

# **Infrastructure Delivery: the DCO process in context**

*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?*

## **Technical Report**

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## **Contents**

<b>1.</b>	<b>Introduction</b>	<b>3</b>
<b>2.</b>	<b>2008 Planning Act: context</b>	<b>5</b>
<b>3.</b>	<b>The operation of Planning Act 2008 since its introduction</b>	<b>19</b>
<b>4.</b>	<b>Why is flexibility important?</b>	<b>32</b>
<b>5.</b>	<b>2008 Planning Act: issues and challenges in practice</b>	<b>42</b>
<b>6.</b>	<b>Findings: General interview and focus groups</b>	<b>53</b>
<b>7.</b>	<b>Findings: A14 Cambridge to Huntingdon Improvement Scheme</b>	<b>104</b>
<b>8.</b>	<b>Findings: Galloper Offshore Windfarm</b>	<b>139</b>
<b>9.</b>	<b>Conclusions and Recommendations</b>	<b>165</b>
<b>Appendix A</b>	<b>NIPA Insights Research brief</b>	<b>175</b>
<b>Appendix B</b>	<b>Research methodology</b>	<b>176</b>
<b>Appendix C</b>	<b>Summary consent data for NSIP DCOs</b>	<b>180</b>
<b>Appendix D</b>	<b>Construction status of consented DCOs</b>	<b>186</b>
<b>Appendix E</b>	<b>Membership NIPA Insights Project Steering and Stakeholder Groups</b>	<b>189</b>
<b>Appendix F</b>	<b>List of those interviewed</b>	<b>190</b>
<b>Appendix G</b>	<b>List of those who participated in focus groups and round tables</b>	<b>131</b>
<b>Appendix H</b>	<b>Paper on detail and flexibility in highways design</b>	<b>192</b>
<b>Appendix I</b>	<b>References</b>	<b>201</b>

## **1. Introduction**

This research was commissioned by NIPA Insights in September 2016-March 2017 to examine the ways in which the 2008 Planning Act has been operating in relation to detail and flexibility in the system. The research brief is set out in Appendix A. The research that has been undertaken and is reported here has been based on a variety of approaches in a combined methodology that is set out in Appendix B and included a literature review, interviews, round tables, focus groups and case studies. The project has been managed by a small group representing NIPA Insights and acting as the client for the project as shown in Appendix C. This group has been assisted by a client side manager. The group has met approximately monthly during the project and there have been additional conversations and discussions between the research team and project board members in addition to these meetings.

The first part of this report examines the purposes of the system when it was established and then there is a review of how it has been working in practice since including the number of applications made within the system, a sectoral breakdown and an analysis of consented schemes that have been implemented. Following this there is a discussion on the issues and challenges faced by all involved in the 2008 Planning Act system including scheme promoters, their advisers, communities, regulators, local authorities and the government. These issues and challenges have been provided both from the research brief that was prepared by NIPA Insights following round table member sessions. To these have been added issues and challenges that have been raised at roundtables and focus groups held as part of this project. There have been two roundtables – one for the project steering group and one for any members of NIPA (particularly legal members). The four focus groups have been specifically concerned with issues raised by promoters and constructors, government and regulatory bodies and communities and environmental stakeholders. Those who have participated in these round tables and focus groups are shown in Appendix G. 35 interviews have been conducted and have represented all sectors and constituencies engaged in the 2008 Planning Act processes, including 22 interviewees who were talking about their experience in general and 13 who were talking more specifically about their experience in relation to our two case study NSIPs, the A14 Cambridge to Huntingdon Improvement Scheme and the Galloper Offshore Windfarm. Those interviewed are shown in Appendix F.

Following the section on the issues and challenges identified in considering flexibility in relation to certainty and community and landowner interests in the 2008 Planning Act by all those involved. The research team have examined these questions and analysed the material obtained during the research through the literature review, document close reading and analysis, interviews and case studies to prepare their findings on these issues and challenges. This has included consideration of how, in some cases, these may be ameliorated through changes in practice by some of the constituencies that play a part in the process. These have been distilled as recommendations and are focused on addressing the issues of community and landowner interests and flexibility. These are set out at the end of this report. They are also presented in a shorter summary “Main Report” of the research, that was requested by the NIPA Insights steering group and is published alongside this more detailed “Technical Report”.

Overall the system is working as intended but there are areas in the process where changes in practices and operational culture could help it to work better. When the 2008 Planning Act was first designed, it was principally aimed at removing delay in the processes that had been observed through the Town and Country Planning system inquiry procedures. In hindsight, it is possible to see that these lengthy inquiries were the exception rather than the rule, although it is recognized that the time taken to deal with them caused concern from all aspects of civil society. For other applications, the system appears

to be working at the same kind of speed as before if the full extent of the process is considered, rather than just the procedural elements from pre-submission to grant of the Development Consent order (DCO) but with more certainty.

However, there may have been an unintended consequence of the front-loading of DCO applications, making it more like a planning application, in that the focus has been primarily on the achievement of the DCO rather than considering the implementation of NSIP projects in their entirety. The issues that are emerging now and the subject of this research are primarily related to concerns about the implementation of consents rather than their achievement in the first place. However, many of the consultants engaged in the process are incentivised to the point of granting the DCO but have less involvement after in the implementation of the scheme, when different consultants and contractors take over supporting delivery for the promoter.

These issues are also coming to light as several consented schemes are now moving towards implementation following promoter pauses after achieving their DCO. Promoters and contractors have been less willing to engage together in the earlier parts of the process prior to granting DCOs and contractors are frequently introduced later in the post-DCO period. This is against the advice of all those involved in project management in the public and private sector including National Audit Office and the Major Projects Association. Promoters are concerned about the expense of designing a scheme from the outset when it may not receive consent and there are also concerns about the risks of determining a detailed scheme too early in the process. From constructors, there are fears that early engagement will reduce their chances of tendering for the project later in the process particularly for publicly funded schemes. There are also concerns about the potential cost of engagement in a project that may not receive consent. We have given some thought to this issue which appears to lie at the heart of the challenges and issues related to detail and flexibility and the conclusions and recommendations address these points.

A second area that has emerged as being a pivotal point between the process of obtaining consent and its implementation is the drafting of the DCO. All constituencies engaged in the 2008 Planning Act process that we have interviewed or met with have pointed out that the content and approach of the DCO draft has a major impact on subsequent constructability. In some DCOs, the flexibilities that are required for later construction have been included in the associated consent processes following the DCO, particularly where these have included local authorities in their discharge. Also while the DCO non-material change process has been used there is a great reluctance to use the material changes process and this is discussed further in the conclusions and recommendations. If the variation in DCO drafting is such a significant factor in the deliverability of the consented scheme then it should be possible to address these variations in some practical ways which are also discussed in the conclusions and recommendations. This lack of flexibility following the award of the DCO is driving more requests for detailed information at earlier stages as the issue of the built project, its impact and construction period are becoming better understood in the process.

A final factor that appears to have been driving the cumulative requests for more detailed information is the risk averse position of consultants and legal advisers to the promoters. These advisers keep under review the progress and process of parallel and previous applications for DCOs and are incorporating issues that may have arisen in other examination processes. This means that environmental assessments are being extended while application content has been narrowed down. These combined issues have had the effect of focusing on further information – whether to be provided with the application on the advice of consultants or from the Examining Authority when they have not received what they consider to be an adequate amount of detail to consider the proposal. Both factors seem to

be compounded by the adviser fee structures that are used: these are focused on the achievement of a successful DCO rather than the implementation of an effective and efficient project outcome.

During our research, the effectiveness of the 2008 Planning Act regime has been compared with the other systems available to promoters. In some case promoters have no other choice but to use the 2008 Planning Act but for other schemes, promoters still have open to them Hybrid Bill procedures, the Town and Country Planning Act and other specific legislation. Whilst the Transport and Works Act has been mentioned more favourably than the 2008 Planning Act by a number of stakeholders, we have been advised by Government and regulators that it perhaps is less satisfactory as a consenting route as the Planning Act which was designed with environmental assessment and Human Rights considerations from the beginning.

The research team would like to thank NIPA Insights for the opportunity to investigate these issues and all those involved who have given freely of their time to help the research process. This has helped in the understanding of what is perceived to be occurring by those using the system and providing ideas about positive solutions. We consider that the system can be primarily improved by a series of small aggregated changes that can be introduced by the actors in the process slightly reconsidering and repositioning their roles or the advice that they provide. There may be a need for more major changes in the review of the NPS both to bring them up to date, make them spatial and more similar in structure to each other. There is also a need to consider whether they are fit for purpose for new users of the 2008 Planning Act regime including the National Infrastructure Commission and those who are choosing to use 2008 Planning Act powers for industrial and commercial schemes as modified by the 2013 Growth Act where no NPS exists. This will also be the case if the Government accepts the NIC 2016 recommendation to include large housing schemes into this regime.

## 2. 2008 Planning Act – context

This research project is not concerned with the overall role of the 2008 Planning Act but rather how it is operating in respect of detail and flexibility and the relationship with the respective interests of the promoter and the community and landowners. However, it is important to set the regime for Nationally Significant Infrastructure Projects (NSIPs) within its context to understand why it was established in the way chosen and how this may be leading to specific practical approaches which are the subject of this research. Further, when discussing the system set up for NSIPs within the research roundtables and focus groups, together with some interviewees, this context, together with subsequent changes in the delivery of the system, have frequently been mentioned as being important in examining the operation of the current system. The context of the 2008 Planning Act is therefore reviewed here for that purpose.

While the 2008 Planning Act is primarily viewed as a response to the Eddington and Barker reports, both published in 2006, there were several earlier government proposals and discussions from 1998 onwards about the potential to establish a planning system for nationally significant infrastructure projects. These are set out in Box 1, below. Most of these focused on the need to provide certainty in the process for scheme promoters, in the expectation that delay and uncertainty were jeopardizing investment in infrastructure projects in England and Wales. There was also an unspoken assumption that the Planning Inquiry procedures used within the framework of the Town and Country Planning Act were giving too much weight to the community and landowners, together with other stakeholder interests and that this was what was causing delay in the process. This was also considered to be the result of the adversarial style of Planning Inquiries which were based on the practices of cross examination of witnesses and testing of the evidence. All the proposals for reform of the system proposed moving to an examination approach which would be based within a system of Parliamentary approval for projects.

### *Box 1: Summary of reforms of the planning system for major infrastructure from 1998*

- 1998** *Modernizing Planning: streamlining the processing of major projects through the planning system* (DETR) (1998)
- 2001** 'New measures will speed up major planning decisions and safeguard public debate' DETR News Release 335 20 July
- 2001** Planning Green Paper 'Planning Delivering Fundamental Change'
- 2001** New Parliamentary procedures for processing major infrastructure projects
- 2002** The Secretary of State for DCLG announced a package for streamlining processing of major infrastructure projects
- 2004** The Planning and Compulsory Purchase Act included a new process for determining major infrastructure planning applications
- 2005** Circular on Planning Inquiries into major infrastructure projects: procedures
- 2007** White Paper on *Planning for a Sustainable Future* (DCLG, Cm 7120) that included *inter alia*, the commitment to ensuring the effective handling of Nationally Significant Infrastructure Projects

One of the first proposals for change was the Consultation on *Modernizing Planning: streamlining the processing of major projects through the planning system* (DETR) (1998) followed by 'New measures will speed up major planning decisions and safeguard public debate' DETR News Release 335 20 July 2001. The latter announced a new approach for planning major infrastructure projects and focused on ensuring that people affected should have a right to have their views known while projects essential for the country's economic future should be prioritised. This new approach envisaged that there would be:

- clear statements of Government policy setting out priorities for investment;
- a stronger regional framework for identifying investment needs and strategies;
- robust arrangements for prior public consultation;
- new Parliamentary procedures for approving projects in principle before detailed aspects are considered at a public inquiry;
- improved public inquiry procedures;
- improved arrangements for compulsory purchase and compensation.

Further proposals for reforming the planning system for major infrastructure projects were contained in Planning Green Paper 'Planning Delivering Fundamental Change' (2001). Its proposals were based on concerns about the opportunities for groups to engage and participate in major planning projects (Owens 2002) and it identified the need for

- clear policy framework to support investment of national significance
- national policy framework for major infrastructure
- CPO powers for land assembly for national infrastructure
- Approval in principle for major infrastructure projects should be given by Parliament
- Reducing adversarial planning procedures that were 'inefficient'

These approaches were accompanied by new Parliamentary procedures for processing major infrastructure projects (2001) that stated that Inquiries would be debarred from opening issues of principle of major infrastructure projects where Parliament had agreed them and that consent would only be refused in exceptional circumstances where issues could be rectified by planning conditions. Following this in 2002, the Secretary of State for DCLG announced a package for streamlining processing of major infrastructure projects through the planning system and comprised commitments from the government to:

- Make up to date statements of Government policy before major infrastructure planning projects are considered within the planning system to reduce inquiry time in debating policy;
- Have improved regional frameworks through RPGs
- Improve inquiry procedures to consider concurrent sessions in major infrastructure projects
- Improve arrangements for CPOs and compensation

In 2004, the Planning and Compulsory Purchase Act included a new process for determining major infrastructure planning applications and this was followed by Circular 07/2005 on *Planning Inquiries into major infrastructure projects: procedures* that included, for England only:

- Implementing the 2002 SoS package
- s77A Planning Act 1990 inserted via s44 Planning and Compulsory Purchase Act 2004
- these changes that meant that
  - There could be concurrent sessions
  - Publicity to be given to Inspectors' pre-inquiry meetings and recommendations
  - Term 'major participant' introduced
  - SoS to notify local authority that inquiry being held
  - New rules on appointing technical advisor and mediation to allow evidence gathering prior to or between pre-enquiry meetings.

The HM Treasury reviews of 2006, primarily those of Barker into land use planning and Eddington into transport both identified the need for planning reform to deliver a more efficient and effective planning system, reduce delays and improve speed and responsiveness of planning decision making. This was accompanied by the Energy White Paper (2007) that also emphasized the cost, uncertainty and delays for major energy projects associated with the planning system. In 2007, the Government also published



a White Paper on *Planning for a Sustainable Future* (DCLG, Cm 7120) that included *inter alia*, the commitment to ensuring the effective handling of Nationally Significant Infrastructure Projects, establishing clearer national planning policy and speeding up and simplifying the system as a whole. Also in 2007, the Treasury's *Review of sub-regional economic development and regeneration* (HMT) identified the need for major infrastructure projects to be led at regional level, for infrastructure investment to be set within a framework of economic indicators, for the establishment regional investment funds and the provision of mechanisms for local authorities to promote infrastructure delivery through asset backed vehicles

## **Summary of concerns before 2008**

This brief review of the period 1998-2007, prior to the 2008 Planning Act, demonstrates a continuing and consistent concern to reform the planning system for major infrastructure projects. These statements about the need for change were not supported by a more substantial case until the Eddington Report was published that set out the need for reform in more detail with evidence. The report also put together the components of reform that had been proposed in the period since 1998 and included them in a single process that resulted in the system established for NSIPs in the 2008 Planning Act. More recently, the Charter and terms of reference for the National Infrastructure Commission have returned to the principles established in the Eddington Report particularly with its points made about the role of transport infrastructure in supporting the national economy. These background issues were as follows:

### **(a) Lack of public policy integration**

One of the key issues before 2008 was the lack of integration between government departmental policy at national level and between the various regional strategies for spatial planning, transport and the economy at regional level. Hull (2005) indicates that a lack of public policy integration is one of the key reasons for poor performance in delivery and implementation deficits. Although, as Eddington later stated (2006), the mechanism available for integration within government was through a Cabinet Committee, no such mechanism existed at the regional scale. The failure of the 2004 North East referendum was followed by a switch in emphasis to sub-regions through the Sub National Review (HMT 2007) and through those groups of local authorities entered Multi Area Agreements (MAAs) within Functional Economic Areas (FEAs). As a result of the SNR, the RSS and other regional strategies were abolished and were to be combined in new regional strategies following the 2010 general election.

### **(b) Contribution to national economy**

In his report, Eddington underlined the role of transport infrastructure in supporting the economy through enhancing productivity. Eddington argued that there were infrastructure challenges across the whole country and beyond as well as in urban areas. In his report, Eddington identified the role of transport in driving the economy is summarised in Box 2 and Eddington identified the influence of planning within all of these factors.

Eddington had no initial intention to consider planning matters, rather leaving that to the parallel review of planning led by Barker (2006). However, he included proposals to reform the planning process for major infrastructure projects by introducing new 'independent Infrastructure Planning Commission to take decisions on projects of strategic importance' (p 7) in his report. He also recommended that transport in larger urban areas should be managed in a more integrated way (SNR 2007). While Eddington's report is remembered for its proposals to change the planning system for major infrastructure investment in the UK, this was a recommendation that was intended to meet the wider

concerns and challenges that had been set out in the report that included climate change, lack of strategic planning and a need to designate networks and hubs using existing as well as new infrastructure to support cities and businesses across England. As part of this economic benefit from transport infrastructure, Eddington stated that one of the key transport infrastructure challenges for England was the operation of international gateways including ports and airports, and that these were mostly in private hands. Eddington identified national government as having an important role in the investment, access and interoperability of these gateways as transport nodes or hubs.

*Box 2: How transport drives the economy*

- Increasing business efficiency
- Increasing business investment and innovation
- Supporting clusters and agglomerations
- Improve the efficient function of labour markets
- Increasing competition
- Increasing domestic and international trade
- Attracting global mobile activity

*Source: taken from Eddington (2006: 15)*

**(c) Cost, uncertainty and delay in the planning system**

After lengthy discussion, Eddington concluded in his report that the planning system: 'has evolved over several decades to the point at which it can impose unacceptable cost, uncertainty and delay on all participants and the UK more broadly. The current situation affects the UK's competitiveness by deterring investments and limiting the responsiveness of the transport sector; it hinders the ability of Local Government and other interested parties to engage properly in the process and can sometimes preclude them from doing so; and in extending planning blight and uncertainty, it can severely affect the lives of individuals directly affected by proposals (p 56).

Eddington stated that the causes of these problems are 'complex, interlinked and vary from application to application. There is no easy solution...a distinction should be made between necessary time spent considering serious matters and unnecessary delays' (p 56). Eddington also recognized that it was not always the planning system that was at fault and some of the deficiencies were the responsibility of the scheme promoter.

Eddington summarized the causes of 'unnecessary cost and delay' and a need for consistency in planning decisions while costs of delay are inefficient for all involved and that these had developed over many decades and included:

1. lack of clarity about national policy so that public inquiries are needed to establish the policy for and basic case for development;
2. the adversarial nature of the process
3. a second stage of decision making – the Ministerial stage
4. overlapping statutory and formal processes with different legislation and operational modes and different Ministerial accountability

Eddington identified the scope for legal challenge from beginning to end and that the (Eddington 2006 p 57) the consequences of planning were as follows (p 322 ff):

1. lack of clarity of government policy

2. cumbersome and complex process – makes it difficult for promoters to know what is required; delay may be tool for objectors; no incentives for inspectors to manage process more effectively; allocation of costs may be inefficient.
3. lengthy inquiry period
4. two separate phases in decision making
5. multiple final decision makers
6. risk of legal challenge

Eddington recommended that:

- direction from Ministers at the heart of the process and Government should produce clear guidance on the strategic objectives for transport
- public consultation on these national strategies
- establish an independent planning commission
- establishes statutory rights of legal challenge at key stages of the process

Eddington (2006 vol 4) found that the community faced costs of uncertainty and blight as a result of lengthy decisions making. He also found that in comparative European markets, competitors could move faster. He also identified planning uncertainty as an issue for both public and private sectors in securing funding for projects. The 'current planning system can be very costly and inefficient, especially for major projects' p 311.

In considering the role and effectiveness of the planning system as reformed and reconceptualised as spatial planning in the Planning and Compulsory Purchase Act 2004, and implemented through PPS1 (Eddington 2006 p312) PPS 12 and RSS (p 313), Eddington found that the objectives had been included to ensure that

- UK infrastructure projects to support sustainable development are identified and brought forward;
- Environmental, social and economic objectives are balanced; the process has to be fair, effective and transparent
  - Fair interested and affected parties can bring forward their views and these properly considered
  - Effective – final decision makers must thoroughly consider the relevant facts and strike a balance in a timely and cost effective manner (p 323)
  - Transparent – public and participants understand how the process is working and to what timetable.

However, Eddington also identified the key issues and challenges for transport infrastructure that were created through the planning process (p 324) as follows:

- It can take too long
- It includes too much uncertainty
- It costs too much for participants and the UK economy.

This was illustrated through figure 5.8 in the report and included above as our Figure 1. Projects that took a long time included M6 toll road and Manchester airport as well as Heathrow terminal 5.

One of key consequences, when transport infrastructure projects have an uncertain time for their regulatory determination, is that their costs can escalate throughout the process. Costs are also uncertain given the time that the application process is open. Inspectors can also add conditions to projects that are not considered at the outset and these also add unexpected costs (p 327). Finally, there are costs where land stands derelict or idle because of delay and non-determination and cites the

Thameslink project as an illustration of this effect (Eddington 2006 p 328). The combined effects of these risks of uncertainty, cost and delay may mean that investors and developers will not support applications for schemes (Eddington 2006 p 328). Scheme delay has costs for society and enables competitors to move in to fill a gap (Eddington 2006 p 329).

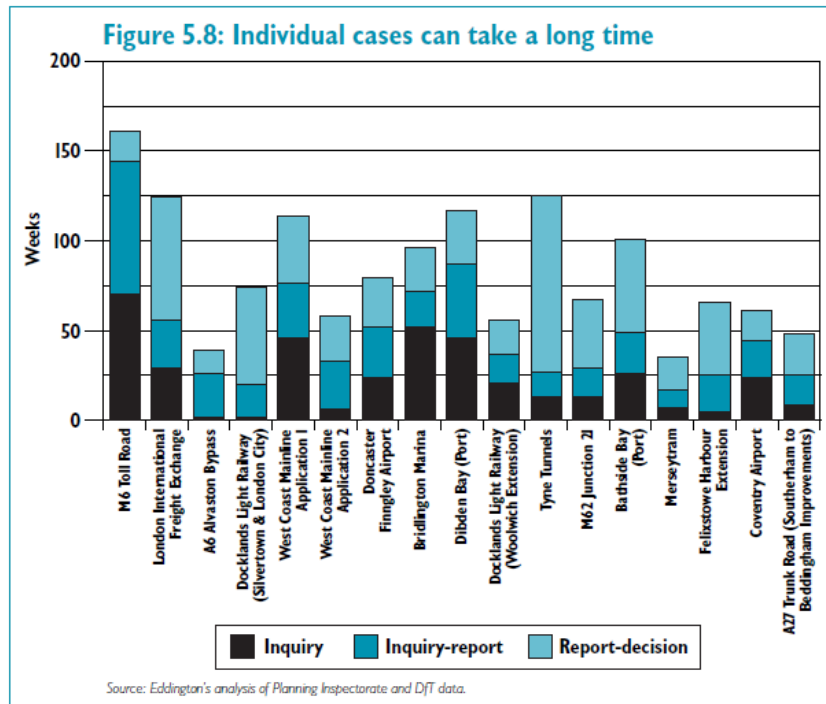


Figure 1: Delays in consenting major transport infrastructure (Source: Eddington, 2006)

#### (d) Public consultation and engagement

In 1998 the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters was adopted by the United Nations Commission for Europe and ratified by the UK Parliament in 2005. The Convention establishes several rights of the public (individuals and their associations) about the environment and provides for:

- the right of everyone to receive environmental information that is held by public authorities ("access to environmental information"). This can include information on the state of the environment, but also on policies or measures taken, or on the state of human health and safety where this can be affected by the state of the environment. Applicants are entitled to obtain this information within one month of the request and without having to say why they require it. In addition, public authorities are obliged, under the Convention, to actively disseminate environmental information in their possession;
- the right to participate in environmental decision-making. Arrangements are to be made by public authorities to enable the public affected and environmental non-governmental organisations to comment on, for example, proposals for projects affecting the environment, or plans and programmes relating to the environment, these comments to be taken into due account in decision-making, and information to be provided on the final decisions and the reasons for it ("public participation in environmental decision-making");
- the right to review procedures to challenge public decisions that have been made without respecting the two aforementioned rights or environmental law in general ("access to justice").

Since its adoption in the UK, the Government reports regularly on its operation to the European Commission. There have been several legal cases where it has been tested particularly in respect of the

costs of engagement in individual cases. The principle approach that the adoption of the Aarhus Convention is the right to participate and that information about environmental matters and in relations to development proposals should be accessible.

**(e) The EU context**

It should also be noted that the EU system for identifying and supporting major infrastructure projects for transport, energy and telecommunications changed in 1993 based on Articles 170-172 of the Treaty for functioning of the EU (Maastricht). For transport, this was through the introduction of the Regulation on Trans European Networks for Transport (TEN-T) and this was expected to be followed by a similar approach for energy. Eddington also identified that the UK planning systems needed to be compatible with EU law (Eddington 2006 p 318) ([http://ec.europa.eu/transport/themes/infrastructure/ten-t-policy\\_en](http://ec.europa.eu/transport/themes/infrastructure/ten-t-policy_en)).

**Eddington's proposals**

As a result of his work, Eddington made proposals to establish a new planning approach for transport infrastructure projects that was as follows:

1. put Ministerial direction at the outset with strategic objectives in national strategies that might include:
  - demand and capacity projections
  - strategic spatial and environmental impacts potentially including SEA
  - wider consequences of development
  - statements about other issues including significant local consideration.
2. have full consultation at the outset of these strategic
3. provide increased certainty for all parties
4. encourage consultation by scheme proposers with the community
5. Establish Independent Planning Commission (IPC) for strategic transport schemes and have the Commission make the decisions that would engage with promoters from an early stage, ensure key issues are appropriately tested and take the final decisions.
6. for IPC schemes, Ministers have no role in determination; where compliant there would be a presumption in favour of development subject to EU compatibility
7. provide more discursive and inquisitorial inquiries rather than adversarial IPC power to determine mitigation measures; assume written reps
8. impose challenging and achievable time limits for key stages of the inquiry to provide greater certainty
9. simplify process through creation of a statutory consent regime with one set of procedural rules
10. establish clear rights of legal challenge

There were seen to be risks associated with these approaches including spending too much time preparing the statements and making them too detailed and finally statement may not be taken into the process or be too risk averse.

**Are there other causes for poorer infrastructure performance in the UK than other countries?**

While the UK economy was the fifth (Mid 2016) and is now the 8<sup>th</sup> largest economy within global economies measured by GDP and the government has focused on improving infrastructure planning

processes since 2008, the relative international performance of the UK in infrastructure provision declined to 27<sup>th</sup> (WEF 2014) and improved to 24<sup>th</sup> (WEF 2016). The OECD (Pisu et al 2015) has identified the relative proportional spend on infrastructure in the UK as average in comparison with other OECD members but lower than other G7 countries. While recognising the role of improved planning processes at national and local level as contributing to the UK's infrastructure delivery performance, the OECD also stated that a consistent National Infrastructure Strategy also provides some certainty for investors. However, the OECD recommended that the investment process needs to be improved to secure better UK performance in comparison with other leading economies (see Box 3).

*Box 3: How UK infrastructure performance could be improved*

- improved public private investment processes
- more integration between modes
- more consistent approaches to regulation
- including all key infrastructure types within regulatory regimes eg ports
- regulatory regimes need more transparency in their approach
- a stronger policy framework is required to overcome policy uncertainty
- overcome insufficiency in long-term planning
- the National Infrastructure Plan is a good first step but needs further development into a long-term reliable strategy – e.g. as in the Netherlands
- government should move away from one and five year budget cycles for its own infrastructure investment
- national infrastructure plans should also include using existing networks in ways that enhance their capacity
- infrastructure investment needs to be considered as part of the country's economic strategy
- horizontal and vertical integration improvements are required within and between infrastructure sectors
- more infrastructure investment needs to be anticipatory such as that for flooding
- there should be better linking between national and local infrastructure planning and programmes and should be included within local plans
- the UK should support and engage in the Investment Plan for Europe
- the government should develop more 'ready to go' infrastructure projects to attract external investment

*(Source: summarised from Pisu et al 2015)*

## **What the 2008 Planning Act was expected to resolve**

In developing and adopting the 2008 Planning Act, these issues of certainty were expected to be addressed as well as the other factors identified in the Eddington report as follows:

### *To be a delivery system for national infrastructure*

Eddington (2006) focused a whole volume of this report (vol 4) on delivery and how it could be improved. One of Eddington's recommendations was that the Government:

'Reforms the planning process for major infrastructure projects to provide greater clarity and certainty without compromising fairness and thoroughness, in particular by providing greater clarity about government policy through Strategic Statements of transport objectives, and

introducing an Independent Planning Commission to take the final decision on specific applications.’ (Eddington, 2006: 52).

As Marshall (2011) has demonstrated, the IPC had been waiting in the wings since 1999 and the independent nature of decision making for the IPC ‘mimicked’ the independence of the International Monetary Committee (p 456).

(a) To make the planning system faster and fairer

In order to balance the needs of the national economy, sustainable development and public engagement, Kelly (2008) stated that the main challenges were to make decisions faster and fairer, more efficient and more accountable, to ensure more timely delivery and to improve the ability of communities and individuals to participate in the system’ (p 2).

(b) To be more cost effective

As Kelly (2008) points out, all three national reviews that informed the development of the Planning Act 2008 – Eddington (2006), Barker (2006) and the Energy White Paper (2006) all demonstrated that there were significant costs associated with planning delays for major projects. At the time that the Planning Act was being considered as a Bill, major infrastructure projects were taking approximately two years to be determined and it was expected that the new Planning Act would reduce this to one year.

(c) To meet the needs of sustainable development

This was seen to be an important feature of any new planning system for major infrastructures (Kelly 2008; Marshall 2013).

(d) More certainty and predictability

This was particularly seen to be a critical component of the new system (Kelly 2008) and as a means of ensuring that major infrastructure projects could find it easier to obtain investment funding.

(e) To remove Ministers from decision making process

Eddington argued that Ministers should be removed from the decision-making process although Kelly (2008) emphasized that it was important for Ministers to be responsible for the policy objectives. Eddington (2006) also stressed the need for Parliament to be involved in decision making by approving departmental policy statements.

(f) Where schemes meet EU requirements there would be a presumption in favour of development

This point was made by Eddington (2006).

(g) To maintain the right to be heard

Kelly (2008) emphasized this provision as part of the new regime and this was a key issue as the Planning Bill passed through Parliament.

(h) To maintain the balance between national and local democracy

The concerns about local democracy and national decision making were widely voiced and the approach taken offered a range of ways through the issue. Firstly, major schemes would be few and more of the smaller local schemes would in consequence be considered by local authorities (Kelly 2008). Secondly, the range of methods for achieving planning consent remained and some schemes would still go through traditional routes. Although there was an intention for local authorities to be consulted in spatially specific National Policy Statements (NPS), in practice the NPS have primarily been a-spatial. However, on every NSIP application, a local impact report from the local authority must be considered.

## 2008 Planning Bill

The Planning Bill attracted 32,000 responses, the majority of which were from organized campaigns (Kelly 2008). The Bill attracted a large measure of political consensus in Parliament which included agreement that reform of the 2005 system in an incremental approach would not be adequate to address the problems that had been identified in the system at the time (Kelly 2008).

## 2008 Planning Act

The 2008 Planning Act created the independent Infrastructure Planning Commission (IPC) as a non-departmental public body that was empowered to examine and take decisions on NSIPs under its chair Sir Mike Pitt. It appointed independent commissioners to examine NSIPs submitted within the 2008 Planning Act regime. Relevant government departments started a process of preparing National Policy Statements (NPS) that were approved by Parliament following a period of consultation. NPS give reasons for the policy set out in the statement and must include an explanation of how the policy takes account of Government policy relating to the mitigation of, and adaptation to, climate change. They include the Government's objectives for the development of NSIPs in a particular sector and state:

- How this will contribute to sustainable development.
- How these objectives have been integrated with other Government policies.
- How actual and projected capacity and demand have been considered.
- Consider relevant issues in relation to safety or technology.
- Circumstances where it would be particularly important to address the adverse impacts of development.
- Specific locations, where appropriate, in order to provide a clear framework for investment and planning decisions.

Table 1: National Policy Statements (NPS)

NPS	Sponsoring Dept	Adoption date	5 year review date
Overarching energy	Dept for Energy and Climate Change (DECC)	19 July 2011	19 July 2016
Renewable energy	Dept for Energy and Climate Change (DECC)	19 July 2011	19 July 2016
Fossil Fuels	Dept for Energy and Climate Change (DECC)	19 July 2011	19 July 2016
Oil and Gas Supply and Storage	Dept for Energy and Climate Change (DECC)	19 July 2011	19 July 2016
Electricity Networks	Dept for Energy and Climate Change (DECC)	19 July 2011	19 July 2016
Nuclear Power	Dept for Energy and Climate Change (DECC)	19 July 2011	19 July 2016
Ports	Dept for Transport	26 January 2012	26 January 2017
Airports	Dept for Transport	Expected 2017	
National networks	Dept for Transport	14 January 2015	14 January 2020
Hazardous Waste	DEFRA	6 June 2013	6 June 2018
Waste Water Treatment	DEFRA	9 June 2012	9 June 2017
Water supply	DEFRA	No date	



They also include any other policies or circumstances that Ministers consider should be taken into account in decisions on infrastructure development. NPS undergo a democratic process of public consultation and Parliamentary scrutiny, before being designated (i.e. published). They provide the framework within which Inspectors make their recommendations to the Secretary of State.

There are 12 designated or proposed National Policy Statements, setting out Government policy on different types of national infrastructure development, which are shown on Table 1.

### **Changes since 2008**

Since 2008, there have been legislative and operational changes to the system. The operational changes have been applied through the abolition of the independent Infrastructure Planning Commission (IPC) in 2011 through the Localism Act, following which the independent decision making on NSIPs was removed from the IPC and transferred to Government Ministers who had set the relevant NPS and in whose departments the schemes lay. The functions of the IPC were absorbed into PINS together with the staff and Commissioners who had been appointed specifically for this task. Some Commissioners decided that they would prefer not to work within the PINS system and although some remained with PINS as members of examining authorities for NSIP applications, most of those appointed by the IPC have now left or moved to work for PINS on a contractual case by case basis. The case officers and staff managing the NSIP regime recruited specifically into the IPC have transferred with their roles into PINS and are still managing the system. These case officers are highly experienced and were employed as consultants or local authority planning officers prior to joining the IPC. They were not recruited through normal civil service administrative staff procedures and have professional qualifications.

A second series of changes have come through legislative adjustments and amendments. These have included the following changes in primary legislation:

- 2009 Marine and Coastal Planning Act: The primary legislation which, amongst other matters, amends certain provisions of the Planning Act 2008 including sections 42 and 104, repeals sections 148 and 149 and inserts a new section 149A;
- Localism Act 2011: The Act abolishes the Infrastructure Planning Commission and transfers the decision-making powers of the Commission to the Secretary of State. The Act also makes several amendments to the Planning Act 2008 which have the effect of altering some aspects of the procedure for seeking development consent for nationally significant infrastructure projects;
- Growth and Infrastructure Act 2013: An Act to make provision amongst other things about facilitating or controlling the provision or use of infrastructure, the carrying-out of development, and the compulsory acquisition of land;
- The Infrastructure Act 2015: An Act to make provision amongst other things to change the timing of the appointment of the examining authority, provide for two-person Panels, and amend the process for changes to, and revocation of, development consent orders;
- The Housing and Planning Act 2016: An Act to make provision about housing, estate agents, rent charges, planning and compulsory purchase. Section 160 of the Act amends s115 of the Planning Act 2008 to allow an element of housing to be included as part of the development for which development consent may be granted;
- 2017 Neighbourhood Planning Act: An Act that includes changes to planning and compulsory purchase orders.

There have also been changes in secondary legislation (<https://infrastructure.planninginspectorate.gov.uk/legislation-and-advice/legislation/#Primary>).

Finally the NSIP system has to take account of the EU Regulation on the guidelines for implementation of Trans European Networks 347/2013 that amends regulation 1315/2013 and includes maps [https://infrastructure.planninginspectorate.gov.uk/wp-content/uploads/2014/05/tene\\_347\\_2013.pdf](https://infrastructure.planninginspectorate.gov.uk/wp-content/uploads/2014/05/tene_347_2013.pdf) .

The third change has been the establishment of a separate system for Wales that is included in the Planning (Wales) Act 2015.

PINS has also provided 9 sets of its own Guidance, together with further guidance from DECC on how to engage with EU TEN-E energy projects. PINS also provides 17 Advice notes on the process and offers a free pre-application service for promoters and their advisers. There is written guidance for those who wish to participate in the process as stakeholders or from affected communities but no free pre-application service like that for promoters.

### **What the 2008 Planning Act has achieved so far?**

Since the Planning Act has been put in to place it has offered both consistency and certainty to promoters until 2015. Once an application is accepted into the system formally by the IPC and now PINS there has been certainty that it would be examined within the timescale specified in the legislation and that PINS would come to a recommendation within 9 months. PINS has maintained a 100% record in meeting these timescales for all applications. Following this 9 month period, Ministers have three months to consider the recommendation made by PINS and issue a decision. Until 2015, all schemes submitted except one were approved either through the IPC or the subsequent Ministerial process and all have been within the three month period specified by the 2008 Planning Act. However, since 2015 there have been time extensions applied for by government departments and two DCOs have been refused. An earlier Ministerial refusal was overturned by Judicial Review.

### **Issues that have not yet been resolved by the 2008 Act**

What is important to consider is that many issues identified by Eddington as being problematic in the planning system for NSIPs have not been resolved through the 2008 Planning Act and its subsequent amendments in legislation and delivery. These include:

- integration between transport modes (Eddington 2006)
- designated networks (Eddington 2006)
- climate change issues
- targeted and strategic investment programme
- need for spatial approach

There is still no vertical or horizontal integration between NPS and scales of governance in decision making. Secondly, there has been no integration between planning for different transport modes. While there is a national infrastructure investment programme of strategic projects, these comprise a list of projects that have no relationship with each other or other spatial approaches that have been adopted through government policies for combined authorities and city deals. Finally, the government's international ranking on infrastructure provision, as defined by the World Economic Forum has not improved since 2008 where in 2015/16 it stands in 24<sup>th</sup> position while the UK's weakness in infrastructure delivery has continued to be viewed as requiring improvement by the OECD and the EU.

In 2008 Planning Act there is a provision to review each NPS when required which was expected to be every five years which means that the majority are now within or entering their review time frame. The ways that applications need to respond to climate change in the future may be a further important issue in the review of NPS since the UK's adoption of the Paris UN climate change agreement (2015). Government departments have stated that there are no current plans to undertake reviews. There are

also issues where there are no planned NPS. This may also be a particular issue for those categories of development that can apply to use the NSIP system following the amendments in the 2013 Growth Act.

Finally, the 2008 Planning Act and its subsequent amendments and changes have not addressed the issue of flexibility as it affects the deliverability of the consented schemes. The primary problem was considered to be the time taken to achieve a DCO and there was less consideration of the effects of the drafting of the consent on its deliverability. Although flexibility and deliverability were not frequently mentioned in the NPS, some of the guidance and advice has been addressed to this issue and this is discussed further in Chapter 4.

### **National Infrastructure Commission**

Since the 2008 Planning Act has been in operation it has been amended (as shown above) to achieve operational improvements. There has been no further mention of the remaining issues identified in the Eddington report and there appear to be no current proposals to make policy or legislative changes to meet them. However, there are two current policy opportunities to address these issues if they are considered to remain significant. These are the National Infrastructure Commission (NIC) and the Industrial Strategy.

The NIC was set up on an interim basis on 5 October 2015 and was established as a national executive agency of the Treasury in January 2017. The NIC has a charter and works within a fiscal and economic remit that is a set within the principles laid out in the Eddington Report. Its responsibilities include advising on ‘the UK’s future needs for nationally significant infrastructure, help to maintain UK’s competitiveness amongst the G20 nations and provide greater certainty for investors by taking a long-term approach to the major investment decisions facing the country’. Its remit is to independently define the nation’s long-term infrastructure needs, prioritising and planning, and testing value for money, to ensure that investment is properly targeted to deliver maximum benefit.

Central to this NIC remit is the National Infrastructure Assessment (NIA) – an in-depth assessment of the UK’s major infrastructure needs on a 30-year time horizon’ that is to be undertaken once in every Parliament. In a consultation on its NIA for the Parliament 2015-7, the NIC considered some of the issues that are identified as being ‘left over’ from the Eddington Report and also asks for views on other areas covered by NPS together with digital services and flooding. The NIC’s vision and priorities for the NIA will be published in the summer 2017 and the final NIA in 2018 although its form has not yet been discussed. Consultees on the proposed methodology considered the role of spatial considerations both in determining strategic infrastructure investment locations and assessments of their potential performance to local economies. Alongside the NIC’s NIA, the Government is also committed to producing an industrial strategy that was published as a Green Paper in early 2017.

### **3. The operation the 2008 Planning Act Regime**

The NSIP regime and DCO processes have now been in operation since 2008 and there is a growing set of views and research on the way that it is operating in practice which are discussed here.

#### **Engagement**

The issue of engagement with local communities (in particular) and local authorities concerning NSIPs was prominent in the literature and was a focus of much of the academic research which has been published on the regime.

There was some concern expressed in the early days of the regime around a perceived lack of democracy due to the end of the public inquiry system and the replacement with the more constrained examination process (e.g. Friends of the Earth, 2010). This led to concerns that an apparent removal of the rights of protestors at inquiries would instead lead to more extreme forms of representation such as direct action (Newman, 2009). There are, however, fewer specific mentions of the loss of public inquiries in more recent literature.

Another concern is that the consultation over the draft NPS was not a meaningful public engagement as they seemed removed from people's everyday lives despite their importance due to the strong presumption in favour of development in accordance with them (Woolley, 2010). In a report for the Green Alliance, Mount (2015) highlights the 5,800 responses to the national networks NPS consultation as evidence of a high level of public interest but suggests that the current NPS approach does not allow proper public engagement in order for civil society to define infrastructure need. She suggests that 'Conventional politics alone cannot secure a public mandate for new infrastructure' (Mount, 2015: 2). Similarly, writing in relation to academic research on energy projects, Rydin et al (2015) suggest that there may be legitimacy concerns if you can have so much public participation with so little apparent impact on the decision-making process.

It is argued by Woolley (2010) that the Planning Act 2008 process does not really allow an effective process for identifying potential conflicts with values held in specific places in advance of particular projects being presented and that engagement process under the Act do not allow opportunities for development that would be publically acceptable to be suggested from the bottom-up. In other words, the system is perceived as too reactive rather than proactive in answering queries as to how and where the public would support important infrastructure due to its policy and programmes being too centrally driven with limited space for deliberative plan-making. In another scholarly paper, Johnstone (2014) expresses concern at the balance of expert versus local knowledge in the system and whether public engagement is really sustained and meaningful.

Such critique of the public engagement opportunity structures of the NSIP regime is linked with several suggested consequences that might result from this. At one level, Johnstone (2014: 709) – arguing that 'the idea that political dissensus can be "solved" through policy reform is misplaced' – predicts a danger of rising levels of legal action and direct action if insufficient opportunity for meaningful engagement. Likewise Mount comments that:

'Securing a public mandate for infrastructure will be essential to successful delivery. But the processes and institutions of the current system of infrastructure planning and inadequate for securing meaningful public input ... Since the abolition of public inquiries for nationally significant

infrastructure projects (NSIPs), pressure groups have increasingly resorted to judicial review; and, as these options diminish, opposition is pushed into less formal spaces' (Mount, 2015: 6)

On another level, Rydin et al's (2015) study of windfarm developments through the NSIP regime suggested that because the NPS gave such strong presumption in favour to schemes. Examining Authorities did not want to dismiss strong public concerns completely, so they often responded by suggesting consent be granted for schemes but with increased levels and focus on mitigation driving an increase in conditions and detail in the DCO. Rydin et al (2015) also noted very limited and poor quality evidence on socio-economic matters in many Environmental Statement (ES) documents.

A different perspective is offered by Government documents. The DCLG have argued that the system is 'deliberately front-loaded' and that it is an 'open, transparent system with representations being published on the National Infrastructure website and hearings held in public' (2014: 5). Turley (2016), meanwhile, dismiss claims that the system is an 'attack on democracy' and argue that the frontloaded public and statutory body consultation is usually very thorough, that the results on any consultation must be taken on board (even if they are dismissed, there must be an explanation as to why, which goes further than the traditional Town and Country Planning system approach) and that the examination process is open.

In their 2013 review, the DCLG did note some concern that some consultation requirements are too onerous and prescriptive with overly long and complex documents and late attempts at genuine engagement and reiterated that, 'it is vital to the credibility of the regime that it considers a full range of views on any proposed development' (DCLG, 2013: 22). Indeed, White (2013) has argued that the reluctance of government to allow a less rigorous process for amendments to consented DCOs is because the consultation phase is so heavily in the pre-application stage for the NSIP regime and any such reform would therefore risk sidestepping the rights of third parties.

In 2009, the Wildlife and Countryside Link made suggestions for more common standards for pre-application consultations and more recently, Nathaniel Lichfield and Partners (2015) also suggest a need for further clear guidance to ensure consultation is proportionate and streamlined. Mount (2015) suggests that the DCO process itself is not radically altered but instead is developed with a more formal public engagement structure on infrastructure at national and local levels and a clearer indication where public support would be highest (for example through a specific civil society organisational link at the preparation of NPSs), reducing time spent on scoping and judicial review.

The role of LPAs has also been discussed in some of the literature. LPAs are not formally involved in the decision making process for DCOs. They can prepare a Local Impact Report but receive no specific fees or funding for their involvement in this (White, 2013). The DCLG (2013) review suggested more peer support for LPAs in engaging on NSIPs. PAS (2014), meanwhile, suggest that one reason for the low uptake in business and commercial projects using the NSIP process might be because of the lack of opportunity to build relations with the LPA and test out acceptability with decision makers in the same way as with local councillors under the traditional Town and Country Planning Act system.

Broader concerns around local democratic engagement have led some (e.g. Wildlife and Countryside Link, 2009) to argue for a more explicit role for LPAs in the process. This might be achieved by one suggested approach to increasing flexibility in the system, namely the idea that a DCO allows for certain detailed design matters to be signed-off post-consent by the relevant LPA within parameters set by the DCO itself (Walker, 2015h).

By their very nature, NSIPs can have large impacts on local environments and are naturally an area of great concern to local communities. Similarly, the needs of the national scale must be balanced with those more local impacts. The current system seeks to achieve this through centrally approved NSPs aligned with more local engagement particularly at the pre-application stage. There are some concerns over the detail and proportionality of documents and whether there is room for proactive meaningful engagement in the system and a suggestion that some levels of detail during the DCO examination and consenting process might be linked to a lack of broader public engagement opportunities. There are also suggestions that a greater role for LPAs could be linked to more flexibility in DCOs. The topic of community, statutory body and LPA engagement is obviously of great importance in the legitimacy of the system and an important consideration when examining the balance of detail and flexibility.

## **Speed**

The issue of the speed of decision-making in the system might seem straightforward given the statutory timescales for acceptance, examination and decision on DCOs. However, it is a very frequent topic of discussion in the literature on the NSIPs regime. The system is seen by the Government as an improvement on the predecessor consenting regimes and delivering faster decisions (DCLG, 2013). Although Woolley (2010) disputes that decision making was always slow before the 2008 Act regime (arguing that cases like Heathrow Terminal 5 were exceptional and the focus on them by government led to an unfair blaming of public participation for delays), Gibson and Howsam (2010) illustrate that the development of offshore windfarms was slow and complicated under the previous Electricity Act route. The lack of a statutory timeframe and open ended decision making timescales were apparently not conducive to developments and the speed possible under the Planning Act 2008 is positive for implementation.

In a report which focuses heavily on the speed of the DCO system, Nathaniel Lichfield and Partners (2015) argue that statutory timescales are being met and this has resulted in greater certainty and confidence. Analysing all then consented DCOs, they found an average timescale of 37 months from initial submission of an Environmental Impact Assessment (EIA) scoping request through to receipt of a decision, as illustrated by Figure 2 (below). They concluded that:

‘Given the nature of many of these projects and the inherent challenges that need to be overcome, the length of time for receipt of a DCO application decision compares favourably with to the conventional Town and Country Planning Act (1990) process’ (Nathaniel Lichfield and Partners, 2015: 10)

The analysis of speed does, however, depend on where the analysis looks. In a recent scholarly publication, Marshall and Cowell (2016) take a broader look by including the full pre-application period through to the decision and compare transport and power station schemes consented under the Transport and Works Act process and under the Planning Act 2008 process. They find that a gain in speed of, on average, six months during the core decision period is often offset by a longer pre-application stage. For example, Sizewell B had a very long public inquiry but Hinckley C had much longer pre-application phase including four stages of public consultation.

They argue the 2008 system has done relatively little to alter overall decision times, despite marked changes to the allocation of time between decision-making stages, concluding that ‘for most major infrastructure projects, 18-24 months has been the typical duration of consenting procedures from the 1990s onward’ (Marshall and Cowell, 2016: 16). Thus, ‘while public planning processes have their time frames tightly regulated, aspects led by developers (e.g. pre-application discussion) are not; arranging finance can have a bigger effect on project time frames, and central government retains much flexibility to manage the flow of time’ (Marshall and Cowell, 2016: 1).





stage compared to a public inquiry (DCLG, 2013). Indeed, White argues that the efficient examination process is possible precisely because of the extensive pre-application work by promoters:

‘There is a widespread view that ... parts of the system are perhaps gold-plated or over-engineered, but that is the price to be paid for the fixed examination timetable’ (2013: 53).

In other words, the rapid examination and decision requires this extensive pre-application phase which is far more time consuming than under the traditional Town and Country Planning Act system.

There have, however, been some concerns raised over the time that the pre-application phase takes (DCLG, 2013), albeit with acknowledgement that reducing time spent here could lead to delay elsewhere (DCLG, 2014). Nathaniel Lichfield and Partners argue that whilst delay at front-end may be acceptable if it enhances the probability of the DCO being granted, ‘there is scope for improvements to be made that empower applicants to have more confidence in their pre-application strategies, in particular by providing clear guidance to ensure consultation is proportionate and more streamlined’ (2015: 10). They also highlight that multiple stage consultation is a frequent cause of longer pre-application timeframes.

