals and then produce applications of the highest standard to allow the IPC to carry out robust and efficient examinations of applications. Promoters will rely on the public and all of the people consulted to provide them with the information required to enable those high standards to be reached. We hope this guidance will encourage all parties to fully engage in that process.

#### **Context**

1 This guidance is to assist those involved in preparing applications for development consent for nationally significant infrastructure projects (NSIPs) and those involved in making representations on applications. **The relevant statutory provisions and guidance prepared by the Secretary of State should be read first**, and this is detailed below.

2 This guidance will be taken into account by the IPC when deciding whether to accept the application under s55 of the Act and in particular whether the application meets standards set in this guidance. It also

concerns pre-application processes and therefore should be taken into account by applicants under s50 of the Act. Other parties may find it useful to enhance understanding of the steps undertaken before an application is formally submitted to the IPC.

- 3 This is the second guidance note produced by the IPC and addresses the preparation of application documents. It will be developed further as all parties gain more experience of operating the process of the submission and examination of applications for development consent. We therefore welcome comments on the content of this guidance especially where examples of best practice have been developed.
- 4 The specific areas covered by this guidance have been chosen either because we have been asked questions concerning these application documents or because we consider there is a high risk to applicants that the IPC will not accept applications where documents have been prepared with insufficient rigour. Even if the application is accepted the examination period could be extended (at greater cost) whilst further information is sought and consulted upon.
- 5 The IPC can advise on aspects of the production of application documents (but not the merits of the proposal) when those are still in draft form prior to submission of the application, and we will ask the applicant to circulate to appropriate consultees and make available generally any drafts provided to us. Any draft would need to clearly be labelled as such.
- 6 The legislation at the date of issue of this guidance and relevant to the application stage includes:-
  - [The Planning Act 2008](#): ss37-40, ss55-59;
  - [Infrastructure Planning \(Applications: Prescribed Forms and Procedure\) Regulations 2009](#) (“APFP”): Regulations 5-10;
  - [Infrastructure Planning \(Model Provisions\) \(England and Wales\) Order 2009](#).
  - [The Infrastructure Planning \(Environmental Impact Assessment\) Regulations 2009](#) (regs 4-11) (“EIA Regulations”);

- [The Conservation \(Natural Habitats etc\) Regulations 1994](#) and [Conservation \(Natural Habitats, etc.\) \(Amendment\) \(No.2\) Regulations 2009](#) (“Habitats Regulations”).
- 7 The relevant guidance issued by Communities and Local Government is [‘Planning Act 2008: Nationally significant infrastructure projects Application Form Guidance’](#). This IPC guidance supplements the CLG guidance.

### **Application documents – including standards set under s37(5) of the Act**

*What supporting documents are required?*

- 8 Regulation 5 of the [APFP](#) lists the documents that must be included in the application. These statutory requirements must be met. [CLG guidance on application forms](#) (noted at paragraph 7 above) provides general and useful guidance on the preparation of these documents. This IPC guidance sets minimum standards for production of all documents and guides and sets standards for some specific documents as indicated.

*Summaries of documents*

- 9 It is important for the IPC to be able quickly to identify issues that will be both important and relevant to its decision (which word in this guidance means either a decision or a recommendation made to the Secretary of State) on the application for development consent. It is therefore essential that each document includes a summary highlighting what in the applicant’s view such issues might be. This will assist all parties because these issues will be fed into the discussion to take place at the preliminary meeting, after which the IPC will confirm the position reached and produce a timetable and structure for the examination, known as a ‘procedural decision’. (See [Infrastructure Planning \(Examination Procedure\) Rules 2010](#)).

*Format of documents*

- 10 In all cases the application documents must be paginated and paragraphs must be numbered. Every document must contain a clear title page which identifies the project, the date of revision, author(s) and the appropriate Regulation 5(2) paragraph number to which the document relates. The document must also contain a table of contents setting out chapter or

topic headings, unless it comprises a short statement of no more than two A4 pages. Where the document provided comprises a plan or plans, these must also be clearly labelled in the bottom right hand corner with 'title page' information; a list of revisions should be produced so at any stage it is easy to identify the latest version of the plan.

