*NIPA Insights Programme 2016 Research Project*

# Does the Planning Act process deliver the certainty and flexibility necessary to attract investment, permit innovation during the design and construction process and support cost effective infrastructure delivery – whilst providing appropriate protection for affected landowners and communities?

## Draft Summary

# Infrastructure Delivery: The DCO Process in Context

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**January 2017**

# 1. Summary overview of progress and emerging findings

Following the background literature review, the research has moved onto empirical data collection through qualitative approaches. We have made considerable progress and over 20 interviews have been conducted, 3 focus groups have been held for promoters/project managers, central government departments and stakeholders and statutory consultees and one roundtable has been held for NIPA members (as well as the roundtable discussion of MSG members). These discussions have all been fully transcribed and key points drawn out. Appendix 1 to this report contains a detailed discussion of this data and the emerging findings.

The research is still underway with case studies about to start and some interviews still to be analysed so the points below and the attached table of recommendations should be regarded as interim draft findings for discussion:

1) Most but not all those engaged in the NSIP DCO process are happy with it overall, in particular valuing the certainty of the statutory timescales;
2) The drafting of the DCO has a significant effect on the degree of flexibility related to the subsequent deliverability of the project and more attention to this issue would be beneficial;
3) Many of the issues relating to deliverability of projects are related to the failure to focus on the completed project and the flexibilities that will be required throughout the earlier stages of the DCO process;
4) There is a widely-held view that the level of detail in the process can be problematic and this is due both to a risk averse approach from promoters and their advisers and from a desire from some of those who are local stakeholders, communities and statutory undertakers to understand more detail of the proposed scheme or its construction, which Examining Authorities can then respond to;
5) Environmental information / assessment and compulsory purchase are seen as key drivers of detail, but the requirements of these are widely understood;
6) There are well known approaches to flexibility such as envelope assessments ('the Rochdale Envelope') and 'Not Environmentally Worse Than' principles, limits of deviation, temporary possession of land and through the use of requirements, if supported by adequate assessment and justification, meaning that is already possible for DCOs to be somewhat 'hybrid' between detail and flexibility (many examples of which already exist), however a variety of factors can work against full use of these and there is not always confidence that all parties are equally as accepting of this;
7) Levels of detail and flexibility will differ between each project and too much flexibility can make it harder to assess impacts as well as sometimes slowing down implementation by the need for further detailed design work and agreeing this through requirements;
8) The issue of flexibility appropriate to each sector could be addressed in the review of individual NPSs and general guidance;
9) While there are benefits of a front-loaded process, there is some evidence that the focus on the decision on the DCO is being financially incentivised through adviser fees and this is increasing cumulative detail and mitigating against a broader focus on deliverability;

10) Promoters should consider the engagement of construction partners and/or advice from the outset of their project to inform their requirements for flexibility and reduce requests for detail further into the process;
11) The potential for deliverability and constructability could be improved by appointing project manager(s) for the whole process from inception to delivery who can advise on flexibility throughout the process;
12) Promoters appear to improve their performance and delivery when they undertake successive projects and positively seek to identify lessons learned; they also gain more experience on where they should provide detail;
13) There appears to be little shared learning or comparing of experience on the delivery of NSIP projects including the drafting of DCOs between promoters;
14) There needs to be further consideration of the post DCO process (particularly involving local authorities and the discharge of requirements) and developing this further;
15) A statutory timetable for the determination of non-material consents would be one way of improving deliverability

**Next steps**

Following the MSG and NIPA Council on 16th January 2016, the research team will be:

- Completing the case studies and other interview analysis
- Identifying specific projects that can be used to exemplify the report's findings
- Drafting the final report including recommendations and action plan
- Holding a meeting with those who have been involved in the study interviews and focus groups to get feedback on the draft report
- Holding a NIPA roundtable for members to get feedback on the draft report
- Holding a further meeting with the MSG
- Holding a briefing meeting on findings and recommendations with DCLG and PINS
- Completing the technical report with the fully detailed context, literature review and data analysis

## 2. Emerging recommendations

| Emerging recommendations: Improving infrastructure delivery through the planning process | | | | |
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| ***Stage*** | ***Recommendation*** | ***Benefits/ Risks*** | ***Lead*** | ***Narrative*** |
| **NPS** | Review the NPSs as they reach the five-year mark and including consideration of flexibility for each sector to optimise deliverability | Sectoral research could identify what flexibility is most relevant to each sector/ location | Government Departments | A large number of interviewees felt that the NPSs were should be reviewed and updated, for a variety of reasons. When doing this, considerations of flexibility could be embedded into each one as this is an issue which varies by sector. Deliverability would then become an issue with Examining Authorities and the Secretary of State were paying more attention to when using the NPSs as the framework of tests for decisions on individual DCO cases |
| **Guidance** | Preparation of guidance specifically on flexibility in the regime, bringing together in one place an overview of the issue, specifically:<br>• Considering the need for detail/ flexibility through engagement<br>• Assessment of the need for flexibility, and the detail necessary to secure it and the requirements for Acceptance<br>• Examination of project deliverability, and<br>• Drafting for greater flexibility in DCOs where necessary and the routes to this<br>• Examples of best practice | Identifying a nuanced approach to where detail in assessment is needed, and where flexibility needs to be secured<br><br>There will not be one size fits all solution, so this will not be easy to write<br><br>However, a method aimed at embedding deliverability into projects could provide long term value | DCLG or PINS/ NIPA? | There is an existing PINS advice note on the Rochdale Envelope and some mention of flexibility in the DCLG guidance on Drafting DCOs. There is not, however, a comprehensive overview in one document of the various acceptable routes to flexibility, considerations in using them, or examples of best practice. Many interviewees felt such guidance would be helpful in both sharing best practice but also bringing all stakeholders in the system to a common understanding of what is possible and why (not), as well as the reasons for this |
| **Project Management/ ECI** | Appoint a project manager / project management team for the whole project from pre-application to delivery, who can ensure an understanding of the DCO consent as part of a wider process of infrastructure delivery and ensure an understanding by all advisers and consultants on the extent of risk mitigation required.<br><br>Promoters might also consider Early Contractor Involvement, which might be achieved through different routes such as an SPV with developers/constructors for | There is a wide range of diverse evidence about this, but the solutions are likely to be project dependent<br><br>Perhaps key objectives can be identified and included in guidance? Or perhaps this could flow from post project evaluation and disseminated through industry workshops | Promoters<br><br>NIPA (with MPA) research? | The benefits of Early Contractor Involvement were raised with us by many interviewees. There was a strong view from many stakeholders that at present the gaining of the DCO consent and the delivery of the infrastructure project post-consent are often almost being treated as two separate projects, which is harming deliverability through lack of understanding of constructability issues whilst trying to gain consent and lack of |

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| | the whole project to enable sharing of the costs and understanding of developing a more detailed design<br><br>Critical objectives are to:<br>• Identify construction method knowledge and innovation early into the assessment.<br>• Transfer knowledge of the DCO requirements, and why they are drafted the way they are, into the way in which the Works Information is drafted to define the construction of the project<br>• Project Management of projects to ensure identification and transfer of key deliverability issues through to construction | | | understanding of why the consent was framed in a particular way during construction. There are procurement challenges which differ between projects, but even if a full ECI solution is not possible, there are different routes to increasing cross-stage knowledge and understanding |
| **Assessment and Acceptance** | Identify a requirement in the Acceptance process for reviewing whether or not the deliverability of the project have been adequately considered in the application.<br><br>This could review the application documents to identify how deliverability has been taken into account in the specification and assessment of the application and whether there has been adequate discussion of deliverability (and the balance of flexibility vs detail required to deliver it) during the pre-application discussion with all parties | Guidance could encourage specific requirements for assessment of detail vs flexibility in the assessment process<br><br>Additional acceptance criteria might assess whether or not it has been considered, but is not likely to identify the quality of how it has been assessed and accounted for in the proposals<br><br>This is no different to other parts of the acceptance process, but still might provide an incentive for it to be properly considered | Promoters / PINS | Some interviewees felt that promoters and their advisors were often so focussed on gaining consent that they could actually drive detail themselves. Some interviewees felt that PINS did not pay sufficient regard to deliverability issues. A specific consideration of this acceptance stage could help all parties think about acceptable levels of flexibility and the rationale for that, and test whether these issues had been explored in a sufficiently robust manner pre-application |
| **Examination** | Is there a need for a hearing focussed on deliverability issues? Or is there another approach we would be recommending to the examination process which would bring an emphasis on deliverability issues? | For discussion | PINS | As above, there was a feeling amongst some interviewees that PINS did not currently pay much regard to deliverability issues, which often relate to flexibility / detail issues. This would be approached most transparently through open discussion following guidance / NPS tests related to the issue |
| **DCO drafting and requirements** | Consider reviewing the guidance available on drafting DCOs with specific reference to scheme implementation, in light of examples of best practice<br><br>Host a cross-sectoral forum to gain feedback on the discharge of requirements and the implications for discharging them (e.g. Planning Performance | Drafting technique might be included in guidance, but is there something else here – about identifying good practice and demonstrating that providing for later discharge of requirements can lead to good outcomes | NIPA / DCLG / PINS | A number of different interviewees, including some from PINS, felt that there was a need for a better understanding by all stakeholders about good practice in the framing of requirements, the implications of how these were drafted and the process for discharging these. Requirements are often suggested as |

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| | Agreements) and then produce an advice note on this | This could come from a review of current experience/ post project evaluation | | somewhere that certain detail can be worked out, and there can be transparent processes for this, however there can be resource issues for LPAs and stakeholder and monitoring / implementation issues depending how exactly these are framed and worded. There was widespread concern to understand more what works in requirements and how to improve learning and best practice across the NSIP community |
| **Non material amendments** | Government review of the need for a statutory timescale for the process for non-material amendments to consented DCOs | Reduce the risk of changes not being sought, and cost escalation being accepted on projects<br><br>Concern about the available resources in Government Departments that would be expected to deliver this | DCLG | There was strong support across almost all interviewees for a statutory timescale for non-material amendments to consented DCOs, including from many different stakeholders. There was a widespread feeling that the scale and timelines of NSIPs were such that some amendments were always likely to be necessary but some recent examples had taken a very long time to determine and this was causing a reluctance to apply for non-material amendments, even when to the detriment of project construction. This was felt to be an anomaly in that other parts of the system are all well governed by statutory timescales, giving a widely appreciated certainty |
| **Post project monitoring and evaluation** | Extract learning and disseminate this to the benefit of future projects | NSIPs are by definition long term projects, and many of the lessons will not be learned until construction has been at least commenced, and ideally delivered.<br><br>One potentially important outcome will be to raise confidence in requirements which allow for later discharge<br><br>There may be commercial sensitivities about lessons learned | NIPA | During the research, certain projects were mentioned by many different interviewees, in particular the Thames Tideway Tunnel and also Hinckley Point C project. Several suggestions were made of interviewees of lessons that could be learnt from these projects, but also there was discussion of how the full picture might not be appreciated until construction of these projects was completed. Many consented DCOs are only now starting construction, and consideration should be given to further research being commissioned by NIPA into detailed case study projects |
| **Dissemination and Training** | Dissemination what works and what doesn't work for the use of applicants, advisors, statutory consultees | Raise cross-industry learning about the detail versus flexibility issue, implications | NIPA? | A number of promoter interviewees were now working on their second (or third) DCO and felt |

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| | Training and pre project support for those with little or no relevant DCO experience | for all parties including the way consultants and advisors are incentivised | | many lessons had been learnt internally within their organisations from their first DCO experience. It was generally agreed, however, that were was less opportunity for cross-industry learning and indeed some myths about the system were taking hold. There was also some suggestion that some constants and advisors are incentivised to merely achieve the DCO consent rather than considering deliverability, which could drive risk aversion and detail. Whilst fee structures may not be entirely changed, wider awareness may help to tackle this. |

## Appendix 1 – Detailed discussion of research findings

The findings reported here are based on qualitative empirical research conducted by the UCL team with a series of interviews and focus groups about the system in general and then two detailed case studies.

21 semi-structured interviews were conducted with a full cross-section of actors in the NSIP world. For ethical reasons, all interviewees have been anonymised as this was the preference of the majority of interviewees, however Appendix 4 gives an indication of the type of organisation interviewees worked for / positions they held. These were all individuals who individually could add a great deal of knowledge to the study.

Three focus groups and one roundtable meeting were then held, each with a group of participants from a similar background / role in the process engaging in a semi-structured discussion around the core themes of the research. The first of these focus groups was with 6 contractors, particularly those associated with the construction industry. The second of these was with 9 civil servants from central government departments involved in the regime. The third was with 6 lawyers who have represented objectors (some had also worked for promoters) and those who worked in-house for statutory consultees. Finally, the roundtable was hosted by NIPA and with an open invite to all their members – x people attended.

In all cases, the interviews and focus groups, were digitally recorded and fully transcribed. These transcriptions were then coded to bring out the key themes and issues.

The two case studies were… [TO ADD].

**Evidence from interviews, focus groups and the roundtable discussion**

**Views on the system generally**

Before asking about detail and flexibility specifically, it was usually a useful 'warm-up' exercise to ask interviewees and focus group participants their views of the Planning Act regime in general and how it worked. On the whole, there was strong cross-sectoral support and a feeling that in general the original objectives around certainties were being met.

Specific elements of the process that were felt could work very well were statements of common ground and the whole front-loading approach to the system:

> *"I think applicants use that pre-application period to different effectiveness, some are in more of a rush to get through it than others, but I think time spent there, particularly being open and transparent about what's negotiable about the project and what isn't, is time well spent because you go into the examination knowing exactly where each other stands and as the examination should be, it's arbitrating between significant viewpoints and significant issues, rather than nibbling round the edges of lots of little things" (Interviewee 1)*

Similarly, Interviewee 4, also a local authority planner, appreciated the frontloading of the DCO regime:

> *"Having gone through it twice now, with two very big applications, I actually found that a relatively broad pre-application process was incredibly helpful, it meant that you could define something that was fit for purpose for our locality, but the challenge was making sure that the community engaged"*

Interviewee 3, Planning Director at a statutory consultee, felt that the pre-app stage was much better under the Planning Act process than the previous regimes, which he said suffered from an 'unstructured approach to pre-application stuff' whereas now there was a much better approach to allow for 'specialist consideration of the issues'. Interviewee 3 felt there could be productive discussion around parameters pre-application:

> *"I think the beauty of a good pre-app is that we can work with the development envelope and we can set parameters, within which, if you can … so the conversation would go something like 'if you cannot touch that bit over there',' or 'if you can carry your viaduct over that bit over there, then where you want to go within that envelope is fine'."*

Interviewee 14, a PINS official, felt there are lots of steps for promoters to follow pre-application but once they got to acceptance, they really benefitted from the statutory timescales. One participant in focus group 3 felt the system worked well because *"I think people have realised it really is a process about fine tuning the requirements, the mitigations, not about the principle of the project at all, generally and it's also a process, therefore, of reaching consensus."*

The high level of openness was remarked on positively; Interviewee 13 (a PINS official) highlighted the accessibility of documentation and regular updates on the PINS website as a real strength for openness and accountability compared to the proceeding regimes. They also felt that communities actually have more ability to have a say now than they did pre-DCO. One participant in focus group 2 made the point that the regime is generally uncontroversial as a process for determining NSIPs, particularly in comparison to some of the public enquiries there used to be:

> *"Generally, it's politically uncontroversial as a regime, as a process, people may not like the decisions, but as a process, generally, politicians … and in terms of the amount of correspondence we get from MPs on the regime, compared to what the … is tiny, so it is well supported, it's actually seen as doing a good job in terms of balancing those different interests and I think that's what brings us back to is why we've looked at it so far in terms of tweaking of a regime, rather than actually 'this needs fundamental re-think.'"*

It was felt the system was more transparent and involved communities more meaningfully pre-application compared to pre-Planning Act practice.