The solution to speedier timescales is apparently engagement with public and statutory consultees and defining the scheme and its environmental assessment as early in the process as possible (Nathaniel Lichfield and Partners, 2015) and for the developer to have prepared the scheme to the point it is ready to implement with a fixed design, consultation undertaken and environmental impact assessed (perhaps 2 years work pre-application) (JBA Consulting, 2016).

This does raise concerns about levels of flexibility in design. Concerns that PINS may not accept an application without sufficient information and consultation work pre-application may drive time-consuming and costs for promoters (Turley, 2016) and is seen as a driver for greater detail in applications (Dunn and Humphreys, 2016).

In addition to timeliness issues pre-application, there are also apparent concerns post-application. Although all DCO examinations have met the statutory timescales, not all Secretary of State decisions have and there are some recent concerns about energy schemes (Walker, 2016e).

More importantly, there are no statutory timescales for making changes to DCOs once granted. There are three routes for this: correction orders (of which 18 have been issued), non-material amendments orders (seven granted) and material changes (none applied for or granted yet). The correction orders must be requested in six weeks and some are quick (7 days for A30 highways DCO) but others slow (647 days for the East Anglia ONE offshore windfarm) and take an average of 231 days (Walker, 2016d). For the non-material change orders, it took 153 days for Hornsea Project One windfarm to obtain one and 310 days for East Anglia ONE windfarm to obtain one, with an average of 201 days taken (Walker, 2016d).

If a material change was requested, this could take about 350 days (assuming examination, recommendation and decision – although following the 2015 amendments, the change might not need an examination though). Given the lack of any statutory deadline for these correction orders and non-material amendments and the fact it is often the same teams working on them than those processes with statutory deadlines, this is a key source of delay (Walker, 2016d). White (2013) links the difficulty amending DCOs post consent to the additional time and detail in the pre-application stage.

Whilst the fixed timetable for examination and decision is seen as a major advantage of the DCO process, it is evident that there is still considerable discussion about speed of NSIP development and delivery in the literature. There are concerns about time taken pre-application, and a suggestion that



the time taken to get DCOs amended post-consent is driving additional levels of detail pre-application. Despite the debate about overall timeliness, however, it is clear that the certainty of timescales once a DCO application has been submitted is a key benefit of the system; whilst not every scheme look a long time under the preceding consent regimes, there was considerable uncertainty and risk that a decision might be delayed considerably.

## **Complexity**

Concerns have been raised about levels of complexity in the NSIP regime, and whether we are seeing drivers towards increasingly technically dense and overly long documents which add costs for promoters but are also difficult for communities to engage with.

One of the key original benefits of the system was that it was perceived to be less complex than previous consenting regimes: Gibson and Howsam (2010) argue that the Planning Act 2008 process compared favourably in terms of complexity that the S.36 Electricity Act 1989 or S.3 Transport and Works Act 1992 processes to consent offshore windfarms. The NSIP regime can also reduce complexity for large schemes which are cross-boundary (between LPAs) and the fact a promoter can draft their own DCO compiling all aspects into a single view whilst also considering discharging conditions is seen as a key benefit (PAS, 2014). Indeed, complexity is arguably reduced by the fact, as per the system's original intentions, developers can have a single consent regime incorporating matters relating or ancillary to the development such as compulsory purchase, rights over and agreements relating to land, stopping-up or diverting highways, the creation of a harbour authority and so on (White, 2013).

There have, however, been some concerns, about increasing levels of complexity. In their 2013 review, the DCLG commented on the need to provide more advice on drafting DCOs and to highlight examples on good documentation to deal with complexity (DCLG, 2013). The same review called for better engagement from PINS with promoters at the pre-application stage around environmental issues in particular and environmental assessment procedures have long been seen as a source of complexity in consenting for offshore windfarms, for example (Gibson and Howsam, 2010).

Given that the process of preparing the environmental statement is considerable and this is an area where the risk of judicial review is high (White, 2013), the result may be to drive longer, more complex documents which consequent cause a burden on all parties (DCLG, 2014), with some complex technical matters more easily discussed at hearings than through a written process (Grace et al, 2015). There may still be a need for greater clarity on the amount of environmental information needed.

## **Flexibility**

The issue of the level of flexibility versus detail in the DCO process is the focus of this research project, and is addressed in other chapters of this report. However, here we focus on specific relevant discussions on flexibility specifically in the literature reviewed. The issue of flexibility is closely associated with its inverse, detail and the concern about levels of detail in documents and consenting which might not lead to better quality decision making or actual project delivery in the event of consent (Bessell, 2016a).

The desire for flexibility in the DCO process is strongly associated in the literature reviewed with the perceived difficulty in changing the application and substituting plans once submitted to the DCO system (PAS, 2014) with a view that the post consent amendment process is 'cumbersome' (Dunn and Humphreys, 2016). This is particularly the case for making material changes to a DCO, which is described as 'formal and highly prescriptive' involving a pre-application process comparable to the original DCO and usually requiring an environmental statement and potentially full examination which is

time consuming and costly (White, 2013). The perceived lack of flexibility is one argument that has been advanced why the DCO route is not suitable for exploration and appraisal shale gas schemes (Turley, 2016).

The flexibility issues, is however, apparently, the issue concerning project promoters the most (Walker, 2015h). Most schemes enter the NSIP process before detailed designers are on board and examiners apparently demand drawings alongside the DCO to confirm a design in accordance with them. Furthermore, large and complex infrastructure projects are 'inherently vulnerable to unforeseen changes of circumstance' but the process to change DCOs after they are made is seen as unsatisfactory due to the time to obtain approval and uncertainties in that process (Philpott and Tafur, 2016; Bond Dickinson, 2014).

The Government have acknowledged the desire for flexibility to make changes to an application after it has been accepted and highlighted the statutory routes to make changes to DCOs after initial consent (DCLG, 2013) as well as making some procedural amendments. In this, there has been some acknowledgement that changes to projects before and during construction are likely due to nature of large scale NSIPs and Government provided guidance to clarify procedures and whether changes are material or non-material (often linked to environmental statement, habitats and protected species, compulsory acquisition, impact on business and residents) (DCLG, 2015).

Yet there are limits to this acceptance of flexibility post-decision. The Government have refused to have different procedures for different types of material changes as they believe this would add complexity and be difficult to operationalise and have reiterate a view that:

'The Government does not wish to do anything which would jeopardise the existing six month statutory timetable for the examination period. Frontloading ... is an important part of the nationally significant infrastructure planning regime. As far as possible developers should have already considered and assessed any alternative options in the pre-application period ... many minor changes to Orders may be avoided if the original orders are drafted with sufficient flexibility' (DCLG, 2014: 13-15).

This instead drives a focus to flexibility within the DCO itself. There appear to be some impulses against this, however. Walker (2016f) suggests that PINS appears to regard DCOs as more similar to detailed planning permissions when there is no reason why some may not have some outline elements whilst Bessell (2016b) reports a PINS perception that DCOs cannot be like an outline planning application and believes this is driving detail, with as little variation as possible.

Objectors, statutory bodies and inspectors apparently, all try to increase certainty while bespoke change procedures are not favoured by PINS who prefer promoters to use official DCO change process (Walker, 2016d). Indeed, trying to have too much flexibility and thus uncertainty on environmental effects may mean the examining authority ask for further detail and actively push as much finalisation of the project as possible prior to submission (Philpott and Tafur, 2016).

Despite such pressures, some routes to achieving flexibility in DCOs are suggested in the sources reviewed. 'Limits of deviation' have apparently long been accepted for linear projects and allows small scale adjustments to the size and location of elements of the project (Bessell, 2016a; Walker, 2015h).

The so-called 'Rochdale envelope' is accepted by PINS in their advice notes and allows for flexibility within the limits of an existing environmental statement as this is a worst case scenario (Philpott and Tafur, 2016). This suggests a principle to manage flexibility of working within parameters which cause no materially different environmental effects.

Another route to flexibility has been so-called ‘tailpiece provisions’ which are at the end of relevant requirements and say variation can be agreed with the LPA but have been actively discouraged by PINS in their Advice Note on drafting DCOs (Philpott and Tafur, 2016).

Flexibility does exist in some granted DCOs, e.g. Hornsea Offshore Windfarm project one could be implemented as one, two or three projects; different routings for overhead electric lines for Hinkley Point C Connection; and a ‘not environmentally worse than’ provision for Knottingley Power Project (Bessell, 2016b). However, there are perceptions that there is insufficient space for flexibility in the process and that this may be under threat. This is in apparent contrast to Hybrid Bills where detailed design is signed off later with LPAs approving location (within project limits), design and external appearance (Walker, 2015h) or Transport and Works Act schemes (White, 2013).

Given that the greater flexibility introduced into a DCO, the worst case scenario in the Environment Statement, the more land that would be needed for compulsory purchase, and the greater the potential that impacts will adversely impact more people, there is a ‘natural disincentive to making the flexibility too great’ (Walker, 2015h: online). The impact that the level of detail (and perceived lack of flexibility) is having on projects in the regime seems to be an important issue for further empirical investigation.

### **Innovation, futureproofing and early contractor involvement**

Another issue raised by NIPA stakeholders is whether levels of detail in the DCO process can restrict innovation and technological development during the construction process, limiting opportunities for reducing costs, and even improving environmental and community protection in the final project.

The timescale of NSIPs mean that technology often changes over the life of a project (Bessell, 2016a) so there is a desire for sufficient flexibility in the DCO process to allow the opportunities of that technological development to be realised as schemes are delivered. Similarly, as the design is developed post-consent, issues may emerge which were not foreseen at the DCO stage, or there may be different development needs driven by such things as safety requirements which might become more pressing later in the construction phase (particular with, for example, nuclear power stations). Again, this drives a desire for flexibility (Philpott and Tafur, 2016).

Most schemes considered through the NSIP regime are at a pre-construction contract stage (Bessell, 2016b), with contractors brought in post-consent (or at least after the initial design has entered the DCO phase). Once on board, these contractors might then suggest different implementation approaches (which might save time and money or further reduce adverse environmental impacts) but which require sufficient flexibility in the DCO to be implemented (Philpott and Tafur, 2016).

As well as questions of flexibility in the DCO, this does also raise the issue of when contractors are engaged. In the Construction Management literature, there is an increasing discussion of so-called ‘early contractor involvement’ (ECI). The Major Projects Association has for some time advocated ensuring that construction (and/or manufacturing) experience exists in design teams however many of the standard textbooks describe the project development process in terms of separate phases of project definition and design followed by the project delivery phase. Such separation is being increasingly questioned with a greater focus on the front-end of projects as providing an opportunity space to reduce costs by ensuring that the purpose of the project fits strategically and that the project is effectively defined and designed. This has led to ‘the development of a number of project procurement forms that introduce the project delivery contractor’s expertise and advice much earlier in the project

lifecycle than has traditionally been the case in the construction industry' (Walker and Lloyd-Walker, 2012: 1).

As Kolman has commented:

'The preparation for large infrastructure projects often consumes an extraordinary amount of time, money and human resources ... Some of this inefficiency is caused by traditional procurement methods which bring contractors into the process after many key decisions have been made... When clients and consultants adopt the Early Contractor Involvement (ECI) concept – allowing a contractor to be involved from the earliest beginning of the project – all stakeholders benefit. And not only for efficiency reasons. ECI offers contractors the opportunity to profile themselves with their expertise and knowledge and to step out of the downward spiral to the lowest price' (2014: 1).

The early contractor involvement concept has been utilised in the High Speed 2 (HS2) railways project, where it is argued it allows an integrated team to gain a good understanding of the requirements, develop innovative solutions, plan and mobilise resources, and manage risks to accelerate delivery and reduce costs whilst ensuring – through the integration of design development and construction planning at an early stage – that the contractor, designer and supply chain can develop innovative solutions for the infrastructure project (HS2, 2014).

In many NSIPs the contractors are often appointed after the design team have produced the drawings submitted with the DCO application and look to tweak the design (Walker, 2014c). There are some difficulties associated with early contractor involvement, for example funding mechanisms, competitive tendering processes and private finance initiative requirements may all lead to a preference or requirement for contractors to be engaged post-consent (Bessell, 2016a) although European Union tendering requirements (which are often held as a barrier) have not prevented tendering which includes early contractor involvement in a number of examples from The Netherlands (van Valkenberg et al, no date).

It seems therefore that contracting processes and technological development can drive a desire for greater flexibility in the DCO process, but that one solution which can partially address some of this push for greater flexibility is to have early contractor involvement and thus more certainty on the deliverability and implementation of designs prior to the consent being achieved.

## **Uncertainty**

In 2015/16 there have been three sustained refusals for DCO applications (a fourth was overturned; further details in the table in Appendix 1). This has raised concerns as to whether there is now increased uncertainty in the system. As White (2013) outlines, the Planning Act 2008 system tries to achieve certainty in a number of ways; he suggests ten such certainties: certainty of regime, certainty of compliance, certainty of integrity, certainty of participation, certainty of project, certainty of process, certainty of outcome, certainty of timings, certainty of decision, certainty of compensation (White, 2013). The result of these certainties should be the advantageous situation of a faster consents process through unified consents regime, statutory timetable and streamlined examinations; greater certainty through strong presumption in favour of development in accordance with NPS; a fairer examination system balancing national need and local impacts; and thus reduced costs for public and private sectors (White, 2013).

There is a strong presumption in favour of development for NSIPs which accord with an NPS because the merits of infrastructure developments have already been considered in the NPS that have received

Parliamentary approval and thus are not considered at the DCO stage. There is some perception that these recent refusals undermine the certainty of outcome originally envisaged in the system, however the evidence from the literature here is not conclusive.

Dunn and Humphreys (2016) argue that prospects of securing consent for a NSIP are still high and call this 'a good news story for the DCO regime' and the strong presumption in favour of development if it is in accordance with an NPS is argued by Wilks (2015) to be a key reason behind the political decision to remove onshore windfarms from the regime (which he calls a 'backhanded compliment' for the system).

The result of this higher level of approval for schemes is perhaps why Barratt Developments has been keen for major housing projects to be included in the NSIP regime, arguing the system is working well and is an efficient way of delivering significant infrastructure (Pinsent Masons, 2015).

There have, however, been fewer applications than originally envisaged, particularly in the case of business and commercial schemes. There have been suggestions this might be linked to concerns about flexibility (or a perceived lack of it) in the DCO system (PAS, 2014) and to increased uncertainty. However, a number of other factors might be relevant here as well. Firstly, White (2013) argues that infrastructure delivery in general has been slower than envisaged due to poor economic growth and broader government policy than issues with the underlying planning regime. Secondly, there are particular economic factors which make financing major infrastructure challenging (particularly in energy) and the government has raised the thresholds for road and rail schemes to qualify as NSIPs (Walker, 2016c). Finally, for more controversial schemes such as major railways and airport expansion, the government seems to be favouring the Hybrid Bill approach. Marshall (2011) and Marshall and Cowell (2016) argue this is due to political expediency rather than issues with the DCO system per se: the decision is then made collectively in Parliament rather than individually by a Secretary of State and so might be less damaging politically.

Nevertheless, the slow rate of business and commercial projects using the system is linked in the literature to uncertainty concerns specifically, due to the lack of a relevant NPS. The NPSs usually provide the policy and decision-making framework and democratic legitimacy for NSIPs as well as guiding decision-making but due to the wide variety of possibly business and commercial developments the government has not produced one for these schemes (DCLG, 2012). Such projects would instead be guided by the NPPF and relevant local plan policies. For these schemes this could increase uncertainty and as White (2013) argues, removed the strong presumption in favour of development which is one of the NSIP system's most attractive features.

Whilst there is thus some discussion of uncertainty in the literature, it is worth noting that three refusals out of 60 decisions is a 95% approval rate which compares very favourably with the traditional Town and Country Planning Act system. As Grace et al (2015) suggest, there is still a very high approval rate and thus certainty associated with the DCO process but a process of statutory planning balance does still apply and it is a regulatory system rather than a rubber-stamping process.

### **Other issues: requirements, costs and Environmental Statements**

A number of other concerns have been expressed by NIPA stakeholders but are not generally present in the published literature. One such issue is where requirements and Section 106 obligations can overcomplicate the process of the discharge of requirements and obligations for both promoter and regulator, which is not mentioned explicitly in the reviewed literature at all.

Another is the cost of preparing a detailed design for a scheme before it secures in-principle consent. There is some commentary that the need to prepare for hearings and respond within a very tight timetable can place a heavy burden on applicants and that the costs of pre-application consultation can be high (White, 2013) and that the costs of an examination can be relatively expensive (PAS, 2014) which are suggested as factors explaining fewer business and commercial promoters using the DCO route. A different factor is considered in a recent House of Lords report (2016) which highlights the cost for taxpayers which result from delays in delivering infrastructure projects. Overall, however, there is limited discussion of the costs issue in the literature.

Finally, there is surprisingly little discussion of Environmental Statements / requirements specifically in relation to the NSIP regime and DCOs. A very early report from the RTPi and IEMA (Institute of Environmental Management and Assessment) considered guidance on the pre-application and application procedure, the unification of regulations, optimising consultation on environmental impact, ensuring Environmental Statements assist decision-making and managing information delivery but this document is now quite out of-date and somewhat superseded by subsequent developments in the regime and Environmental regulations. There has been very little subsequently published on these issues in specific relation to the NSIP regime and this is a somewhat surprising lacuna given the importance of assessing environmental impacts of such projects alongside the potential for such procedures to drive detail and complexity (particularly given that two DCO refusals have been closely linked to environmental issues: the Navitus Bay offshore windfarm due to the visual impact on the Jurassic Coast World Heritage site and the Mynydd y Gwynt windfarm due to a lack of information on assessment of impact on a Special Protection Area for red kites (Walker, 2015a).

Although there is little published information on these issues of cost, requirements and environmental statements in relation to DCOs, that does not mean these are not potentially important issues for the study and indeed makes it more necessary to consider them during the empirical research phase.

### Examination of documentation for NSIPs : a review of four applications

As the final part of the desk review, it was decided to examine the documentation available via the Planning Inspectorate for four NSIPs which had been through the DCO process, with these examples being one where an application was made soon after the system was established and one where an application was made more recently with both applications being from the same sector / type of NSIP.

Table 2: Decision timescales for example projects

	Project Name	Promoter	Application made	Decision	Time taken	Notes
Energy	Kentish Flats windfarm	Vattenfall	11 Oct 2011	19 Feb 2013	497 days	
	Hornsea windfarm project two	SMart Wind	30 Jan 2015	16 Aug 2016	564 days	Two month delay at decision stage
Highways	Heysham to M6 link road	Lancashire County Council	6 Dec 2011	19 Mar 2013	469 days	
	M4 Junctions 3 to 12	Highways Agency	30 Mar 2015	2 Sep 2016	522 days	All phases except decision making by SoS took slightly longer than the Heysham scheme

The examples chosen were thus two offshore windfarm energy projects - Kentish Flats and Hornsea Project Two – and two highways projects – the Heysham to M6 Link Road and M4 Junctions 3 to 12 since energy and highways projects are the two sectors which have made greatest use of the Planning Act

process so far. For each example project, we looked at the timescales and the number, length and content of documents per stage (from application to consent). In both cases the more recent schemes took longer to come to a final decision than the earlier schemes, as summarized by the Table 2 (above).

Looking at the number of documents submitted per stage (as shown on the PINS website), in both sectors we see a significant rise in the number and often in the length of submitted documents during the pre-application, application and examination phases in the more recent projects. At the pre-application stage much of this growth is from documents associated with the Environmental Statement whilst during examination, much of the additional number of documents can be explained by additional inputs from statutory consultees and local authorities. We also see here an increase in the number of plans and technical drawings in the more recent schemes in association with issues such as ornithology, wave and noise simulations, land acquisition and so on. Tables 3 and 4, below, illustrate this.

Table 3: Number and length of documents at the pre-application stage

Project Name		App. form length (pages)	Draft DCOs length (pages)	No. ES docs	ES: Total length (pages)	No other docs	No plans and drawings	No. consultation report docs
Energy	Kentish Flats windfarm	9	24+29	60	2538	10	9	5
	Hornsea windfarm project two	16	178+37	138	9401	6	10	12
Highways	Heysham to M6 link road	14	76+23	17	1754	7	9	14
	M4 Junctions 3 to 12	32	221+57	223	3555	50	19	47

Table 4: Number and length of selected documents at the examination and decision stage

Project Name		No. written reps	No. relevant reps	DCO length (pages)	No schedule s	No. plans	Total number of documents on PINS website
Energy	Kentish Flats windfarm	25	20	28	2		242
	Hornsea windfarm project two	25	32	195	13	126	760
Highways	Heysham to M6 link road	46	357	90+4	13		357
	M4 Junctions 3 to 12	28	327	160	12	312	1283

Overall, the examination of documents suggests that the level of detail associated with decision making for NSIPs has increased over recent years. There can be differences between the scale, location and nature of projects which might influence this (the table above clearly indicates that on land highway schemes get more representations than offshore wind energy schemes and this does not seem to have changed over time). However, the idea that we are seeing an increase in detail associated with the regime does seem to be supported, with notable increases in the length of environmental statements and DCOs and in the number of documents over time seen in both sectors.

## **Conclusions**

This background research on the NSIP regime and the DCO process indicates that the system was the result of a long period of government concern over the delivery of major infrastructure projects and a desire to increase the speed of delivery, certainty and consistency of decision making and consenting of such schemes. The system that resulted from the Planning Act 2008 is now well embedded and is generally perceived to be successful, delivering more certainty.

There remain, however, wider concerns about the delivery of infrastructure in the UK. More specifically on the NSIP process, there are particular concerns over the balance of detail and flexibility in the system and whether the regime therefore delivers 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. The background review of literature supports and contextualises such concerns. There is further evidence of increases in levels of detail having entered the system over five years as seen between two example highways and windfarm schemes.

This background review suggests a number of issues and topics to explore further in the empirical stage of this research project:

- Do levels of detail seen in the system support meaningful community engagement?
- Does community engagement drive detail in the consenting process as a result of a desire to respond to representations raised? If so, are there more effective approaches to engagement that could be implemented in the regime?
- Would local planning authorities be willing to support higher levels of flexibility by consenting some elements left more flexible in DCOs? Why is there reluctance to such approaches from the Planning Inspectorate?
- Is the pre-application stage working effectively supporting faster decision making later in the process as intended?
- Would statutory time limits for post-consent amendments to DCOs reduce the need for more flexibility within DCOs?
- What means for delivering flexibility have been successfully employed in approved DCOs and other consenting regimes which might serve as examples of good practice?
- Could earlier contractor engagement help reduce the need for flexibility?
- Is more evidence on the requirements of Environmental Statements as a potential driver of detail needed?

By their very nature, however, NSIPs can have significant impacts on the environment and communities and so it is important to approach any suggestions for potential reform with care and rigorous evidence.



## **4. Why is flexibility important?**

### **Introduction**

The principle of certainty is a central feature of the 2008 Planning Act process and one of its main objectives when established as discussed in Chapter 2. It can be measured through both decisions taken on individual applications and whether these have been determined within the timeframe set within the legislation. As noted earlier, until 2015, this certainty of time and outcome was found in all DCOs accepted into the system. Since 2015, there have been 3 refusals and requests for time extensions for decision making by Secretaries of State, where similar request from promoters have always been refused.

However, the question of whether this certainty in time and outcome has been effective in attracting investment and in cost effective innovative delivery is more difficult to address. When reviewing the 75 applications that have received DCO approval since 2008, just 7 have been constructed (see tables in Appendix C and Appendix D). Of the rest, there has been some delay in beginning construction work and some there appears to be no intention to implement some consented schemes. Of those that are now under construction, the delays have been caused by a number of factors including the market. These issues have been further investigated in the research and project case studies and there will subsequently be further discussion on these factors.

The inclusion of detailed working methods and construction approaches within the DCO are related to two key factors. The first is that the environmental assessment of the project, both during construction and on completion, has to consider the implications of its delivery and its environmental impact in the worse case scenario. If there are uncertainties in the project delivery or the final outcome, then the environmental assessment process requires that the promoter sets wider parameters than finally to be required from the scheme that will allow the assessment to be made. The promoter can define an environmental envelope that will allow the development and working methods to operate within the defined area but not be limited to any specific location within the envelope as would be the case with 'red lines' on a planning application.

The second factor driving this detail in the DCO is that of the community, landowner and stakeholder interests. For the community into which this development is being located, there are two main concerns where certainty is an issue. The first is the operation and appearance of the final project and the second is the operational disruption that will occur during its implementation. The promoter is required to consult with the community as part of their pre-submission process including attempting to indicate as much detail as possible on the outcome and working methods. Once consulted with the community may be concerned to ensure that the scheme that they have engaged with represents the final scheme that will be delivered.

The second group requiring some firm indication of the NSIP scheme secured in the DCO are landowners affected by the scheme. For some, their land may be taken in a permanent or temporary Compulsory Acquisition and they may wish to minimise the land that is lost to them in this process. The land that may be used for the working period of the project's delivery will eventually be returned but this may not be in the foreseeable future and the land may be blighted until the time when the project starts, that may be some time after the DCO is approved, as it specifies commencement and expiry dates. Landowners therefore wish their interests to be guaranteed by certainty in the Examination and the approved DCO.

The third group that have an interest in certainty on the DCO use of land and impact of the scheme are the statutory consultees that represent wider national interests in heritage and place. In relation to their specific interests and responsibilities, they may have detailed views about different but nearby locations and may wish to restrict the use of particular sites. Uncertainty and flexibility about these issues may mean that they cannot fully agree processes or provide the examining authority with final comments.

For these three groups, the requirements for certainty on the use of land, methods of construction, appearance and subsequent mode of operation of the development resulting from the NSIP approval as set out in the DCO are all significant. This research has been specifically targeted to consider whether the NSIP process is providing sufficiently flexibility to encourage and enable deliver when the project moves from consent to implementation. NIPA Roundtable discussions between members have suggested that there are a number of issues that have emerged that are in some ways preventing flexibility in delivery that are set out in more detail in chapter 5 but can be summarised as follows:

- DCOs are too detailed in matters of construction and this fetters consideration of a range of approaches
- That non-material changes and corrections in the DCO after it has been approved are taking too long to agree and introduce a period of uncertainty into the process by being within open-ended timeframes
- That non-material changes in the DCO take 18 months to agree and are accompanied by an element of risk that they will not be agreed
- That where material changes are desirable to allow the most efficient and effective delivery method, promoters are taking a risk averse path and delivering through the method set out in the DCO
- That rigidity in the wording of the DCO is making construction of projects more expensive as they are fossilizing delivery and working methods, not allowing promoters to obtain the best prices for their schemes
- That where schemes will be implemented over longer period of time, there will inevitably be innovative solutions available that will not be included within the DCO
- That detailed working method including working site requirements set out in the DCO are preventing effective delivery when subsequent delivery methods may be better

### **The research question set by NIPA Insights**

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?

There are three main parts to the 2008 Planning Act process and each of them has a role and influence on flexibility and safeguarding issues. The first is in the pre-application phase, where the level of detail in the scheme can determine the implications of the scheme for the community, landowners and statutory consultees although this may also be where scheme promoters wish to minimise costs and keep their options open on scheme design and delivery by not providing a detailed scheme. In the second phase of the NSIP process, acceptance to DCO recommendation, then it is the Examining Authority's responsibility to consider the impacts of the scheme and they may require more detail of the proposed implementation outcome if these are not supplied explicitly in the application. This may require further consequential environmental assessments during the course of the examination. Once the DCO is approved then the promoter must implement the scheme as agreed unless they seek material amendments and it is here where they find that the form of the DCO will influence the degree of flexibility they have in implementing an efficient, effective and innovative scheme.

While the acceptance and Examination phases of the process consider the proposed scheme, it is the DCO that fixes the project outcome and how it will be delivered. As this is such a pivotal point in the relationship between the promoter’s scheme and the interests of the community, landowners and statutory consultees, it is important to consider what advice is provided on the ways that this can be reflected in the drafting of the DCOs. It should be noted that the wording of the DCO is provided by the scheme promoter within the context of the legislation and the advice provided by NPS, PINS and Government Departments.

**How is flexibility defined in the 2008 Planning Act process?**

The term flexibility in the 2008 Planning Act process is defined as *full details not being ready at time of application*.

**What advice do the National Policy Statements provide on flexibility in DCOs?**

In our review of the NPS, there is some occasional mention of flexibility but this is not a consistent issue that is addressed. Instead NPS mainly list factors that applicants need to provide and that decision makers need to consider. Some NPS drive the requirements for detail in many aspects from design to construction to air quality to landscaping. The references to flexibility in NPS where it is mentioned are as follows:

*DECC (2011) Overarching National Policy Statement for Energy (EN-1)*

para	Policy statement
4.1.3	In considering any proposed development, and in particular when weighing its adverse impacts against its benefits, the IPC should take into account: <ul style="list-style-type: none"> <li>• its potential benefits including its contribution to meeting the need for energy infrastructure, job creation and any long-term or wider benefits; and</li> <li>• its potential adverse impacts, including any long-term and cumulative adverse impacts, as well as any measures to avoid, reduce or compensate for any adverse impacts” (44)</li> </ul>
4.2.7	In some instances it may not be possible at the time of the application for development consent for all aspects of the proposal to have been settled in precise detail. Where this is the case, the applicant should explain in its application which elements of the proposal have yet to be finalised, and the reasons why this is the case.
4.2.8	Where some details are still to be finalised the ES should set out, to the best of the applicant’s knowledge, what the maximum extent of the proposed development may be in terms of site and plant specifications, and assess, on that basis, the effects which the project could have to ensure that the impacts of the project as it may be constructed have been properly assessed
4.2.9	Should the IPC determine to grant development consent for an application where details are still to be finalised, it will need to reflect this in appropriate development consent requirements” (47)

*DECC (2011) Planning for new energy infrastructure National Policy Statement for Renewable Energy Infrastructure (EN-3).*

Para	NPS
2.4.2	Proposals for renewable energy infrastructure should demonstrate good design in respect of landscape and visual amenity, and in the design of the project to mitigate impacts such as noise and effects on ecology (9)

*DfT (2012) National Policy Statement for Ports*

para	NPS
5.7.8	The decision-maker should consider whether mitigation measures are needed both for operational and construction emissions over and above any that may form part of the project application. A construction management plan may help codify mitigation at this stage (56) guidance on many factors

DfT (2014) National Policy Statement for National Networks

para	NPS
4.18	In some instances it may not be possible at the time of the application for development consent for all aspects of the proposal to have been settled in precise detail. Where this is the case, the applicant should explain in its application which elements of the proposal have yet to be finalised, and the reasons why this is the case
4.19	Where some details are still to be finalised, applicants are advised to set out in the environmental statement, to the best of their knowledge, what the maximum extent of the proposed development may be (for example in terms of site area) and assess the potential adverse effects which the project could have to ensure that the impacts of the project as it may be constructed have been properly assessed
4.20	Should the Secretary of State decide to grant development consent for an application where details are still to be finalised, this will need to be reflected in appropriate development consent requirements in the development consent order. If development consent is granted for a proposal and at a later stage the applicant wishes for technical or commercial reasons to construct it in such a way that it is outside the terms of what has been consented, for example because its extent will be greater than has been provided for in terms of the consent, it will be necessary to apply for a change to be made to the development consent.” (33)
4.28	Applicants should include design as an integral consideration from the outset of a proposal
4.29	Visual appearance should be a key factor in considering the design of new infrastructure, as well as functionality, fitness for purpose, sustainability and cost. Applying “good design” to national network projects should therefore produce sustainable infrastructure sensitive to place, efficient in the use of natural resources and energy used in their construction, matched by an appearance that demonstrates good aesthetics as far as possible
4.32	Scheme design will be a material consideration in decision making. The Secretary of State needs to be satisfied that national networks infrastructure projects are sustainable and as aesthetically sensitive, durable, adaptable and resilient as they can reasonably be (having regard to regulatory and other constraints and including accounting for natural hazards such as flooding)”. (36)
4.58	It is very important that during the examination of a nationally significant infrastructure project, possible sources of nuisance under section 79(1) of the 1990 Act, and how they may be mitigated or limited are considered by the Examining Authority so they can recommend appropriate requirements that the Secretary of State might include in any subsequent order granting development consent.” (41)
5.14	The Secretary of State should consider whether mitigation measures put forward by the applicant are acceptable. A management plan may help codify mitigation at this stage. The proposed mitigation measures should ensure that the net impact of a project does not delay the point at which a zone will meet compliance timescales.
5.15	Mitigation measures may affect the project design, layout, construction, operation and/or may comprise measures to improve air quality in pollution hotspots beyond the immediate locality of the scheme.” (49)
5.87	The Secretary of State should be satisfied that all reasonable steps have been taken, and will be taken, to minimise any detrimental impact on amenity from emissions of odour, dust, steam, smoke and artificial light” (64)

*NPS with no mention of flexibility*

Dept	Date	NPS
DECC	2011	National Policy Statement for Fossil Fuel Electricity Generating Infrastructure (EN-2).
DECC	2011	National Policy Statement for Gas Supply Infrastructure and Gas and Oil Pipelines (EN-4).
DECC	2011	National Policy Statement for Electricity Networks Infrastructure (EN-5)
DECC	2011	National Policy Statement for Nuclear Power Generation (EN-6). Volume I of II
DECC	2011	National Policy Statement for Nuclear Power Generation (EN-6). Volume II of II - Annexes
DEFRA	2012	National Policy Statement for Hazardous Waste
DEFRA	2012	National Policy Statement for Waste Water

**What does DCLG and PINS Guidance say about DCO flexibility?**

DCLG guidance has also been provided and this explicitly deals with issues of flexibility / Rochdale envelope as do PINS advice notes. However, neither set of advice indicates practical / detailed as to how this works best. This advice is as follows:

DECC (2014). *The Ten-E Regulation EU347/2013.*

Para	Guidance
10	Projects need to be “mature enough to enter the permitting process
10	Projects must have a “reasonably detailed outline’ including ‘the location of the project (where the project is linear and alternative corridors are being considered, this should include the details of the alternatives

DCLG (2013) *Planning Act 2008: Application form Guidance*

Para	Guidance
5	Standard application form and consultation report must be submitted on application, but also any other information specified in the relevant NPS, “The application information must be provided to a sufficient degree of detail that will enable the Secretary of State (and all interested parties) to appropriately consider the proposal. If the applicant considers that it is not feasible to provide full and final details of any element of the proposal at the point of submitting the application, the applicant should clearly set out its reasoning for this in its Explanatory Memorandum or, if more appropriate, in its planning statement if one is submitted with the application. However, in such circumstances, the applicant should still submit sufficient information on those elements to enable them to be considered during the examination

DCLG (2013) *Award of costs: examinations of application for development consent orders*

para	Guidance
8	All parties normally expected to meet their own costs, unless a part has acted ‘unreasonably’, which usually means “non-compliance with procedural requirements or failure by a party to substantiate a relevant part of their case
9	To minimise likelihood of costs being awarded against a party they should ensure careful case management, “constructive co-operation and dialogue”, maintenance of good records and actively reviewing the content of their submissions and evidence (9)

DCLG (2013) *Planning Act 2008: Guidance related to procedures for the compulsory acquisition of land*

para	guidance
5	The applicant will also need to demonstrate that the proposed interference with the rights of those with an interest in land is for a legitimate purpose, and that it is necessary and proportionate
5	The Secretary of State must ultimately be persuaded that the purposes for which an order authorises the compulsory acquisition of land are legitimate and are sufficient to justify interfering with the human rights of those with an interest in the land affected
6	The applicant should be able to demonstrate to the satisfaction of the Secretary of State that the land in question is needed for the development for which consent is sought. The Secretary of State will need to be satisfied that the land to be acquired is no more than is reasonable required for the purposes of the development
6	Parliament has always taken the view that land should only be taken compulsorily where there is clear evidence that the public benefit will outweigh the private loss

DCLG (2015) *Planning Act 2008: Guidance on the pre-application process*

para	Guidance
5	Early involvement of local communities, local authorities and statutory consultees can bring about significant benefits
6	To be of most value, consultation should be based on accurate information that gives consultees a clear view of what is proposed including any options
8	Consultation should be thorough, effective and proportionate” .... There can be some flexibility on the precise form that the consultation takes
9	Early engagement with statutory bodies can help avoid unnecessary delays and the costs of having to make changes at later stages of the process
15	LPAs have to confirm the ‘adequacy of consultation’ and have to respond to the proposed ‘Statement of Community Consultation’ within 28 days “Applicants must set out clearly what is being consulted on. They must be careful to make it clear to local communities what is settled and why, and what remains to be decided’
18	To realise the benefits of consultation on a project, it must take place at a sufficiently early stage to allow consultees

	a real opportunity to influence the proposals. At the same time, consultees will need sufficient information on a project to be able to recognise and understand the impacts ... To manage the tension between consulting early, but also having project proposals that are firm enough to enable consultees to comment, applicants are encouraged to consider an iterative, phased consultation consisting of two (or more) stages
19	Where a proposed application changes to such a large degree that the proposals could be considered a new application, the legitimacy of the consultation already carried out could be questioned
19	Consultation should also be fair and reasonable for applicants as well as communities”
24	For the pre-application consultation process, applicants are advised to include sufficient preliminary environmental information to enable consultees to develop an informed view of the project ... The preliminary environmental information is not expected to replicate or be a draft of the environmental statement. However, if the applicant considers this to be appropriate (and more cost-effective), it can be presented in this way
103-105	Drafting the DCO – applicants can draft it in a manner of their choosing
103	Applicants with projects that will take a considerable amount of time to be completed are likely to want to allow for some degree of flexibility in the Order. This could be to allow for applicants to take advantage of future, as yet unknown technological developments, the requirements of occupiers (for example, of rail freight interchanges), and capacity considerations. This poses specific challenges, as the draft Order needs to be detailed enough to allow the Secretary of State to make an informed and balanced decision on the benefits of the project and its impacts (27)
104	Where applicants identify aspects of their proposed project where they want this flexibility, they may wish to include provisions in the Order concerning the discharging of particular finalised aspects of the project and the nomination of specific discharging authority. Applicants should ensure that they have consulted with the proposed authority about their proposals and they should include a rationale for their approach along with their application, for example in their consultation report or explanatory memorandum. It may be more appropriate for particular types of projects to adopt the Rochdale Envelope approach (27)
105	<p>There may be circumstances where despite extensive consultation, the applicant is unable to determine a preferred option for a particular aspect of a development. This may happen, for example, where consultees differ in support for one or more options or there is no other overriding factor for determining between them. Equally, the best option in environmental assessment terms will not always equate with the option favoured by the local community. There will be benefit to all parties in being able to consider the balance of arguments for and against options in these circumstances. Therefore, it is permissible to include more than one option in the draft Order, and to allow the issue to be explored as part of the examination of the application, provided that:</p> <ul style="list-style-type: none"> <li>• all options have been fully consulted on;</li> <li>• that the environmental impacts of all such options have been fully considered and assessed and included within the environmental statement submitted with the application;</li> <li>• where relevant, that the options are included in ‘land plans’ and the ‘book of reference’ for the purposes of compulsory acquisition;</li> <li>• where relevant, that the options are included in the draft DCO, and shown on the ‘works plans’;</li> <li>• applicants have ensured that they have included a rationale as to why it has not been possible to decide on one option prior to submission of the application;</li> <li>• this mechanism is not used to include within an application options which effectively constitute different projects, or as a substitute for a proper options appraisal;</li> <li>• the options are not so complicated that it would be difficult for consultees to grasp the various pros and cons, and</li> </ul> <p>the options are not so many and so complicated that they could jeopardise the prospects for full examination within six months” (27)</p>
109-113	Flexibility: The Rochdale Envelope
109	The term ‘Rochdale Envelope’ refers to the additional flexibility given to certain applications under the Planning Act, particularly in those cases where there are good reasons why the details of the whole project are not available at the time of submitting the application (29)
110	It is expected that draft Orders submitted will generally closely reflect the actual final development. However, there may be times where a degree of flexibility is required, over and above the situation described above. For example, the Overarching National Policy Statement for Energy identified the use of the so called Rochdale Envelope approach as a suitable way forward in these circumstances” (29)
111	The principles of the Rochdale Envelope are that where there are clear reasons why it would not be possible to define a project fully in the short term (thereby delaying significantly the submission of an application) then applicants should be afforded a degree of flexibility, within clearly defined and reasonable parameters. These parameters should be no greater than the minimum range required to deliver the project effectively and applicant will have to justify these parameters to the Secretary of State when they submit their application. Care should be

	taken to ensure that they proposed parameters are not so great that they effectively may give rise to a separate project (29)
112	. The use of the Rochdale Envelope approach does not remove the onus on applicants to submit as detailed as possible project proposals in their application, and it should certainly not be an excuse for an unnecessary degree of flexibility. The Inspectorate and the Secretary of State will need to be satisfied that, given the nature of the project, they have full knowledge of the likely significant effects on the environment. In particular, care should be taken to ensure that they likely environmental effects, within the defined parameters, are assessed and, where possible, mitigated against. It is accepted that it may not always be possible to assess every impact and so it may be appropriate to consider a ‘worst case’ scenario which can serve as an overarching reference point for mitigating actions. In addition where it is considered that too much flexibility has been used, and therefore there is uncertainty to the likely significant effects, then more detail can be required or consent can be refused” (29)
113	Applicants should satisfy themselves that they have provided enough information and in the clearest manner possible for the Secretary of State to make a full assessment of the impacts of the proposed project. To aid this, it may be practical to set out the project proposals in terms of minima and maxima, to better illustrate the scale of the parameters and the likely effects for different scenarios” (30)

*DCLG (2015) Planning Act 2008: Guidance for the examination of applications for development consent*

source	guidance
website	The role of the Examining Authority is to ensure that all aspects of any given matter are explored thoroughly... Consequently, the Examining Authority should probe the evidence” (16)
website	Determination will be primarily through written representations

*DCLG (2015) Planning Act 2008: Guidance on Changes to Development Consent Orders*

source	guidance
P 12	There is no statutory timetable for making the decision for a non-material change
P 12	Where the applicant has complied with all necessary procedural requirements and has provided all the information and documents necessary for a decision to be made, a decision should normally be expected within 6 weeks of the closing date for responses to publicity and consultation” (12)
	Statutory timetable for dealing with applications for material changes to DCOs specified

No definition of what constitutes a ‘material’ as opposed to a ‘non-material’ change to a DCO but common features of a material change would be the need to provide an updated Environmental Statement, the need for a new Habitats Regulations Assessment or the need to compulsorily acquire additional land. On non-material changes, there is evidence of this not being complied with by government in several cases

*PINS 2012 Advice Note One: Local Impact Reports*

source	advice
S174 2008 Act	DCO obligations

*PINS (2012) Advice Note 11, Annex B – Marine Management Organisation*

source	advice
P 4	The conditions included in a marine licence should be enforceable, clear and sufficiently detailed to allow for monitoring and enforcement

*PINS (2012) Advice Note 11, Annex D – Environment Agency*

source	advice
4	Engaging early on environmental permitting matters and, where necessary, parallel-tracking of the permit and DCO applications will identify any complex permitting issues at an early stage and minimise the risk of requirements under permitting conflicting with the works authorised by the DCO (e.g. stack of greater height than that authorised by the ECO could be required) and the associated risks to implementation”

*PINS (2012) Advice note thirteen: Preparation of a draft order granting development consent and explanatory memorandum*

source	advice
2	Developers should provide a draft often to PINS “as soon as the details of their proposals have sufficiently crystallised to allow them to prepare meaningful draft application documents. This is likely to coincide with developers preparing their environmental statement’
2	PINS understands developers are likely to submit successive drafts of DCOs, “given the long gestation period of proposed NSIPs’
3	Legal advice recommended to remove need to alter drafting after examination due to requirements of legal compliance “The draft of the DCO should include ... a full, precise and complete description of each element of the NSIP ... a full, precise and complete description of each element of any necessary associated development...”
5	Model provisions do exist “The description of the proposed development together with the provisions of the DCO (including the requirements) will determine what is authorised to be carried out ... Clarity and precision in the description and drafting of the provisions can, for example, prevent future uncertainty over whether development and other activities are carried out within the terms of the order”

*PINS (2014) Advice note nine: Using the ‘Rochdale Envelope’*

A number of developers, particularly those for proposed offshore windfarms, have sought advice on the degree of flexibility that would be considered appropriate with regards to an application for development consent under the 2008 Act regime. Developers have suggested that the approach known as the ‘Rochdale Envelope’ may be useful in considering applications for consent under the 2008 Act, especially where there are good reasons why the details of the whole project are not available when the application is submitted. Such as approach has been used under other consenting regimes (the Town and Country Planning Act 1990 and the Electricity Act 1989) where an application has been made at a time when the details of a project have not been resolved. This approach is identified in the Overarching National Policy Statement for Energy (NPS) (EN-1) and the NPS for Renewable Energy Infrastructure (EN-3).

There are a number of key areas when preparing an application for development consent under the 2008 Act where the level of detail and amount of flexibility are particularly relevant. These are:

- during consultation and publicity at the pre-application stage;
- when preparing the environmental impact assessment; and
- in the description of the project within the application documents” (2)
- Must still demonstrate ‘clearly defined parameters’ and ‘full knowledge of its likely significant effects on the environment’;
- “The importance of consultation during the pre-application phase cannot be overemphasized, given the ‘front loaded’ processes under the 2008 Act. Such consultation needs to be appropriate ... the consultation must be undertaken on issues that are easy to identify and on a project that is as detailed as possible” (5);
- Must identify maximum potential adverse impacts “The purpose of the 2008 Act was to introduce a streamlined system that speeded up the consenting process for nationally significant infrastructure projects ... The Secretary of State cannot accept an application unless, among other things, the quality of the developer’s statutory and public consultation has been adequate” (9);
- “Developers should make every effort to finalise as much of the project as possible prior to submission of their application for development consent” (9);



- “One practical way forward would be for the draft Development Consent Order (DCO), submitted with an application for development consent, to set out specified maximum and minimum” (10);
- “Any flexibility should not permit such a wide range of materially different options such that each option in itself might constitute a different project” (10);
- “If approved, any flexibility of the project will also need to be reflected in appropriate DCO articles and requirements” (10);
- “The key areas where the level of detail needs to be addressed are during pre-application consultation; in the EIA; and within the description of the project in the application documents” (11);
- “The challenge for the EIA will be to ensure that all the realistic and likely worst case variations of the project have been properly considered and clearly set out in the ES and as such that the likely significant impacts have been adequately addressed;
- It may be possible to draft a DCO in such a way as to allow some flexibility in the project. The project should be described in such a way that a robust EIA can be undertaken” (11)

*PINS (2014) Advice note fifteen: Drafting Development Consent Orders*

source	advice
S 19	deals with “Providing flexibility – approving and varying final details
19.1	When preparing the draft DCO, applicants will need to consider carefully which aspects of the proposed development can suitably be left for approval at a later stage by the local planning authority (LPA) and which aspects can or should be fixed by the terms of the DCO. Paragraph 82 of the DCLG pre-application Guidance advises that a requirement may be proposed which allows details of ‘particular finalised aspects’ of a development to be submitted later to the LPA or another body for approval in writing
19.2	In relation to matters which are fixed by the terms of the DCO, changes to a DCO can only be authorised in the prescribed way under section 153 of and schedule 6 to the PA 2008. Furthermore, it is not considered acceptable to circumvent the prescribed process in schedule 6 by seeking to provide another route to providing such changes or variations, by a person other than the Secretary of State who made the DCO, for example by applying the provisions of section 73 and/or section 96A of the TCPA 1990.
19.3	Therefore, adding a tailpiece such as the one below would not be acceptable because it might allow the LPA to approve a change to the scope of the authorised development which had been applied for an examined and circumvent the statutory process: “The authorised development must be carried out in accordance with the principles set out in application document [x] [within the Order limits] unless otherwise approved in writing
19.4	On the other hand, a requirement might make the development consent conditional on the LPA approving detailed aspects of the development in advance (for example, the details of a landscaping scheme). Where the LPA (or other discharging body) is given power to approve such details it will be acceptable to allow that body to approve a change to details that they had already approved. However, the tailpiece (or other wording) should not allow the LPA to approve details which stray outside the parameters set for the development as part of the examination process and subsequent approval of the Secretary of State” (6-7
19.4	Applicants should, in the explanatory memorandum submitted with the application, provide justification in relation to each tailpiece proposed for needing flexibility to seek small scale relaxations in writing. Any relevant case law should be cited in support. It is also recommended that the updated memorandum which accompanies the applicant’s last draft DCO includes any further justification necessary for maintaining such flexibility in the light of the examination of the DCO and its requirements, the views of the LPA and interested parties and the rationale for imposing the requirement” (7)
20.1	A DCO should only authorise works that are within the scope of the environmental impact assessment (EIA) that has been carried out for the NSIP. For example, when the NSIP includes a generic list of ancillary works all such works should be within the scope of the EIA.
20.2	Particular care should also be taken when drafting a power to maintain so that it does not authorise works outside of those assessed” (7)

*PINS (2015) Advice note sixteen: How to request a change which may be material (Requesting Changes)*

source	advice
P 2	Nothing in this advice note should detract from the importance of submitting applications that have been thoroughly prepared. The purpose of the statutory pre-application stage is to front load project development and to require applicants to comprehensively prepare their applications. Technical issues should be identified and resolved as far as possible during the pre-application stage so that they will not act as an impediment to the examination of the application within the statutory timescales
P 2	The justification for making a material change after an application has been accepted for examination must be robust and there should be good reasons as to why the matters driving the change were not identified and dealt with proactively at the pre-application stage

*DCLG and PINS Guidance and Advice with no mention of flexibility*

source	date	Guidance/advice
DCLG	2013	<i>Planning Act 2008: Guidance on Associated Development Applications for Major Infrastructure Projects.</i>
DCLG	2013	Planning Act 2008: The Infrastructure Planning (Fees) Regulations 2010 Guidance
PINS	2012	Advice note 8.1: How the process works (Nationally Significant Infrastructure: How to get involved in the planning process)
PINS	2012	Advice note 8.2: Responding to the developer's pre-application consultation (Nationally Significant Infrastructure: How to get involved in the planning process)
PINS	2012	Advice note 8.3: How to register and become an interested party in an application (Nationally Significant Infrastructure: How to get involved in the planning process)
PINS	2012	Advice note 8.4: Influencing how an application will be examined – the Preliminary Meeting (Nationally Significant Infrastructure: How to get involved in the planning process)
PINS	2012	Advice note 8.5: Participating in the examination (Nationally Significant Infrastructure: How to get involved in the planning process)
PINS	2012	Advice note eleven: Working with public bodies in the infrastructure planning process
PINS	2012	Advice Note 11, Annex F – Nuclear Regulators.
PINS	2012	Advice Note 11, Annex E – Historic England
PINS	2012	Advice Note 11, Annex C – Natural England and the Planning Inspectorate
PINS	2012	Advice Note 11, Annex A – Cyfoeth Naturiol Cymru / Natural Resources Wales
PINS	2012	Advice Note Fourteen: Compiling the Consultation Report
PINS	2013	Advice note two: The role of local authorities in the development consent process
PINS	2015	Advice Note three: EIA Notification and Consultation
PINS	2015	Advice Note four: Section 52 (Obtaining information about interests in land (Planning Act 2008))
PINS	2015	Advice note five: Section 53 (Rights of Entry (Planning Act 2008))
PINS	2015	Advice note seven: Environmental Impact Assessment – Preliminary Environmental Information, Screening and Scoping
PINS	2015	(Advice Note Twelve: Regulation 24 of the EIA Regulations (Transboundary Impacts)
PINS	2015	Advice note seventeen: Cumulative effects assessment relevant to nationally significant infrastructure projects.
PINS	2016	Advice note six: Preparation and submission of application documents (How to submit your application).
PINS	2016	Advice note ten: Habitats Regulations Assessment relevant to nationally significant infrastructure projects

## **5. 2008 Planning Act: issues and challenges in practice**

### **Introduction**

The operation of the 2008 Planning Act together with its subsequent amendments was designed to improve the certainty of the consent system for major infrastructure projects. As already demonstrated this certainty was largely achieved until 2015. However, the research brief, reflecting on the NIPA member roundtables and discussions has set out the need to investigate whether there are other issues and challenges within the system that may have been there from the outset or have gradually emerged as unintended consequences of its operation, particularly in respect of flexibility. These issues have been set out in the research brief (Appendix A) and interpreted through the NIPA Insights project and stakeholder groups (Appendix D). In this chapter, more detailed issues and challenges identified in the search for flexibility through the roundtables, focus groups and interviews undertaken for the project are identified. There have been two roundtables, three focus groups and over 35 interviews and participants in these processes as set out in Appendices E and F. These have also been informed by the contextual and literature reviews set out in chapters 2 and 3.

