Department for Communities and Local Government

Infrastructure Bill:

Nationally Significant Infrastructure Projects

Briefing note

June 2014
Department for Communities and Local Government

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If you have any enquiries regarding this document/publication, email contactus@communities.gov.uk or write to us at:

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

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Infrastructure Bill: Nationally Significant Infrastructure Projects

Briefing Note on Clauses 17-19

This briefing note provides further information on clauses 17-19 of the Infrastructure Bill as introduced in the House of Lords on 5 June 2014. It provides further information on all three clauses, but focuses in particular on clause 19 (changes to Development Consent Orders) where the Government is proposing to consult on changes to secondary legislation in July this year.

Background

1. The Planning Act 2008 ("the 2008 Act") created a new regime for consenting certain types of nationally significant infrastructure - major energy projects, railways, ports, major roads, airports, water and waste projects. The aim of the regime is to simplify and speed up planning consent for such projects by reducing the number of separate applications and permits which are required and enabling faster decisions.

2. The process for obtaining consent under the 2008 Act involves a front loaded process where the developer consults on a proposed project before submitting an application. If the application is accepted, it is then examined by a single inspector or a panel of inspectors ("the Examining Authority"). Following completion of the examination, the Examining Authority will provide a report and recommendation to the Secretary of State. Where the Secretary of State proposes to grant consent for a project, this will be through a Development Consent Order which is normally made as a statutory instrument.

3. The Department for Communities and Local Government (DCLG) has recently undertaken a review of the nationally significant infrastructure regime[1] ("the 2014 Review"). This resulted in a number of suggestions for improvements to the regime being taken forward. The Government's response to consultation on the review[2] sets out further details of these. Three of these measures require amendments to the 2008 Act:

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1 See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/262984/Reviewing_the_National_Significant_Infrastructure_Planning_Regime_-_Discussion_document.pdf

2 See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/306404/Government_response_to_the_consultation_on_the_review_of_the_Nationally_Significant_Infrastructure_Planning_Regime.pdf

(i) *Timing of appointment of Examining Authority* (clause 17) - allowing the examining panel of inspectors to be appointed immediately after an application has been accepted;

(ii) *Two person Panels* (clause 18) - allowing the examining panel to comprise 2 members;

(iii) C*hanges to, and revocation of, Development Consent Orders* (clause 19) - changes to the powers in the 2008 Act governing the making of changes to consent orders to enable certain simplified processes to be introduced through secondary legislation.

Timing of appointment of Examining Authority

The current position

4. The Examining Authority are responsible under the 2008 Act for the examination of an application for a Development Consent Order and then for providing a report and recommendation to the Secretary of State. The 2008 Act currently provides for the Examining Authority to be appointed once an application has been accepted for examination and the applicant has also certified that they have notified prescribed persons and categories of person of that acceptance. Because appointment of the Examining Authority can only take place after notification and certification have taken place, there is typically a period of around two months between an application being formally accepted for examination and the applicant submitting the relevant certificates such that the Examining Authority can be appointed.

What is being changed and why?

5. Clause 17 will amend the 2008 Act to make clear that the Examining Authority can be appointed as soon an application has been accepted. Appointing the Examining Authority earlier should give them more time to become familiar with the application, which can, for example, run to 70,000 pages in length. This will allow inspectors greater time to familiarise themselves with the issues and may in some cases then shorten the time needed for examination.

Two person panels

The current position

6. The 2008 Act requires the Secretary of State to decide whether an application for development consent should be examined by an Examining Authority that comprises a single person or a panel comprising 3, 4 or 5 persons, one of whom will be appointed as the Chair of the panel. There are also provisions set out in the 2008 Act to cater for circumstances where Panel members may resign or be removed by the Secretary of State. In such cases, the Secretary of State must recruit additional members should a panel only have 1 or 2 members so as to ensure that the Panel has at least 3 members. Decisions by the panel require

the agreement of a majority of members with the lead panel member having a casting vote in the event of a tie.

