NATIONAL INFRASTRUCTURE PLANNING ASSOCIATION ("NIPA") RESPONSE TO THE CALL FOR EVIDENCE IN RELATION TO THE INDEPENDENT REVIEW INTO LEGAL CHALLENGES AGAINST NATIONALLY SIGNIFICANT INFRASTRUCTURE PROJECTS ("THE REVIEW")

Introduction

1. 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 principal focus is the planning and authorisation regime for Nationally Significant Infrastructure Projects ("NSIPs") introduced by the Planning Act 2008 ("the 2008 Act"). 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 the 2008 Act.

2. In summary NIPA:
    a. advocates for and promotes an effective, accountable, efficient, fair and inclusive system for the planning and authorisation of national infrastructure projects and acts as a single voice for those involved in national infrastructure planning and authorisation;
    b. participates in debate on the practice and the future of national infrastructure planning and acts as a consultee on proposed changes to national infrastructure planning and authorisation regimes, and other relevant consultations; and
    c. develops, shares and champions best practice, and improves knowledge, skills, understanding and engagement by providing opportunities for learning and debate about national infrastructure planning.

The case for intervention

Responses to Questions 1 and 2

Question 1: Do you have any comments regarding the Review's methodology or its findings?

3. The Review is, on any view, an impressive piece of work. The data collection, within the review timescale, particularly so.

4. NIPA would, however, have liked to see more on the causes of legal challenges, i.e. the first part of the Terms of Reference and the Review at [31] to really understand and inform the need for change. Relatedly, NIPA understands the explanation, in the Review and in the Call for Evidence, that the concept of 'inappropriate' legal challenge (in the Terms of Reference) is unhelpful. However, had the Review included more information about the grounds of legal challenges to NSIPs, together with an analysis of the nature of those grounds in the context of, or in comparison to, the significant public interest benefits that NSIPs are designed to deliver, then the issue of proportionality could have been usefully explored, with particular reference to the consequences (or 'downstream' effects) of delays to NSIPs. Such analysis, had it been carried out and included in the Review, may have been helpful in either substantiating or disputing the perception among some NSIP promoters that the grounds of legal challenges to NSIPs are sometimes contrived by those opposed to a project as a deliberate mechanism for delaying that project until such time as it becomes unaffordable (in consequence of some of the 'downstream' effects referenced in the Review) or is otherwise forsaken (see the Review at [31(5)]). This, NIPA

believes, was the issue which the Terms of Reference sought to articulate and which the Review could helpfully have investigated.

5. Given the significance of critical national infrastructure, the scale and increasing complexity of DCO proposals, and the current lack of spatial and long term planning, it seems inevitable that DCO applications will attract high levels of interest and objection, both local as well as from national groups such as environmental and other non-governmental organisations (NGOs). In terms of local people, and noting the commentary in the Review at [31(1)], NIPA is of the view that consideration should be given to whether consultation and engagement under the 2008 Act is as effective as it could be and whether there are improvements that could be made that would make projects and the planning process more accessible, improve understanding and project design and development, including the delivery of greater community benefits, and therefore reduce uncertainty and sustained local opposition. That said, it only takes one local person to pursue a judicial review and it is not realistic to think that, by improving engagement between promoters and communities, all local people could ever be assuaged in their concerns about an NSIP that is proposed in their area.

6. NIPA is of the view that the Government needs to progress efforts in relation to DCOs being able to provide more by way of community benefits, community mitigation, integrated environmental outcomes, economic and social infrastructure benefits, skills and employment. These things could well bring better understanding and opportunities and more local people engaged with and on board for a project. None of this would though deal with underlying policy causes or the bringing of judicial reviews by national organisations such as environmental NGOs like Transport Action Network and CPRE.

7. The Banner Review rightly notes that: "*There is little doubt that the cost caps available for judicial reviews within the scope of the Aarhus Convention – as all NSIP cases will inevitably be – have contributed towards the proliferation of challenges to DCOs*" (at [59]). As set out in NIPA's response to the Aarhus Call for Evidence (see the **Appendix**), NIPA considers that the Government should not make any changes to the Environmental Cost Protection Regime ("ECPR") to make those rules any more protective of claimants than they currently are. That would only be likely to further increase the number of challenges to DCOs.

