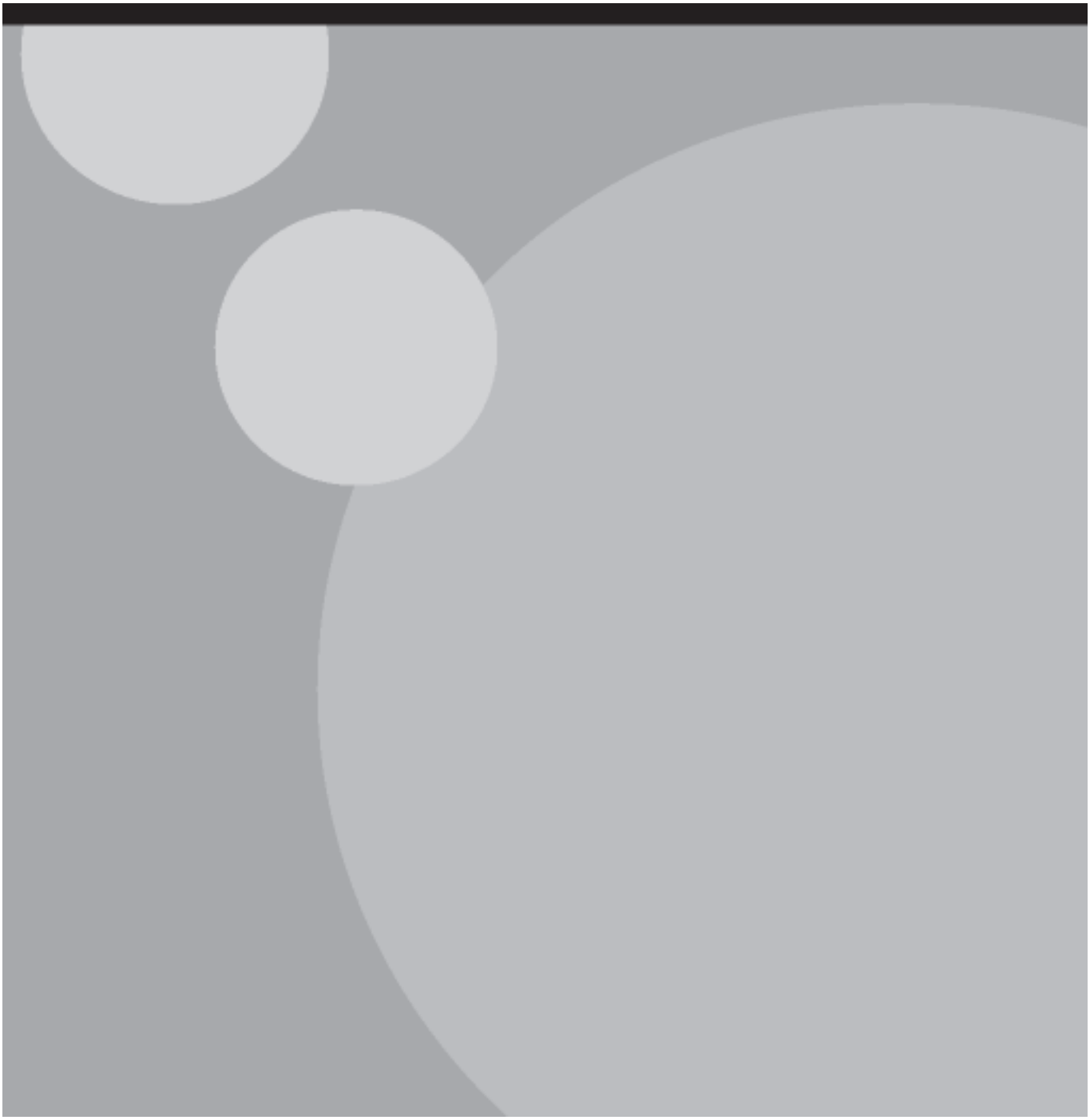
Communities and Local Government

Planning Act 2008: Procedures for revoking or making changes to development consent orders for nationally significant infrastructure projects- consultation

