

Insights

NSIP OPERATIONAL REFORM CONSULTATION: WILL IT IMPROVE THE PROCESS?

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SUMMARY

The Government is currently consulting on operational changes to the NSIP consenting process that have the potential to make significant improvements to parts of the DCO process. In this Insight we outline the changes proposed and discuss the areas that would also benefit from improvement but have been left out.

The Government launched a consultation at the end of July 2023 (which closes on 19 September) on operational changes to the NSIP consenting process that were outlined in the NSIP Action Plan published in February 2023 to improve the flexibility and resilience of the NSIP system so it can better handle the increasing pipeline of energy and other infrastructure projects and making the process more transparent and easier to navigate.

The government will bring forward these reforms through secondary legislation and Guidance under powers in the Levelling-up and Regeneration Bill.

This consultation does not cover strategic aspects of the NSIP reform programme, such as updating the existing National Policy Statements, proposals for Biodiversity and Marine Net Gain and changes to environmental assessment, which are being progressed separately.

REFORM AREAS

The key operational changes consulted on intended to make the system work more effectively for applicants, local authorities and communities. There are broadly three reform areas which are:

- **Operational reforms to support faster consenting** with an emphasis on delivering proportionate examinations, strengthening pre-application section 51 advice and introducing a fast-track consenting timeframe for projects that meet the proposed fast track quality standard.

- **Recognising the role of local authorities and strengthening community engagement with Nationally Significant Infrastructure Projects** with greater support and measures to embed community input and benefits much earlier in the process.
- **Improving system-wide capacity and capability** through developing skills and training and extending proportionate cost recovery by PINS and key statutory consultees to support the DCO process and build resilience into the system.

SUMMARY OF OPERATIONAL REFORM PROPOSALS

In summary, the changes proposed to the operational NSIP process include:

- **A new three tiered pre-application services from PINS:** This is hoped to be available from 2024 and would cover a **basic service** (for low complexity, uncontroversial projects with no or limited compulsory acquisition), a **standard service** (for potentially any project but not those seeking the fast-track) and an **enhanced service** (for those seeking the fast track and complex or controversial projects to identify and tackle complex issues). Each service will be priced to achieve cost recovery by PINS and would be available for a 12 month subscription period. No changes are planned to the PINS service to statutory consultees and others who will still receive advice without charge.
- **Enabling PINS to provide merits and procedural section 51 advice whilst maintaining impartiality:** Currently advice given in response to s51 requests focusses on procedural matters and requests for meetings. However, to facilitate PINS' new pre-application services, amendments to guidance will clarify PINS' role in providing procedural advice as well as views on planning questions ('merits advice') on a 'without prejudice basis' on pre-application and examination issues as part of its enhanced pre-application service. PINS would still not be able to give an opinion on the merits of an application, which is a matter for the Examining Authority.
- **Providing greater clarity for applicants on who to consult and when** by updating and consolidating the list of prescribed bodies which will help to proactively identify and resolve issues as early as possible.
- **Ensuring more effective and proportionate consultation through an early 'adequacy of consultation' milestone:** The current consultation burden can be disproportionately high. New and updated guidance will clarify that consultation should be proportionate while meeting statutory requirements. This will include guidance on expected levels of engagement which will be assessed at the early 'adequacy of consultation' milestone, linked to sections 47 and 48 of the Planning Act 2008 that will be embedded in the PINS' pre-application services. This will assess the adequacy of proposed consultation arrangements and provide clarity for

developers as to whether their consultation is proportionate to the project and more certainty as to whether the later tests of adequacy will be met.