The issues and challenges for flexibility identified through this research process have been grouped for ease of consideration. There are some initial overall issues that have been identified. The greatest number of issues and challenges have clearly related to different parts of the NSIP process – pre-submission to acceptance, acceptance to consent recommendation and then consent to implementation. There are also points made that relate to specific constituencies in the NSIP process. This is followed by a discussion of the evidence relating to these points using the research findings including interviews and other material in Chapter 6 and the overall response to the research brief is discussed in chapter 7 with conclusions and recommendations following this.

### **Overall questions**

The research process identified a number of issues and challenges arising from the 2008 Planning Act system. Some of the participants saw the main test of the success of the system as whether:

- the scheme in operation meets the challenges and issues identified before the introduction of the 2008 Planning Act?
- Never intended to be another version of a Planning Inquiry – has this remained the case?

A second group of general questions was concerned with the status of the applications entering the NSIP regime. Some participants were strongly of the view that the set of applications entering the NSIP regime at the outset had been in the consent system for some time and were already matured and so questioned whether:

- there was a difference between the level of maturity of schemes submitted in the early operation of the 2008 planning Act and those made more recently?
- early schemes more ‘oven ready’ and did this make a difference to the level of detail required?

In terms of the specific schemes there were questions about variations between sectors and scales of the individual scheme. Here there were points made about the respective difference between the financial position of public and private sector promoters schemes which are more prevalent in different types of project. For applications made by private sector promoter there were likely to be more

concerns about costs at the outset whereas the public sector there were more concerns about meeting overall delivery deadlines. The participants considered that these differences might influence the extent to which schemes had been designed and developed before their submission for acceptance to PINS. The participants asked whether:

- It is possible to draw analogies between the experiences of schemes from different sectors? Are there different issues between smaller and larger schemes?
- the role of environmental envelopes be more explicitly associated with the 2008 Planning Act regime through legislation?

Another set of issues was related to the type of area in which a scheme was located, drawing upon experience of differences for schemes involving networks such as pipelines through open countryside and those relating to fixed facilities in more built up areas. Further, were there more issues about control, of working practices during the construction of the scheme than the scheme in its finished form in urban areas? In some cases, the finished scheme did not seem to be an issue for communities but elsewhere the design of the scheme was considered to be a major point for the community and addressed through the pre-application consultation. These concerns could drive requirements for greater detail at the pre-submission and examination stages. It may also be an important issue for consideration in the drafting of the DCO. So the questions identified here were whether:

- There are different issues for schemes that are in open countryside such as networks and those in specific locations?
- At what stage would the detailed design be agreed?

A final set of general questions related to comparison between the NSIP system and those available to promoters under other regimes including the Town and Country Planning Act, the Transport and Works Act, the Hybrid Bill procedure and specialist legislation such as the Harbours Act. The view was expressed that under some systems such as the Transport and Works Act, civil servants are more empowered to have discussions with applicants in the process in ways not possible through DCO examination process that makes the system more flexible. The question here was whether:

- The Ministerial role in decision making in the Transport and Works Act makes the system more flexible for applicants and promoters?
- the 2008 Planning Act process is more detailed than other consent regimes?

### **From scheme inception to acceptance**

The issues and challenges that were raised in respect of the first part of the process – from inception to application acceptance - represented the longest list raised for the three parts of the process. These were as follows:

#### Costs

This was a main concern for all promoters and local authorities at the early stages of the process. One promoter indicated that their costs of the scheme development and associated processes for submission from inception to acceptance were £5m per application and despite having submitted a further application, using experience gained the first time round, the costs were the same. The costs were attributed to advisers and the advice that they were providing on processes. Promoters stated that advisers were increasingly risk averse in their approach and this had increased over the period of the operation of the NSIP regime. Promoters also commented that this approach appeared to be cumulative in that advisers were adding experience from previous examinations to attempt to gold plate the application. The questions here were:

- Are the costs to promoter proportionate to the scale of the project and degree of certainty achieved through the system?

- Are these costs proportionate where promoters had no other choice of application process?
- Are costs being driven by advisors who are increasingly risk averse? Is the complexity of documentation required by PINS adding to promoter costs?

A second set of issues relating to cost questioned the extent to which scheme promoters are reliant on their advisers and where this is the case is there a cumulative process of providing more detail with applications as a means of mitigating risk. Promoters also want to mitigate their risk by linking a successful outcome for a DCO with the fee scales agreed with consultants and advisers. This incentivises the consultants and advisers to do all they can to achieve a successful DCO and this may be reducing the potential for thinking about applications in different ways. This point was put to the research team from different interests in the process. The questions here were:

- How far do promoters rely on the consultants and advisers they use? Does this change with experience?
- Is there a cumulative risk culture between the promoters and consultants/advisers that is driving more detail?
- Are advisers and consultants to promoters risk averse and advising accordingly?
- Is this related to fee structure for advisers?

### Detail

A number of comments were made about the level of detail that was required to be submitted to PINS prior to any application being accepted. Questions were asked about what is driving the level of detail required at this stage in the process and also associated with the extent to which any design should be finalised before submission. This latter point was also associated with stakeholder consultation and environmental assessment issues. The questions here were:

- Is PINS driving requests for more detail at the early stage of the application pre-acceptance?
- Is this level of detail also being driven by advisers who might also be acting as intermediaries between PINS and the promoters?

### Scheme design

There were varied views about the extent to which any scheme should be finalised before it is submitted or accepted by PINS. Some participants mentioned that a broad outline of the scheme should be submitted leaving the detail to be worked up later. For the regulators, there were concerns that general schemes did not allow them to make their assessments and this tended to mean that they left their engagement in the application process to a later stage when the design was more firmly identified. There was also an issue of the focus on detail in examining limits of deviation in any scheme including both CPO and for working sites during construction phase. The questions here were:

- How far should a design be finalised before consent?
- How will new CPO powers concerning temporary possession influence the current situation?

### Scheme delivery

A recurring issue that arose from all constituencies of research participants was the extent to which the construction and delivery of the scheme was considered throughout the application process. This was at the heart of many of the flexibility vs certainty issues that emerged in the research. Some stated that promoters did not want to add to their costs at the outset if there were no guarantees of achieving a DCO despite the intention of certainty in the system. From constructors, there was reluctance to engage in schemes based on the belief that early design engagement would remove their eligibility to tender for work later particularly in schemes with public sector promoters or using public funds. There were also questions about the benefit of appointing a project manager for the delivered scheme at the outset – although there were conflicting views from consultants and advisers about the benefits of such an approach.

The questions here were:

- Are there differences between schemes promoted within different sectors?
- Is delivery of the overall project considered at this stage?
- Does cost of including promoters have a significant impact in project development at this stage?
- Will contractors not get involved in scheme design at an early stage as they believe that it will disbar them from later opportunities to tender?
- Is this the same in all sectors?

### Process

A number of issues and challenges and potential changes in the pre-submission process were suggested through the interviews and discussions. There was a view that it might be useful to test the position of all the parties at the beginning of the application process that might help to define some of the issues that might emerge at a later point in the process. There was also a question about the wider use of an evidence plan and the potential opportunity for applicants to withdraw their proposals and resubmit them, although this would primarily be an issue after application acceptance.

Other issues relating to process suggest that stakeholder consultation needs to be considered in new ways rather than their formulaic approaches that are frequently adopted at the moment. This comment came from all constituencies in the process. There was a concern that promoters were not being advised to make common cause with local authorities early enough in order to establish their mutual interests.

Finally, there was a view that some promoters were avoiding the NSIP process altogether particularly in energy scheme where there is a choice of approach if the scheme is below 49 MW. Also, there were views that the costs of an NSIP process were high for relatively small and straightforward schemes. The questions here were:

- How far should there be a requirement to test the position of all parties at this stage?
- How far are evidence plans useful – used in some sectors? How far does the promoter seek to establish a common cause with the local authority and establish mutual interests?
- Should applicants have ability to withdraw proposal and resubmit once process started?
- Are scheme promoters avoiding 2008 Planning Act process if others consent regimes available to them e.g. energy schemes at 49 megawatts?

### Advice and guidance

There was debate in all discussions about the issues and challenges offered by the quality and content of the NPS, their non-spatial nature and the extent to which they are currently fit for purpose. There was a Ministerial indication given in Parliament that each NPS would be reviewed five years after their publication but there are no current commitments by Government Departments to do this. This is also an issue raised in respect of the future work on the National Infrastructure Commission.

There was a general view that despite the amount of PINS Guidance available to all parties in the NSIP system there could be a need for further advice and guidance. There was an issue about guidance for the statutory tests being further developed. Also there were some concerns about the style of the DCLG advice to PINS and whether this was having restrictive effects on the process. The questions here were:

- Should there be more PINS advice in statutory tests applied before scheme acceptance?
- How far should DCLG advice be reviewed? Does it have a restrictive effect on the process?
- How far are NPS fit for purpose?

### Statutory consultees

The role of the statutory consultees in this first stage of the process was also raised by a number of the participants from different constituencies. Some questioned their role being of any use at all, while others questioned how experienced statutory consultees were in dealing with this type of application. There was praise for some statutory consultees who have established specific units or teams to deal with NSIPs but there was also a view that many waited until late stages in the process and engaged through single interventions than in an ongoing way. There were some questions about whether statutory consultees should be given a duty to engage in these processes and be obliged to engage at this first stage. There was also a view expressed by some advisers that statutory consultees left their engagement too late to enable them to achieve what they wanted from the process. Earlier engagement was seen to lead to more positive outcomes for statutory consultees. The questions here were:

- Does the statutory consultation process result in useful outcomes?
- How far does the level of experience of statutory consultees influence the process? Are some are set up to deal with responses and others not?
- Should statutory consultees and regulators be forced to engage earlier and throughout the process rather than continue the practice of some of only engaging once in the examination process?

### Flexibility

While much of the effects of flexibility or its absence are felt in the third stage of the process, following the granting of a DCO, many participants were of the view that issues relating to flexibility required for constructability should be considered at this first stage of the process. While promoters were aiming to keep more flexibility in their approach by delaying their design for the scheme, others raised the question about whether this was a false economy and that more flexibility could be gained by considering it as a core issue and outcome to be delivered through the process.

There were also issues concerning the environmental envelope available and used for schemes to provide maximum flexibility. This envelope is available through planning legislation rather than specifically through the NSIP system. In attempting to achieving maximum flexibility by defining the widest areas, promoters and consultants may be failing to recognise the cumulative effects of their environmental assessments and reducing the availability of neighbouring sites for similar schemes. Is this an unintended consequence of seeking to achieve flexibility? The questions here were:

- Could more developers be prepared to be more flexible within this process rather than putting off decisions to later stages in the process?
- Is it meaningfully possible to submit/assess schemes with wide amounts of flexibility?
- Are scheme promoters and consultants considering the cumulative impact of their environmental assessments on future adjacent schemes?

### Stakeholder engagement

As mentioned above there were issues raised about the formulaic approaches to consultation which were not regarded as meaningful types of engagement by PINS. There are also issues of stakeholder engagement in the environmental assessment to consider. One obstacle to engagement appears to be the general nature of schemes and their lack of detail which means that communities may not take them seriously enough. Also there are requirements for stakeholders to register with PINS at this stage if they wish to engage in the process later and frequently the interest in engaging only arises later in the scheme. There can be confusion with the planning inquiry process where many stakeholders and consultees assume that there will be an adversarial process they can use. However, despite a wish from some parts of the environmental Bar to see an adversarial style, the system has remained that of an examination and many people cannot engage if they are too late.

Some of the participants suggested that consultation was seen as being too procedural by advisers and that there was more focus on ensuring consultation specific requirements were met rather than considering engaging with communities and stakeholders about the final scheme. While PINS provides free advice to promoters it does not seem to offer the same advice to stakeholders and communities and this is more likely to be available from local authorities. However local authorities have to be engaged in preparing an impact report and need to represent the wider position that may extend beyond those communities immediately impacted by the proposed development. The questions here were:

- Difficult for everyone to take scheme seriously at this stage or in level of detail – what could be done to improve this position?
- Is consultation over procedural?
- Should there be consultation focus on outcomes?
- Should PINS guidance be reviewed?

## **From acceptance to DCO**

### Detail

There was some mention of the level of detail being considered and requested during the examination process and this seems to be emerging from two different sources. The first is from the Examining authorities who may have some specific interest or concerns on some aspects of the application that they consider need to be explored. Secondly, they may be requesting further detail to ensure issues that are relevant to the community and stakeholders are being fully aired in the examination. This might result in more details of the proposed scheme being provided.

A second area where more detail is being required during the examination is on matters relating to the environmental envelope and extent of deviation from the expected sites for final operation and for use during delivery. As more detail of the scheme becomes available, possibly in response to the Examiners' questions, as indicated above, then this may lead to consequential requests for further environmental information to test specific issues that subsequently arise.

There were also questions raised about whether the level of detail required in the examination process had increased since the NSIP system has been introduced. Some suggested that the level of detail supplied in the submission process had reduced as promoters and advisers became more confident. Others suggested that it reflected the balance and nature of the schemes now being submitted with those in the energy sector being less well developed given their reliance on a DCO prior to raising investment finance. The questions are:

- Has this part of the process become more detailed and complex since implementation of the 2008 Planning Act
- Level of detail at the examination what is driving the level of detail at this stage?

### Process

There were a number of points raised in relation to process at this middle stage of the application journey. There were questions raised about the extent to which applications were fixed once they were approved for submission by PINS although some Examining authorities remarked that the applications were changing throughout this six month examination period prior to a DCO recommendation being made and this degree of change is problematic.

There were a number of comments about variation in practice between examining authorities and whether this was a problem for the consistency of the process. Some suggested that these variations



depended on the interest and experience of members of the Examining Authority whilst others thought that these differences related to the differences between schemes and the level of detail submitted. Some suggested that the inclusion of other consenting matters, particularly in relation to CPOs had a strong influence on the conduct of the Examination and this was a specific driver of further detail in the process. The questions here were:

- Would changes accepted by PINS after the scheme has been approved for submission improve flexibility?
- Do specific interests and differences between members of the examining authority have an influence on the process?
- How far does the inclusion of CPO powers and requirements influence the nature of the examination? Is this driving the level of detail being sought together with additional information during the examination process?

### Community and stakeholder interests

The roles of community and stakeholder interests were considered to be particularly important in this examination phase. Some who act as Examining Authorities considered that it was their responsibility to ensure that relevant issues were identified and considered even if they were not directly raised by the community and stakeholders in the process. Examining Authorities also attempted to ensure that stakeholders and communities were heard although some problems were expressed about those who engaged with the process too late. Some suggested that statements of common ground between all parties could be developed further and reduce the need for issues to be examined specifically through open processes. The questions here were:

- Do some community consultees and land agents want to have their day in court?
- How far should Examining authorities ensure that community and stakeholder issues are being appropriately aired?
- Can statements of common ground between parties be developed further?

### Flexibility and drafting the DCO

The main consideration in this middle phase rested on the pivotal role of the drafting of the DCO. For promoters and constructors, the quality and type of flexibility included within the DCO was critical to the later constructability of the project. Those project managers who had been engaged in the delivery of DCOs all remarked on the importance of this drafting and how it could have a significant influence on the final efficiency and effectiveness of the construction means and also the potential role of innovation that could be brought to the scheme in its implementation. All those involved considered that the issues of delivery, including associated flexibility could be included in the post consent processes, particularly those undertaken by the local authority.

If deliverability can be included from the outset as central to the whole process then there was considered to be a better opportunity to achieve these more flexible ends. In some DCOs, promoters and their advisers set limits or working procedures that may bring difficulties in the future. How far can these be overcome within DCO drafting and subsequent consent processes? One of the key concerns raised was the relationship between flexibility and maximum parameters in the environmental envelope relating to the scheme. This appears to be a difficult and crucial issue on the relationship between flexibility and process. Developing a greater detail of the proposed scheme earlier or setting out construction intentions as part of the submission phase could contribute to the solution.

One approach suggested was to consider the role of the local authority as being central to achieving flexibility and deliverability. Local authorities and others suggested that the use of model wordings and timeframes for sign offs could be used in planning agreements to greater effect. This might also overcome concerns about the role of local authorities by promoters. There was also some discussion

about moving towards using model wording for DCOs together with their bespoke elements. If there is a wide variation in the quality of wording of DCO and this has a specific relationship to flexibility in delivery then this suggests that further research and/or more guidance on wording could be an effective measure to consider.

In some cases, there were views expressed that Government Departments influenced the wording of DCOs and that they were instrumental in the cessation of the use of tailpieces. The questions were:

- How can DCOs deal with the conundrum of maximum parameters in relations to environmental envelopes?
- Can DCOs be more flexibly drafted?
- What are the different practices in wording DCOs? What influence does this have on later flexibility in achieving changes and in constructability
- Is the construction and drafting of the DCO critical to scheme flexibility and constructability
- Could DCOs use more model wordings as a starting point for local authority consent regime discharges?
- Are DCOs influenced by government departments in their drafting?
- What is the role of DCO tailpieces?
- How far is environmental equivalence an issue in its own right and how far does it relate to the drafting of the DCO?
- How far is there pressure from PINS to see more detailed DCOs?

#### Local authorities and communities

Some issues were raised concerning the interest and engagement of communities in the proposed scheme which may be more immediately focused on the problems caused by the construction of the project rather than the project once completed. Projects may take many years to complete and result in additional traffic on local roads, traffic re-routing, heavy and dirty vehicles passing through communities and access for construction workers. There will also be concerns about hours of working. Can much of these can be agreed by the local authority and be informed by local community knowledge?

A second community concern was raised by local authorities and others about the concerns and interest of councillors observing the Examination process. Whilst they may be content with the NSIP proposal, the issues raised at the examination may serve to make them more cautious and act subsequently in more risk averse way. Questions were raised about ways in which these concerns might be dealt with in different ways. The questions were:

- What are the relative weight of community concerns between the construction period and construction management and then finished scheme?
- How far are councillors concerned and influenced by the line of questioning taken by the examining authority? Does this make them more risk averse?

#### **From consent to implementation**

In the post DCO phase there are two main sets of issues and challenges raised. The first is about process and the second about implementation of the consented scheme and in some cases these are linked through the processes for material and non-material changes of the DCO as implementation teams take over from those concerned with obtaining consents.

#### Process

There are two sets of questions about the processes in operation after the DCO has been approved. The first relates to the sign off of detailed matters by local authorities and concerns were raised about the issue where local authorities have this role but have not been in favour of the scheme. Another set of

questions relate to the capability and resources available within local authorities to undertake these processes. Some promoters and advisers reported variations in the practices of local authorities and the speed with which they are able to deal with these processes even where planning agreements have been secured for determination within set periods.

The second questions relate to the amount of time taken to approve non-material amendments to the DCO. This process appears to be mystifying to most of the non-Regulatory participants in the research who also regarded it as a major inhibitor of innovation and efficiency in scheme design for implementation.

The questions on process were:

- Why are there variations in the local authority post-DCO roles in different projects?
- Do local authorities have sufficient experience and resources to play their role in the post-DCO period?
- In local authorities, post-DCO, do local politics have a debilitating role in achieving the implementation of the consented scheme?
- Have promoters appreciated the extent to which local authorities can assist in scheme implementation if their role is specified clearly in the post-DCO consent regimes?
- Should local authorities' discharge of consents post DCO be set more clearly within agreed time frames? Should there be deemed consent if local authority does not determine within specific periods?
- Why are material and non-material amendments to DCOs not set within legal timeframes when this creates project risks?

### Delivery

The issues concerning the DCO, its potential for change or amendment and its relationship to construction methods is emerging as a greater issue and challenge as more schemes are moving from consent to construction phase. Generally, post-DCO, a new set of project managers and advisers are appointed and this may be when the promoter takes the scheme to market to find contractors to implement the project. Several issues appear to be emerging at this stage. Firstly, those involved in construction of the project are finding the DCOs are reducing their options for delivery and in some cases incorporating delivery approaches that require higher levels of expenditure than might be achieved through different methods. Secondly, the DCO process for material and non-material changes is long and risky, so many promoters would rather choose a more expensive but guaranteed construction methods than one that has an open-ended start date for a project.

For some projects the DCO as drafted does not allow for innovation through different construction or delivery methods. There may also be restrictions agreed in the DCO concerning transport of materials and hours of working which the promoter may wish to change to the benefit of the scheme and the local community. In addition to these questions, one participant asked whether it would be possible to learn about flexibility and implementation best practice from implemented schemes and this is addressed through the two project case studies which have been selected from DCOs under construction for this reason. The questions were:

- Are issues re constructability within agreed DCO ever considered?
- Is the DCO preventing later design innovation?
- Is the DCO preventing increased implementation efficiencies and effectiveness?
- Innovation in later design
- Could there be more flexibility at this stage?
- What lessons can we learn from implemented schemes?
- Does post DCO process deal adequately with likely required flexibility?

- Do NPS achieve what Parliament required of them?

### **Other issues and challenges relating to participants in the 2008 Planning Act system**

In addition to these issues and challenges raised in relation to different parts of the NSIP consenting and implementation process there were some further issues raised in relation to different sets of participants in the NSIP scheme and these are set out below.

#### Issues relating to promoters

In addition to the points made above, some questions were raised about the role of promoters and projects within the NSIP system. Some comments were made about the differences between public and private sector promoters and the reluctance of some government departments to engage with local authorities for post-DCO consent processes. Some participants commented on the lack of applications for industrial and commercial schemes following the new powers made available in the 2013 Growth and Infrastructure Act and wondered whether this might be because there is no associated NPS for this sector leaving the process and outcome less certain than other types of application. The questions were:

- Are commercial DCO powers attractive when there is no NPS for the sectors allowed?
- Are there differences in approach between private and public sectors scheme promoters?
- Do Government Department promoters prefer to use Ministerial rather than local authority consent sign off? Does this have any significant effects? Does choosing this method provide more flexibility?

#### Issues relating to regulators

There were a number of issues and challenges related to the regulators including PINS and holders of other consent regimes. Participants asked whether there could be any more explicit transfer or practice between consent regimes to the benefit of the NSIP system. They questioned whether there was enough training of DCO examiners in PINS and whether anything had been lost at the transfer of responsibilities from the IPC to PINS. Some participants referred to a PINS 'mindset' and culture that was in some way detrimental to the NSIP regime although no specific examples of PINS' practices were provided to exemplify this point. The questions were:

- Can there be any transfer of practice between consent regimes?
- Should regulators receive more explicit training?
- Is there a 'mindset' in PINS?
- Did the formation of the IPC have any specific benefits?
- Was anything lost when regime changed from IPC to PINS?
- Should there be a review of guidance?

#### Issues related to central government

Participants raised a number of questions about the role of central government departments and Parliament in respect of the NSIP regime including whether commitment to review the NPS after 5 years should now be fulfilled and the opportunity taken to make them more integrated and uniform. It was suggested that such a review could indicate where flexibility could be brought into the drafting of DCOs and reflects the difference in requirements within each NPS. Finally, given the recent experience of three DCOs not being given consent and the time extensions requested by Ministers, that the balance between certainty and cost in the system is now being undermined by uncertainty in outcome in time and decision. The questions were:

- Should NPS be reviewed? Are the NPS sufficiently uniform? Are they still fit for purpose?
- What question are NPS designed to answer?
- Could Parliament give advice on levels of flexibility available in each NPS?

- Should NPS continue to be endorsed at Ministerial level when out of date?
- Is the cost of the 2008 Planning Act system to the promoter balanced by the certainty of outcome?

Overall suggestions

Finally, there were a number of participant suggestions for more training in the 2008 Planning Act system for all involved within it. Participants frequently reflected during the research that they had not discussed these issues before in this way and appreciated the opportunity to compare experience and discuss the system with each other. The question was:

- Is more training required for all participants in the 2008 Planning Act regime?

## 6. Findings: General interviews and focus groups

In responding to the issues raised by the research brief and raised in the scoping stage of the research, the specific findings are reported here. These findings are based on qualitative empirical research conducted by the UCL team with a series of interviews and focus groups about the system in general.

At this stage, 22 semi-structured interviews were conducted with a full cross-section of actors in the NSIP world asking about their experiences of the regime generally. For ethical reasons, all interviewees have been anonymised as this was the preference of the majority of interviewees. However, Appendices F and G give an indication of the type of organisation interviewees worked for / positions they held. These were all interviewees 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 six contractors, particularly those associated with the construction industry. The second of these was with nine civil servants from central government departments involved in the regime. The third was with six lawyers, four of whom have represented objectors and promoters and two of whom worked in-house for statutory consultees. Finally, the roundtable was hosted by NIPA and with an open invite to all their members – 34 people attended.

In all cases, the interviews, focus and stakeholder groups, were digitally recorded and fully transcribed. These transcriptions were then coded to bring out the key themes and issues. These ‘general’ interviews and focus groups were then followed by further original empirical research related to two case studies focussed on specific NSIPs, which follow in chapters 7 and 8.

### 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 well it was working. On the whole, there was strong cross-sectoral support for the regime 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 21, from another statutory consultee, agreed. 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 accountability compared to the preceding regimes. They also felt that communities 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 inquiries there were formerly:

*“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 by many that the system was more transparent and involve communities more meaningfully pre-application compared to pre-Planning Act practice. Thus interviewee 19 argued that public engagement was important to the system:

*“The inspectors go out of their way to allow people to speak and hear what they've got to say and if they haven't got the confidence to speak, they can submit it in writing and my experience is they do get listened to and my experience is even a sceptical public, like at Hinkley at the beginning, by the end of the examination, at least knew they were going through a fair process, they trusted the planning inspectors and that was a real sign of success, we started off with hundreds of people objecting at the preliminary meeting and ended up with very few people at the last hearings because people knew they'd had their say and they trusted the inspectors to come to the right decision.” (Interviewee 19)*

There was some disagreement on this, however, with Interviewee 18 suggesting that the process wasn't set-up for meaningful public engagement: “rather than this sort of mass participation exercise in public democracy, it's too technical and legal for that which is a shame, I think.”. Indeed, he went on to describe the DCO process as “a steamroller than ran over us all ... the scales are weighed heavily in the promoter's favour” (Interviewee 18). Interviewee 22 similarly felt that meaningful public engagement was made harder by the complexity of the system: “It is complex and the notion that any poor Mrs Boggins in no. 53 Acacia Avenue can have any notion of what's going on is just farcical, it's a very exclusive, non-inclusive process really.”

Interviewee 17, meanwhile, did feel there was an increased emphasis on community engagement but this was challenging to applicants. Interviewee 17 felt the Planning Act process had delivered the original objectives in terms of the advantages of certainty of timescale for examination and decision and had provided greater clarity about policy context. However, she felt that,

*“Where applicants have found it more challenging is at the pre-application stage in particular, in terms of engaging with the statutory elements of the Act around consultation, in a way which I think we would consider as genuinely informing processes; so I think part of the reason for that is that in parallel with the Planning Act has been a more rigorous set of wider controls which relate to both environmental regulation and Human Rights issues which have become part of a more comprehensive, wider framework and I think that has happened about the same time that the Planning Act was coming into force; so what is now cumulative impact, if I can use the terminology, is you’ve got three things happening simultaneously which is a formal framework for the Planning Act, a more vigorous European and international framework for environmental appraisal and assessment and mitigation and a better understanding by the public in relation to their rights and access to justice.”*

Interviewee 17 was clear that other consenting regimes, including Town and Country Planning, had needed to catch-up with environmental regulations and the Human Rights Act, whereas these contexts had been present in the Planning Act process from the initial legislation: “Given the number of consents that have been dealt with, you just need to shift your mindset that actually, you can't get away with certain things anymore and as I say, it's probably going to get more significant with the new regs.” This led to her view that,

*“if anything, the Planning Act is more legally secure than those other processes ... if people are trying to compare with processes that are 30 years old, their heads are in the wrong place ... sorry, I'm being a bit brutal here ... I can understand why commercial consultants want to go the easiest route for things, but they must know, in their hearts, that their professional practice doesn't lie in legislation from the 1970s.”*

Beyond discussion around engagement, 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 inquiry under the former regime has apparently gone on for three years. This certainty really helped project programming.



Interviewee 22, also highlighted the importance of the certainty of timescale, and noted the system had 'bedded down' to work much better recently:

*"I've been more sold on the system as we've gone through, first it was just chaos, nobody knew what they were doing really, it was very much the blind leading the blind, but with the blind not being prepared to accept, or acknowledge that they were blind and trying to pretend that they knew and it was all a bit difficult, but that has improved, as any system beds in, improves and there's more of a common understanding as to what's expected and what's not expected, whereas it used to change all the time and you never knew where you were. The big thing about it, which clients absolutely love, is the certainty of the outcome in terms of the timing. They hate the additional expense because it is a so much more expensive process in terms of legal fees and all the other stuff, but they almost live with that, on these big schemes, for the certainty".*

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"*. Interviewee 21 added the fact that there was certainty a decision would be made on a project once it had been accepted by PINS.

There was, apparently, though a mixture of pressure and certainty during examination:

*"I will say that once you go into examination, it is hellish because your life, for the next six months, or nine months, I guess until it finishes and you're turning round a lot of material and questions and reviews etc., you're sacrificing a lot of your life to do that. However, it does give you the certainty of getting a decision in a timely manner which you never had with the Section 36 regime. So that is a positive." (Interviewee 15)*

Similarly, Interviewee 18 did feel that a six-month examination period for a project of the scale of Thames Tideway was too short: *"So it was speeded up, but it just meant that the misery was concentrated in a shorter period of time and really concentrated and it didn't help ... that was just hellish."*

The system was described by interviewee 19 as *"A very good system, so both in principle and the principle of establishing a need in the NPS and taking all that out of the examination and in the process, I think it's a terrific process, far better than planning inquiry"*. He explained several advantages from his perspective:

*"The main advantages of the process are ... there are several; the clear timescale for the examination, so everybody likes certainty of deadline, the expectation that applications have to go through a gateway of acceptance and they have to be good enough when they are accepted for examination, rather than just submit it like a planning application, so that does force best practice in consultation particularly, otherwise, you genuinely feel that PINS won't accept your application. So better prepared applications because the NPS establishes the need, normally in the preparation of applications, you're focusing on what you should be focusing on which is optimum site selection and mitigation strategies to doing the development as best you can and then the examination*

*itself - because it's largely conducted in writing, principally conducted in writing - that's the key to ensuring it can be achieved within the six month time period and the fact that the inspectors decide what hearings they want, what questions they want to ask is very efficient ... and because it's not cross-examination, it's less accusatory, so it's much less 'where were you on the night of the 12th?' and more 'can you help us with this, we don't quite understand this?' and the six month examination becomes a long conversation, the only purpose of which is to get to the truth really, to allow the decision makers to understand as much as they need to understand to make the right decision; so it kind of takes the heat out of the adversarial nature of planning enquires and focuses instead on what's important and I think it's a brilliant system, genuinely brilliant. I'm a huge fan of it and every time I'm ever asked about whether it should be reformed, I say 'please don't reform it. Finally, in the planning process, we've got something that actually works.'"*

Having inquisitorial examinations instead of the previous adversarial inquiries was perceived by interviewees as another advantage of the system. Interviewee 15 felt that the Examining Authority in his experience had been very fair and gave a reasonable hearing to people in the room whilst keeping focussed on the key issues: "I was very impressed by him in particular and how he managed every, different set of views, good, bad, or indifferent, I thought he was very good." Interviewee 19 also preferred the inquisitorial examination approach to the adversarial inquiry approach, calling that a 'pantomime' and commenting:

*"The vast improvement of the DCO process was the lack of that adversarial ... rubbish which is just awful ... it's a lot of grandstanding and points scoring ... so I don't see there's any benefit to it and actually, if the panel are on top of their game, they can get more useful information leading discussions ... I just think is a better way of the technical issues of finding out actually what the point is, rather than just scoring points from one side to another"*

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 than a Transport and Works Act Order. Indeed, interviewee 1 reported that there is a feeling much more detail has been required on highways projects than 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. Interviewee 15 felt that for smaller energy promoters, the system was a "bit of a shock" compared to the former Section 36 Electricity Act consent process and highlighted the cost: "I think, rule of thumb for us, we must have spent at least £5 million on each project and it's a small power station, it's a 25 metre stack and you're like 'wow, this is a lot of money'." Interviewee 16 felt the central 'trade off' of the DCO regime was high cost but good certainty of timescale.

Interviewee 18 felt there had been insufficient attention to the construction of projects during the DCO consenting process: "A focus more on the implementation phase during the hearings and pre-app, not looking at the stage you're at, rather than the stages ahead would be perhaps, talking now, would be my fundamental point."

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.

Whilst there was widespread comment that levels of detail and complexity were high, there was not general agreement that there had been any increase in these since the inception of the Planning Act regime. 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 is, and a focus group 3 participant suggested there was now some 'folklore' which had developed around the regime and how it operated (focus group 3 participant).

Interviewee 19, like many others, did not think the system had become more complex over time and felt now people all understand it better, and that the "Planning Inspectorate's always been interested in listening to ways in which the process can be improved." This typical view that there was complexity but it hadn't increased was also expressed quite clearly by Interviewee 22:

*"I don't think it's become more complex, in fact, there's more clarity now because there's, as I say, more of a common understanding as to what's expected. It was all very confused at the beginning as to what was required and it just changed constantly as PINS evolved and began to themselves decide how the system worked. It's probably an inevitable part of any new regime coming in. So I, personally, don't think it's more complex, but it is complex"*

## 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 frequently. 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 16, like many, felt that local authorities have become better at engaging in the DCO process over time.

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 been comfortable signing off some requirements and wanted this to remain with the Secretary of State rather than them. Interviewee 22, meanwhile, expressed surprise that levels of engagement varied greatly: “Certainly, I've been surprised at how local authorities have been prepared to have something very significant happen in their patch and not really engage and I think others have engaged”.

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)*

The political nature of local authorities could cause some frustrations:

*“It became political, rather than what are the planning merits, it became political which wasn't fun... So I would sit and talk to the planner and agree things and then he would say 'fine' and then I'd get a written bit of something back, it would be the opposite because he'd had to go to various local politicians to sign off and it changed dramatically ... very, very frustrating... we thought we were leaving the TCPA process which is very political” (Interviewee 15)*

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). Interviewee 15, a promoter, was aware of the resource constraints in LPAs:

*“This planning performance agreement, that you can enter into because we all acknowledge that local authorities are short on resource and I think when you approach them with something so big - the DCO - which is extremely involved, they maybe sometimes can struggle to deal with this and you've got to try and help them out.”*

There were also issues with local authorities who were not experienced under-estimating resource requirements, according to Interviewee 20:

*“I suppose, as the system has evolved and we've ... like you referenced earlier, we've had that many more decisions, that means a lot more authorities have either had in their area, or have been neighbouring to, or are aware of projects that have gone through the regime, so in that sense, there is a lot more general understanding built up, at a basic level. I think expectations about the resource pressures, the timing pressures, the intensity of the process perhaps isn't real to those authorities that haven't actually been through it directly.”*

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. Interviewee 18 explained that the statutory consultee he had worked for had evolved in its approach to DCOs and was now working more in partnership with other statutory consultees and local authorities. Interviewee 18 did feel, however, that promoters could still be very resistant to compromise during the examination other than when the Examining Authority took an interest in certain topics, a ‘don’t give them anything’ rather than consensual approach.

The issue of resources at 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”*

Interviewee 16 also explained that PINS does not get funding for pre-application work (fees being tried to examination) and workload between years can vary greatly so this makes *“resource planning ... really challenging, particularly when you're looking to learn lessons ... retain expertise, whether it's inspectors, or professional staff, or in any way invest in training and development”*. 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 grant consent to nationally significant projects which depended on them having had a robust examination.

Interviewee 17 explained that changes to the environmental regulations due in 2017 would have an impact:

*"I think, in some senses, it's going to get easier post 2017 because of course, the environmental regulations are updating and that will mean that there is an even greater emphasis on proper mitigation being built in up front and it will be less a matter of trade off in the examination and more a matter of things that people have to put forward as part of the application; so it may be that some of the pressure that we've been having to exert will actually fall further on the applicant up front and then it will be a matter for them as to how comfortable they are with the range of assessment that they're going to have to do" (Interviewee 17)*

Interviewee 9 believed that people tended to focus on ticking boxes, just gathering and presenting information for the preliminary environmental information / EIA rather than 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. This was summed-up by Interviewee 22:

*“I think EA is what drives detail, most of all, in terms of needing to have sufficient information to assess your scheme because every discussion you have about parameters is all related to environmental assessment, so that is a risk, but it's no different for all planning applications, it's exactly the same for a large planning application, no different at all... [however] it is not problematic as people understand it, they know it, it's built into their programme and they realise where the flexibility is, what they can and can't do... I think it's fine and an understood animal”.*

### **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. Interviewee 16 felt for some schemes the complexity came just from the scale of the project, which could then lead to complexity around land ownership issues. He continued, “It's a driver when you get objections from an affected person, that causes a lot of work and we're doing a lot to try and front load that ... Having said that, the compulsory acquisition powers are an attractive part of development consent”.

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 is your day in court”.* Finally, Interviewee 17 explained that sometimes there were complications and late challenges just because it's not always clear who owns land.

### **The public**

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.

Interviewee 15 argued that local communities would drive detail when promoters tried to engage them:

*“So we went to the local community, not with a full idea of how this is going to look yet, but just to introduce ourselves and try and get any questions and we got a pounding for it. So we were then trying to do a positive thing which was 'look, here we are, any questions, this is what we're trying*

*to do, thoughts welcome,' blah, blah, blah, but people wanted to see absolute detail before we even got there, that was an interesting lesson for us, we thought we were doing a good thing there, but we're actually doing a bad thing. So you always want to think fully baked before you walk into the local people in some ways, which was contrary to how I thought it would work."*

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."*

The number of people interested in a scheme was suggested as a driver of detail by Interviewee 16, particularly if you had local residents with relevant expertise (such as a barrister or engineer). The planning history of particular sites was an important determinant in public engagement in NSIPs, for example the Preesall Underground Gas Storage NSIP had had a previous TCPA application on the site and 10,000 local residents signed a petition in relation to the project, or the strong interest in the Navitus Bay project. Interviewee 16 concluded that *"a lot depends on the approach of the applicant, the history of the site"*.

Local impacts were important to the system, according to Interviewee 17:

*"People will often be willing to engage in a discussion about major projects, what they're often concerned about is, in some ways, is smaller scale impacts, but nonetheless are very significant to them, so people do understand, often, that we need major infrastructure, but they find it quite difficult to cope with the traffic, the noise, the dust, the poor lighting, that kind of thing. So often, what we're thinking through is how there is a need for major things to happen, but that you build them in a very well controlled, managed way that minimises the impacts on other people and the impacts on the wider environment."*

In other words, *"I can't change the fact the thing may need to get built, what I can do is try not to make your life hell, particularly while I'm building it. I don't think that's unreasonable."* An example of concerns over construction impacts was given by Interviewee 17:

*"We had one particular examination where it was required that there was going to be, literally, dozens of lorries a day, going through a small village, turning left, into a pedestrian crossing with a listed building on one side and a listed building on the other side and it seemed to come to a surprise to the applicant that that was going to be contentious. The rest of the project was relatively uncontentious, but the lorries going down this particular, narrow village and then having to do a left turn onto a pedestrian crossing was obviously going to be an issue and I don't think it was rocket science to have worked that out some time in advance and not still be arguing about it in month five of an examination and then wondering why we were insisting that they needed to think about their mitigation more carefully. So I think applicants are often very focused on the thing, it is the responsibility of project teams and consultants and advisors to be really aware of the wider picture, that's what they're paid for. So you can absolutely see why a company which specialises in stringing the electric lines isn't necessarily an expert on lorry logistics, in terms of mass transport, but somebody in their team should have thought about it."*

Similarly, Interviewee 19 felt the key public concern was often around construction impact:

*“At Heathrow, for instance, there will be other concerns, but when it comes to infrastructure, people tend to accept that infrastructure needs to be whatever infrastructure needs to be, so if you're building a gas fired power station, or a runway, or an airport terminal, or a nuclear power station, or a waste water scheme, nobody really expects the design to be particularly flexibility, it's a piece of kit, it's got to do a job and the promoter is probably the expert in what it needs to do. So at Hinckley, not that many people, ironically, were concerned about the nuclear power station, but they were concerned about what they could understand and thought they could affect more regularly, the lorries going past their front door and do we need a by-pass or not? Nobody really suggested the power station should be a different shape, or half the size - they might think it ought to be a different colour, but that's about the extent of it. Similarly, with railways, nobody really says 'Network Rail don't know how to design a railway,' so the kit tends to be seen as pretty fixed and focus of attention is on the more day to day consequences of that.”*

“The human impacts are very, very important to the examination process”, second only to environmental assessment in driving detail according to Interviewee 19: “people want to know, with as much confidence as they can, what it is that’s going to be built, so the more you hide your scheme in three dimensional parameters, the less people understand what the development is going to be”.

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). The level of community interest was really variable between schemes, according to Interviewee 22: for some there just wasn’t much public interest and in others actual support for the development. 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, whilst Interviewee 20 had noticed in a few projects that members of the public could be concerned about detailed design issues being left to be sorted out post-consent if there was no effective community consultation process involved at that stage. 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”.*

Interviewee 22 did, however, comment that whilst communities might want more detail, this doesn't always force promoters to provide it:

*“I think then people think they're going to get a lot more detail, but actually, the way that the rail freight interchanges work in terms of they're kind of zonal presentation with parameter plans, it's basically set out the worst case in terms of height, distance from roads and visual impact. I think people then feel that they should have had more information, so I think possibly, in a general sense, there's a perception that people aren't getting the level of detail they want, but I wouldn't say that engagement is necessarily driving developers to a level of detail that they're not comfortable with”*

Interviewee 20 did highlight that she thought the requirements around community consultation specified in the legislation were quite limited. Interestingly Interviewee 20 felt some promoters were far more open to meaningful engagement pre-application than others:

*“it is highly dependent on the applicant and how the applicant approaches the pre-application phase and in dealing with applicants, you can find that some are very open to discussions, explorations, with the planning inspectorate - but with others - whereas others are quite closed down, in all areas”*

### **Examining Authorities / the Planning Inspectorate**

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 an NSIP scheme much more than would have happened through a Transport and Works Act process:

*“I watched the inspector at [a TWA scheme examination] 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 [with a NSIP scheme examination] it felt adversarial 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). A risk averse culture at PINS was something commented on by Interviewee 22:

*“They were just so terrified and they seemed to be more terrified of things like JRs than my clients were; it was my clients that were taking the risk really, not them, in terms of pounds, shillings and pence, but I think they are more relaxed now”*

Interviewee 22 also commented more broadly about the culture at PINS (although they felt this had changed over time, for example from an initial position where the use of the Rochdale Envelope type assessment was questioned):

*“It's not rocket science, all you have to do is treat it like a major planning application, but the problem was at the beginning, with PINS, was the dogma, there was a mantra sort of it's not a planning application because they wanted to distinguish themselves from being a planning application because it was a new system and they didn't want anybody thinking it was just a planning application with whistles on, it was completely different, when in fact, large chunks of it are like a planning application, same ES, consultation is a bit more broad and what have you, but it's still consultation, you do that with a planning application. So there wasn't any reason for them to be defensive about embracing the same kind of concepts, but they were, but if you deal with it like your planning application, so parameters and the flexibility is all assessed and so forth and explained, then it's not hard and I think they've pretty much got there, to be honest”.*

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”.*

Interviewee 16 agreed Inspectors could drive detail, but felt this was correctly motivated: “From a positive point of view, a desire to understand and for an inspector to be comfortable making a recommendation, or decision, that inquisitive nature in their mind needs to be satisfied and that's one driver, I would say ... [they need] confidence with limited information and how you make a judgement and ultimately, the backstop is risk of judicial review”. This was also the sentiments of Interviewee 20:

*“From an organisational point of view, we need to ensure that we have sufficient information to allow that robust examination, that's our role, that's our guide. So it's not done on a whim and it's not done just for information's sake, to get more information on the table, there are clear rationales for it and clear drivers for it, which goes to the heart of the regime in its totality really and it's about getting robust decisions and infrastructure constructed... If you think about it, the number of successful JRs is so limited on this, so that developers, whilst they might be risk averse in putting in more information, are hopefully getting robust decisions at the end of it”.*

There was apparently inconsistency in 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, which was also commented on by Interviewee 22:

*"You don't have the benefit of having experienced the inspectors, who've been used to dealing with planning applications; in a lot of cases, they have different backgrounds and they're not on the same mould as the other planning inspectors, or at least they haven't been, in my experience to date."* (Interviewee 22)

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, as 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"*

There was strong support for the role of PINS from Interviewee 19:

*"I'm a big fan of the system, a big fan of the Planning Inspectorate; I think they're one part of the planning system you can rely on to be independent and rigorous and fair minded and the process weeds out a bad application, focuses on what's important and because you've got six months to do*

*it, there's no hiding place, if you've got a bad scheme, you get found out; if your mitigation isn't good enough, you get found out."*

Indeed, Interview 19 felt there was some unfair accusations PINS were opposed to flexibility in schemes per se: "I think the issues related to levels of detail are exaggerated and I think PINS is accused of a position which it doesn't actually hold, so I think there's a common misconception in the profession that PINS will insist on detail and I've heard this mantra so many times." Interviewee 19 felt folklore had built up around certain decisions and this led to perceptions that flexibility was always being denied, although did explain that there had been some process, apparently, of educating PINS to accept flexibility for the warehousing in Rail Freight Interchange schemes, getting them to understand it's a DCO but "it needs more flexibility than you might expect because it's really a commercial development" (Interviewee 19). The difference, apparently, is that a developer can submit an outline planning application through the Town and Country Planning process and the local authority has to determine it, whereas under the DCO regime there has to be a justification of the flexibility being sought.

Interviewee 17 felt Examining Authorities were responding, correctly, to the tests in the NPSs but some people perceived this as them driving detail. She further added:

*"We hold the ring between the international investors and the environmental groups and yes, we sit in the middle and yes, we do ask lots of difficult questions, but in the end, that's what we're here to do and also, I think the other issue is people shouldn't get too upset, we give people a pretty rough time at examination sometimes, but it's only because we're actually trying to sort out something which, if we don't sort it out, they'll only end up in a mess with it afterwards."*

In contrast to some interviewees who clearly thought Examining Authorities had been 'too hard' on promoters trying to deliver publically beneficial infrastructure, there was 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.

## **Lawyers and consultants**

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 averse 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".

Interviewee 15 commented that:

*“You tend to find that the lawyers are coming in from the side and really trying to make the EIA really bullet proof and making a typical EIA much more involved in it, perhaps, than it would have been before.”*

He added:

*I do think there's an element of experience that you can bring to the table, especially when you're trying to deal with a lawyer, or arguing with an EIA person, or a planner; at the end of the day, it's the developer that's got to make the call and going through the first two, you're very much on the legal side ... 'yes, I'll do whatever you tell me to do'. It's just with experience, you just realise, okay ... it's an issue that I can push off, or I'm comfortable to try and deal with at a public examination, rather than trying to focus and get everybody to jump to their tune all the time, but again, for people that are new to it and going through it, you spend so much money, you want it as robust as possible, so you can understand why you lean towards any legal view on it.*

Interview 20 suggested that some promoters new to the regime had engaged lawyers who were not so experienced with DCOs, and this could cause issues around understanding detail / flexibility issues and their consequences.

Similarly, various consultants were also suggested as drivers of detail. Sometimes this might be because of experience 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.”* Interviewee 17 was concerned over levels of understanding of the system compared to other / previous consenting regimes:

*“All I would say is that 10 years on, good practice is now essential process, for the reasons I've just given in relation to the wider context of the environmental regulation and Human rights and other judicial activity. So I think that's where some consultants, perhaps, haven't really kept up to speed; it's not that they don't know how to do it, it's that they don't take it seriously enough, if I can put that gently. Most of it's 'not a nice to have anymore'.”*

In other occasions this might be because of the opportunity to make money from projects. One participant in focus group 3 suggested that consultants could drive levels of detail through trying to justify their role and specialism and consequent inflation of their workload. Similarly, interviewee 14 suggested some consultants are risk averse 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”*.