Summary of responses



Planning Act 2008: Procedures for revoking or making changes to development consent orders for nationally significant infrastructure projects- consultation

Summary of responses

April 2012
Department for Communities and Local Government

This document/publication is also available on our website at www.communities.gov.uk

Any enquiries regarding this document/publication should be sent to us at:

Department for Communities and Local Government
Eland House
Bressenden Place
London
SW1E 5DU
Telephone: 030 3444 0000

April, 2012

ISBN: 978-1-4098-3086-3

Contents

Section 1

Introduction

1.1 The Government carried out a consultation between 1 November and 24 December 2010 on proposed procedures for revoking, or making changes to, development consent orders that have been granted for nationally significant infrastructure projects under the Planning Act 2008 ('the Act'). The proposed procedures were set out in draft regulations that accompanied the consultation document.

1.2 The consultation was aimed at organisations and members of the public who have an interest in the nationally significant infrastructure planning system which was established by this Act. Responses were received from twenty-one organisations. A summary of their main comments are set out in sections 2 and 3, along with details of how the Government has responded to them. The respondents are listed in section 4. The final regulations[1] were brought into force on 1 October 2011, and incorporated suggestions made by respondents where this was considered appropriate.

1.3 The Localism Act 2011[2] has now abolished the Infrastructure Planning Commission and transferred its functions to the Secretary of State. This has required consequential amendments to be made to the suite of regulations that have been brought into force for this infrastructure planning system[3]. For the procedures to revoke or change a development consent order, amongst other amendments this has required substituting 'Secretary of State' for the references to the 'Infrastructure Planning Commission' and the 'appropriate authority'. The 'appropriate authority' was that which had granted the original development consent, being either the Infrastructure Planning Commission or the Secretary of State. As these consents will now always been granted by the Secretary of State, the 'appropriate authority' term is now defunct and so has been removed by the Localism Act. The commentary within this summary of responses

[1] The Infrastructure Planning (Changes to, and Revocation of, Development Consent Orders) Regulations 2011 (SI 2011 / No.2055), which can be accessed at http://www.legislation.gov.uk/uksi/2011/2055/contents/made

[2] The Localism Act 2011 can be accessed at http://www.legislation.gov.uk/ukpga/2011/20/contents

[3] These amendments have been made through The Localism Act 2011 (Infrastructure Planning) (Consequential Amendments) Regulations 2012 (SI 2012 / No.635), which can be accessed at http://www.legislation.gov.uk/uksi/2012/635/contents/made

reflects the terminology and consequences of the Localism Act's amendments to the Planning Act.

Section 2

Summary of comments received and Government response: overarching issues

2.1 The Act provides for the establishment of two sets of procedures – one for making 'non-material' changes to development consent orders and the other for making 'material' changes. Many of the comments addressed issues that are applicable to both and were as follows.

Distinguishing 'non-material' and 'material' changes

2.2 Most respondents felt it would be beneficial for the terms 'non-material' and 'material' to be clearly defined and thereby more easily distinguished from each other. A few believed such definitions should be set out within the regulations. However, as was explained within the consultation document, the Act does not provide the power to define these terms. We will consider if there are other ways in which we can assist on this issue, but it is important to stress that it will always be for the Secretary of State to satisfy itself, on a case by case basis, whether the proposed change should be treated as non-material or material.

Persons who are eligible to apply for changes to an order

2.3 In addition to the holder of a development consent order, the Act also provides for the making of applications for non-material or material changes by 'a person with an interest in the land', and 'any other person for whose benefit the development consent order has effect'. These provisions were set out in the draft regulations which were within the consultation document.

2.4 Several infrastructure providers expressed concerns about this. There was, for example, some uncertainty about who such persons could be and also that this provision risks providing an opportunity for these persons to cause unnecessary delays or even to purposefully obstruct the implementation of the order. The key concern was that the said persons could deliberately withhold their views at the time the application for the development consent order was being considered,

only to then seek to make changes to that order by submitting their own application some time after the development consent would have been granted. A further concern was that the holder of the order would incur costs through having to engage in application processes that were instigated by others, and through any delays that may result to the construction and operation of the infrastructure.