8. It is not just the ECPR that has led to the increase in challenges but also the increased use of social media and how people receive and communicate information (accurate or otherwise) and the increased sophistication of spoiling tactics in opposition to proposed development, including the ability to use crowd funding platforms to fund litigation. For many objectors a judicial review is seen not as something out of the ordinary (as it always used to be seen) but as a continuation of the process of objection to a DCO under the Planning Act 2008. Often such challenges are little more than a thinly veiled attempt to re-argue national policy statement policies and/or the planning merits of the proposal, and extend the timescales and costs for the projects. In this context it is notable, as the Review points out, that very few of the many judicial reviews of DCOs have ultimately been successful.

9. There is also concern expressed as to the number of grounds of judicial review pursued in DCO challenges and that where only some of the grounds are given permission the claimant can renew its application for permission on the refused grounds and make use of the three bites of the cherry currently allowed: see below.

10. The Review also points out that delays caused by challenges to such projects cost many millions of pounds (at [52] *"[a]t the time of providing evidence to us, National Highways has calculated that the increase in costs arising attributable to its schemes, caused by legal challenges, is between £66 million and £121 million per scheme"*). The savings to the public purse and ultimately consumers, if challenges to DCOs could be more focussed and proportionately reduced, are therefore significant and justify further serious consideration looking at the lifecycle of infrastructure and whole life costs and benefits delivery.

11. This is not to overlook the fact that the Secretary of State has decided to refuse DCO applications and may well do so in the future, e.g. the AQUIND Interconnector DCO, which following a successful challenge under s118 of the 2008 Act is being redetermined. Therefore delay to NSIPs does not always fall at the feet of third party objectors.

Question 2: Do you agree with the Review's conclusion that there is a case for streamlining the process for judicial reviews of DCO decisions? Please provide evidence to support your answer.

12. NIPA agrees with the Review's conclusion that there is a case for streamlining the process for judicial reviews of DCO decisions. Supporting evidence is provided in response to Question 1 (above) and in response to the Review's recommendations (below).

13. Please also see NIPA's additional suggestions for other reforms, set out in the final section of this response to the Call for Evidence (at paragraphs 43 and following).

Responses to recommendations 1 – 10

(i) Recommendation 1: amending the cost caps

14. Please see the **Appendix** (below) for a copy of NIPA's Response to the Ministry of Justice's Call for Evidence on access to justice in relation to the Aarhus Convention. As mentioned above, in that response NIPA has set out that it considers that the Government should not make any changes to the Environmental Cost Protection Regime to make those rules any more protective of claimants than they currently are. That would only be likely to further increase the number of challenges to DCOs.

(ii) Recommendation 2: standing

15. NIPA supports the Review's conclusion that amending the standing rules is not the way forward.

(iii) Recommendation 3: reducing the number of permission attempts
(iv) Recommendation 4: raising the permission threshold

16. Recommendations 3 and 4 are considered in parallel. While there was some support within NIPA for reducing the number of bites of the cherry for permission from three to two there was among others a sense that the written permission stage is important and should not be removed. There was some support for raising the permission threshold but there are difficulties about the formulation of this and concern about whether it would really make much of a difference.

17. The concern around there being three bites of the cherry for permission is focussed on:
    a. the delay that going through potentially three permission stages clearly causes;
    b. the fact that few challengers give up after a paper refusal in the High Court or indeed until all "bites" have been fully exhausted; and
    c. given the scale and complexity of NSIPs there is a strong tendency for courts just to grant permission almost regardless, and so allow the matters to be considered further.

18. Given the issues outlined above, NIPA proposes that consideration be given to a more radical alternative proposal.

19. There is no permission stage with some statutory reviews (e.g. challenges under the Transport and Works Act 1992 and the Harbours Act 1964, and challenges to compulsory purchase orders under section 23 of the Acquisition of Land Act 1981) and this used to be the position on s.288 challenges under the Town and Country Planning Act 1990 ("the 1990 Act"). No difficulties have arisen under those two other infrastructure planning regimes as a result. NIPA would therefore propose:

    a. There be no permission stage for challenges to DCOs, instead all cases proceed following filing and service of detailed grounds from the defendant and interested parties, at first instance, to a substantive hearing as soon as possible, within a structured timetable. The imposition of a timetable, by the court, would reduce the level of uncertainty (suffered by NSIP promoters currently) and would enable more effective re-evaluation and restructuring of project programming and financing in response to the delay caused by the legal challenge. The production of a timetable could be mandated by the CPR (or could be an output of the case management conference ('CMC') if that process were adopted *and* the permission stage removed – see response to Recommendation 7 below). Overall, it was felt that these reform proposals could be expected to lead to a sooner final resolution in many cases, potentially saving approximately 3 months.