## **Promoters**

Interviewee 6 suggested not just lawyers, but promoters (developers) could themselves drive levels of detail. Interviewee 6 felt risk averse 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 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)*

Similarly, Interviewee 16 did feel some promoters take a risk adverse approach leading to supplying too much detail or information at times:

*"If you're a promoter and you're trying to second guess what the question might be, or understand, you might go belt and braces. Some might not and take the risk and I think it's a risk appetite on a promoter's part as to how much information they might put in, ultimately and that would be grounded in advice from their consultants, as well as advice from consultees and I think understanding the drivers behind professional advice consultants ... helps you answer that question".*

On other occasions, this might be 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’.

Understanding of planning (as opposed to engineering) might also be an issue on the promoter side. Interviewee 19 did feel that a lot can depend on the promoters:

*“certainly...we had a smart client, planning informed client, infrastructure informed, but also a planning informed client, so they understood their own need for flexibility and worked very closely with a small team to devise the application in that way. I don’t know how common that is ... but there are some DCOs that don’t engage planning consultants and are driven from more of a operator, infrastructure, engineering type focus which may not see the same latitude for flexibility.”*

Interviewee 19 suggested that there were other cases where promoters had not given themselves enough flexibility and changed their minds by the time they came to build out a project.

It might also be about changes in ownership, with a promoter who is selling on the consent focussed just on gaining that consent rather than construction: Interviewee 18 suggested Thames Water were mainly focussed on getting the consent for the Thames Tideway project (the consent then being given to another company, Tideway, to construct): *“to get the consent was obviously Thames’ fundamental objective ... ‘must get the consent’ and if that means we’ll give them a condition and have a condition placed on it, that was acceptable.”*

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... 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.”*

Interviewee 19 explained that sometimes promoters want detail in the DCO because they know precisely what they want to build and don’t want to go through a two-stage approval process, particularly if they want to get on with construction “immediately” or if they have a hostile local authority who they worry might not be cooperative in discharging requirements.

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 that 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.

### **Local Authorities and statutory consultees**

The role of local authorities and statutory consultees in driving levels of detail was also acknowledged several times. Indeed, Interviewee 17 highlighted that PINS has to write the report that assured the Secretary of State other statutory bodies were happy, so sometimes it looked like PINS driving detail even when it was other bodies. 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), as Interviewee 20 explained: “Under the legislation, it's [the NPS] the primary document which drives their decision making and as part of their examination, they presumably ask for information on points that have been listed in the NPS and determined accordingly that they didn't feel it met the criteria of the NPS”. Thus it was surprising 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 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?’”*

The tests in the NPSs certainly drive detail – or ‘rigour’ – as Interviewee 17 termed it:

*“You can see how where we are seeking assurance on certain matters at examination because for example, in a national policy statement, it would say that such and such a level of assurance is needed for the Secretary of State to grant consent; if the project pipeline puts the detailed work that relates to that level of assurance later down the process, then you're going to end up with a mis-match... So if people want to defer detailed design until later in their projects pipeline, but the policy statement says Secretary of State needs x level of assurance, our only option is to try and give x level of assurance - because that's what we're required to do - but I think that's partly because that the thing is a mis-match of how things were done in the past and I suppose, just as sort of generic push back, is if a public body, in particular, says to me ‘oh, that's not how our process works’, my view would be ‘your process is out of date’.”*

Interviewee 17 further explained that,

*“If you look in the policy statements, go to the policy statements and it will lay out ... just by way of example, if you go to the annexes of the national networks policy statement, so go to the appraisal of sustainability, go to the tables and the matrices that assess the impacts of the national policy statement ... what it says is, essentially, this policy statement gets a positive environmental appraisal and the basis on which it's come to that conclusion is local mitigation of impacts, so air quality, noise, dust, etc. So you've got a really big policy position, but it all hinges on appropriate mitigation and appropriate mitigation needs to be in response to the assessment and the assessment will be framed in the degree of flexibility that the project is cast in.”*

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

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.

Certain locations could lead to European environmental or transboundary issues, which drives complexity. There could also be a multiplier from several big schemes in close proximity interacting.

Location could be related to the number of residents in an area, environmental sensitivities or also construction impacts:

*“It is inherent that areas where there are more sensitive receptors in terms of environmental matters will be more significant and so, in that sense, it's fairly obvious, I would have thought, to an applicant, if they look at the big picture of their scheme, where the issues are going to be, but they also need to think about logistics because often, the thing itself maybe relatively straightforward, but the logistics of constructing it, if for example, they require road access through a small village which may be some distance from the site, but it's quite obvious that that is going to be an area of contention, then again, it's that thing about just getting the project team to think about those issues early on and looking at them seriously.” (Interviewee 16)*

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.

Finally, Interviewee 21 also mentioned that some NSIPs required additional consents beyond what was consented through the DCO, particularly for environmental issues through the Environment Agency or Natural Resources Wales, and these may have different information requirements which could drive detail:

*“Where schemes require other consents, we have been asked by the examining authority on occasions for ... I'm not quite sure what to call them, but it's kind of the best description I have is statement of comfort as to the likelihood of a consent being given, or an issue being addressed and that can prove a difficulty for us, if sufficient information hasn't been provided at a particular point in time.”*

## 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 NSIP 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 a highways project was given by Interviewee 5, where apparently the Examining Authority went into some considerable detail 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 ... 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 some examinations, inspectors were pushing the promoter to try and tie down 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 in 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'"*

Interviewee 19 felt flexibility was possible, but was concerned that,

*"Sometimes, when you have conversations with PINS, you sense them not being very tolerant of the need for flexibility and really, really needing to be convinced that an applicant needs flexibility and in practice, that hasn't caused being a problem - if you need flexibility, normally you can justify it - but I don't think it's necessary to have to have to justify it. If an applicant wants a flexible application, they should be able to have a flexible application, as long as they're prepared to accept the consequences which is a much more complicated assessment and a kind of longer consenting process because I have to go through a reserve matters type process, but it's just that starting presumption that it's expected to be detailed unless there's a good reason."*

Not all detail was felt to be problematic, even when it was acknowledged, however. Interviewee 2 gave an example of a requirement for a gap 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 NSIP 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 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 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).

Particular drivers of the need for flexibility for Rail Freight Interchanges were commercial viability issues:

*"With the RFIs, you need flexibility because you're going to build it out over 15/20 years, occupiers' requirements change and you don't know precisely what occupier is going to come along when and what they're going to want, so you build in as much flexibility as you can - almost always, I would think 95 per cent of these schemes I've ever been involved in - after that, you have to go back for more changes as well anyway because you can never foresee every, possible scenario.. They're commercial schemes you see, proper commercial schemes and that's why it was difficult in the early days because there was no concept of that... it's not quite the same when you don't know who your occupiers are going to be and you're trying to plan something for 15/20 years and one thing you do know is that whatever you plan, it's going to be different. You wouldn't imagine, five years ago, that Amazon would be delivering by drones, it changes so quickly and the retail changes at the moment are driving all the changes in the logistics and keeping up with it is very difficult and so that's why you can build all the flexibility you want in the initial scheme, and that's great, but you always will need to amend, therefore it is important how long it takes.." (Interviewee 22)*

Particular issues in the energy market, susceptible to policy and financing changes, mean that flexibility can be useful for Power Stations. More generally, time was highlighted as an issue by Interviewee 19: "Experience of almost any large project tells you that one thing you can guarantee is it's going to change ... every project changes and no big project I've ever been involved with has been built exactly as it was applied for, or exactly as it was conceived." Interviewee 20 felt that differing sectors have different drivers of the need for flexibility:

*"Offshore wind, where actually, technology change, it's one of the reasons that they argue that they need flexibility, whereas rail freight interchanges would argue that because they don't know*



*their end users and they need the flexibility to attract and retain commercial interest - which is what makes the project liable in the first place - that's where they need the flexibility"*

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 some DCOs were felt to now be providing difficulties and extra expense for construction:

*" 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 an ongoing 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/for 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 in another scheme:

*“I started... 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 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. Interviewee 16 explained how an

energy promoter had wanted to add another gigawatt to a scheme just during a one-year pre-app stage because the turbine manufacturers were developing new technologies and so it was easy to see the desire for flexibility on a five-year programme.

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.

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 22 explained how commercially necessary it was for some promoters to get amendments in a timely fashion, suggesting this could make the difference to the viability of some Rail Freight Interchanges where potential occupiers of warehousing facilities may require slightly adapted designs by strict deadlines in order to agree to move in.

Interviewee 11 also felt it would 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). Indeed, for Interviewee 22 a key driver for flexibility was concern about the difficulties of amending consented DCOs, who expressed particular concern when the nature of projects made amendments not that unusual:

*“I don't know how many people at PINS have been involved on a day to day basis with planning applications and I think it shows that there probably haven't been that many and if there were, they'd feel it was like more routine, not so frightened of them. It's like it's a failure if you have to amend, it's normal, it's just the natural course of things.”*

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, an interviewee highlighted the importance of flexibility being done within the parameters established through legislation, regulations and relevant case law. It was apparently already the case that some issues could be dealt with in an outline manner in a DCO, and suggested the boundaries of flexibility had been pushed by some Rail Freight Interchanges, but the interviewee 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 17 explained that:

*“The Development Consent Order is a legal document and people have a right to know environmental information that enables them to understand what the impact on them is going to be and for us to assess it and for us to hear their viewpoint and that's what the Planning Act process is meant to do, it's meant to trade off your wish to have a legal right to construct something, versus affected persons rights to understand how they may be affected by it and therefore to give their comments on the project and in particular, to lobby for things that will make their lives better”*

Interviewee 17 was concerned that whilst some promoters needed flexibility, for example because they weren't sure about who the end user would be, others were simply wishing to ‘defer certain matters’ because that's how they'd managed detailed design under previous consenting regimes.

Interviewee 14 noted that envelope assessments were well accepted in the system, but did suggest 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”.*

Interviewee 15 stated simply that “with additional flexibility comes additional complexity”, most centrally linked to Environmental Assessment.

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. Indeed, as Interviewee 20 commented, “ultimately, an examining authority and then up the Secretary of State need to understand what is being consented, so they understand the impacts of it”

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”*

Interviewee 18 was concerned that too much flexibility could increase risks and safety issues which his organisation was responsible for controlling. He felt that minimum intrusion and impact was guaranteed by a “tightly drawn scheme” rather than wider limits of deviation. An example was given of a current DCO where “there’s a host of more flexible options that they want that we cannot allow ... [it’s] a fundamental statutory role we have and it’s not for [the promoter] to impinge on that”.

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 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.

Finally, Interviewee 20 Interviewee 20 felt issues around flexibility often happened where different elements of the application didn't align, for example the description in the DCO and the associated environmental statement:

*“There must be a clear link between the way that the development is described in the Development Consent Order, the way that it's consulted on and the way that that is then assessed in the environmental statement and often, where we get ... not often, I'll check myself on that one, where we sometimes get problems at acceptance, is where there doesn't seem to be that clarity of relationship between those three elements”*

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”*.

Interviewee 17 outlined how:

*“Where there's a clear need, so in other words, objectively justified because for example, technology is moving, so we fully understand that, we're not naïve. Where there is a wider interest in it, in other words, that it's in people's interests that if, for example, micro-siting is something that does need to be decided later in the process, that's fine and it is perfectly open to people on commercial, or other grounds to decide to have a degree of flexibility in their project; what they need to do then is match that to their risk profile, but they also need to be clear that the mitigation range has to match the flexibility range because you can't get round this fundamental point that if people are entitled to understand what the range of impacts may be on them and then they're entitled to lobby for the range of mitigation that is appropriate”*

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, where a zonal parameter plan approach was common (Interviewee 20).

Limits of deviation are common on highways schemes (Interviewee 20) and there is also the example of limits of deviation for a long onshore connector cable for East Anglia ONE offshore windfarm, 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).

The use of options is another route to flexibility. York Potash Harbour facilities had different options for a conveyor route and whether to have a closed or open quay in the application (Interviewee 22). 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). Interviewee 19 also gave the example of the National Grid connection for Hinckley, where apparently they submitted options for the route to go either side of a village, demonstrating that “you can be very creative with your application. I think the perception that you have to be very detailed isn't the right starting point.”

Interviewee 19 gave other examples of flexibility employed at Hinckley C, one route being applying for both detail and outline parameters for the same components:

*“We thought the Hinkley application was good, two or three characteristics of that I can remember, on the main site, the nuclear power station site, we applied both in outline and detail for the same scheme; so we thought we knew exactly what we wanted to build, so we applied in detail, but at the same time, we applied in outline and the great thing about the DCO, you write it yourself, you can make it as flexible, or as complicated as you want it to be, so we applied both in detail ... and if we had, at the point of procurement, consistently decided that that was what we wanted to build, could just have got on and built it, but if it moved, if buildings moved within the parameters we gave ourselves, then we wouldn't need to go through a change process, we'd just need to go through a ton of reserve matters, type process.”*

Another was 'written parameters':

*“The other sort of flexibility is something else called written parameters, as opposed to drawn parameters and what we tried to do at Hinckley was look at 'what if' scenarios, kind of what could possibly go wrong sort of thing, so if your ES is based on a construction programme, for instance, what if your construction programme changes ... So we looked at ensuring that the environmental statement tested different construction programmes and 'what if' it changed? We tested different levels of construction work numbers, construction worker accommodation to our best estimates on which the ES was based, but we're very careful to ensure that the ES also explored parameters, or flexibility around those things, different levels of impact, traffic impact, whether it as this high, or lower, so that when you end up accepting restrictions, they're at the higher level and you've assessed up to that level. The trick is not to commit to mitigation at that level because you're actual impact may still be down here, so you need a very carefully construction application that gives you the flexibility that doesn't necessarily commit the promoter to the full scale of mitigation, so a kind of more dynamic mitigation strategy that responds to actual levels of impact, but it's very*

*important for the author of the DCO and the planning consultant to work closely with the environmental specialists to ensure that it's the ES which has to be written in a very intelligent way because if you haven't assessed the impact, planning inspectorate won't allow you the flexibility."*

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 there 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). Requirements could certainly be used as a route to flexibility:

*"Provided that we are clear that it's appropriately secure in terms of mitigation, a considerable amount can be dealt with by requirements ... Anything that does fit within the environmental assessment can generally be agreed, but what you cannot do is use it as a means of stepping outside of the process in terms of proper assessment and in particular, public rights of access to the environmental information on which that assessment was based" (Interviewee 17).*

There were, however, concerns expressed about requirements as a route to flexibility as well. Interviewee 18 felt some issues which should have been sorted out during the main DCO examination / consenting process had instead been left to requirements, which he described as "multitudinous and complex and inter-related" adding that "at the time of the hearing, it's very easy to say 'oh, we'll have a condition on that' because that's, effectively, pre-commencement for the most part and so it doesn't affect them at the hearings, everyone said 'yeah, that's alright, we'll kick that can down the road' which is, of course, human behaviour and alas, now, I'm afraid it's coming back and kicking us.". He explained that:

*"So what it meant was this keenness to put everything into conditions mean that I now have a team of 15 people involved in consenting Tideway. We've got three project managers because obviously, there is three contracts and the amount of consenting work, either directly that we consent, or that we're a consultee to and there are formal drafts, submission drafts, it's Byzantine."*

Interviewee 18 explained the process was very bureaucratic and things were often submitted to them at short notice with pressure to approve them to avoid holding-up the project: "so we're now getting the 'can you turn a consent round in - minimum amounts of time - which is proving difficult and we've really only just started". Furthermore there were issues with some requirements seeming 'almost contradictory'. Interviewee 18 also felt that the ability of a statutory consultee to exert necessary influence was reduced if things were dealt with through requirements:

*"all you're doing is, by saying we'll have a requirement, is the promoter thinks that just means you'll say yes further down the line, whereas the consenting body might not agree because effectively, you're just kicking the problem down the road ... again, by saying flexibility, we'll put as a requirement, there is, undoubtedly, an implicit view from the promoter that just means it will be a yes later, but that's not necessarily right from the consent ... the determining authority and to my mind ... effectively, what's the point of the requirement".*

Interviewee 18 gave an example of a requirement and Code of Construction Practice not allowing percussive piling or dredging at a certain time of year due to impacts on wildlife but now the contractors were putting pressure on the statutory consultee to allow that due to "the hard reality of programme and delays". He felt more should be agreed upfront than in requirements where possible.

Interviewee 2 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). Interviewee 15 gave an example of the use of a worst case scenario assessment:

*“We were looking for the ability to construct either one gas turbine, or two gas turbines, or three - up to five - so one of the things that we were trying to understand from PINS and their EIA team was how do we manage the worst case scenario, how do we approach that? So that was a reasonable dialogue, I think we were probably first of a kind in that... and we got there in the end and we got our consents which allowed us to do that”*

Interviewee 19 was comfortable with using the Rochdale Envelope approach:

*“If you read the advice note from PINS on the Rochdale principle, it tells you that you can apply within parameters, you can apply for flexibility, you just need to be smart in the way you make your application ... the principles are almost exactly the same [as the Town and Country Planning system] and they’re not driven by the 2008 Act, they’re driven by EIA regulations. If you want flexibility, you have to assess it, that’s the same for a big, regeneration scheme, or for an infrastructure scheme, the rules are exactly the same... if you’ve got a good reason and you can explain that reason that you need flexibility, then the Planning Inspectorate have no difficulty accepting that and most DCO applications operate within Rochdale type parameters.”*

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. Similarly, Interviewee 22 felt an outline approach was acceptable given that detail would be governed through requirements: "In concept, there's no reason why it shouldn't be viewed as an outline planning permission in terms of what flexibility is and isn't appropriate [but] PINS absolutely hate it if you use that term".

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 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 20 commented that some form of ECI was vital to avoid surprises – good and bad – when contractors were engaged post-consent and "the benefits of not getting embroiled, hopefully, in the post-consent amendments".

Interviewee 19 had been involved in the approval of the Bank Station Regeneration which had used ECI and felt it worked well: “we were able to say to the Inspector 'we know, with confidence, that that's going to be within six inches of what we showed on the drawing because contractors have been involved”. He added:

*“I don't really know why ... I sort of do know why, but I don't agree with them, applicants don't involve contactors earlier in the process, they tend to get their consent, then go out to contractors and some applicants are not the right people to decide what their scheme should be because they have no intention of building it themselves and they will then try and reserve perhaps more flexibility in the application than they need because they need to protect against what the contractor may want to do, whereas the very obvious answer to that is to get the contractor involved earlier.”*

Interviewee 19 felt for many NSIPs, the key issues were around construction, and so ECI would help:

*“A lot of infrastructure projects, the impacts are more about construction than they are about operation, so when Hinkley Point C is built and operating, are you just going to sit there and hum ... as long as it doesn't explode and the impacts we really had to deal with through the application was the construction in place, 10 years of construction, 5,600 construction workers in a remote part of western Somerset and all the traffic associated with that, there's a much bigger impact than the operational impact. So a promoter in Thames Tideway, it's the same and when it's there, nobody's going to know it's there, the operation is all good with no impact and all invisible, largely, so it's all about construction. So those sort of promoters, really should do as much as they can to understand the construction process before they make their application because through the examination, 90 per cent of the questions were about the construction process and the impact and how are you going to do this and if you haven't equipped yourself with the contractor's knowledge, then you're in a more difficult position. So none of this is the fault of the process, it's the way applicants approach their application.”*

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 be 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'”.*

Similarly, Interviewee 21 succinctly commented that “One of the lessons we've learned is that it's best for them to engage construction advice early on in the process”.

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)*

Interviewee 15, an energy promoter, did not believe ECI would be practical for them, commenting “No chance, it could cost you £1 million to put a tender together... the reality is that I think it's very difficult, especially for a small promoter.” Interviewee 22 also understood some promoters just wouldn't want to financially commit to the high costs of construction tendering without having “crossed the line in principle”

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 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 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 contractor 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"*

Furthermore, although arguing strong that full ECI was impractical for energy projects, Interviewee 15 did acknowledge that communication between teams and lesson learning between consenting and construction teams was vital. Interviewee 17, meanwhile, suggested contractor engagement could take a number of different forms:

*"Early contractor engagement, if that works with your framework and your investment strategy, otherwise, just make sure you've employed somebody on your team who has a better idea about these matters and if I can put it as bluntly, has actually been out and walked the site... it doesn't suit everybody's investment profile, but I would say, nonetheless, just make sure you've got somebody on the team who can think like that and will therefore provide the challenge at the early stage because it's not that they need to know the exact, specialist form of piling, but they do need to be able to think 'okay, there are going to be some issues about this location, whether it be right vibration is the issue, so we're probably going to need to look at boring'... so even if you can't afford to do a formal select list and formal engagement, there will be ways round of doing it."*

### **Post-consent amendments**

There was very real concern present amongst promoters, in particular, about the post-consent amendment process. Partly this was about timeliness:

*"The big thing about it, which clients absolutely love, is the certainty of the outcome in terms of the timing ... and that's why there's such a contrast for them, the consenting process and then the post-consent, if they need amendments and that's what causes them so much grief - although the certainty in the amendments, the time it takes for those amendments to be done - it's far too long in comparison to if they were building a site out with no planning permission and the other sites they're competing with" (Interviewee 22)*

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.

Interviewee 19 felt that if some promoters were prepared to “take the risk” of a material change, the process might be tested and be found not to be too painful, so people would “become less concerned”. However, he did feel the lack of certainty on timescale for non-material changes was an issue and felt more could be delegated to PINS rather than central government departments in determining them. More guidance could also help here, apparently: “It could do with more attention from the policy makers, DCLG and PINS, focusing on how to design the process; we still don't have good guidance notes on the change process and limited experience of it.” Similarly, Interviewee 17 suggested that:

*“Given that we will have had a number of decisions go through the non-material process in coming through, there are a little stream of them now coming through, I wouldn't be surprised if that wasn't valid for perhaps an area of further reflection, given that that was, essentially, a new process then and I would be interested to see how people feel it's working now*

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.

Interviewee 22 felt there shouldn't just be a time limit for amendments, but rather the process should be looked at, for example giving it to local authorities to determine amendments to consented DCOs:

*“I think that would be the solution, let it go back to the local authorities, let them deal with the amendments. Give them fees, proper fees, which is another issue for them, get the proper fees for doing it, but let them do it because PINS aren't set up to do it and it just seems a nonsense.”*

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 15 had had to have a non-material amendment and felt this had been determined in a reasonable timeframe, although this had involved “a lot of corralling from our point of view; we made sure we got into the face of BEIS”.

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. Interviewee 17 seemed to think a statutory timescale for non-material amendments would be “helpful to the regime as a whole”, suggesting that “The regime is based in confidence on timeframes, it seems a little strange that there is one bit that doesn’t have it.”

## Guidance and NPSs

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 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 note 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 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?’”*

Interviewee 17 did think that the Planning Act envisaged that the NPSs were updated approximately every five to seven years. 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.”

Interviewee 21 suggested that it would be useful if the NPSs could be updated to reflect the Welsh planning system post-devolution, for example flood consequence assessments are slightly different in England than Wales and post-devolution the NPSs could “provide greater clarity in terms of the situation in Wales and that policy framework in Wales”. They also highlighted the importance of thinking about the spatial location of major infrastructure, noting that the nuclear NPS is spatial but the others are not and whether this is something that might want to be considered further in future.

In contrast to some of the views above, however, Interviewee 19 felt current advice is absolutely fine and was concerned that revising advice notes or guidance could see attempts to restrict flexibility currently allowed which would “not assist the delivery of national infrastructure ... if you've tightened the practice so much that you have to go through a change process instead of just a reserve matters requirements process, you've added 12 months to nationally important infrastructure.”

## Requirements

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 by agreeing the principle and then later submitting detailed applications with a set timescale and sign-off process with LPAs. Traffic management plans and Codes of Construction Practice, implemented through requirements, were really important and a good route to mitigation according to Interviewee 17.

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 15 explained how they were just moving to the construction phase on two electricity related projects and:

*“So I think one of the things that we're going to find, very shortly, is we've negotiated and agreed a series of requirements with the local authority under the DCO and it's going to be interesting to see how those play out and whether we would have gone back and tried to negotiate things and do things differently - we're not quite at that stage yet - but I can certainly see, there would have been some things would have changed, so it's going to be an interesting space in the next six months”.*

Interviewee 15 explained how, now it has come to construction, different approaches to site clearance had been put forward and that has implications for their environmental management plan. There were some concerns about the wording of the requirements, which they perhaps had not given full enough attention to in the rush to get the DCO in time for the capacity auction process.

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 working now so many are being discharged, and to identify best practice in their framing. Interviewee 18 supported the idea of further guidance on requirements:

*“Obviously, there is going to be requirements and clearly there are. The question then is the scale and how detailed they are and the idea of guidance perhaps from PINS, or through the process as to what is suitable for a requirements and what isn't because design of handrails, heritage strategy ... at the end of it, you could say 'fair enough, it's something to do later on,' but it's just more ... I think there has to be a limit to what you can condition”*

If greater use is made of requirements to support flexibility, however, Interviewee 21 was keen to ensure the resource implications of this for those discharging them was understood, highlighting that:

*“The issue that we are picking up on is that the discharge of consent process itself is emerging as quite a major driver on staff time resources and I think that's a piece of learning we're currently trying to get a national handle on” (Interviewee 21)*

Interviewee 21 went on to explain that the work discharging a DCO requirement was often more complex and resource intensive than discharging conditions on a Town and Country Planning application but that many less experienced LPAs and statutory consultees thought they would be similar and so underestimated the workload.

### **Workshops / training**

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. Interviewee 17 felt it was important people learned from previous projects:

*“So, for example, standard protective provisions and we've tried to push some of that along, so we've made it pretty clear in one of our recent advice notes that we don't expect applications to come in with blank, protective provisions anymore because there's simply just enough decisions out there, that even if you haven't managed to reach agreement with another body, you should at least be able to produce a draft set of protective provisions because you'll see that they've been made on other schemes for virtually every other body out there; so we've given people a shove in the direction of ‘if you haven't researched it, you jolly well have to because we won't accept it if you come and give us a blank piece of paper’.”*

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”*

A very similar point was made by Interviewee 17 (also from PINS):

*“Where I would be interested, genuinely, I would be interested in feedback is whether we're as good at framing some of our requirements as we could be, or whether there are practical elements to the framing of our requirements which are easier or more difficult to handle... I think that's an area that is difficult for us because although there have always been planning conditions, it's obviously because of the strength of the power of a DCO, we don't yet know fully ... there are some which have been built, but they were generally the more straightforward projects, it's because we're getting into the more complex projects that I think some of this feedback is occurring and therefore, I'm very happy to have that feedback loop, but it needs to be a feedback loop which is based in this thing about getting the process right, we're not going to change the process fundamentally, but if it's in terms of how we phrase things and the degree of specificity which we give things, I would be interested in that... we've not formally reviewed it as externally as we might have done in other areas of the process ... I don't think we've actually had an appeal on a requirement come all the way through the process yet, so in that sense, if there are issues with*

*requirements, the local planning authorities are still wrestling with them, but they haven't yet come all the way through the system."*

Interviewee 11 suggested the need for a better feedback loop now that many schemes are under construction to both PINS but also government departments could learn from the process, for example as to whether the NPS tests are 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.

More generally, 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. Interviewee 15 described their first DCO as a 'baptism of fire', although commented that they are now at the pre-app stage for another and there had been considerable internal lesson learning. Another perspective was around perceptions of complexity amongst new promoters, raised by Interviewee 16: "I think, someone who's new to the process, it will always feel complicated at first, but it shouldn't be because the principles behind it are fairly standard, straightforward". Indeed, he was concerned about some of the aura around the system putting people off:

*"It's still a young process, so a lot of people haven't been through it and those that have been through it, went through it when it was in its very, very early learning phases and those examinations were exhausting for all concerned and I've heard that in conferences from promoters who've been to it, you kind of give up your life for six months to do the examination and I think, if you're coming into that new and that's what you're hearing at a conference, then you can imagine where this perception comes from"*.

## **Other**

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 acknowledge 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. The evidence plan approach was commended by Interviewee 16:

*"We've tried an evidence plan process for habitats regs on offshore wind which have certainly structured things and helped bring some stability around, so that, for me, is an example of an*

*innovation which I think is helping bring some standardisation, but that doesn't get away from there's a lot of data still required and it's expensive to get, particularly things like when you're doing geophysical surveys offshore."*

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 (Interviewee 15 made a similar suggestion). For the more straightforward projects, it was felt the DCO process could be slower than the Section 36 Electricity Act consents or a Planning Permission process might be.

Fourthly, in relation to PINS, Interviewee 16 suggested that PINS could have a stronger facilitative role with all stakeholders, bringing them together, particularly in the pre-application stage. Interviewee 17 suggested looking at the amount of secondary legislation governing the DCO regime:

*"I probably would strip out some of the secondary legislation because there is a huge amount of processed stuff in there which is very detailed in its actual form and it was written because the IPC was going to be an independent body and the civil servants wanted to pin it down a lot... I would say a slight freeing up of the secondary legislation because it's overly prescriptive, would just reduce some of the background hassle and the other thing is that, actually because so much stuff takes place online now, the balance of issues has changed ... and that would actually then mean less administrative resource and more resource devoted to getting on with the sorting out of the project stuff ... Reams and reams of it is unnecessary."*

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.

The interviewees and focus group participants thus provided a great deal of evidence as to views about how the system is working, what drives levels of detail within it, the possibility for flexibility in DCOs and suggested improvements which could be made to help drive a greater focus on deliverability of nationally significant infrastructure through the consenting regime. Whilst there was some disagreement between research participants on some issues, it was clear there was consensus around a number of other interpretations of issues and suggestions to resolve them. These discussions were all about the system in general (albeit many drew on examples of specific DCOs, as all those interviewed had experience of one or more DCO directly). The issues raised were then further explored by the UCL research team in relation to two specific case studies, to which we now turn.



## 7. Findings: A14 Cambridge to Huntingdon improvement scheme

The A14 Cambridge to Huntingdon Improvement Scheme is a Nationally Significant Infrastructure Project promoted by Highways England and currently under construction in Cambridgeshire and was one of our two case studies. A DCO application was made to the Planning Inspectorate on 31 December 2014 and was granted by the Secretary of State for Transport on 11 May 2016. The scheme involves:

‘The improvement and upgrading of a 23-mile length of strategic highway between Cambridge and Huntingdon, the widening of a 2-mile stretch of the A1 between Alconbury and Brampton, and the modification and improvement of the associated local-road network within this corridor’ (PINS, 2017a: online)

The location map below (Figure 3) gives an overview of the scheme whilst the detailed map reproduced in Figure 4 illustrates the ‘red line boundary’ established through the DCO.

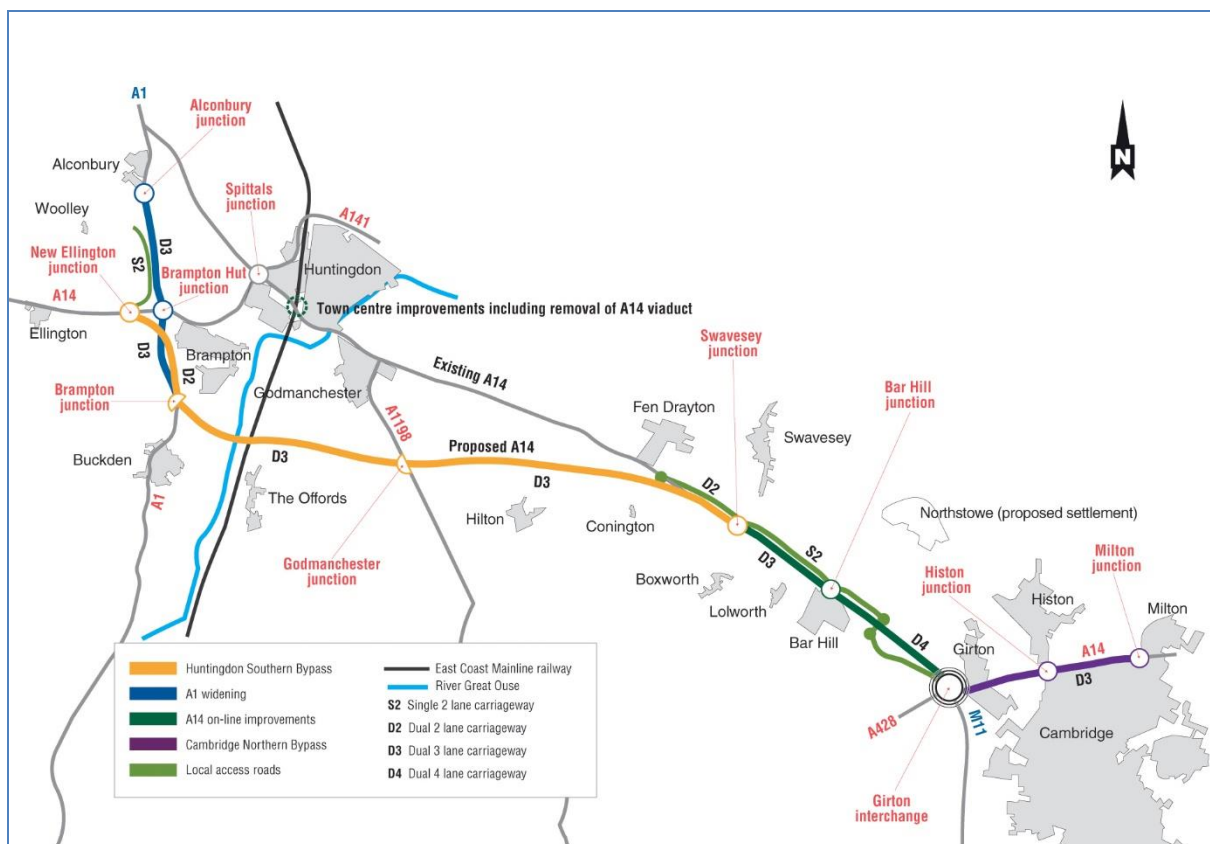


Figure 3: Outline map of the route (Source: Highways England, 2017b)

The stretch of road that the scheme is designed to relieve contains both North-South traffic travelling between the M11 and A1 and East-West traffic on the A14. Highways England argue that the scheme is needed because of traffic delays on the A14 between Cambridge and Huntingdon, with almost 85,000 vehicles per day (above what the road was designed to handle), and because over a quarter of this is Heavy Goods Vehicles (well above the national average for this type of road) particularly traffic to and from the Port of Felixstowe. It is suggested that this project is necessary to combat congestion, unlock economic growth, improve connectivity and safety, and provide enhanced facilities for pedestrians and equestrians (Highways England, 2017a).

The project is currently under construction, with work now (early 2017) including installing safety barriers on the A14, constructing a temporary bridge over the River Great Ouse, creating roads within the construction site to avoid using local roads, archaeological mitigation, diverting utilities within the scheme boundary, clearing vegetation and creating new habitats for water voles (Highways England, 2017a). The £1.5 billion scheme is due for completion in 2020. A project website from Highways England provides detailed updates on project progress (Highways England, 2017a).

The findings reported here are based on desk based and qualitative empirical research conducted by the UCL team. The first stage of this was a careful reading of the documents relating to the project on the PINS website (PINS, 2017a), in particular considering the Examining Authority's Report, the Secretary of State's Decision Letter and the made Development Consent Order in relation to the themes of this research.

The second stage was then data collection through a series of seven interviews and one focus groups around this project. The interviews included those associated with the promoter, their legal advisor, a landowners' organisation, a statutory consultee, local government and design/engineering contractors. The focus group included four representatives of the local community and civil society including Parish Councils and charitable organisations. 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 final stage was a site visit a site visit to location by the UCL project team at the end of January 2017. The photographs below (Figures 5-11) taken during that visit illustrate the existing A14 and some current construction activity.



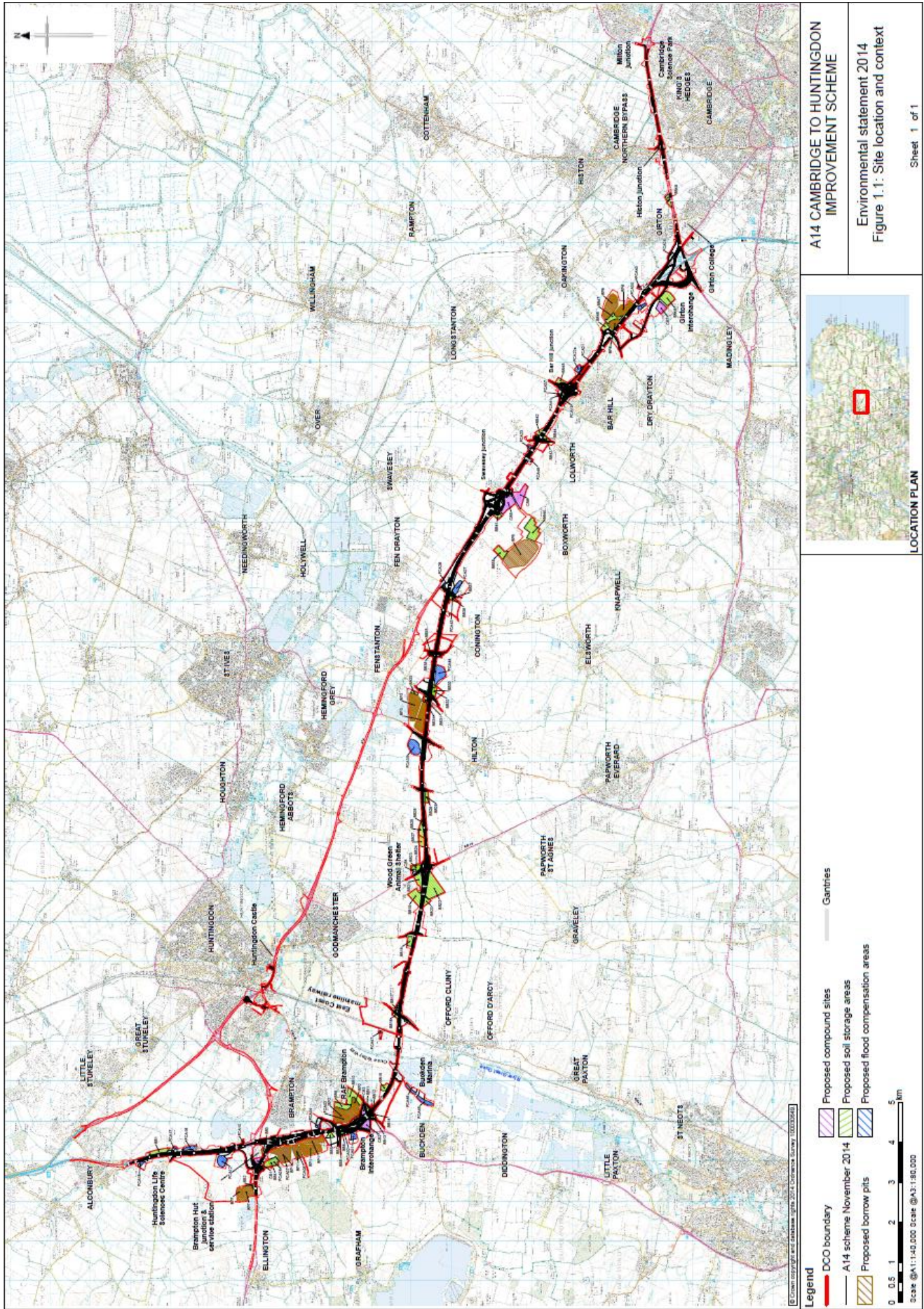


Figure 4: Detailed map of the scheme including DCO ‘red line’ boundaries (Source: Highways England, 2017c)





*Figure 5: Current A14 road near Cambridge Services. (Source: Ben Clifford, 2017)*



*Figure 6: A14 construction compound near Cambridge Services. (Source: Ben Clifford, 2017)*





Figure 7: Site clearance near Cambridge services. (Source: Ben Clifford, 2017)



Figure 8: Construction traffic management signs near Cambridge services. (Source: Ben Clifford, 2017)





*Figure 9: Construction site adjacent to the River Great Ouse, Huntingdon. (Source: Ben Clifford, 2017)*



*Figure 10: Traffic on the current A14 adjacent to the site of Huntingdon Castle. (Source: Ben Clifford, 2017)*



Figure 11: A14 flyover over local road and the East Coast Mainline at Huntingdon Station. (Source: Ben Clifford, 2017)

## Evidence from desk based research

The documentation relating to the DCO for this project on the PINS website were examined, in particular the Examining Authority's Report (Fernandes et al, 2016), the Secretary of State Decision Letter (Wood, 2016a) and the final consented DCO (Wood, 2016b). The documentary evidence shows that a number of changes to the originally proposed DCO were considered during the Examination Period, including some last-minute changes to significantly reduce the impact in terms of land take, supported by argument that there had been difficulties obtaining representations from interested parties on this before late into the examination. In total, there were 71 changes made to the DCO accepted by the Examining Authority and one further change accepted by the Secretary of State, with six revised drafts of the DCO submitted.

As well as land acquisition, the other main factors considered as part of granting consent included traffic flows and modelling; designing and engineering standards; air quality and emissions; carbon emissions; noise and vibration; flood risk; landscape and visual impacts; water quality and resources; biodiversity and ecological conservation; economic and social effects; the historic environment; Environmental Impact Assessment and Habitats Regulation Assessment.

The only time the term 'flexibility' is explicitly mentioned in the Examining Authority's report is in relation to 'limits of deviation', where the report comments:

"The applicant's view was that it was necessary to retain a degree of flexibility given that detailed scheme design was still to emerge, as discussed in the introduction to Chapter 4. Furthermore, given that the protective provisions include a 'plan approval' role of elements of the scheme, these protective provisions would 'bite' to give comfort to the relevant parties involved ... Drafting

changes were made to Article 7(b) at version 3 of the draft DCO [REP7-032] in response to concerns from the Panel that the wording was not clear. The drafting amendments include the need for the undertaker to demonstrate to the SoS's satisfaction that a deviation in limits would not give rise to any materially new or materially worse adverse environmental effects from those assessed in the ES" (Fernandes et al, 2016: 244).

The wording of the article in relation to limits of deviation is given in Box 4, below.

*Box 4: Wording of the A14 DCO in relation to limits of deviation (Source: Woods, 2016b: 9)*

**Limits of deviation**

7. In carrying out the authorised development the undertaker may—

(a) deviate laterally from the lines or situations of the authorised development shown on the works plans to the extent of the limits of deviation shown on those plans; and

(b) deviate vertically from the levels of the authorised development shown on the engineering section drawings—

(i) to a maximum of 0.5 metres upwards or downwards; or

(ii) in respect of the excavation of the borrow pits or the flood compensation areas, to a maximum of 0.5 metres downwards but to any distance upwards to ground level, except that these maximum limits of vertical deviation do not apply where it is demonstrated by the undertaker to the Secretary of State's satisfaction and the Secretary of State, following consultation with the relevant planning authority, certifies accordingly that a deviation in excess of these limits would not give rise to any materially new or materially worse adverse environmental effects in comparison with those reported in the environmental statement.

The final DCO also makes use of another recognised route to flexibility, temporary possession of land. This is dealt with in article 30 of the DCO (see Box 5, below, for the wording) and generally accepted by the Examining Authority except in relation to access to Cambridge Crematorium, with their report commenting:

"Although the form of drafting of these articles was not contentious, the Panel has recommended refusal of the use of the powers of temporary possession to provide a new access to the Cambridge Crematorium in relation to land at the crematorium owned by CCC" (Fernandes et al, 2016: 248).

*Box 5: Wording of the A14 DCO in relation to temporary use of land (Source: Woods, 2016b: 24)*

**Temporary use of land for carrying out the authorised development**

30.—(1) The undertaker may, in connection with the carrying out of the authorised development but subject to article 22(1) (time limit for exercise of powers to possess land temporarily or to acquire land compulsorily)—

(a) enter on and take temporary possession of—

(i) the land specified in columns (1) and (2) of Schedule 7 (land of which temporary possession may be taken) for the purpose specified in relation to that land in column (3) of that Schedule relating to the part of the authorised development specified in column (4) of that Schedule; and

(ii) any other Order land in respect of which no notice of entry has been served under section 11(a) (powers of entry) of the 1965 Act (other than in connection with the acquisition of rights only) and no declaration has been made under section 4 (execution of declaration) of the 1981 Act;

(b) remove any buildings and vegetation from that land;

(c) construct temporary works (including the provision of means of access) and buildings on that land; and

(d) construct any permanent works specified in relation to that land in column (3) of Schedule 7, or any other mitigation works.

(2) Not less than 14 days before entering on and taking temporary possession of land under this article the undertaker must serve notice of the intended entry on the owners and occupiers of the land.



The use of requirements to sort out issues such as detailed design post-consent is another common route to flexibility which is seen in this DCO. The Examining Authority's report contains an in-depth discussion of the requirements, noting that the original draft DCO submitted to them contained a "general paucity of requirements ... particularly when compared to other consented highway-related DCOs" (Fernandes et al, 2016: 253). Over the course of the Examination, ten new requirements were introduced as well as a number of drafting changes to the 13 originally drafted requirements. Changes include:

- ensuring that the detailed design does not introduce materially worse environmental effects than assessed in the Environmental Statement;
- making provision for the Design Council to review and provide advice in the finalisation of detailed scheme design (in relation to landscape and visual impact);
- ensuring the SoS and LPA must sign-off the detailed design of the visually intrusive new Great Ouse viaduct;
- ensuring consultation on contaminated land and groundwater is not "falling between two stools" of the LPA and the EA (Fernandes et al, 2016: 258);
- introduce more precision around air quality monitoring.

Interestingly, further detail in the requirements themselves about borrow pit restoration and management, as originally proposed by Cambridgeshire County Council, was avoided by the fact that a Borrow Pit Restoration Strategy would become a 'certified document' linked to the DCO. Furthermore, the requirement relating to consultation over requirements is bespoke to this DCO (Box 6, below).

*Box 6: A14 DCO Requirements relating to consultation and a public register (Source: Woods, 2016b: 69-71)*

**Details of consultation**

**19.**—(1) With respect to any requirement which requires details to be submitted to the Secretary of State for approval under this Schedule, the details submitted must be accompanied by a summary report setting out the consultation undertaken by the undertaker to inform the details submitted and the undertaker's response to that consultation.  
(2) The undertaker must ensure that any consultation responses are reflected in the details submitted to the Secretary of State for approval under this Schedule, but only where it is appropriate, reasonable and feasible to do so, taking into account considerations including, but not limited to, cost and engineering practicality.

**Register of requirements**

**22.**—(1) The undertaker must, as soon as practicable following the making of this Order, establish and maintain in an electronic form suitable for inspection by members of the public a register of those requirements contained in Part 1 of this Schedule that provide for further approvals to be given by the Secretary of State.  
(2) The register must set out in relation to each such requirement the status of the requirement, in terms of whether any approval to be given by the Secretary of State has been applied for or given, providing an electronic link to any document containing any approved details.  
(3) The register must be maintained by the undertaker for a period of 3 years following completion of the authorised development.

The DCO requirements cover the preparation of the detailed design, code of construction practice, pre-construction surveys of protected species, notifying contaminated ground water to the LPA and EA, landscaping, archaeology, traffic management plans, surface water drainage, borrow pits, noise mitigation, Brampton meadows SSSI mitigation, highway lighting, flood risk assessment, air quality monitoring and mitigation and traffic monitoring and mitigation. Boxes 7-9 (below) gives examples of these requirements.

*Box 7: A14 DCO requirements applying to the whole project (Source: Woods, 2016b: 65)*

**Preparation of detailed design, etc.**

**3.—**(1) The authorised development must be designed in detail and carried out so that it is compatible with the preliminary scheme design shown on the works plans and the engineering section drawings unless otherwise agreed in writing by the Secretary of State following consultation with the relevant planning authority on matters related to its functions and provided that the Secretary of State is satisfied that any amendments to the works plans and the engineering section drawings showing departures from the preliminary design would not give rise to any materially new or materially worse adverse environmental effects in comparison with those reported in the environmental statement.

(2) Where amended details are approved by the Secretary of State under sub-paragraph (1), those details are deemed to be substituted for the corresponding works plans or engineering section drawings and the undertaker must make those amended details available in electronic form for inspection by members of the public.

(3) No part of the authorised development is to commence until options for the detailed design of that part of the authorised development have been submitted to the Design Council's Design Review panel and the undertaker has received and considered the advice of the Design Council's Design Review panel in respect of the detailed design of that part of the authorised development.

(4) The undertaker must, in the course of developing the detailed design of the authorised development, consult with the relevant planning authorities, the Parish Forums, the Community Forums, the Landowner Forums and the Environment Forum in accordance with the provisions of the code of construction practice.

(5) No part of the authorised development is to commence until details of the external appearance of the viaduct to be constructed as Work No. 5(gg) have been submitted to and approved in writing by the Secretary of State, following consultation with the relevant planning authority.

**Code of construction practice**

**4.—**(1) The authorised development must be carried out in accordance with the provisions of the code of construction practice.

(2) The undertaker must make the local environmental management plans produced in accordance with the code of construction practice available in an electronic form suitable for inspection by members of the public.

*Box 8: A14 DCO requirements which must be discharged before any part of the development can commence (Source: Woods, 2016b: 66-69)*

**Implementation and maintenance of landscaping**

**7.—**(1) No part of the authorised development is to commence until the undertaker has, following consultation with the relevant planning authority, issued a planting strategy which includes the landscape elements and objectives of the authorised development.

**Traffic Monitoring and Mitigation**

**17.—**(1) No part of the authorised development is to commence until written details of a traffic impact monitoring and mitigation scheme has been submitted to and approved in writing by the highway authority.

(2) The traffic impact monitoring and mitigation scheme must include—

(i) a before and after survey to assess the changes in traffic;

(ii) the locations to be monitored and the methodology to be used to collect the required data;

(iii) the periods over which traffic is to be monitored;

(iv) the method of assessment of traffic data;

(v) control sites to monitor background growth;

(vi) the implementation of monitoring no less than 3 months before the implementation of traffic management on the existing A14;

(vii) agreement of baseline traffic levels;

(viii) the submission of survey data and interpretative report to the highway authority; and

(ix) a mechanism for the future agreement of mitigation measures.

(3) The scheme approved under sub-paragraph (1) must be implemented by the undertaker.

