

## IPC GUIDANCE NOTE 1 ON PRE-APPLICATION STAGES (CHAPTER 2 OF THE PLANNING ACT 2008)

Revision 1

29 March 2010

### **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. 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. Since opening for business in October 2009 more than 20 projects have been notified to the IPC and we have been advising promoters and statutory consultees on the new processes, including helping with the scoping of environmental statements. This guidance note is about the pre application stage and is a revision of the guidance produced in December 2009 which has been developed to share the lessons which we have learnt and the best practice which has evolved. We hope this revised guidance will help promoters to engage effectively and to meet their statutory responsibilities in the pre-application phase.

### **Context**

- 1 This guidance is to assist those involved in the procedures leading up to the submission of an application for development consent for nationally significant infrastructure projects (NSIPs). The **relevant statutory provisions and guidance prepared by the Secretary of State should be read first**, and this is detailed below.

2 An applicant for development consent must have regard to this guidance under s50 of the Act. Other parties may find it useful to enhance understanding of the procedures before an application is submitted formally to the IPC.

3 This is the first revision of the pre-application guidance note produced by the IPC on 7 December 2009. It will be kept under review and will be developed further as all parties continue to gain experience of the process.

4 The legislation at the date of publication of this guidance and relevant to these pre-application activities includes:-

- [The Planning Act 2008](#) (“Act”) (s 37(3)(c)), and Part 5 Chapter 2);
- [The Infrastructure Planning \(Applications: Prescribed Forms and Procedure\) Regulations 2009](#) (regs 3-4 and 12) (“APFP Regulations”);
- [The Infrastructure Planning \(Environmental Impact Assessment\) Regulations 2009](#) (regs 4-11) (“EIA Regulations”);
- [The Infrastructure Planning \(Model Provisions\) \(England and Wales\) Order 2009](#) (“Model Provisions Order”);
- [The Conservation of Habitats and Species Regulations 2010 and Conservation \(Natural Habitats, etc.\) \(Amendment\) \(No.2\) Regulations 2009](#) (“Habitats Regulations”).

5 The relevant guidance published by Communities and Local Government is ‘[Planning Act 2008: Guidance on pre-application consultation](#)’. This IPC guidance document supplements that guidance and avoids duplication.

6 This guidance on pre-application consultation relates the consultation requirements to the procedural steps to be taken on the EIA screening and scoping process and to a determination of whether the project requires an appropriate assessment to be undertaken by the IPC under the Habitats Regulations.

7 The guidance that follows addresses in particular procedural issues concerning the following steps, and how those interrelate:-

- Options for pre-application programme;
- Notification to the IPC of the application;

- The EIA and scoping process;
- Consulting the local community.

### **Options for pre-application programme**

- 8 The statutory requirements allow some flexibility for promoters to determine the most applicable programme by which they will be able to comply most effectively with their duties. The overriding intention of the legislation is to ensure that detailed matters are consulted upon and solutions or mitigation negotiated with the local community, landowners, statutory consultees and local authorities before submission of the application for development consent to the IPC.
- 9 The IPC encourages applicants to submit draft application and supporting documents to it whilst they carry out consultation and work up detailed proposals in order that quality issues can be identified before the application is submitted to the IPC. The IPC will not advise on merits of proposals but will be able to provide applicants with non-binding feedback as to whether the documents are likely to cover sufficient material and have been prepared to the necessary high standards. When submitting documentation to the IPC applicants should also submit it to the local authority and other parties with whom consultation is ongoing. This will ensure that those bodies are aware of the nature of the exercise that is being undertaken and so they may provide suggestions to the applicant should they wish to do so. To assist the IPC in providing constructive technical comments on the draft documentation submitted for advice copies of any relevant correspondence with local authorities and other parties (for example in relation to any agreement reached on proposed requirements or provisions) should also be supplied. Guidance has been produced on the production of application documents (see the [CLG guidance note](#) and the [IPC guidance note 2](#)).
- 10 Annex B of [CLG guidance](#) shows in diagrammatic form two options for the pre-application process; one example shows discrete phases of consultation related to the scoping of an environmental statement to be submitted with any application. Other options are possible.