    b. If a challenge is truly hopeless there remains the ability for a defendant or interested party to apply for a strike out/summary judgment, but proceeding to a full hearing may in the end still be more efficacious.

    c. The recommendation (see Recommendation 7) for a CMC could be taken up and take place following detailed grounds and a fixed number of weeks before the date set for the full hearing itself.

Questions relating to Recommendations 3 and 4

Question 3: Do you agree with the Review that the number of permission attempts should be reduced for judicial review of DCO decisions? If so, should this be reduced to two (maintaining the right of appeal) or just one?

20. NIPA's view is that the permission stage for challenges to DCOs should be removed; please see our proposal in paragraph 19 above.

Question 4: If you agree that the number of permission attempts should be reduced for judicial review of DCO decisions, do you think that this change should also be applied to judicial review of other planning decisions?

21. Potentially yes, given the Government's objective of speeding up the planning (i.e. consenting) process for development, in the interests of supporting economic growth.

Question 5: What would be the impact on access to justice if the number of permission attempts were reduced, either for just DCO judicial reviews or wider categories of judicial review?

22. Given that there are numerous other statutory challenge procedures which do not include a permission stage, NIPA does not consider that there would be any negative impact on access to justice if the number of opportunities to apply for permission in relation to judicial review challenges to DCOs were reduced, or even removed entirely. Please see our proposal in paragraph 19 above.

Question 6: Do you think the CPRC should be invited to amend the CPR to raise the permission threshold for judicial review claims challenging DCOs.

23. Please see our response to Recommendation 4, in paragraph 16 above; it is likely that other reform proposals would have greater effect.

Question 7: What, if any, are the potential benefits of raising the permission threshold for judicial review claims challenging DCOs?

24. Please see our response to Recommendation 4, in paragraph 16 above; it is likely that other reform proposals would have greater benefits.

Question 8: What, if any, are the potential impacts on access to justice of raising the threshold for judicial review claims challenging DCOs?

25. As explained in paragraph 16 above, NIPA's recommendation is that more radical procedural reform would bring greater benefits without compromising access to justice.

(v) Recommendation 5 – Specialist "NSIP ticket" judges in the High Court

26. The Review does not find in favour of an "NSIP ticket" approach. NIPA agrees. However, NIPA would say that:

    a. There is a clear and urgent need for more specialist planning judges in the High Court and Court of Appeal. There are at present not sufficient judicial resources.

    b. The Supreme Court has also not had a specialist planning judge since Lord Carnwath retired.

    c. Specialist planning judges must be people who have in practice before going on to the Bench regularly undertaken and advised on planning work, not simply judges who in practice were never involved in planning work, but on the Bench decide it is something they wish to do.

27. In addition, consideration could be given to High Court judges in DCO challenges sitting with an assessor; the assessor could be a former examining inspector or very experienced DCO professional practitioner. The CPR already allow assessors to sit with judges. This

would help to ensure that the Court understood fully the DCO application and examination context.

Questions relating to Recommendation 5

Question 9: What, in your view, are the potential benefits of introducing an NSIP ticket which would restrict the ability to hear judicial review cases concerning DCO decisions to a small specialist pool of judges (four to six judges)?

28. As explained in paragraph 26 above, NIPA is not in favour of an "NSIP ticket" approach. However, please see the related commentary, and the proposal in paragraph 27 above.

Question 10: What would be the impact on the operation of the Planning Court if an NSIP ticket were to be introduced?

29. Whilst NIPA is not in favour of an NSIP ticket approach, it strongly recommends that any strategy for bolstering specialist planning expertise within the judiciary is founded on bringing in genuine expertise in planning law and practice.

(vi) Recommendation 6 – "significant planning court claim" designation

30. NIPA supports this proposal.

Questions relating to Recommendation 6

Question 11: Do you agree with the Review that the CPRC should be invited to amend the CPR so that DCO judicial reviews are automatically deemed Significant Planning Court Claims?