The certainty of timescale was certainly a big issue mentioned by numerous interviewees. This was especially important for energy projects to be able to programme to bid in the annual capacity auctions. Thus, whilst perhaps overall the process isn't quicker (probably about the same overall as previous regimes according to interviewee 10, who worked for an energy promoter) but there is certainty, which is very much valued and is essential for programming projects. Interviewee 12, who also worked for an energy sector promoter, was very sure that the certainty of timescales were the major benefit of the DCO regime:

> *"we know that we will get a decision on, or before, I think, [date] next year, which will really help us in terms of planning, for the supply chain, but also for bidding in for financial support through the government subsidy regime etc., it's really, really helpful for us to have that kind of certainty in terms of the timescale… the NSIP process does have its advantages in terms of a clear, transparent process with very defined consultation periods and a very defined timescale."*

This was compared with an experience for an offshore wind project in Scotland where the decision making process had taken a lot longer.

Interviewee 1 spoke of two highways schemes electing to go into the NSIP regime because of the certainty of the timescale and how well this links to programme deadlines. Interviewee 5, who worked for a highways promoter, was aware of work comparing Highways Act consents prior to

the 2008 Act with DCOs and felt that whilst DCO pre-application work was more intensive and took much more resource, that the overall timescales were similar and there was a real appreciation of the statutory timescales; one public enquiry under the former regime has apparently gone on for three years. This certainty really helped project programming.

One participant in focus group 1 (which was themed around contractors and those involved in the construction industry in particular) highlighted the fact that what got consent was very similar to what they had originally asked for:

> *"I have to say, if you compare the DCO that was submitted upon application with the one we got consent for, there's very few changes, really, in the scheme of things, given the scale, so that's encouraging and I think that is a tick in the box for the system."*

The same speaker then added:

> *"I think, now that we're delivering under the DCO, I think it's a fantastic consent overall, it does give us almost all the powers we need to deliver the project, it places controls upon us where it's appropriate to do … I think, fundamentally, the DCO process, allows that flexibility for the applicant to choose its own route"*

Another participant then commented *"I don't disagree … and on top of all of that, it delivered time certainty to the day".*

Another big advantage was dealing with the compulsory acquisition side of things simultaneously as the planning side, and the chance to cover related works in the one system. A participant in focus group 3 (focussed on lawyers who had represented objectors and those who worked for statutory consultees) said:

> *"I think it's good, as an applicant, to be able to draft your own consent, put in all the powers that you want in one thing, that's quite good. So if you want to be innovative, you can in a way that you couldn't draft your own planning permission, or your own compulsory purchase order in quite the same way, your own parameters, so I think that flexibility, that amount of control, is really good for applicants and … being able to get compulsory purchase powers direct to yourself is a real advantage, I think."*

The NPSs and the way they established the need for development was also commented on: the NPSs were described by interviewee 12 as giving very helpful context for their projects, particularly the establishment of need, which avoids some of the debate that can apparently be seen in Scotland (under a different regime) on whether there's a need for renewable energy or wind turbines in the first place. Interviewee 12 also explained that in the past the biggest issue for offshore wind was getting consent, whereas now there is greater certainty of what you need to do to get that, but there's far less certainty about funding so a great deal of work on obtaining a DCO might ultimately not see a project actually built which is now 'the biggest thing that's affecting the industry'.

The perceived disadvantages related to cost and perceptions it was an 'onerous' process which is more focussed on detail that a Transport and Works Act Order. Indeed, interviewee 1 reported that there is a feeling much more detail has been required on highways projects that NSIPs from other sectors. There was a suggestion some energy promoters may have a 'fear of the unknown' hence keeping schemes at 49 MW to avoid the regime. Interviewee 7 (who worked for an energy consultee) highlighted the number of 49 MW gas power stations going through the TCPA process because of the much faster timescales possible than a 50 MW scheme through the DCO regime. Furthermore, Interviewee 10 said that the economics of a 60/70 MW renewables project just don't add up because of the NSIP process.

There was some feeling that the DCO regime could be more complex than other consenting regimes for major projects such as Transport and Works Act Orders or hybrid bills. One example was given during focus group 1:

> *"I spoke the head of consent for HS2 Phase 1 and he felt that Tideway DCO was actually more onerous, in terms of construction, information that needed to be approved by local authorities, than HS2 and he felt that when they were in parliament, they were being asked 'well, we want this information, Tideway gave it to us' and then saying 'no, no, you've got the Code of Construction Practice, that's enough."*

Participants in focus group 3 felt the Planning Act system was 'really its own thing' so you couldn't easily compare it with other consenting regimes, although there was comment that with an expert panel, there was 'more scope for getting the consent right' in an NSIP process than a Hybrid Bill.

There was disagreement that levels of detail had increased since the inception of the system in focus group 2 (who were central government civil servants). One participant commented that the original IPC commissioners had taken a very precautionary approach because it was a new regime, and that approach has remained. Furthermore, one participant in focus group 2 was concerned that there were certain views of what the system should be, rather than what the system actually is, and a focus group 3 participant suggested there were was now some 'folklore' which had developed around the regime and how it operated (focus group 3 participant).

**Experience working with stakeholders and local planning authorities**

The specific issue of how well promoters were able to engage with statutory consultees, local planning authorities (LPAs) and other stakeholders as part of the system came-up. In part this was people commenting about how the system was working in general, but feedback here does also link more specifically to issues of detail and flexibility as the acceptance and capacities of statutory consultees and local planning authorities can be so vital in making flexibility work.

As regards local authorities, there seemed to be a feeling that there was a challenge in dealing with some local planning authorities who had not yet had DCO experience (as discussed in focus group 3), including an example where an LPA engaged with a promoter too late to influence something they might have been able to improve on a project had they engaged sooner. There were, however, examples of other LPAs who now had experienced of several DCOs and had even shared their experience with other authorities.

Interviewee 5 expressed concern about different attitudes, expertise and resourcing levels at LPAs, describing their experience as a 'mixed bag'. Indeed, interviewee 5 went on to comment:

> *"On the scheme I was in, there wasn't much awareness of the local impact report and there's a real risk, if the local authorities don't understand the importance of it because if they submit one and they've not given due regard to it, it could point out loads of issues which don't exist because they haven't read all the application".*

Interviewee 5 also gave an example from a Highways scheme where the LPA has not actually been comfortably signing off some requirements and wanted this to lay with the Secretary of State rather than them.

There could, apparently, sometimes be issues with the cooperation of local authorities due to political views of the proposed NSIP (even if LPAs are advised to separate political views of the scheme from technical work on its local impacts):

> *"The main problem, talking to local authority partners, is that they are much more likely to be a political influence, whereas we, mercifully, are largely immune from that; so we sometimes can't have a very sensible, technical conversation because the officers have been told not to support the scheme because of the council's position on it" (Interviewee 3)*

Very real concerns were expressed in focus group 2 about the levels of capacity and expertise in local authorities and statutory consultees, which could impact their ability to deal with higher flexibility in the system. Indeed, resourcing was clearly an issue for local planning authorities, Interviewee 4 explaining that getting LPAs more involved in managing flexibility through the discharge of requirements would only work *"provided that is adequately supported by a funded service level agreement because to be quite blunt, we don't have those resources and I think that in order to give assurances to both the applicant and the local authority, we'd need to be able to secure those".* He went on to state that:

> *"There is a fundamental flaw, for me, in the development of the system in that, back in 2007, the LGA wrote a rather unhelpful response that suggested that the management and engagement in the DCO process in the Planning Act 2008 could be absorbed into the normal run of business and I'm afraid the complexity of discharging some of the requirements associated with one of these projects is above and beyond what could be achieved through our resources."*

Some developers are not keen on entering into Planning Performance Agreements but without these local authorities get no fees to cover their work like the local impact report and discharging requirements (interviewee 13).

Local authorities who had been politically opposed to the project could cause issues during the discharge of requirements, according to one participant in focus group 1:

> *"I think one of the difficulties is where there are local authorities who did take a stance at the start that they weren't interested in this project, or they wanted to object to this project, it's very difficult for them to just turn around, once we've got DCO, and change their entire attitude. So it takes a while to get them on board, some of the initial applications, they're not dealing with in the timeframe that was anticipated; they're asking for more information than they are necessarily entitled to and that has that initial slowing up of the process."*

Just as many LPAs have had to learn about how the system works and how best to engage, so too have statutory consultees. The initial unwillingness of some statutory consultees to engage came-up in focus group 3:

> *"You're supposed to engage with people a lot on pre-application in terms of drafting the order and all of the requirements, like the conditions, but I think some statutory consultees didn't really engage with that process very much, I think they just thought, fairly in a way, 'well, I'll wait until I see your actual application, I'll review your actual ES and then I'll start talking to you about the draft requirements, but of course, we have to put some in, so it was a bit of a battle, they're busy anyway and to get them to prioritise it, as you're supposed to, was a bit tricky."*

There was some discussion in focus group 3, though, that things had improved more recently. This is similar to the feeling from Interviewee 3 that the DCO process had improved over time:

> *"I think we've probably, gradually, got the hang of how the process is supposed to work and got better at engaging and at the same time, so have the promoters of the schemes. We've learned how to work together better, I think, in more recent times."*

It was suggested that as a statutory consultee, interviewee 3's organisation was now asking more precise questions, looking only for relevant information, as they now had a better understanding

of the way the process is supposed to play out. There was a feeling, however, that the natural environment statutory consultees were further ahead than the others and more use could be made of the evidence plan approach used in connection with Habitats Regulation Assessments in other spheres, particularly EIA. Indeed, interviewee 3 felt these evidence plans could 'dovetail nicely' with statements of common ground. Interviewee 3 did, however, admit that there was variation between the organisation's regional offices in how wide they would cast their net in terms of asking for survey work and information on potentially harmful impacts of a proposed NSIP.

Examples of good practice included interviewee 3 highlighting how his organisation had regular phone calls from colleagues at other statutory consultees to try and ensure they weren't giving promoters conflicting advice. Good use was being made by the 'DEFRA group' statutory consultees of the 'evidence plan' approach (agreeing survey methodologies etc. between all parties and so moving the discussion on to findings, impacts and mitigation rather than how the data were gathered and modelled in the first place). Similarly, Interviewee 12 felt that for their second NSIP, what had worked well was setting up a steering group with technical working groups during the pre-app phase with organisations like the MMO and Natural England involved, discussing things like survey methodology.

The issue of resources available to statutory consultees was raised quite strongly. Some statutory consultees are very engaged but there are very real resourcing issues impacting the ability of some to meaningfully engage in the way the system intends (interviewee 13). Interviewee 3 said some promoters are very happy to come to a service level agreement with a statutory consultee but others are very resistant, *"they resent it thoroughly when somebody comes along and then they've got to pay for the privilege of being told that they can't do it the way that they want to do it"*. Indeed, some promoters are willing to pay one statutory consultee but not another. One solution to this was apparently for the statutory consultee to more clearly define what clients were getting as part of a charged for pre-app advisory service.

Interviewee 12 highlighted the resourcing of the statutory nature conservation bodies (and similar stakeholders) as an issue of concern for them as a promoter:

> *"Stakeholder resourcing is really important for the sector, for us as a developer, for the stakeholders themselves and particularly on the environmental side, the SNCBs under the DEFRA family have seen huge cuts to resourcing and are increasingly asked to comment on huge projects, complicated projects, new technologies and where they are, the things that work for us in terms of statutory timeframes, or prescriptive requirements. It's important that they have, not just the kind of like bums on desks, but also the right sort of level of expertise and experience as well. We have concerns over their levels of staff turnover, experience and expertise and that learning from previous projects".*

The system can involve non-statutory consultees as well, of course. Interviewee 12, who was stakeholder manager for her promoter, felt the pre-app process worked quite well with lots of information but clear purpose, process and timescales. There was, however, some challenges for smaller non-statutory consultees such as a conservation charity they wanted to engage:

> *"We had to do an introduction to the NSIP regime and the examination. It is a reasonably complicated process and she wasn't aware of how it all works and what's expected from them as a stakeholder, which in actual fact, was quite a good opportunity because then she could see that I was spending time, talking everything through with her and we built up a rapport, I think she really appreciated the fact that we put some effort into that, but I think that can be challenging for stakeholders."*

It is worth noting that the concerns about resourcing challenges in this age of austerity were not confirmed to local authorities and statutory consultees. Interviewee 4 expressed concern that there aren't the *"level of resources within central government to keep pace with the level of change that the development industry requires".* Interviewee 13 was concerned about resourcing levels in the government departments who determine non-material changes and believed as more projects are built out, there could be more requests for non-material amendments coming in and even more time taken determining them. It was believed none so far have met the six-week determination period suggested in guidance.

Interviewee 11, a former inspector, was very concerned about levels of resourcing at the Planning Inspectorate, particularly as concerns pre-application advice:

> *"The civil service has been under extreme pressure, the planning inspectorate are part of the civil service and it is a highly professionalised area and an expert body, the planning inspectorate is an expert body and any reduction in that professional resource has risks that then drive pre-prescribed behaviours and following precautionary practice, rather than unique, professional thinking and innovation and consideration from a base of experience and practice which informs that. I think that's an increasing risk area, that by its nature, therefore, drives precautionary behaviour and detail is an easier route for those with less of a background and expertise."*

Resourcing issues at PINS were explained by interviewee 13:

> *"On of the clear issues we've got in the planning inspectorate is resourcing these NSIPs. DCLG asks us how much money do we think we'll need next year and we'll say - because we're trying to move to a position where we're 100 per cent cost recovery from the fees and - so we're saying we're predicting that these applications will be this number of applications will be submitted in the next financial year and this is how much revenue they're going to generate and then they all fall away because there's a general election, or a capacity auction. So it's impossible to resource this in a sensible, planned way and we're always asking and begging and pleading developers to give us a realistic assessment, but then they're constrained by what their boards want them to say … We've got to think about how to get line up inspectors, who've got the necessary expertise, and then you're sort of blocking out their time for a project that might not come in"*

Such issues clearly impact the way the system works and can impact how issues like the balance between detail and flexibility play out.