*Box 9: A14 DCO requirement where the requirement must be discharged for that part of the development before it can commence (Source: Woods, 2016b: 65)*

**Protected species**

5.—(1) No part of the authorised development is to commence until final pre-construction survey work for that part has been carried out, reflecting that contained in the environmental statement, to establish whether European or nationally protected species are present on any of the land affected, or likely to be affected, by any part of the authorised development or in any of the trees and shrubs to be lopped or felled as part of the authorised development.

As well as requirements, the DCO also incorporates protected provisions in Schedule 9, covering things like access to or changes to apparatus, expenses or costs, reasonable cooperation, submitting plans / notification of construction. The protected provisions are:

- For the protection of electricity, gas, water and sewerage undertakers;
- For the protection of operators of electronic communications code networks;
- For the protection of the Environment Agency;
- For the protection of Cambridgeshire County Council in respect of ordinary watercourses;
- For the protection of National Grid;
- For the protection of railway interests; and
- For the protection of CLH Pipeline System Ltd (Woods, 2016b)

The issue of detail also came-up in the Examining Authority's report with one clear example being in relation to a representation from Cambridgeshire County Council for the DCO itself to specify widths of public rights of way, which the applicant resisted. The report comments:

"CCC argued that Public Rights of Way [PRoW] widths should be included in the DCO. They referred to the advice of Gregory Jones QC who in essence advocated that it would be 'prudent' for CCC to ensure the widths of any PRoW granted by the DCO were made clear on the face of the Order and set out in his advice his reasons for so doing. The applicant explained that it was not legally required to show the widths of PRoW; that it was not usual for DCOs to provide this detail and that it would not be possible for the DCO to provide exact details of design given the sequencing of the detailed design process in relation to consenting of the Order ... It seems to the Panel, having considered the case put forward by both parties together with the fact that detailed design has yet to be completed in relation to the scheme, that it would not be possible for the applicant to be more precise ... The Panel also gives weight to the applicant's proposal to consult with CCC during detailed design" (Fernandes et al, 2016: 247-248).

There were other references to certainty-uncertainty parameters in the Examining Authority's report. For example, in relation to air quality monitoring, the report comments:

"The local authorities maintained their view that monitoring ought to be carried out at strategic locations and in areas forecast to experience a decline in air quality. In their view, there was sufficient uncertainty in relation to their air quality predictions to warrant post implementation monitoring to validate modelling predictions." (Fernandes et al, 2016: 66)

In relation to compulsory acquisition, the report comments:

"The objectors argue that with regard to the compelling case, how can a compelling case be made for land take and interests in it when these matters are not known with any degree of certainty at the time of the application, may change later in the process, or necessitate further studies which may affect the land take and interests, requiring less or more land and interests, as has been the case in this application" (Fernandes et al, 2016: 194)

Finally, whilst noting the strong national need for the project, the Secretary of State's decision letter does highlight the need for air quality monitoring to be done "in consultation with the local Planning Authority, following the Code of Construction Practice" (Woods, 2016b).

The documentary evidence thus reveals that the consented DCO makes use of some well-established routes to flexibility (limits of deviation /temporary use of land) and that the requirements are used to govern the consideration of further detail later or through associated documents (for example through the detailed design stage and the use of a Code of Construction Practice). There does not appear to have been great controversy around the routes to flexibility used, or pressure for great amounts of additional detail over what was originally proposed to be added to the main DCO itself, however there have been a number of additional requirements added following representations made and on the recommendations of the Examining Authority, and more precision added to many of the requirements.

## Evidence from interviews and focus groups

### Views on the system generally (beyond just this project)

Interviewees and focus group members were first asked about their views on the DCO regime in general, before the conversation moved more specifically to the A14 scheme. The range of views given here was similar to those from the general interviewees discussed in the previous chapter. Firstly, there were positive views about the way the regime promoted a more frontloaded approach. For example, Interviewee 31 (working at a local authority) felt the system was better than the previous regime because of the emphasis on pre-application engagement:

*“I think because of the emphasis on the upfront dialogue, in other words, before you actually get to the DCO stage, there has to be effective consultation and the local authorities have a role in certifying that consultation has been effective. So I think that pushes onto the promoter, a greater obligation to try and design out conflicts, before reaching the application stage, rather than pushing the scheme through and then relying on superiority of resources to actually get it through the public inquiry stage”.*

There were also comments about the greater certainty the system provided, if not that much quicker overall, as Interviewee 23 (who worked for the promoter) explained:

*“It's not necessarily quicker for the kind of schemes that we're applying it to as Highways England, the majority of our schemes might well have had fairly painless Highways Act enquiries in the past, but there is certainty, certainty of policy and certainty of timescale, which wasn't necessarily the case.”*

Similarly, Interviewee 30 (a statutory consultee) felt the system wasn't necessarily quicker but there was more certainty and clearer expectations:

*“Having been involved in different types of case work, but I'm not sure that it's made it quicker, but I think it has provided greater certainty I think and it's made the different stages of the process more clear cut in providing those kinds of deadlines for things. Most of our work takes place at the pre-application phase and obviously, that can be quite long and there's no set period for how long that lasts, but then once you're into the NSIP process, it does get through it quickly, but that's not to say that public inquiries we were involved in went on for months and months because they rarely did, they usually got sewn up relatively quickly, but I think it has helped, I think it's formalised the process more, so we know exactly which bits we need to engage with and when... I think the DCO process is clearer, it's more straightforward and you know what you've got to be inputting at what stage,”*

The holding of an inquisitorial examination as opposed to an adversarial inquiry was also valued:

*“I thought it was more positive. My experience of other routes is that the promoter, inevitably, holds the cards and will have the upper hand going into public inquiries and so on. They have the*

*resources to prepare evidence at length and the public inquiry process can be quite intimidating to objectors ... participating in the hearings was also different from my experience in public inquiries. In public inquiries, put it this way, it's all a performance for the inspector, whereas I felt that the examining panel were far more interested in what other people had to say and they would make sure that that say was had and they would ask questions; so rather than an adversarial process, it becomes much more of an inquisitorial process; they ask questions of the promoter and the others involved in the scheme and you provide answers and then a dialogue ensues, whereby it's easier, I think actually, to get your point of view across."*

There were, however, concerns expressed about how the regime deals with issues of detail and flexibility, the key focus of this research project. Thus, Interviewee 29 (a legal representative) welcomed the certainty and other benefits of the regime, but felt there was an unresolved central issue around allowing flexibility:

*"I think that flexibility is needed, in line with other existing and previous statutory authorisation regimes where you, in effect, are seeking consent for a concept design, a preliminary design, the engineers would probably call it ... Reference design/concept design can be designed exactly within defined parameters which you've assessed and you therefore should be free to go ahead and design the detail of the scheme within those parameters for the safeguards of it downstream, but I think the important point is to make sure that you are still going to building the same scheme, but of course, that begs the question 'what is the scheme?' and are you free to change a few individual components of a scheme without it being said you're changing the overall scheme."*

The desire for flexibility in the system was something Interviewee 29 had seen play out in another highways scheme where the promoter faced difficulties in implementation due to a lack of flexibility: "they've been actually implementing it and building it out, they said 'good heavens, we've tied ourselves up in knots here, we didn't give ourselves enough flexibility, it's been really difficult to actually get the detailed design sorted within the parameters that we gave ourselves and boy, if we were doing this again, we would certainly do it differently.'" A contrasting view, however, was held by Interviewee 25 (who was associated with landowner interests) who expressed concerns about the use of limits of deviation for other schemes, explaining that for a grid system minor changes in the location of a pylon could make a section of land unworkable for a farmer (for example due to not allowing sufficient room to get farm vehicles around it). In other words, one Interviewee felt more flexibility was needed to successfully implement projects whilst another expressed concern about the implications increased flexibility can have for affected landowners.

There was also some speculation as to the cause of conceived issues around how the regime deals with the flexibility / detail balance. Interviewee 29 was concerned about PINS being 'thirsty for detail':

*"I think that PINS do have a role to play in that, or are playing a role. I don't know that they'd be the entire source of the drive, but I think, in my own personal experience of working on schemes, they are very thirsty for detail.... I suspect that the reason that they want the detail is because they want to know exactly what they are assessing and I would imagine that the desire for certainty comes out of risk aversion, if you like, so that if they can defend the decision they've made on the basis of they've done it, or made their recommendation on the basis of full knowledge of what the scheme is going to be, then I would imagine that they'd anticipate there's less comeback, or less risk of challenge and perhaps, since the objective of the regime is to get schemes through more quickly, or one of the objectives anyway, then I can see why getting mired in post-consent challenges wouldn't be a way that they're wanting to go. It's a tricky one."*

Interviewee 23, however, felt that levels of detail could be driven by promoters themselves in some cases, as well as the examining authority:

*It seems that it very much depends on the examining inspector as to what is required and also what the applicant is prepared to put in. I don't think there is very much which is prescribed and so a risk-taking applicant might well decide to put in an application with very little detail on it and there would be no reason why they couldn't apply for that, but I suppose the risk they take is that they'd have a very difficult examination if an inspector was minded to chase that detail down.*

*So, in some ways, the applicants are driving with their attempts for certainty, not just certainty of outcome, but certainty of workload during the examination."*

Interestingly Interviewee 29 also speculated that the combination of projects from different former consenting systems might explain the emergence of a Planning Act culture which was too like a Town and Country Planning Act approach:

*"I think you just had players coming into a common regime from all sorts of different perspectives, energy, transport, waterways, they all have their own, historic ways of doing things and I think that, possibly, government didn't fully articulate what their vision was for the regime at the time in terms of it wasn't meant to be a detailed planning consenting regime, that I would have thought was implied, given that the regime provides for all the requirements to be done later to the thing."*

Overall, the advantages and disadvantages of the regime expressed here are similar to those raised by our other interviewees. Further issues became evident when discussing the A14 project more specifically, and the experience of the various stakeholders in engaging with the DCO regime in connection with consenting it.

### **Experience of the DCO system in general for this project**

There was a mixture of views about the way the DCO system in general worked for the A14 project. A number of more specific issues are addressed later in this chapter, but in terms of the general experience of the regime, there was a clear appreciation of differences compared to previous consenting regimes. Thus, Interviewee 23 told us that there was an understanding amongst the promoter's staff that the system required a different approach to previous consenting systems:

*"Our engineers are used to Highways Act applications, which are largely a centre line on a map and that's what they're quite happy to apply for, we know that that's not possible anymore and that was the 70s and that was acceptable then, it's not simply a change in legislation, it's a change in our approach to public involvement and environmental assessment."*

Interviewee 33 (a contractor for the promoter) felt it had been onerous to work with the system although there were advantages too:

*"I think the DCO process was quite onerous on the proposer/developer - Highways England in this case - and the team working, doing it for them in terms of the timescales and the very strict programme that it works to in that way, but equally, I can see where that derived from in terms of the benefits to the overall process as such, when it comes to the comparison to the old system"*

They also explained about the need to have a quite well-developed scheme going into the DCO examination:

*"The DCO maybe perhaps - because it's a relatively new process, compared to the old system - people are still finding their feet somewhat in what they can and can't do and how to interpret certain parts of it, but I guess the indicative feasibility design that's taken through in to the DCO becomes relatively restrictive once it's gone through the DCO process, if it's not developed sufficiently at that time, or within the strict timescales, as I said, that apply to it." (Interviewee 33)*

There were different views about the experience at examination. Interviewee 23 felt the examination had really been driven by the interested parties, and the issues they raised, which were in his opinion

given fair consideration. Interviewee 29 felt the examination had gone well and that “the main focus of the examining authority's efforts was on behalf of the landowners and the communities to understand more about Highways England's plans and how the scheme would be constructed and designed in detail... they really wanted to make the project a bit more transparent in terms of the process for design, detailed design, design approvals and construction”. For compulsory acquisition of land “we were pushed into making sure that we absolutely had the bare minimum that we need to deliver the scheme”. Concerns were, however, raised about the programming of the examination, with issues sometimes not discussed on the days they would be at hearings, requiring a big commitment from interested parties in sitting through many days of hearings.

It was also apparent that the experience of the six-month examination period was stressful: “it's a definite rollercoaster, once it starts, it's sort of off with a real bang and it feels like you're absolutely just flat out on it for six months... I think what's slightly worrying as well is that each infrastructure project is only given six months, no matter what the size of the project is. So the A14 was obviously a very big road project, there hadn't been anything that size for a very long time - we thought six months wasn't long enough” although apparently “the experience at the hearings in fine, you get treated really well by the examiners” (Interviewee 25). Similarly, Interviewee 32 (a contractor for the promoter) remained us that the cost of the certainty over the consent timetable was the stress and high workload during the examination period:

*“The DCO process, it's a rigid timescale, that's the key thing, absolutely everything runs to a timescale and once you've made your submission and once you've submitted your application, you're into this six month period that's governed by the next deadline and that was the key difference between it and other regimes, as far as the actual DCO is concerned, the hearings and that, is that your life is completely on hold and you're entirely governed by the next deadline. It's a means to an end of reaching a result in six months, but it's not the healthiest way of living six months of your life ... very, very intense.”*

Overall, then, the experience of the A14 DCO and its examination appeared to demonstrate similar themes to other projects in terms of engaging with the DCO regime.

## **Engagement with statutory consultees, local authorities and landowners for this project**

### Statutory consultees

In general, the view from both those interviewed associated with the promoter and with statutory consultees was that the A14 NSIP had seen fairly effective engagement of statutory consultees through the DCO process. For example, Interviewee 30, from a statutory consultee, felt Highways England had engaged effectively with them throughout the process: “Highways England and their contractors, their ecologists, throughout the project, I'd say we only and positive engagement with them. I can't think of any particular issues we had through the whole process.” They then added “and it's when you come to a scheme like this that that works well, so it wasn't a very adversarial engagement with this scheme, we all knew where we needed to get to and were happy to work with each other to get to that point.”

There were some concerns around two specific statutory consultees, however, which may be linked to resource issues. Thus, there was concern expressed by Interviewee 23 about the resource levels at the Environment Agency and the implications this had for engaging around flood risk assessment. Interviewee 29 was also concerned that the Environment Agency's engagement with the project had been insufficient: “the whole running the flood risk model was desperately delayed and I think the agency changed their flood risk model very late in the day”. This was felt to be due to resourcing issues.

The engagement by National Grid was felt by Interviewee 23 to have been slightly problematic on this project, with the apparent case of not wanting to engage on a project too speculatively pre-application

because of the costs of detailed work associated with doing so, but then having very specific requirements which needed to be accommodated for a gas pipeline diversion during examination. Similarly, Interviewee 29 felt some of the utilities providers had been harder to engage pre-application, resulting to changes to the scheme being needed when they did engage during the Examination: “there was quite a lot of late input from some of the utilities, which meant that we had to bring forward quite a few changes to the scheme”. It should be highlighted here that although invited, we were unable to interview staff from either of these organisations for this research.

### Local authorities

The engagement of local authorities through the DCO regime for the A14 NSIP also appears to have largely gone well from the perspective of both the promoter and the authorities. Indeed, Interviewee 31 felt that the promoter had engaged local authorities better in the A14 project than they would have done under the previous regime which placed less emphasis on the pre-application stage, however noted that the local authorities concerned had been supporters of the project which influences their position.

For the A14, there was a partnership between Cambridge City Council, Huntingdonshire and South Cambridgeshire District Councils and Cambridgeshire County Council, with a joint impact report albeit particular interests pursued by some (such as the City Council’s particular interest in air quality measurement and monitoring). Interviewee 31 felt this joint working between authorities worked well albeit resources were constrained:

*“We had to rely on our own in-house resources, all of whom were committed to normal planning work and didn’t always find the time, particularly within the restricted turnaround periods, to respond and that’s probably where our approach to really see what actually is it that we need to say, what are our actual points to get across came into play in terms that we targeted the specific points that we needed to put to the examining panel and we didn’t get dragged into other things which weren’t of particular interest, if that makes sense.”*

There was some speculation that the local authorities might have put more resource in had they been objectors to, rather than supporters of, the project at a higher political level.

It was suggested, however, that the local authorities did not always find Highways England and their advisors very responsive to working with them to resolve the issues they were raising: “at times, it was like getting blood out of a stone, to be quite honest, in terms of getting effective dialogue and getting them not to be defensive about it... obviously, we had local knowledge which we thought they would find useful” (Interviewee 31). Indeed, interviewee 31 further commented that it would have been good to have been able to reach agreement before examination between the local authorities and Highways England about the issues they were raising and he felt that Examining Authority were ‘exasperated’ at the preliminary meeting that they had not.

It was suggested by several interviewees that Highways England had not allowed enough pre-application time for a scheme of this size, with a feeling that the year between appointing a development partner to submitting the DCO application being a rush in terms of the amount of documentation and investigation work required. This may have been linked to the tight funding window for the project.

The main issues for the County Council going into examination were apparently around the de-trunking of the old A14 and the condition that 32km of the former road that would be transferred to them, around securing public rights of way, around traffic modelling, flood modelling and the extent of archaeological work. The District Councils were apparently more focussed on noise and air quality, as well as traffic modelling and future monitoring. Interviewee 23 felt the local authorities had engaged effectively as a collective group through the pre-application and examination phases and had had some



success over issues such as traffic modelling, where there was apparently disagreement with the promoter.

Interviewee 33 summarised that it felt there had been effective engagement between promoter and local authorities on the project: “Local authorities, as I say, I think there was quite a lot of dialogue and liaison with them to develop the position prior to the hearings, although there were, as one would expect perhaps, still some differences of opinion that were heard by the inspectors.”

### Landowners

The picture concerning the engagement of landowners affected by the A14 project seems to have been more mixed. Interviewee 23 felt it had been hard for the promoter to engage landowners in the pre-application stage, and they had then tried to accommodate them through many changes (related to design issues) to the DCO during the examination:

*“We find that we will talk in advance to landowners and to statutory parties, but it's not really real for them until the examination is underway and the chances are, we won't be able to come up with an acceptable solution to them during the six months of the examination period, so while it might be acceptable in planning terms and it might well receive consent, we found that if we give it a few more months of negotiation, we might get something which is even better for the landowner and maybe even better for us. So things like access gates, private means of access, arrangements of hedgerows and so on and you wouldn't want, especially, to be tied down to a particular plan, if you could improve it with a little bit more discussion and it's hard to get that discussion before the application.*

*Notably, with the A14, you probably saw, there were quite a few changes made during the examination and they were, as a result of those negotiations happening, they managed to get them in before the close and I think it was put into three main sets, private means of access and so on, for landowners; gas diversions, where National Grid actually got properly involved and said 'alright, what you've dotted out there isn't going to work for us, we want this instead' and finally, it's further discussion with the Environment Agency when that finally got itself sorted out meant that we were able to reduce some of the flood compensation areas. It is the intention of the Act that that kind of thing is sorted before the application goes in, but it's very hard to get the buy in from the other parties, to give that level of attention, when they're not time pressured by the examination.” (Interviewee 23)*

From the perspective of Interviewee 32, engagement with landowners, in particular, drove many of the changes made to the DCO during the examination phase, which showed a certain willingness to respond to consultation:

*“The vast majority of them were down to ongoing negotiations with landowners, who at that late stage, had stated preference to something - I don't know, what was in the DCO - and we found we were able to take those comments on board, that we thought it was better to make changes than try and rigorously defend something that we were able to adapt to and I think, despite the number of changes, I think we were better to have made those changes. I suppose it's a shame that they came to light so late in the day, midway through the DCO process, but we tried to flush them out earlier and that was just not possible.”*

Interviewee 25, however, had a different perspective and felt that the engagement with landowners had been impacted by the lack of early detailed design work: “The lack of detail to start off with means that they haven't been able to tell landowners exactly how they're going to be affected. That is a slight problem with then flexibility ... Basically, at the end of it, it's all down to cost, there's nothing else, it's

down to cost.” There was also apparently a lack of meaningful engagement, which involved negotiating changes to the scheme:

*“What they're more or less doing at some of the meetings they're having, is what I would say is they're going through the process with landowners and they're pretty much saying 'this is the route, this is what's going to happen and this is the process of the DCO and then we'll get our compulsory powers and then it will be constructed,' ... they're not negotiating.” (Interviewee 25)*

In summary, many landowners “complained that they hadn't had enough one to one meetings with enough information, so basically, they were saying that they hadn't had any negotiation, they'd just been told 'this is what's going to happen.’” (Interviewee 25). There was, apparently, a reasonable response from Highways England to issues when they were raised, however.

### **Engagement with the community for this project**

Similarly, there also appear to have been some issues relating to the engagement of the community for the A14 project, according to the opinions of a number of people we spoke to in the course of this research. As ever, each project must be seen in context. Two participants in focus group 4 (which comprised civil society groups including members of Parish Councils, charities and campaigners locally) had been involved in earlier proposals for improving the A14 between Cambridge and Huntingdon and this longer planning history clearly provided context for their experience of the current scheme.

Interviewee 31 did feel that the DCO process was more positive than previous regimes in terms of community engagement: “one of the reasons why I felt it was a more positive process because it did have that engagement, they had this right to be consulted and part of the process is for the examining panel to decide whether or not they had been effectively consulted, so it's good they had that dialogue.”

There was some suggestion that different Parish Councils apparently wanted contradictory things in relation to local roads, particularly towards the eastern end of the scheme. Towards the western end of the scheme there was apparent acknowledgement by local authorities of the issues being raised by the Parish Councils impacted by the new road alignment, but they still felt it was the best routing possible. In relation to parish councils, interviewee 23 commented that “Highways England probably hadn't been engaging with parishes as well as they could have been - maybe as well as they should have... they can be effective during the examination”.

There was a feeling from one participant in the focus group that “the consultation was very much 'we'll tell you what we're going to do,' rather than really listening to some quite sensible ideas from a whole variety of people”. Another, a Parish Councillor, commented “I did get them to engage with me, but they just (strung) me along until the end of the enquiry and said 'thank you very much, that's it.' So I'm very, very critical of the Highways Agency and their so called consultation because I think it's a complete and utter sham.” Another commented “For me, the issue was about attitude. This was epitomised in one of many well attended meetings in Brampton, where very carefully worded questions were asked of Highways England and by the end of the evening, not one of the 12 questions had been answered, not one.” One member of a charitable organisation reported that they felt at the pre-application stage, after the initial outline work was done, they were able to get some adaptations from the promoter but they became less engaging the further into the DCO process you got.

One participant in the focus group reported attending some of the examination hearings and feeling that the promoter was not responsive to civic society or Parish council organisations, only the County Council, whose representative was able to apparently enter into meaningful dialogue and negotiation with the promoter in a way they felt they were not. Another participant in focus group 4 had not

attended the examination because “I couldn't really make the level of commitment required to deal with it properly” whilst another commented “the feeling I got was that it was a fast track process, just to force the issue through, there was never any issue that it was going to be consented, there was no real interest in engaging.” Although all documents were online, the time taken to find these and engage could be an issue for community engagement: “each of their responses would require me to spend about half a day going on the internet, try to find references to various documents that they'd referenced all over the place - extremely difficult to do - but I kept going because I was determined not to let them just fob me off.”

There were a number of key areas for concern raised by the civil society groups and individuals. There were strong concerns about air pollution and noise impact and the actual monitoring of this from several participants in focus group 4. One example was given in relation to the way the noise levels had been modelled. Other concerns mentioned by individual members of the focus group included induced traffic and the safety of the road layout in certain locations and non-motorised users.

Severed footpaths, an apparent lack of imagination in what would happen with the old A14 left over and the consideration of non-motorised users and public transport were key concerns discussed by participants in focus group 4:

*“I think, for me, was the big disappointment, that it was just another road scheme, without the aspiration that was promised by the Department of Transport, that it would be undoing the damages of the '70s and it turned out, they've just done it again. So there was a real feeling that there's a massive opportunity wasted in terms of what they could have done. They've done a minimum level of NMU provision, but they could have done so much more.”*

These may be issues involving County Council as well as Highways England responsibilities, but for local community groups there appeared a lack of joined thinking about a ‘total route strategy’ rather than a narrower ‘road strategy’. One participant had apparently tried to engage with the County Council but found them not as engaging as he would have hoped:

*“I was dealing with the county council, their team, and that was part of the disappointment I felt was they weren't engaging any more than Highways England was, so that was clearly a weakness, from our point of view, that they weren't particularly ... and I got the feeling, as I say, that's because they're so cash strapped”*

Another issue was not considering alternative options at the Girton Interchange or ‘rat running’ on other local roads as this was outside the project boundary.

Two of the participants in focus group 4 did report some positive early engagement with the promoter but felt dialogue had then ceased, one commenting:

*“I thought that was quite positive, we got the feeling it did help to steer the inclusion of new stuff in the DCO plans, but that's when it stopped, they said 'we've done it now, we've given you our best compromise' and that, I think, was the frustration, that there was no ongoing ... yes, the initial encounter was, I thought, quite positive.”*

Another added: “I'm really dismayed by the total drop off the cliff of the communication at the end of the enquiry, that was it, there was no more discussion.”

The overall experience was described by one focus group participant as a “like a juggernaut” and given the County Council’s support for the project, they were described as “part of the juggernaut”, another focus group participant adding “That was a shame really because that's the only other powerful organisation”. The stop/start planning history of upgrading this stretch of the A14 was acknowledged by one participant of focus group 4 as part of the issue in local community perceptions: “three shots at doing the A14 ... that's caused a lot of problems, people have had to fire themselves up and then it's all been taken from the table again.”

In slight contrast to this, Interviewee 33 felt there had been effective attempts at engagement: “I think, yes, there was a good deal of involvement/participation” but that people wanted higher levels of design detail pre-application than the promoter could supply: “I think possibly, in terms of individuals, they would perhaps prefer and have a better understanding of concrete facts and designs, whereas obviously, we were looking, at that stage, of an outline feasibility; so perhaps the engagement of individual parties, landowners and others was not so great.”

Interviewee 32 also made a link between level of detail and community consultation, suggesting that a lack of detail at the concept pre-application stage could make meaningful engagement more difficult:

*“The emphasis of DCO, as you probably know, is on doing lots and lots of consultation with the affected parties in advance of the DCO, so in theory, you've got all the tricky issues flushed out in advance and ideally agreed as much as possible in advance, which is by reaching a certain concept because most people don't have to talk detail at that stage, before you've issued your proposals, most people want to keep the powder a bit dry ... so it can be quite tricky, getting meaningful consultation in at early stages - and it's all about level of detail - if you haven't got the detail to show them, it's a bit difficult to consult.” (Interviewee 32)*

Although consulting early did apparently allow some “scope to take on board people’s opinions” so there were advantages and disadvantages to the front-loading of engagement, but levels of detail were important.

Asked for their takeaway lesson from engaging with the A14 project, one participant in focus group 4 stated:

*“That it's a steamroller, basically. There isn't a genuine attempt at engaging. As I said right at the beginning, to me, there were two parties they had to engage, one was the county council, the other was the landowners on the compulsory purchase, so they did that, they had to negotiate with them. The other people, I got feeling the DCO process was designed to expedite an avoid a public inquiry and make the whole thing much quicker, a done deal.”*

Another recognised that having a time-limited examination was, in his view, better than a longer public inquiry (commenting “it is a positive because you’ll get things moving quickly”) but then added “but you might as well say you're not going to have the engagement, it's completely facile, please don't bother to ... don't waste your time because that, I think, is the feeling that a lot of people have, is this sense of putting a lot of effort in and not getting much out of it”. A third participant commented “small players get sidelined” whilst the fourth suggested “the time constraints they put on the money, which means that they throw a plan on the table and say 'it's got to be that, otherwise we won't have the money'” contributed to a lack of meaningful community engagement.

There were clearly strong views on the community engagement aspect of the A14 project, some of which are linked to much broader issues of the national approach to transport networks and development and air pollution and some of which may be linked to (understandable) concerns from people having a large new highway constructed in their area. There does, however, seem to have been some issues with the perception on the willingness of the promoter to engage with local groups and very real concern that this engagement declined through the examination and into the post-consent period. This is important in relation to local communities having sufficient trust in promoters and their contractors to support detailed issues being resolved post-consent and, indeed, there was some specific discussion of detail in relation to engagement amongst our interviewees.

## Particular issues around detail and flexibility for this project

There was some discussion of issues relating to detail and flexibility specifically in connection with the A14 project during several of our interviews. Following on from the previous section, some of this was in relation to this apparent tension between some community members and groups wanting more detailed design during engagement, and keeping things more flexible to allow room for construction innovation and efficient use of resources. Interviewee 23 believed that community consultation had led to some changes to the scheme, for example noise fencing and very low noise surfacing which were discussed during examination rather than just left for consideration post-consent through the construction environmental management plan.

Local authorities and statutory consultees also required some more detail in relation to this scheme. For example, local authorities apparently had concerned over the widths of public rights of way and had wanted these defined in the DCO itself but Highways England said this wasn't possible as they had not yet done the detailed design, however sufficient safeguards were apparently ensured through associated orders. Local authorities had also been concerned about 'Borrow Pits' and drove some additional detail around these through the Examination:

*"One example was where we showed borrow pits; so the sources of material to build roads out of comes out of these borrow pits and we included the application for the borrow pits in the DCO application and the way it panned out is there was quite a focus on wanting more levels of detail, or a higher level of detail on the restoration plans for these borrow pits afterwards - that was one area they felt they hadn't covered in enough detail - and more detail seemed to be demanded as the hearings went on. It was a big topic for some people as to what these borrow pits might be left looking like afterwards; I suppose it's understandable, but we generally applied the same level of detail as we applied for landscaping and the rest of the scheme ... we ended up having to far more detailed plans than they might have envisaged to satisfy various objectors. The alternative is, you don't do that detail, you leave these questions hanging and you let the planning inspectorate decide whether you've justified the case or not, but obviously, you try your best, in the time available, to answer the questions that people raise" (Interviewee 32).*

Additional detail had also been driven in this project by landowners, and Interviewee 25 felt more detailed design should have been done pre-application:

*"We think that the developers that are putting in these applications, sometimes, from our point of view, they haven't done enough work on the design process before they put in these applications and there's too much design detail left for like 'oh, well that will come after the examination process,' when actually, landowners need to know that the detail of how they are going to be affected, rather than just roughly where something is going to be, or what something might look like. Particularly with regards to the A14, we thought that Highways England were six months ahead of themselves and they shouldn't have put in their application for it to be accepted for at least another six months."*

There were particular concerns about a lack of detail on field drainage and the drainage off the road according to Interviewee 25.

Flexibility remained important, however. For highways projects, fully detailed design was not appropriate until the contractors got on site, according to Interviewee 23:

*"The way we work is we intend to have a finalised design around about the time that we get on site, maybe a little bit afterwards. You wouldn't expect to have that 18 months in advance, which is what you need in order to make the DCO application. Had you got a 100 per cent completed design on application, then 18 months' worth of traffic growth, changing standards, changing environmental conditions would mean that your design, your detailed design, at least, would have*

*been somewhat aborted by the end of that. So, the reason for flexibility is that a phrase 'fully cooked design' wouldn't be appropriate 18 months later."*

Similarly, Interviewee 32 explained that it is normal to do detailed design post-consent because of the costs associated with it:

*"What drives level of detail is costs of design. I don't know whether you know typical ball park costs, but the preliminary design of a scheme like A14, to get to DCO submission, design costs, typically, are three per cent, maybe, and that includes all sorts of things, but three per cent of the construction cost; so if we're looking at a £1 billion scheme, it might cost £30 million in various forms of design and consultancy ... The detail design of that same scheme is probably at least as much again, if not more, so £30/40 million ... people don't want to pump that much money for a scheme that hasn't yet got planning permission; they want to reduce the outlay until the scheme's got some sort of committed planning permission. So, there's a reluctance from the people who are paying to do unnecessary levels of detail, but there's pull in the other direction from consultees to have more detail available for them and you clearly have to do enough detail to be confident about the land take, as I suggested before; you have to do enough detail to have some confidence in the construction."*

The tension this caused was around consultation, however:

*"The conflicting demands of some people not to spend too much money and other people wanting more detail, demanding some expectation of, I don't know, full 3D drive through visualisations that have got every last detail modelled in them, down to the road sign and the lighting column and safety fencing and some of those expectations are unrealistic at that stage."*

Interviewee 30 felt there was a difficult balance between detail and flexibility between what a developer might want and what a statutory consultee might want:

*"I think, from a developer's perspective, they do want that flexibility, from our perspective, as a regulator and an advisor to government, we probably welcome it less. I think the more detail that we have in the Environmental Impact Report and in the licence applications and the range of submissions that we need to know that the developers are meeting their environmental obligations, we need quite a level of detail in those documents and the less detail there is in there about design and the impact of that design and then the necessary mitigation, then the more room for error there is, potentially, so I suppose it's making sure that the structure of the commitments that the developer makes is sufficient to make sure that they're still meeting their environmental obligations, even with some fogginess around design issues. So, I think there's probably a bit of a tension there between what the developer might like it not being nailed down and what we might like."*

Some of the detail around land acquisition and its use could be difficult, as Interviewee 33 explained:

*"The DCO does lay out quite categorically and specifically land that is identified for various uses of temporary possession through to title acquisition for the scheme and with it, within the Book of Reference and the Statement of Reasons, there's a description against pretty much every plot as to what its intended use would be. Now, that's absolutely fine on the face of it in terms of the outline design, but should there be a need within the design development to adjust what, effectively, is within each plot, if for instance there's a plot which is that rights are required for the placement of certain listed statutory undertakers plant, then the question mark that's arisen is whether or not that is strictly a limitation, or does that permit other utility plant to then also be placed in that area, maybe an access track provided for third party rights of access ... could a right of access be provided along a rights plot, even though it was listed only there to provide a route for utility plant and the practicalities of it would be, as I see it, relatively little, or no change to the end result in terms of the overall effect on the said landowner, but it would potentially provide that greater*

*amount of flexibility to the design within its development to be able to move things around like that.”*

There had been issues around detailed design and how much had been developed up to the hearings, and what then got consented, according to Interviewee 33: “I think there is a need to have a certain amount of flexibility in order to be able to deliver the intentions within the spirit of the agreement and sometimes the practicalities and the more rigid legalities of the constraints actually stifle some of that.” A detailed example relating to part of the scheme where a better construction solution, and one more preferable to an affected landowner, was provided. Apparently, this was not possible due to the drawing of the DCO red line boundary and the difficulty getting this changed, leading Interviewee 33 to comment:

*“In effect, I suppose I could summarise it in the sense that this particular scheme is on a very fast delivery programme, for the size of the scheme at least, and the balance between the amount of detail prior to the hearing stage and, in some ways, the rigid nature of the legal position of the DCO that's granted, in having to develop that design within those constraints, that's, potentially, led to the difficulties all round.”*

The limits of deviation on the scheme were quite restrictive (half a metre for the vertical limit) according to Interviewee 32, less than other major infrastructure schemes he had worked on before and “that makes it very restrictive at detailed design stage, if you want to do anything else, if you want to explore better road layouts, more economic whatever, it sometimes ties your hand” but reflects the environmental assessments underpinning the Environmental Statement.

Generally, however, it seems that in the A14 the promoter was able to retain desired levels of flexibility, as Interviewee 32 explained: “Generally, we wanted contractors still to have a range of options available to them, we didn't want to go down the line of absolutely nailing, say, bridge types.” The construction and environmental management plan and landscaping plans were used as a way of managing more detail post-consent, according to Interviewee 23. Overall, Interviewee 29 suggested that the DCO for this project was quite flexible: “it's a flexible DCO because it authorises, in essence, a referenced design, a preliminary design and the detail was not there because Highways England hadn't produced a detailed design”. Furthermore, the use of temporary possession of land was something landowners did like: “Temporary possession of land, yes, lots of farmers said 'well actually, if they're just wanting that land for a compound site, or a site to put soil on, yeah, of course, we'd rather they took it on a temporary basis,' so that's fine and they liked that.” (Interviewee 25).

This project therefore seems to have allowed some flexibility to be retained through the use of limits of deviation and temporary use of land, albeit there were some drivers for further detail to be provided around certain issues. There was also use of requirements to manage detailed design issues being sorted out post-consent, as considered further in the next section.

### **Particular issues around requirements**

In common with other DCOs, extensive use was made of requirements to govern more detailed design and construction management and monitoring post consent. Unusually, however, the requirements for this DCO are discharged by the Secretary of State, rather than the local authority:

*“What that means is that our details are being signed off by experts and specialists in our schemes, rather than local authority generalists who may struggle with it, so we're happy that it's going to the right technical expert who has the national interest at heart - and the schemes are indeed in the national interest - nationally significant and this has been accepted by the planning inspectorate and the Secretary of State as the right way to proceed with certain safeguards in it, so*

*we have got a particular method of consulting with local authorities and I believe we publish our discharge register.” (Interviewee 23)*

There were apparently concerns about Highways England effectively discharging their own requirements for this scheme, but the suggestion that local authorities should do them caused some apprehension, according to Interviewee 31:

*“After consulting with senior officers, we decided that we didn’t have the resources, or the skills to do that, there was no way the county or district councils had the resources or skills to discharge requirements of a project of this scale, we would have just ground to a halt, trying to process the mountain of information necessary. So, Highways England backed off from that and they promoted this idea of public scrutiny, so that the process of discharge would be subject to consultation and this idea of this double dose, whereby Highways England would consult the local authorities regarding the discharge of the requirement and then when they’d submitted their recommendation to the Secretary of State, the Secretary of State would then consult with local authorities.”*

The key issue about who signed off the consents centred on the transparency of that:

*“The inspectorate were very interested in the public involvement in the discharge of consents and how individuals would be able to track this working, if it were taken away from the local authority and so the consents register, which I think is secured in the DCO and is on a website somewhere, was the new thing... I think the discussion actually came from a compulsory acquisition here, where the NFU and CPRE were looking at the interests of landowners and farmers, how would they know that a particular thing had been ... how can they follow this process and so what we came up with was a register that they can follow.” (Interviewee 23)*

A public, online consents register was the solution presented here.

In terms of what went into the requirements themselves, Interviewee 23 outlined how the number of requirements had almost doubled over the course of the examination, saying “broadly, it starts off with the smallest Christmas tree you can get away with and then it gets decorated over the course of the six months.” Some of the requirements might have been avoided by delaying the project a further six months but this was not acceptable for the funding programme according to Interviewee 32: “I think we could have removed some of the requirements by spending another six months on the design, but that would have held the scheme up six months and our instructions were pretty clear that we must deliver to the timescale”. He concluded that, overall, “I’ve got a feeling, on our scheme, we got the balance about right to be honest, about the level of detail”.

Although the number of requirements increased through the Examination, they did indeed appear to have helped to avoid further detail going into the DCO. For example, there was apparently some disagreement between the promoter and the local authorities over the aftercare for the ‘borrow pits’ associated with the project but this was able to be dealt with through requirements rather than the main DCO with a ‘borrow pit restoration plan’ included in the associated documentation. Similarly, some disagreement between the promoter and the local authorities was apparently avoided by the use of the ‘Code of Construction Practice’.

Interviewee 29 explained that care had been taken to try and avoid having a duplication of detail between individual requirements and the Code of Construction Practice, Construction Environmental Management Plan and Local Environment Management Plan which were utilised here. This was important to make the discharge of them more manageable:

*“We were very tough in terms of saying ‘well, if something is dealt with by, in effect, the Code of Construction Practice, we’re not going to double up and have it as a requirement as well.’ So that’s why, if you look at the DCO, there aren’t as many requirements as many other projects because we*



*were keen to not double up and to try to maintain some rigour and discipline because the more requirements you have, the more process you have to go through later on for discharge.”*

Interviewee 30, a statutory consultee, was involved in the discharge of requirements and felt this process was working effectively. They did, however, think the detailed wording of requirements was very important and this was something they had learned from other NSIPS they had been involved in. They had a standardised wording they would suggest. Interviewee 32 did feel the discharging of requirements was ‘intense’:

*“It's been quite hard work and quite intense because some of the requirements were written 'no work must proceed until this particular consent is in place,' which pretty much puts your entire site on hold until certain consents are found, so certain consents become very, very critical; others of the requirements were written 'no relevant part of the work may progress until the relevant requirements have been satisfied.' So that's limiting, geographically, to the local area around a particular issue... The one I described about River Great Ouse Viaduct, I think, quite strangely, said that the scheme couldn't progress until a visual of the river viaduct had been discharged; it's quite strange that the whole scheme should be on hold”*

The public register of requirements was commented on positively by Interviewee 25:

*“They set up some documents on their website, that's where they had to be shown that they'd been done after the process. We have found that quite useful, to keep an eye on whether they have done what they said they were going to do and I've actually requested that on some of the other schemes, as an example... otherwise there is an issue of how do we know that the developer is doing what they said they were going to do.”*

There was some discussion around the governance of construction now that the project had entered that stage. It was clear from focus group 4 that construction impacts, things like lorry movements, piles of soil, the construction compound were indeed things of great concern to local residents. One participant in focus group 4 did feel there was some care going into construction:

*“My only positive comment, they've been putting crossings of all the minor roads, south of Huntingdon because that's along the line of the construction and people were quite pleased, they were doing it one at a time, one a weekend, which was quite thoughtful, at least it's not the whole system is taken out in one, so people were quite pleased about that, that at least there were well signed diversions”*

Community groups did apparently feel there was less willingness to engage post-consent from Highways England, however. There were some concerns about an apparent lack of engagement over detailed design issues post-consent reported by some participants in focus group 4, for example the design of the viaduct and A1/A14 junction in the Brampton area:

*“it will come over the railway, over the river and then over another and it looks as if it's going to be enormous, but they won't show us a model of what it's going to look like. We've asked for it, they agreed, but it never happened ... We're still struggling on the air pollution issue, to try to get more pressure to change some of the design of the bridge, of the layout at Brampton.” (Participant in focus group 4)*

The requirements of this DCO seem to have supported flexibility and some aspects appeared to be working well, however community engagement around detailed design issues being developed post-consent seemed to be a slight issue. The transparency of the discharge of requirements is clearly very important, as is who to contact with complaints about that. The public register for the A14 project

partly seeks to address this, but from the community focus group it appears this is an area even further attention might be required.

### **The link between consent and construction and current stage of the project**

At the time of writing, the construction of the A14 Cambridge to Huntingdon Improvement Scheme is well underway. There was thus some opportunity for interviewees to reflect on the link between consent and implementation. The consent can stifle design improvements going into implementation, according to Interviewee 33:

*“There are a number of outcomes from the hearings and within the consent letter and report that they did that certain things were to be developed through the design process and liaison continued with the parties involved, but when it comes back down to what was approved within that process, it stifles, perhaps, the opportunities to introduce further innovation and development of the design when strictly controlled by things such as the red line boundary of the application, perhaps.”*

Some issues between consent and construction had indeed become apparent. For example, there was some discussion in interviews that the red line had been drawn ‘somewhat too close’ to accommodate the final design / construction in places. The linear nature of highways schemes made the red line boundary particularly challenging, apparently, when moving from consent to construction:

*“With a highways scheme being such a different animal in terms of a linear scheme, there is far more opportunity, or risk of developing the design, which will perhaps impact on the development boundaries, the red line boundaries from the DCO, and to a degree, perhaps that's really where I've been coming from with my comments in terms of some of the difficulties that we've had to overcome within this phase, there is an understandable need to justify the land that has been identified and there is no wish to take more land than is required, but in terms of trying to constrain that down to a reasonable limit, it does therefore constrain the boundaries for the design as it is developed in detail.” (Interviewee 33)*

An example of this might relate to earthworks:

*“The simple example of that would be if land take is limited by the red line boundary, but the alignment of the scheme runs very close, and whatever earthworks are involved within the limits of deviation that are allowed within the DCO for design development - which themselves, certainly in terms of vertical levels, are quite onerous in that way - but potentially, an earthworks slope may need to be restrained, introducing more costly supporting structures, retaining structures, or some other means of reducing the footprint; so yes, potentially, there could easily be a cost implication of having to be restrained by the red line boundary developed on an outline scheme, without being overly conservative with the amount of land that's identified at that stage to put in front of the inspectorate.” (Interviewee 33)*

It was suggested by Interviewee 23 that there had been some discussion over construction compounds but the layout was specified in the DCO:

*“I hear that the contactors asked if they could lay out the site compound differently and the answer was 'no' because it's secured in the DCO that it will be arranged in a particular way and that's what they'll have to deal with, even though the other way might well be cheaper for them and less environmentally damaging for surrounding areas.”*

These were apparently issued with the notice served for temporary possession of land not having sufficiently detailed plans: “I think some plans were sent, but the plans just weren't detailed enough; that was another problem of Highways England just not able to keep up with all the stuff they had to do

... they're saying 'we can't tell you that because we haven't done the detailed design.' It's a vicious circle." (Interviewee 25).

Interviewee 33 was clear there were potential amendments to the DCO contractors would like to aid delivery which had already become apparent but "to follow the legal process would, detrimentally, extend the period of time required for delivery and that impinges on the benefits of the scheme." Understanding constraints on flexibility were required, there could still be advantages in a particular example with this DCO:

*"If it were feasible to have some flexibility, to acquire slightly more land at the agreement of the landowner, there would be some potential to further improve the environmental benefit that is gained from the scheme, somewhat more over and above the original concept of the scheme in that particular location, by acquiring slightly more land and being able to use it for the scheme, if all parties were in agreement ... and we're not talking about acres of land here, it's just a few metres wider width, or so, then it would perhaps provide greater opportunity for environmental planting and habitat creation, within the overall provision." (Interviewee 33)*

Similarly, Interviewee 32 gave examples of some things which had been proposed post-consent to improve constructability but were not possible due to the DCO, these included "work outside of the DCO red line boundary, a lot of utility work where additional land would be beneficial", variations outside of the Limits of Deviation (raising the alignment) and a footpath diversion. However, these were improvements on the consented project, but "as I say, we've got a scheme that could be built and we're trying to pursue improvements to it". In other words, the project as consented is deliverable. Any potential improvements would not, however, be pursued through formal amendment of the DCO due to concerns about the timescales of the change process but instead through alternative routes:

*"We're not proposing to resubmit the DCO, but what we are proposing is finding ways and means of acquiring rights over additional land, say for a utility type diversion, or just temporary occupation, the contractor needs to use a bit of additional land, or moving the location of a pond, that sort of thing, the requirement rights over additional land; we seem to have agreed with the local authorities that a more traditional ... if you want to go and build a pond on an additional area, it would be like a planning application to a local authority"*

There would also need to be a benefit to cost ratio of enabling any changes of 10:1: "A 10 to 1 multiplier is a typical rule of thumb that people use, if there is £1 million to be saved, they might punt £100,000 at pursuing it". In other words, "It's much easier to go with the bird in the hand that you've got, you've got a consented scheme, it's much easier to go and build the one you've got than to start looking at alternatives".

Interviewee 23 explained that the promoter was keen to get on building the project, particularly given the project finances, and so were unlikely to consider post-consent amendments to the DCO:

*"We're very keen to avoid it because of the time scales, so we are generally given very quick turnaround targets by government, to get something from their idea on to site as quick as possible and the post-consent regime, the post consent changes would delay that."*

Overall, Interviewee 29 felt that although there had been some minor issues apparent in the way the project had been consented now it was being constructed, these were very few in number for a project this size:

*"I think the project would have been very challenging for them to build now, if actually they had been put in a straightjacket through the DCO process in terms of elements of the scheme, but in essence, they've got that power through the DCO to design the detail in a way that is appropriate, but with important safeguards for landowners, for communities, for statutory bodies, that I think is, so far, working out well."*

Interestingly, even though it was overall working well, the importance of a firm link and institutional memory between consent and construction was apparent in the A14 NSIP: Interviewee 31 gave evidence of the need to explain to contractors the background to things, explaining why a particular local authority had wanted something at the examination stage. This links to an emerging theme from our earlier general interviews about the importance of through project management for NSIPs, bridging the divide between consent and construction. A number of other suggestions made to improve the regime which appeared in the general interviews also came-up during the A14 interviews, as we consider in the next section.

### **Suggested improvements as a result of this project**

Just as with the general interviews, there were a number of suggestions for potential improvements to the DCO regime which emerged through the A14 interviews and focus group. There were also some comments directly relevant to suggested improvements discussed in the general interviews section. We consider both here.

There was some considerable discussion of Early Contractor Involvement. The project did not involve full ECI or a design and build model but did involve an alliancing type model with integrated working between designers and contracting in an integrated delivery team which we were told has led to,

*“A more positive working environment because designers are no longer fettered by the contractor so much, the contractor has still got the opportunity to decide on pavement types, earth moving strategies and all sorts of things, in order to drive the value of the scheme, or the cost of the scheme down, which ultimately is what Highways England wants. Also, on this timeline, there wouldn't be time for conventional design, then build.”*

Although the contractors weren't appointed right at the start of the project, they were engaged before the examination finished, as Interviewee 23 explained:

*“The design contractor was appointed, I think, two weeks before the preliminary meeting, so that was over a year before the consent was granted. It gives the impression to the public and to local media that the whole thing is being treated as a fait accompli, it has to be explained to the press and others that it is working at risk, but it's necessary to get the project on site for the opening date that the public want.”*

So, there had been some ECI in this project, and according to Interviewee 33 it had worked quite well:

*“I would say, in this scheme, there has been quite a lot of early contractor involvement, to the benefit all round, but it is a large scheme and there's an awful lot of different people on various sites - contractors, consultants and client side alike -involved within that part of the process and everything has moved very fast, for the past 18 months or so, through that phase, as a necessity really, in order to achieve the required delivery, but to get that feedback loop successfully operating in that sort of environment has been challenging, but I think it's worked relatively well.”*

Such ECI was advisable due to the nature of the DCO system:

*“Again, we go back to the essence of the DCO process where a more developed design would be desirable in all other things being equal, to take to a DCO because of the rigidity of the outcome and I guess, certainly from my knowledge, not being involved at the time, there wasn't a huge degree of contractor involvement at that stage to participate, so effectively, some decisions became fixed and difficult then to effect change in that way.” (Interviewee 33)*

Interviewee 29 felt some more ECI could be helpful, albeit there was a balance between costs and benefits:

*“I think early contractor involvement in a selective way can often be helpful because you clearly need to draw the line somewhere and the sheer cost of producing detailed designs is too much to*

*bear before you've got your in principle consent, which is what the DCO is, but in terms of certain, key things like on the A14, had we had the contractor appointed, then we would have had greater certainty on things like borrow pit requirements”.*

Interviewee 32, however, had a somewhat ambivalent attitude to Early Contractor Involvement:

*“If you've got the contractor who is already in contract and committed to building the scheme and is able to give you committed preferences on things; if they can say, 'yes, I'm going to concrete buffers and steel beams' and if they can commit to particular construction techniques, then it enables you to be a little more certain about what you say in the Environmental Statement and how you assess the scheme. You don't have to put as much margin in to various assessments, if you know exactly how the construction compounds are going to be and the vehicle movements a day that would be muck shifting up and down the route. If you've got all that on board, then it is possible to be a little more certain, but the reality is that even when you've got a contractor on board, the level of design and the level of development that that contractor has done at that stage where it would need to have done it, usually isn't enough to be that much committed, they wish to keep their options open at that stage. So even if you've got a contractor giving you good advice, it's difficult to really commit that much. Generally, my experience is they won't commit that early on because a year later, the market will have change and steel could become expensive, or cheap - things change... People talk about early contractor involvement is going to solve everything, the truth is, even without having a contractor on board, we do get construction advice”*

Regardless of the advantages and disadvantages of ECI, Highways England apparently do try to have a project manager who is with the scheme all the way through and this has proven useful. Furthermore, Highways England did have their main suppliers write a ‘lessons learned’ tool kit on the A14 DCO which can be used for future projects, demonstrating a positive approach to organisational learning.