31. Yes.

Question 12: The [Review] states that in practice all DCO judicial reviews are treated as Significant Planning Court Claims. What would be the benefit of formalising this existing practice? In particular how would this change help to reduce delays or the impact of delays?

32. It would put the matter beyond question, thereby increasing confidence that the case will necessarily be prioritised and also reducing the need for argument to be made in support of a request for a case to be considered a Significant Planning Court Claim. Whilst the consequential time and cost savings to be gained from not having to make such an argument might not be particularly significant, they would still be beneficial for the reasons outlined above.

(vii) Recommendation 7 – pre-permission CMCs

33. In the context of the current regime (whether there are two or three bites of the cherry at permission) this is not supported.

34. There was a concern that such a procedure will just add to the delay and costs arising from legal challenges to NSIPs.

35. However, NIPA would support a CMC process, much like that recommended, if the 2008 Act was amended to remove the permission requirement: please see our proposal in paragraph 19 above.

Question relating to Recommendation 7

Question 13: Do you agree with the Review that the CPRC should be invited to consider amending the CPR to introduce automatic case management conferences in judicial review claims challenging DCOs? If so, do you agree that case management conferences should be convened in the way suggested by the Review, including the requirement for pre-permission case management conferences and further case management discussion once permission for judicial review or permission to appeal has been granted?

36. For the reasons explained above (in paragraphs 33 to 35) NIPA is not in favour of introducing CMCs into the current judicial review process, but would support a CMC process if the permission stage were to be removed in respect of judicial review challenges to DCO decisions. Our suggestion is that this could be achieved through an amendment to the Planning Act 2008.

(viii) Recommendation 8: Target timescales in the Court of Appeal
(ix) Recommendation 9: Target timescales in the Supreme Court

37. Recommendations 8 and 9 are considered in parallel. Since the introduction of the Planning Court, and the procedure for significant planning court claims, the time taken for a challenge to be determined at High Court level has improved significantly. Delays in the Court of Appeal and Supreme Court remain a real issue. The uncertainty and delay at the Court of Appeal permission stage is especially acute. These two recommendations are strongly supported by NIPA.

Questions relating to Recommendations 8 and 9

Question 14: What, in your view, are the factors leading to the length of time currently taken by the Court of Appeal and the Supreme Court to determine an application for permission to appeal and to deliver a judgment on the appeal with regards to judicial review claims against DCO decisions?

38. Resourcing issues: insufficient specialist expertise and capacity. Please see our response to Recommendation 5 above (at paragraphs 26 and 27).

Question 15: Do you agree with the Review that the CPRC and the President of the Supreme Court should be invited to consider introducing target timescales in the Court of Appeal and the Supreme Court respectively?

39. Yes, NIPA strongly agrees with this proposal. Please see our response to Recommendations 8 and 9 above (at paragraph 37).

Question 16: What would be the impact on the operation of the appellate courts if the target timescales proposed by the Review were to be introduced?

40. This is a question for the courts.

(x) Recommendation 10: reporting against key performance indicators

41. NIPA supports this recommendation.

Question relating to Recommendation 10

Question 17: Do you agree with the Review that the Planning Court and the Court of Appeal should be invited to publish regular data on key performance indicators as outlined in the report? Please provide any evidence of likely benefits and potential costs, where available, to support your answer.

42. Yes, NIPA supports the recommendation that the courts should report on performance against KPIs and that those KPIs should include adherence to or divergence from 'milestones' and deadlines for the handling of legal challenges to DCO decisions. One practical advantage to be gained from the increased accessibility of such information is that it would assist NSIP promoters (and their advisers) in seeking to forecast the extent of the delay their project might suffer, thereby facilitating better informed decision-making in relation to re-programming and re-financing, and the implications thereof. This would, potentially, help in the management of spiralling project costs, which are a regrettable consequence of most legal challenges brought against DCO decisions via the current judicial review process.