#### *Copies and media for application*

- 11 The applicant should submit 3 paper copies of the full application submissions together with a list of all of the application documents that accompany the prescribed form (see Schedule 2 of the APFP). In addition, the IPC should be provided with an initial further 10 copies of the full application submissions compiled on DVDs (in a format to be agreed in advance with the IPC). The IPC may need to request additional paper or DVD copies on a case by case basis.

#### *Consultation Report*

- 12 An application must be accompanied by the applicant's Consultation Report prepared under s37 (7) of the Act. That report should draw together:-

- An account of the statutory consultation, publicity, deadlines set, and community consultation activities undertaken by the applicant at the pre-application stage under sections 42, 47 and 48;
- A summary of the relevant responses to the separate strands of consultation; and
- The account taken of responses in developing the application from proposed to final form, as required by s49(2).

- 13 We have produced guidance on the pre-application stages including consultation (see [IPC guidance note 1](#)) to supplement CLG guidance. The consultation itself should be carried out in a way that allows the submission of a robust and detailed report at the application stage. A list of the individual responses received should be provided and categorised in an appropriate way. For example, consultation responses should be listed by statutory consultees (under s42 and Sch 1 of the APFP), local authorities, landowners and then local community consultation responses resulting from consultation in accordance with the statement of community

consultation (“SOCC”) produced under s47. The list should also make a further distinction within those categories by sorting responses according to whether they contain comments which have led to changes to matters such as siting, route, design, form or scale of the scheme itself, or to mitigation or compensatory measures proposed, or have led to no change. A summary of responses by appropriate category together with a clear explanation of the reason why responses have led to no change should also be included including where responses have been received after deadlines set by the promoter.

*Draft Order and Explanatory Memorandum*

- 14 Applicants for an order granting development consent for a NSIP must include a draft of the proposed Order with their application (s37(3)(d)); APFP Reg 5(2)(b)). This will be considered by the IPC in making its decision on the application. This is in draft form but it does set the parameters for what may be permitted. The decision-maker (whether the IPC or Secretary of State as appropriate) may amend the draft if it decides to grant development consent, however, the draft Order is a key application document.
- 15 The draft Order should include a full description of the development for which development consent is required, including any necessary associated development. The latter is subordinate to the NSIP, but necessary for the development to operate effectively to its design capacity, for example warehousing related to a rail freight interchange (s115(1)-(2)). [CLG Guidance](#) is available on associated development.
- 16 The draft Order should also include provisions relating to the following areas:-
  - Provisions giving the developer authority to take actions necessary for the project to be implemented satisfactorily. These might include, for example, authority to compulsorily acquire land, or to stop-up streets or extinguish private rights of way, or to carry out protective works to buildings (s120(3)-(4)); Sch 5 of the Act);
  - Other provisions which are necessary for the purposes of the project, or matters ancillary to it, for example, applying or amending existing

legislation, or modifying agreements, or protecting the interests of persons potentially affected by compulsory land acquisition.

- Requirements are similar to conditions under existing consent regimes, for example specifying the matters for which detailed approval needs to be obtained before the development can be lawfully begun, for example a detailed landscaping scheme. The IPC will be the body to whom details are to be submitted for subsequent approval but the local planning authority will enforce any breach of the terms of any order granted.

17 The description of the development together with the provisions (including requirements) will determine what is authorised to be carried out. It is the responsibility of applicants (not the IPC) to ensure that the draft Order applied for would provide them with all the necessary authorisations to implement their scheme. Applicants are therefore advised to consider engaging a person with the necessary legal expertise to draft their Order. Clarity and precision in the description and drafting of the provisions can prevent future uncertainty over whether development is carried out within the terms of the order.

18 As indicated in paragraph 5 of this guidance note the IPC can advise on the production of application documents (not their merits), and welcomes submission of a draft Order in order to save time and potential problems during the process of examining an application, for example, if a draft Order needed to be substantially amended. The applicant is advised to provide the draft Order to the IPC well in advance of submitting its application and certainly not less than 6 weeks beforehand. The draft Order should also be made available to other parties who may have useful comments on the operation of the Order. The IPC will be prepared to offer comments on technical/drafting aspects of the draft Order without prejudice to its eventual decision.