2.5 However, the Act provides for such persons to have the opportunity to make these applications, and so we are obliged to provide for this in the regulations. They refer to very specific, and therefore restricted, categories of persons and circumstances, in line with the existing typical usage of such terminology in law including, for example, the circumstances relating to situations of compulsory acquisition of land or rights over the use of land. All applicants would have to satisfy the Secretary of State that they fell within these definitions, in order for their application to be accepted for examination.

Format of application documents

2.6 Several respondents requested clarity on the necessary format to be used for setting out the detail of the proposed changes within the application documents, such as whether it would be acceptable for those provisions to be contained within an addendum to the extant development consent order. We decided to not prescribe the format within regulations, as we consider it appropriate to allow applicants the flexibility to utilise a format that is most relevant for their particular case.

2.7 In response to a suggestion that there would be practical benefits in allowing flexibility in the choice of sizes and scales of plans and drawings that are submitted, we have now provided for the Secretary of State to have the discretion to allow the applicant to utilise sizes and scales that are different from those prescribed within the regulations.

Statutory consultees

2.8 The draft regulations contained a proposed list of statutory consultees, which was the same for that set out within the suite of existing regulations governing the procedures for obtaining a development consent order. Respondents suggested a few alterations to the proposed list, to either include additional organisations or remove ones which no longer existed. We have considered these suggestions and have also reflected on how some of the organisations within the list have been affected so far by the Government's review of public bodies. We have also considered whether organisations on the proposed list have been the subject of mergers, abolition or changes of name since the previous regulations were brought into force. Taking all of these issues into account, we have made the following decisions:

- The Regional Planning Bodies have been removed as these have now been abolished.

- The entry for the Rail Passengers Council has been changed to Passenger Focus, which has absorbed the functions of the former.

- The Marine Fisheries Agency has been removed as its functions have now been transferred to the Marine Management Organisation (MMO). However, we have not added the latter to the list as it is already a statutory consultee by virtue of amendments to the Planning Act 2008. We have, though, at various points throughout these regulations included references to this organisation where it has been necessary so as to ensure it is included within the processes in question.

- The Scottish Fisheries Protection Agency has been removed as its functions have now been transferred to a department within the Scottish Executive, which is already on the list. Organisational units within Devolved Administrations are not separately cited within the statutory consultee lists.

- Similarly, we have decided to not include the Ministry of Defence. Its inclusion was suggested on the basis it has an interest in the potential impacts of wind farms. Instead, we are continuing with the existing approach that UK Government departments are not included as formal statutory consultees within the nationally significant infrastructure planning system.

- There was a request for Scottish Water to be explicitly cited as it is currently the only provider in Scotland of water and waste water infrastructure. However, 'Statutory undertakers', such as Scottish Water, are generically cited within the list. The suggestion was that specific identification could assist with a speedier engagement with them. However, we have decided to continue with the existing approach of only using the generic term within this list. This will allow for any future changes in the organisations which hold the statutory undertaker roles, without the need to amend the list.

2.9 It is important to note that the above mentioned amendments have only been made so as to reflect changes that were occurring to these organisations prior to, and during, the finalisation of the regulations. The amendments do not represent a wider reconsideration of which organisations should be included as statutory consultees for the nationally significant infrastructure planning system.

Risk of re-opening non-relevant issues

2.10 The consultation document stated the intention for the procedures to not allow for a wider reconsideration of the original development consent, and of issues that are not relevant to the changes being proposed. This approach was widely welcomed by respondents, who were concerned of a risk of other issues being unnecessarily re-opened. A few believed this point should be further emphasised by strengthening the wording in the regulations. We have considered this but have decided the proposed wording is sufficient, as it clearly restricts the consultation, publicity and examination to the issues that are set out within the application that contains the proposed changes. Within that application the applicant is required to address any issues that are relevant to those changes. It will be for the Secretary of State to be satisfied that this has been done, and also to ensure that the examination is restricted to only relevant issues.

