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Planning Reform Team
Department for Communities and Local Government
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5th October 2009

Dear Mr Lancaster,

Re. PLANNING ACT 2008: consultation on examination procedures for nationally significant infrastructure projects

BWEA welcomes the opportunity to provide comments on this third consultation package on the Statutory Instruments to fall out of the Planning Act 2008, and provides this submission on behalf of the UK wind energy industry.

BWEA was established in 1978 and is the representative body for companies active in the UK wind, wave and tidal energy market. Its membership has grown rapidly over recent years and now stands at over 500 corporate members as well as a number of academic members.

It is vitally important to support and encourage the growth of the wind energy sector if the UK is to meet its national and European renewable energy and carbon reduction targets. In representing the wind industry, BWEA is in a unique position to comment on the circumstances which affect the future growth and development of the sector. BWEA work closely with the UKBCSE and supports the UKBCSE's submission. We also welcome the IPC's active engagement with the industry at this important stage in the development of the infrastructure planning framework.

Thank you for the opportunity to submit comments on this consultation document. We have arranged our response in 3 sections:

- 1. General Comments**
- 2. Response to Consultation Questions**
- 3. Further comment on the Annexes**

If you have any queries please do not hesitate to contact me. BWEA would be pleased to clarify any issues raised and offer any further information which may be required.

Yours sincerely,

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PLANNING ACT 2008: consultation on examination procedures for nationally significant infrastructure projects

1. General Comments

- a.** BWEA welcome the Planning Act and the associated guidance. We believe that the new infrastructure planning framework will create a system that is, in broad terms, both simple and flexible. The ability of the system to provide a degree of flexibility at the level of individual applications will be particularly important for wind energy developments and especially for offshore Round 3 developers, in order to design and develop schemes in the way that is most appropriate.
- b.** BWEA would ask that a statement of principle is produced which underpins two overarching principles of cost and efficiency to provide the foundation to the planning process and ensure government policy objectives are met. We believe that through making clear decisions, within an appropriate and more reasonable and affordable timeframe, for all parties involved, investment in UK infrastructure will be encouraged, helping to secure UK energy supplies.
- c.** Furthermore we would also ask that a statement of principle is made that the IPC 'must have regard for the consultation report'. This will ensure the pre-application consultation process has the value intended and incentivises interested bodies to early engagement. We fully support the need to recognise the work already carried out, both to avoid repetition and to limit unnecessary time spent re-opening issues already dealt with early on in this process. This will allow the IPC examination to focus solely on un-resolved issues or genuine new issues that have emerged as a result of the examination process.
- d.** A concern remains as to the number of interested parties that can be included in the examination process. The same entitlement given to statutory consultees is also given to interested parties; who can be anyone who makes a relevant written representation. This very much differs from procedures currently in place and could be exploited by objectors resulting in significantly high numbers of people classed as interested parties. This would be a huge administrative burden for the IPC and could cause delays in the process.
- e.** Investment in the UK may slow if decision making is slow and uncertain. We would like the applicant to have the right of response (to be publicly transparent) when the Examining Authority makes procedural changes e.g. changes to the timetable. This will ensure greater accountability and transparency on costs.
- f.** BWEA would welcome the inclusion of a flow-chart demonstrating the stages involved for a promoter (for small, large and very large projects) in the development and submission of an application to the IPC.

2. Response to Consultation Questions

Consultation Question 1

Do you agree that the draft rules provide a comprehensive set of procedures that explain how the provisions contained in the Planning Act on examinations would work in practice? If not, what additional points do you believe should be added?

We consider that there are a number of areas where clarification and alterations may help the running of the examination, which we mention below.

Under rule 6(2) the Examining authority ("EA") should notify the invitees to the preliminary meeting of the matters it wishes to discuss. We think it would help if the EA could also include within those matters a preliminary indication, based on relevant representations and the application of the principal matters that it considers should be the subject of issue-specific hearings. This will enable the invitees to consider their approach in advance of the meeting.