19 The draft Order is also important because it should reflect the defined scheme that has resulted following the assessment of environmental impacts within any environmental statement (“ES”) submitted with the application. In defining the form, scale, location and elements of the scheme including any restrictions, or limits of deviation if any subsequent

flexibility is to be allowed, the draft Order (in particular its provisions) will set the parameters of the scheme. Such parameters as set out in the draft Order must relate to the assessment of environmental impacts that has been carried out. It is vital that the draft order and the ES are mutually consistent.

- 20 In view of the significance of the draft Order and the challenge its preparation may present to applicants, model provisions are provided in the [Infrastructure Planning Model Provisions Order 2009](#). These include provisions which could be common to all NSIPs, others which will be useful to particular infrastructure development types and others relating to requirements. The advantages of model provisions include consistency, and assisting applicants to draft a comprehensive set of lawful provisions. Model provisions are intended as a guide for applicants in drafting orders, rather than a rigid structure.
- 21 It should be noted that if a development consent Order seeks to include the compulsory acquisition of certain special categories of land, such as local authority, statutory undertaker, National Trust or common land, then additional procedures apply. These are either that a provision authorising the compulsory acquisition of such land cannot be included in an Order unless the appropriate certificate of authorisation is issued by the Secretary of State (and so the IPC will need to be provided with the certificate before making its decision); or in some cases once a decision to grant an Order is made, the Order will be subject to special parliamentary procedure before it comes into effect (s127-132). Promoters should obtain any required certificate before submission of the application wherever possible (under s127 and s131) or at least have made some progress towards obtaining any necessary certificate and include information in the Explanatory Memorandum confirming the stage reached in these procedures (for guidance related to procedures for compulsory acquisition, see [Planning Act 2008 Guidance related to procedures for compulsory acquisition](#)). The IPC will be able to advise on the process if special category land is to be included in the application.
- 22 It is also possible for a draft Order to include provisions which remove the need to obtain certain additional authorisations, for example an order

under s53 of the Wildlife and Countryside Act 1981 which modifies the definitive map of public rights of way. It is necessary for the authority responsible for granting the authorisation to consent to this process (see s150 of the Act). The list of authorisations which can be treated in this way are contained in Schedule 1 of the [Infrastructure Planning \(Miscellaneous Prescribed Provisions\) Regulations 2010](#). The Explanatory Memorandum supplied to the IPC by the promoter should identify the authorisation, the reasons why the promoter is following this route and should state how close the promoter is to achieving consent of the authority concerned. Where a promoter is seeking separate authorisations or licences these should be separately listed in the application submitted to the IPC (see [CLG Application form guidance](#))."

23 Please note that if a draft Order includes 'legislation provisions' to be made under s120(5) of the Act (for example, provisions amending other legislation), the Order (if made) would have to be made as a Statutory Instrument. In these cases, it would be particularly helpful if applicants could prepare their draft Orders using the Stationery Office template for Statutory Instruments, which can be found at [www.opsi.gov.uk/si/template](http://www.opsi.gov.uk/si/template).

24 The draft Order must be accompanied by an Explanatory Memorandum (Reg 5(2)(c)) explaining the purpose and effect of each provision in a draft Order (explaining, for example, why it is considered necessary) and any departures from the model provisions. In addition to including any comments on issues mentioned in paragraphs 21 to 23 above, the Explanatory Memorandum should identify relevant precedents for non-standard provisions.

*Development consent obligations ('s106 obligations')*

25 The Act amends the Town and Country Planning Act 1990 so that development consent obligations can be entered into in connection with an application for an order granting development consent (s174 of the Act). Development consent obligations do not form part of the draft Order but they are important because they will affect the overall impact of a proposed development on the local area. The local planning authority

remains the party who will enforce such obligations and would potentially be the beneficiary of financial contributions lawfully offered and related to the development. Legal obligations of this kind can be useful, for example, in securing off-site benefits to mitigate adverse impacts of an infrastructure development, such as tree planting on other land within the applicant's control.

