IMPLEMENTING THE INFRASTRUCTURE (WALES) ACT 2024

Consultation response by the National Infrastructure Planning Association (NIPA)

Context

The National Infrastructure Planning Association (NIPA) was established in November 2010 with the aim of bringing together individuals and organisations involved in the planning and authorisation of major infrastructure projects. NIPA's membership is actively involved in major infrastructure consenting projects across the whole of the UK and as such has an active interest in Developments of National Significance in Wales and in the proposed infrastructure consenting (IC) regime. We provide a forum for those with an interest in the planning and authorisation of national infrastructure projects in the UK, particularly those brought forward within the framework of PA 2008.

In summary, we:

- advocate and promote an effective, accountable, efficient, fair and inclusive system for the planning and authorisation of national infrastructure projects and act as a single voice for those involved in national infrastructure planning and authorisation;
- participate in debate on the practice and the future of national infrastructure planning and act as a consultee on proposed changes to national infrastructure planning and authorisation regimes, and other relevant consultations; and
- develop, share and champion best practice, and improve knowledge, skills, understanding and engagement by providing opportunities for learning and debate about national infrastructure planning.

Introduction

On 19TH September 2024, the Welsh Government published its consultation on Implementing the Infrastructure (Wales) Act 2024. NIPA welcomes the opportunity to comment on the consultation.

The consultation was framed as a number of questions under each of the proposed chapters within the Act and these are addressed in turn below.

Chapter 2: Transitional provisions

Question 1 – Do you agree with the proposed transition points in existing consenting regimes, if not why not?

The transition point referred to in paragraph 2.10 of the consultation document appears to be at a point in time after which one of the reference bodies has received an application. NIPA is of the view that mandatory transition at this stage may be far too late in the process and risks causing unnecessary delay in the case of applications already in an advanced state of preparation. NIPA would recommend careful consideration of this point taking note of representations likely to be received from applicants and other bodies. NIPA's experience of other transition provisions in infrastructure consenting reflects that there are a number of earlier stages at which transition could occur, for example prior to or following Environmental Impact Assessment (EIA) scoping where the direction of travel on programme critical issues such as survey and assessment are agreed. NIPA acknowledge that using EIA scoping alone as a transition point may not be sufficient to ensure timely transition. In this regard, additional

triggers such as a requirement to demonstrate and evidence progress 'post scoping' are also likely to be required to ensure that projects are not left dormant in the previous system for too long and the addition of a long stop date in any event such as a two-year period could provide the necessary certainty for all.

Question 2: What time period is considered appropriate between regulations being laid, to the infrastructure consenting process coming into force?

NIPA welcomes the inclusion of a transition period between the existing and new consenting regimes however there should be a presumption that where significant work has already been carried out under the Development of National Significance (DNS) regime that this work should be able to be carried over into the new regime. It is inevitably the case that some development proposals will already be at an advanced stage when the new regulations come into force and the significant investment that applicants and stakeholders have put into DNS applications must be acknowledged in any transitional provisions.

The necessary time period will depend on the flexibility allowed within the transitional period however a minimum period of six months is likely to be necessary. In the event that transition to the new regime is at the sole discretion of the Welsh Government a longer period may be required in order that projects already within the DNS regime can be concluded/consented without incurring excessive delay or cost.

Question 3: What time between the legislation being made and coming into force is sufficient for all stakeholders to understand the requirements?

NIPA recognises the fact that capacity and resources will differ amongst stakeholders and as such due consideration should be given to this in order to avoid unnecessary delays to projects. A minimum period of six months would seem reasonable.

Question 4: What other provisions should be introduced to enable projects to move to the new system?

NIPA welcomes the provisions contained in paragraphs 2.16 to 2.19, acknowledging the considerable amount of work that may have been undertaken in the preparation of applications for submission under the existing DNS regime. In order to ensure consistency and transparency, clear guidance should be issued in this regard rather than the carry-over of environmental and other pre-application work being at the sole discretion of Welsh Ministers.

NIPA would also welcome the update of current guidance issued in respect of DNS projects in advance of the new regime coming into force.