**Views on the drivers to detail**

The first topic directly associated with the discussion on detail and flexibility in the DCO regime which emerges from all interviews was suggestions as to who or what was driving levels of detail in the system. It is worth noting that several people suggested that certain levels of complexity were inevitable just because of the nature of NSIPS, for example Interviewee 11 highlighted that NSIPs are very substantial schemes and so by their nature will always involve a certain level of complexity: *"it is a complex application and it is quasi-judicial process and inevitably, that will appear complex to many people".* The very nature of the regime is that it deals with very complex, complicated issues as one participant in focus group 3 acknowledged. Another called the process 'huge' with a massive amount of material to try and work through in a six-month examination process. There was also some disagreement about whether the process had

become more complex over time, or rather there had been a high level of complexity right from the start.

Environmental information / assessment

There was widespread agreement that the requirements of the environmental statement and Habitats Regulation Assessments drove detail but this was very much seen as necessary detail, and indeed Interviewee 2 suggested that perhaps the Section 55 checklist should be even more detailed to ensure adequate information was being supplied to meet these requirements. Interviewee 6 felt the DCO regime was more complex than previous consenting regimes, but this was in response to the incorporation of EIA requirements and EIA driving risk adverse behaviours:

> *"The EIA process, they've got you; so often the whole design team, the promoter, clients, they're scared. When I started these things in 1990, rarely did we have legal advisors involved, they came right at the end and just signed off. Now, they're probably the first bunch of consultants that are employed - that's the nature of their job - they're naturally cautious and everything is belt, braces and bullet proof. So yes, it has become more complicated."*

One participant in focus group 2 was very concerned around the risk of legal challenge on the environmental issues, noting the fairly stringent demands of the Habitats Directive, Birds Directive, Water Framework Directive and the EIA Directive. Another was concerned that the Secretary of State could be legally challenged if the NSIP had not been properly considered during the DCO examination:

> *"There's a risk here, if we don't actually examine this level of detail, we don't have this level of detail in the DCO, that when it comes to a challenge, the Secretary of State will be found not to have taken full regard of all material considerations in taking the decision and that's what drives it, it's a very legal system and the risk to challenge is to the Secretary of State - judicial review of the Secretary of State's decision - and I think there's an element to which there is a precautionary approach taken to the way people look at DCO applications, when they're taken forward, simply because of that."*

Another participant felt a very stringent examination was necessary for the Secretary of State to then be able to grant a consent in their three-month decision making period, and the Secretary of State wanted to be able to actually grant consent to nationally significant projects which depended on them having had a robust examination.

Interviewee 9 believed that people tended to focus on ticking boxes, just gathering and presenting information for the preliminary environmental information / EIA rather than actually using the process to enhance the environmental design. Such small criticisms aside, whilst there was widespread agreement that environmental information and assessment could drive levels of detail in the system, most people seemed to accept this and there were no suggestions that any particular changes should be made to the regime around these issues.

Compulsory acquisition

Interviewee 13 felt environmental assessment requirements and compulsory acquisition were the main drivers of detail and was emphatic that there was need for certainty where people's land was going to be compulsorily acquired, in particular. Similarly, interviewee 17 highlighted the higher threshold tests that were applied in relation to compulsory acquisition of land but felt these was appropriate because there were substantial Human Rights issues at play and a DCO to grant large powers to a private sector company in this area.

The issues of detail in relation to compulsory acquisition were not just because of the very nature of the system, however, but also because of how some actors behaved. Interviewee 5 gave evidence of how land owners and land agents could push for detail but often because they had not dealt with a DCO before and did not have confidence in leaving detail to be settled post-consent. Furthermore, some land owners and their agents will apparently only raise things at examination and not engage fully pre-application, according to Interviewee 5: *"I think people - public/landowners - sometimes take time to digest everything, understand it's real, accept it and then realise they have to engage".* Similarly, interviewee 4 commented that *"there is still a perception within, I believe, in the public that the examination process if your day in court"*.

<u>The public</u>

Beyond environmental and compulsory acquisition requirements (which were almost universally mentioned as drivers of detail), a range of other factors were mentioned by some – but not all – research participants. One fairly common suggestion related to local communities. Thus whilst one need for detail was clearly environmental impact legislation, but interviewee 4 suggested another was what he termed the 'community test':

> *"I think there's an element of, if you're not able, if the applicant is not able to answer that [how many HGVs will run past my house during construction] and provide some degree of assurances, that's probably another threshold because how can a community engage in an application that they don't know what the impact would be"*

Yet this could, apparently, readily be dealt with by setting upper and lower limits rather than absolute numbers.

Communities often drove detail, interviewee 6 felt, but this was because of a lack of benchmarking to understand construction impacts, which could be resolved by pointing to other recent schemes and things like *"the number of lorries on your road will be fewer than the number of Ocado vans that come past per day"*. Interviewee 10 felt communities really tried to push detail that was hard to provide at the consenting phase ('when exactly will this cable be laid past my front door'). One participant in focus group 1 did acknowledge why local communities want certainty: *"If it was taking place outside your house, would you want them to be telling you positively and certainly what they're going to do, or would you want them to say 'I might do better than that, or I might not' and it's an interesting dilemma."*

It was clear, however, that whilst some communities are very concerned about the construction of projects, others are more concerned about the finished project's impacts (interviewee 13). Interviewee 10 felt there was a lack of confidence in the system and local planning authorities and promoters to be able to work together to sort out construction management issues post-consent. There was a discussion in focus group 1 that perhaps local communities do not trust projects where it is unclear who will be constructing the NSIP and therefore whether they can be 'trusted' to be good neighbours. Similarly, one participant in the focus group commented:

> *"You get hundreds, if not thousands of people that object, get together in groups because if they didn't, they fear that they would not be fairly treated, rightly or wrongly and no client on their own can stand up and say 'I promise that if you let me get my consent order in, or whatever, then I promise to treat you fairly' because they can't rely on that sort of promise because they don't quite know who they're dealing with and what the promises were. So the way that they get certainty is before approval is granted and that's why I think we spend an awful lot of money doing exact analyses"*

Examining authorities would really want to understand what's driving community impacts, however well the case is made, and whether that's a legitimate concern in the planning process,

explained Interviewee 11. The nature of national infrastructure is such that the beneficiaries are not necessarily the people who have to deal with local impacts and,

> *"Examining authorities are very aware of that … to some extent, the only tools in their box are mitigation, so it doesn't necessarily drive detail, but it will drive certainty around delivery of that and mechanisms of that. Some of it may be prescribed detail, such as operating hours, which go directly to impacts on people, they are requirements where you might want some respite for a community that's having impacts over a very long period … So those things, they are real detail, but actually, if an examining authority can get to grips with that and get an applicant talking about it and providing proper information, actually, you could end up with slightly better outcomes, which go to a local impact; you can't take away the eight years of construction and that the community is near it, you can't take that away, but what you can do is humanise it to some extent and make small differences that might just give slightly better environment, a slightly better relationship and some respite within that overall programme".*

<u>Examining Authorities / the Planning Inspectorate</u>

A direct link was made by a number of interviewees between community driven concerns leading to detail and the actions of examining authorities (Inspectors). Interviewee 1 felt communities gave an example of the planting in a highway hedgerow having been driven by inspectors responding to community concerns:

> *"I think, again, if you went out to community and said 'look, you have another opportunity, in the future, you will be consulted on the detail,' then they may be more relaxed about it because I've been in examinations about what is the planting mix in the hedgerow and is that really an issue that the Secretary of State needs to be interested in, or can the applicant, with the support of planning inspector, say 'look, we've set out a process in the DCO, how requirements will be dealt with, they will be consulted on and determined in the proper way,' but that doesn't seem to happen at the moment".*

Interviewee 1 felt there was still a distrust of the construction industry even though contractors have progressed over the past few years with things like the Considerate Contractors Scheme.

Interviewee 6, a private sector environmental consultant, felt the Examining Authority had driven detail on the Tideway scheme much more than would have happened though a Transport and Works Act process:

> *"I watched the inspector at the Northern Line extension and that person was used to things, used to dealing with large schemes and getting, let's say, the best out of both the community involvement and the promoter and reaching a compromise, whereas, whilst it wasn't adversarial, it felt adversarial at times on Tideway because the inspectors were looking for a high level of detail, which we had, but probably wasn't necessary… I'm not looking to point the finger, but I know that they're very good and very professional, but they are briefed and they are on the brief that they are given … this is detailed consent, that you need to know every detail, almost down to what type of nail you've got to use on that hoarding."*

There was also a feeling that Examining Authorities 'react to who's in the room' (interviewee 7); Interviewee 13 suggested inspectors could drive detail during examinations but often this was in response to community concerns and that a key role of the process is to balance the national need for NSIPs with the local impacts of them.

Interviewee 2, a former Inspector, felt that inspectors could drive detail, but this was part of their role:

> *"Sometimes, we find detail, but in hearings, the public, or even the local authority, will say 'oh, thanks for identifying that 'cos we didn't realise that was missing' and yes, we do need*

*that detail... In a couple of cases I've dealt with, not knowing the implications of the CA requirements and how's it all going to work and what's the timing and what's the land take, so in that way, you are acting on behalf of the public".*

Indeed, Interviewee 2, felt Examining authorities didn't ask for detail just for the point of it but because the DCO was a final consent:

*"It's a matter of fact that if you don't get it in the DCO, or in the document that is certified by the DCO; then there's no way of controlling it after that and so, all the time, you come back to 'is this secured in the DCO somewhere?' and so some of the detail, which is important, is sometimes not secured in the DCO and you know, with the Rochdale envelope, which is another relevant point, all the time you're trying to see whether they've tested the worst case scenario, so you need detail to do that sort of thing".*

There was apparently inconsistency is how planning conditions are dealt with between projects, *"what is the watershed, if you like, between a matter of substance to be dealt with as a DCO application and what is the matter that is the detail and doesn't go to the heart of the consent which is really what the DCO examination should be about"* (Interviewee 1). Interviewee 1 also felt the levels of detail varied between different NSIPs in the regime:

*"I think it's a bit of lottery is what I'd say. I think some people … and a lot of it will go down to … there's lots of factors, so the individual examiners, the representations that come forward from the community and the representations that come forward from statutory consultees and landowners" (Interviewee 1)*

The qualifications or interests of panel members can apparently make a difference

*"On my panel, there was an architect inspector - he just happened to be an architect - and he really drove this forward and got them to do design studies, which they hadn't done and in the end, their design studies were secured in the DCO and I think the outcome was very much better, but to be honest, it's only 'cos he was there with his knowledge, that that detail was entered into, so I think this is an area of inconsistency" (Interviewee 2)*

Interviewee 5 felt that because of concerns about 'fettering an examining authority', there was a difficulty for promoters responsible for multiple DCOs to build relationships and that there could be inconsistencies between Examining Authorities. This could apparently be further driven by the professional background of individual Inspectors.

Interviewee 7 felt the culture from the start of IPC had been too detail heavy at the pre-application stage:

*"I think there was a nervousness at the start, from both the planning inspectorate and also clients, to make sure that every letter was followed, which resulted in quite a volume of applications and quite a long period of pre-application consultation to make sure that everything had been complied with and I think because it was done so perfectly at the beginning, there's a nervousness now for developers to step away from that model and I think the planning inspectorate quite like that it's all been belt and braces before they get the application in."*

Interviewee 5, felt that levels of detail had increased through the five DCOs they were aware of, for example an increase over the years from inspectors asking 35 questions in the first round in one early project (the A556) to 150 in a more recent example.

Flexibility can clearly be harder for Examining Authorities, an interviewee 11 explained:

*"You can go in prescribed detail of a fixed scheme … of you can put in imitations, parameters and thresholds and with certainty and engagement continuing in the process and the latter is much harder for the examining authorities to grapple with … In determination, the inspectors have got to know what they're reporting on"*

Interviewee 10 did, however, feel that there was more understanding from PINS recently:

> *"The early stages, it was quite … I suppose they thought they were going to be the decision makers and they didn't want to have JR and it all felt like really, really pushing for information that it wasn't appropriate to push for and not understanding the kind of commercial drivers behind these projects and that's not so much my recent experience with planning inspectorate, I think things are changing"*

In contrast to some interviewees who clearly thought Examining Authorities had been 'too hard' on promoters trying to deliver publically beneficial infrastructure, there was actually a perception amongst a number of those who had worked for statutory consultee and civil society objectors that the regime was set-up with a 'mindset' to say yes to NSIPs and that good in principle objections were not always taken seriously. From this perspective, the culture at PINS was *"'please get your application in, we're stand ready to grant your consent.'" (focus group 3).* There was thus some disagreement over perceptions of the culture at PINS between different stakeholders in the system.

<u>Lawyers and consultants</u>

Whilst some suggestions were made that Examining Authorities could drive detail, there were also suggestions that detail could be driven by lawyers and consultants working for promoters. Thus interviewee 9 suggested legal advisors can drive detail in application documentation:

> *"I suspect it's the lawyers who are driving that because what we're talking about here is a legal process … I think there's a tendency based on what's happened in previous cases and the way that PINS is looking at things for lawyers to say 'well, the panel were concerned about this last time, we'd better cover that off and produce something to do with it' and so I think, over the years, the customer practice has developed which has meant more material, more comprehensive submissions, to try and anticipate what PINS will be wanting."*

There was acknowledgement of risk adverse behaviour by one promoter following legal advice during focus group 1:

> *"We got our lawyers to advise us what we needed to do and we did it on the basis of increasing the certainty of getting a DCO because if we went through all that process, the downside was if we didn't get it and we had another 18 months to go through it all again, so obviously, you're not going to do anything that risked, you're going to be risk averse in terms of what you put in."*

Another participant then replied *"Absolutely and bearing in mind, as a country, where we are with JRs, you could fully understand that"*.

Similarly, various consultants were also suggested as drivers of detail. Sometimes this might be because of experiences levels. Interviewee 10 felt some environmental consultants working on NSIPs were not experienced with projects of this scale and could drive too much detail: *"I think that when people ask for information to assess environmental impacts, they need to think about the impacts, not just this huge list of information it might be nice to have."* Interviewee 4 felt some of the consultants used by promoters tended to drive detail in order to aid their assessments and that *"I think you still see very poor, very clumsy, cumulative impact assessments … It still feels very formulaic on the assessment side."*

In other occasions this might because of the opportunity to make money from projects. One participant in focus group 3 suggested that consultants could drive levels of detail:

> *"There is a cynical view about it, which is that there's an … and I'm not saying this is my view, but there is a school of thought that, effectively, you have so many specialisms, all of whom*

*are making their career out of the promotion of big, infrastructure schemes, that they're not going to say 'oh, that's just an afternoon's work, don't worry, I can give you my analysis of this particular, technical point on a single side of A4' and instead, they come back and say 'that's a month's work and 200 pages of analysis.'"*

Similarly, interviewee 14 suggested some consultants are risk adverse and conduct assessment work on a much wider scope than is strictly necessary because of their incentivization through fees, and similarly some pre-application consultations appeared 'gold plated' and not necessarily proportionate.