We believe there may be a risk that oral representations could extend beyond the ambit of the relevant or written representations because rule 14(3) only requires that any oral representations "should be based on the relevant or written representations".

On one reading of this rule the person making the oral representations might be considered to have the option of giving oral evidence based on one or other of the two forms of representation. While written representations are defined in the regulations to be "the full particulars of the case which a person puts forwarding respect of an application and includes any supporting evidence or documents", a relevant representation need only contain the prescribed information required by section 102(4) and Regulation 4(3) of the draft Infrastructure Planning (Interested Parties) Regulation. These provisions only require the relevant representation to include "an outline of the principal submissions which the person proposes to make in respect of an application"

Some parties might conclude that it is in their tactical interest simply to outline their case in the relevant representation rather than giving advance details (and evidence relied upon) required of a written representation.

Furthermore, the word "based" is a fairly flexible term and it might be interpreted as enabling evidence to be put that is only loosely based on the earlier representations (whether relevant or written).

It is recognised that the Act and Regulation 8(1)(b) enables the IPC to seek further written information and we believe that it is important that the IPC exercises vigilance to avoid applicant being taken by surprise by an extensive case being presented at inquiry that fall within the outline of a relevant representation. We also note that there is no requirement for written proofs to be submitted in advance of the hearing and therefore time may have to be used during the inquiry to clarify or assess evidence that is given orally

Consultation Question 2

What assessors would be acceptable to assist the examining authority to consider the relevant issues. To what extent would independent regulators, for example, the Health and Safety Executive, be suitable?

Provided assessors have the requisite specialist level of expertise and the parties can be confident that they are independent and disinterested, they should be acceptable.

As long as an independent regulator from, say HSE, had the requisite expertise and there was no perception of any policy conflict or interest in the relevant project, we would again not see a problem in principle to in their being appointed to an assessor role.

Consultation Question 3

Are there any inconsistencies or unintended consequences in the rules as drafted?

In our response to question 1 we drew attention to the risk that, in the absence of requirements to provide written proofs in advance, parties might be tempted to employ by "ambush" tactics, by trying to avoid full and early disclosure of their case which would obviously conflict with the objective of the examination procedure.

Consultation Question 4

What further action, if any, should government take to facilitate the effective running of the examination?

The examining authority should try to ensure that time limits are adhered to as far as possible. It is recognised that it might be considered insensitive and counterproductive to disregard representations where there are short overruns of limits but the system will be unwieldy if there is a lack of discipline. Where deadlines have not been met, the EA might consider using warning letters to provide a short extension under regulation 23 and if the extended period is not met, then the representation should be disregarded, (save in exceptional circumstances).

Consultation Question 5

Do you think transcribers, or other less costly methods of documenting evidence (eg audio/video recording) should be used during IPC examinations?

We think transcribing is clearly the best method; written records can be searched easily by electronic means dispensing with the need for viewing/listening to lengthy and irrelevant passages. Transcriptions will particularly useful where concurrent sessions take place and parties need to assess how evidence given may impact on their case.

Consultation Question 6

Do you agree with the list of statutory parties? Are there any others which you feel should be included?

We have not identified any additional statutory parties, however we note that certain relevant authorities are to be consulted in "all case". In the case of an authority which only has a terrestrial jurisdiction, will it be a relevant authority if the development consent being sought is located wholly within a marine area. In the context of off-shore wind, this could conceivably happen where development consent is sought for a zonal Round 3 development where export transmission lines have already been installed for a previous wind farm within that zone. In such a case a connection for a new wind farm could be made on the sea bed. It could also be the case where an applicant decides not to include ancillary development within a development consent but instead promotes onshore development through non-IPC planning and consenting routes.

Consultation Question 7

Is the information required to be stated in the registration form appropriate? If not, what omissions or additions would you make?

For reasons previously mentioned, where a person indicates that they propose to make oral representations there should be a note indicating that they will be required to either submit full written representations or a proof of evidence.