What is being changed and why?

7. Clause 18 amends the 2008 Act to allow the appointment of an Examining Authority comprising 2 persons. In addition, the clause provides that the appointment of additional panel members is only required if a panel is reduced to a single member (rather than reduced to two members); and sets out the procedure for decision-making for two-person panels (ie. the lead member will have a casting vote).

8. The appointment of two person panels was widely supported during consultation on the 2014 review of the nationally significant infrastructure planning regime. It will lead to reduced costs for applicants of smaller and less complicated developments in those cases where a three person panel would otherwise have to be appointed. It may also speed up the examination of applications in those cases that can now have a 2 person panel instead of a single person examining authority as inspectors will be able to divide some of the work up between them. The Department estimates that having a two person rather than a three person panel would produce savings to developers of £300,000 a year. Against this, for those cases where a two person panel was appointed instead of a single person, the estimated additional annual total cost to developers would be £100,000.

Changes to, and revocation of Development Consent Orders

Introduction

9. When consent for a nationally significant infrastructure project is granted by the Secretary of State, it will be through the making of a Development Consent Order (which may be contained in a statutory instrument). The Development Consent Order not only provides planning consent for the project but may also incorporate other consents and include authorisation for the compulsory acquisition of land. The Order will specify in considerable detail the nature of the development consented and its location (including a detailed works plan) and any requirements (conditions) that must be met in implementing the consent.

10. The level of precision in a Development Consent Order means that if a change needs to be made to a project during the implementation/construction phase, it may not be capable of being made within the remit of the existing consent. That will mean an application will have to be made to the Secretary of State for an Order to amend the existing Development Consent Order.

11. The process for changing a Development Consent Order once consent has been granted is set out in Schedule 6 to the 2008 Act and in the Infrastructure Planning (Changes to, and Revocation of, Development Consent Orders)

Regulations 2011 ("the 2011 Regulations")[3]. The detailed procedures for making an application for a change, and how that is then handled, are set out in these regulations.

12. Consultation responses to the 2014 review made it clear that, whilst the existing procedures for making changes had not yet been tested, the current procedures for taking forward changes were likely to be onerous and in many cases disproportionate. There was strong support for making changes to these procedures to simplify them and support for providing guidance on them.

13. The government is proposing to consult on amendments to the 2011 Regulations in order to simplify and speed up the process for making changes to Development Consent Orders in July this year. An outline of the amendments that are likely to be put out for consultation are set out in paragraphs 19-26 below and in Annex A. The amendments to the 2008 Act proposed in clause 19 of the Infrastructure Bill are necessary in order to facilitate some of these proposed amendments to the 2011 Regulations, should a decision be taken to proceed with these after consultation.

Non-material and material changes

14. The 2008 Act allows the Secretary of State to grant consent for both non-material and material changes to an existing Development Consent Order, each having different procedures under the 2011 Regulations. The procedures involved in making a non-material change have substantially fewer requirements than those for a material change. However, neither the 2008 Act nor the 2011 Regulations provide any definition of a material or non-material change. Although no applications for change have so far been made, there is also no guidance in place on what might constitute a non-material as opposed to a material change for a nationally significant infrastructure project.

15. There was substantial support expressed in the consultation responses to the 2014 Review for providing advice on what would constitute a material or non-material change. Given the range of infrastructure projects that are consented through the 2008 Act, and the variety of changes that could theoretically be proposed for single project, it is not possible to set out precise guidance on whether a change would be material or non-material in a particular case. Such decisions will inevitably depend on the circumstances of the specific case. But there may be certain characteristics of a change that means there will be a greater likelihood of it being non-material, for example, if it does not involve:

    - an update to the Environmental Statement (as originally consented) to take account of likely significant effects on the environment;

    - a need for a Habitats Regulations Assessment, or the need for a new or additional licence for a European Protected Species;

[3] http://www.legislation.gov.uk/uksi/2011/2055/contents/made

- compulsory acquisition of any land that was not authorised through the existing Development Consent Order.