Finally, one participant in focus group 3 suggested that between promoters, lawyers and consultants *"sometimes a myth can build up around a project, which actually isn't what the consent is seeking to achieve".*

<u>Promoters</u>

Interviewee 6 suggested not just lawyers, but promoters (developers) could themselves drive levels of detail. Interviewee 6 felt risk adverse behaviour from promoters and lawyers could prevent them seeking flexibility in their DCOs: *"It's the usual thing with any project - quiet life - get consent and then go back and seek change; fear, legal advice"*. Interviewee 2 had a concern as to how well some promoters understand the process and how well developed their schemes are at the time of submission, whilst interviewee 8, a former civil servant, suggested sometimes there's an attitude that *"'well, oh gosh, my company/my investors don't want to spend a lot of money on this scheme which might never materialise'"*

Promoters could drive detail themselves, in some cases, said interviewee 11 and Examining Authorities would not usually ask for less detail as it is an easy way to achieve the certainty required to demonstrate what you're reporting on:

*"It's interesting, if an examining authority's presented with a figure, so we want to go to a depth of three metres, I have been known to ask 'do you mean three metres?' and if I'm told 'yes, we mean three metres,' then the consent will be for three metres, not up to three metres, not approximately three metres, or not three metres with these limits of deviation… if you offer it, you'll get tied to it."*

In some cases, this appeared to because of concern about not getting consent. Interviewee 4 felt there was a reluctance on the part of promoters to sometimes push for flexibility:

*"All DCOs, these are, by their very nature, huge projects and complex projects and there's got to be an element of flexibility in order to accommodate how things will be done, but my concern is that … again, across the board, there appears to be this nervousness within an applicant to either assess a broader level of impact, or assess a greater level of scenario because that seems to admit a potential greater impact, either requires greater mitigation, or could demonstrate the application has a significant harm on the local community and I just think, somehow, you just need to move past that and get to the point where we've got a series of scenarios that then stakeholders and the applicant can work off how they would be mitigated, or how that flexibility could be embraced."*

It can be difficult for promoters to understand how much detail to put in their application in order to get it accepted:

*"It's difficult for applicants, do they constrain it so much that they cause themselves unintended consequences, or is it so loose that it can't reasonably be said to have consulted on adequately and appropriately - adequacy of consultation being one of the tests – acceptance" (Interviewee 11)*

On other occasions, this might because of a lack of a similar scheme to use as a model: interviewee 7 felt promoters themselves could sometimes drive detail, *"particularly on the big, infrastructure projects, like nuclear, or Thames Tideway, they're one off projects and you don't have that confidence of other developers doing a similar thing before"* whereas for more routine projects which have had similar ones consented before, you could learn from that DCO as to where flexibility could be acceptable.

Lack of understanding of the whole project can be an issue:

> *"I think, if you don't have experience across the whole range of that process, it's quite hard to understand, that you might have a mantra for your bit that might be completely diametrically opposed to people on detail and flexibility in another part of the process. I think it's important to remember that" (Interviewee 11)*

The fact that promoters could themselves drive detail as they were focussed on getting the consent was acknowledged by a participant in focus group 1: *"Obviously, we were very focused on getting a Development Consent Order, so we have ended up with various thresholds for noise, which we might not have ideally wanted to choose ".* Another participant then added *"I guess the question the applicant and the promoter needs to ask from the outset is 'what is my appropriate balance of flexibility and certainty that I want to defend through the process?".* One participant in focus group 2 felt that in the past people had been very focussed just on getting to acceptance and needed to be promoted to think about the examination more, but now they were also trying to encourage promoters to think about implementation and ensuring it could be 'something you can actually build afterwards'.

There were good reasons why a promoter might drive detail themselves according to one focus group 3 participant, like wanting to be seen to be a 'good neighbour' or to allow speedier construction:

*"What happened at Hinkley point, I think, was that if you go out and you consult people about … we call them campuses, but like a big accommodation block in their area, it's hard to say, 'well, it's just going to be somewhere within these parameters and there you go,' like that's it. From a human level because you're encouraged to consult so much, people want to know what colour it is, where the door's going to be; you're consulting them, there's no point, what else are they going to … so you have to put some stuff forward, so that's something that drives a level of detail, the promoters wanting to be a good neighbour, have something to consult on, even though legally, we could probably have got away with saying 'no, we're going for something broadly like this.' Also, sometimes you want to get on with construction straight away, so you don't want to have the lag of going to go and get what's, essentially, an outline permission and then deal with the local authority, who might hate you by that point anyway and be very slow and therefore, you actually just want everything consented. There's various reasons why it suits you, in some cases, to go for a lot of detail and not in others."*

One participant in focus group 3, a lawyer who had acted for promoters, said that *"they would they tell us what their - and this is all about flexibility - they tell us where they want flexibility, for example and then we help them achieve it"* so felt flexibility was very much driven by the client. The example of some flexibility which was built into the Hinckley Point C DCO to allow for different building plans subject to any post-Fukushima recommendations was given. A lawyer who had worked in the regime commented *"I kind of feel like either you've got a good case for flexibility, or you haven't." (Focus group 3).*

There was some disagreement here, however. Interviewee 10 disagreed promoters themselves were driving detail – *"as an applicant, particularly from a utility, your drivers are, during the project, commercially viable and that means flexibility"* – but felt that sometimes legal advisors were trying to ensure success at the consenting phase and driving detail there. Interviewee 10 went on to add that they did not think the system had become more complex over time, but they did feel that as a developer they were now asking for more complex things (like phasing) and pushing the boundaries more, which might then lead to issues over detail arising.

LPAs and statutory consultees

The role of local planning authorities and statutory consultees in driving levels of detail was also acknowledged several times. Interviewee 4 did feel that local authorities could drive levels of detail:

> *"I think local authorities do drive a desire for greater levels of detail. I think it's a nervousness about understanding the project, it's a nervousness around not being the determining authority and as a result, it's an opportunity to exercise control".*

Such driving of detail by LPAs could often happen, according to interviewee 7, when there was political dimension in that local councillors wanted to be able to say to residents 'we've secured this for you, we've got this tied down'.

Interviewee 1 suggested levels of experience at local authorities varied greatly as many will never have dealt with a DCO before. This could lead to an expectation of their part that a DCO is very like a detailed planning application and a *"confidence and understanding of, actually, you can have control and deal with detail later in the process"* through requirements. Experienced LPAs were apparently much easier to collaborate with and more trusting in the ability to sort out detail post-consent.

One participant in focus group 3 acknowledged that statutory consultees did indeed like more detail up-front as it made their assessment of the impacts of a project more meaningful:

> *"Certainly in terms of early engagement, trying to understand what the project is to be able to make some meaningful engagement in terms of what are the parameters then for a DCO in terms of what kind of requirements would be included in it, so that's where, from our perspective anyway, the more detail there is upfront about the nature of the application, they more likely it is to be able to do an assessment of the impact on the significance of the heritage assets, for us then to say 'yes, that's fine as is,' or 'actually, we just need to have some parameters down there to make sure that it's not adversely affected.'"*

National Policy Statements

The key tests that Examining Authorities needed to consider are usually specified in the relevant National Policy Statement (NPS). Thus is was uprising that some mention was made of these documents as drivers of detail: Interviewee 2 suggested that the NPSs can drive detail with *"hoops certain inspectors have to jump through"*. Interesting, however, they apparently weren't always actually helpful in terms of guiding Examining Authorities:

> *"In some cases, I've found that when you really want guidance, it's not there; it just says 'the decision maker must take into account the following' and you sort of think 'well, I know that, but what's our policy on it?'"*

Interviewee 5 reported that a key concern was that level of detail was not categorized or defined clearly in the NPS so *"we don't know what we're going to get questioned on"*, with lots of detail on EIA but on other factors such as design, visibility there is not, resulting in a lack of confidence and resulting 'risky or risk adverse' practices by all parties. Another example was aesthetics where,

apparently, the National Networks NPS *"says aesthetics is important, but it doesn't say how we're meant to show regard for that in our assessment or application"*. It was felt the NPS was much better at explaining how promoters and Examining Authorities should deal with flood risk, for example, than design.

Location

Finally, it was clear that the location of the project could drive levels of detail if it was in a more sensitive location in terms of impacts on communities or the environment. Interviewee 5 discussed how the regime was 'very centred around understanding impacts' and they could understand if more detail was required where, for example, there might be impact on a listed building that an over bridge 'in the middle of nowhere'. Interviewee 1, meanwhile, gave an example of a gas fired power station which was to be located in an industrial area where the local planning authority were not very concerned about the power station itself but were more concerned with a sub-station a mile away in a much more sensitive historic location where environmental effects could be significant. They were happy for more flexibility of the main power station but wanted much more detail on the sub-station.

There were many variables that would vary between project, however, making the relationship between location and levels of detail a complex one. For example, it might be assumed an urban location was more challenging than a rural one but in fact the rural one may have many sensitive environmental sites whilst the urban one could be in an existing industrial location, although land interests and construction impacts on communities could be significant drivers of detail in other urban locations.

**Examples of detail**

Given the focus of the research brief, there were some examples where certain stakeholders felt there had been issues with levels of detail in the DCO regime discussed.

Very real examples of difficulties being experienced during construction of NSIPs due to the way DCOs were consented were given during focus group 1, for example:

> *"I've got an issue at the moment where the limits of deviation, for this particular structure, are reasonably narrow and the contractor at the moment is saying 'oh well, I just need to be able to put down a bit of extra fill and I can bring a crane in and do it this way' and I'm saying 'well yeah, that would be great, but you're the wrong side of the DCO line, so actually, you can't do that and now they're struggling how to actually build it within that red line and I'm sure that red line is in that location for a very good reason, it might come back to what you were taking about, about more wider compensation in terms of not being able to justify the DCO stage, taking that bit of land for a wider amount"*

As well as:

> *"We had an example, it's quite a small thing, but it was the use of a certain type of piling was mentioned in one of the Code of Construction Practice, which there's actually a better solution for a quieter option, but we can't use it because it's actually specified the type we will use"*

Interviewee 1 gave an example of where during examination, questions were asked about the reversing alarms of HGVs:

> *"As an example, we just had a wind farm examination and one of the questions was asking for more detail in the reversing alarms of HGVs … it's just wholly disproportionate, you're looking at a wind farm that's going to generate a gigawatt plus electricity, cables that run*

*for 25 miles… and this is the thing actually, we were quite happy to have the precise location of the cables and how the impacts are managed in detail confirmed at a later date, but the Planning Inspectorate, for whatever reason, decided to raise the issues of detail itself on this particular occasion - I don't see anything anyone else's representation that was asking for this level of detail".*

The example of the Immingham Highways project was given as one where detail was driven by the Examining Authority around the layout of a replacement car park:

*"We got a request to draw up some plans for some old replacement car parking and some level of detail, which was pointless because it just felt like it was a non-issue, no-one was asking about it … it was a village hall and how are we going to sort the car parking out on a bit of land and it was very strange because as I say, the inspector wasn't really driving detail in other areas, like what bridges look like, which was quite strange, but on this particular topic, he got a bee in his bonnet … we paid the money to design it … but it felt a bit eccentric and unexpected because where I'd presumed, if you got pushed to a level of detail, I can understand it, say, a bridge, as an example, not the number of car parking spaces in a parish hall car park" (Interviewee 5)*

Interviewee 5 gave an example of where a contractor for a highways project wanted to re-orientate one of their compounds but could not as it was specified through the DCO. The problem was no contractor engagement during the pre-examination phase:

*"Unless you've got a contractor involved who's going to be able to say 'we need this amount of vehicles, we need this amount …' they don't know how big the car parking's going to be … how many people they're going to have because the canteen … it's all these sort of things"*

Interviewee 4 felt sometimes Examining Authorities asked for extra detail even when something was not a concern to local communities or the local authority, giving one example:

*"The applicant and the Highway Authority had agreed on the broad layout and scope of a junction improvement and we found a non-expert inspector spending a huge amount of time on general arrangement drawings for that junction, without reason, in my view, where no changes were made and yet we were made to jump through hoops to be able to demonstrate that we'd come to a reasonable agreement".*

Interviewee 7 gave an example from detail from the Hinckley project:

*"Some of the Park and Rides, we really fixed the level of detail in terms of the layout of the actual car parking itself, which you think is fine, but actually, when your contactors come on board and say the roads not wide enough, or they need to put different lighting schemes in, actually, you do need to go through the change process because everything's so fixed and actually, does it really make a difference, how we were to lay out our car park when it's not a public facility, it's just for our construction workers"*

There was a feeling that if the mitigation was specified around the boundary, what was the need for fix the internal layout of the car park.

It was felt that in the Thames Tideway examination, inspectors were pushing the promoter to try and tie does noise thresholds and contractor plant in a detailed manner which could only really become clear once the design was completely finalised, but this was something that would happen post-consent (focus group 1):

*"The good analogy is that you're looking into a room through a keyhole, you've done some site investigation, you have some information, whereas at the DCO, there was a feeling that we'd walked into the room and seen everything, but we were only looking through a keyhole*

*and that was informing decisions because we didn't want to dig up everywhere at once to understand what it all was because it would never have been cost effective."*

Another example of detail from the Thames Tideway examination was given by interviewee 6:

*"There was one in particular that we argued for a couple of hours about at the examination; what would happen to a car parking space that one household lost and it would go into a 24-hour car park and it was a question about insurance cover and you think 'crikey, that's a lot of detail for a £4 billion project that could perhaps be resolved at a later date'"*

Not all detail was felt to be problematic, even when it was acknowledged, however. Interviewee 2 gave an example of a requirement for a gas pipeline where the pipeline for construction was being stored on an airfield used by a local gliding club and the promoter was required to buy the gliding club a new tow rope. This could be seen as something which was unnecessary detail for a DCO, but it apparently swept away a whole objection and helped the promoter as there was nowhere else they could have stored their pipe locally.

**Justification for the need for flexibility**

Just as some examples of what were perceived to be unnecessary levels of detail were given, so there is also a wide-ranging discussion evident across the data as to why there needs to be space for flexibility within the DCO regime. It is worth noting, however, that it was suggested that the place to sort out detail will vary between issues and projects:

*"That's exactly what we're talking about, is where on that spectrum do the issues between the start of pre-app and completing the scheme, what is the right point on that spectrum to deal with a landscaping plan, for argument's sake, or the height of a nuclear power station" (Interviewee 1)*

One participant on focus group 3 commented *"The debate tends to be framed as though it's flexibility favours developer and not interested party actually, it cuts both ways"* and then discussed how a developer might like more detail to get on with construction sooner whilst a local authority might like space for future negotiation through requirements. A speaker at the roundtable felt the public often didn't understand that flexibility could be a good thing which actually allowed a less impactful scheme to be constructed.