Other options for reform

43. There are a number of other reform proposals which NIPA wishes to raise – as follows:

Judicial review

44. As set out above, NIPA's suggestion is that the permission stage should be removed entirely from the 2008 Act.

45. Any changes to the procedures governing judicial reviews of DCOs should also apply to other judicial reviews under the 2008 Act, most notably of NPSs. Challenges to NPSs can have very significant impacts on the delivery of NSIPs, with the Heathrow Expansion example being the clearest. There are other possible judicial reviews under the 2008 Act, see e.g. ***R. (Innova Cellophane Ltd) v Infrastructure Planning Commission*** [2012] P.T.S.R. 1132 on third party land access. All 2008 Act judicial reviews should be subject to the same procedures. This would benefit the DCO regime and those involved in it by ensuring parity of approach irrespective of the type of infrastructure, thereby helping to maintain access to justice as well as consistency within the regime, whilst also upholding its credibility and effectiveness.

National Policy Statements

46. There is a debate to be had as to whether NPSs, given the degree of pre-designation consultation and the need for Parliamentary approval, should be subject to judicial review at all. Consideration should be given to whether judicial review might properly be excluded for the designation of an NPS.

47. This might be achieved in different ways:
    a. by amending the 2008 Act to preclude judicial review of NPSs; or
    b. by introducing a process for NPSs which results in a single clause Act: see further below (under the heading 'Provisional DCOs for Critical National Priority Projects').

48. The first way ((a) above) is constitutionally controversial. The second ((b) above) is less controversial (insofar as it is based on established legal precedent), but may reduce the

speed of the initial process of designation. It would, however, avoid the subsequent (and potentially more wide-ranging) effects of delay arising from legal challenges.

49. There was a concern by some in NIPA, however, that reducing the ability of people to challenge NPSs might result in some Examining Inspectors giving more leeway than they should to consider issues at a DCO examination that were closed off by an NPS. This is a risk that could be effectively managed by the provision of appropriate Examining Authority training programmes.

50. A further issue that has emerged in relation to NPSs is the judicial review of government decisions not to consider reviewing, or, in practice, not actually reviewing, NPSs once designated. Such judicial reviews potentially undermine the whole point of NPSs, in that they are detrimental to the certainty and policy support that NPSs are intended to afford to infrastructure development proposals and decision-making. Consideration should be given to whether any ability to judicially review a NPS following its designation should be removed for a period of years; this would preserve the purpose and effectiveness of the NPS until such time as it was due (or overdue) for scheduled review.

Provisional DCOs for Critical National Priority projects confirmed by Parliament

51. While views on this within NIPA differ, overall NIPA considers that given what is at stake here, e.g. the incumbency of achieving clean energy by 2030, the Government needs to consider a more radical solution. Consideration should be given to amending the 2008 Act in the following way, so that Parliament has a role in confirming some DCOs:

    a. It would be possible, via a procedure similar to that for s.35 directions, to designate certain NSIPs as “critical national priority projects” (“CNPs”) – at present this is only a policy concept under the Energy NPSs.

    b. The normal DCO process would then be followed except with accelerated examination, recommendation and decision stages (we would suggest two thirds of the current maximum timescales).

    c. Then, if a DCO is made by the Secretary of State, it is made as a Provisional DCO (“PDCO”).

    d. The PDCO is then required to be confirmed by Parliament, in order for it to come into effect. The confirmation process would require a single clause ‘Provisional Order Confirmation Bill’ to be introduced into Parliament by the relevant Secretary of State soon after the PDCO had been made.

    e. The Bill would then go through an abridged Parliamentary process involving a joint select committee if there are petitions against it, and the rules of *locus standi* (i.e. the right to be heard) established by Parliament in relation to private and hybrid bills and in effect since the 1850s would apply to petitioners.

    f. The resulting Provisional Order Confirmation Act would then not be subject to judicial review at all, just like an Act resulting from a hybrid bill is not. Explicit provision would, however, need to be made preventing judicial review of the decision of the Secretary of State to make the PDCO.

g. The Parliamentary process could take 6-9 months if there are petitions against the confirmation bill, but would be much shorter than the delays currently caused by judicial reviews and subsequent DCO redeterminations (which, evidence demonstrates, can take several years).

52. There is considerable 19th and 20th century precedent for provisional orders for infrastructure projects, most recently re Scottish private legislation (which is still in force but has been unused since devolution in 1998): see Private Legislation Procedure (Scotland) Act 1936.