Deemed licences affecting the marine environment

2.11 A couple of respondents sought clarity on how the process would work for seeking changes to any deemed licences that affect the marine environment. In the consultation document we had stated that development consent orders for projects that affect the marine environment may include deemed licences under Part 2 of the Food and Environment Protection Act 1985, consents under Part 2 of the Coast Protection Act 1949 and, as from April 2011, Marine Licences under Part 4 of the Marine and Coastal Access Act 2009. We further stated that proposals to make changes to these deemed consents would be dealt with by the Marine Management Organisation and, where appropriate, the devolved administrations, and therefore such proposals were out of scope of the consultation. This means that proposals to make changes to those deemed licences are not to be contained within applications for non-material or material changes under the Planning Act 2008, in accordance with the provisions set out in paragraphs 2(13) and 5(6) of Schedule 6 of the Act. Instead, they will need to be submitted directly to the Marine Management Organisation or devolved administration, as appropriate.

Comments on the drafting of the regulations

2.12 A few suggestions were made for altering some of the technical drafting of the regulations, such as the descriptions used within section headings. We have made a few minor amendments, such as to provide further clarity on the circumstances when each part of the regulations would be applicable.

Section 3

Summary of comments received and Government response: other issues

3.1 In addition to the overarching issues addressed in section 2, set out below is a summary of the other main comments that were made in relation to the specific consultation questions.

Non-material changes

Question 1
Do you have any comments on the application process for non-material changes? In particular do you think the balance is right between simplicity of process and transparency and opportunity for third parties to comment?

3.2 We proposed that the non-material change application process should be 'light touch' and streamlined, compared to the more substantial process for material changes. There was general agreement for this approach among the respondents, although several of them felt that some aspects of the non-material change proposals should be further streamlined in various ways, to thereby make those activities more proportionate to the nature of the changes to which they would relate. This issue is addressed in the first item below, followed by summaries of the other key issues.

Proportionality of the procedures

3.3 The Act requires the consultation on, notification of and publicity activities for applications for non-material changes to be undertaken by the Secretary of State. Several respondents felt that some of the proposed requirements were disproportionate, given that the proposed changes to development consents would be relatively minor in nature. We accept the suggestion that national publicity for non-material change applications is not necessary, and so we have removed this requirement. We also agree with a suggestion that it may not always be necessary to consult all of the statutory consultees and other prescribed persons that were required to have been consulted for the development consent order by virtue of section 56 of the Act. To allow

for this, we have now provided the Secretary of State with the discretion to use their judgement, on a case by case basis, when considering which persons it would be appropriate to consult. This discretion can be used in respect of the nature of the proposed change, as well as relating to the geographical location of the proposed change and locations where that change may have an effect. The latter point is intended to provide flexibility where infrastructure projects are linear in nature, such as roads and pipelines. Whenever the Secretary of State uses this discretion it must, in the interests of transparency, publish the reasons for doing so on its website.

Prescribing of procedures within the legislation

3.4 The draft regulations on which we consulted had set out prescribed procedures for only some of the stages that are needed for considering and determining applications. Some respondents felt that the regulations should contain all of the stages. However, it is not possible to do this as the powers within the Act limit which stages the Secretary of State can prescribe in regulations. This means it is for the Secretary of State to decide, outside of the regulations, the detail of the processes to be followed for any of the stages that have not been prescribed within either the regulations or the Act itself. These stages include the procedures and timescales for the handling and consideration of responses to publicity and consultation and those for making the decision on the application.

Application fee

3.5 A few comments were made on the proposed fee level and the type and estimated duration of activities on which it was based. A couple of respondents felt it was too low. For example, one respondent suggested the fee had not incorporated the legal resource that would be needed to undertake an initial consideration of whether the proposed change would, indeed, be non-material, as opposed to being material and therefore be instead subject to the material change procedures.