A number of interviewees suggested that flexibility might be helpful not just for developers, but for other stakeholders. There was a feeling that levels of information required by the regime could be challenging for all stakeholders in the process, not least community groups. Interviewee 9, a private sector contractor, was concerned that the amount of documentation produced at the pre-app stage could mean you 'lose sight of the fundamentals of the project' and make it harder for *"stakeholders and the community to find the information that they need to take a view on the project. For most folk, it's just overwhelming to be faced with that volume of material"*.

The pre-application consultation was always intended to be quite accessible and not overly formalized, according to interviewee 8:

*"the consultation would be done by a developer, along those lines, so they wouldn't be having a legal conversation with people, they would be having a kind of informative, listen to what people had to say kind of … so I was anticipating more a developer with an outline design … I think a consultation can be wide, but it doesn't need to be definitive about the scheme"*

Thus flexibility can actually be helpful pre-app in terms of allowing for a more meaningful engagement of the community. Indeed, levels of detail can impact public engagement, as interviewee 11, a former PINS inspector, explained:

> *"It's the problem of if you're going to meaningfully consult, people have got to know what you're consulting on, but it shouldn't be so fixed that they don't feel they can influence and engage with it and have a real effect on how it comes forward, its impacts, and its desired reiteration and actually, whether it continues forward to a successful project at all, or not. It is Catch 22"*

The relationship between communities and the detail / complexity balance can therefore be slightly complex.

Some other reasons suggested for the need for flexibility in the process included the dynamic nature of some locations (for example a river estuary may change physically between the consent being granted and the project being built) and the fact that DCOs can include assets for third parties, e.g. a power station might have an associated sub-station for National Grid who wouldn't want to invest in doing too much detail for a project that might never be built. It'd be better to do detailed design for that post-consent (Interviewee 1).

The biggest driver for flexibility, however, was the relationship between consent and construction. This seems particularly pertinent at present because of the number of NSIPs which have recently entered construction:

> *"Focusing on the construction element is really important, but that's actually where people start to get most anxious and where most flexibility is required, especially because you might not have the contractors you're going to build it involved, so local people want to know what you're going to do and you can advise, based on the advisors that you have at that time, what they would do in building it and where the lorries would go and so on, but that's the bit that's most likely to change." (Roundtable participant)*

Interviewee 7 was emphatic that levels of detail were causing problems for schemes now under construction:

> *"So I think the main driver [of detail] is the need to satisfy stakeholders, to get them comfortable with what you're doing. The consequences are that what would seem a relatively easy concession and a necessary concession to make at that time can cause time and cost and pressures further down the line."*

The importance of consequences from the way the DCO was constructed for construction were explained by Interviewee 5:

> *"Quite a lot of efficiencies and the big money is going to be the same as in construction and those only made come when the contractors get involved and the contractor's knowledge is changing … they get their knowledge through experience from the last scheme, so there could be things that aren't even there now, which parameters set up in applications and decisions about what needs to be fixed could actually fetter that and that's got real implications for building a safer scheme, building a more efficient scheme and building a scheme that also delivers on our environmental KPIs"*

Interviewee 5 expressed concern that the detail in requirements about things like construction working hours could overly constrain things, for example if you have periods of bad weather and then want to make-up some time when there's good weather, whereas more flexibility could be achieved by not specifying the exact working hours as part of the DCO but simply requiring a Construction Environmental Management Plan which has flexibility and a process for agreeing and adapting working hours.

Levels of detail in the Thames Tideway DCO were felt to now be providing difficulties and extra expense for construction:

> *"the Tideway consent, for example, the drive strategy is fixed, we have to drive it from one location to another, the direction of drive is given. Some of the contractors would like to change that, or perhaps incorporate cost saving measures and they can't do that because of the DCO requirements, so the level of detail that's in that consent is restricting and more costly. At the time it was merited because the promoter was being bombarded, on all sides, by angry residents, local authorities who wouldn't co-operate and also didn't really know the process. … sometimes you just say 'yes, we'll do it' – hindsight's a great thing" (Interviewee 6)*

Interviewee 6 was currently involved in another live project where the contractor felt there was a solution which could save money and was better from a health and safety perspective but the promoter was absolutely unwilling to go for an amendment to the consented DCO, which they felt had been 'hard won'.

The need for flexibility during the construction phase was explained during focus group 1:

> *"As design has evolved, based on better information on ground condition, those kinds of things, or better information on contamination, you then have to change your design, but you've only got the flexibility of what the DCO allows"*

An example from the ongoing Thames Tideway project was given:

> *"There is a step in one of the shafts … we do have the option of, technically, removing the step, but because the level of the invert of the shaft is written into the DCO, to undo that would take a very long time. However, technically, it would be a much better solution to remove that step and in terms of delivery of the project would be better; so there's different things where things would be possible, technically, but perhaps the flexibility that is need to make the change, along with the aspirations of a project - which obviously wants to deliver it quicker and wants to deliver it as safely as possible and bring it in on time and on budget - maybe the flexibility isn't there and the decisions to not change it is sometimes easier than going for the change."*

Another participant discussed the risks of 'stifling innovation'.

As a participant in focus group 1 explained:

> *"I think, if you go back to the hearing, the assumption from those who are petitioning is that if you want to change it in the future, you'll be changing it for the worst, so we need to tie you down now and actually, greater control doesn't necessarily equate to better environmental outcome. With technological advances in construction, we can often do things in a less impactful way given sufficient flexibility"*

Contractors usually aren't appointed during the consenting phase and often have different ways of going about things, as one participant in focus group 1 explained:

> *"If you ask three/four different contractors how to construct a certain viaduct because I'm thinking about that because I've got an issue at the moment, but you'll get three, or four different answers and three, or four different ways of doing it, so even if you've got someone on board at the DCO stage, to provide constructability information on how something will be done - even if it's someone from a contractor - when you go out to the market to actually find someone to build it, you could well find that someone comes back with a completely different way of doing it that's better, for various reasons."*

This was picked-up by another participant who commented:

> *"You go out to tender and say you want the best contractors and you want innovation, creativity to deliver better value, then you put this massive straightjacket on people and say 'but you have to operate within this.'"*

The timescales and scope for construction innovation over that period were an issue for Hinckley:

> *"I started on Hinkley in 2009, we submitted our application in 2011, we got consent in 2013, we started this year, 2016 and we're not going to finish until 2025, so you start to go through that, you rehearse that in your head and think that's an awfully long time and some of those buildings that we got consent for back in 2011 aren't going to be built and used until 2024/2025 and there's so much change in the development sector and even nuclear power itself, there's no real room, how we constructed our DCO, to enable that sort of innovation to come forward" (Interviewee 7)*

Flexibility was needed around construction but also where technology can develop rapidly, for example wind turbines or gas turbines. There's rapid development in offshore technologies so need for flexibility about precise methodologies and equipment: *"so we don't know what type of turbine we're going to use, we don't know what type of foundation we're going to use, we don't know what length of cables we need."* (Interviewee 10). This could actually mean even with an envelope approach, it was possible to get it wrong, however, for example through not allowing for future turbine designs or having restrictions for platforms which restrict you to just one contractor.

East Anglia ONE needed to change a DC cable to AC because of changes in technology and finance for their scheme, this was a change which would make the project cheaper and so could ultimately make electricity cheaper and was a non-material consent but they found it very hard to engage with DECC and it took 9 months to get the non-material change approved. This presented great difficulties for the internal financial investment processes of the promoter and could have threatened the project (interviewee 10).

The need for post-consent amendments was apparently constant due to the scale, timescale and nature of NSIPs:

> *"It's not unusual at all for circumstances to change. Let's say, for example, something emerges on the natural environmental side, which means that there needs to be a change which has a knock on impact on the historic environment, or a technical solution has been found which means that the road, or the road to bridges doesn't have to be built in that way, so that's quite common" (Interviewee 3)*

There was, however, widespread concern in the sector about the post-consents change process, interviewee 7 recounting a story from another project where they *"the drain was in the wrong place by about a metre and they had to go through the non-material change process and you start to think that's not going to affect anybody and I know the process drives it and it's necessary, but it can't be in anyone's interest to use the planning inspectorate's resourcing, or the relevant department, to consider that tiny change"*.

Interviewee 5 was concerned at the lack of guidance as to what constitutes a material as opposed to a non-material change and that, despite the statutory timescale for a material change, this was too long if you have a contractor appointed and you could miss your funding window. Interviewee 11 was aware of post-consent changes that a number of contractors had wanted but promoters had been nervous:

> *"I think everybody tries to make them non-material and schemes have lived with what they were given as detail, probably to the detriment of the scheme, rather than take the time and risk the process of going through the material changes process. In other words, it's a poorer scheme for it, or a more costly scheme for it, or a more time delayed scheme, or whatever it is."*

One speaker at the roundtable event described the material change process as *"so scary, no-one's done it"* adding that *"People are just electing not to make changes in the end because it's so scary".*

Interviewee 12 was concerned that there should be a statutory timeframe for non-material changes and explained:

> *"Following the government subsidy bidding round, we won funding for our project, in the competitive process, but for a much smaller project than the original consent; we wanted to vary the consent to include the option to build a smaller project and actually, in taking that option for a less environmentally damaging project, so we considered that to be a non-material change. I think everyone was fairly happy that that was a non-material change and the determination of that application actually took 10 months, whereas the material change process, which now has a statutory timeframe, is I think, eight months and we would argue that projects, or variations that actually have less environmental impact, you would really expect the decision making process to be quicker for those projects... I think the team that deal with the variations and changes are very small and they're dealing with all of the energy NSIPs, so if there is something that falls on a desk that has a non-statutory timeframe, you'll probably have to put that to one side when something big which does have a statutory timeframe comes in, so I think it got caught in that process a little bit… In the end we actually put all the papers for this higher level of investment up to the top levels of the company without the valid consent actually in place because we had a key milestone we had to meet for our final investment decision, so that was actually a risk for the whole project."*

The change process was an area of concern for interview 11, who explained:

> *"The change in procedures are quite cumbersome and do not guarantee delivery of timescales, which are big risks, particularly when you're in a delivery programme - you don't want to be in a contractual breach, just because you're waiting on something that's not got a statutory timetable. Simplifying and making it more transparent and easy would make it more effective - and within a prescribed period"*

Interviewee 11 also felt it would actually help the Planning Inspectorate to have a statutory timescale. Without one, there would apparently continue to be a strong driver for high levels of flexibility in DCOs so that promoters could avoid the post-consent change process wherever possible.

Concerns about the post-consent amendment process were also driving other behaviours, for example such apprehension is apparently driving some promoters to seek to use drop-in planning applications as a way to get a consent for some minor change to associated development rather than the legally neater solution of amending the original DC (focus group 3).

There was some acknowledgement of the flexibility issue during focus group 2, with civil servants, but levels of detail were not something that caused any issues for decision makers:

> *"I can understand how applicants have to produce a lot and it's a burden for them, but I think there possibly is, in the future, to look at how much more flexibility there is for them to build in, but it's not an issue that's really caused us a problem at decision stage"*

Another colleague commented:

> *"I suppose, we have noticed an increasing number of applications for non-material changes from applicants, which would suggest although perhaps require certain flexibility, which the system isn't giving them at the moment*."

**Concerns over flexibility**

It is important to note that whilst many interviewees and focus group participants discussed the need for flexibility and consequences of a lack of flexibility, there were others who expressed some concerns about increased levels of flexibility in the system.

From the perspective of PINs, interviewee 13 highlighted the importance of flexibility being done within the parameters established through legislation, regulations and relevant case law. It was apparently already the caser that some issues could be dealt with in quite an outline manner in a DCO, and suggested the boundaries of flexibility had been pushed by some Rail Freight Interchanges, but interviewee 13 felt detail was required elsewhere and that presenting a consent for a new nuclear power station as 'an outline consent' could cause public concern.

Interviewee 14 noted that envelope assessments were well accepted in the system, but did suggestion some caution around their use:

> *"I think there's always a level of caution that should be applied to that because you can make your envelope too large and that does two things; I think it presents uncertainties in terms of the decision making process and what are you actually going to do, but it also presents uncertainties in terms of your requirements to consult with people and engage people in the process and equally, that can then lead to questions about the adequacy of the environmental information that you've provided and that can get really tricky because you then, ultimately, you could end up with a challenge that would lead you back in looking at European legislation and have you applied that correctly. We advocate, in the advice that we give, that the envelope is there and can be used, but it should be used in a responsible way and not just to write a blank cheque".*

One participant in focus group 2, from the civil service, felt that levels of detail could help prevent legal challenge, which would delay schemes further:

> *"One of our top goals, or the top goal is to have a robust decision because what you really don't want is a decision that's been through such a long and expensive process to then fall at the very end, so if it gets challenged and the nature of these projects means that there is a very high propensity for them to get challenged, it means that they have to be so robust, that when they get judicially reviewed, that the judicial review is unsuccessful for the people who are trying to bring down the decision and that actually means it almost then has that effect of having to be a risk averse system because otherwise, you just increase the likelihood that you will fall at the judicial review stage."*

There was concern in focus group 2 that there needed to be sufficient detail for people to meaningfully comment on during the pre-app and examination stages of what was designed to be a front-loaded system:

> *"It's about the people engaging with it need to have a sufficient idea, a reasonable idea of what it actually is that they're commenting on and therefore, if it's drawn far too widely, then that wouldn't be the case."*

In other words, you do need sufficient detail to understand what project is being consented at the DCO stage and cannot just leave everything to be sorted out at the requirements.