53. This change would involve the Government deciding that for CNP infrastructure projects, Parliament should be asked to step up and adopt a more active role, though nothing like to the extent required by the full hybrid bill process that has been used in recent years on major railway bills. Rather, the Parliamentary procedure for consideration of a Provisional Order Confirmation Bill in respect of a PDCO would be analogous to the current process for Special Parliamentary Procedure ("SPP") which is invoked in relation to compulsory acquisition proposals (e.g. in compulsory purchase orders and DCOs) to address the scenario in which an objection to the proposed compulsory acquisition of what is known as special category land, or land held inalienably by the National Trust, remains unresolved at the decision-making stage of the statutory order process. Where this is the case, the statutory order is made or confirmed but remains subject to SPP, such that it cannot come into force until it has been referred to and considered by a joint committee of both Houses of Parliament. The joint committee's role is to consider any petitions received in respect of the compulsory acquisition proposals and to report its consequent recommendation to Parliament as to whether or not approval should be granted.

54. Given that the PDCO and Provisional Order Confirmation Bill / Act process NIPA is proposing would mirror the basis on which SPP currently operates, it is clear that if it were adopted and given effect, the right of access to justice would be maintained in line with the UK's domestic and international obligations, and there would be no detrimental effect on the maintenance or exercise of that right. Access to justice and ECHR Convention Rights would be preserved, as the PDCO and Provisional Order Confirmation Bill/Act process would include a right for opponents (petitioners) to make representations and to be heard (where *locus standi* is demonstrated, in accordance with the established rules) by a joint select committee, just as it is preserved in the case of SPP.

55. If adopted, this procedural change would have a significant positive impact on the government's ability to deliver clean energy in line with its net zero agenda, any progress towards which is, indisputably, beneficial and in the public interest.

Section 35 NSIP 'opt-out' option

56. The current restrictions in the 2008 Act which mean that if a project meets the definition of an NSIP it must be consented under the 2008 Act, should be relaxed. Developers whose projects 'qualify' as NSIPs should be able to seek an opt-out direction, in much the same way as the current s.35 direction 2008 Act opt-in process operates. If developers prefer the development consenting process under the Town and Country Planning Act 1990 then they should be allowed to use it.

23 December 2024

APPENDIX

NATIONAL INFRASTRUCTURE PLANNING ASSOCIATION ("NIPA") RESPONSE TO THE MOJ CALL FOR EVIDENCE ON ACCESS TO JUSTICE IN RELATION TO THE AARHUS CONVENTION

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. Our principal focus is the planning and authorisation regime for Nationally Significant Infrastructure Projects (NSIPs) introduced by the Planning Act 2008 (PA 2008). 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

1. It is important that the Government takes a holistic approach. At the same time as undertaking this Call for Evidence it is also consulting on the Banner Review which is looking at ways to reduce the number of judicial reviews of Development Consent Orders ("DCOs") granted under the Planning Act 2008 ("the 2008 Act") for Nationally Significant Infrastructure Projects ("NSIPs").

2. The general purpose of the call for evidence is to consider changes to the Environmental Cost Protection Regime ("ECPR") to make those rules more protective of claimants.

3. The Banner Review provides a detailed and careful analysis of legal challenges to DCOs under the 2008 Act. It is clear from that the ECPR are in no way limiting the number of judicial reviews against such decisions. The Banner Review notes that: "*There is little doubt that the cost caps available for judicial reviews within the scope of the Aarhus Convention – as all NSIP cases will inevitably be – have contributed towards the proliferation of challenges to DCOs*" (at [59]). The Review also points out that delays caused by challenges to such projects costs many millions of pounds.

4. The view of NIPA is that the ECPR do not need to be amended to make them more protective of claimants. If this were to be done it is likely to result in more challenges to DCOs under the 2008 Act. This will be liable to undermine any changes brought forward in response to the Banner Review. It is also likely to lead to increase in challenges to planning decisions more generally. That will undermine this Government's objectives to deliver 1.5 million new homes in 5 years and to improve the nation's economic infrastructure, for example to be able to produce and distribute clean energy by 2030.

5. One of the Aarhus Compliance Committee ("the ACCC") cases in which findings have been made against the costs rules was ACCC/C/2012/77. This case pre-dated the ECPR. It was a challenge by judicial review by Greenpeace to the Nuclear NPS . The claim was refused permission on the papers and not further pursued. The award of costs against Greenpeace was £8,000. This was considered excessive at the permission stage. But it is difficult to support that view. As is pointed out in the decision Greenpeace's income for 2010 was £8,931,000. An adverse award of costs of £8,000 against a very well-resourced NGO bringing a claim that was found to be unarguable and which raised issues of a technical nature that required a careful and detailed response cannot be said to be a concern. A number of the judicial reviews of the Airports NPS were by claimants who enjoyed the benefit of costs caps under the ECPR or £5,000 or £10,000.