<u>Chapter 3: Developments that fall within the consenting process by direction</u>

Question 5: Do you agree with the projects that may be directed and their corresponding thresholds?

NIPA does agree that powers of direction are necessary and indeed beneficial, in particular with respect to projects which may be of National Significance in Wales but may not be captured by a simple quantitative threshold. Nonetheless the current guidance on categories of

projects (3.21) should be clarified. The term 'Developments that do not meet the thresholds listed in Part 1 of the Act' could theoretically capture any project and further guidance should be provided over and above the examples given in the consultation documents (paragraphs 3.19 and 3.20). The potential for inclusion of projects involving new or novel technologies that do not meet the thresholds and categories in 3.23 is welcomed, however, definition of 'new or novel' also needs further clarification. The example of hydrogen provided is potentially confusing given that it refers to larger scale hydrogen projects which may benefit from inclusion in the new regime however hydrogen, in and of itself is not a new technology. Rather, it is the current nature of production, transport and use that is new.

The question also refers to the thresholds proposed, however, thresholds in the context of powers of direction seems to run counter to the intent of those powers. If the question is referring to the thresholds contained within the Act (paragraph 3.23), NIPA recommend that these are reviewed to ensure that they truly capture infrastructure projects of significance to Wales. As it stands the thresholds are highly inconsistent and, in some cases, very low indeed. For example, offshore generating stations of 1-50MW may well capture any offshore generation project rather than those of genuine national significance, including for example research demonstrator projects seeking to test and prove new technology.

It is further noted that at this stage there is no process for exemption of schemes which may not be desirable to include within the IC regime. We would therefore recommend that consideration is given to an amendment within section 17 of the Act to allow such an amendment, should Ministers at some time in the future feel that this is desirable for certain types of project.

In addition, NIPA consider that Welsh Ministers should have a power to give 'opt-out' directions if, in the case of a particular project, the applicant considers (and Ministers agree) that it would be more appropriate for the project to be consented locally, i.e. for it not to have to be consented through the new regime, and makes an application to Welsh Ministers accordingly. This would give welcome flexibility.

Question 6: What other new or novel technologies not currently listed in the Act should be listed, and what is the corresponding threshold?

NIPA observes that there may be some inconsistency in this question given that the intent of the direction powers is to avoid the capture of new or novel technologies by thresholds which do not reflect the significance of the project in question to Wales. We would further note that the nature of a new or novel technology is such that a list that is provided today does not capture the new or novel technology of tomorrow. As such a definition of new and/or novel technology may be a better way to ensure that the intent of the Act is delivered whereas a list of what is new and novel may preclude the very new technologies it is intended to facilitate.

Chapter 5: Extinguished and deemed consents

Question 7: Do you agree with the Consents that may be extinguished/deemed? If not, what consents should be removed or listed?

In broad terms NIPA is of the view that consistency with the NSIP/DCO regime would be beneficial in order that applicants are clear on what may be required. This is particularly important in cases where schemes such as pipelines may have cross-border implications. This

should also seek to remain consistent with any changes to the Planning Act 2008 that may be brought about in this regard through the Planning and Infrastructure Bill that is expected to be brought forward in the Spring of 2025.

Question 8: Which consents should be extinguished/deemed only with the consent of the relevant body?

As noted in the above response clarity regarding cross-border schemes is of vital importance in this circumstance particularly given that both IC and DCO may be required. NIPA also suggest that a 'reasonableness' test should be applied in cases where relevant bodies are unwilling to extinguish or incorporate consents. Examples have been cited where requests for extinguishment of consents have been refused on the basis that 'it hasn't been done before'. Such an argument should not be considered 'reasonable' when weighed against strong evidence provided by an applicant. In such cases the relevant body should be expected to respond substantively to the evidence provided.

For cross-border schemes it is essential that the relevant body each side of the border takes a proactive, collaborative and consistent approach.