16. These are only initial views on criteria that could be considered. The Government will seek views on these, and on any other criteria that might be used to assist when deciding whether a change is material, when it consults on new procedures for making changes later this in July 2014.

The current process

Non-material changes

17. For non-material changes, the current process for making changes is set out in Part 1 of the 2011 Regulations:

    - an application is made to the Secretary of State with a fee payable with the application;

    - the Secretary of State then publicises the application through a notice in a local newspaper in the vicinity of the land on which the infrastructure project is situated, and in any other publication the Secretary of State considers necessary to ensure that notice is given in the vicinity of that land. Representations on the application can be made during a period following publication of the notice – set as a minimum of 28 days;

    - the Secretary of State must also consult prescribed persons by sending them a copy of the notice;

    - after the end of the period specified in the notice, a decision can be made by the Secretary of State having considered any representations received. If the original Development Consent Order was made in a statutory instrument, any change must also be made through a statutory instrument.

Material changes

18. For changes that are material, the current process for making changes is set out in Part 2 of the 2011 Regulations. The process mirrors that set out in the 2008 Act for making a full application for development consent. The main steps are:

    - a pre-application consultation process;

    - a duty on the applicant to publicise the proposed application;

    - before making an application, the applicant must have regard to relevant responses;

    - an application is made to the Secretary of State;

    - the developer is required to publicise and give notice of the application to specified persons and invite representations to be made on the application;

- an Examining Authority will then be appointed who will hold an examination into the application for change, provide a report and recommendation to the Secretary of State and then make a decision on the application for change.

What is being changed and why?

19. The amendments to the 2008 Act in clause 19 would allow certain changes to be made to the 2011 Regulations in respect of both non-material and material changes to Development Consent Orders. The Government will be consulting on detailed proposals for amendments to the 2011 Regulations in July 2014. However, in advance of that, a summary of some of the likely areas for change to be included in that consultation is set out below.

Non-material changes

20 At present, only the Secretary of State is specified as having to meet the requirements set out in the 2011 Regulations in terms of publicising and carrying out consultation on an application for a non-material change. Clause 19 amends the 2008 Act so that it is possible to prescribe in regulations that the person making an application for a change has to carry out the required publication and consultation themselves. The Government believes that there is potential to improve the efficiency of the process for making non-material changes by placing responsibility for some elements of the process set out in the 2011 Regulations to the applicant. Clause 19 also makes clear that the power to make regulations provides for the exercise of a discretion by the Secretary of State or an applicant. This could be used, for example, to allow the Secretary of State to disapply the requirement to consult someone if a change proposed would not have any impact on them.

21. At present, the process of publicising and consulting certain persons and bodies of the application has to be undertaken by the Secretary of State and that process can therefore only start once the Secretary of State has received an application. Given the lead-in time necessary for publishing the notice of the application in a local newspaper (and in other publications, as appropriate), consideration of the application is likely to be delayed - it is this notice that invites representations on the application and these representations will need to be considered before a decision on the application can be made by the Secretary of State.

22. Clause 19 will allow amendments to be made to the 2011 Regulations so the applicant is required to undertake the publication of a notice of the application and consultation by sending certain bodies a copy of the notice. This would allow preparations for the publication and consultation to be undertaken by the applicant while preparing their application and in advance of the application being submitted to the Secretary of State. The Government will include more precise details of how this process might work, for example on the timing of publication, in its forthcoming consultation paper.

23. The applicant currently has to pay a fee for an application comprising a fixed fee of £6,891 plus the costs incurred by the Secretary of State in publicising the application. Moving responsibility for publicising the application will therefore have no cost implications for applicants. The applicant would incur an additional cost in sending the notice of the application to specified bodies to meet the consultation requirement. But earlier publication of the notice and consultation could result in earlier receipt of any representations. This, in turn may enable the Secretary of State to make a decision more quickly than at present.