Consultation Question 8

Do you agree that the proposals in these rules adequately allow for the protection of information relating to defence and national security, while still ensuring that individual rights are protected? If not, what omissions or additions would you make?

It is not expected that there likely to be many occasions where national security issues will arise in connection with applications for development consent for offshore wind farms.

However, in circumstances where a national security direction is made, although an applicant would always clearly prefer to be able to be present when evidence affecting an important application is made, it is recognised that there will be, hopefully very rare, cases where national security precludes evidence being given in public session and at least the appointment of a representative means that the interests of an applicant can be represented.

We do not see any reason why the Secretary of State should not consult with the applicant about the identity of the representative before an appointment is made so as to ensure that the applicant or other party has confidence that their interests can be properly represented. It is acknowledged that the Secretary of state would nevertheless need to have the final say on the appointment in these cases.

Consultation Question 9

Are there any inconsistencies or unintended consequences between these rules and the main examination procedure rules?

We do not have any comments.

GUIDANCE ON EXAMINATION PROCEDURES

Consultation Question 10

Do you agree that the draft guidance, when combined with the Act and draft rules, would provide a firm principles-based framework for how the IPC should conduct and manage examinations into applications for NSIPs? If not, what changes should be made?

We agree that the framework does provide a principle based approach although there are a number of points to which we should wish to draw your attention:

We consider that the preliminary meeting will be extremely important in ensuring the effective operation of the examination procedure. We therefore think that the guidance could place greater emphasis on the role of the meeting within the procedure and also provide assistance on preparation for the meeting.

We note that at paragraph 51 of the guidance there is a statement that "all participants remain free to submit other written statements to the examining authority at any time: such statements will be made available for public inspection and circulated as appropriate". This appears to be at odds with the purpose of the EA at the preliminary meeting to set deadlines for submission of written representations (see para 56). If parties had the notion that statements could be submitted at any time during the examination process, it could prove to be chaotic. We therefore think that para. 51 should be made consistent with para. 56 and the draft Rules.

The guidance gives more detailed on what is expected of the written representations at paras 80 and 81 than is given in the draft Rules. If changes are not to be made to the Rules in respect of provision of proofs of evidence, then we think it would be useful if clear guidance could be given on what is meant by an oral representation "based" on the written representation. It could be stated that it is expected that the written representation shall contain the full case and that oral representations should be for the purpose of summarising evidence rather than adding new issues or matters.

MATTERS TO BE TAKEN ACCOUNT OF IN DECISIONS ON APPLICATIONS FOR DEVELOPMENT CONSENT

Consultation Question 11

Are there any 'have regard to' requirements on decision makers that have been missed from the list in this statutory instrument?

The draft Infrastructure Planning (Decisions) Regulations set out a number of instances where the decision maker must have regard to existing statutory tests in relation to certain consents. Section 104(3) includes the obligation to determine development consents in accordance with the relevant national policy statement unless, inter alia, such determination would be in breach of any duty imposed on it by or under any enactment (s.104(5)). Is there not an argument that sub-section (5) effectively imposes a general requirement that the "have regard to" tests (and other statutory duties) are to be taken into account irrespective of the list of legal duties prescribed in the Decisions Regulations?

MATTERS WHICH CANNOT BE INCLUDED IN DEVELOPMENT CONSENT ORDERS

Consultation Question 12

Does the list set out in the SI capture all those consents that should be protected?

We cannot identify any further consents that should be excluded from the effect of a development consent

MATTERS RELATING TO APPLICATIONS FOR COMPULSORY ACQUISITION OF LAND

Consultation Question 13

Do you agree with the principles set out in the regulations?

The provisions for the acquisition of additional land accord with general CPO principles and we would also refer to our comments in relation to question 16.

REGULATIONS ON THE DURATION OF POWERS TO COMPLETE COMPULSORY ACQUISITION

Consultation Question 14

Do you agree that a duration of five years is appropriate for development consent orders under the Planning Act?