NIPA also believe that Welsh Ministers should consider whether it is necessary and appropriate for *any* consents to be subject to the consent of the relevant body, on the basis that ultimately the Welsh Ministers can judge the position when it comes to making a decision on the terms of the consent to be granted, if necessary with the benefit of submissions made by the applicant and the relevant body. This is the position in relation to orders made under the Harbours Act 1964 and the Transport and Works Act 1992 and it is not clear to NIPA why the position should be any different under this new regime.

Chapter 6: Pre-application advice and information

Question 9: Do you agree with the general approach proposed for pre-application services? If not, why not?

NIPA welcomes the commitment to a comprehensive and meaningful pre-application advice service. In broad terms we support the stated requirements for pre-application submissions set out at paragraphs 6.7 and 6.8 of the consultation document. We would recommend that the validation of requests should be made within a defined timescale of no greater than 14 days and as such suggest that the phrase 'as soon as is reasonably practicable' is replaced or added to by: in any event within 14 days, in 6.14.

Regarding the fee charging regime, we understand the move towards full cost recovery as is now the practice in other consenting regimes, on a not-for-profit-or-loss basis. We note the pre-app fees set out in Chapter 10 refer to an hourly rate for pre-app services however this should be commensurate with the level of expertise provided and clarity over the scope, level and timing of service to be expected. We recommend the Welsh Government consider an upper limit and/or the introduction of tiers of pre-application advice, each with a fixed fee. Such a system would give certainty to both the applicant and the Welsh Government as to the scale of the service to be provided as well as cost certainty.

Consideration should also be given to the treatment of commercially sensitive information, particularly in the early stages of developing applications. In order to encourage applicants to engage fully at the earliest opportunity it may be advisable to ensure that the option to keep pre-application discussions confidential until the stage of engagement with relevant authorities, statutory agencies and communities, is possible for all parties.

Question 10: Do you agree with the proposed minimum requirements specified for the Welsh Ministers, LPAs and NRW in providing pre-application services? If not, should any requirements be added / removed?

We support the proposed 28-day response time set out at paragraph 6.15. However, there does not appear to be a mechanism to hold the relevant bodies to meeting this response time. We recommend failure to adhere to the 28 days response time should result in the repayment of 50% of the pre-application fee paid.

We additionally welcome the clarity provided in paragraphs 6.16 – 6.22 but consider that the points listed here are the minimum expectations. The most benefit to applicants is the ability to engage on specific issues with the relevant specialists at the local planning authority and NRW. For example species specialists, noise specialists, ecologists, etc. Without meaningful engagement from the relevant consultee early in the process it is extremely challenging for promoters of applications to ensure that potential issues are sufficiently addressed in consultation, and the development of applications.

Question 11: Do you have any comments on the process for obtaining information about interests in land?

NIPA supports the proposals for obtaining information regarding interests in land and in particular reliance on the notion that 'diligent enquiry' is an appropriate bar for applicants to fulfil in cases where information on land interests is not readily available. There is sufficient precedent in both the Welsh and English regimes to support the definition of the terms used within the current proposals and these should be taken as the starting point.

Question 12: Do you have any comments on the process for powers of entry to survey land?

NIPA understands that it will sometimes be necessary to access land for the purposes of undertaking survey works. On the understanding that further detailed guidance will be forthcoming, we therefore support the principles outlined in paragraph 6.50 onwards relating to section 125 of the Act (Powers of Entry to Survey Land). We support the requirement that applicants act reasonably and first make every reasonable effort to obtain access directly from the landowner before seeking authorisation from Welsh Ministers.

Chapter 7: Pre-application notification and consultation

Question 13: Do you agree the proposed minimum requirements are proportionate given the different types of application that may be submitted? If not, why not?

NIPA supports the minimum requirements for pre-application consultation, as set out from paragraph 7.22 onwards. These should help to ensure applicants are aware of what is expected of them as part of the process and giving certainty to stakeholders as to the minimum level of pre-application interaction they can expect from an applicant.

We welcome the flexible approach to in-person public events as different developments can benefit from different formats at such events. We also welcome the engagement with UK-wide bodies not covered by the Act who may also have a valuable contribution to make through the consultation process.

Question 14: Do you agree with the proposed content of a substantive response? If not, why not?