These views from PINS and the central civil service were reflected in the particular concerns raised by many of the statutory consultees around this issue. A statutory consultee at the

roundtable event did feel that greater flexibility made it harder for them to comment on schemes meaningfully. Not all detail should be left post-consent, according to interviewee 10:

> *"You've got to be careful you don't want a non-consent … so really, what have you got a consent for, well I've got a loose envelope of things that you've got to agree the detail of later, so actually, there's so much we've got to get signed off that it's questionable, so I think it has to be project specific and what's appropriate for that project"*

From a statutory consultee perspective, there were apparently differences in acceptable levels of flexibility between projects:

> *"I think it's true to say that things like overhead power cables and so on, the envelope approach is much easier for us to deal with because it doesn't really matter whether it's five metres, or ten metres to either side, as long as you're missing the really sensitive stuff, the affect it's going to have on the settings of all the things which it's not actually hitting, but is nearby, isn't going to make any difference, whether it's a few metres to one side, or the other; so you can do the corridor approach … whereas, if you're talking about something like roads, or new railways where there's serious engineering to happen, then five metres either side can make all the difference between it either taking a chunk out of an important monument, or meaning the demolition of a listed building; so some, certainly, do lend themselves more to that sort of flexibility than others" (Interviewee 3)*

Interviewee 3 was also concerned that leaving all detail to be sorted out post-consent could lead them as a statutory consultee in a weaker position:

> *"The possibility of saying 'well no, actually, that's just too harmful', or 'you're really not trying hard enough to avoid the harm' post-consent is much harder. We've got both hands tied behind our backs at that stage really because the consent is granted"*

Another statutory consultee did find that dealing with issues post-consent was more challenging than pre-consent:

> *"It's difficult because the permission's already there, so your ability to influence it gets weaker as you go further into it and project teams have moved on and so you start to remember back to what you were doing at the time and what we agreed to and re-reading documents which were a bit cold now and all the rest of it." (Focus group 3)*

And another commented:

> *"Because you work so long and so hard to actually work with them, to get the DCO in the first place, there is that kind of 'right, okay, you want to change it now …okay, well what do you want to change and why do you want to change it?' to actually understand then whether, or not you can do it within the flexibility of the DCO, which is always the best because then, you don't have to worry about separate planning applications, or making material changes, making material amendments to the DCO, but that's something, I think, we're conscious of because on one or two schemes, where having worked so closely with the promoter to get to a particular, fixed position, that any deviation from that position will then mean … it just raises questions for the whole scheme."*

Sometimes detailed design issues could actually be very important to a statutory consultee, as interviewee 3 explained:

> *"The appearance of a, let's say, a viaduct, the design of a viaduct, or the materials from it which a bit of soundproofing is made, or something, can make all the difference between it and clashing with its historic environment, or nestling quite happily with all the other stuff. So High Speed 1, the Channel Tunnel Rail Link, just used a sort of a house style, which therefore bashed its way, very aggressively, through the Kent landscape, taking no notice of the context that it was going through, whereas, had it been willing to adjust the design, the appearance*

> *of some of those mitigation measures, so that they sat more happily in their landscape, that would have reduced the impact hugely"*

However, Interviewee 3 then added that much of this detail could be decided post-consent (for example through the statutory consultee agreeing via the discharge of requirements) so long as the principles were agreed during consent.

It wasn't always PINS and statutory consultees raising concerns about the consequences of flexibility, however. One promoter did explain that the cumulative impact of everyone over-assessing impacts though the worst case offshore can lead to a situation where limits are being reached of impacts on certain protected species and then future projects are actually over-constrained (interviewee 10). Another explained that it can be complex working out the overlap between different envelopes of flexibility: the environmental assessment envelope might not be the same as the Habitats envelope, apparently, and this can involve additional time and expense with consultants. Another participant in focus group 1 actually felt some of the restrictions from the DCO were driving innovation by their construction contractor.

In general, it seemed there was a feeling that you should have some sense of proportionality in the balance between detail and flexibility so that, for example as a participant in focus group 3 explained, you might not want to specify what colour the door of a building would be but you should give a sense of where the building would be located so that the impacts could properly be judged, and if necessary mitigated.

**Potential routes to flexibility**

There seemed widespread agreement across interviewees and focus group participants as to the routes to flexibility that did potentially exist within the DCO regime: assessing impacts 'Not Environmentally Worse Than', the envelope assessment of impacts (sometimes referred to as 'the Rochdale Envelope' although strictly that term applies to Town and Country Planning), Limits of Deviation, temporary possession of land, and the use of requirements for things to be determined by an agreed process post-consent.

Interviewee 11 outlined how you can achieve the certainty the system requires not just by detailed design but by creating *"an appropriate envelope and control mechanisms and guarantees of thresholds of impact, that give you that certainty of outcomes and impact and deliverables by other means and mechanisms, which are absolutely tied and transparent and can be followed and engaged with throughout the early implementation"*. This was harder to grapple with, but *"in a dynamic environment and changing technology, can deliver better outcomes for everybody, both in cost and delivery, effective infrastructure and in terms of impact mitigation and continuing engagement with communities and statutory bodies - clearly, local authorities - who feel they're still engaged with the project, it's not just being done around them; so it actually has a real upside"*

Interviewee 11 also explained the importance of a good justification for, and route map from consultation to implementation, for any flexibility and the fact that it is not an either/or choice between detail and flexibility in any single DCO:

> *"If you have got detail and you can fix it, don't run away from it because it's mainly a hybrid position, it's not all or nothing … it is almost always best done as hybrid and actually, there was some situations where you need some detail around certain things and I think the*

*interface with land ownership - and particularly compulsory acquisitions - are particularly tricky in this regard."*

The actual drafting of the DCO was seen as central to flexibility by interviewee 9:

*"That requires, I suppose, some creativity and careful thinking about how things are drafted, how the project is configured and where, working with the promoter to establish a way you want to build in that flexibility to allow for detailed design, or changes later."*

Similarly, one participant in focus group 2 was clear that flexibility was possible in the system however it often came down to justification and explanation:

*"I think there are a number of other drivers here, which mean that detail is often the answer, even when it may not necessarily have to be, but it may still be the easier answer than actually providing the extra justification to justify the flexibility, but actually, systemically, the system allows and is capable - it's been proven so many times - the system is capable of delivering flexibility that if the request for the flexibility is, firstly, put forward by the applicant in the first place and then well justified and explained, why it's needed and in those cases, if that was the case, then the inspectorate would also go along with it… developers may find it sometimes more difficult to justify why the flexibility is needed, rather than actually developing the detail"*

Another added that *"having the justified flexibility is fine, it's just it needs to be articulated well"*.

Examples of where flexibility has been used in existing DCOs were offered by many different research participants. Offshore wind was mentioned frequently, and it was clear that the offshore wind industry does appreciate the levels of flexibility that have been allowed:

*"So offshore stakeholders, so for example, the Maritime Coastguard Agency, they know and would understand, that we can't commit to detail now and there's a tried and tested method therefore of having the right conditions in the marine licence that allow for that detail to be agreed later. I think, offshore, there's a really good culture of providing the right level of information which is relatively broad at the consent stage and doing the impact assessment on that broad basis and then having conditions which allow the detail to be agreed later, that works, broadly speaking." (Interviewee 10)*

There were, however, also examples of flexibility that had been allowed in onshore DCOs and interviewee 14, a PINS official, seemed to well understand the drivers for that such as the way construction technologies were rapidly progressing. Other examples given were the way that the North Killingholme DCO allowed for different fuel options for the power station and quite a lot of flexibility over buildings according to future users for the Rail Freight Interchanges.

Example of limits of deviation for a long onshore connector cable for East Anglia ONE offshore windfarm were given allowing for more detailed survey work to be done later and to take account of construction challenges, archaeological surveys and attempts to minimise environmental impacts – all of which would have been very expensive to try to pin down pre-consent as over a 37 km corridor (Interviewee 1). For Hinckley Point C's grid connector, there were two different routes proposed, even though only one was allowed in the end it was apparently very helpful to consider both as part of the DCO process (Interviewee 7).

Lots of examples were also given of the way flexibility could be allowed through the use of requirements. Article 20 of the Hinkley Point DCO was suggested as an example of where flexibility was allowed for the LPA and promoter to agree detail on highways issues (Interviewee 4). Interviewee 10 gave an example of good flexibility for the onshore substation associated with an offshore windfarm where the substation design could be agreed post-consent through the

discharge of requirements, having set outline principles and a process for agreeing detailed design as part of the DCO. The example of White Moss hazardous landfill was given as one where was lots of flexibility around the amount of hazardous waste that would be stored to allow response to market changes, this being governed through requirements (focus group 3).

Interviewee 2, a former Inspector, felt there were examples of flexibility in the cases they had dealt with and many design issues were allowed to be dealt with post-consent through requirements rather than being 'fixed too early'. Indeed, Interviewee 2 was happy that some detailed design, for example substations and transformer stations, could be dealt with post-consent with the local planning authority – *"I think the details of design are best left to the local planning authority"* – but *"I don't think, to be honest, inspectors deal with this in a consistent way"*.

Interviewee 11, another former inspector, did feel that when using requirements for flexibility it was important to put engagement into post-decision implementation (those affected and those engaged with approving, enforcing and monitoring detail are engaged post-consent when the detail is decided). As interviewee 11 explained, *"it's about information and transparency, so there's no surprises."* It is also important to note that there were difficulties in leaving too much to requirements, as one statutory consultee now heavily involved in discharging requirements for Thames Tideway explained (Interview 18).

The 'Not Environmentally Worse Than' (NEWT) test and Environmental Effects Compliance were routes that could be used to make DCOs more flexible according to interviewee 6, and on environmental issues the Rochdale envelope approach was seen as 'really good' and 'well established' (interviewee 9). One key issue was, however, apparently the relationship between the envelope and justifying compulsory acquisition of land which can be a challenge. The other key issue was, of course, the level of assessment to support the flexibility. Interviewee 14 explained how a Development Consent Order will be constrained by the level of assessment that has been done to support it: *"the issue that you've got is what you get consent for needs to be supported by the relevant information and one of those things is the level of assessment that's done from the environmental impacts, so the envelope seems to be the only way you could do that, I think, from an EIA point of view".* The additional assessment work was seen as the 'price to pay' for flexibility so unlikely to be taken on lightly by developers:

> *"There is a price to pay though and the price to pay is during the assessment because if you're trying to create that flexibility, you've probably got more work to do to assess what realistically the worst case is and the different scenarios in order to create that flexibility" (Roundtable participant).*

Interviewee 11 didn't think you could identify some sites where flexibility was always more difficult as it really varied between locations and projects, but suggested that:

> *"I think it's understanding that and identifying those things that do require detailing in your scheme, so it's a matter of scoping your proposals appropriately and the relationship, the impacts and the physical implications and land interests that need to be scoped appropriately to work out where you do need that level of detail, or where you don't".*

Interviewee 7 felt environmental impacts were a good way to distinguish where detail was merited:

> *"I see this as really one of the drivers to help guide what level of detail you need. So if you've got a potentially significant environmental impact and your scheme, a particular element of your scheme, needs to be fixed to be your mitigation, or to avoid it happening, I am*

*completely understanding of that and similarly, in HRA space because the tests are so much higher than environmental impact assessments. Again, I can understand where there is an interface with the HRA, the need to tie things down. So I think, almost, that's quite a good criteria, or one of, I think there would need to be others, but it could be one of the measures, when you're starting to work out 'does this need to be fixed, or not.'"*

There was some discussion of how much of an 'outline' process a DCO could be. Interviewee 17 was emphatic that a DCO could not be like an 'outline planning consent' because it was a final consent. Interviewee 2, however, felt the DCO process was and had to be hybrid in nature, going in to a great detail on some matters but being capable of being more outline elsewhere. When asked how much like an outline consent a DCO could be, interviewee 14 explained at length:

*"If you look at the offshore wind farms, they're basically red lines on a map and they are very outline - and it's not just offshore wind either - even with something as controversial as Hinkley Point C, there's a hell of a lot of flexibility built into that consent that they've received and there's a lot of missing detail, there's a lot of detail as well, but there's a lot of missing detail deliberately … again, whether I've used carefully 'missing' … missing is probably not the right word to use, there's a lot of scope there for them to make small changes that are necessary to deliver their scheme.*

*So I think it can be a lot like outline planning, I think the difference is probably it's more like a hybrid, a hybrid application, where you've got both outline and detail because for certain things, it would be unacceptable, I think, to offer that level of flexibility, so if it's things like access, it's pretty fundamental that you know how something is going to get in and out of a main development site and that you know what the impacts of that will be.*

*There's a hell of a difference between putting a new junction access onto a motorway, say, than onto a local road and so we do need to know what's going to happen there and for things like understanding … so if you're promoting something that is … take a rail freight interchange, for example, now I accept that you need flexibility because you don't know who your end users is going to be, necessarily, there's detail that needs to be agreed around that and you need to be able to adapt to your consumer, to the market that is out there, but equally, there has to be, in the decision making process, some robustness to which a local stakeholder will understand how you've made that decision because how could you explain to somebody, 'oh it's completely acceptable for this development to be there, but we don't know how big it is and we don't know where it's going to go exactly and it might block your entire view, or it might cast you in darkness for the rest of your time.' That, to me, is a difficult message to give across, so I think we need to take that to some level of detail, to be able to give those people some comfort, that their opinions have been taken into account in the decision making process … and equally, what are you going to assess otherwise, what assessment are they going to present to us if they're not going to tie anything down.*

*I would say that I've not seen one DCO that is fully detailed, they can't be, although the developers certainly tell us they can't be and we've accepted that decision makers have accepted that."*

Overall, Interviewee 4 felt flexibility was already possible, 'already in the gift of the developer' through the Rochdale Envelope type approach but that it would be helpful for PINS to give greater confidence to promoters in terms of how they would accept drafting that allowed flexibility to come forward. At present advisors apparently took a risk adverse approach without more steer on acceptable good practice around flexibility. This was a view shared elsewhere, for

example there was some discussion of inconsistency between levels of flexibility that were apparently allowed on some DCOs but not others.

**Suggested improvements and actions**

There was discussion in the interviews and focus groups around a number of possible improvements involving all stakeholders in the regime which might help address the perceived issues around detail and flexibility.

Early contractor involvement

Early contractor involvement (ECI) was a popular area for discussion, but one where there wasn't necessarily consensus. Most, but not all, research participants agreed that early engagement of construction expertise would help ensure DCOs were constructed with a view to buildability, one of the key drivers to the desire for flexibility being contractors being engaged post-consent and raising concerns in implementing projects.

Interviewee 13 said that his own learning from the NSIPs he has been involved with is that developers need to get their construction contractors involved far earlier. It was suggested that some developers focus very much on getting their DCO consented when that is actually just one part of a far larger project management process. There could also, apparently, be issues about the interface between planners and engineers. Contractor engagement was a recurring theme in many discussions:

> *"The contractors come in, they've got brilliant ideas for saving millions of pounds - that's their innovation - but then, if we'd known that when we were drafting the DCO, we could have perhaps built in a bit more flexibility, but we just didn't … without contractors, you don't have those big ideas." (Roundtable participant)*

Interviewee 9 highlighted the importance of some form of early contractor involvement:

> *"What we're talking about is nationally significant infrastructure projects, they're large scale projects with big price tags on them and I think, having the constructors involved in whatever way, shape or form at the early stage is absolutely valuable because as I said earlier, I don't see how you can understand what you're consenting, unless you've worked out how you're going to build it because invariably, the greatest impacts are those that arise from the construction, rather than the operation and that's, more often than not, is what local communities are concerned about, it's the bother that they're going to have over a number of years, while construction vehicles and dust and noise and so on and so forth. So I think a lot more attention ought to be given to that, getting the right advice from contractors early on."*

Interviewee 4 felt that early contractor involvement might be something developers feel they can't afford but that the potential benefits were significant:

> *"Everybody says early contractor engagement is the answer, but early contractor engagement costs money and developers say 'we're not buying in to do that until I've got some assurances that I've got a scheme; I've got investors to satisfy and my priority is getting consent, not getting early contractor engagement as well as consent' and that attitude needs to changed. I think that early contractor engagement would potentially give PINS and/or the local authorities the confidence that that flexibility is not about sneaking through, or underplaying an impact, it's about 'actually, we genuinely don't know and these are the variety of different ways we could deal with it'".*

Nevertheless, Interviewee 1 explained that many energy projects were quite speculative and cannot necessarily afford early contractor involvement (the funding often being dependent on getting consent in the first place). Thus, whilst perceptions of the consequences of levels of detail often came down to contractors wanting to do things differently, Early Contractor Involvement was suggested as helpful but not often possible due to the way schemes got funding in several sectors (not just energy):

> *"We won't get the funding and we won't get, often, the contractor appointed until we get consent and so the issues that gives us is the risk of a contractor coming on that wants to do things a bit differently and whereas we …I mean, A556 was done on an ECI early contractor involvement because that was the process at the time and we had our contractor involved two years before and that really helped, but there's not always … for other schemes going through at the moment, that procurement method isn't being progressed" (Interviewee 5 – Highways promoter)*

One participant in focus group 1 really felt early contractor involvement was important as this would help ensure buildability better than trying to have flexibility and appoint a contractor later. Another participant disagreed though, and referred to the example of the Thames Tideway project:

> *"I think the thing on Tideway, particularly, to remember is that there wasn't political certainty for quite a long time, about whether it would go ahead, that was one of the issues; so trying to get a contractor on board on the basis that we could spend a whole of money on this because I think they were tendering something like £1.5 million each to tender for this, so are you going to do it on the basis it may go ahead, or not."*

A third participant suggested that at Bank Station, TfL had appointed a contractor before getting Transport and Works Act approval and thought this was 'very innovative'.