Another area of discussion was the pre-application stage. Interviewee 31 felt it was important to allow adequate time pre-application for full cooperation “because once the clock starts ticking you're up against it”. Interviewee 25 felt on some issues more detail was required up front to properly understand impacts for affected landowners. Similarly, though, for Interviewee 33, the key point of learning for future was the degree of design work required pre-application for a successful DCO: “I guess the over-riding point, which has probably come to light more and more as the design process has gone on is the need to have a quite well-developed scheme in terms of what is actually taken to the DCO.” There was some concern about greater flexibility and whether this might reduce some of the benefits of the new system:

*“I think, if there is to be more flexibility in the outcome of the approval through the DCO process, then the danger is that it starts to go back towards the former system, so I can understand the benefits in the change that's been introduced this way. The public inquiry type process was more confrontational perhaps in some ways between the various parties and have the tendency, or certainly the risk, to be rather more drawn out as the fixed timescale of the DCO process is obviously beneficial in those respects and with it comes the requirement to look at things in a different way; that's why I say we've come to a position of accepting the benefits and the reasons for the change, it probably just means that the design has to, effectively, be progressed to a far greater detail, in an ideal world - I have to stress that - so that we can begin to understand the constraints to all parties, but in an ideal scenario, if the scheme was designed to a greater level of detail, then those discussions/consultations with the stakeholders and the affected parties, could take place in a more meaningful way and then there would be, what you might describe as less change within what, for this scheme, has been the detailed design phase, post-hearing, post DCO. Again, you have to balance that with the risk of not gaining consent through the DCO process and the much greater investment that would be required to reach that point without any guarantee; so*

*whilst expressing these thoughts and perhaps views, personal that they might be, rather than corporate, then I do understand the basis of the constraints that sit behind them.” (Interviewee 33)*

The promoter acknowledged the large number of amendments made to the DCO during examination, and felt whilst unpopular these had improved the scheme and responded to concerns raised by statutory consultees and landowners. They felt landowner engagement would continue to be challenging, but as an organisation they could improve statutory consultee engagement in future:

*“We’re certainly advocating even more forceful discussion with the statutory bodies beforehand. We’re coming up with corporate level agreements with National Grid, with Environment Agency, among others, for service level that we would expect and that we would provide in return to try and stop that sort of thing from happening again.” (Interviewee 23)*

Better engagement of statutory consultees does, however, raise resourcing issues. Indeed, from the perspective of the other key public sector actors in the system, and as a result of his experience on this project, Interviewee 31 advised local authorities to “not underestimate the amount of resources they need”.

Suggestions were also made in relation to the issue of community engagement. A participant in focus group 4 felt the form of community engagement pre-app for DCO projects could be better, utilising best practice seen in other regimes such as a recent workshop he had been involved in with relation to a City Deal:

*“Through a series of workshops, I think they put together something like eight over a week and the same group of people, interested campaigners came along and over the eight weeks, it did actually gel together, people started to understand each other’s point of view. One of the difficulties is you get different campaigners all have slightly different views - and sometimes very different views - but the workshop does, at least, allow everybody to try and converge, to get a common message, and I think that process, rather than this divide and conquer approach of the DCO, could have merit, if you genuinely want to create a consultation that could work.... I think, generally, there is scope because certainly, my feeling is people are not nimbies in the total sense, they understand there is a need, but it needs to be done with a bit more thought for all the impacted communities.”*

Interviewee 30 felt the project had reminded them of the importance of effective engagement pre-application as “the key to unlocking these schemes as they move forward and if we get that right and we get everything resolved in the early part of the project, as far as it can be, then our engagement with the NSIP process is much smoother”.

The A14 is the largest highways scheme in England for about twenty years, and certainly the largest to have come through the DCO route, and had promoted Interviewee 31 to wonder if six months was sufficient for an examination into a project of this scale. He felt it meant it was difficult to “get to grips with the huge amount of detail” and commented:

*“So yes, the process is much better than the old way of doing it, but I think a scheme of this size, maybe nine months would have been a bit more realistic timescale and I think, at the end of that process, we’d have had probably complete agreement ... all these issues would have been bottomed out, or at least crystallised. So I think, towards the end, you’re very much on a sense of a train headed towards the buffers and throughout, we were trying not to pull the emergency cord on that train, don’t get the train to stop, just make sure it takes the right path, was the strategy we took.”*

On a slightly different note, Interviewee 33 explained that some complexities around land acquisition had become apparent through this project. Apparently under the former CPO route, notices were served prior to a scheme commencing but then only confirmed at the completion of construction when

it was clear where the boundaries would lie and what the actual land take was with the according final settlement of the payment. Under the DCO General Vesting Declaration process:

*“There is a requirement to get things in place up front and if there are opportunities to effect some design changes throughout the construction phase, which would result in less land take - even if it's only by a few metres - then the opportunity is almost lost by having to invest the land up front. There is a mechanism to redress that and sell the land back to the landowner, but that is yet to be tested as to how that might work. It's a messy process in terms of having to convey land in one direction and then back again.”*

A resolution to that would be an apparently useful change to the system.

The importance of having the ability to make temporary use of land was Interviewee 29's main takeaway lesson from the A14 DCO: “being able to go on and take temporary possession of land before you want to acquire it is really important and if I were doing future projects, I'd want to make sure that we had that safeguard of that flexibility in place.”

Finally, Interviewee 32's main take away lesson from the A14 project was the importance of “adherence to the ins and outs of the Planning Act. In the early days, while we were all learning, they didn't necessarily appreciate ... there's so many requirements buried in there, consultation and notification, making sure the right people are notified of the right things. It's not so much engineering, it's more about playing by the rules of the Planning Act - a new set of rules - and we're all learning those new rules. It's quite difficult to identify the various groups and the various notices and everyone who has to be notified”

## **Evidence from written feedback supplied to the UCL team**

In addition to the interview and focus group participants, a number of different parties with an interest in the scheme supplied the UCL team with written comments / papers relevant to the project.

### **Further information on detailed design of highways projects**

John Border, a consultant with Arup, sent a paper which explains the level of design that is normally carried out at the preliminary design stage for highway schemes and which elements are not carried out until the detail design stage (whilst noting that there is not an absolute fixed line between preliminary and detailed design, with judgement to be made about what to include when). In this paper, reproduced in Appendix H, ‘Preliminary design’ is defined as “all the design and scheme development carried out in advance of applying for ‘planning permission’, and is the design on which any Environmental Statement, draft Scheme Orders, Land Purchase, etc is made” and ‘Detailed design’ is defined as “the further design work that is then required in order to be able to construct the scheme”.

The paper notes that “The minimum level of design development carried out prior to DCO application is a 1:2500 scale preliminary design suitable for the following:

- 1) Identifying the required scheme land take footprint in the DCO
- 2) Identifying the effects on rights of way
- 3) Allowing an Environmental Impact Assessment to be carried out to identify and mitigate environmental impacts
- 4) Enabling a scheme budget to be developed with a suitable degree of accuracy
- 5) Developing credible and efficient construction methodologies

- 6) Permitting 'approvals in principle' 'no objection in principle, outline consents, etc to be obtained from relevant stakeholders such as the County Council, Natural England, Environment Agency, Network Rail
- 7) Holding meaningful consultation with general public and affected parties"

This preliminary design is not sufficient, however, for the scheme to then be constructed, containing insufficient information to develop all the necessary details for construction (which normally relies on plans at 1:500 scale, for example).

Reasons for doing less detailed design early include:

- Cost – detailed design for a scheme of the size of the A14 Cambridge to Huntingdon would apparently be around £25-£30 million which is “generally considered far too much public money to spend ‘at risk’ – ie before the necessary consents and permissions are in place”
- Programme – detailed design could take another 12 months for a scheme like the A14, delaying the point at which the DCO application could be made
- Risk – if detailed design is done early, then changes that are made (e.g. as a result of the Examination), would have a larger impact in terms of time and cost revising the detailed design, and a perception the promoter is committed to certain solutions simply because they have already carried out the detailed design
- Consultation – if too much detail has already been designed and so fixed, consultation is not a credible process
- Flexibility – preliminary design is usually carried out before of the appointment of construction contractors (except ECI schemes), and not doing the detailed design earlier leaves room for the market place to determine economic methods and options for construction (e.g. over materials, suppliers, specific construction techniques) to allow better value to be achieved at the tendering stage
- Detailed design on site – road schemes are apparently more susceptible than other building schemes to ground conditions so even despite best planning and surveys, the final 5% of detailed design is best done on site when construction is underway. Furthermore, the interrelation of elements means for the final detailed design of some elements, other elements must similar be fixed (e.g. road alignment for bridge design).

In contract, reasons for doing more detailed design early include:

- Clarification of areas of concern of risk – for example from stakeholders wanting more detailed information on a topic important to them, to get more certainty over the budget of high cost items, or due to the long-time taken for things like utility diversions of railway possessions
- To accelerate the overall scheme programme – particularly is some items of detail critical to the programme later on

In balance between these factors, the promoter may be concerned that pre-application, when the DCO is not granted and further changes to the scheme are quite likely, the time and cost do not justify detailed design as this stage.

### Community responses

A local resident and parish councillor (writing in a personal capacity), responded to the key issues of concern for the project in writing. She had been involved in the Parish Councils working party on the A14 and went to a number of public meetings with Highways England. These meetings are described as *“a farce as nearly every question or point raised was met with the same ‘dead bat’, either at the meeting or in subsequent correspondence – the current rules say we can do this, so we will do it. That, despite evidence of more recent WHO standards, European regulations on air quality, etc.”*. The respondent’s experience of the A14 project was that the pre-application consultation was not genuinely collaborative,



with the promoter apparently not making people feel listened to or like evidence and concerns raised were taken seriously: “They physically were present but conversations were most frustrating”. The main issues being raised were over air quality, route choice, rat-running on local roads, changes to elevations of local roads over the new alignment, noise concerns and environmental issues (wildlife and trees in particular).

The NPS document was something this respondent was aware of, but she comments that:

*“It simply reinforces whatever current standards and regulations are in place, it makes no accommodation for more recent evidence of the need to change those standards and regulations. It neither makes sufficient requirement to explore different solutions in light of changing local situations – in our case, large quantities of new housing, reclaimed air force sites for both business parks and housing, local development of 2-lane routes which could be expanded upon. In addition, it requires no attention to be paid to rising pollution levels generally and specifically, except what might exist in the old rules.”*

The National Networks NPS was designated just after the application was made, but Highways England did then apparently issue a compliance statement with it.

At examination, the respondent reported that the lead examiner did seem to listen and ask Highways England and their lawyers to review things but it was “always the same outcome – within current rules so it is an expensive farce”. She did not feel the issue of air quality was adequately dealt with at examination. Post-consent, there are local concerns about tree and hedgerow removal and construction traffic. The result is that the apparent take-away lesson from the A14 DCO experience is:

*“Do not trust this process. It seems that the only way to make any significant change to the early plans must be outside of this system. It is a closed loop which simply costs tax-payers millions of pounds, frustrates those trying to work collaboratively for the best outcome – recognising the need for national infrastructure – and develops massive distrust with our government and its agents.”*

Another person who contacted us, who has been involved with the Campaign for Better Transport (but also writing in a personal capacity), highlighted that the improvement works had led to the closure of the bus stop alongside the A14 used to access the Cambridge Crematorium with no alternative bus access possible, and described this as ‘disturbing’. An article in the *Cambridge News* reported this, noting comments from the bus operator that they had not been consulted before the lane closure was put in place (Pilgrim, 2017). Dr Norton was also concerned about the removal of many other local bus stops along the A14 over the years before the improvement scheme and whether these might be reinstated on the new ‘local road’ being constructed as part of the project.

Finally, a response to the scope of this research project was sent to us by the Brampton A14 Campaign Group (BCG). The BCG comment that:

*“Based on full participation in the A14 scheme DCO submission and Examination in Public process in 2015, Brampton Campaign Group (BCG) consider the current system is skewed in favour of Highways England (scheme promoter) and does not meet the criteria of ‘an effective, accountable, efficient, fair and inclusive system for the planning and authorisation of national infrastructure projects’. Nor does it support cost effective infrastructure delivery or provide appropriate protection for affected communities”.*

There have apparently been particular concerns about design issues (including a request for a scale model of the proposed new Brampton Interchange), visual intrusion, value for money issues and statements of common ground and the consideration of alternative schemes.

The BCG do have concerns about “Highly complex, technically dense and long documents being prepared which are costly and impenetrable by the lay person wishing to engage with the process”. In terms of community engagement, they comment:

*“The detailed discussions of the issues were also heavily weighted in favour of the scheme promoter (HE) who had lawyers (a QC and a solicitor) to present the case, specialist HE staff and consultants to support it and easy access to public funds. Parish Councils and residents groups, however, had to find their own funding for expert advice/support or fight their case themselves. This meant a steep learning curve on planning and policy and law issues, the examination process and the transport, public health, environment, value for money and design issues related to the scheme itself... The new time constraints and tight timetable for providing evidence/response to PINS questions, and commenting on HE responses to questions, were particularly demanding. HE made this process even more difficult by providing a plethora of obfuscating documents as their response instead of a clear and concise reply.”*

The BCG response suggests that perhaps Highways England ‘jumped the gun’ in submitting their DCO early before having considered alternatives and before “all options for reducing congestion on the A14 between Cambridge and Huntingdon (the purpose of the A14 scheme) had ... been considered”. BCG suggest that other Secretaries of State should be consulted before projects are approved (for example Health, in relation to air quality issues and related mortality rates). They conclude that:

*“BCG contends that the A14 scheme is not compliant with current UK/EU/WHO transport, environment and health policy and law or UK sustainable development principles. These overarching issues should be addressed first so that nugatory work on a sub-standard, non-compliant project, which will increase and lock-in road traffic air pollution and increase the proven risks to public health, can be avoided.”*

## Conclusions

The A14 Cambridge to Huntingdon Improvement Project is a very large NSIP now under construction. The experience of the DCO project has clearly already been one from which a number of stakeholders, including the promoter themselves, have been able to learn a number of lessons and gain useful experience to apply in future projects.

The project has not been one where there have been critical problems relating to issues of lack of flexibility. Flexibility has been built into the DCO, for example through limits of deviation, temporary use of land and the requirements. Whilst there have been some minor issues relating to detail from the DCO constraining construction, none of these appear to be ‘show stoppers’ and the DCO as consented is described as ‘implementable’. There have been some drivers for further detail at various stages of the project from community groups, statutory consultees, local authorities and community groups. There does seem to be some feeling that there was a rush on the part of the promoter to get to Examination and some of the requests for detail might have been avoided had more time been spent pre-application (there may be funding issues here constraining this), however changes made to the DCO and the use of requirements has demonstrated a willingness to respond to many concerns raised.

There are, however, a number of concerns that have been raised around community engagement in relation to the A14 project. The promoter clearly did engage consultants and put some considerable effort and resource into engagement pre-application, and some changes were apparently made to the scheme as a result of this. There are, perhaps, some understandable anxieties from those having a large new road built near them which are always going to be present however much engagement is carried out simply because the road is being built near to them. Some issues raised, such as questions about

alternative transport strategies and whole network policies reducing the need for the new road and in relation to air quality are much bigger issues which any part of the planning system would struggle to cope with (despite their vital importance to society as a whole) and thus become difficult to answer through the DCO process. Nevertheless, it does appear that some lessons might be learnt here for future projects. This would include the importance of transparency of engagement (clear information summarising changes made as a result of the engagement, or explaining changes that can't be made), ensuring engagement is meaningful and able to influence the scheme rather than being a 'Decide and Defend' type approach, and ensuring the transparency of the discharge of requirements. If more detail is being decided post-consent then it is vitally important to ensure there is sufficient opportunity for meaningful engagement on this: there cannot be an appearance of engagement 'dropping off' once the Examination ends if there are still matters being determined after it.

Finally, other themes again emerge around Early Contractor Engagement, continuity of project management between consent and construction, the resourcing of statutory consultees and local authorities, and engagement with landowners and the importance of being able to make temporary use of land. Many of these reinforce those made by the general interviewees.

## **8. Findings: Galloper Offshore Wind Farm**

The Galloper offshore wind farm is a National Significant Infrastructure Project originally promoted by SSE Renewables and now promoted by a joint partnership between Innogy SE, UK Green Investment Bank (GIB), Siemens Financial Services and Macquarie Capita and currently under construction off the coast of Suffolk. A DCO application was made to the Planning Inspectorate on 21 November 2011 and granted by the Secretary of State for Energy and Climate Change on 24 May 2013. An application for a non-material amendment to the DCO was made on 27 January 2015 and granted on 2 July 2015. The scheme involves:

“The installation, operation of Galloper Wind Farm, a proposed offshore generating station and its associated electrical connection. The Galloper Wind Farm generating station would involve the development of up to 140 wind turbine generators, with a maximum capacity of 504MW encompassing an area of 183km<sup>2</sup> within three areas. Export cables would be brought to shore and a proposed substation would be constructed to connect the project to the national grid network via existing adjacent transmission towers. Includes new electric downlines and sealing end compounds to connect the wind farm to the existing 400kV network.” (PINS 2017b: online)

Due to issues relating to the project’s financing, a ‘project optimisation’ exercise resulted in a reduction to 56 turbines and reduction in generating capacity to 340 MW after the DCO was granted. This then resulted in a smaller onshore substation being needed, and it was decided to move the location slightly to within the grounds of an existing substation. As these changes to the associated development consented under the DCO fell outwith the red line boundary of the DCO, additional permission was required either through amending the DCO or through a Planning Permission under the Town and Country Planning Act. A Planning application for the substation was made to Suffolk Coastal District Council on 28 Feb 2014 and granted by them on 21 May 2014.

The wind farm represents an expected investment potential of around £1.5 billion. It is estimated that the average annual generation expected at the site will be equivalent to the approximate domestic needs of around 336,000 average UK households (Galloper Wind Farm, 2017). An overview map of the project is included below (Figure 12).

Initial onshore ground work construction commenced in June 2014, however there was then a pause due to the original promoters (SSE Renewables) withdrawing support for the project. Onshore construction works then resumed in October 2015 and offshore construction works started in summer 2016. Construction is due for completion in March 2018 (Galloper Wind Farm, 2017).

The findings reported here are based on desk based and qualitative empirical research conducted by the UCL team. The first stage of this was a careful reading of the documents relating to the project on the PINS website (PINS, 2017b), in particular considering the Examining Authority’s Report, the Secretary of State’s Decision Letter and the made Development Consent Order in relation to the themes of this research.

The second stage was then data collection through a series of six interviews around this project. The interviews included those associated with the promoter, their legal advisor, three statutory consultees, and local government. Local community and civil society groups were invited to a focus but none attended. In all cases the interviews were digitally recorded and fully transcribed. These transcriptions were then coded to bring out the key themes and issues.

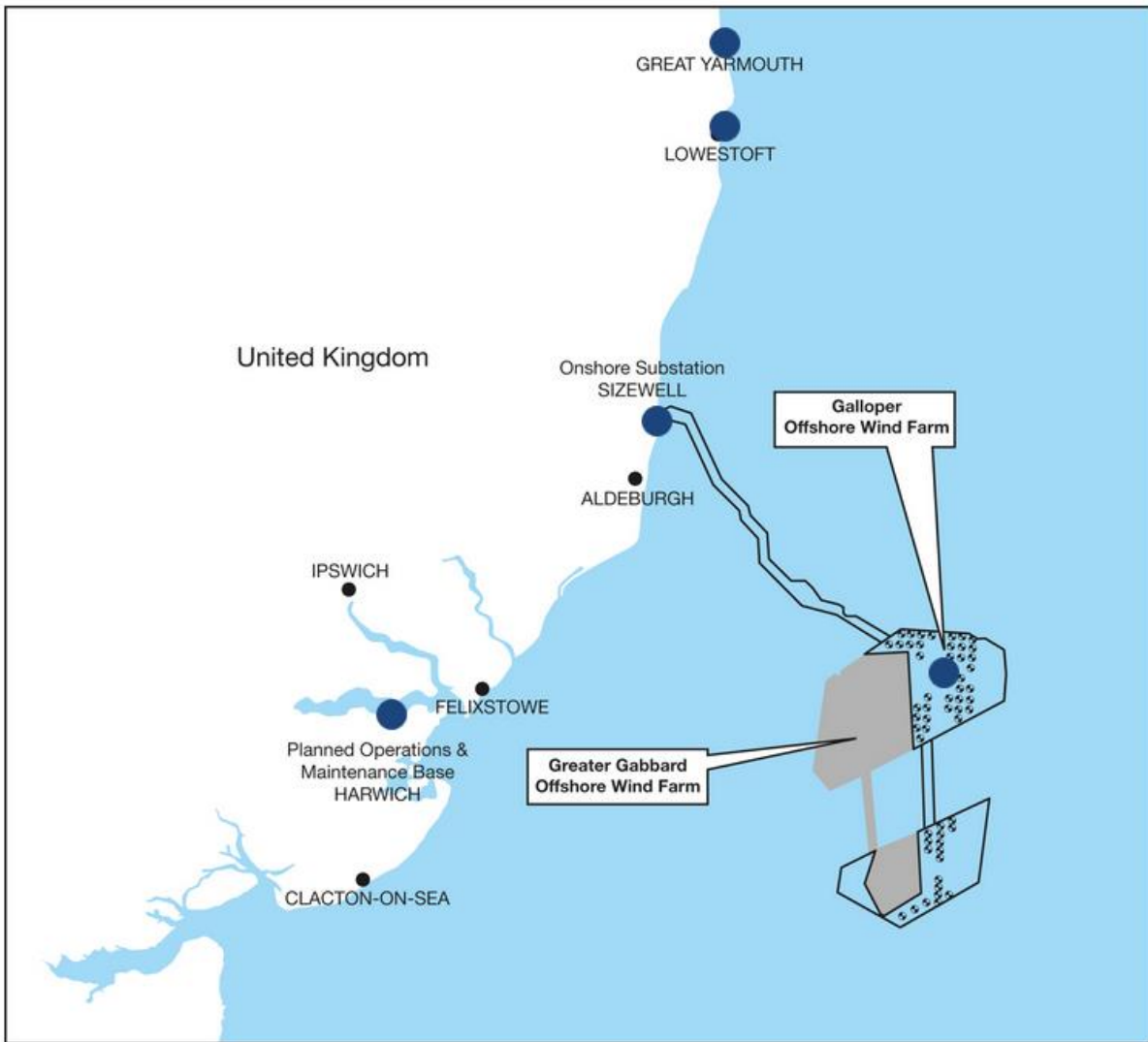


Figure 12: Location of the Galloper Offshore Wind Farm (Source: Galloper Wind Farm Ltd, 2017)

The final stage was a site visit a site visit to location by the UCL project team at the start of February 2017. The photographs below (Figures 13-24) taken during that visit illustrate the environment around Sizewell and current construction activity of the substation there.



*Figure 13: Sizewell beach, where the Galloper connector cable comes ashore. (Source: Ben Clifford, 2017)*



*Figure 14: Sizewell beach, where the Galloper connector cable comes ashore. (Source: Ben Clifford, 2017)*





Figure 15: Sizewell beach, where the Galloper connector cable comes ashore. (Source: Ben Clifford, 2017)



Figure 16: Galloper information sign at Sizewell beach. (Source: Ben Clifford, 2017)





Figure 17: Construction site signage in Sizewell. (Source: Ben Clifford, 2017)



Figure 18: Entrance to the sub-station construction site, Sizewell. (Source: Ben Clifford, 2017)





Figure 19: Construction works for the Galloper sub-station, Sizewell. (Source: Ben Clifford, 2017)



Figure 20: The sub-station for the Galloper offshore windfarm, Sizewell. (Source: Ben Clifford, 2017)





Figure 21: Construction of an earth mound as visual mitigation at Galloper sub-station. (Source: Ben Clifford, 2017)



Figure 22: Tree planting as visual mitigation at Galloper substation. (Source: Ben Clifford, 2017)





Figure 23: The Galloper sub-station under construction, as seen from the road in February 2017. (Source: Ben Clifford, 2017)



Figure 24: Galloper information board adjacent to the Sizewell tea hut. (Source: Ben Clifford, 2017)

## Evidence from desk based research

The documentation relating to the DCO for this project on the PINS website were examined, in particular the Examining Authority's Report (Bessell et al, 2013), the Secretary of State Decision Letter (Scott, 2013a) and the final consented DCO (Scott, 2013b).

The key issues for the offshore wind farm seem to have related to ornithology issues and the Secretary of State's decision letter notes significant debate around project mitigation between the Application, Natural England, the RSPB and the Examining Authority (Scott, 2013a). There was also concern as to cumulative impacts (the Galloper wind farm being directly next to the existing Gabbard one), with the decision letter noting that "the Secretary of State must consider whether a project...is likely to have a significant effect on a European site or a Ramsar site either alone or in combination with other projects". There was also some discussion of fishing interests offshore during the Examination. Onshore the key issue was the location of the substation, as the Examining Authority report explains:

"The onshore site lies within the Suffolk Coast and Heaths Area of Outstanding Natural Beauty(AONB) and this was a matter that was of particular concern and identified within the Local Impact Report (LIR) submitted jointly by Suffolk Coastal District Council (SCDC) and Suffolk County Council (SCC) (the Councils).....However, all reasonable alternatives have been considered and there is agreement with the Councils that the proposed landscape mounding and planting will over time limit the landscape and visual impacts and that there no other alternative is available." (Bessell et al, 2013: 188).

Flexibility was used in this DCO, with an 'envelope' assessment [the 'Rochdale Envelope'] type approach and a 'not environmentally worse than' approach to both the offshore wind turbines and onshore substation. This can be seen in the wording of Schedule 1 to the DCO, which outlines the authorised development (see Box 10 below). This was commented on in the Examining Authority's report, for example noting the landscape and visual effects of the substation, they comment "A worst case scenario is assessed, defining the substation broadly because of the desire to preserve flexibility for future design" (Bessell et al, 2013: 126), whilst in relation to Habitats Regulation Assessments they comment "In reporting and using the information provided by the parties to recommend how and what mitigation level we believe it is necessary to deliver to achieve a position of 'no likely significant effects' we have had full regard to the: uncertainty and or flexibility of elements of the project and data" (Bessell et al, 2013: 191).

*Box 10: Wording of the Galloper DCO demonstrating flexibility for the construction of the offshore turbines, onshore substation and grid connectors (Source: Scott, 2013b: 20)*

Work No. 1—

- (a) an offshore wind turbine generating station with a gross electrical output capacity of up to 504 MW comprising up to 140 wind turbine generators each fixed to the seabed by one of four foundation types (namely, monopile foundation, space frame foundation, suction monopod foundation or gravity base foundation), fitted with rotating blades and situated within one or more of array areas A to C whose coordinates are specified below, and including the further works comprising (b) to (e) below;
- (b) up to one accommodation platform fixed to the seabed by a monopile or space frame foundation within the array areas;
- (c) up to one collection platform fixed to the seabed by a monopile or space frame foundation within the array areas;
- (d) up to three meteorology masts fixed to the seabed by a monopile, space frame, gravity base or suction monopod foundation within the array areas;
- (e) a network of cables laid within the array areas between the WTGs, the meteorology masts, any collection platform, any accommodation platform and Work No. 2, for the

transmission of electricity and electronic communications between these different structures, including one or more cable crossings;  
and associated development within the meaning of section 115(2) of the 2008 Act comprising—  
Work No. 2 — up to three offshore substation platforms fixed to the seabed by monopile or space frame foundations within the array areas;  
Work No. 3A — a grid connection or connections between the different offshore substation platforms comprising Work No. 2 and between Work No. 2 and Work No. 3B consisting of up to three cables laid along routes within the Order limits seaward of mean low water spring tides, including one or more cable crossings;  
*In the county of Suffolk, district of Suffolk Coastal*  
Work No. 3B — a grid connection consisting of up to three cables laid underground from mean low water spring tides to the south of Sizewell at reference point A to Work No. 4;  
Work No. 4 — up to three transition cable jointing bays, with cables, to the south of Sizewell Gap connecting Work No. 3B to Work No. 5;  
Work No. 5 — a grid connection consisting of up to nine cables laid underground from Work No. 4 to Work No. 6 running in a westerly then northerly direction and going under the unnamed road at reference point B and under Sizewell Gap at reference point C;  
Work No. 6 — an electrical substation compound at Sizewell Wents approximately 10 metres west of Work No. 10 with an underground electrical connection to Work No. 10;  
Work No. 7 — a screening landform adjacent to all or part of the northern, western and southern boundaries of Work No. 6.

Provision was made for the temporary use of land for both the carrying out and maintenance of the development (see Box x, below), with temporary use of land seen as a route to flexibility in DCOs.

*Box 11: Wording of the Galloper DCO in relation to temporary use of land (Source: Scott, 2013b: 13-14)*

Temporary use of land for carrying out the authorised project  
23.—(1) The undertaker may, in connection with the carrying out of the authorised project—  
(a) enter on and take temporary possession of the land specified in columns (1) and (2) of Schedule 5 (land of which temporary possession may be taken) for the purpose specified in relation to that land in column (3) of that Schedule relating to the part of the authorised project specified in column (4) of that Schedule;  
(b) remove any buildings and vegetation from that land; and  
(c) construct temporary works (including the provision of means of access) and buildings on that land.  
Temporary use of land for maintaining authorised project  
24.—(1) Subject to paragraph (2), at any time during the maintenance period relating to any part of the authorised project, the undertaker may—  
(a) enter on and take temporary possession of any land within the Order land if such possession is reasonably required for the purpose of maintaining the authorised project;  
and  
(b) construct such temporary works (including the provision of means of access) and buildings on the Order land as may be reasonably necessary for that purpose.

The requirements of the DCO are used to govern the flexibility provided. They provide a time limit for the development to be carried out, design parameters for the wind turbines (and a process for approving the design through the Secretary of State) (see Box 12) as well as requirements in relation to offshore safety management, aids to navigation and offshore decommissioning.

*Box 12: Wording of the Galloper DCO requirements in relation to design parameters for wind turbines (Source: Scott, 2013b: 25)*

Design parameters for wind turbines

3.—(1) No wind turbine generator forming part of the authorised development shall—

- (a) exceed a height of 195 metres when measured from LAT to the tip of the vertical blade;
- (b) exceed a height of 120 metres to the height of the centreline of the generator shaft forming part of the hub when measured from LAT;
- (c) exceed a rotor diameter of 164 metres, or have a rotor diameter of less than 107 metres;
- (d) be less than 642 metres from the nearest WTG in either direction perpendicular to the approximate prevailing wind direction or be less than 856 metres from the nearest WTG in either direction which is in line with the approximate prevailing wind direction;
- (e) have a distance of less than 22 metres between the lowest point of the rotating blade of the wind turbine and MHWS.

(2) In sub-paragraph (1), references to the location of a wind turbine generator are references to the centre point of that turbine.

Approval of detailed wind turbine design parameters by the Secretary of State

4.—(1) The authorised development shall not commence until the Secretary of State has received the Approval Application and issued the Approval Notice.

The requirements contain many provisions in relation to the governance of the onshore construction works associated with the substation and grid connectors, for example allowing for flexibility in detailed design subject to sign-off by the local planning authority (Box X), and the need for approval from the local planning authority (in consultation with the County Council and Natural England) in relation to landscaping. Provision is similarly made for approval of fencing, drainage, archaeological surveys, an ecological management plan and a code of construction plan and control of construction hours to be agreed with relevant authorities after the DCO has been granted but before relevant construction starts (for example, Box 13). The DCO also incorporates a ‘Deemed Marine Licence’ and protected provisions for statutory undertakers.

*Box 13: Wording of the Galloper DCO requirements in relation to approval of detailed design for onshore construction and the Construction Code of Practice (Source: Scott, 2013b: 29-32)*

Stages of authorised development onshore

19. Neither the connection works nor the transmission works shall be commenced until a written scheme setting out all the stages of the relevant works has been submitted to and approved by the relevant planning authority.

Detailed design approval onshore

20.—(1) Except where the connection works or the transmission works, as the case may be, are carried out in accordance with the plans (or relevant parts of the plans) listed in Requirement 21, no part of the relevant works shall commence until details of the layout, scale, levels and external appearance of the same, so far as they do not accord with the authorised plans, have been submitted to and approved by the relevant planning authority. The relevant works must be carried out in accordance with the approved details, unless agreed otherwise by the relevant planning authority.

(2) Any works approved by the relevant planning authority under sub-paragraph (1) shall accord with the principles of the design and access statement submitted with the application for this Order and be within the Order limits.

(3) No building forming part of Work Nos. 6, 8A, 8B or 10, shall exceed the relevant height limit for its proposed location specified on the height restriction plan above the approved floor level for that location.

(4) The floor level of Work Nos. 6 and 10 shall not be higher than 9 metres AOD.

(5) Work No. 6 shall not be brought into commercial operation (excluding commissioning) until Work No. 7 has been constructed.

(6) The height of the relocated communications mast shall not exceed 15 metres AOD, and its

supporting pole shall not exceed 16 metres AOD.

(7) The width of the corridor occupied by the grid connection comprising Work Nos. 3B and 5, and any related associated development, once constructed, shall not exceed 23 metres, save for any part of the works where drilling is proposed, which part(s) shall not exceed 33 metres.

Construction code of practice

28. No part of the connection works or the transmission works shall be commenced until a construction code of practice relating to the relevant part of the relevant works has been submitted to and, after consultation with the highway authority and Natural England, approved by the relevant planning authority in relation to the relevant part of the relevant works. The code shall cover all the subject areas set out in the final draft code submitted as part of the examination and as certified by the Secretary of State and any other matters the relevant planning authority reasonably requires. The code approved in relation to the relevant part of the relevant works shall be followed in relation to those works, unless otherwise agreed by the relevant planning authority.

Flexibility is a significant issue for the Habitats Regulations, as the Examining Authority's report notes:

"In seeking to narrow the areas of uncertainty we sought confirmation from each of the parties on the parameters and evidence that should be used in reaching a conclusion on the level of mitigation required ... In reporting and using the information provided by the parties to recommend how and to what mitigation level we believe it is necessary to deliver to achieve a position of 'no likely significant effects' we have had full regard to the:

- uncertainty and or flexibility of elements of the project and data;
- technical feasibility of what is proposed;
- quantity and quality of what is proposed including not relying on a single method of resolution when there is any uncertainty about delivery and effect; and
- level of commitment provided to achieve the mitigation sought including tolerance to address any uncertainty." (Bessell et al, 2013: 191)

There is also some discussion of managing the construction of the onshore elements of the project, given the flexibility given in the DCO for this to be agreed later with the local planning authority, with the Examining Authority's report noting that:

"We consider that this results in potential uncertainty in relation to triggers for commencement of certain 'works' ... Requirement 27 is the Construction Code of Practice (CCoP) which is particularly important in this context as is Requirement 28 with regard to construction hours" (Bessell et al, 2013: 217).

Finally, as already noted, the DCO for this project has had a non-material amendment approved through the Secretary of State. This related to the wording of requirement 8, which governed the size of the turbine foundations for the offshore construction (see Box 14, below, for the wording). As the Secretary of State's decision letter explains:

"The Applicant is seeking consent for a change to the 2013 Order to increase the permitted monopile diameter from a maximum of 7.0 metres to a maximum of 7.5 metres. In order for the Applicant to be able to proceed with the construction of the offshore wind farm, it has concluded that it is necessary to increase the monopile foundation diameter to 7.5 m. With a diameter less than 7.5m it considers that it cannot design a foundation which meets the required harmonic frequency, stiffness and strength limits to satisfy the geotechnical and turbine design limits without exceeding the absolute limitations of mass and steel thickness imposed by the manufacturing and installation processes." (Scott, 2015: 1).

This proposed parameter change was compared to the worst-case scenarios applied in the original Environmental Statement and found to be within the limits for all but one parameter – the increase in the maximum pile diameter meaning greater hammer energy applied during construction. This was

a concern in relation to the potential for mortality or injury to marine mammal and fish species. The applicant updated their noise modelling and concluded that the impact would still be equal to or less than those presented in the original Environmental Statement. The Secretary of State's decision letter notes some dispute of this from Natural England, however the modelling and case of the applicant was accepted and the change granted (Scott, 2015).

*Box 14: The wording of the requirement to the Galloper DCO which was amended post-consent (Source: Scott, 2013b: 26)*

- 8.—(1) Each monopile foundation forming part of the authorised development shall not have a diameter greater than 7 metres.
- (2) Each monopile foundation forming part of the authorised development shall not be constructed in water with a depth greater than 45 metres between LAT and the seabed.
- (3) Each gravity base foundation forming part of the authorised development shall not have—
- (a) a diameter at the level of the seabed which is greater than 45 metres;
  - (b) a base height, where there is a flat base, which is greater than 7.5 metres above the level of the seabed;
  - (c) a column diameter, where there is a flat or conical base, of greater than 10 metres;
  - (d) a cone/column intersect which is higher than 20 metres above the top of the base;
  - (e) a cone diameter at its base which is greater than 35 metres.

## Evidence from interviews and focus groups

### Views on the system generally (beyond just this project)

As with the A14 interviewees, the Galloper case study interviewees often gave useful views on the DCO regime generally before commenting on the particular NSIP. In terms of the advantages of the system, Interviewee 24 felt the system offered more certainty over timeliness and also made things simpler where there might be several different local authorities involved:

*“I think it's got more certainty and it's a better way of doing things. I think, traditionally, I've seen projects where they had to have Town and Country Planning stuff through the local authority, two or three local authority areas, and it was just a nightmare, we couldn't get the consents, and then also, with the Greater Wash Section 36, where DECC just sat on their hands for three years because they didn't want to have to make a decision... , there's a very clear timetable on this and a decision has to be made within 12 months, so I think that's definitely a much better process.... what we've got now, with the planning act process, there's much more clarity ”*

The regime was compared favourably to the consenting process for offshore windfarms in Scotland.

Similarly, for Interviewee 26, the certainty of timescale was certainly a key positive of the regime:

*“It's definitely quicker for most projects, I think, once you have submitted and the fact that you've got that certainty, compared to the considerable uncertainty that you had in some of the previous regimes for some types of development, which still exist in other parts of the UK, there's no question that that's been a major benefit and I think, broadly, there is more certainty in the regime and there's also a very high success rate.” (Interviewee 26)*

Interviewee 27 also generally felt the system offered more certainty, in a number of ways:

*“Provided there is appropriate need for it and you can mitigate the environmental impacts that there is more surety and more certainty that 1) there will be a decision and 2) there will be a decision that is relatively favourable to the developer; obviously, it depends on the requirements, or conditions that come out of it as well, but at least there's a bit more certainty on time and result”*

He did feel, however, that “the cost is a lot” and it takes considerable time pre-application.



Interviewee 35 felt the examination process was better than the former inquiry procedures, and gave an examples of another DCO he was aware of where members of the public had been allowed to raise some very serious issues and these were responded to and considered in a way which would not have happened under an adversarial inquiry: “the examining authorities are coming to us, they do seem to be very willing to follow through on issues that have been raised by, not just the statutory planning bodies, but also the non-statutory kinds of bodies and local people”. There could, however, still be issues post-examination:

*“Even when we've had some projects with the Secretary of State for that determination, decision making period and they've been issuing questions and seeking further clarification ... So the end of the examination isn't the end of the process and that's what we have to keep telling the developers, there's another three months to go and actually, it's the last three months that makes all the difference ... when you see the letters from the Secretary of State, most of them include amendments of some kind or another, for all projects.” (Interviewee 24)*

Interviewee 28 felt that the level of engagement from promoters with statutory consultees pre-application could be variable, so that in some projects most issues were resolved before the examination but in others many were still outstanding:

*“That is the way that the process was intended, as I understand it, it was supposed to be front loaded, but as choice, it is not always necessarily the case that everything has been discussed sufficiently, so that you sometimes do end up in examination where you have significant, unresolved issues where you have questions about the way forward and not a lot of time to come to agreement and there is a lot of pressure from the panel because they want people to agree ... and if you've got a lot of new issues coming up because you haven't had sufficient engagement ... and you're going through it in more detail and you suddenly think you haven't noticed something because you hadn't seen this document and been aware of this fact and this is an issue and it's brought up in the examination process, it's not always easy”*

It is also notable that several interviewees commented on how pressurised the examination could be. Examinations could be ‘gruelling’ according to Interviewee 28 and their organisation had looked at the experience of the first few DCOs they had been involved in, which included Galloper, to try and look at how better to support staff in future. Interviewee 35 felt that “the DCO regime, it can be very hard work, very onerous and time can't stand still” with “intense pressure” during the examination, and that “some of the pre-application consultation process can be quite drawn out” but the certainty of timescale at examination and decision phase, and the ability to project plan around that, was an advantage.

All actors in the system had become more experienced, according to Interviewee 24, so at first you had Inspectors who had not dealt with the type of projects they were examining before, and you had legal advisors arguing over the definition of things like ‘maintain’ at examinations, but things had moved on since then. Interviewee 26 similarly explained how the system had evolved, largely positively, since its inception:

*“The Infrastructure Planning Commission had been put under orders to be ... [less engaging] in the way that they dealt with promoters ... We've now moved a million miles from that, so in that sense, it's a very good thing that the regime has been prepared to respond and change, partly because of government change, but also because there was a response to feedback within the PINS organisation, or what became the PINS organisation. So overall, I think it's a broadly positive story”*

On issues of detail and flexibility, Interviewee 34 understood the need for some flexibility in DCOs:

*“At the end of the day, you can't grant a development without the ability to alter it, dependent upon the circumstances that you find as soon as you put spades in the ground, it's the nature of the beast and when you're planning a project of that magnitude, there's always going to be what are relatively minor changes to it, the difficulty is, what's a minor change to something of that magnitude, making sure that it is reasonable to consider it”*

There was a real need for flexibility for offshore windfarm DCOs, as Interviewee 26 explained:

*“One of the reasons that offshore wind farms have needed flexibility is because of the very steady development in offshore turbine technology. When I started doing it, two megawatt machine were standard, six to seven megawatt machines are now the standard and that's going up all the time and that has direct relationship to the dimensions of the turbines and the number of the turbines and so on, so that has been a major factor, but in addition, it's not just the turbines in that sector, it's also the foundation designs - that's a big issue because of knock on effects, particularly around the potential for noise, when you're putting in the foundations and effects on marine mammals - and then there's also an ongoing issue, development on construction methods, so the level of technical innovation and the need to accommodate that is another factor.”*

Interviewee 24 felt routes to flexibility like the Rochdale Envelope type approach were well understood in the DCO regime:

*“I think developers are pretty good at coming up with a meaningful project design envelope and the likes of Natural England are pretty well versed in working with them to assess the worst case scenario; it's an approach we're all quite comfortable with and people like Natural England and the MMO, they understand the need for flexibility, they understand that from the point of gaining consent, it's going to be seven more years, possibly, until you actually start construction, so they understand that need to take account of how the supply chain might have changed”*

There were some concerns around levels of detail in relation to the system:

*“It seems to me that there's an incredible amount of work goes into these, with vast tomes of documents and plans and in fairness to PINS, they do seem to read it all, but I can't help feeling it's just over the top sometimes. I think you need a certain level of detail when dealing with key impacts, that might prevent you reaching consent, so I'm thinking of issues relating to habitats regulations, impact on birds and marine mammals, but an issue that the offshore wind sector in particular is guilty of - and this might apply to other sectors - is we're not good enough at scoping out issues from the EIA, so EIAs end up being lengthier and time and effort is spent assessing impacts that is never going to be significant.” (Interviewee 24)*

Interviewee 24 felt these issues were down to ‘all players’ really:

*“It's down to all players really. Developers should be pushing harder to scope issues out, statutory advisors should be more accepting of the evidence being presented to them for scoping issues out and PINS, in issuing scoping opinion, should be ... well, they're quite risk averse and I don't know whether that's partly down to in house knowledge and experience and so they're very much relying on what the precautionary advisors are saying, or whether they would just rather that things get played out during examination, but I think it's something for all involved in EIA to work on. I think if we were able to scope smarter, so that EIAs were shorter, then we would see a reduction in the level of detail having to be addressed through examination, but then having said that, you do need a certain level of detail to be able to meaningfully assess impacts and make sure that the DCO is correct.”*

Interviewee 26 helpfully highlighted a number of a drivers for detail in the regime. These included compulsory acquisition and the need to justify acquisition, client preference and EIA and the habitats regulations, local residents, local authorities, statutory consultees, and the Planning Inspectorate:

*“There is always pressure from the inspectorate to provide more detail and to limit the scheme - you almost never get pressure in the other direction - so that has an effect because of who they are, so you may give in to pressure that perhaps you shouldn't because it becomes a safer application.”*

Previous DCOs could also have an impact on acceptable levels of detail / flexibility:

*“The other pressure, or influence, is example of previous DCOs; inevitably, you look back and see what people have been able to achieve, but also what concessions people have made and you have to make decisions as to whether you're going to follow what's happened before ... sometimes, you get opportunities out of that, you're pleasantly surprised that people have got something and you therefore follow it, other times, you're very disappointed that either things have been conceded, or they've been imposed by Secretary of State and then you have a judgement call as to whether to re-fight those battles, or not” (Interviewee 26)*

Interviewee 27 explained that the Environmental Statement can be a driver to detail, as can promoters themselves:

*“ES's have become bigger because as a developer, you need certainty, therefore, you don't want to not put the information on it, an application, that's going to delay the process of delay and decision, so you basically, throw the kitchen sink in, get as much information in as you can and hope that's what is required.”*

Sometimes requests for more detail from various actors can be hard to respond to because of the way a promoter has approached an NSIP:

*“You do get some issues where there is legitimate pressure for more detail, but as a promoter, you may have committed yourself to a point where you can't actually easily provide it at that point, so I don't think it's ever going to be easy” (Interviewee 26)*

Interviewee 28 felt “detail needs to be brought in as early as reasonably practicable to do so, especially, as I say, because you've got a fixed examination period” but equally could understand some of the drivers for detail:

*“unlike when you're building something onshore, when you're building something offshore, you don't have that much knowledge on the history of the site and of the land, you've conducted surveys, but not necessarily ones to the detail because it's expensive to do them for the construction and it's not reasonable for them to be conducted prior to application because it would massively increase the cost and risk for the developer”*

Interviewee 35 felt more detail made the role of statutory consultees easier: “Sufficient detail, so that when it comes to recommending requirements, we are absolutely happy that they have carried out an adequate assessment of the impacts”.

### **Experience of the DCO system in general for this project**

Galloper was one of the first major DCOs to go through the Planning Act regime. Galloper was not a typical project, according to Interviewee 24, as it was an extension of the existing Greater Gabbard project, and because it was able to build the onshore sub-station right next to Sizewell, reducing the onshore issues. Nevertheless, it was still a large scheme going through a new consenting route. Interview 27 felt the DCO experience for this project specifically had been good, although there was lots of learning for all parties as it was a very early consent in the history of the regime: “ourselves and the regulators and local authorities and stakeholders were all learning as we went along as to how it all worked, but there was a lot of guidance out there, which was good”. There were, however, apparently some difficulties from the IPC not being that engaging in giving the promoter advice pre-application although this has moved on as the system has evolved and the IPC has been replaced by PINS.

The Energy NPS was very important as it gave the presumption in favour of granting the consent and provided a “useful framework for the decision maker that the applicants and other parties can take into account when they're preparing the applications; it provides a checklist” (Interviewee 26). Interviewee agreed that the NPS had been important in providing policy context for this project:

*“Commercial fisheries, for example, the potential impacts on commercial fisheries was an issue and the applicant wasn't able to reach into any statement of common ground with the UK bodies of fisherman and their Dutch and French equivalent, but the examining authority and the Secretary of State were satisfied that there was a policy imperative in the NPS that provided sufficient reason to proceed with issuing consent. So there are specific examples where it's been drawn out into the decision making.”*

Interviewee 27 agreed that the NPS was helpful in terms of structuring the DCO, but was concerned it might now be out-of-date:

*“It [the NPS] was quite key to how the Environmental Statement, in particular, was structured and written and how it was thought out during the scoping phase of the EIA, so at the time, it was very important. I don't know where it's ever been refreshed, or if there is any intention to refresh it, but I would have thought it would have been horrendously out of date and things have moved on a lot since then, but as a starting point, it was very good”.*

Interviewee 26 highlighted two key issues for the DCO for Galloper, around Habitats for the offshore windfarm and around land acquisition for the grid connector and sub-station:

*“The two, main pressure areas, looking back, were in relation to the habitats directive and the fact that we were effecting a population that was linked to an SPA near to the site - bird population - and the other issue was the interaction with EDF and the fact that we were seeking to compulsory acquire land for the substation extension and it turned out ... well, they revealed that our grid connection was going through the route of a site they were reserving, in their own minds, for cooling water for Sizewell C, which is an application some way in the distance, so both of those required a job of work to be resolved in the EDF relationship, I guess. The DCO process certainly puts you under pressure to resolve things and I think that's broadly a good thing”*

Interviewee 27 added that the examination process had been very stressful, with lots of pressure and work in short timescales and all parties really finding their way with a new system. Overall, however, the project achieved consent and a consent that is now being constructed.