- 11 Where an application will be subject to processes under the EIA Regulations and the Habitats Regulations there will be considerable consultation with statutory environmental bodies, and others with useful local knowledge, to obtain their considered views on the potential environmental impacts of a proposal. It is for promoters to best judge at what stage in the formulation of project proposals to commence formal consultation with those bodies and how that relates to the local community consultation.
- 12 The following steps are set out in summary here - with more detail below - as the IPC's view of the most likely order (some steps will be undertaken in parallel) for various procedural steps:
- Request for screening direction from IPC or notification that it is proposed to provide an environmental statement under regulation 6 of the EIA Regulations<sup>1</sup>.
  - Submission of material to the IPC, on whether the project is or is not considered likely to have a significant effect on a European site. The applicant will need to consult with statutory environmental bodies<sup>2</sup> (and other relevant authorities where additional consents e.g. in respect of SSSIs may be required) on this issue and the IPC would welcome representations and supporting information from promoters on this matter at a very early stage.
  - Request for scoping opinion from the IPC on the required environmental statement under regulation 8 of the EIA Regulations. This step may occur after a s46 notification.
  - s46 notification to IPC accompanied by such documents as required for s42 consultation to be undertaken with local authorities, statutory consultees, landowners and others significantly affected (see below). This step must occur on or before the s42 consultation start date.<sup>3</sup>

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<sup>1</sup> Notification under regulation 6 must be made before carrying out consultation under s42.

<sup>2</sup> This term is commonly used by those involved in nature conservation and planning processes and here means those organisations that have a statutory role in commenting on nature conservation issues.

<sup>3</sup> s46(2)

This step may also be combined with a regulation 6 notification (see further below).

- Formal consultation on the proposed application under s42 with local authorities, statutory consultees and landowners (see further below).
- s47 duty to first consult the local authority in respect of the Statement of Community Consultation (“SOCC”). The SOCC needs to state whether the proposal is EIA development and how the preliminary environmental information is to be consulted upon (Reg 10 of the EIA Regulations), and so when an applicant consults a local authority on the SOCC the local authority will need to have the preliminary environmental information<sup>4</sup> available at that time so that its response can be an informed one. The consultation with local authorities under s42 and contact with local authorities on the SOCC under s47 can occur in parallel.
- Publicising the application under s48 and regulation 4 of APFP Regulations. It would be helpful if the published deadlines for receipt of views on the application are as close as possible to deadlines given to landowners and local authorities etc. in the s42 consultation.

13 Applicants should be aware that where insufficient information (either for the purpose of EIA Regulations or Habitats Regulations assessments has been provided to the IPC at application stage the IPC will refuse to accept the application (see [IPC guidance note 2](#)) and therefore early consultation with the IPC on these issues is very important.

#### *Notifying the IPC of a proposed application*

14 If the promoter considers that the project is a NSIP which requires development consent under the Act, it must notify the IPC of the proposed application (s46). This must be done on or before commencing formal pre-application consultation and the IPC must be sent the same information as proposed to be used for the s42 consultation; the intention is therefore that the two steps will happen relatively close together.

15 The applicant may choose also, at this time, to notify<sup>5</sup> the IPC that it is proposed to provide an environmental statement in respect of the

<sup>4</sup> “Preliminary information” is defined in regulation 2 of the EIA Regulations

<sup>5</sup> In accordance with regulation 6(1)(b) of the EIA Regulations

development. A regulation 6 notification imposes<sup>6</sup> on the IPC a duty to notify certain consultation bodies<sup>7</sup> in order to facilitate the preparation of the environmental statement. The notification may be incorporated within the s46 notification but should be identified expressly as a notification under regulation 6.

16 The IPC encourages applicants to notify it as soon as feasible as it assists the IPC in its processing both by allocating staff to particular projects and by storing and managing information received relating to a definite proposed project.

#### *EIA development and scoping process*

17 It is for the applicant to determine when to notify the IPC under regulation 6 (subject to notification being made before the s42 consultation is commenced) and when, or whether, to request a scoping opinion<sup>8</sup>.

18 If a regulation 6 notification or scoping request is received the IPC must notify<sup>9</sup> or consult<sup>10</sup> the consultation bodies. These are bodies prescribed under s42(a) of the Act and bodies prescribed by the APFP Regulations. The IPC has prepared an [advice note](#) to clarify the IPC's understanding and application of the APFP Regulations. Further guidance is also provided below which relates the IPC's obligations under the EIA Regulations to an applicant's duties under Chapter 2 of Part 5 of the Act.

#### *Consultation stages*

19 Deciding when to submit a formal s46 notification to the IPC will depend to some extent on how the promoter wishes to carry out its formal consultation. There are two separate formal stages of consultation on the proposed application: one under s42 with statutory consultees, local authorities, landowners and significantly affected persons and a second with the local community in accordance with the SOCC. Therefore the s42 consultation can be carried out first and some changes to the scheme already made as a result - for example to take account of fundamental

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<sup>6</sup> Regulation 9 (1)(a)

<sup>7</sup> These bodies are defined in regulation 2 of the EIA Regulations

<sup>8</sup> In accordance with regulation 8 of the EIA Regulations

<sup>9</sup> In accordance with regulation 9(1) of the EIA Regulations

<sup>10</sup> In accordance with regulation 8(6) of the EIA Regulations

environmental issues such as flooding - before the community consultation is carried out. A balance needs to be achieved between providing well developed details which may only be possible after extensive project development work and a less precise definition which can be amended in the light of consultation. The IPC will expect the balance between these issues to be carefully considered, and it may be that an approach to the local authority under s47 prior to publishing the SOCC could seek the local authority's advice on whether an early community consultation would be advisable in the circumstances of the case.