3.6 A couple of other respondents felt the fee was too high, on the basis that some of the activities should not require as much time to undertake as was being suggested. The proposed flat rate fee was based on equivalent types of activities, and their costs, as had previously been estimated for the processing of development consent order applications and which are therefore embedded within the fees for those applications.

3.7 We have carefully considered the consultation responses and have decided that the only ground to revise the proposed fee is by incorporating additional resource for the initial legal consideration of the

application. Therefore, the fee has been raised slightly from £6,534 to £6,891 to reflect this.

Reimbursement of publicity costs

3.8 The proposed fee did not incorporate payments to newspapers for the placement of publicity notices about the applications. Given that the Secretary of State has the duty of undertaking that publicity, some respondents felt that it would be appropriate for the applicant to bear those costs. We agree that these costs should fall to the applicant. We have decided the most appropriate way to achieve this would be by requiring the applicant to reimburse the actual cost that is borne for the case in question, rather than incorporate a possible 'average' or 'typical' cost within the application fee. These costs will be lower than some of the respondents were suggesting, since we have now decided to remove the requirement for national publicity.

Multiple changes to a development consent order

3.9 Some respondents requested clarity on whether it was possible for a single application to address several non-material changes to a development consent order, including where such changes could be unrelated to each other. In principle this would be acceptable, however it will be for the Secretary of State to consider such requests on a case by case basis, in a similar way in which it is able to consider single applications under sections 52 and 53 of the Act for requests to obtain information about interests in land and to gain rights of entry, respectively.

Local authority roles

3.10 A couple of local authority respondents felt that local authorities should have a role in deciding whether the proposed changes were non-material or material. They also felt local authorities could be made responsible for determining non-material applications. However, the Act requires it to be the Secretary of State that decides applications for non-material changes. Where a local authority has concerns that proposed changes should instead be considered as material changes, it can make such representations to the Secretary of State when responding to the notification and publicity about the application.

Material changes

Question 2
Do you think the pre-application process covers that which is necessary?

Is there anything else you would like to see included, or anything you would like to see excluded?

3.11 We proposed the procedures for material change applications should closely follow those for obtaining a development consent order for each of the stages of pre-application, application, pre-examination and examination. Most respondents felt that, overall, this was appropriate. For the pre-application process, some felt that flexibility should be allowed for in the publicity, consultation and notification requirements, on the grounds that it may not always be necessary for all the persons who had been consulted and notified about the proposed development consent order to again automatically be involved this time. We agree that this could be the case and, as with non-material change applications, we have provided the Secretary of State with the discretion to use their judgement, on a case by case basis, on which persons ought to be consulted and notified. For material change applications, it will be for the applicant to make a request to the Secretary of State for that discretion to be used. The request should state those persons that it believes should not be consulted and notified.

3.12 A few respondents felt that national level publicity was not necessary. However, we are retaining the requirement for both local and national publicity, as we consider both forms of publicity are necessary to enable people to be made aware of proposed changes that are expected to have a significant effect. However, for the local publicity of linear projects, we have provided for discretion to be used by the Secretary of State to allow, on a case by case basis, the applicant to undertake this only at the locations where the proposed material changes would have an effect, rather than along the whole of the development consent order route.

3.13 As with non-material change applications, whenever the Secretary of State uses this discretionary power relating to consultation, notification and publicity, the reasons for doing so must be published on its website.

3.14 A few respondents felt it was unnecessary to require applicants to produce a statement of community consultation and consequently submit a consultation report with the application. We disagree and have decided to retain both as they have the same important roles to play in the material change application process as those for the development

consent order application process. The statement will help ensure the applicant identifies all of those in the community who should be engaged in relation to those specific proposals. The effort needed by the applicant to fulfil these requirements will be self-limiting to the nature of the changes that are proposed. The applicant, and relevant local authorities, will also be able to make use of the work that they had undertaken previously for the development consent order application. In terms of the consultation report, this is an important tool with which the applicant is able to demonstrate how its consultation with local communities, statutory consultees and any other bodies has helped to shape the proposals that form the actual submitted application.

