



Department
for Transport

Government Response

**Consultation on Major Infrastructure Planning Reform –
Amendments to the definitions for Highways and Rail Nationally
Significant Schemes in the Planning Act 2008**

May 2013

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Introduction

The Planning Act 2008 (the Act) introduced the Development Consent Order (DCO) regime for nationally significant infrastructure schemes. While the Act set thresholds for other types of infrastructure schemes, rail and highway schemes did not have such a threshold. This has resulted in some smaller rail and highway schemes which are not genuinely nationally significant schemes, having to fulfil DCO requirements which are disproportionate to their impacts.

The Planning Act is also ambiguous about when a road scheme which is not or will not be part of the Strategic Road Network (SRN) needs to follow the DCO regime. This has led to some schemes on local roads being challenged leading to delay in increased costs. There was also an anomaly that schemes required to deliver developments and were part of an granted planning permission were required under the Act to undergo a second planning process via the DCO regime to obtain the necessary highway orders. This led to increased costs and delays to delivering these developments.

The consultation set out proposals to address these issues with questions posed to draw out any further suggestions from respondents.

Overview of responses

The consultation closed on the 22nd January 2013. We are grateful to the organisations and individuals who took the time to respond. We have now considered all the received responses. This document sets out the Governments response and the next steps towards implementation.

A total of 34 responses were received regarding the proposals. Respondents included a number of local authorities, consultants on behalf of developers, various transport interest groups and a number of organisations from the environment sectors.

The overall balance of opinion was supportive of the proposals. Where concerns or queries were raised, points were made to specific cases where the proposals would have either a positive or negative effect rather than the underlying approach. In some cases the points raised related to clarification of certain phrases .No single response provided detailed input to all the questions set out in the consultation.

Summary of responses and Government response

Question 1 - Do you consider that there are reasonable grounds for introducing thresholds for small highway and railway schemes into the Planning Act?

Most (21) respondents recognised the need for greater proportionality for schemes which were not nationally significant and welcomed the amendments proposed to include thresholds in the Act for highway related development and railway development. There were 13 respondents who did not express an opinion and there were none against the proposals in principle. Two respondents expressed concern around the use of thresholds in National Parks and Areas of Outstanding Natural Beauty (AONB). They did not object to thresholds per se but felt that the lowest threshold should be applied to these areas,

Government response

The Government notes that all respondents who expressed a view supported the amendments in principle.

Question 2: Do you consider that there are reasonable grounds to remove local major schemes and mitigation works within an existing planning permission from the Planning Act?

18 respondents agreed that there were reasonable grounds for removing these types of schemes from the Planning Act.

Two respondents did not agree that the promoter identity should be the defining factor and thought scheme impacts (social, environmental and economic) were more important. One respondent felt that it should be for the promoter of a local scheme to decide whether to use the Planning Act or alternative planning regimes.

14 did not express a view.

Government response.

We welcome the support shown on this amendment by the majority of the consultees.

We recognise that the impacts of a scheme should be taken into account but feel the alternative planning regimes are sufficiently robust to deal with any issues of impact.

On the question of allowing the promoter to choose to use the DCO regime, the Planning Act must be very clear on what is meant by a genuinely nationally significant scheme. To allow the promoter to choose to use the DCO regime, introduces uncertainty about what constitutes a genuinely nationally significant scheme. We do not feel that the point raised by this respondent undermines the reasonableness of the proposal.

Question 3: Do you agree with the way we propose to include the thresholds? Do you consider that the specified criteria for thresholds are reasonable? If not, what other criteria do you suggest and why?

16 were supportive and agreed that the criteria for the thresholds added certainty about when a scheme would fall within the Planning Act. However, there were some comments around the possibility that some schemes which were not genuinely nationally significant would still be required to use the DCO regime. Some respondents sought clarification that the construction works area would be included in the thresholds.

One respondent who supported introducing thresholds was not convinced that for highway schemes, speed limits were necessary.

Another respondent did not have a view on the rail threshold but felt that the highway thresholds were sufficient but arbitrary.