There is nothing laid down in the Act or relevant Regulations that requires preliminary environmental information to be provided at the s42 consultation stage<sup>11</sup> but it is important to be aware of the matters to be publicised about the application (under s48 and Reg 4 of the APFP Regulations) and importantly the s49 duty to take account of responses to both the s42 consultation and to the local community consultation. If very little information on the project is provided to local authorities, statutory consultees, landowners and others at the s42 stage, the ability to demonstrate comments have been taken into account in developing the proposal could be hampered. The promoter is of course encouraged to carry out on-going consultation with statutory consultees before submitting its application to the IPC; this will assist the promoter to comply with its s49 duty.

20 It is therefore possible to comply with the statutory requirements under s46 and s42 of the Act with less than full information on the application, but unless there is a clear iterative consultation process followed and further documentation provided to consultees during the process the promoter will risk being unable to demonstrate that the scheme was carefully considered in the light of consultation responses received. The consultation report to be submitted with the application is where the promoter will set out how in its view it has complied with its duties (see [IPC guidance note 2](#)).

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<sup>11</sup> Paragraph 92 of CLG Guidance on pre-application consultation will be amended to take account of this point.

21 When meeting their statutory pre-application obligations under s42 of the Act applicants must make diligent inquiry, carry out their own investigations and take legal advice as appropriate. Applicants may nonetheless find it helpful to recognise and understand the approach taken by the IPC when meeting the IPC's own obligations under the EIA Regulations (see the relevant [advice note](#)). The IPC has undertaken a careful review of the consultation bodies prescribed under s42(a) of the Act and considers that its approach to identifying those consultation bodies is reasonable and proportionate.

Before accepting an application for examination the IPC must conclude that the applicant has complied with Chapter 2 of Part 5 of the Act (pre-application procedure). If applicants identify and consult fewer consultation bodies (as part of their s42 obligations) than the IPC consults in relation to a scoping opinion request a clear explanation should be provided when the application is submitted. This will assist the IPC to reach a conclusion about whether or not to accept the application<sup>12</sup>.

22 The consultation report will enable applicants to flag and explain any differences between the IPC's consultation under the EIA Regulations<sup>13</sup> and their own s42 consultation. Differences may arise as a result of additional information becoming available to promoters as part of their due diligence exercise which was not available to the IPC when identifying consultation bodies or because promoters have, on the basis of additional information, properly exercised judgment and reached a different decision. This should be made clear in the consultation report.

### **Consultation with the local community and the role of the SOCC**

23 The principles and objectives for community consultation are fully explained in the [CLG guidance on consultation](#), see in particular

<sup>12</sup> In accordance with s55(3)(e) of the Act

<sup>13</sup> IPC scoping opinions include a list of consultation bodies consulted before adopting the scoping opinion. The IPC is also required to inform the applicant, under regulation 9(1)(b) of the consultation bodies notified.

paragraphs 8-20. There is a statutory duty on the potential applicant to carry out the consultation as proposed in the SOCC (s47(7)) and therefore the content of that document is important so that the community understands on what and how it will be consulted.

*Why involve local authorities?*

24 Local authorities need to be consulted on the content of the SOCC (s47(2)). Their knowledge is key. For example, socio-economic, cultural, historical and other characteristics may influence decisions on the geographical extent of consultation and the methods that will be most effective in the particular local circumstances. Local authorities will also hold valuable information on umbrella community groups in the local area which could complement responses from the population generally.

*Publication of SOCC*

25 Once finalised, the SOCC must be published in a newspaper circulating in the vicinity of the land (s47(6)(a)). In practice, to suit local press publishing requirements, the SOCC may need to be a concise document (see paragraphs 24-27 below on the SOCC content). However, in linear schemes affecting many different communities, there is no option but to include in the published SOCC all locations and dates for proposed local exhibitions or workshops, for example.

26 The important point is that the published SOCC needs to provide sufficient information on the project and its impact on the community to encourage constructive participation, which means the community must know exactly what will be done. It may be advisable in some cases for promoters to also make available to the public a separate document which sets out in more depth the factors that had led to the view taken on consultation catchment, timing and methods to be employed and refer to this in the published SOCC.