Similarly, another DCO project had apparently had appointed the contractor before consent was granted but this meant the contractor was *"champing at the bit to get on site, whereas there's a whole load of requirements to discharge before you can actually start".* Further concerns discussed during focus group 1 were that appointing a contractor before consent was granted might appear presumptuous to some objectors and even call into question the independence of the decision making process and that it could actually lead to more detailed questioning from inspectors and reduce the flexibility of the DCO even further. It was also suggested it might add to costs as you would do more detailed design work early on which might then be for elements that then change anyway.

Interviewee 6 suggested contractors wouldn't give away their 'best idea' under ECI, particularly if the project procurement meant an early contractor advisor couldn't then actually bid to build the project, although it might be possible if the contractor acts more like a consultant for the project promoter from design to engineering advice. Similarly, Interviewee 10 felt strongly that early contractor involvement just wouldn't happen for their type of projects:

> *"'Look, they are not going to commit to anything, or provide any decent information outside of a capacitive procurement process. I think it's a really nice thing to say and question to ask, but in reality, it's almost impossible … they're not going to come in earlier, they're not going to provide information, it's commercially sensitive information, why would they want their competitors to find out about their solutions."*

Overall, then, as Interviewee 14 explained, full early contractor involvement was unlikely in practice:

> *"So we talked about whether you're using early contractor involvement and in a naïve sense, that's a perfect way of delivering, you get the contractor on board, you know exactly how you're going to build this thing, you've costed it and you can go and do it. The reality is that that doesn't happen because what would happen if you did that was the contactor on board would exploit that situation and potentially drive up your costs overall and might also stymie innovation later in the process. So I think that the idea was the right one, but I think that it was probably too ambitious, not a realistic idea"*

There was a concern that with earlier contractor involvement you might just 'fuel the fire' in that the Examining Authority would then drive into excessive detail as the information is then more readily available (Interviewee 1). Similarly, one speaker at the roundtable event felt that early contractor involvement might just 'feed the machine' in terms of just providing more and more detail and trying to fix things during the examination, avoiding the issue of what flexibility should and can be acceptable in the DCO.

There was, however, another route to full ECI and this was where there was expertise or project management that crossed the divide between the consenting and implementation phases. Interviewee 9 felt it worked well when you have a consultancy that could be involved in the 'whole life span' of a project, from conceptual stage, through consenting, detailed design to construction. He felt the DCO was just a staging post and that *"I do feel strongly - and again, maybe this reflects the way that we operate - that you do need to have that advice right at the outset, it's no good trying to bolt it on later, or post-DCO; I really don't see how you can seek to promote a project unless you know how you're going to construct it*." Interviewee 14 also believed a good project manager was essential throughout the life of NSIPs:

> *"In my mind, I think it's the management of the project that is the absolute key, so a really good project manager that is on top of the team supporting him and understands what he actually needs, or she actually needs, I think is absolutely pivotal to them… I think there is added value, if you've got somebody that understands where the planning consent came from, to then implement"*

<u>Post-consent amendments</u>

There was very real concern present amongst promoters, in particular, about the post-consent amendment process. Partly this was related to a belief that there was a need for greater clarity on post-consent amendments:

> *"I think one of the gaps, for me, is a greater level of clarity on material and non-material amendments and the ability of non-material amendments to be dealt with more swiftly and almost establish the envelope for what is a non-material amendment; I think the guidance is a little woolly, if I'm honest and doesn't provide that certainty." (Interviewee 4)*

The guidance from DCLG here does seem slightly unclear, although the multitude of factors that could impact whether something was material or non-material does clearly make this a complex issue. Interviewee 12 suggested it would be really helpful if a promoter could submit a high level summary and PINS could then screen it to determine whether it was likely to be a material or a non-material amendment to the consent.

A participant in focus group 1 was keen to have a quicker post-consent amendment procedure:

> *"I think there needs to be some mechanism for change which doesn't trigger a 12 or 18 months delay, where it can be seen to be to benefit to all parties. I think, particularly, if you look at some of the duration of some of these projects and the rate of innovation in our industry, you don't have the ability to unlock some of these great things that are coming to*

*market over the course of the length of time it takes to do the DCO and then the length of time these projects actually are going to take, you want to take benefit of that"*

Given then revisions made in 2014, it seems unlikely there would be much appetite from Government to make further changes to the material change process.

It was very commonly suggested, however, that there should be a statutory time limit for non-material changes post-consent. The lack of such a timescale was a concern for interviewee 7:

*"The torture of the uncertainty of timescales for non-material change …Hinkley took nine months, it was one of the first and it was the time when the process was changing, so I think we were a bit unfortunate... I think there's been a few now, Progress Power have got consent recently - that's a gas fired power station - that took three/four months I think, but even that's a long time to wait when you've got your diggers on site going 'oh, we've found this drain' or uncovered x, y, z 'we now need to re-route,' or something, you just don't have that time."*

Interviewee 12 felt that a non-material change time limit was very important now that many projects are entering the construction phase:

*"This non-material change process we've been talking about, it's like everyone's number one, we all are looking to implement projects and develop further projects and it's we've kind of got a shopping list of non-material changes and it's like who's going first, how are we going to do this? For me, it's a key issue and for my colleagues in the industry… There has to be a time bound process for non-material changes... if there was only one thing I could do, it would definitely be that we can rely on a non-material change process, post-consent and that would stop people panicking, that would, I hope, stop the drive for flexibility quite so much pre-application."*

Interestingly, several PINS interviewees did also agree that it might be helpful to have such a time limit and that the non-material change approval process did stand out as the one part of the system without such a statutory timescale, albeit this might cause resourcing issues in the central government departments responsible for the decision making on them.

<u>Guidance</u>

A fairly common suggestion was around for the need of some further guidance around acceptable levels of flexibility. The precise form this should take, and best place it should go, was however something where there were a range of views on.

In the roundtable discussion, one speaker commented that the system did allow flexibility but there was a need for greater confidence in whether that would be acceptable:

*"I think the system includes the potential to include quite a lot of flexibility. I think the biggest challenge is having confidence that the level of flexibility that a promoter includes within their DCO is going to be accepted by the examination panel …I think making sure that the examination panel have got a very clear set of guidelines for how they interpret what constitutes a good reason for flexibility because I think that's absent at the moment."*

One speaker at the roundtable suggested a need for an advice note on flexibility generally:

*"In my experience, lawyers/planners and effectively clients spend a lot of money trying to come up with a way of navigating between detail and flexibility and I think people keep trying to re-invent the wheel. Actually, if there was an established position that was acceptable to the planning inspectorate, the we could all move forward in the same direction, that would be a good outcome."*

Another speaker at the same roundtable felt this could really boost confidence that certain flexibility would be accepted, noting that promoters didn't want 'carte blanche' but just an indication that it was reasonable to sort out the detail of some things post the DCO consent through a proper process. A third speaker added that there were lots of tools out there at present to achieve flexibility but it would be helpful if PINS gave a clearer steer on what was acceptable, and a fourth suggested there should be good practice examples actually given.

Interviewee 9 felt that the existing PINS guidance was 'pretty good' but there was a need for some free standing guidance on flexibility and how to do that best within the provisions of the regime. Interviewee 7 felt guidance from PINS about acceptable flexibility would be hugely beneficial:

> *"The planning inspectorate being very clear that flexibility is allowed in the process, there's nothing that restricts it and actually, that it can be really positive and start to give some examples of where it's to be used and the benefits that that's had to communities, to quick decision making and I think, if people heard that and understood that, then the Natural England Environment Agencies of this world and the local authorities will probably take notice because at the moment, it's really developers saying 'can we have flexibility' and they're thinking 'oh yeah, you just want to get around the system.' It's not actually about that, but there's some real, meaningful benefits. So that's why I think guidance is probably the way forward because then you can set out what the principles are, what you're trying to achieve, why you are trying to do it"*

DECC's guidance on varying Section 36 Electricity Act consents felt to be well presented and helpful.

The idea of a PINS advice note on flexibility – or an advice not on acceptable routes to flexibility which was co-authored by PINS and NIPA – came-up during focus group 2. Interviewee 11, however, felt there would be greater weight placed on a DCLG Guidance document on flexibility in the system as opposed to a PINS Advice Note.

There was some disagreement as to whether the NPSs were the place to discuss flexibility or not. Some people thought they should remain as 'higher level principle' documents and interviewee 11 felt any steer on flexibility should be cross-sectoral so better in DCLG guidance than individual NPSs, however interviews 9 felt NPSs could be clearer and give more guidance on acceptable levels of flexibility for each sector. Similarly, Interviewee 4 felt that the NPSs should be reviewed, that they could indicate broad locations for projects in their sector and they could then start giving a sense of acceptable levels of flexibility and the associated levels of assessment required to facilitate that.

More generally, there was some concern expressed that the NPSs played such a vital role in the system that they should be regularly reviewed and kept up-to-date. Interviewee 13 agreed that the suite of energy NPSs was 'coming to the end of its useful life', for example with new technologies not being covered (such as tidal lagoons and some developments in battery storage). It was also suggested that the National Network NPS might have been stronger if it actually identified strategic gaps in the national networks, with a more spatial approach. The NPSs certainly needed updating, according to interviewee 14:

> *"they're old and they need to be revised and updated. They are fundamental to the process, so they do need to be up to date and ready to deal with the issues of the day."*

As well as new technologies not covered, Interviewee 2 felt the NPSs were due a review and needed to be more dynamic to take into account issues that arose, for example a recent High

Court case relating to Air Quality. Interviewee 3, meanwhile, felt that the NPPF had really changed planning culture from just a 'do no harm' type approach to one that focussed on 'findings ways to make life better for everybody' but that the NPSs did not reflect this. Thus:

> *"We increasingly are seeing that there are ways in which these infrastructure schemes can have either direct, or indirect benefits for the surrounding areas and we'd love to be able to play more of a role in achieving these sorts of things, or in helping to achieve those sorts of things, pointing out where, if you're going to do some mitigation work, well you could do it in one way, or you could do it in another and if you do it in the second way, it will actually add quite a lot of value to the project in the [local] environment, but unless we're given the opportunity to have those conversations, they'll be missed and the NPS's tend not to create the environment in which we can say 'have you thought about doing it better?'"*

There were no immediate plans to review the energy NPSs, according to a participant in focus group 2, but *"an interesting factor to bear in mind when we consider, as and when we do so, whether the flexibility that the NPS's do offer is pitched correctly and helpfully."*

<u>Requirements</u>

Making greater use of requirements as a place to 'sort out detail' was a popular proposal in the research, not just from promoters and their advisors but also from a number of local planning authorities. A good general approach would apparently be to agree design principles as part of the DCO process then deal with the detailed design through the discharge of requirements (Interviewee 1). Similarly, Interviewee 6 proposed some sort of 'hybrid' process where certain details were provided for some issues as part of the actual DCO whereas other things were dealt with just be agreeing the principle and then later submitting detailed applications with a set timescale and sign-off process with LPAs.

One speaker at the roundtable event felt much more detail should be dealt with through requirements:

> *"There needs to be more guidance, actually, what is the strategic issue that goes to the heart of the consent and what can be dealt with later. Is it the place of the examination to discuss species mixes in hedgerow planting and reversing alarms on lorries; that doesn't affect the heart of a consent, so that isn't an appropriate place to deal with that, but nobody seems to know what the boundary is between those two things and I think that's what we need to understand more."*

The use of panels to sort out some design detail post-consent was suggested by a participant in focus group 3 (within consented parameters).

This could, however, apparently present some potential issues. One participant in focus group 3 did comment:

> *"One thing I think is interesting, when you're looking at the overlap with planning, is the post-DCO consent position because it all gets dumped back with local authority and there is a real tension of jurisdictions here, this isn't just planning, it's education across the board in the country, it's where, essentially, power has been taken by central government for one part of the process, but then the requirements and enforcement of them falls back to the local authority"*

Another added:

> *"As the local authority you then have to think 'oh gosh, these are our requirements, do we discharge them, or not discharge them and how can we engage to make sure it's the right scheme that is actually implemented on the promoter ones,' but something that the stat*

*consultees would be happy with, together with the locals, y'know, 'we didn't want it in the first place.'"*

Interviewee 6 felt some LPAs were trying to 'refight old battles' in discharging requirements whilst interviewee 5 explained how concerns over levels of expertise in LPAs meant that as a promoter they preferred Secretary of State sign-off of requirements as opposed to that by LPA. There were concerns over timescales in the process of discharging requirements, according to interviewee 9, with interviewee 10 suggesting a clear escalation process for issues with LPAs although many DCOs have written their own appeal mechanisms in relation to a requirement not being discharged within a particular timeframe.

Resourcing could be a concern, but interviewee 4 felt LPAs could very much support higher levels of flexibility if these were linked to a Planning Performance Agreement with developers:

*"I think it's about creating and giving assurances to the planning inspectorate, that there is a working mechanism, or would be a working mechanism between the applicant and the local planning authority, for how those matters of flexibility would be discharged including SLAs; if you wrap all that up together, I would feel it's a really powerful argument, if you can say 'we are comfortable with that level of flexibility because the environmental impact assessment is broad enough in its scope and we have a sufficient level of resource' and the developer can be assured that we will discharge that within eight, or thirteen weeks because of this agreement, you should be reassured that you don't need to worry about that at the end."*

The framing of requirements could be an issue, explained interviewee 7:

*"What we found for Hinkley was, during the examination stage, but also between the examination finishing and us getting a consent, a number of different conditions were imposed on us … There were quite a few that were a surprise when we got the DCO."*

Interviewee 18 explained passionately the difficulties that having too many requirements could present to a statutory consultee.