2 respondents did not agree with the criteria proposed for the thresholds. One was concerned that the thresholds were unclear in that local roads would be removed from the DCO regime, and that there was no allowance for local needs to be taken into account when deciding which planning regime should be used. They were also concerned objectors would not have an adequate opportunity to be heard or that the application would not be heard expeditiously. They also raised the point that impacts of these schemes on motorways and trunk roads should also be a consideration in assessing which regime to use.

The other respondent advocated that a plan led approach should be used as the criteria suggested were mechanistic. This would be linked to LEP areas and support their infrastructure Plans. These plans would show the programme of proposed schemes for 5 years which would then be sent to PINs for determination to as to whether they should use the DCO regime.

15 respondents did not express a view.

Government response.

We accept that there will be circumstances where a scheme which is above the thresholds may not be considered to be genuinely nationally significant. The intention of the thresholds is not to remove all non nationally significant schemes just the ones where the requirements of the DCO regime would be disproportionate to the scale and impact of the scheme. The construction area of highway schemes would be included within the threshold and we apologise that this was not made clearer in the consultation.

On whether to include speed limits as part of the criteria for the highway thresholds rather than area only, the impacts of schemes on highways with a lower speed limit are usually in more populated areas and therefore are more likely to be impacted by schemes. Consequently the full weight of the DCO regime would be more appropriate for these schemes. We agree that the thresholds will cause some schemes just over them to fall within the remit of the DCO regime but there is some justification for the threshold criteria as set and we would repeat the intention is not to avoid schemes using the DCO regime but use the most appropriate planning regime.

We understand the points raised by the respondents who do not agree with the thresholds. Taking the first respondents points, the proposed thresholds apply to the Strategic Road Network and not to local roads. Opportunities for objectors to be heard and for the application to be heard expeditiously are part of the alternative planning regimes and are sufficiently robust to provide an equal amount of protections for objectors and applicants that the DCO provides for road schemes.

Currently, under the PA08, no account is taken of impact. The only reason that a local road scheme would be designated as a Highways Nationally significant Infrastructure Project (NSIP) is that it connects to the SRN. Consequently, a very small scheme can be designated as an NSIP whilst a major project such as a by-pass is not. In the unlikely event that such a scheme should have impacts that are truly of national significance then the works could be designated

as an NSIP using the Secretary of States powers under section 35 of the Act. Any impacts would also be assessed and any mitigation required would be identified as part of the planning application process, through negotiations with scheme promoters and local authorities.

The second respondent suggested that the thresholds should be set locally through a 5 year plan being assessed to see which schemes would or would not require a DCO process.

We do not agree that this way of deciding which planning regime is appropriate is clear or certain. A clear and consistent understanding of what constitutes a genuinely nationally significant scheme needs to be in place so that stakeholders, potential objectors, local authorities and network operators can know from early in the delivery process which planning route a particular scheme will follow.

For national network operators, this is particularly important in setting long term works programmes. Each LEP area could be at a different point in deciding Infrastructure plans which would mean that resources would be used by network operators in consulting with LEPs in their plans. In practical terms we can not support this suggestion.

Question 4 – Do you agree that the area thresholds for highway schemes are the right size? Should the limit include land required for the purpose of construction?

13 respondents supported the proposed thresholds with comments that land required for the purpose of construction for highway schemes should be included within the thresholds.

3 respondents did not agree with the proposed thresholds saying that even short road lengths could have adverse environmental impacts especially in designated areas such as AONBs. One respondent was not convinced that thresholds should be set but based on criteria and another did not see the connection between area based threshold criteria and level of impact. All three respondents agreed that land needed to build the new or altered trunk road should be within the threshold limits.

18 respondents did not express a view on this question.

Government response

The intention of the legislative amendment is to distinguish those schemes which are truly of national significance from other works. The proposed road threshold has been based on the works area required to construct or alter a single junction on the various category of road that make up the Secretary of State's network. Although potentially of local or sub-regional significance, schemes of this type are the least likely to be of national significance. The scale of the thresholds also takes account of the potential for impact on surrounding landowners.