Broadly speaking NIPA agrees that a 'substantive response' should be required from statutory consultees, however the descriptions of contents provided in paragraph 7.47 should be enhanced. Bullet point three requires the consultee to describe their concerns and how these could be addressed, however, the level of detail required and any further consultation necessary should also be described, including the level of supporting information and evidence required to support their position and requests. Furthermore, bullet point 4 appears to allow consultees to state an unreasoned objection and this should be rectified as NIPA suggests. In all cases more guidance should be provided to consultees on the nature and expected detail, level of reasoning and supporting evidence to be contained within a 'substantive response'.

Question 15: Do you agree with the introduction of a 'pre-application validation' process and a two-step pre-application consultation process? If not, why not?

We do not agree with the introduction of a mandatory 'pre-application validation check.' It is for the applicant to decide on the appropriate level of detail to submit with the application, following consultation with stakeholders and having due regard to the requirements of the prevailing planning policy and EIA requirements, as appropriate. Qualitative judgements are part of the examination process and should not be undertaken as an administrative exercise.

We support the two-step consultation process set out at paragraph 7.54 however we would question whether this should be mandatory. We do, however, recognise that it could be useful in addressing issues early, thereby saving time at the Examination stage and possibly eliminating the need for a consultee to take part in Examination, saving time and reducing costs for the parties involved.

<u>Chapter 8: Applications for Infrastructure Consent</u>

Question 16: Should any additional information, documentation or plans be submitted with an application for infrastructure consent?

NIPA recognises the fact that all applications are different and as such the nature of submissions will necessarily vary to some degree.

Nonetheless NIPA does support the list of documentation and plans provided at paragraph 8.11 and further recommend the specific requirement for submission of an overall/high-level

masterplan be listed as a required drawing. A masterplan provides an important point of reference for all the main features of a proposed development and aids significantly in the orientation of stakeholders in particular.

In relation to the requirement to provide a statement identifying who will be responsible for grid connection (paragraph 8.11), this should include the option of confirming the provider of the grid connection later in the application process. This is necessary because discussions with National Grid can take a considerable amount of time and do not necessarily align with other factors driving a development programme, for example funding gateways.

The Act will benefit from some flexibility and potentially change in the future given that Grid reforms are ongoing and may result in the need to demonstrate progress in relation to obtaining a planning permission/infrastructure consent before certainty in relation to a grid connection can be provided by regulators.

Question 17: Do you agree with the general approach for submitting and validating applications for infrastructure consent? If not, why not?

NIPA broadly welcomes the overall approach outlined in terms of the submission and validation of applications however we believe that the timings do require further consideration.

In particular, the requirement for applications to be submitted 'before the expiry of a 12-month period beginning on the day on which a pre-application notification is accepted by Welsh ministers' is likely to give rise to significant problems. We would recommend that this period is extended to a 24-month period, and that flexibility is introduced in order that applicants are able to respond to the requirements of stakeholders and other consultees.

In terms of acknowledgement and validation of applications we would also recommend that a timescale for acknowledging receipt is introduced and that a 42-day validation timetable should be the absolute maximum rather than the norm. Validation should always be as timely as practicable but in any event never longer than 42 days. We are concerned than any ability to extend validation would be open to abuse and there are no ways to prevent that, therefore we do not support the concept of being able to extend the validation period.

Question 18: Do you agree with the proposed minimum requirements for publicity and notification of an application for infrastructure consent? If not, why not?

NIPA is comfortable with the proposals for publicity and notification of an application as set out in the consultation paper. As with pre-application procedures, we welcome the 42-day limit for stakeholders to respond with a substantive response. We note that there is no sanction for statutory stakeholders in the event that they do not provide such a response. Whilst it may be difficult to directly mirror the 'no comment, no objection' outcome suggested for community consultees, some means of drawing consultation periods to a close is required for statutory consultees as well as the community. This could be addressed by introducing sanction whereby consultees who are excessively late or who raise new issues (which could have been raised at statutory consultation) are not entitled to any cost recovery of their fees/time for dealing with and progressing the matters during examination unless there is a clear material change in circumstances?