*Consultation catchment*

27 The appropriate area for consultation must include 'people living in the vicinity of the land' (s47(1)). The [CLG guidance](#) especially paragraphs 49-54 provides full guidance on this.

*Additional guidance on the content of the SOCC*

- 28 To ensure the local community appreciates the context within which they are being consulted, the SOCC should include a succinct summary of the IPC's role as examining authority, and draw attention to the status of NPSs. If a relevant NPS is in place, it is important to provide a realistic steer to the local community on the appropriate scope of any subsequent feed-back. It should also highlight the importance of the pre-application consultation in relation to the examination process after an application is accepted by the IPC.
- 29 The SOCC should provide sufficient detail of the project, referring to both positive benefits to the local community that would result from the development and to the issues which could be considered negative elements of the NSIP so as to encourage participation in the process. The scale of the proposal should be described. The SOCC should also indicate what information will be provided during the consultation process on the scope for any associated land restoration, landscaping, other mitigation or compensatory measures for natural habitats' impact.
- 30 The applicant should consider whether the most appropriate consultation will involve multiple stages, and whether there is a role for building knowledge at early stages which could help communities understand either technical or other elements of the proposal. It is more likely that the quality of response and the sense of satisfaction felt in the community that views have been taken seriously will be enhanced by enabling members of the public to give valuable, informed local insights. If the promoter decides such methods are appropriate to the scheme, the details should be included in the SOCC.
- 31 If relevant, the SOCC should also take account of any other major consultation exercises being undertaken in the area, for example in relation to planning applications or development plans proceeding under different legislation. The aim should be to achieve a programme that minimises confusion and possible 'consultation fatigue'. If the NPS relevant to the proposal is not yet in place and consultation on a draft NPS is planned or underway the SOCC publication and subsequent consultation should ideally follow the NPS consultation.

## **Transitional arrangements**

32 Promoters who have complied with regulation 12 of the [APFP](#) Regulations can take advantage of the transitional arrangements that apply to applications submitted to the IPC before 1 October 2011. This means that a promoter needs to have carried out between 1 October 2007 and 1 October 2009 the following steps in connection with a proposed application for development consent:

- commenced the s42 consultation i.e. with local authorities, all statutory undertakers detailed in schedule 1 of the APFP Regulations and landowners; and
- commenced consultation with the local community;
- publicised the proposed application in a way that “substantially fulfils” the requirements of regulation 4 of the APFP.Regulations. The detail of the publicity undertaken need not be identical to regulation 4 but the promoter needs to be satisfied that the community will have been aware of the proposal so that the promoter is able to demonstrate how comments from the community and s42 consultation have been taken into account in the formulation of the proposals.

33 Regulation 12 also requires the promoter to submit a report which says what the promoter has done and shows how responses received before deadlines set by the promoter as part of their consultation process have been taken into account.

34 In summary the substance of the consultation process that applies to an application must have been complied with but the transitional arrangements allow that some of the detailed procedural steps taken can differ.

## **Preparing for statements of common ground**

35 At the pre-application stage, the IPC encourages the promoter and any relevant parties to start preparation of statements of common ground setting out matters agreed and disagreed together with the reasons for agreement or disagreement. These are intended to deal with factual matters and evidence of relevance to the application. More guidance on

statements of common ground is available in [CLG Guidance for the examination of applications for NSIPs](#).

- 36 It would assist if a statement was agreed with the local authority where the proposal would be located. This would then form an agreed statement of common ground to be submitted during the examination process by the deadline set following the preliminary meeting.
- 37 Similar statements of common ground may also be prepared clarifying which are common areas of agreement between the promoter and any statutory consultee or with local representative groups, for example. The IPC encourages all parties to do preparatory work on such statements as early as possible in the process.

### **Preparing for local impact reports**

- 38 The local authority or authorities concerned will prepare a local impact report (“LIR”) for submission during the examination process. Focusing on the preparation of the LIR at the pre-application stage can be extremely valuable. The consultation under s42 of the Act will allow the local authority to identify areas of concern and begin to weigh which matters are most significant in its own consideration of the local impact of the proposal.
- 39 It would assist the IPC greatly if at the time the LIR is produced a local authority is able to indicate which social, environmental or economic issues have weighed most, and which the least. Furthermore where specific mitigation or compensatory measures are proposed either by way of proposed provisions, requirements or by way of development consent obligations these could be identified and weighed specifically in the LIR. The IPC therefore encourages local authorities to use the pre-application process both to start its own internal evaluation process but also to use that to respond appropriately to promoters when consulted.
- 40 The IPC has produced an [advice note](#) concerning the production of LIRs which is intended to assist local authorities with the form and content of LIRs.