The status of the surrounding land does not affect the national significance of a road scheme. Where Highways Act 1980 Orders are required, it would not be possible to secure them where its consultation process or environmental assessment were inadequate. Consequently, even though there may be potential consultees such as ANOB boards which are not statutory consultees under the HA80, they will be consulted as a matter of course and their responses given full consideration.

As mentioned above the thresholds would include land required for the purpose of building the new or altered road.

Due to the level of support shown for the thresholds, we therefore propose to adopt the thresholds as set out in the consultation document.

Question 5 – Do you agree that the rail threshold should be based on length of track? Do you agree that the limit should be 2 kms of continuous track and include both single and multi track schemes?

15 respondents supported the introduction rail thresholds with some suggesting that the 2km limit was too low. Suggestions to increase the limit included 5kms and 15kms limits. Length of track rather than area based thresholds was also strongly supported.

4 respondents did not agree with the threshold as set out and suggested that the level of impact, any contribution to national policy, schemes at pressure points and critical rail infrastructure should be the determining factors in deciding whether the scheme is nationally significant. Source of funding was also proposed as a determining factor of whether a rail scheme is nationally significant.

Two of these respondents were also concerned that the thresholds did not take into account environmental impacts in designated areas such as national parks and AONBs.

15 respondents did not express an opinion to this question.

Government response

We believe that a threshold based on the length of track provides a clear and understandable criterion, providing certainty for developers and interested parties alike. The proposed threshold seeks to ensure that there is no need for smaller schemes to be subject to the DCO process, without requiring specific clearance/direction from the Secretary of State. To do so would introduce bureaucracy and reduce certainty

In proposing a track length based criterion, we have deliberately sought a clear objective delineation which does not require the exercise of judgement. The answer to the question 'is the scheme strategic?' requires a judgement to be made, and is open to debate and challenge. The length based threshold seeks to provide certainty as to the process to be followed.

We also do not support the view that the source funding should be a factor in determining whether a scheme is nationally significant as this would not have any bearing on the significance of a scheme

The suggestion that additional purposive criteria should be applied to ensure that smaller schemes which nonetheless will have a significant impact on the national infrastructure continue to be considered under the Planning Act is noted. However, defining such criteria in a way which provides certainty would be difficult as it would rely on the exercise of judgement. The Planning Act already provides, through Section 35, the power for the Secretary of State to direct that development is treated as development where a DCO process is required where that development would otherwise fall outside the scope of the DCO process. This power can be used to ensure that the need to apply the DCO process can be considered on a case-by-case basis, and proposed developments brought within the regime where appropriate

The Department examined alternative thresholds, including 4km track length. However, taking note of typical rail schemes, it was felt that 2km provides the right balance in differentiating between projects which are of national significance and those which are not. It is not practical to seek to take account of any additional land required for access or working during construction of the development

The introduction of a threshold does not in any way remove the need to take into account any protected landscape which would be affected by a proposed development. Development which would no longer qualify as NSIP will nonetheless fall to be considered by an appropriate consent regime outside the Planning Act, ensuring that the impacts of the development are

properly considered. Existing requirements to undertake Environmental Impact Assessment where necessary will be unaffected by the threshold.

We therefore propose to adopt the rail threshold of 2kms of continuous track to include both single and multi track schemes.

Question 6 – Do you have any other suggestions for setting reasonable thresholds for these types of schemes? Please support your suggestions with appropriate evidence.

6 respondents made suggestions to change or use different thresholds. Of these, 2 respondents were of the opinion that the threshold should be increased to above 5kms of track length. One suggested that the rail threshold should be area based to include major junctions and that it should include the whole of the scheme not just where the track was outside operational land.

One respondent suggested that a mechanism should be put in place which allowed the scheme promoter to choose which planning regime to use.

Another respondent advocated setting thresholds based on a purposive assessment of the proposed scheme to bring it in line with those of the private sector investors and developers and further suggested that critical national infrastructure is regulated by the national framework regardless of the physical size of a scheme.