- 26 Promoters should agree at least the heads of terms of any development consent obligation with the relevant local authority before an application is submitted. Ideally a fully drafted agreement (or unilateral undertaking) which has been consulted upon and referred to in the consultation report should be included with the application. It is important that the local authority is able to take into account any development consent obligations in its local impact report and therefore the earlier the obligations can be produced and agreed the more robust the local impact report is likely to be.

*Documents which may refer to the environmental statement*

- 27 A flood risk assessment will be submitted in appropriate cases to support an application (Reg 5(2)(e)). This will be prepared with appropriate consultation with the Environment Agency. A separate flood risk assessment will need to be submitted in the unlikely event in this case that an ES is not required in connection with the application. In situations where an ES is submitted with the application the applicant may choose to provide a flood risk assessment as an appendix to the ES, with an assessment included in an appropriate chapter such as that dealing with hydrology matters.
- 28 A statement on matters covered by the Environmental Protection Act 1990 Section 79(1) should deal with any effects of the proposed development that would constitute a statutory nuisance and how they would be controlled or mitigated. If applicable, this information will be covered by any ES. The IPC will in that event still require a statement confirming the position in relation to statutory nuisance matters. The statement should contain references to detailed information on assessment and mitigation contained within the ES where one is submitted.

## **European sites and Habitats Regulations matters**

29 The IPC, or the Secretary of State in appropriate cases, must consider whether a project is likely to have a significant effect on designated European sites and if that is the case, it will require sufficient information within the application to enable the IPC or Secretary of State to carry out an appropriate assessment under the [Habitats Regulations](#)<sup>1</sup>. The report to be submitted under Reg 5(2)(g) of the APFP with the application must deal with two issues. The first is to enable a formal assessment of whether there is a likely significant effect and the second, should it be required, is to enable the carrying out of an appropriate assessment. Determinations on both matters will be undertaken during the examination process.

### *Sufficient information to assess significant effect*

30 As part of the pre-application process (see [IPC guidance note 1](#)) the IPC encourages submission of sufficient information on the proposal and any potentially affected European sites to enable subsequent consideration of whether a significant effect on such sites is likely. It is possible that the applicant will have made fully reasoned representations (supported or otherwise with responses from statutory environmental bodies) to claim that a significant effect is not likely. The IPC cannot make a formal determination on the need for an appropriate assessment except as part of the formal examination, and so full representations and supporting material must be set out in the report to be submitted with the application under Reg 5(2)(g). If this information is not submitted to support an application, in circumstances where European sites may be affected, that in itself will be sufficient reason for the IPC to refuse to accept an application under s55 of the Act.

### *Sufficient information to carry out appropriate assessment*

31 The applicant (as well as the IPC when sufficient material is presented to it) will have consulted with any relevant statutory environmental bodies

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<sup>1</sup> Guidance on this topic is included in the Government Circular: Biological Diversity and Geological Conservation – Statutory Obligations And Their Impact Within The Planning System which can be found at <http://www.communities.gov.uk/documents/planningandbuilding/pdf/147570.pdf>

throughout the pre-application process so that the applicant can prepare required information and the IPC is able to judge whether sufficient information has been provided to allow an appropriate assessment to be carried out. The report submitted with the application (under Reg 5(2)(g)) must provide the information required to carry out an appropriate assessment, including any proposed compensatory measures. This report will also provide the opportunity for the applicant to set out its case for allowing development to go ahead in the event that the IPC considered the proposal would adversely affect the integrity of a European site under Regulation 48. The applicant's case should be structured by reference to the tests that must be applied under Regulation 49 and deal with compensatory matters under Regulation 53 of the Habitats Regulations.

- 32 The applicant is encouraged to explain clearly where any information within the report submitted under Reg 5(2)(g) either draws on (or indeed where it expands upon) information within the ES. However in all cases it must be clear to all parties that the ES is a standalone document due to requirements of the EIA Regulations, and there must be a document which, with cross referenced material, can be clearly identified as the Habitats Regulations report.