Interviewee 6 felt some model requirements would be helpful:

*"In terms of the model requirements where some of the detail can be decided and agreed, I think, might be a good way of helping everyone to get through the flexibility versus detail and the like and perhaps putting some sort of timetable to it and also what if people can't agree, some way of adjudication."*

Similarly, Interviewee 1 suggested that there should be a prescribe process for consultation and discharge of requirements. It was suggested at the roundtable that it would be beneficial to further look at the way detail can be dealt with during the discharge of requirements and how that can work effectively not just for promoters but for local communities and statutory consultees as well. Interviewee 17 also expressed a desire for more feedback to PINS to capture how requirements are actually working now so many are being discharged, and to identify best practice in their framing.

<u>Workshops / training</u>

A cross-stakeholder desire to learn more about the framing and discharge of requirements, in particular, linked to some suggestions made about the opportunity for workshops and training to address some of the issues of concern raised. As a promoter, interviewee 10 stated that going through the discharge of requirements for their first DCO has given a lot of knowledge about how better to frame them in future, to ensure they are clear what is trying to be done and that they're easy to discharge and clearly it would be beneficial if this learning was shared beyond the individual promoter. The training of those discharging requirements (particularly at LPAs) was felt

to be a key issue by one participant at the roundtable event, particularly if more weight was placed on them due to increased flexibility in the actual DCO.

Interviewee 13 was keen for PINS staff to have more understanding about discharging requirements, suggesting:

> *"I think it would be really useful for us, in here, to actually spend some time with the local authority, trying to discharge some of these requirements, I think the ability for us to do that in the future is something we definitely want to look at in terms of secondment… I think, just in terms of providing them with pre-app advice and understanding how they're written and how they actually manifest themselves when they actually come to do the work is an information gap"*

Interviewee 11 suggested the need for a better feedback loop now that many schemes are under construction to both PINS but also government departs could learn from the process, for example as to whether the NPS tests are actually the right ones. Interviewee 11 also suggested that there should be more monitoring now that so many schemes were finally in the construction phase. Interviewee 14 highlighted the fact that PINS always do a post decision feedback meeting, but felt that were not always as productive as they could be as the consent team often disappears as soon as the DCO is granted and these meetings are often held after consent is granted but well before construction starts.

Interviewee 1 felt that *"what really needs to happen, is a lot more work and understanding and dissemination of knowledge about how the post consent stages work"*. This was apparently on the part of Planning Inspectors as well as local planning authorities. A mark of success would be not having to have regard to every representation made to the Examining Authority but saying 'this will be dealt with in requirements'. Interviewee 11 thought Examining Authorities could drive detail, sometimes with good reason, but felt that there was a need to workshop different scenarios around flexibility with inspectors so there was a better understanding of the need, drivers and what is acceptable without the risk of Judicial Review.

Several promoters we spoke to are now working on their second (or third) DCO and have internally learnt a lot about drafting and negotiation but, as interviewee 10 explained, it does not feel that there is enough lesson learning cross-industry.

<u>Other</u>

The above suggestions were the main issues raised by several different interviewees related to the core focus of this research project. There were a number of other reflections which are also worth mentioning. Firstly, Interviewee 4 suggested that at the establishment of a timetable, it would be incredibly helpful for the Examining Authority to identify what they believe the principle issues for consideration are: *"they've acknowledged the principle impact of x, y and z and that's what the examination will focus on".*

Secondly, a number of interviewees felt greater use could be made of things like the evidence plan approach, mitigation route maps and Codes of Construction Practice as ways of better managing, or avoiding unnecessary, detail.

Thirdly, Interviewee 6 felt thresholds could be used for a 'DCO light' process for smaller schemes whilst two participants in focus group 3 did suggest there should be some sort of thresholds in the DCO process because of the difference between a small gas fired power station to Thames Tideway scale projects. For the more straightforward projects, it was felt the DCO process could

actually be slower than the Section 36 Electricity Act consents or a Planning Permission process might be.

Finally, interviewee 13 felt the limits for what were an NSIP were generally about right but that it might be useful for the Secretary of State to have a bit more discretion to direct stuff out of the regime where it really isn't an NSIP.

## Appendix 2: Construction state of consented DCOs

The following is based on public domain information reviewed by the UCL research team. All information is correct to the best of publically available information as of 1 November 2016.

**SUMMARY**

| | | |
|---|---|---|
| 7 schemes built (14%) | Mainly Highways and Railways | |
| 13 under construction (26%) | Mainly Highways and Windfarms | |
| 11 with planned construction dates (22%) | Mainly energy projects | |
| 19 not started construction and no public date to do so (38%) | Mainly energy projects | 2 definitely cancelled |

| Project | Promoter | Decision | Order | Correction | Change | Construction status |
|---|---|---|---|---|---|---|
| Rookery South EfW | Covanta Energy | 13-Oct-11 | 2013/680 | | | Construction to commence late 2017 - Covanta and Veolia |
| Ipswich chord | Network Rail | 05-Sep-12 | 2012/2284 | | | Built. Opened March 2014 |
| North Doncaster chord | Network Rail | 16-Oct-12 | 2012/2635 | | | Built. Opened June 2014 |
| Kentish Flats windfarm | Vattenfall | 19-Feb-13 | 2013/343 | | | Built. Operational from December 2015 |
| Brechfa Forest windfarm | RWE Npower | 12-Mar-13 | 2013/586 | | 2016/337 | Construction due to start before the end of 2016 |
| Heysham to M6 link road | Lancashire County Council | 19-Mar-13 | 2013/675 | | 2015/571 | Built. Opened October 2016 |
| Hinkley Point nuclear | EDF Energy | 19-Mar-13 | 2013/648 | 2013/2938 | 2015/1666 | Financing still being put in place, construction commencement date TBC |
| Galloper windfarm | SSE Renewables | 24-May-13 | 2013/1203 | 2013/2086 | 2015/1460 | Construction commenced November 2015 |
| Triton Knoll windfarm | RWE Npower | 11-Jul-13 | 2013/1734 | | | Pre-construction surveys conducted early November 2016 |
| King's Cliffe haz waste | Augean | 11-Jul-13 | 2013/1752 | | | Unclear but believe now built |
| Blyth biomass | RES | 24-Jul-13 | 2013/1873 | | | Cancelled due to uncertain government funding |
| M1 J10a upgrade | Luton Council | 30-Oct-13 | 2013/2808 | | | Built. Opened July 2015 |
| Redditch improvement | Network Rail | 31-Oct-13 | 2013/2809 | | | Built. Opened September 2014 |

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|---|---|---|---|---|---|---|
| Able Marine Energy Park | Able UK Ltd | 18-Dec-13 | 2014/2935 | | | Construction due to commence 2017 but uncertainty over funding |
| King's Lynn line | National Grid | 18-Dec-13 | 2013/3200 | | | Construction not yet started, awaiting decision to develop King's Lynn B Power Station |
| Stafford chord | Network Rail | 31-Mar-14 | 2014/909 | | | Construction commenced, due to complete December 2016 |
| North London line | National Grid | 16-Apr-14 | 2014/1052 | | | Due to be delivered in 2022 due to delays with new power sources it is due to connect |
| East Anglia ONE windfarm | Scottish Power | 17-Jun-14 | 2014/1599 | 2016/447 | 2016/447 | Construction to commence in 2017 - Siemens appointed |
| DIRFT 3 RFI second attempt | Rugby Radio Station | 04-Jul-14 | 2014/1796 | | | Construction to commence early 2017 |
| Rampion windfarm second attempt | E.On | 16-Jul-14 | 2014/1873 | 2015/1319 | | Under construction, due to complete summer 2018 |
| A556 upgrade | Highways Agency | 28-Aug-14 | 2014/2269 | | | Under construction, due to complete March 2017 |
| North Killingholme power stn | C.Gen | 11-Sep-14 | 2014/2434 | 2015/1829 | | Delayed due to government policy on carbon capture, believed not yet started construction |
| Thames Tunnel | Thames Water | 12-Sep-14 | 2014/2384 | 2015/723 | | Under construction, due to complete 2023 |
| Clocaenog Forest windfarm | RWE Npower | 12-Sep-14 | 2014/2441 | | | Construction to commence in 2017 |
| Burbo Bank windfarm | Dong Energy | 26-Sep-14 | 2014/2594 | 2014/3301 | | Under construction |
| Woodside Link | Central Bedfordshire Council | 30-Sep-14 | 2014/2637 | | | Under constrution, due to open spring 2017 |
| South Hook CHP | ExxonMobil, Total, Qatar | 23-Oct-14 | 2014/2846 | | | Cancelled due to market situation |
| Walney windfarm | Dong Energy | 07-Nov-14 | 2014/2950 | 2015/1270 | 2016/810 | Construction to commence in 2017 |
| Hornsea windarm project one | Smart Wind | 10-Dec-14 | 2014/3331 | 2015/1280 | 2016/471 | Under construction (onshore connections - offshore starts in 2018), due to complete 2020 |
| Willington pipeline | RWE Npower | 17-Dec-14 | 2014/3328 | 2015/1616 | | Site for power station sold from RWE to Calon Energy. No public date for construction |
| Morpeth Northern Bypass | Northumberland County Council | 12-Jan-15 | 2015/23 | | | Under construction, due to open early 2017 |
| A160 upgrade | Highways Agency | 04-Feb-15 | 2015/129 | 2015/1231 | | Under construction, to be completed by end 2016 |

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|---|---|---|---|---|---|
| A30 Temple to Carblake | Cornwall Council | 05-Feb-15 | 2015/147 | 2015/243 | Under construction, due to be completed by spring 2017 |
| Dogger windfarm Creyke Beck | Forewind | 17-Feb-15 | 2015/318 | 2015/1742 | No public information on date construction to start |
| Knottingley Power Project | Knottingley Power Limited | 10-Mar-15 | 2015/680 | 2016/797 | Under construction (site clearance commenced) |
| Whitemoss Landfill | Whitemoss Landfill | 20-May-15 | 2015/1317 | | Environmental permit issued Sept 2016. Unclear when construction commences |
| Norwich Northern Distributor Road (NDR) | Norfolk County Council | 02-Jun-15 | 2015/1347 | | Under construction, due to complete 2018 |
| Swansea Tidal Lagoon | Tidal Lagoon Power | 09-Jun-15 | 2015/1386 | 2015/1830 | Aim to commence construction in 2017 |
| Preesall gas storage | Halite Energy | 10-Apr-13 | 2015/1561 | 2015/2071 | Land acquistion started. Construction date not publically available |
| Hirwaun power station | Stag Energy | 23-Jul-15 | 2015/1574 | 2015/2070 | Failed to secure a contract in Dec 2015 Capacity Market Auction. Will try again Dec 2016 |
| Progress power station | Stag Energy | 23-Jul-15 | 2015/1570 | 2016/736 | Amendmends to DCO requested. Aim to start construction in 2017 |
| Dogger windfarm Teesside A&B | Forewind | 05-Aug-15 | 2015/1592 | | No public information on date construction to start |
| Ferrybridge Multifuel project | Multifuel Energy Ltd | 28-Oct-15 | 2015/1832 | 2016/737 | Construction due to begin before end of 2016 |
| Internal enhancement Port Talbot Steelworks | Tata Steel | 06-Dec-15 | 2015/1984 | | No public information on date construction to start |
| East Midlands Gateway Rail Freight Interchange | Roxhill (Kegworth) Ltd | 12-Jan-16 | 2016/17 | | Construction due to begin January 2017 |
| Hinkley to Seabank line | National Grid | 19-Jan-16 | 2016/49 | | No public information on date construction to start |
| A19/A1038 Coast Road | Highways Agency | 28-Jan-16 | 2016/73 | | Under construction, due to complete 2018 |
| Palm Paper CCGT | Palm Paper | 11-Feb-16 | 2016/166 | | No public information on date construction to start |
| Thorpe Marsh pipeline | Thorpe Marsh Power Ltd | 03-Mar-16 | 2016/297 | | No public information on date construction to start |
| A14 improvement | Highways Agency | 11-May-16 | 2016/547 | | Construction to begin March 2017 and complete March 2021 |

## Appendix 3: Membership NIPA Insights Project Steering and Stakeholder Groups

### NIPA Insights Project Steering Group

| | |
|---|---|
| Keith Mitchell | Peter Brett Associates |
| Robbie Owens | Pinsent Masons |
| Michael Wilks | Suffolk County Council |
| | |
| Hannah Hickman | Hannah Hickman Consulting |

### NIPA Insights Project Member Stakeholder Group

| | |
|---|---|
| Alan Jones | Somerset County Council |
| Alex Herbert | Tidal Lagoon Power |
| Anna Pickering | Highways England |
| Ben Lewis | Billfinger GVA |
| Chris Girdham | Ballymore |
| Claire Hennessey | WSP/ PB |
| Greg Tomlinson | Marine Management Organisation |
| Helen Walker | Scottish Power Renewables |
| Jan Bessell | Pinsent Masons |
| Julian Boswell | Burgess Salmon |
| Karen Wilson | Amec Foster Wheeler |
| Keith Farley | Keith Farley Ltd |
| Michael Harris | RTPI |
| Simon Webb | Major Projects Association |
| Stephanie Wray | IEEMA |
| Tony Burton | Big Lottery Fund, Consultant |
| David Wilkes | DCLG (Observer) |

## Appendix 4: List of interviewees

Energy promoter, development manager
Energy promoter, development manager
Energy promoter, planner
Energy promoter, stakeholder manager
Engineering / planning consultancy, environmental planning consultant
Engineering / planning consultancy, infrastructure manager
Former civil servant
Former Examining Authority Member, Planning Inspector
Former Examining Authority Member, Planning Inspector
Highways promoter, consents manager
Local authority, planner
Local authority, planner
Planning consultancy, director
Planning Inspectorate, current staff
Planning Inspectorate, current staff
Planning Inspectorate, current staff
Planning Inspectorate, current staff
Planning Inspectorate, current staff
Statutory consultee, planner
Statutory consultee, planner
Statutory consultee, planner

## Appendix 5: List of those who participated in focus groups and round tables

| **Roundtable**<br>***NIPA Members*** | | **Focus Group 1**<br>***Contractors / implementation*** | | **Focus Group 2**<br>***Civil service*** | | **Focus Group 3**<br>***Lawyers, statutory consultees*** |
|---|---|---|---|---|---|---|
| TBC | | • Civil engineering consultancy, director<br>• Engineering / planning consultancy, director<br>• Engineering company, project manager<br>• Engineering consultancy, delivery manager<br>• Planning consultancy, director<br>• Tideway, project manager | | • Civil servant, BEIS<br>• Civil servant, BEIS<br>• Civil servant, BEIS<br>• Civil servant, BEIS,<br>• Civil servant, DCLG<br>• Civil servant, DCLG<br>• Civil servant, DfT<br>• Civil servant, DfT<br>• Civil servant, PINS | | • Environmental and planning barrister<br>• Environmental and planning barrister<br>• Environmental and planning barrister<br>• Environmental and planning solicitor<br>• Statutory consultee, in-house lawyer<br>• Statutory consultee, in-house lawyer |