- **Revising and updating pre-application guidance** to support a shift to greater emphasis on identifying and resolving key issues early in the pre-application process, providing clarity on proportionate consultation, the content and standard of applications, and publication of the application on the applicant's own website once submitted.
- **Support for faster and more flexible and proportionate examinations** by allowing the Inspector advising at the pre-application stage to also be the examining inspector, requesting more detailed relevant representations, discretion to set flexible deadlines during the examination, greater use of digital tools and updated guidance on the information requirements for both the pre-application and examination stages. New guidance on the preparation of the DCO that would cover standard clauses, approach to regular matters, transfer of the benefit of the Order, flexibilities, requirements and protective provisions, is also being considered. However, reinstatement of the Model Provisions Order is not proposed.
- **Establish a fast-track route to consent for projects** that are deemed capable of progressing through the process more quickly to be determined against the quality standards. PINS would set a statutory shorter examination timeframe of up to 4 months as part of a non-statutory target of 12 months from acceptance to decision. Applicants using this track must use PINS' enhanced pre-application service. The new fast track consenting timeframe is expected to be piloted from September 2023.
- **Review the process for post consent changes to a Development Consent Order.** Evidence indicates that considerable time is spent questioning the materiality of proposed changes (before the change itself is considered). Proposed changes to the process include more support for applicants so they can be directed to either the material or non-material change process and a statutory timeframe for decisions on non-material change applications.
- **Strengthening performance of government's expert bodies.** Performance standards and monitoring arrangements are proposed with full-cost recovery for project advice and updated guidance on the requirements for engaging with statutory consultees.
- **Increased application fee:** An increase in pre-application fees is proposed that could range from £50,000 and £200,000 per application for a 12 month period. (Current pre-examination fees range between £24,000 and £79,000). Changes to the application, pre-examination, examination and final handling fees and additional fee points are also being considered.
- **Greater support and measures to embed community input and benefits earlier in the process** through innovation and capacity building for local authorities; new guidance on the use of 'planning performance agreements' with local authorities with an expectation of full cost

recovery in return for a commitment to agreed levels of service and engagement to provide greater clarity on effective community engagement expectations, and more prescriptive guidance and an early 'adequacy of consultation' milestone to better test the effectiveness of engagement earlier in a project, so issues can be remedied early.

- **Delivering benefits to local communities.** There are no proposals on this here, as the government has separately consulted on a recommended approach (the outcome of this consultation is expected in due course) and the National Infrastructure Commission has made recommendations which are also under consideration.
- **Building the skills needed to support infrastructure delivery** with a Planning Skills Delivery Fund to help planning authorities deal with the backlog of applications and support upskilling ahead of implementation of planning reforms. Further Innovation and Capacity funding aims to provide further skills development in local authorities who engage in DCOs applications for local authorities, alongside work with the Planning Advisory Service and local authority NSIP network to support and provide materials for local authorities.

COMMENT

These proposed changes are welcomed, in particular those relating to the pre-application stage improvements which could offer the prospect of notable improvements to the advice from PINS and engagement of key statutory agencies and bodies. However, introduction of a costs regime that would penalise a failure to engage in line with the statutory duty (n.b. this is not proposed) could have further boosted the likely effectiveness of these measures in practice. No doubt there is a happy middle ground being struck here.

Better funding, resourcing and training for participants in the process is also very welcome as this is what underlies many of the current delays and frustrations, but whether these steps will be enough will remain to be seen. Proposals to increase the application fee are seemingly justified and will probably be acceptable to applicants, but only if they deliver more process certainty in practice.

We also like the idea of a three tiered pre-application service from PINS and the option of a fast track with a shorter examination for certain applications. To play on a James Bond quote - there are DCOs and there are DCOs. However, much will depend on the detail of the standards imposed, as to its availability of the fast track in practice.

However, some may be disappointed that no improvements are proposed to streamline the acceptance and pre-examination stage further, as this could improve efficiency. Whilst more flexibility is proposed in PINS' responses to section 51 advice, some might have welcomed guidance allowing PINS to take a proactive approach to advice, perhaps so it is not strictly limited to applicants' requests, so that omissions or details that need clarification can be addressed promptly.

Others might lament that there is nothing on the timetabling of issues specific hearings or ways to keep examinations more focussed and efficient.

More guidance to all parties on the management of discharging requirements, which can be protracted if approvals are issued in a piecemeal and un-coordinated way, or on the appropriate and justified use of separate consents alongside or after the DCO is granted, would also be helpful.

But overall, the measures that have been proposed seem well thought through and have potential to improve the DCO process.

RELATED CAPABILITIES

- Planning & Zoning

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