Question 19: Do you agree with the proposed content of local impact reports? If not, why not?

We welcome the suggested content for local impact reports, the need to keep impact reports factual and to not express opinions at this stage of the process. It may be beneficial to emphasise that LIRs should only comment on those matters within the remit of the LPA.

Question 20: Do you agree with the proposed content of marine impact reports? If not, why not?

We welcome the suggested content for marine impact reports and the need to keep impact reports factual and to not express opinions at this stage of the process. It may be beneficial to emphasise that MIRs should only comment on those matters within the remit of the NRW relating to the marine environment.

Question 21: Do you agree statutory consultees should not be able to provide comments on any matters which could have been raised during the pre-application consultation period? If not, why not?

In principle NIPA agree that the pre-application process outlined in the consultation document provides sufficient opportunity for statutory consultees to signpost issues likely to be raised. Raising new, substantive matters late in the process is likely to unfairly prejudice the applicant and could result in the need for additional work and costs that should have been addressed in earlier stages of the process.

Nonetheless, it is recognised that whether or not to accept 'new' substantive matters will be a matter of discretion and in practice limiting comments from statutory consultees may well present a risk of legal challenge. As such it should be clarified in guidance that only in limited circumstances where there has been a genuine change in circumstances, such as policy or legislative amendments, should statutory consultees be expected to raise new issues not signposted during the pre-application stage.

Chapter 9: Statutory Consultees

Question 22: Do you agree with the proposed statutory consultees to be consulted in all cases? If not, why not?

We agree that the list of consultees presented at paragraph 9.13 of the consultation document is appropriate***.***

NIPA also welcomes moves to consult with UK-wide bodies upon which Welsh Ministers cannot place a duty to respond.

Question 23: Do you agree with the proposed statutory consultees to be consulted in specific circumstances? If not, why not and have any been missed?

NIPA supports the provision of a list of statutory consultees that may be included under certain circumstances or for certain development types. We would however raise some concern

regarding the inclusion of groups and bodies who are not legally responsible for the issue being given the status of statutory consultee. While such 'special interest groups' should of course be consulted as a part of the process, elevating such groups to statutory status may result in a prevalence of narrow interests over and above evidenced and reasoned debate and they are ultimately not the body who has the legal responsibility for an asset being affected or as statutory adviser to the Welsh Government.

NIPA notes that for proposed stopping up/diversions of PRoWs the proposed list of statutory consultees omits the local highway authority which has the legal responsibility for managing these. We suggest that they should be added.

Chapter 10: Fees

Question 24: Do you agree that the relevant LPA should receive a fixed fee for producing a Local Impact Report? If not, why not?

We agree the fee produced for producing a Local Impact Report should be a standard fixed fee in all cases. The key elements of a local impact report are set out in paragraph 8.48 and should be factual in nature, avoiding opinion or argument and as such lend themselves to a fixed fee.

Question 25: Do you agree that the LPA should receive a reduced payment, or no payment, if they do not submit the Local Impact Report within the timescale and minimum requirements? If not, why not?

We agree it is fair and reasonable for Welsh Ministers to withhold or reduce payment to LPAs if they do not submit a Local Impact Report within the required timescales and to the required standard. The standards expected to be achieved, as set out in the consultation document, are reasonable in our view and delays and/or poor-quality submissions can cause delays and additional expense to the applicant.

Question 26: Do you agree that NRW should receive a fixed fee for producing a Marine Impact Report? If not, why not?

For the reasons stated above we agree it is fair and reasonable for NRW to receive a fixed fee for producing a Marine Impact Report.

Question 27: Do you agree that NRW should receive a reduced payment, or no payment, if they do not submit the Marine Impact Report within the timescale and minimum requirements? If not, why not?

We agree it is fair and reasonable for Welsh Ministers to withhold or reduce payment to Natural Resources Wales if they do not submit a Marine Impact Report within the required timescales and to the required standard. The standards expected to be achieved, as set out in the consultation document, are reasonable in our view and delays and/or poor-quality submissions can cause delays and additional expense to the applicant.

Question 28: Do you agree that the applicant should not receive a full refund if their application is invalid? If not, why not?