Post-consent, the reduction in capacity to 340ish from an originally planned “up to” 504 Megawatts meant a smaller substation was needed but this was outwith the flexibility allowed in the DCO, so a Town and Country Planning Act permission was sought instead:

*“By making those slight tweaks, we've actually made the development better, if you like, for the locals because there's less footprint, there's less visual impact, various other things, but actually, the DCO didn't allow us the flexibility to do that - that may be our fault - not having the foresight to see that, actually, we many not build out to the maximum capacity we were allowed”*

The changes in the transformer and sub-station design were apparently driven by National Grid, in response to the reduced generating capacity. The decision to go via the Town and Country Planning Act rather than amend the DCO was due to concern about the time this would take, with a deadline to start generating energy by in order to obtain government funding:

*“So we went back to the drawing board and we had a reasonable local authority in place, so it was all done in just about the timescales that we required, but if we had had an antagonistic local authority, who was dead set against the development - it happens, a lot - that would have had to have gone to appeal and various other things before we'd even have got near it and that could have put the grid connection in doubt, which, ultimately, could have killed the project because the project we have is on a deadline for renewable obligation certificates ... when we made that*

*change, it was thought that the TCPA route would be the better one, given we had a decent relationship with the local authority and it was a good story to tell, the fact that we were reducing the footprint, so that was fine... due to the lack of certainty and the relative complexity of that, it was decided the TCPA was the better route” (Interviewee 27)*

This use of a planning application to vary the associated development is not unusual in the NSIP regime, but is itself an interesting commentary on the ease of amending a DCO.

## **Engagement with statutory consultees, local authorities and landowners for this project**

### Statutory consultees

A range of statutory consultees were involved onshore and offshore, and a range of concerns were raised. The overall feeling from the statutory consultees seemed to be that the promoter had engaged well with them, and that various statutory consultees had cooperated where required between them on their response and engagement with the project. For example, Interviewee 35 felt that the promoters were responsive to the issues they raised: “We had contact with them at the pre-application stage and then again during examination stage as well. I think, generally, they were very responsive, very engaging.” Equally, the promoter seemed to feel that engagement by statutory consultees had generally been very good, but it was notable some bodies clearly had separate teams working on the onshore and offshore elements, and this could sometimes cause delay and issues around coordination.

There were apparently some difficulties reaching agreement with Natural England over predicted impacts on bird life:

*“The key risk... is to try to reach an agreement with the relevant statutory nature conservation body - in that case, Natural England - as to what the predicted impact - in that case, the relevant SPA species would be - and that proved to be extremely challenging ... we then had to offer a menu of solutions, some of which went directly to the question of flexibility, that then had a knock-on effect with the predictions... the whole issue of predicted mortality is complicated” (Interviewee 26)*

Agreement was, however, reached on a ‘consentable’ range for the scheme. The promoter had apparently taken a slightly novel approach to mitigating bird mortality at Galloper, including not just changes to hub height and similar measures to reduce mortality at the generating site, but also contributing towards mitigation by supporting nesting colonies onshore: “I haven't seen this dual approach been taken seriously, not for any other offshore wind farm anyway” (Interviewee 24). There were apparently also some concerns over surface water disposal at the sub-station, which is quite a large site, and this is an example of detail which was driven by the Environment Agency.

### Local authorities

There seems to have been good engagement between the promoter and the local authorities on this project. Interviewee 26 felt there had been a very positive working relationship with Suffolk County Council and Suffolk Coastal District Council and those issues which did emerge were resolved effectively. Interviewee 34 agreed that promoter had been proactive in their engagement with the local authorities. No Planning Performance Agreement was signed, however, although there has been a “not insignificant” workload for them.

Interviewee 34 explained the main considerations for the local authority in relation to the project:

*“Clearly, there is an economic, social ... a gamut of what you would normally consider under a development management process, it's there about saying about natural beauty, but at the same time, there's the social importance of it as a national infrastructure project, but within that, the logistics of how it will happen, what the significance of the appearance will be, what level of mitigation is required and is achievable, but this followed, pretty much, hot on the tails of Greater*

*Gabbard as well and you were looking at cumulative impacts and at the same time, there were also, to some extent, cumulative impact issues to do with some of the work at Sizewell B.”*

There were no particular issues around the engagement with the local authorities, according to Interviewee 27, and the issues around mitigation raised were things agreement was reached over:

*“Local authorities, generally, were very good, very ... sympathetic is not the right word, but professional in their approach and they knew what they wanted, knew what they wanted in terms of mitigation - we agreed it over time - so they were fine, they engaged ... again, because they're used to such a big infrastructure project”*

The big issue onshore was around landscaping, and the promoter agreed to have a large mound surrounding the substation so that it was well screened.

### Landowners

The major land ownership issues seen in some other NSIPs were not seen here, perhaps given the very small onshore component to the scheme. Nevertheless, there was apparently a particular issue around compulsory acquisition of land, and the competing needs of mitigating impact but justifying land take for this project (which was eventually resolved by a deal which did not require compulsory powers):

*“Because we were in an AONB, we had to think very carefully about how the landscaping and the tree planting and so on would work with the substation, but at the same time because we were doing compulsory acquisition, we also had to be mindful of the normal rule that says you must be able to demonstrate that you're only taking the land that you absolutely need. So there was a lot of tension between those two things and the solution that we came up with was to put in two versions of the scheme in the original application and we said 'this is the version, that if we already owned the land, we think it's the best for the environment, as it were, but this is the alternative version that's more restricted in terms of a platform that we were having to build and the planting, the size of the platform and the slopes and what have you, this is the alternative version that we think is still acceptable in environmental terms,' but it does also meet the CPO test and those were very different designs; if you were to look them up, they were significantly different. So in the end, we didn't need to take that the whole way through because we were able to do a deal with EDF, and part of that deal was to use the better design, which involved the bigger land take”*  
(Interviewee 26)

Interviewee 27 agreed that there were some challenges around a nuclear power station owner being the landowner for the substation site.

### **Engagement with the community for this project**

There seems to have been a comparatively low level of community engagement with this scheme. According to Interviewee 26, the community had no particular interests in the windfarm as it is so far offshore: “on Galloper, our turbines are over the horizon, although the residents don't care about what they look like, but they did care about the sub-station because that was relatively close to them” . The planning history of the area, with previous major developments like Sizewell, also meant there was local understanding of consultation.

A similar view that the local community did not apparently have many concerns about this NSIP at all was presented by Interviewee 34:

*“I think the community - quite a localised community at Sizewell - they do have regular stakeholder meetings with these people and open days and I think it's worked reasonably well as a community because of what they have lived with over the years with Sizewell A and B and Gabbard, they are a community that has been used to living with these sort of large scale projects and I have to admit, the way the project is managed, the greatest impact, I suppose, has been on where highway speed*

*limits and things like that were introduced into the road and where they were perhaps moving plant into the site for a very limited duration, but fairly much self-enclosed and away from the community itself, but there's been very few direct complaints about anything"*

The promoter did apparently try to respond to some issues that were raised, however:

*"In terms of the local community, we have reasonable engagement with them, we weren't that worried at the time, it wasn't a case of some other schemes, whether it's an overhead line, or whatever that goes 200 miles through an AONB, it was a relatively short ... onshore cable and the substation itself, the onshore substation is in an AONB, which could have been a major issue for some local authorities and some local people; the fact that it was, in fact, within a few hundred metres of Sizewell A and B Nuclear Power Station kind of put things into context and also we tried to locate it next to an existing substation for the Greater Gabbard Offshore Wind Farm, so we tried to minimise it and we took their points of view into account, trying to keep all the infrastructure together basically. In general, there wasn't a huge amount of concern, but obviously there were some individuals that had some concerns that we tried to deal with, but there wasn't a huge amount of community interest" (Interviewee 27)*

Whether the lack of vociferous negative reaction from the community is related to action by the promoters or just the particular nature of this scheme is, of course, open to debate but it is clear that this NSIP is not characterised by strong local opposition in the way some others have been.

### **Particular issues around detail and flexibility for this project**

The issues around detail and flexibility seen with Galloper are in some ways quite typical of offshore windfarms. Offshore windfarms are generally at the higher level of flexibility within the DCO regime, and this NSIP was typical of that:

*"Offshore wind is at the outer edge of the level of flexibility that you could reasonably expect because you are saying 'there's a large area of sea, I don't want to commit to the precise number of turbines, I want up to x. ... there are some offshore wind farms where the site is very tight and that really does largely dictate what it's going to look like, but then Galloper was a relatively generous site. The DCO that we have ended up with meant that that scheme could have looked ... there were quite a lot of layout variations that were credible within that and I think that was very helpful to the project, it enables the design to be optimised in terms of energy yield that goes directly to ... well firstly, the amount of electricity that you're generating and also to the business case in a sector that's being subsidised and needs to improve its business case wherever it possibly can.'" (Interviewee 26)*

The Rochdale Envelope type approach was apparently 'at the heart' of the application, as well as use of limits of deviation both for turbines and for the cable route. Flexibility was built into the DCO with a menu of approaches to controlling ornithological impacts, with drafting essentially allowing an acceptable level of bird mortality to be agreed and then that applied to modelling to agree the turbine size and number of turbines.

Interviewee 27 explained that flexibility is an absolute necessity for offshore wind farms, and they had used the Rochdale Envelope approach to assessment to try and enable this:

*"We had to have those options in this, so that when we get contracts, or get offers in from the suppliers and the principal contractors, then we actually have a reasonable chance of actually getting something like this buildable for the money that it costs. Unfortunately, it's not the same as building a extension where you can actually go 'right, it's going to be this size.' You don't know with an offshore wind farm, just slightly changing the layout where the wind turbines are, having a slightly bigger one, having less with smaller foundation types, or different foundation types,*

*changes so much ... There's so many different variables ... but until you've actually got the certainty of the consent, you can't really drive it that much further forward"*

It is only once consent is given that a contractor is appointed to do the detailed implementation design work. This need for flexibility when working in a marine environment was apparent to statutory consultees: "there needs to be an envelope approach because of this uncertainty that is caused by working in the marine environment, so when it comes to the flexibility of a licence, we are aware that" (Interviewee 28).

The Examination can drive detail, and promoters can feel bound to respond to this to try and ensure they get consent, as Interviewee 27 explained:

*"We had questions on erosion processes hundreds of miles up the coast and that isn't a problem ... but again, you come back to the 'we should give an answer to that if we can' type thing because you get more certainty, so you spend time and energy and resources actually looking into relatively spurious matters that don't, ultimately, affect the decision."*

More specifically to Galloper, detail was driven around the sub-station design by issues such as statutory consultee and local authority concerns, but also due to the landowner: "we had a major interaction with EDF and their nuclear operations at Sizewell because we cut the shore very close to there and so that had an effect on detail" (Interviewee 26).

High levels of detail were apparently required around the Environmental Statement and the documentation required for a DCO application was voluminous, according to Interviewee 27:

*"I think, when we put the application, we had ... I can't even remember now, about 27 volumes of the ES, the Environmental Statement, plus every other document that had to go in - it was difficult to keep track of all documents that needed to go in - and obviously, you change one thing, you're almost repeating it on another one, so it was all the paperwork and making sure everything was consistent was tricky, but doable, but one does wonder about the value in terms of one's time in having to do the same thing two, three, four times ... ours was probably one of the shorter, certainly offshore wind DCOs, in terms of the amount of information we submitted; I've seen some since that are just absolutely huge and I don't know how everybody on the regulatory side, or on PINS side would even attempt to read them all"*

### **Particular issues around requirements**

The heavy use of the Rochdale Envelope type approach meant more had to be sorted out post-consent through the requirements. The Construction Code of Practice was used, along with other codes to help govern detailed design and construction issues:

*"There was Landscape Management Plan, and other surveys that needed to be done, DCO design drawings that needed to be improved, lighting schemes ... pretty much, all the detail needed to be sorted out later, which is fine, understandable and again, because we had a reasonable local authority, I think that was okay. Offshore, we've had a million and one things to do as well, as you can imagine, that's generally through the Deemed Marine Licence" (Interviewee 27)*

Part of the project was being consented on behalf of National Grid and the requirements were framed in a way that compartmentalised them around future work packages, to try and have a phasing that would work well.

The requirements were apparently worded quite 'generously' compared to a planning application's conditions with "fairly broad latitude" around issues like the detailed design and hours of working according to Interviewee 34, although he understood the reasons for this flexibility: "invariably, between planned and construction through a field, there always needs to be an opportunity to tweak



designs and adjust, to take into account detailed circumstances and how you do build that into the process and it is an interesting balance.”

The requirements allowed for the unexpected to be found when undertaking construction work offshore:

*“where issues have been dealt with through requirements, it pretty much depends on what the developer finds when they go out there. For Galloper, they found ... it was the ship's bell and a couple of cannons and then potential World War I or World War II aircraft, so they've had quite a lot of archaeological things that they've been dealing with ... there is a wealth of information that comes out of these things that benefit everybody.” (Interviewee 28)*

Overall, the requirements were apparently working well with no major issues during their discharge according to several interviewees.

There were, however, some concerns as to how the discharge of requirements was working in practice according to other interviewees. On the one hand, there was a concern about which statutory bodies were named in relation to some of the requirements, according to Interviewee 35: “So sometimes, the perception maybe of people involved, like PINS etc., or consultants, isn't quite right as to who should be doing what”. Yet, on the other hand, an issue with the requirements was apparently that many named bodies were, in practice, not that interested in them:

*“Part of the awkwardness that I have found is some of the wording of the conditions, which required consultation with certain agencies, where we are looking at relatively minor matters, where they weren't terribly interested ... a lot of conditional stuff is localised and so concentrated on local and specific sort of areas” (Interviewee 34)*

Another minor issue with the requirements was that they did not allow for the (unforeseen) pause in construction with the change of promoter and scaling back of the project to prevent it being cancelled: “The originally approved Ecological Management Plan, obviously, I think didn't cater for what would happen if there was a period where development ceased and that is often the problem that we have on mitigation anyway” (Interviewee 34).

The discharge of requirements had not worked entirely “in the manner that was envisaged in the DCO and Deemed Marine Licence” according to Interviewee 27:

*“You don't always have the information ready at the right time to get things to people four months in advance, before the start of construction, for instance; before the start of construction is a fairly arbitrary line. I understand why it's there, particularly for onshore applications, but sometimes, it is not feasible to do all the work in advance of the offshore construction starting”*

Another issue was around the surveys for unexploded ordnance:

*“The lifespan of clearance certificates for a UXO survey is only 12 months. There's only a certain amount of time in the year that you can go out and do these surveys, otherwise the weather takes its toll on it and the cost escalates by a huge amount, or you don't get it done. What we try to do is we try to do the surveys at the same time for the environmental stuff as we do for the UXO, or for other geophysical surveys that we need to do, it makes sense to combine the information, but that brings us up against tight deadlines in the DCO and the DML, so that sort of thing probably wasn't envisaged as we went through the application phase”*

Finally, an issue had apparently arisen because the MMO can change conditions in a Deemed Marine Licence and had changed the ones in the Galloper DML to reflect standard conditions which they developed after the Galloper DCO was granted. This led to some duplication of work by the promoter. Another issue with the DML was that due to competition regulators, the generating station cannot be owned by the same people as the connection, so “you have to sell off the offshore substation platform

and the cables that connect it to the onshore substation and you sell off the onshore substation and all the stuff in it as well” but the Deemed Marine Licence cannot be split to the new owner of the connector cable and this is causing complexities for the Galloper promoters. Workable solutions have, however, apparently been found to all the issues experienced.

### **The link between consent and construction and current stage of the project**

There was a change of promoter during the life of the project and a need to optimise the business case which led to a significant scaling back of the project, however the DCO had “the necessary flexibility to cope with that offshore very easily” (Interviewee 26). Onshore, however, the associated change in the sub-station was dealt with through a planning application under the Town and Country Planning Act instead of amending the DCO, as already mentioned:

*“Onshore, it involved a major change to the substation arrangement, so we had to consider whether to use the amendment regime, or whether there was an alternative and the alternative that we chose to use - because it didn’t touch on the bit of the onshore works that were the NSIP - everything else was therefore associated development, which could have been consented using TCPA, but it was obviously more convenient to include it within the DCO and so instead of going down the amendment route with all the risks and the timings attached to that, we were able to craft a TCPA application, which dove tailed with the DCO; it didn’t replace ... so it meant that part of the overall substation works were still going to be built under the DCO, but the remaining, reduced part was going to be built, but still substantial, was going to be built under the TCPA and then we had to work with the local authority to persuade them that we could make that work and that the conditions could all be aligned and so forth and we were successful in doing that and it's on that basis that it has been built out” (Interviewee 26)*

In general, it can be common post-consent for there to be discussions as to what the consent means, whether certain things will be signed-off and whether people are “prepared to go through the time, cost and risk of seeking amendments” (Interviewee 26). A minor issue apparently arose because of the need for an additional temporary car park for contractors doing construction, which was not in the original DCO and did not seem to have been estimated, but this was resolved with the local authority.

A change in promoter can involve gaps in understanding, although apparently not particularly in this case:

*“There are many challenges about making sure that the new promoter understands the requirements of the licence. Obviously, the original promoter was involved in drafting that and having the discussions, whereas with the new promoter, you have to say 'this is what we wanted from that and this is what we expect from you.' I'm not aware of there being any particular, major disagreements when it's come to that.” (Interviewee 28).*

The most notable feature of the post-consent stage with the Galloper project has been the non-material amendment approved by the Secretary of State. This non-material amendment was around the turbine foundations, as Interviewee 26 explained:

*“Everybody thought that they had made enough allowance for the maximum possible width of diameter of the pile and the technology had moved on such that the project wanted to use the bigger pile and we had to take a view on how quickly we could get that through, whether it was controversial - we didn’t think it was controversial - and we made the decision to apply, it took a while, but we got there.”*

The post-consent non-material amendment had been vital to ensure the continued viability of the project, as Interviewee 27 explained:

*“The second amendment order was to allow a larger mono pile and that came about because the only way we can make the numbers work was to put a bigger turbine on it, the only way to put a bigger turbine on it was to put a bigger model pile on it. Without that then, there would be no project, which is an interesting concept and it shows that at least there was some flexibility within the system to allow that change to be made, but it did take quite a lot of time, effort and uncertainty within the project as to whether that would ever get through or not, at the time.”*

Engineering advice has apparently been sought at the time of the original DCO which said that a six metre diameter for the mono pile foundations was more than sufficient, nobody at that point had ever gone beyond that, and the consent allowed up to seven metres. In two years, the construction technology had moved on such that a 7.5 metre mono pile was needed. As Interviewee 27 recalled:

*“We had lots of engineering advice through pre-application and lots of different things, that actually, you find out in real life, isn't the way because things move on, things change all the time, people have different ideas, different engineers have different thoughts about how things should be done, so the flexibility is key”*

Other amendments to the DCO had been considered between consent and construction, driven not just by engineering developments but also by a need to reduce costs to make the project viable (hence the six month pause in construction). In the end, they were not necessary and engineering advances improved the viability of the project sufficiently for construction to proceed.

### **Suggested improvements as a result of this project**

As with the A14 project, interviewees for the Galloper case study made some suggestions as to improvements possible to the NSIP regime as well as offering comment relevant to other suggested changes already discussed in this report.

On Early Contractor Involvement, Interviewee 26 was unsure true ECI would work for the offshore wind industry and there can be nervousness that contractors appointed early might try to game the consent for their own commercial advantage. Interviewee 27 felt there was value in having a project or development manager through the life of project, although this was apparently rare:

*“Planners normally get the permission, get the consent in place and they may never see, or be involved in a project again, it's up to the engineers and they will get professionals in to make sure the consents are complied with, but it's very unusual to be involved in the consent applicant, get the consent and then stay on throughout the construction process ... there is obviously a lot of benefit in continuity and understanding and knowing the stakeholders as much as anything, as well as understanding the intentions behind when the applications were made.”*

There was some discussion of fundamental changes to the DCO regime. Interviewee 24 was also aware of offshore windfarms being built off the coasts of Denmark and the Netherlands having apparently much simpler consenting process and wondered “if it's all under EU legislation and so on, why is the UK process so tortuous? Is there a way of simplifying it and taking cost out?” Other discussion was around a more graduated system to take account of differences in scale and complexity between NSIPs. Thus a faster system for simpler DCOs would be welcomed: “There still seems to be some quirks because some of the very small schemes, they still take maybe 18 months and it just seems to be if it's six months, six months and whatever, they stick to it.” (Interviewee 24). Meanwhile, there was apparently a need for longer examination periods for very big projects (like nuclear power stations); Interviewee 35 felt a more flexible examination timetable for bigger NSIPs would be useful:

*“I'd like to see more flexibility when it comes to the examination timetable and absolute appreciation by examining authority really, of the degree of intense work that can go into that at that particular stage”*

Less radically, Interviewee 24 felt statutory timescales for non-material changes would be “very helpful” as “Non-material amendments still seem to take a long time to go through” and “we actually saw a couple of projects fall foul of those delays”. On requirements, Interviewee 34 was concerned about levels of experience on certain technical issues, for example on sub-station transformer design, if a local authority was given even more control over detailed design through requirements to support higher levels of flexibility in a DCO.

Interviewee 27 suggested that the NPS could be updated and give more of a steer on specific things that do not need to be in the Environmental Statement, adding:

*“We would employ consultants and they would say 'well, this is what we think is important,' which is what they do, but we always err on the side of caution and put in pretty much everything; whereas if the regulators can turn around and say 'that's not an issue, you don't need to look at that, this is not an issue,' but very few regulators will put their neck on the line”*

Interviewee 35 felt the funding of statutory consultees was an important issue: “we are becoming more alive to the issue that it is costing us time and money and we've got to try and recover that more and more.” Interviewee 35 was also concerned about the monitoring side of the NSIP regime, but felt the new EIA directive coming into force in 2017 addressed this concern.

Much more specifically to Galloper, the project is being built at much less capacity than originally envisaged, but this was allowed for in the flexibility of the DCO and the DCO thus hadn't been updated. Interviewee 24 felt this had particular implications for cumulative impacts on future projects:

*“[It has] implications for projects, subsequent projects basically; so in theory, at some point, we're going to reach a point where because of the cumulative impact - on birds, for example, we're not going to be able to allow any further development because we've reached that threshold of acceptable impact, but that cumulative impact is the sum of all the worst case scenarios consented, rather than what's been built, so it's, potentially, a piece of work there to do, which would need to get done with BEIS and PINS and the relevant developers to bring the consents down to match what's actually being built, so that for subsequent cumulative assessments, you can take account of what's actually being built, rather than what's been consented and there's, potentially, unused headroom.”*

Overall, most of these suggestions and reactions reflect those already discussed in the report. The cumulative impacts of assessing the worst case has come-up before, but the Galloper example gives an important example of where there the flexibility that has been allowed means much greater environmental impacts have been assessed than have occurred in practice. This has important implications for future projects.

## **Evidence from written feedback supplied to the UCL team**

A member of a local environmental organisation could not meet for an interview but provided written feedback to the UCL team. The main concern was about environmental and wildlife damage. Concern was raised by the promoter's representative at the public exhibition apparently having no awareness,

*“that vegetated shingle is a biodiversity action plan priority habitat, even though this would be significantly disturbed where the cables come ashore at Sizewell. The shingle contains rare plants, such as Sea Pea. The beach is also a County Wildlife Site. In addition he had no idea that the sea off the Suffolk coast is part of the Outer Thames Special Protection Area (SPA), designated for the*

*rare red-throated diver and important for harbour porpoise. Yet the route for the cables would be directly through this European protected site.”*

This was compounded by a lack of response from the promoter to written questions asked of them at the pre-application stage. There were also concerns about the timing of the works in relation to the red-throated diver visiting the area during winter.

Overall, this local group felt that:

*“Our views were not at all taken into consideration by the developer ... It seemed extraordinary that they should be totally unaware of the wildlife and environmental issues. We were left with the distinct impression that the company considered such issues to be unimportant, and that our concerns weren't worth the bother of responding to.”*

These specific concerns were not discussed with the promoter by the UCL team for a response, but are included here as feedback provided to us.

## Conclusions

The Galloper offshore windfarm construction is well underway both on and offshore. In common with other offshore windfarms, considerable flexibility has been built in to the DCO, although in this case much of the work in enabling routes such as the ‘Rochdale Envelope’ to be used in the Planning Act regime seems to have been done through this NSIP. Despite such flexibility, however, a non-material amendment was required in order to enable construction to proceed in a viably cost-effective manner, taking account of the latest wind turbine technologies. This demonstrates the pace with which construction technology in this sector has moved on, and the need for a good route to make amendments to DCOs even if they have flexibility built into them. Concerns about the ease and timeliness with which a DCO can be amended are further demonstrated in this particular project by the fact a Town and Country Planning application was used to amend the substation (as associated development) rather than amending the DCO itself.

There appears to have been good engagement between the promoter and statutory consultees and local authorities in this case, and key concerns raised by them seem to have been addressed. Although great care clearly went into thinking about how to frame the requirements, the discharge of requirements in practice has presented some difficulties, and there is perhaps experience that could usefully be shared from this process. It is notable that at least one local authority and one statutory consultee involved in the discharge of requirements reported they had underestimated the amount of time and work this would involve, and resource constraints in such public bodies are clearly an issue if more is to be dealt with post-consent in flexible DCOs.

There do not appear to have been major community concerns over this project, however concerns raised by some local environmental groups might not have been fully or perhaps transparently addressed. This is a reminder of the importance of effective engagement, which is often about ongoing dialogue throughout the life of a project and effective communication as much as opportunities to comment pre-application.

The Galloper scheme was one of the earliest DCOs, and it is clear it has provided a basis for many subsequent projects to learn from. In that sense, some of the learning from this case study has perhaps already been extracted and benefited a range of parties in the NSIP regime, however there are clear correlations with key themes and issues seen here expressed elsewhere in this study, and with some much more recent DCOs. This therefore further supports some of the overall conclusions and recommendations of this study.

## **9. Conclusions**

### **Overview of findings**

This report is published alongside a shorter “Main Report” in which we summarize the key findings from this research project. The general impression we have been given throughout this research is that the majority of stakeholders are broadly happy with the system and believe it has settled down after its introduction, and is the right approach to consenting nationally significant infrastructure projects. There is no apparent desire for major and disruptive change to the system. Even where changes were suggested to the system by some interviewees, for example having a more graduated approach (a ‘DCO Light’ for smaller infrastructure and longer examination periods for the very largest schemes) or having non-material amendments approved by local authorities rather than the Secretary of State, these were envisaged by their proponents as tweaks to improve a system they are largely happy with.

The general support for the Planning Act process is centred in particular on the certainty that comes with the system, primarily the certainty of the need for development established through the National Policy Statements and the certainty of timescale from acceptance through examination to decision. This certainty may come at the cost of considerable hard work and stress during the examination, and the pre-application period may mean that overall, in some cases, the system is not much faster than that which it replaced but the uncertainty of an unusually long public inquiry is prevented and the ability of promoters to project plan is greatly enhanced. Some interviewees also highlighted the way that, as a modern consenting system, the regime has been designed from the start to be compliant with Human Rights and Environmental Impact considerations. The system does appear to offer the certainty necessary to attract investment in and support cost effective infrastructure delivery.

There is a general feeling quite widely shared, however, that there are some particular issues around the balance between detail and flexibility in the regime, with a view that sometimes the system does not allow sufficient flexibility and can drive unnecessary levels of detail at particular stages in the process. This view is not universally shared: some interviewees thought there had been problems in the early days of the regime but they had not settled, whilst a few others felt the levels of detail being requested were fully justified. Nevertheless, a wide range of stakeholders could see an issue. Numerous examples were provided of what were felt to be unnecessary detail. The impact of this can be to add costs and complexity for all stakeholders, and prevent innovation during the detailed design and construction process, sometimes not allowing solutions and approaches which might have lesser impacts on the environment and local communities.

The drivers to detail to the system were many and varied. Examples were cited, and opinions shared, that detail could be driven by landowners, local communities, local authorities, statutory bodies, Examining Authorities, the requirements of Environmental Impact, consultants and legal advisors, and promoters themselves. In some cases, there seems to have been a greater focus, and incentivisation upon, gaining consent than thinking about the through project relationship between consent and construction (although certainly not in all cases) and hence risk adverse approaches which may drive detail and reduce flexibility. This raises the issue of whether projects are truly being approached in an integrated manner or whether the DCO is seen as an almost separate process to the implementation instead of an integral part of the whole process.

There are, of course, a number of tried and tested routes to flexibility which have been used in the system such as the Rochdale Envelope type approach to assessment windows and parameters, the Not

Environmentally Worse Than approach, limits of deviation, the use of options within consents, temporary use of land, and the use of requirements to govern post-consent detailed design and construction management issues. On the whole, such approaches seem well understood and the issue seems to be one of confidence as to whether they will be accepted by a particular Examining Authority for a particular scheme. This then raises the spectre of the guidance which helps govern the system, and the National Policy Statements which provide the relevant tests of the examination of projects within each sector.

For requirements, however, there did appear to be a particular need for all stakeholders to increase their understanding of how these are best framed and the process for their discharge, which can have particular resource implications for local authorities and statutory consultees and where slight changes in wording can have dramatic implications. The use of requirements to govern more detailed design and construction management issues is a key route to allowing flexibility in a DCO, so it is important that further attention is paid here.

There were some suggestions that the need for flexibility might be reduced by having Early Contractor Involvement and that the problem in some cases was a lack of construction expertise prior to consent being sought. A number of interviewees felt such ECI might not be practicable, but it seems an important area for further reflection in the NSIP community.

There was also considerable discussion of the post-consent amendment process for DCOs. It appeared that some of the desire for greater flexibility in DCOs came from concerns about the difficulty – and time taken – to amend a DCO after it has been consented. Even in highly flexible DCOs, examples exist of amendments being sought through non-material amendments or through the Town and Country Planning system (for associated development) because the nature of NSIPs and, in particular, the time projects of this scale take means there is always likely to need to be some changes along the way. Several examples of the consequences of slow decisions on non-material amendments were provided, along with construction innovations not being used by promoters nervous about amending a DCO.

The regime is centrally about providing consent for nationally needed infrastructure but whilst ensuring appropriate protection for affected landowners and communities more locally. NSIPs can vary considerably in their scale, location (for example urban or rural, sensitive natural environmental location, site with a long and difficult planning history) and of course the very nature of the scheme itself, which can mean some are of little concern to landowners and/or communities and others cause greater concern (in terms of construction or final built project). Confidence in the protection of the interests of these affected parties is vitally important if higher levels of flexibility are supported in DCOs, and in particular the certainty of open, meaningful and ongoing engagement and the transparency of the discharge of requirements process.

These findings lead us to make a number of recommendations which we believe could incrementally improve the NSIP regime and help deliver nationally needed infrastructure more effectively. These are not about radical changes to a regime which is largely supported, but about the aggregation of marginal gains which all stakeholders can contribute to and, hopefully, benefit from. The recommendations are below.

### **Research reflections**

Finally, it is worth reflecting here on the process of research itself. We have been careful to try and involve as great a range of stakeholders as possible across our general and case study interviews and focus groups. On the whole, we have found people very willing to be interviewed and generous with

their time and opinions. There are important differences of opinion on some of the issues discussed in this report, and where that occurs, we have tried to give space to the discussion of the full range of viewpoints, before drawing our conclusions. It is also important to note that whilst interviewees have been very open in their general comments and sharing opinions, people were not usually able to give precise costs of things like delays because of commercial sensitivities.

We have also tried to take on board a range of feedback we have received as the research progressed. In addition to meetings with our NIPA client group and wider Member Steering Group, we also presented our emerging findings and draft recommendations to an open roundtable meeting for NIPA members and held a meeting at UCL where all those interviewed or who had participated in focus groups were invited.

The research is, however, inevitably limited through the time available to conduct it and the resources provided. The project is not designed to be an entire review of the NSIP regime, yet even with regards to what allows reasonable flexibility it is clear that there are further issues to explore around community engagement and around the discharge of requirements in particular. These would certainly benefit from further research. It is also apparent that some of the largest and most complex schemes, like Thames Tideway or Hinckley Point C would provide fascinating case studies rich with potential learning for many stakeholders once constructed.

## **Recommendations**

What would improve the system and give greater certainty to those implementing the scheme so that changes may be achieved in ways that beneficially support the implementation of any project? We have set these out as the following recommendations, based on our research findings on the role of flexibility and detail that will support investment, greater innovation and cost effectiveness in delivery. These recommendations reflect an approach to achieving this that provides appropriate protection for the affected landowners and communities. Together they comprise an aggregation of marginal gains that will improve the operation of the NSIP system and do not depend on any one recommendation being implemented to achieve beneficial improvements in the system for its users.

### A. National Planning Policy, Legislation and Guidance

#### Recommendation 1

##### National Policy Statements should address deliverability

The role of the NSIP system is to deliver national infrastructure. There is more that could be done within the NPS to support this deliverability in practice. When the NPSs are reviewed, as they reach the five-year mark or subsequently, flexibility for each sector should be addressed to optimise deliverability. Taking a sectoral approach allows deliverability to be considered in ways appropriate to project size and type. The NPS should explain what might be suitable for outline principle consideration and what requires more detailed design, which can be addressed in any new NPS when drafted. This should be implemented by Government Departments as and when the NPS are reviewed and there should not be a period when the NPS is not available. This would then drive consideration of deliverability and flexibility appropriate to each sector during scheme preparation and examination.

#### Recommendation 2

##### Government guidance and advice on flexibility and deliverability should be brought together

The objective of the NSIP guidance and advice is to support the effective delivery of national infrastructure projects. Preparation of guidance and specifically on flexibility to support delivery and construction of NSIP projects, that would bring together in one place what already exists to give these issues some focus in the process. While it is possible to see that there is guidance and advice on



deliverability in the NSIP process it is set in several different documents and it does not have any central focus. It would be more useful for promoters and their advisers if the issues of delivery and construction could be specifically related to each stage of the process including pre-application, examination, in the drafting of the DCO and in the discharge of requirements.

Some further sense of the degree to which a DCO can be 'hybrid' between meeting the needs of those requiring detail and allowing flexibility to aid project implementation should be provided. This hybrid form acknowledges what can be confirmed in terms of detail, including some matters of design, environmental mitigation and construction while also indicating the areas where requirements (including use of appropriate codes) will need to be used to determine issues as the project moves through the construction phase.

The guidance should outline common approaches to flexibility (such as envelope assessments, Not Environmentally Worse Than approaches, limits of deviation, temporary use of land) and the suitability and implications of each (for example, need for more work on the environmental assessment for wider envelope assessments and the potential cumulative impacts of several DCOs all assessing a worst-case scenario). It would be helpful if this work on new guidance could be undertaken as soon as is practicable. If there are potential delays, it would be helpful if DCLG and PINS could provide a signal that it is their intention to address this matter as a priority.

### Recommendation 3

#### *The Government should put non-material amendments into a statutory time frame to support NSIP flexibility and deliverability*

Given that the process for requesting non-material amendments is out of step with the rest of the timed system, and that there has been considerable variation in practice, the Government should introduce a statutory timescale for the process for non-material amendments to consented DCOs. This may be longer than six weeks but would conform to the expectations created in NSIP regime overall. This would assist in the deliverability of projects, reduce uncertainty and cost.

## B. Project Management and Early Contractor Involvement

### Recommendation 4

#### *Promoters should consider some form of Early Contractor Involvement (ECI) in the development and pre-application processes for their projects to address the need for detail and flexibility*

While it is appreciated that ECI may add cost to the development of an NSIP project, we consider that should be seen in the totality of scheme cost and not just at the application phase. The benefits of ECI are for the promoter in terms of an increased ability to address subsequent requests for detail in the pre-application and examination stages where this can assist all parties in determining their views on the scheme. There should be the opportunity to learn from other NSIP projects that have gone through the process on the benefits and the costs overall of neglecting this engagement. It will also greatly assist in identifying where flexibility in any project's delivery will be needed in the DCO and how best these later construction requirements can be reflected by all parties engaging in the process. ECI also provides a potential for promoters to be consistent in communicating and engaging with communities to ensure that requirements for flexibility and detail are understood.

This ECI may come in a number forms from consultancy advice to the establishment of SPV that includes the promoter and contractor from the outset. There is evidence that these joint forms have been successful and that some promoters are starting to incorporate pre -project contractor competition and engagement to enter the application process as a single team. This should support the provision of

detail where it is required and identify where and how flexibility should be included in the DCO to deliver the scheme.

Recommendation 5

All promoters should appoint a project management capability for the whole project from the outset to ensure flexibility and deliverability are addressed as it progresses to operational completion

NSIP scheme promoters can protect their own interests to maintain flexibility throughout the delivery and construction phase if they appoint a project management capability with this express remit. Project management should be provided from the initial inception and scoping of the scheme, through pre-application, examination and implementation phases. While it is appreciated that the precise requirements of project managements may change during this process, and may reflect the relative scale of the project, the promoter can be advised of the implications for the whole project when taking advice or making decisions that may have longer term implications for the project than initially anticipated. The project management function can also advise on when construction advice is best provided, ensure that stakeholder and statutory consultees are kept up to date through the project communication plan and provide a consistent focus during the life of the NSIP to delivery. Where projects are sold on, it is also recommended that the project management function is retained across the bridge of ownership.

C. Engagement with stakeholders and communities

Recommendation 6

Statutory consultees should engage at the pre-application phase and consider developing standards and advice to support delivery

While some statutory consultees do not consider that is worth engaging until the scheme has been developed to a certain point of detail, we are of the view that earlier engagement allows statutory consultees to influence design and the outcomes that would serve their interests best. This may require the promoters to provide more detail but will also allow more flexibility in delivery. While statutory consultees might find some aspects of flexibility hard to accept, given their responsibilities, it is helpful to promoters and their advisers to have some standards and advice that they can work within. Further, if the recommendations for ECI and project management are taken up, then statutory consultees will have a greater opportunity to engage meaningfully from the pre-applications stage. We found that some statutory consultees have their own version of PPAs and where resources are tight, all statutory consultees may wish to consider introducing similar mechanisms to allow them to participate fully and in a timely manner

Recommendation 7

Promoters should engage in meaningful dialogue with the community to reflect their requirements for detail and support the required flexibility in delivery

It is important to ensure that the engagement with communities is meaningful and, where appropriate, the level of detail on the proposed scheme is adequate. Promoters need to understand this and engage in a genuinely productive dialogue about the relationship between detail and subsequent needs for flexibility. Where it is not possible to provide detail at an early stage, then mechanisms for future community engagement in the processes of design and construction should be clear. Discussions on the proposal can be made more transparent through ‘you said, we did’ approaches to responses so that the community can see how their views have been considered. It is also possible to have a more deliberative dialogue and engagement as part of the process rather than rely on conventional consultation methods. This is particularly important if more detailed design matters are being resolved through the framework of requirements post-consent. There may also need to be further consultation during these phases so it is important to maintain the dialogue with community groups and stakeholders.

Recommendation 8

To support flexibility, an independent person should be appointed to receive community questions and complaints during the delivery phase

This meaningful dialogue needs to continue following consent to ensure that the community can have a single point where it is possible to see the discharge of requirements and a contact if they have concerns about the contractors on site. Other schemes such as HS1 have appointed an independent person to act in this role and, given the scale of NSIP projects, this appears to be a sensible approach to maintain contact with communities during the development of the design and construction.

D. Pre-application assessment and documents

Recommendation 9

Promoters and their advisers should consider their approach to environmental assessment and consider a risk assessment of the potential outcome for achieving flexibility in the DCO

The process of environmental assessment required under the DCO regime is an important part of the process of understanding the impacts of a scheme and its mitigation, and has been described to us as a driver of detail but one which is legitimate and necessary. There is, however, some evidence that the approach to environmental assessment is one of sometimes unnecessary detail, for example to reflect the questions and issues addressed at previous examinations of other projects without any consideration of the needs of the specific project or the make up any Examining Authority.

The environmental assessments are always undertaken on a precautionary basis but we consider that this precaution should be applied to the specific scheme rather than to experience of previous schemes in a cumulative manner. There has also been concern expressed that sometimes a heavily risk averse approach has been taken as consultants have been focussed on (and incentivised around) gaining DCO consent rather than seeing the DCO as part of an overall process of project delivery.

The increasing scale of environmental assessments can both reduce transparency and make engagement by stakeholders, communities and other parties more difficult. Whilst there are critical issues which must be addressed by the Preliminary Environmental Information and Environmental Statements, promoters and their advisors should take care to ensure a proportionate approach to these and consider the link between the approach to environmental assessment and the final implementation of the NSIP.

E. The Development Consent Order

Recommendation 10

DCO drafting should address flexibility for deliverability as a core component

While all DCOs are necessarily bespoke, there are some which appear to have included greater degrees of flexibility that support the delivery and construction phases of NSIPs. We recommend that PINS review the advice on drafting of DCOs to bring flexibility and delivery to the foreground so that it is addressed more explicitly in DCOs. We further recommend that examiners and Secretaries of State consider deliverability and constructability when they amend DCOs before they are approved. We also recommend that NIPA, on behalf of those involved in the NSIP process, should undertake specific piece of work to examine the construction of DCOs. This should incorporate a focus on deliverability and construction phases, the flexibility that will allow this set within the context of all the other requirements included within the DCO.

Recommendation 11

To support flexibility of NSIP schemes in delivery and construction, careful consideration must be given to the framing of the DCO requirements. There is a need for greater cross-sectoral understanding of how requirements are worded, and how best to make use of the range of codes such as those for construction, design, sustainability and community engagement should be included within the DCO

If detailed design issues are being developed post-consent in a more flexible DCO, this will be governed by the requirements section of the DCO. It is frequent practice within the requirements of DCOs to make use of codes for design, construction and sustainability however these have not been used consistently or systematically. We believe a more uniform use of codes like the Code of Construction Practice could increase Examiner, local authority, statutory consultee and public confidence in them and thus support greater flexibility in the DCO, whilst protecting the interests of those affected by the scheme in delivery and use.

Although we are aware of the codes that are used now, we consider that these should not be a defined list, as new codes may emerge that would be useful to adopt. However, all codes used should be recognised as standards for the sector or activity concerned and should avoid being devised for any specific scheme. To support this, NIPA should host a cross-sectoral forum on requirements (including the use of codes) and work with PINS produce an advice note on this.

F. The Examination

Recommendation 12

Considering flexibility for deliverability during the examination

While examiners are free to consider any matter during the examination, we recommend that they should assure themselves that deliverability and construction have been specifically considered and that any flexibility required to support this has been considered in the process and in the drafting of the DCO. Where examiners are not satisfied that these issues have been sufficiently addressed, we would recommend that they consider having a specific session to consider these issues. The knowledge that this might be a possibility should ensure that promoters and advisers address these issues specifically and include deliverability and constructability in their risk assessment processes. This discussion could be supported by a statement on deliverability submitted by the promoter, which might then also explain and justify the flexibility incorporated in the scheme.

Recommendation 13

Reduce the amount of behind the scenes detailed negotiation during the examination phase by considering flexibility overall

While it is recognised that the time pressures during the examination are intense, the pressure to make many side arrangements and agreements during the process puts pressure on the individuals involved and excludes the community and sometimes other stakeholders. Having more detail at the outset by considering approaches and methods of constructability through ECI should mean that the project is more developed when it comes into the process and that these matters are already dealt with. At present, it appears that the compacted time scale is being used as a means of dealing with lack of certainty in project design and delivery and this could be managed better to everyone's benefit. There is some evidence that pressurised negotiation and agreement is leading to later restrictions on scheme flexibility and the need for amendment. If more detail is provided at an earlier stage, then agreements could be made in ways that do not restrict later flexibility.

## G. Resourcing

### Recommendation 14

#### Local authorities should have Planning Performance Agreements with the promoters from the outset to support requirements for detail and flexibility in delivery

Local authorities have several roles in the NSIP process. They are required to review and sign off the statement of consultation, to prepare a local impact report and, in many cases, discharge requirements. They can also act as promoters. While some local authorities are engaging well in the process, the role of local authorities need to be more overtly expressed to support the delivery of NSIPs. This was an initial commitment by the then Minister in Parliament when then the 2008 Planning Bill was being considered but it has not been as fully effected as might have been expected. Most local authorities need to be encouraged to fuller engagement at each stage of the process including assessment of community consultation and on its own impact report. It would also be helpful to support local authority engagement in the process if the statement of local impact was addressed more fully in the process rather than being considered only at pre-application phase. This might also assist in the confidence that promoters could have in local authorities discharging requirements and assessing compliance with codes that may have been set out in the DCO.

To ensure proper engagement in NSIPs the role of local authorities needs to be overtly recognised from the outset. While some arguments have been made that local authorities that have only a small element of any project crossing their area do not have to engage in the same way as those that are more critically impacted by a scheme, the legislation does not differentiate in this respect. All local authorities, regardless of the scale of the project in their area, are required to undertake the same assessments and while this remains the case they need to be supported to fulfil this duty in every respect. Support is already available from other local authorities with experience but in all cases, there will be additional cost which will need to be found to undertake this task in a meaningful and compliant way.

However, a major issue for local authorities is the scale of their available resources. Planning services have been one of the most severely cut in local authorities over the period since 2010. Where a local authority has a PPA this allows for their support to the local community during consultation, more resources to undertake their local impact statement and overall engagement in the process. This PPA could be extended to include resources and agreements for the discharge of requirements and codes if local authorities are designated as fulfilling that role in the DCO. As we are recommending the greater use of codes and requirements to support flexibility, then this will be an increasing issue and one that should be addressed as part of the improvement to flexibility. Local authority provision of more support to the community during consultation may reduce the requirements for detail while having more resources for local impact reports may improve local authority engagement in the entire process of delivery.

Where local authorities do not currently have PPAs for consented schemes, even where their portion of the overall scheme is small, there should be a recognition that this remains a continuing resource issue. To overcome this, there should be some provision for retrofitting PPAs to NSIPs even at the delivery phase to support a beneficial outcome for the promoter, the community and other stakeholders.

## H. Continuous Learning and Dissemination

### Recommendation 15

#### That PINS and NIPA should further review processes of the discharge of requirements as part of project flexibility

On behalf of these engaged in the NSIP system, NIPA should host a cross-sectoral forum to gain feedback on the discharge of requirements and the implications for discharging them including Planning Performance Agreements. This must include consideration for public accessibility of information as to who is responsible for discharging them, how this will be monitored and an adequate 24/7 system for the public to notify the promoter if any of these requirements (including any codes they may incorporate) appears to be broken or potentially undermined. The promoter should take responsibility for publicly reporting back their investigations and actions on these issues in a timely manner proportionate to the issue. Once NIPA has cross-sectoral feedback, it should then support PINS to produce an advice note.

*Recommendation 16*

*NIPA should disseminate the learning from individual NSIP projects to improve practice in achieving flexibility to support deliverability*

NIPA, on behalf of those engaged in the NSIP process, should hold a cross-sectoral forum to extract learning and disseminate this to the benefit of future projects, particularly on what has been learned once projects have been constructed and gone through the full consent to construction process.

*Recommendation 17*

*NIPA should undertake more dissemination and training on the application of appropriate detail and flexibility in the delivery of NSIP projects*

NIPA, on behalf of those engaged in the NSIP process, should disseminate what works and what doesn't work for the use of applicants, advisors, statutory consultees; training and pre-project support for those with little or no relevant DCO experience.



## **Appendix A: The Research Brief**

### **NIPA Insights Research Project: Flexibility Vs Detail – What is the optimum balance?**

The basic outline of the research proposed is as follows:

**Stage 1A, September 2016:** A desktop review of the issues to determine current policy and practice. Issues to be considered include the level of detail in EIA and DCO applications generally, examination practice, and in the DCO itself; as well as impacts for the project in terms of flexibility, scope for innovation, cost, construction and operational effects. This will inform proposals for stakeholder consultation to be undertaken in Stage 1B.

**Interim Report, October 2016:** A report on Stage 1A, summarising the issues identified in Stage 1A and the issues to be considered during Stage 1B, will be prepared by the beginning of October 2016.

**Stage 1B, October/ November 2016:** Consultation with stakeholders based on an interviews and focus groups, to determine their experiences and consequences for projects of which they have experience. Stakeholders should include Government Departments (which would be coordinated by DCLG), Promoters, Advisers, Contractors, Local Authorities, Statutory Consultees, and Community Representatives.

**Preliminary Report, December 2016:** A draft Preliminary Report on the principal issues and impacts, (eg social & economic effects, skills and capacity within each stakeholder group, as well as risk, cost and programme for project outcomes), arising from the desktop review and stakeholder consultation to be prepared by the beginning of December 2016. Consideration may also be given to any differences between industry sectors within the scope of Nationally Significant Infrastructure Projects as defined in the Planning Act, including commercial and business schemes. A final Preliminary Report will be completed by the end of December 2016.

**Stage 2, January / February 2017:** Engagement with stakeholders about the findings of the Preliminary Report, including the principal issues and impacts identified. Three NIPA Roundtables with Members and wider stakeholder groups, and meetings with DCLG and PINS are proposed to explore opportunities and constraints to future changes in policy or practice, and potential changes which could lead to a more optimal balance between detail, flexibility and project outcomes.

**Final Report, March 2017:** Following engagement with stakeholders about preliminary findings, a draft Final Report will be prepared by the end of February 2017. The Final Report will summarise the evidence reviewed, identify the principal issues and impacts, summarise stakeholder views following consultation, and identify recommendations aimed at achieving an optimum balance between detail, flexibility, process, decision-making and project outcomes, by the end of March 2016.

**As part of our ambition to put NIPA members at the heart of this work, we proposed the formation of a Member Stakeholder Group** to act as a sounding board for the research team, to hear conclusions at key stages of the project, and to influence the direction of its outcomes.



## **Appendix B: Research Method**

### **Research objectives**

The NIPA brief has identified the research objectives as follows:

With respect to the planning and authorisation of national infrastructure projects through the Planning Act process –

- To **collate evidence** and stakeholder views about **issues** (the level of detail required in assessment, application, examination and consent of/for national infrastructure projects) versus the **impacts** of current practice on the quality of the process for all stakeholders, the impact of current practice on the quality of decision-making, and on the quality of resultant schemes, including their delivery
- To **objectively identify** the principal issues and impacts based on evidence and industry views, based on a strong cross industry conversation about this issue;
- To identify **practical recommendations** which can support a move towards an optimum balance between detail, flexibility, process, decision-making and project outcomes for the planning and authorisation of national infrastructure projects

### **Approach to meeting these objectives**

We would undertake this research through a combination of literature / desktop review, research interviews and focus groups, and then a triangulation of the data. The research would thus use a mixed methods approach which the team members have considerable experience of from previous research.