Material Changes

24. Clause 19 also amends the 2008 Act to provide the Secretary of State with a power to refuse to determine an application for a material change to a Development Consent Order, if (in particular, but not exclusively) he considers that a full application for development consent should be made.

25. At present, the process for making material changes requires an applicant to go through broadly the same process as if making a full application for a Development Consent Order. The government is therefore proposing to introduce a more proportionate process for making such changes. Clause 19 should ensure in practice that an applicant will not be able to use the change process for an application that should properly be subject to the full application process as set out in the 2008 Act.

26. Decisions on whether a proposed change to a project should require a full application for development consent rather than using the change process will need to be assessed on a case-by case basis. Early discussions with the Planning Inspectorate before making any application should avoid the situation of the Secretary of State having to decline to accept an application for change. The power is expected to be used very infrequently. But some theoretical examples of when it might be used could include:

    - if a road project from town A to town B was granted a Development Consent Order and the applicant subsequently submitted an application for the road to be extended from Town B to Town C, the Secretary of State might use his power to refuse to accept the application if the building of the road from Town B to Town C on its own would require a Development Consent Order,(because it met the thresholds in the 2008 Act to be a nationally significant infrastructure project).

    - if a gas fired power station was granted a Development Consent Order, but the applicant subsequently submitted an application for changes so the plant was fired by an another fuel (perhaps biomass or coal), then the Secretary of State could consider that the changes to the project were so significant that a new application should be made for a development consent rather than through an application for a material change.

27. Clause 19 also clarifies that the power to make regulations for the process of making material changes includes a power to allow a person to exercise a discretion. This would allow changes to regulations to be made so the Secretary

of State could dispense with the need to hold an examination if he considered that one was not required. An examination might not be needed, for example, in a situation where the Secretary of State felt able to reach a decision without the need for an examination because only a very small number of representations had been received.

Changes to the 2011 Regulations

28. The Government is proposing to consult in July this year on changes to the 2011 Regulations which govern the process for making non-material and material changes to Development Consent Orders. Annex A to this note sets out, broadly, the possible changes to the 2011 Regulations that it is likely the Government will consult on. No final decisions will be taken until the conclusion of that consultation exercise.

Annex A:
Changes being proposed to the Infrastructure Planning (Changes to, and Revocation of, Development Consent Orders) Regulations 2011

The existing regulations governing changes to Development Consent Orders can be found at: http://www.legislation.gov.uk/uksi/2011/2055/contents/made.

The following possible amendments to the 2011 Regulations are likely to be proposed as options in the Government's forthcoming consultation:

Part 1 (non-material changes)

(i) An amendment to regulation 4 on the requirement on scale of maps so it reflects the changes being proposed for full development consent applications in respect of offshore projects (see the Government's response to consultation on the 2014 Review);

(ii) the removal the regulation 5(5)(b) that requires the applicant to pay the Secretary of State's costs for publicising the application;

(iii) amendments to regulation 6 ("publicising the application") and regulation 7 ("duty to consult") to place these requirements on the applicant;

(iv) the possible need for a new regulation requiring the applicant to make a statement that the necessary requirements on publicity and notification have been met.

Part 2 (material changes)

(i) An amendment to regulation 10 to replace the requirement for pre-application consultation with everyone who was consulted about the original application for development consent, with a less onerous obligation on the developer to undertake such consultation (regulation 10(1)(a) and (b));

(ii) the possible removal of the duty to prepare a statement of community consultation (regulation 13);

(iii) the removal of the requirement for publicising an application at pre-application stage (regulation 14);

(iv) the addition of a new regulation that will allow the Secretary of State not to hold an examination if he considers one to be unnecessary in a particular case;

(v) a change to the maximum time periods for the examination (currently 6 months), recommendation (currently 3 months), and decision (currently 3 months) (regulations 42, 43, and 49).