Consultation question 3
Is the information required to be submitted with an application appropriate?

Are the consultation, notification and publicity requirements appropriate?

Is there anything you think should be done differently?

3.15 Most respondents felt that the required information was appropriate although some sought clarification on the format in which this information should be submitted. As was mentioned above, we have specifically decided to not prescribe this format, as we consider it appropriate to allow the applicant to adopt whatever is most appropriate for their particular case.

3.16 The regulations have been amended so that the changes we have made to the consultation, notification and publicity requirements for the pre-application stage, as described above, are also reflected in the equivalent procedures that must be followed when an application has been accepted for examination.

Question 4
Do you think there are any aspects of the examination process that it is not appropriate to use for the examination of a material change?

3.17 There was a mixed response as to whether all of the development consent order examination stages should be used. Some felt it was appropriate given that the proposed changes to the extant order were, by definition, intended to be significant in nature. Others felt that it would be onerous to use all of the examination stages and so should instead be simplified, or discretion be given to the Secretary of State on which stages should be used, and how, on a case by case basis. A few respondents felt it unnecessary to always require a preliminary meeting

to be held given that, for relatively smaller material changes in particular, the main issues may well already be known when the application is submitted. We disagree, as the main purpose of the preliminary meeting is to discuss procedural issues, such as the timetable for the examination, and therefore it is necessary to require that such a meeting is always held. We remain of the opinion that all of the examination stages are relevant and should be utilised for material change applications. The length of time needed to complete the examinations will, in part, depend on the nature and extent of the changes to the extant order that are being proposed.

3.18 Some respondents felt that deadlines should be prescribed for the completion of the examination, giving of recommendations and the making of the decision. It was suggested that these should be the same timescales that are required for a development consent order application – namely up to six months to complete the examination, up to three months for the submitting of the recommendation to the Secretary of State and up to three months for the Secretary of State to make the decision. We agree, and have amended the regulations accordingly for the consideration of all applications for material changes, except for those applications that are in respect of development consent orders that contain a 'significant error', or those orders whose development would be in contravention of Community law or any of the Convention rights (as described in Schedule 6 of the Act), or where there are other 'exceptional circumstances' that make it appropriate to make changes to the order – namely, cases where paragraphs 3(3) or 3(7) of Schedule 6 of the Act apply. This is because these cases are subject to different procedures, as set out in Part 3 of the regulations.

Question 5
Is there anything else that you think should be taken into account in making the decision?

3.19 The requirement for the Secretary of State to decide the application in accordance with any relevant national policy statement was widely welcomed. A couple of respondents suggested that the regulations should stress that the extant development consent order, and the conclusions that had previously been reached in granting it, should be taken into account when determining the decision. They felt that this was particularly necessary given that national policy statements were not likely to contain any policy on the weight to be given to extant orders when considering applications to make changes to those orders. However, we do not consider it necessary or appropriate for the regulations to address the issue in that manner. It is already a requirement that only issues that are relevant to the proposed changes are to be considered during the application and examination process.

Also, the decision must then be taken in accordance with whatever is the then relevant national policy statement, which may be different from the statement under which the development consent order in question had been made.

3.20 Several respondents sought clarification on whether local authorities would be expected to submit local impact reports to the Secretary of State, of the type they are able to submit in relation to development consent order applications. It is at the local authority's discretion as to whether or not they submit a local impact report for the development consent order applications. For material change applications, we have not provided for specific local impact reports, as we consider it will be sufficient for local authorities to provide their views on local impacts within any relevant representations that they may wish to make in response to the submitted application, as well as within the opportunities for engaging during the examination stages. The Secretary of State will consider such views in the context of all the other points that are made during these processes.

Question 6
Do you have any other comments on the proposals in this document?