The first stage would be the literature / desktop review in September. This would aim to draw out the key issues in current policy and practice with respect to the level of detail in EIA and DCO applications generally, examination practice and the implications for national infrastructure projects in terms of flexibility, scope for innovation, cost, construction and operational effects. This would be achieved by first, undertaking a brief review of any relevant previous academic literature or publications from previous academic research on related topics (searched through using the full access to electronic journals and scholarly databases of the UCL Library).

Next, we would look at actual DCO applications and publically available documents from PINS to analyse examples which have passed through the system. In February 2016, the 50<sup>th</sup> scheme to be determined under the planning regime established by the Planning Act 2008 (as amended) was approved: of these 31 were energy, 16 transport, two waste and one waste water developments. This analysis would look across a purposeful sample of different types of infrastructure falling under the Planning Act requirements, and for energy and transport scheme we would propose looking at one example of a recent DCO application and one example of a similar type of project made about five years ago to see if there are noticeable differences between the two with respect to the key issues of concern. Finally, in this first stage, we would consider any relevant documents or evidence which NIPA may already have collated, for example meeting notes from previous roundtables with promoters or data on how long each stage has taken for prior DCOs.

The second stage would be a series of 20 semi-structured interviews and 3 focus groups with a cross-section of stakeholders to be held in October. The interviews and focus groups would be semi-structured in format, asking a common series of questions but allowing flexibility for further follow-ups depending on how conversations unfold. The interviews and focus groups would be digitally recorded and fully transcribed, which would then form the core corpus of data for analysis using standard coding

techniques. Across the interviews and focus groups we would seek to engage with a broad cross-section of stakeholders and cross-section of different types of project falling under the remit of the Planning Act, with stakeholders including Government departments, promoters, advisers, contractors, local authorities, statutory consultees, and community representatives.

The interviews would be used where there was a particular stakeholder with whom a direct, detailed discussion would be most appropriate, whereas the focus groups would be used when there was a group of stakeholders with clear overlap in interest or where a group discussion would seem most appropriate to draw out useful evidence in relation to the research objectives. The interviews would be conducted by the core research team of Professor Janice Morphet, Dr Ben Clifford and the research assistant. The focus groups would be hosted by the three advisory researchers, Professor Brian Field, Professor Maria Lee and Dr Ed Manley, with each chairing the one most appropriate to their expertise. For example, drawing on Maria Lee's expertise as a member of UCL Laws, her focus group might include contacts from the legal world who specialise in representing developers, government lawyers (such as Natural England), NGO / community group lawyers. The advisory researchers would then meet with a member of the 'core' research team following the focus group to capture their own reflections on the discussions and any broader issues they feel are important for the research (drawing on their past expertise).

In selecting the stakeholders for interview / research group participation, we would use a 'snowballing' technique of recommendations by word-of-mouth and then look across the suggested contacts to ensure a good spread of different types of stakeholder are represented as well as different industry sectors (different types of Nationally Significant Infrastructure Projects as defined in the Planning Act). The DCLG, NIPA members, client project team and Member Stakeholder Group (MSG) would be particularly engaged in the process of selecting appropriate people to interview / participate in a focus group via email and, perhaps, a specific meeting to discuss this.

As an 'added value' proposal, we would also undertake two case studies at this stage, with each case study a specific Nationally Significant Infrastructure Project which had passed fully through the system. In both cases, a further five semi-structured in-depth interviews would be conducted with a range of stakeholders associated with that one project. These interviews would explore similar issues to the 20 general interviews, but we believe that the 'general' interviews are likely to look at cross-project and cross-sectoral issues and that whilst participants in those might bring up useful examples, there may be additional Insights gained from interviewing a range of different stakeholders all about the same specific projects. Taken together, this will give us 30 interviews and 3 focus groups and a mixture of both key / recurrent issues and in-depth examples which will be a powerful evidence base.

Following this evidence gathering, a preliminary report on the principal issues and impacts (social, environmental and economic effects, skills and capacity issues within stakeholder groups, and risk, cost and programme impacts for project outcomes) would be prepared and a meeting held with the NIPA Client Project Team and MSG to discuss this.

In January and February, the research team would support NIPA with engagement with stakeholders about the findings of the preliminary report, including the principle issues and impacts identified. This would include three roundtables with NIPA members and wider stakeholder groups, and we would again use our advisory researchers to chair one of these each (as most appropriate given their previous expertise). These could be hosted at UCL facilities or the team are able to travel to any other venues, should there be merit in hosting these in different geographical locations or hosted by different stakeholders at their offices. The research team would be available to meet with DCLG and PINS to explore opportunities and constraints to future changes in policy or practice, and potential changes

which could lead to a more optimal balance between detail, flexibility and project outcomes. Furthermore, we would also propose at this stage beginning to utilise the services of the UCL media and public policy teams to start to publicize the work and seek feedback from stakeholders generally. This might include an article on our website (with feedback form), and social media.

Utilising the feedback from these initial engagements over the preliminary report, we would then work to produce a final report in February ahead of a meeting with the MSG. The final report, published after this, would summarise the evidence to investigate and inform principal issues and impacts identified, summarise stakeholder views following consultation, and identify recommendations aimed at achieving an optimum balance between detail, flexibility, process, decision-making and project outcomes. We would again utilise the UCL media and public policy teams to gain useful coverage for the report. We would also anticipate having a public event to formally launch the report, which we could host at UCL and would likely attract considerable attention in the sector and attendance by a wide range of stakeholders.

### **Proposed questions for interviews and focus groups**

#### *The system in general*

- Has the 2008 Act and its subsequent evolution met the issues of concern for major infrastructure projects identified in 2006 by the Eddington Report by creating a quicker system with greater certainty?
- Has the DCO process become more complex over time? In which areas have complexity and detail been most evident? How have these issues influenced the design / outcomes of individual schemes?
- Are there particular examples where the levels of detail in the DCO regime have been problematic? What have the consequences of this been?
- Where is detail merited / important to the DCO process?
- Where and why is flexibility needed?
- Are there refusals in a comparatively short time-period undermining the certainty of the system or isolated examples of regulatory balance?

#### *Behaviour by actors as drivers of detail*

- Who or what is driving the level of detail?
- Is the increase in detail required being led or caused by more uncertainty? For example, promoters have so much invested in schemes they themselves are so determined to get consent that they don't want to take any perceived risks to this.
- Does community engagement drive detail in the consenting process as a result of a desire to respond to representations raised? If so, are there more effective approaches to engagement that could be implemented in the regime?
- Does the culture at the Planning Inspectorate influence the way the NSIP regime operates?
- Do Local Planning Authorities and statutory consultees drive levels of detail? How? How well do they engage pre-application as opposed to during the Examination phase?
- Are there issues for local authorities that have to deal with DCOs infrequently, for example on dealing with the discharge of requirements?
- What influence have government departments had on the process?
- Are there examples where Examining Authorities have sought to reduce flexibility? Do Inspectors drive detail through their questions?

- Are there are examples of difficulties getting statutory consultees to sign statements of common ground and only really engaging at examination when it's urgent?

#### *Process requirements as drivers of detail*

- Are Environmental Information requirements a driver of detail?
- Is the pre-application stage working effectively supporting faster decision making later in the process as intended?
- Are DCO processes and requirements proportionate for different scale NSIPs?
- At what stage in the DCO process should the detailed design be agreed?
- Are there certain types or locations of schemes where higher levels of flexibility in the DCO are regarded as problematic? Why?
- Are compensation and compulsory purchase requirements a driver of detail?

#### *Guidance and documentation*

- Does government policy / advice drive detail or prevent flexibility in DCOs? Why are tailpiece amendments allowing post-consent agreements with local planning authorities not favoured?
- Are the NPSs still fit for purpose? Could they give a steer about acceptable levels of flexibility for their sector? Is the government willing to update the energy NPS?
- How much freedom is there for promoters to tailor their own DCOs in practice?

#### *Consequences of detail*

- Is the cost of preparing a detailed design for a scheme before it secures in-principle consent growing and what are the consequences of this?
- Do levels of detail seen in the system support meaningful community engagement?
- Why have we not seen more business and commercial schemes make use of the system, or why have we seen some energy schemes apparently stay at 49 MW to avoid the DCO regime? Is this related to issues around detail / flexibility?
- Are there examples of amendments that engineers / contractors have wanted post-consent due to a lack of flexibility in the drafted DCO? If so what have been the consequences of this?
- Is the current approach to DCOs fixing the design of schemes too early and therefore reducing ability to save cost of project by incorporating later design improvements?
- How much does the DCO constrain how contractors go about building approved projects?

#### *Potential routes to flexibility*

- Would local planning authorities be willing to support higher levels of flexibility by consenting some elements left more flexible in DCOs? Is there reluctance to such approaches from the Planning Inspectorate / government? If so, why?
- What means for delivering flexibility have been successfully employed in approved DCOs and other consenting regimes which might serve as examples of good practice?
- Is there greater flexibility possible in other similar consent regimes such as Hybrid Bills or Transport and Works Act Orders and why are these not possible for DCOs?
- How much like an outline planning application can a DCO be? What drives the need for greater levels of detail?

- Is the Rochdale Envelope (accepted in PINS Advice Notes) prevented from use in practice? Are there any issues with a 'not environmentally worse than' approach to allow flexibility? (Environmental equivalence)
- What other routes might there be for encouraging more flexibility within DCOs?

*Potential to reduce the need for flexibility*

- Would statutory time limits for post-consent amendments to DCOs reduce the need for more flexibility within DCOs?
- Would making the post-consent amendment process easier reduce this desire for flexibility?
- Could earlier contractor engagement help reduce the need for flexibility?

*Concluding recap question*

- Who / what drives levels of detail in the DCO regime? What are the consequences of this? What one thing would you do about it given the opportunity?

## Appendix C: Summary consent data for NSIP DCOs

Data compiled by Angus Walker, Bircham Dyson Bell LLP

APPLICATION STATUS 5 SEPTEMBER 2016	
Applications made	75
Applications approved	56
Applications refused	3
Applications in progress	11
Applications withdrawn	5
DCOs corrected	19
DCOs amended	7

Project	Promoter	App made	Acc/rej	Rep start	Rep end	PM	Ex end	Rec made	Decision	Order	SPP	JR	Correction	Change
Rookery South EfW	Covanta Energy	05-Aug-10	26-Aug-10	07-Oct-10	19-Nov-10	17-Jan-11	15-Jul-11	-	13-Oct-11	<a href="#">2013/680</a>	Yes	Yes		
Ipswich chord	Network Rail	29-Jun-11	21-Jul-11	28-Jul-11	01-Sep-11	09-Nov-11	22-Mar-12	12-Jun-12	05-Sep-12	<a href="#">2012/2284</a>	No	No		
North Doncaster chord	Network Rail	22-Jun-11	19-Jul-11	01-Aug-11	09-Sep-11	16-Nov-11	02-May-12	31-Jul-12	16-Oct-12	<a href="#">2012/2635</a>	No	No		
Kentish Flats windfarm	Vattenfall	14-Oct-11	10-Nov-11	28-Nov-11	06-Jan-12	22-Feb-12	20-Aug-12	29-Nov-12	19-Feb-13	<a href="#">2013/343</a>	No	No		
Brechfa Forest windfarm	RWE Npower	04-Nov-11	30-Nov-11	07-Dec-11	18-Jan-12	13-Mar-12	13-Sep-12	12-Dec-12	12-Mar-13	<a href="#">2013/586</a>	No	No		<a href="#">2016/337</a>
Heysham to M6 link road	Lancashire County Council	06-Dec-11	23-Dec-11	11-Jan-12	20-Feb-12	04-Apr-12	20-Sep-12	19-Dec-12	19-Mar-13	<a href="#">2013/675</a>	No	Yes		<a href="#">2015/571</a>
Hinkley Point nuclear	EDF Energy	31-Oct-11	24-Nov-11	02-Dec-11	23-Jan-12	21-Mar-12	21-Sep-12	19-Dec-12	19-Mar-13	<a href="#">2013/648</a>	No	Yes	<a href="#">2013/2938</a>	<a href="#">2015/1666</a>
Galloper windfarm	SSE Renewables	21-Nov-11	19-Dec-11	23-Jan-12	24-Feb-12	29-May-12	29-Nov-12	27-Feb-13	24-May-13	<a href="#">2013/1203</a>	No	No	<a href="#">2013/2086</a>	<a href="#">2015/1460</a>

Infrastructure Delivery: The DCO Process in Context – Technical Report

Triton Knoll windfarm	RWE Npower	01-Feb-12	23-Feb-12	22-Mar-12	09-May-12	23-Jul-12	21-Jan-13	17-Apr-13	11-Jul-13	<a href="#">2013/1734</a>	No	No		
King's Cliffe haz waste	Augean	14-Mar-12	11-Apr-12	20-Apr-12	01-Jun-12	26-Jul-12	22-Jan-13	22-Apr-13	11-Jul-13	<a href="#">2013/1752</a>	No	No		
Blyth biomass	RES	16-Mar-12	11-Apr-12	24-Apr-12	01-Jun-12	02-Aug-12	02-Feb-13	02-May-13	24-Jul-13	<a href="#">2013/1873</a>	No	No		
M1 J10a upgrade	Luton Council	29-Jun-12	27-Jul-12	01-Aug-12	21-Sep-12	15-Nov-12	13-May-13	13-Aug-13	30-Oct-13	<a href="#">2013/2808</a>	No	No		
Redditch improvement	Network Rail	04-Sep-12	01-Oct-12	05-Oct-12	15-Nov-12	07-Jan-13	30-May-13	02-Aug-13	31-Oct-13	<a href="#">2013/2809</a>	No	No		
Able Marine Energy Park	Able UK Ltd	19-Dec-11	12-Jan-12	23-Feb-12	02-Apr-12	24-May-12	24-Nov-12	24-Feb-13	18-Dec-13	<a href="#">2014/2935</a>	Yes	Yes		
King's Lynn line	National Grid	27-Jul-12	21-Aug-12	05-Sep-12	12-Oct-12	11-Jan-13	10-Jul-13	10-Oct-13	18-Dec-13	<a href="#">2013/3200</a>	No	No		
Stafford chord	Network Rail	19-Dec-12	10-Jan-13	17-Jan-13	22-Feb-13	18-Apr-13	14-Oct-13	03-Jan-14	31-Mar-14	<a href="#">2014/909</a>	No	No		
North London line	National Grid	30-Aug-12	27-Sep-12	03-Oct-12	12-Nov-12	24-Apr-13	23-Oct-13	23-Jan-14	16-Apr-14	<a href="#">2014/1052</a>	No	No		
East Anglia ONE windfarm	Scottish Power	21-Nov-12	14-Dec-12	25-Jan-13	06-Mar-13	25-Jun-13	23-Dec-13	18-Mar-14	17-Jun-14	<a href="#">2014/1599</a>	No	No	<a href="#">2016/447</a>	<a href="#">2016/447</a>
DIRFT 3 RFI second attempt	Rugby Radio Station	22-Feb-13	20-Mar-13	11-Apr-13	20-May-13	08-Jul-13	08-Jan-14	07-Apr-14	04-Jul-14	<a href="#">2014/1796</a>	No	No		
Rampion windfarm second attempt	E.On	01-Mar-13	25-Mar-13	03-Apr-13	11-May-13	18-Jul-13	18-Jan-14	17-Apr-14	16-Jul-14	<a href="#">2014/1873</a>	No	No	<a href="#">2015/1319</a>	
A556 upgrade	Highways Agency	24-Apr-13	17-May-13	06-Jun-13	04-Jul-13	03-Sep-13	03-Mar-14	02-Jun-14	28-Aug-14	<a href="#">2014/2269</a>	No	No		
North Killingholme power stn	C.Gen	25-Mar-13	19-Apr-13	09-May-13	21-Jun-13	11-Sep-13	11-Mar-14	11-Jun-14	11-Sep-14	<a href="#">2014/2434</a>	No	No	<a href="#">2015/1829</a>	
Thames Tunnel	Thames Water	28-Feb-13	27-Mar-13	17-Apr-13	28-May-13	12-Sep-13	12-Mar-14	12-Jun-14	12-Sep-14	<a href="#">2014/2384</a>	No	Yes	<a href="#">2015/723</a>	
Clocaenog Forest windfarm	RWE Npower	28-Mar-13	23-Apr-13	01-May-13	12-Jun-13	12-Sep-13	12-Mar-14	12-Jun-14	12-Sep-14	<a href="#">2014/2441</a>	No	Yes		

*Infrastructure Delivery: The DCO Process in Context – Technical Report*

Burbo Bank windfarm	Dong Energy	22-Mar-13	19-Apr-13	13-May-13	24-Jun-13	26-Sep-13	26-Mar-14	26-Jun-14	26-Sep-14	<a href="#">2014/2594</a>	No	No	<a href="#">2014/3301</a>	
Woodside Link	Central Bedfordshire Council	14-May-13	11-Jun-13	24-Jun-13	29-Jul-13	08-Oct-13	04-Apr-14	04-Jul-14	30-Sep-14	<a href="#">2014/2637</a>	No	No		
South Hook CHP	ExxonMobil, Total, Qatar	31-May-13	27-Jun-13	12-Jul-13	16-Aug-13	23-Oct-13	23-Apr-14	23-Jul-14	23-Oct-14	<a href="#">2014/2846</a>	No	No		
Walney windfarm	Dong Energy	28-Jun-13	22-Jul-13	10-Aug-13	20-Sep-13	12-Nov-13	12-May-14	07-Aug-14	07-Nov-14	<a href="#">2014/2950</a>	No	No	<a href="#">2015/1270</a>	<a href="#">2016/810</a>
Hornsea windfarm project one	Smart Wind	30-Jul-13	22-Aug-13	05-Sep-13	11-Oct-13	10-Dec-13	10-Jun-14	10-Sep-14	10-Dec-14	<a href="#">2014/3331</a>	No	No	<a href="#">2015/1280</a>	<a href="#">2016/471</a>
Willington pipeline	RWE Npower	30-Jul-13	22-Aug-13	11-Sep-13	11-Oct-13	10-Jan-14	02-Jul-14	02-Oct-14	17-Dec-14	<a href="#">2014/3328</a>	No	No	<a href="#">2015/1616</a>	
Morpeth Northern Bypass	Northumberland County Council	15-Jul-13	07-Aug-13	02-Sep-13	04-Oct-13	15-Jan-14	15-Jul-14	14-Oct-14	12-Jan-15	<a href="#">2015/23</a>	No	No		
A160 upgrade	Highways Agency	08-Jan-14	27-Jan-14	30-Jan-14	07-Mar-14	24-Apr-14	04-Sep-14	06-Nov-14	04-Feb-15	<a href="#">2015/129</a>	No	No	<a href="#">2015/1231</a>	
A30 Temple to Carblake	Cornwall Council	15-Aug-13	09-Sep-13	10-Oct-13	22-Nov-13	06-Feb-14	06-Aug-14	06-Nov-14	05-Feb-15	<a href="#">2015/147</a>	No	No	<a href="#">2015/243</a>	
Dogger windfarm Creyke Beck	Forewind	29-Aug-13	25-Sep-13	07-Oct-13	08-Nov-13	18-Feb-14	18-Aug-14	17-Nov-14	17-Feb-15	<a href="#">2015/318</a>	No	No	<a href="#">2015/1742</a>	
Knottingley Power Project	Knottingley Power Limited	04-Oct-13	01-Nov-13	14-Nov-13	06-Jan-14	13-Mar-14	13-Sep-14	12-Dec-14	10-Mar-15	<a href="#">2015/680</a>	No	No	<a href="#">2016/797</a>	
Whitemoss Landfill	Whitemoss Landfill	20-Dec-13	17-Jan-14	20-Jan-14	28-Feb-14	21-May-14	21-Nov-14	21-Feb-15	20-May-15	<a href="#">2015/1317</a>	No	Yes		
Norwich Northern Distributor Road (NDR)	Norfolk County Council	07-Jan-14	04-Feb-14	14-Feb-14	23-Mar-14	02-Jun-14	02-Dec-14	02-Mar-15	02-Jun-15	<a href="#">2015/1347</a>	No	No		
Swansea Tidal Lagoon	Tidal Lagoon Power	07-Feb-14	06-Mar-14	07-Mar-14	11-Apr-14	10-Jun-14	10-Dec-14	10-Mar-15	09-Jun-15	<a href="#">2015/1386</a>	No	No	<a href="#">2015/1830</a>	
Preesall gas storage	Halite Energy	01-Dec-11	23-Dec-11	04-Jan-12	10-Feb-12	24-Apr-12	24-Oct-12	22-Jan-13	10-Apr-13	<a href="#">2015/1561</a>	No	Yes	<a href="#">2015/2071</a>	



*Infrastructure Delivery: The DCO Process in Context – Technical Report*

Hirwaun power station	Stag Energy	21-Mar-14	15-Apr-14	21-Apr-14	29-May-14	23-Jul-14	23-Jan-15	23-Apr-15	23-Jul-15	<a href="#">2015/1574</a>	No	No	<a href="#">2015/2070</a>	
Progress power station	Stag Energy	31-Mar-14	25-Apr-14	01-May-14	06-Jun-14	24-Jul-14	24-Jan-15	24-Apr-15	23-Jul-15	<a href="#">2015/1570</a>	No	No	<a href="#">2016/736</a>	
Dogger windfarm Teesside A&B	Forewind	28-Mar-14	23-Apr-14	06-May-14	13-Jun-14	05-Aug-14	05-Feb-15	05-May-15	05-Aug-15	<a href="#">2015/1592</a>	No	No		
Ferrybridge Multifuel project	Multifuel Energy Ltd	31-Jul-14	20-Aug-14	04-Sep-14	16-Oct-14	04-Dec-14	29-Apr-15	29-Jul-15	28-Oct-15	<a href="#">2015/1832</a>	No	No	<a href="#">2016/737</a>	
Internal enhancement Port Talbot Steelworks	Tata Steel	07-Aug-14	02-Sep-14	15-Sep-14	22-Oct-14	09-Dec-14	09-Jun-15	09-Sep-15	06-Dec-15	<a href="#">2015/1984</a>	No	No		
East Midlands Gateway Rail Freight Interchange	Roxhill (Kegworth) Ltd	29-Aug-14	19-Sep-14	26-Sep-14	03-Nov-14	12-Jan-15	12-Jul-15	12-Oct-15	12-Jan-16	<a href="#">2016/17</a>	No	No		
Hinkley to Seabank line	National Grid	28-May-14	19-Jun-14	01-Jul-14	26-Aug-14	19-Jan-15	19-Jul-15	19-Oct-15	19-Jan-16	<a href="#">2016/49</a>	No	No		
A19/A1038 Coast Road	Highways Agency	14-Nov-14	03-Dec-14	16-Dec-14	23-Jan-15	24-Feb-15	30-Jul-15	30-Oct-15	28-Jan-16	<a href="#">2016/73</a>	No	No		
Palm Paper CCGT	Palm Paper	23-Sep-14	20-Oct-14	03-Nov-14	03-Dec-14	18-Feb-15	18-Aug-15	18-Nov-15	11-Feb-16	<a href="#">2016/166</a>	No	No		
Thorpe Marsh pipeline	Thorpe Marsh Power Ltd	20-Nov-14	12-Dec-14	27-Jan-15	10-Mar-15	22-Apr-15	07-Sep-15	07-Dec-15	03-Mar-16	<a href="#">2016/297</a>	No	No		
A14 improvement	Highways Agency	31-Dec-14	27-Jan-15	05-Feb-15	14-Mar-15	13-May-15	13-Nov-15	11-Feb-16	11-May-16	<a href="#">2016/547</a>	No	No		
Meaford Energy Centre	St Modwen / Glenfinnan	31-Mar-15	24-Apr-15	21-May-15	21-Jun-15	20-Aug-15	20-Jan-16	19-Apr-16	19-Jul-16	<a href="#">2016/779</a>	No	No		
York Potash Harbour Facilities	York Potash Limited	27-Mar-15	21-Apr-15	30-Apr-15	08-Jun-15	21-Jul-15	21-Jan-16	20-Apr-16	20-Jul-16	<a href="#">2016/772</a>	No	No		
North Wales Wind Farms Connection	SP MANWEB	20-Mar-15	17-Apr-15	28-Apr-15	07-Jun-15	28-Jul-15	28-Jan-16	28-Apr-16	28-Jul-16	<a href="#">2016/818</a>	No			
Hornsea windarm project two	SMart Wind	30-Jan-15	19-Feb-15	11-Mar-15	22-Apr-15	16-Jun-15	16-Dec-15	16-Mar-16	16-Aug-16	<a href="#">2016/844</a>	No			

Infrastructure Delivery: The DCO Process in Context – Technical Report

Humber pipeline	National Grid	15-Apr-15	12-May-15	27-May-15	26-Jun-15	09-Sep-15	07-Mar-16	27-May-16	25-Aug-16	<a href="#">2016/853</a>	No				
M4 Junctions 3 to 12	Highways Agency	30-Mar-15	27-Apr-15	28-May-15	03-Jul-15	03-Sep-15	03-Mar-16	03-Jun-16	02-Sep-16						
Yorks & Humber pipeline	National Grid	18-Jun-14	16-Jul-14	28-Jul-14	12-Sep-14	19-Nov-14	19-May-15	19-Aug-15							
Triton Knoll Electrical Connection	Triton Knoll Offshore Wind Farm	24-Apr-15	21-May-15	12-Jun-15	13-Jul-15	03-Sep-15	03-Mar-16	03-Jun-16	05-Sep-16						
Brechfa Forest electric line	Western Power Distribution	29-May-15	24-Jun-15	01-Jul-15	07-Aug-15	06-Oct-15	06-Apr-16	06-Jul-16							
North London heat and power	North London Waste Authority	15-Oct-15	11-Nov-15	18-Nov-15	23-Dec-15	24-Feb-16	24-Aug-16								
Glyn Rhonwy pumped storage	Snowdonia Pumped Hydro	21-Oct-15	17-Nov-15	10-Dec-15	15-Jan-16	08-Mar-16									
Keuper Gas Storage	Ineos Enterprises	24-Nov-15	22-Dec-15	04-Jan-16	10-Feb-16	16-Mar-16									
Richborough Connection	National Grid	14-Jan-16	11-Feb-16	17-Feb-16	01-Apr-16	08-Jun-16									
East Anglia THREE windfarm	East Anglia THREE Ltd	18-Nov-15	15-Dec-15	03-Mar-16	22-Apr-16	28-Jun-16									
Wrexham Energy Centre	Wrexham Power Ltd	18-Mar-16	13-Apr-16	28-Apr-16	31-May-16	19-Jul-16									
Silvertown Tunnel	Transport for London	03-May-16	31-May-16	13-Jul-16	31-Aug-16										
M20 J10a upgrade	Highways Agency	19-Jul-16	16-Aug-16	25-Aug-16											
White Rose Carbon Capture and Storage	Capture Power	24-Nov-14	17-Dec-14	08-Jan-15	12-Feb-15	22-Apr-15	15-Oct-15	14-Jan-16	13-Apr-16	Refused					
Mynydd y Gwynt windfarm second attempt	REH	31-Jul-14	20-Aug-14	05-Sep-14	17-Oct-14	20-Nov-14	20-May-15	20-Aug-15	20-Nov-15	Refused					
Navitus Bay windfarm	Eneco	10-Apr-14	08-May-14	13-May-14	23-Jun-14	11-Sep-14	11-Mar-15	11-Jun-15	11-Sep-15	Refused					

Infrastructure Delivery: The DCO Process in Context – Technical Report

Brig y Cwm EfW	Covanta Energy	31-Dec-10	26-Jan-11	03-Feb-11	25-Mar-11	07-Jun-11	Withdrawn							
Roosecote biomass	Centrica	03-Jul-12	31-Jul-12	03-Aug-12	07-Sep-12	Withdrawn								
Atlantic Array windfarm	RWE Npower	14-Jun-13	12-Jul-13	01-Aug-13	16-Sep-13	Withdrawn								
Fieldes Lock power stn	Veolia	14-Aug-12	07-Sep-12	17-Sep-12	19-Oct-12	Withdrawn								
Maesgwyn power line	Western Power Distribution	03-Aug-10	31-Aug-10	Not accepted										

## Appendix D: 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	<a href="#">2013/680</a>			Construction to commence late 2017 - Covanta and Veolia
Ipswich chord	Network Rail	05-Sep-12	<a href="#">2012/2284</a>			Built. Opened March 2014
North Doncaster chord	Network Rail	16-Oct-12	<a href="#">2012/2635</a>			Built. Opened June 2014
Kentish Flats windfarm	Vattenfall	19-Feb-13	<a href="#">2013/343</a>			Built. Operational from December 2015
Brechfa Forest windfarm	RWE Npower	12-Mar-13	<a href="#">2013/586</a>		<a href="#">2016/337</a>	Construction due to start before the end of 2016
Heysham to M6 link road	Lancashire County Council	19-Mar-13	<a href="#">2013/675</a>		<a href="#">2015/571</a>	Built. Opened October 2016
Hinkley Point nuclear	EDF Energy	19-Mar-13	<a href="#">2013/648</a>	<a href="#">2013/2938</a>	<a href="#">2015/1666</a>	Financing still being put in place, construction commencement date TBC
Galloper windfarm	SSE Renewables	24-May-13	<a href="#">2013/1203</a>	<a href="#">2013/2086</a>	<a href="#">2015/1460</a>	Construction commenced November 2015
Triton Knoll windfarm	RWE Npower	11-Jul-13	<a href="#">2013/1734</a>			Pre-construction surveys conducted early November 2016
King's Cliffe haz waste	Augean	11-Jul-13	<a href="#">2013/1752</a>			Unclear but believe now built
Blyth biomass	RES	24-Jul-13	<a href="#">2013/1873</a>			Cancelled due to uncertain government funding
M1 J10a upgrade	Luton Council	30-Oct-13	<a href="#">2013/2808</a>			Built. Opened July 2015
Redditch improvement	Network Rail	31-Oct-13	<a href="#">2013/2809</a>			Built. Opened September 2014
Able Marine Energy Park	Able UK Ltd	18-Dec-13	<a href="#">2014/2935</a>			Construction due to commence 2017 but uncertainty over funding
King's Lynn line	National Grid	18-Dec-13	<a href="#">2013/3200</a>			Construction not yet started, awaiting decision to develop King's Lynn B Power Station

Infrastructure Delivery: The DCO Process in Context – Technical Report

Stafford chord	Network Rail	31-Mar-14	<a href="#">2014/909</a>			Construction commenced, due to complete December 2016
North London line	National Grid	16-Apr-14	<a href="#">2014/1052</a>			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	<a href="#">2014/1599</a>	<a href="#">2016/447</a>	<a href="#">2016/447</a>	Construction to commence in 2017 - Siemens appointed
DIRFT 3 RFI second attempt	Rugby Radio Station	04-Jul-14	<a href="#">2014/1796</a>			Construction to commence early 2017
Rampion windfarm second attempt	E.On	16-Jul-14	<a href="#">2014/1873</a>	<a href="#">2015/1319</a>		Under construction, due to complete summer 2018
A556 upgrade	Highways Agency	28-Aug-14	<a href="#">2014/2269</a>			Under construction, due to complete March 2017
North Killingholme power stn	C.Gen	11-Sep-14	<a href="#">2014/2434</a>	<a href="#">2015/1829</a>		Delayed due to government policy on carbon capture, believed not yet started construction
Thames Tunnel	Thames Water	12-Sep-14	<a href="#">2014/2384</a>	<a href="#">2015/723</a>		Under construction, due to complete 2023
Clocaenog Forest windfarm	RWE Npower	12-Sep-14	<a href="#">2014/2441</a>			Construction to commence in 2017
Burbo Bank windfarm	Dong Energy Central Bedfordshire Council	26-Sep-14	<a href="#">2014/2594</a>	<a href="#">2014/3301</a>		Under construction
Woodside Link	Council	30-Sep-14	<a href="#">2014/2637</a>			Under construction, due to open spring 2017
South Hook CHP	ExxonMobil, Total, Qatar	23-Oct-14	<a href="#">2014/2846</a>			Cancelled due to market situation
Walney windfarm	Dong Energy	07-Nov-14	<a href="#">2014/2950</a>	<a href="#">2015/1270</a>	<a href="#">2016/810</a>	Construction to commence in 2017
Hornsea windfarm project one	Smart Wind	10-Dec-14	<a href="#">2014/3331</a>	<a href="#">2015/1280</a>	<a href="#">2016/471</a>	Under construction (onshore connections - offshore starts in 2018), due to complete 2020
Willington pipeline	RWE Npower Northumberland County Council	17-Dec-14	<a href="#">2014/3328</a>	<a href="#">2015/1616</a>		Site for power station sold from RWE to Calon Energy. No public date for construction
Morpeth Northern Bypass	Council	12-Jan-15	<a href="#">2015/23</a>			Under construction, due to open early 2017
<a href="#">A160 upgrade</a>	Highways Agency	04-Feb-15	<a href="#">2015/129</a>	<a href="#">2015/1231</a>		Under construction, to be completed by end 2016
A30 Temple to Carblake	Cornwall Council	05-Feb-15	<a href="#">2015/147</a>	<a href="#">2015/243</a>		Under construction, due to be completed by spring 2017
Dogger windfarm Creyke Beck	Forewind	17-Feb-15	<a href="#">2015/318</a>	<a href="#">2015/1742</a>		No public information on date construction to start
Knottingley Power Project	Knottingley Power Limited	10-Mar-15	<a href="#">2015/680</a>	<a href="#">2016/797</a>		Under construction (site clearance commenced)
Whitemoss Landfill	Whitemoss Landfill	20-May-15	<a href="#">2015/1317</a>			Environmental permit issued Sept 2016. Unclear when construction commences
Norwich Northern Distributor Road (NDR)	Norfolk County Council	02-Jun-15	<a href="#">2015/1347</a>			Under construction, due to complete 2018
Swansea Tidal Lagoon	Tidal Lagoon Power	09-Jun-15	<a href="#">2015/1386</a>	<a href="#">2015/1830</a>		Aim to commence construction in 2017

Infrastructure Delivery: The DCO Process in Context – Technical Report

Preesall gas storage	Halite Energy	10-Apr-13	<a href="#">2015/1561</a>	<a href="#">2015/2071</a>	Land acquisition started. Construction date not publically available
<a href="#">Hirwaun power station</a>	Stag Energy	23-Jul-15	<a href="#">2015/1574</a>	<a href="#">2015/2070</a>	Failed to secure a contract in Dec 2015 Capacity Market Auction. Will try again Dec 2016
<a href="#">Progress power station</a>	Stag Energy	23-Jul-15	<a href="#">2015/1570</a>	<a href="#">2016/736</a>	Amendments to DCO requested. Aim to start construction in 2017
Dogger windfarm Teesside A&B	Forewind	05-Aug-15	<a href="#">2015/1592</a>		No public information on date construction to start
<a href="#">Ferrybridge Multifuel project</a>	Multifuel Energy Ltd	28-Oct-15	<a href="#">2015/1832</a>	<a href="#">2016/737</a>	Construction due to begin before end of 2016
<a href="#">Internal enhancement Port Talbot Steelworks</a>	Tata Steel	06-Dec-15	<a href="#">2015/1984</a>		No public information on date construction to start
East Midlands Gateway Rail Freight Interchange	Roxhill (Kegworth) Ltd	12-Jan-16	<a href="#">2016/17</a>		Construction due to begin January 2017
<a href="#">Hinkley to Seabank line</a>	National Grid	19-Jan-16	<a href="#">2016/49</a>		No public information on date construction to start
<a href="#">A19/A1038 Coast Road</a>	Highways Agency	28-Jan-16	<a href="#">2016/73</a>		Under construction, due to complete 2018
Palm Paper CCGT	Palm Paper	11-Feb-16	<a href="#">2016/166</a>		No public information on date construction to start
Thorpe Marsh pipeline	Thorpe Marsh Power Ltd	03-Mar-16	<a href="#">2016/297</a>		No public information on date construction to start
<a href="#">A14 improvement</a>	Highways Agency	11-May-16	<a href="#">2016/547</a>		Construction to begin March 2017 and complete March 2021

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

## NIPA Insights Project Steering Group

Keith Mitchell	Peter Brett Associates
Robbie Owen	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 F: 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  
Law firm, planning lawyer  
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  
A14 Case Study – Contractor  
A14 Case Study – Contractor  
A14 Case Study – Landowners Representative  
A14 Case Study – Lawyer  
A14 Case Study – Local Government Planner  
A14 Case Study - Promoter  
A14 Case Study – Statutory Consultee  
Gallop Case Study – Lawyer  
Gallop Case Study – Local Government Planner  
Gallop Case Study – Promoter  
Gallop Case Study – Statutory Consultee  
Gallop Case Study – Statutory Consultee  
Gallop Case Study – Statutory Consultee



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

<b>Roundtable</b> <b><i>NIPA Members</i></b>	<b>Focus Group 1</b> <b><i>Contractors / implementation</i></b>	<b>Focus Group 2</b> <b><i>Civil service</i></b>	<b>Focus Group 3</b> <b><i>Lawyers, statutory consultees</i></b>	<b>Focus Group</b> <b><i>A14 Community members</i></b>
<ul style="list-style-type: none"> <li>• 34 members of NIPA including people from the legal, planning and environmental consultancy, contractor / engineering and promoter fields</li> </ul>	<ul style="list-style-type: none"> <li>• Civil engineering consultancy, director</li> <li>• Engineering / planning consultancy, director</li> <li>• Engineering company, project manager</li> <li>• Engineering consultancy, delivery manager</li> <li>• Planning consultancy, director</li> <li>• Tideway, project manager</li> </ul>	<ul style="list-style-type: none"> <li>• Civil servant, BEIS</li> <li>• Civil servant, BEIS</li> <li>• Civil servant, BEIS</li> <li>• Civil servant, BEIS,</li> <li>• Civil servant, DCLG</li> <li>• Civil servant, DCLG</li> <li>• Civil servant, DfT</li> <li>• Civil servant, DfT</li> <li>• Civil servant, PINS</li> </ul>	<ul style="list-style-type: none"> <li>• Environmental and planning barrister</li> <li>• Environmental and planning barrister</li> <li>• Environmental and planning barrister</li> <li>• Environmental and planning barrister</li> <li>• Environmental and planning solicitor</li> <li>• Statutory consultee, in-house lawyer</li> <li>• Statutory consultee, in-house lawyer</li> </ul>	<ul style="list-style-type: none"> <li>• Four members of the local community including those associated with Parish Councils and civil society organisations</li> </ul>

## Appendix H: Paper on detail and flexibility in highways project design

*Source: John Border (Arup) for J2A on behalf of Highways England*

**A14 Cambridge to Huntingdon Improvement- Extent of Design Development for DCO Application**

Fourth Draft September 2015

### 1 Purpose of Paper

This paper describes the level of design that is normally carried out at the preliminary design stage for highway schemes and which elements are not carried out until the detail design stage. It sets out the reasons why some activities have to be carried out for preliminary design, and why other activities may be best left for the detailed stage. It concludes there is not fixed line between preliminary and detailed design and there is a judgement to be made on the relative merits of carrying out more detail versus less detail design

### 2 Scheme Stages

Typically a highway scheme goes through the following stages in its development:

- Stage 1 Option Identification
- Stage 2 Option Selection
- Stage 3 Preliminary design
- Stage 4 Statutory procedures and powers
- Stage 5 Construction Preparation (including detailed design stage)
- Stage 6 Construction, commissioning and handover
- 

These stages have been developed by Highways England over a long period to best set out the stages through which a scheme has to progress, and to document which activities should be progressed at each stage. This is known as the Project Control Framework (PCF). Note it is possible and in some cases preferable for stages to overlap – eg elements of detailed design (stage 5) commencing before all statutory powers being obtained (stage 4)

For the purpose of this note the following definitions and assumptions are made:

*Preliminary design* is all the design and scheme development carried out in advance of applying for ‘planning permission’, and is the design on which any Environmental Statement, draft Scheme Orders, Land Purchase, etc is made.

*Detailed design* is the further design work that is then required in order to be able to construct the scheme.

### 3 Purpose of Preliminary Design

There is no fixed definition of what constitutes preliminary design. There is guidance (see HE’s PCF handbook) and there is precedent. However the documents that have to be produced for the DCO application, and supporting information, require certain activities to have happened as a minimum. The minimum level of design development carried out prior to DCO application is a 1:2500 scale preliminary design suitable for the following items (not an exhaustive list):

#### 1) Identifying the required scheme land take footprint in the DCO

Landtake is defined on 1:2500 Ordnance Survey Plans on Order plans – so greater accuracy is not required at this stage for this purpose. However the design has to be developed well enough so that all ‘land-hungry’ elements of the design have been considered and included. This therefore includes:

- Mainline and side road and rights of way alignments, cross sections and earthworks
- Junctions and links sized for predicted traffic demands
- Geotechnical investigations to determine material properties, side slopes, earthworks balance
- Drainage outfalls, attenuation ponds etc
- Access requirements including maintenance and emergency accesses, and landowner requirements
- Conceptual structure types and layouts
- Conceptual construction strategy where this affects temporary access roads, temporary working space, storage areas, compounds etc
- Environmental mitigation requirements such as noise bunds, ecological areas, landscape planting etc
- Utility diversions
- Large Advanced direction signage

**2) Identifying the effects on rights of way**

The DCO will seek permission to stop up, divert and create new rights of way. These will need to

- be identified in the Orders and
- be demonstrated they would be reasonably convenient for the relevant user groups

**3) Allowing an Environmental Impact Assessment** to be carried out to identify and mitigate environmental impacts

- Required under EU legislation at this stage before permission to proceed is granted
- Alignments, elevations, scheme footprint etc has to be sufficiently developed to allow environmental surveys and assessment to be carried out accurately.

**4) enabling a scheme budget to be developed** with a suitable degree of accuracy

- Public funds need to be justified ( offering value for money, and a suitable benefit/cost ratio) and budgets assigned

**5) developing credible and efficient construction methodologies**

- needed to support the ES production, and the development of a scheme budget
- this may mean more detail is needed in some areas to establish how something can be built.
- Identification of temporary landtake for construction which can include compounds, borrow pits, storage areas, haul roads, access roads, temporary highway diversions, utility diversions

**6) permitting 'approvals in principle' 'no objection in principle, outline consents, etc to be obtained** from relevant stakeholders such as Cambridge County Council, Natural England, Environment Agency, Network Rail

- Bringing stakeholders along with the design development in a staged manner reduces risk of late surprises
- Agreement of key 'Departures from Standard' on the scheme where if not approved these would have an effect on the orders applied for

**7) holding meaningful consultation** with general public and affected parties

- Generally there is a poor reaction if it appears all details have all been worked out at this stage. That gives no room for consultation and adaption to suit preferences expressed. There is a fine balance between too much and too little information

#### **4 Purpose of Detailed Design Stage**

The design carried out prior to DCO is not a detailed design and does not contain enough information from which to be constructed. The preliminary design is taken as an input for the detailed design to develop all the necessary details for construction. Typically, these would be 1:500 scale plans or larger at junctions and structures. (ie at least 2.5 times more detailed than preliminary design) The table overleaf gives an overview of the difference between the design details.

#### **5 Where is the line between preliminary and detailed design?**

There is no fixed hard line that can be drawn to define where preliminary design ends and where detailed design starts. There are a number of factors that in some cases may influence the level of detail to increase at an earlier stage, and similarly there are factors that would work in the opposite direction. These are set out below.

Reasons for doing less detailed design early

- Cost – Detailed design costs of a scheme of this size would typically be £25 to £30 million. This is generally considered far too much public money to spend ‘at risk’ – ie before the necessary consents and permissions are in place
- Programme - Preliminary design from option selection to submission of DCO application is typically 15 to 18 months. Detailed design of the scheme would take another 12 months at least. This would delay the point at which the DCO application could be made
- Risk – Changes that are required (for whatever reasons) would have a much larger more significant effect in terms of time and cost once detailed design was underway. These may be changes that are forced on HE through the DCO. HE may be seen to be ‘wed’ to certain poor solutions merely because the detailed design had been carried out.
- Consultation and Examination of DCO – When consulting on scheme proposals, if too much detail has already been designed and therefore fixed, there would be no realistic prospect of amendments and adjustments to the design happening to take on board feedback received. Without this ability to adjust the design, consultation is not a credible process, as all decisions would have effectively been made already
- Flexibility in Detailed design – Preliminary design is carried out generally in advance of when construction contractors have been formally appointed (nb except ECI contracts). By still keeping open a degree of flexibility in the design, HE are not committing to a particular specific construction technique, material, supplier etc. Doing so would reduce the ability of the market place to determine economic methods and options for construction, when the contracts are tendered. A change in preferred construction technique can for example change a bridge design completely – eg steel to concrete, precast to insitu etc.

- The last 5% of detailed design happens on site. Road schemes are for the most part ‘in the ground’ and are therefore far more susceptible than building schemes to the variability of ground conditions. Even with the best advanced planning and surveys it is not possible to know all variable ground conditions, uncharted utilities etc, until construction is underway. Interrelation of design disciplines means that most elements of detail design cannot advance in isolation without other elements being fixed at the same time or in advance. To fix a bridge design, the road alignment and cross sections need to be fixed; similarly for a drainage design.

#### Reasons for doing more detailed design early

- Clarification of areas of concern or risk- this might be as a result of:
  - Internal or external stakeholders wanting more detailed information in relation to a topic important to them. Eg:
    - to obtain a consent or non objection from an appropriate body or landowner
    - to get key Departures from Standard approved
  - to get more fixity on the budget for high cost items
  - Long lead times identified for certain items eg utility diversions or railway possessions
- Acceleration of overall scheme programme – there may be some items of detail that perhaps due to programme criticality later on, it is deemed preferable to start early.

## **6 Highways England Position**

Highways England consider that while the permissions are unconfirmed, and further changes to the scheme are quite likely, the expenditure of further costs and the time delay to the DCO application carrying out significant quantities of detailed design are not generally justified at this stage. However there is a fine line between too much and too little information and on a case by case basis elements of detailed design will be considered to be advanced and carried out early, depending on the merits of the situation. Where consultees demand more certainty Highways England may give undertakings or commitments during the course of the DCO process which may tie them to certain solutions or place restrictions on their future ability to make changes.

Design elements	Included in DCO Application	Developed later	Reasons for doing less detailed design early
<b>Highway Layout</b>			1,2,3,4,5,
Mainline Alignment /cross section	Approval in Principle/preliminary design layout @1:2500 <ul style="list-style-type: none"> <li>• Horizontal alignment</li> <li>• Vertical alignment</li> <li>• Cross section</li> <li>• Departures from standards</li> </ul>	Detailed design @1:500 Optimisation of alignments for detailed topographic survey, tie ins, headroom clearances, pavement overlays, etc  All lines, levels, dimensions, setting out information	
Junction Alignment / cross section	Approval in Principle @1:2500 <ul style="list-style-type: none"> <li>• Horizontal alignment</li> <li>• Vertical alignment</li> <li>• Cross section</li> <li>• Departures from standards</li> </ul>	Detailed design @1:250/1:100 etc Optimisation of alignments for detailed topographic survey, tie ins, standards, headroom clearances, pavement overlays, etc  All lines, levels, dimensions, setting out information,	
Side Road Alignment/ cross section	Approval in Principle @1:2500 to <ul style="list-style-type: none"> <li>• Horizontal alignment</li> <li>• Vertical alignment</li> <li>• Cross section</li> <li>• Departures from standards</li> </ul>	Detailed design layouts @1:500/1:250 Optimisation of alignments for detailed topographic survey, tie ins, standards, headroom clearances, pavement overlays, etc  <ul style="list-style-type: none"> <li>• All lines, levels, dimensions, setting out information</li> </ul>	

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Access track alignment/cross section	Approval in Principle	Detailed design	
NMU route alignment /cross section	Approval in Principle	Detailed design	
Laybys,bus stops,maintenance hardstanding, etc	Approval in Principle	Detailed design	
Site Clearance		To define exact extents (may not be whole of DCO redline boundary) Items in boundary to be protected	
Fencing		Detailed Design Specify fencing types on all boundaries, including risk assessment where needed Agree accommodation works with adjacent landowners	
Road Restraint Systems		Detailed design	
Pavements		Construction thicknesses to suit predicted traffic Overlay designs to provide design life Alignment optimisation for overlay depths	
Kerbs		Types and locations	
Traffic Signs and Markings	Signing strategy only – key destinations to size up large advance direction sizes	Layout plans and schedules of all signs an lines	
Street Lighting	Strategy only	Detailed design	
Miscellaneous and Accommodation Works	May include commitments to include certain items of accommodation works	Detailed design (except where 3 <sup>rd</sup> party commitments given)	
<b>Comms and ITS</b>	Strategy concept only	All equipment specifications Schematic and geographic layouts Power requirements Power circuit / loading distribution diagrams Site data Factory acceptance testing	1,2,3,4,5
<b>Construction Logistics</b>	Enough methodology to support ES	Design to suit selected contractors	1,2,3,4,5,6



Infrastructure Delivery: The DCO Process in Context – Technical Report

	production and landtake and budget	preferred methods	
<b>Drainage</b>			1,2,3,4,5,6
Discharge consents	Approval in Principle	Detailed consent	
Drainage network pipes and chambers	Strategy only	All pipe sizes, levels, pipe types	
Ditches	Strategy only	All ditch sizes, levels, linings details etc	
Watercourse diversions	Strategy only	All sizes, sections , levels, linings details etc	
Balancing ponds	Strategy only	Inlet, outlet details, levels, sizes, materials	
<b>Geotechnical design</b>	Approval in Principle		1,2,3,4,5,6
Earthworks specification		Detailed design of all materials, categorisation,	
Embankment/Cutting Design and Treatments		Detailed design of all earthworks details	
<b>Utilities</b>			1,2,3,4,5,6
General Arrangements	Strategy only		
Detail Design		All sizes, materials, levels, details	
<b>Structures</b>			1,2,3,4,5,6
Structural general arrangement (Bridges, retaining walls, large culverts, gantries, misc structures)	Approval in Principle Structures option selected		
Piling and foundations		Detailed design -	
Structural Concrete		Detailed design	
Structural Steel		Detailed design	
Bearings, Expansion joints		Detailed design	
Brickwork, Blockwork and Stonework		Detailed design	
Special Structures		Detailed design	
<b>Accommodation Works</b>			1,2,3,4,5,6
<b>Landscape and Ecology</b>			1,2,3,4,5,6

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Planting	Strategy only	Detailed design	
Ecological works	Strategy only	Detailed design	
Other mitigation	Strategy only	Detailed design	

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