6. The ACCC is unlikely to ever be satisfied with the costs rules in England and Wales. The reality is that the Aarhus Convention and the ACCC are not set up in such a way as to fully understand our common law system and why it involves greater costs than civil law systems.

7. The ECPR have been in place for many years. They are responsible in part for increasing amounts of environmental litigation. No further protection is required or is necessary.

Responses to the questions

(a) ECPR and Volume of Claims

Question 1: How effective is the ECPR in ensuring that environmental claims are not prohibitively expensive to bring?
Question 2: Please provide data on the number of Aarhus claims that you have been involved in since January 2020 and their outcomes.
Question 3: Please provide data on the impact, if any, of the Covid-19 pandemic on the number of Aarhus claims that you have been involved in.

8. As set out above in the context of the 2008 Act it is clear that the ECPR are contributing to the large numbers of challenges to DCOs. It is clear from this that the ECPR are effective as they stand to ensure that bringing claims is not prohibitively expensive and there is no case for further increasing the costs protections.

(b) Types of claims covered: private nuisance

Question 4: Please provide any data or information you hold on the costs involved in pursuing a private nuisance claim with an environmental component.

Question 5: Please provide your views on the courts using judicial discretion to determine whether a private nuisance claim should benefit from the ECPR. What are the likely benefits and potential risks of doing so?
Question 6: What particular private nuisance claims should benefit from costs protection under the Aarhus convention?
Question 7: Please provide your views on mediation or other forms of dispute resolution as a means to resolve private nuisance.

9. This is outside the scope of matters that NIPA is concerned with.

(c) Default levels of costs caps: unincorporated associations

Question 8: Are you aware of any cases where the ECPR has been applied to claims involving unincorporated associations? If so, what decision was made on the costs cap and were there any significant problems?

Question 9: Are you aware of any cases where a lack of clarity as to the application of the ECPR to unincorporated associations has had an adverse effect on participation?

Question 10: What are the potential benefits and risks of amending the CPR to provide further clarity as to the application of the ECPR in cases involving unincorporated associations?

10. This is not an issue in practice with individuals often putting their name to proceedings and obtaining the lower cap: see e.g. ***Wesson v Cambridgeshire CC*** [2023] EWHC 2801 (Admin).

11. If there was considered to be any issue then the CPR could be amended to make clear that unincorporated associations should have the £5,000 cap.

(d) Variation of costs caps

Question 11: Please provide data on the number of Aarhus cases you have been involved in where an application was made by a defendant or claimant to vary the costs cap. Of those applications, how many cases successfully varied the costs cap downwards?
Question 12: Please provide data on the number of Aarhus claims you have been involved in where defendants have applied to vary a costs cap during proceedings (that is, not at the first opportunity). Of those applications, how many were successful? Please provide detail of the case and circumstances.
Question 13: Please provide your views on the court's ability to vary the costs cap. Do you think the possibility of varying the costs cap is potentially dissuading claimants from bringing forward an Aarhus claim?
Question 14: Should the rules allowing for defendants to challenge a costs cap be revised and, if so, how?
Question 15: What are the likely benefits and risks of varying the costs cap?

12. Again, it is clear from the evidence in the Banner Review that the ability for defendants and interested parties to apply to vary the cap is not having the effect of preventing challenges to decisions under the 2008 Act.

13. The ECPR, following the decision in ***R. (Royal Society for the Protection of Birds) v Secretary of State for Justice*** [2017] 5 Costs L.O, provide a number of protections for claimants including in relation to the timing of applications to vary.

14. Applications to vary the caps are not that common and certainly not commonly granted.

15. The ECPR do not need to be changed.

(e) <u>Schedule of claimant's financial resources and hearings on applications to vary costs caps</u>

Question 16: The ECPR rules provide that any claimant who wishes to take the benefit of the default costs cap is required to file a financial schedule to evidence their financial position. This information may then be discussed in an open court. Should this provision be revised in a way which protects the financial circumstances of all parties, and if so, how? What are the benefits and risks of this approach?