NIPA agrees that it is fair and reasonable for Welsh Ministers to retain a portion of the fee paid to cover reasonable costs incurred, in the event that it comes to light that an application is invalid and that the applicant has not taken steps to address deficiencies identified. We note the details of this refund mechanism are not yet set out in full but should be reasonably and transparently calculated on the basis of officer time incurred.

Question 29: Do you agree that fees should be paid in stages or one initial application fee paid and if the processing of an application is less, this will be refunded?

NIPA recommend that fees are paid in stages to avoid unnecessary overpayment and administration. Where a staged payment is due but has not been made, Ministers would be at liberty to instruct that no further work is undertaken by officers until payment is made.

Chapter 11: Examination

Question 30: Is the examining authority best placed to determine the procedure for an examination?

NIPA is content for the Examining authority to ultimately decide the best procedure for the examination, but would recommend that the applicant be given the opportunity to promote an alternative choice of procedure, which should include detailed justification for the alternative choice and that this must be taken into account in any final determination on procedure by the appointed Examining authority.

Question 31: Is ten or more requests an appropriate amount to trigger a requirement to hold at least one open-floor hearing during examination? If not what number of requests is?

The need for an open floor hearing should be triggered at the discretion of the Examining authority rather than being based on any number of requests.

Chapter 12: Deciding Applications and Making Orders

Question 32: In addition to those specified in Section 60(2) and 62(3) of the Act, who should the Welsh Ministers notify of a decision for infrastructure consent and the reasons for the decision?

Notification should be sent to all statutory and non-statutory consultees and interested parties who submitted representations.

Chapter 13: Environmental Impact Assessment

Question 33: Do you have any suggestions on how to align existing EIA processes with the Infrastructure Act?

We recommend a separate statutory instrument be issued setting out EIA requirements for Welsh Infrastructure projects. The proposed Act will essentially replace the existing consenting regimes, many of which currently have the benefits of their own EIA regulations. Using the Town and Country Planning EIA Regulations may inadvertently lead to discrepancies in the EIA assessments, particularly during the transitional periods. It is recommended that any new guidance should mirror the situation for major infrastructure projects elsewhere in the UK.

Chapter 14: Post Decision

Question 34: Do you agree with the approach set out for amending an infrastructure consent order? If not, why not?

NIPA are of the view that the process for seeking material or non-material amendments should be as proportionate and streamlined as possible. It should be subject to the same rigour and diligence regarding timelines as the wider IC process in order to ensure in particular that new approaches and technologies can be adopted into consented infrastructure appropriately and that changes do not result in protracted negotiations with decision-makers or consultees.

Question 35: Do you agree with the approach set out for revoking an infrastructure consent order? If not, why not?

NIPA welcomes the proposed approach to the revocation of an Infrastructure Consent which will seek representations from all interested parties on the matter. This is welcomed in the interests of openness and transparency.

Chapter 15: Compulsory Acquisition

Question 36: Do you agree with the procedure specified for determining a compulsory acquisition request as part of an application for infrastructure consent or when amending an existing order. If not, how should the procedure be amended?

It is noted that the specified procedure will be supported by secondary legislation which will need to be reviewed in its own right. However, NIPA broadly supports the proposed compulsory acquisition procedures set out in Chapter 15 of the consultation document.

Question 37: Do you consider specific procedure should be set out in subordinate legislation regarding examining a compulsory acquisition request as part of an application for infrastructure consent? If yes, what procedure should be specified?

In the case of compulsory acquisition NIPA considers that subordinate legislation should set out specific procedures in relation to compulsory acquisition. We note that the procedure for examining compulsory acquisition of land will be determined by Welsh Ministers on a case-by-case basis (paragraph 15.19) and whilst NIPA does not disagree with this in principle, such

decisions should be reasoned and determined in consistent manner. The consultation is currently unclear on the circumstances where a specific compulsory acquisition hearing may be required and this should be clarified in any subordinate legislation that is drafted. It will also be important to keep the consenting within one coordinated process and prescribed set of timescales to deliver certainty and timely outcomes.

23 December 2024