3.21 A few concerns were raised about references in the regulations to the exercise of powers under paragraphs 3(3) and 3(7) of Schedule 6 to the Act. Paragraph 3(3) provides for the Secretary of State to make a change to a development consent order if it is satisfied that the order contains a 'significant error', and that it would not be appropriate for the error to be corrected by means of a non-material change application, or through the exercise of the power conferred in paragraph 1 of Schedule 4 to the Act which relates to the correction of other forms of errors. Paragraph 3(7) provides for the Secretary of State to make changes to an order if the development would be in contravention of Community law or any of the Convention rights, or where there are other 'exceptional circumstances' that make it appropriate to make changes to the order.

3.22 Several respondents queried what could constitute a 'significant error' or 'exceptional circumstances'. However, the Act does not define these, nor provide the power for these to be defined within the regulations. It will be for the Secretary of State to interpret the Act in these respects on a case by case basis, although it is not anticipated that these issues would occur often, nor those relating to a contravention of Community law or Convention rights.

3.23 A few respondents were also concerned that the order could be amended under these three paragraphs of Schedule 6 without the Secretary of State first consulting with the holder of the order. In Part 3

of the regulations we have set out the procedures that the Secretary of State must follow when considering cases that fall under paragraphs 3(3) and 3(7). They include the requirement to notify and consult with each person whose benefit the development consent has effect. This will include the holder of the order.

Question 7
An Impact Assessment is being published alongside this document. Do you have any comments on the data used in this assessment?

3.24 A few respondents provided comments on the impact assessment. It was suggested that the fees analysis should be based on a higher figure than the assumed steady state annual average of forty-five applications for development consent orders. The rationale given was that this number could be a low estimate given the scale of new infrastructure that was needed to meet the UK's climate change objectives. However, we have retained this assumption for the purpose of consistency, as it is what underpins the fees calculations for development consent orders and which we have utilised for calculating the fees for material change applications. A review of all the fees charged under this nationally significant infrastructure planning system will be undertaken at a later date, once experience and evidence has been gained from a sufficient number of cases proceeding through the system.

3.25 It was suggested that the stated potential for there to be savings in costs and time for a material change application, relative to applying for a whole new development consent order, may not be significant. The reasoning stated was that all of the same stages would have to be followed. However, we consider that there is scope for the holder of the order, and all other parties, to benefit from the work that would have been undertaken previously during the procedures to gain the original order. The nature and extent of the changes that are proposed to that order will also impact on the time and costs that will need to be borne in seeking those changes.

3.26 One respondent noted that the analysis did not include an estimate of costs to the holder of the development consent order in the circumstances when another person is the applicant for the change or revocation. Nor did the analysis include the potential impact of delays to projects when applications of this nature were made.

3.27 The impact assessment has been revised[4] since closure of the consultation, so as to reflect amendments that have been made to the proposed regulations in response to the consultation responses, and

[4] The revised impact assessment can be accessed at http://www.legislation.gov.uk/uksi/2011/2055/impacts

also to provide some further analysis on other matters, including some additional commentary relating to fee and non-fee costs.

Section 4

Respondents

4.1 The consultation ran from 1 November to 24 December 2010. Twenty-one organisations submitted responses. These are listed below by category and organisation.

Category	**Members**	**Number of respondents**
Business	Including business trade associations	14
Government bodies	Including local authorities, government agencies and non-departmental public bodies	5
Professionals and academics	Including representative bodies for professionals	2
Total		**21**

List of organisations

Business

- Centrica Energy
- EDF Energy
- E.ON
- Heathrow Airport Limited
- National Federation of Fisherman's Organisations
- RenewableUK
- RWE npower plc

- RWE npower renewable limited
- Scottish and Southern Energy plc
- ScottishPower Renewables
- Scottish Water
- Thames Water
- UK Business Council for Sustainable Energy
- UK Major Ports Group

Public bodies

- East Lindsey District Council
- Infrastructure Planning Commission
- Rushcliffe Borough Council
- Sedgemoor District Council & West Somerset Council (joint response)
- The Crown Estate

Professionals and academics

- Bircham Dyson Bell
- Society of Parliamentary Agents