16. The ECPR strike a balance between the concerns expressed about the provision of such information and ensuring that very wealthy organisations and persons should not benefit from the ECPR. Prior to the ECPR providing for this there were egregious examples of very wealthy persons benefiting from costs protection.

(f) <u>Costs for procedures with multiple claimants</u>

Question 17: Would you support a default shared claimant costs cap, and if so, what form should that take and should any conditions apply (for example, only where a second claimant is raising the same legal arguments)?
Question 18: What are the likely potential benefits and risk of a default shared claimant costs cap?

17. The ECPR are sufficiently protective of claimants as they stand and do not need to be amended in this regard.

(g) Costs relating to the determination of an Aarhus claim

Question 19: Please provide any data on the number of Aarhus claims you have been involved in where claimants' costs have not been recovered when defendants have unsuccessfully challenged the Aarhus status of a claim.

Question 20: In your view, are indemnity costs dissuading claimants from bringing forward Aarhus claims? Please provide evidence.

18. NIPA is unaware of any evidence in practice to support such concerns.

(h) <u>Costs protection on appeal</u>

Question 21: Should CPR Part 51.19A be clarified to ensure greater consistency around the costs cap applied to appeals and, if so, how? What are the likely benefits and risks of doing so?

19. NIPA is unaware of any evidence in practice to support such concerns.

(j) Cross-undertakings for damages

Question 22: Please provide any data on the number of Aarhus claims you have been involved in where an interim injunction was sought and whether the issue of a cross-undertaking in damages arose, in particular: a) the number of Aarhus claims in which an interim injunction was sought; (b) whether a cross-undertaking was required; and (c) if so, the amount required.

20. NIPA is unaware of any evidence in practice to support such concerns.

(i) Costs orders against or in favour of interveners

Question 23: Please provide any data on the number of Aarhus claims you have been involved in where it has been appropriate for interveners to intervene to support claimants, and whether there has been uncertainty as to costs liability. Did this uncertainty dissuade an intervener from taking part in the claim?

Question 24: The ACCC's position is that costs protection should be afforded to interveners during proceedings. Should interveners in support of an Aarhus claim have any additional protection from costs beyond the current position? What are the likely benefits and risks of doing so?

21. The rules as they currently stand operate satisfactorily in this regard.

(j) **ACCC/C/2015/131 (b): Calculating the sum of costs to be awarded against an unsuccessful claimant**.

Question 25: In your view, what further clarification in the CPR, if any, is required to achieve this effect?

(k) ACCC/C2015/131 (c): 'Litigant in person' hourly rate'.

Question 26: In your view, what should the optimal hourly rate for a litigant in person pursuing an Aarhus Convention claim be? Please provide justification.

(l) ACCC/C/2015/131(d): Proceedings within the scope of Article 9 of the Convention in which the applicant follows the Party's concerned pre-action protocol.

Question 27: Please provide any data or evidence to support the view that public authorities do not comply with the pre-action protocol? What procedural steps or otherwise should be included in the CPR or elsewhere to ensure compliance?

22. NIPA have no comments on these matters.

Judicial Review Time Limit

Question 28: What are the likely benefits of changing the rules on the commencement of the time limit for bringing an Aarhus Convention claim as suggested by the ACCC?

Question 29: What are the potential risks of changing the rules on the commencement of the time limit for bringing an Aarhus Convention claim as suggested by the ACCC?

Question 30: If the rules in England and Wales were to be changed so that the time limit starts when a decision is made public, should 'when a decision is made public' be defined as the date when that decision is published, or should this be left open for the courts to determine?

Question 31: Are there other approaches which could better address the non-compliance finding regarding the rules on judicial review time limits in England and Wales?

23. NIPA does not consider that this is an issue on which there is a need for any change in the rules. The risks of changing these rules is to increase uncertainty around when a project is free from a possible judicial review challenge.

Litter abatement orders

Question 32: Should the provisions on costs in relation to a litter abatement order under section 91 be revised, and, if so, how?

Question 33: Do you consider there to be other means of meeting our obligations under the Aarhus Convention, particularly outside of the courts, and, if so, how?

Equalities Impact Assessment

Question 34: Are there any equality impacts arising from any of the measures included in this Call for Evidence? If so, please outline what these are, with evidence, together with any mitigations you think could be considered.

24. NIPA have no comments on these matters.

09/12/24