Another suggested that the thresholds should be set following the local infrastructure plans as developed by LEPs.

27 respondents did not respond to the question.

Government response

The merits of increasing the length of rail track from 2kms to either 5 or 15kms were discussed above.

We believe that to try to introduce a legally sound definition of "strategic" that is not open to challenge or varying interpretation would be very difficult, if not impossible, to draft. It would also introduce uncertainty and would require the exercise of judgement, which works against the simplicity and certainty of a length or area based threshold.

The current proposals will remove from the Planning Act 2008 system schemes for the construction or alteration of a single road junction which, although potentially of sub-regional and local importance, are most unlikely to be of national significance

The approach to the rail threshold does not take account of land taken to facilitate construction but which is not a part of the finished development. The length based threshold has been deliberately chosen as providing a simple criterion to apply to what is largely linear development

Choice of authorisation would introduce uncertainty and create the opportunity for obstructive challenge. The Planning Act must be clear on what is a genuinely national significant scheme to ensure that scheme promoters and all interested parties know that any scheme outside the thresholds must follow the DCO regime.

We are grateful for the suggestions given by respondents.

Question 7 – Do you agree with the decision to remove the purposive requirement for the construction or alteration of a highway (i.e. that the highway must be built “for a purpose connected with a highway for which the Secretary of State is the highway authority”)? Do you consider this wording is still relevant?

16 respondents supported or strongly supported this proposal. Of these one suggested extending the thresholds for the SRN to all road schemes and another requested that guidance should be given on how to apply to the Secretary of State for a s35 direction.

One respondent expressed the view that some purposive element to the wording should be retained to take account of the impact and reasons for the scheme which then could have national significance regardless of size or whether the scheme is locally promoted. They propose that the current wording could be amended to create exemptions from the mandatory requirement to apply for a DCO, for small road schemes which are not genuinely nationally significant.

17 respondents did not express any views.

Government response

Currently, under the Planning Act 2008, no account is taken of impact. The only reason that a local road scheme would be designated as a Highways NSIP is that it has a purpose connected to the Strategic Road Network. The proposal set out in the consultation would mean that all schemes where the Secretary of State is not or will not be the highway authority will be exempt regardless of scale.

The suggestion that the proposed thresholds for schemes on the Strategic Road Network should be extended to all road schemes would bring into the remit of the Act schemes which are not nationally significant such as local road schemes.

While we agree that the promoter identity is not a foundation for assessing whether a scheme is nationally significant, we do not agree that the scale of the scheme should be the only determinant of whether a scheme is nationally significant. The purpose of introducing the thresholds for highway schemes is to remove those schemes which are not genuinely nationally significant but are within the remit of the Act due to their location. It would be perverse to extend those thresholds to include other road schemes which are of only local or sub regional significance because of their size.

However, where a scheme promoter or other interested party can show that the scheme is genuinely nationally significant, they may apply to the Secretary of State for a direction to bring the scheme within the DCO regime. The suggestion made by one respondent to provide guidance on how to apply for a s35 direction is well taken. We do not propose to issue guidance at this time and would advise that each application will be assessed on its particular merits.

The suggestion that we should retain some purposive wording to allow schemes to fall out of the DCO regime was investigated as part of the research work undertaken by DfT in informing the consultation proposals. However, we are of the view that this would create uncertainty due to the opportunity for various interpretations and challenges of any new purposive wording. We are proposing these changes to remove uncertainty.

We therefore intend to remove the purposive wording from the Act.

Question 8 – Do you have any suggestions or opinions on this proposal? Please support your suggestions with any relevant evidence.

8 respondents expressed views which have already been dealt with in earlier questions. 26 respondents either did not answer the questions or had no suggestions to make.

Government response

We would like to thank those who responded.

Question 9 – Do you agree with this proposal (i.e. that development mitigation works already subject to a planning permission should not be required to undergo a second planning process via the DCO)? Do you have any other suggestions you might wish to make to help resolve the issue?

14 respondents supported or strongly supported the proposal. Most comments were around the issue of delay and extra costs should a development mitigation scheme be required to undergo a second planning process to obtain Orders and consents through the DCO regime.

20 respondents either did not answer the question or did not express a view.

Government response

We would like to thank all respondents for their views

Question 10 – Do you agree with the Governments assessment that the proposals meet the stated policy aims? If not, please explain how you consider other proposals would better meet those aims.

18 respondents agreed that the proposals meet the stated policy while 14 did not express a view.

One respondent repeated their concern that there was a risk that schemes falling below the threshold but which were genuinely nationally significant would need the DCO process.

Another respondent, while agreeing with the proposed thresholds, felt that that the emphasis of the proposals was on growth rather than sustainable growth and that there should be consistency with the NPPF. They illustrated the use of transport credits to rebalance any negative transport impacts from development and felt that the carbon issue on new road schemes required re-examination in light of the Climate Change Act 2008. They were also concerned that schemes claiming to reduce congestion and improve journey times (as set out in the Impact Assessment) could displace rather than reduce, congestion. They therefore disagreed with the assessment on carbon impact

Government response

We welcome the support for the proposals given by over half the respondents and agree with the point that there may be some small schemes which would still be regarded as nationally significant. We have stated in the consultation document that in this eventuality, the scheme would be directed into the DCO process in line with DfT's intention to ensure that the most appropriate planning regime is used.

On the point of consistency with the NPPF, we agree that our proposals should be consistent with the Framework and apologise that this was not made clearer in the consultation document.

We would also expect that any new road scheme would comply with legislation and the NPPF makes it clear that where a development would have a significant impact a Transport Assessment would be required. The Guidance on Transport Assessments is clear that mitigation measures must be included in the assessment and planning permission for the

development should also consider how to ensure these measures are delivered. We therefore consider that adequate protection exists to support sustainable development and reduce congestion (and therefore carbon emissions).rather than displacing it.

Question 11 — Do you have any views about when the changes to the Planning Act should come into force?

17 respondents supported the June implantation date with most supporting an earlier date in April or as soon as possible.

17 did not express a view.

Government response.

We intend to implement the changes in June.

Question 12 — Do you think projects that have started out under the Act but not been the subject of an application for development consent under the Act should be allowed to remain governed by it after the changes have taken effect and if so, on what basis?

17 respondents agreed that there should be an element of choice where the application was close to being submitted with the majority expressing the view that this should be an opt in/opt out choice made by the developer.

One respondent did not agree stating that the application submission stage was clear and that it should be retained.

16 respondents did not express a view

Government response

We accept that there will be circumstances where a scheme promoter may wish to opt out of the Planning Act regime even where an application has been submitted. We also accept that some scheme promoters would wish to continue under the Act where they are at pre application stage of the process. It would be difficult to have a clear determination of when a scheme should continue under the Act where such an element of choice was permitted.

The changes to the Planning Act reset the definition of what is a nationally significant scheme. The vast majority of respondents have indicated that this needs to be clear and transparent. It also needs a clear and transparent transitional period to ensure that promoters, developers and objectors have consistency in defining national significance and have certainty about the appropriate planning regime.

Allowing an 'opt in' or 'opt out' choice would mean that for a period of time there would be inconsistency and confusion as to why a scheme is following a certain regime when, by definition, it is either a national scheme or not. This could also lead to challenges where interested parties used this confusion to delay a scheme.

On these grounds we do not believe that there should be a general provision for applicants to choose the regime under which they should submit applications. We also do not consider it reasonable to introduce further complexity by providing for consideration of whether schemes which have started out under the Act are sufficiently progressed but not ready to submit, to be treated as nationally significant schemes.

We therefore propose to adopt the transitional arrangements set out in the consultation document that any scheme which has already submitted an application under the Planning Act regime would continue under that regime.

Under section 35 of the Planning Act 2008, it is open to the Secretary of State to direct that an application for consent in England should be treated as an application for development consent under the Act. We consider that it is not necessary to make any additional provisions in this amendment.