Proposals for major wind energy generation installations are obviously large and complex developments for which appropriate periods within which to begin development should be allowed. The 2008 Act does allow flexibility in the period to be specified and therefore, provided that the prescribed period of five years is not adopted as the inevitable option, the period is satisfactory. The process of securing a development consent will be a major project for any developer and requirements for new applications should be avoided wherever possible.

Consultation Question 15

Do you agree that a five year period is also appropriate as the period within which a notice to treat must be served under section 5 of the Compulsory Purchase Act 1965?

In view of the observations made in respect of Q.14 above, there would not appear to be any justification for prescribing a different period for the exercise of compulsory acquisition powers.

Consultation Question 16

Do you have any comments about the procedures for the compulsory acquisition of land which are set out in the guidance document?

Given the need to ensure that adequate procedural safeguards (including the right to a hearing) and substantive protections are granted to a person whose interests may be expropriated (which provisions are contained in both the 2008 Act and the Human Rights Act, we agree with the principles contained in the Regulations.

The guidance follows familiar principles for CPO guidance, which are generally contained in 06/2004.

On a specific point, it may be useful to provide guidance on the application of section 131(5) concerning the compulsory acquisition of commons, open spaces and allotments. In the case of schemes involving linear acquisitions in particular. There may be a need to acquire a number of small areas of protected land, which, individually fall below 200 square metres but which in aggregate exceed the threshold and it would be helpful if the aggregation approach could be explained..

APPLICATION FEES

Consultation Question 17:

Bearing in mind the need to achieve a simple fee structure, do you agree that the three categories of day-rate provide a sufficient range of flexibility on the resources that might be involved?

Because of the scale of projects, we consider that the principles of the fee structure and the rates prescribed by reference to days and number of personnel involved is satisfactory and will avoid producing disproportionate and unacceptable fee structures.

We have considered whether hourly rates might be an alternative but in the context of IPC projects, such a fine calibration is probably unnecessary.

Consultation Question 18

Do you have any comments on the fee estimates and impact assessment, in particular the estimated resource requirements for each activity of the IPC?

We would like to see a review mechanism for costs for the applicant built into the process to ensure charges are appropriate and there is a clear audit trail. An applicant must have the ability to respond as it is their application on the line and their costs which are justifiable to both shareholders and customers.

Consultation Question 19

Do you have any comments on the draft fee regulations?

The procedure entails an initial estimate given after the preliminary meeting followed by a final account to be delivered at the conclusion of the examination. In fairness to the applicants, we think that a duty should be imposed upon the IPC to keep the estimates under review and to notify the applicant if the IPC forms the opinion that there will be any significant increase in the estimated time (and fees) prior to the delivery of the final account. A suggestion for the level of significance may be an increase exceeding 10-15%.

Consultation Question 20

Do you have any comments on the assessment of the impact on small and medium enterprises?

No comments

Consultation Question 21

Do you have any comments on the merits of introducing a cap into the draft fee regulations?

We consider that a cap should be introduced to ensure that there is industry confidence that the procedure is not one that requires an "open cheque" to be delivered. Whilst recognising the need to provide for the recovery of costs, this needs to be balanced against the burdens imposed on applicants who are seeking to provide nationally important projects. A cap, set at an appropriate level, would also help to incentivise efficiency in the operation of the process. This cap could obviously be kept under review.

Consultation Question 22

Do you have any comments on the miscellaneous prescribed provisions?

Under Article 4, we suggest that it is expressly stated that the periods specified in paragraphs (1) and (2) are prescribed for the purposes of sub-sections (1) and (3) of Section 154, respectively, for the avoidance of doubt.

3. Further comment on the Annexes

Annex 1	Infrastructure Planning (Examination Procedure) Rules 2010
Sec.3	<p>Relevant Representations</p> <ul style="list-style-type: none"> We agree with the cut-off point for representations that may be 'disregarded', but would like clarification as to whether there are any legal implications if a proponent does not consider representations received after the cut-off date. Proponents should be permitted to submit documents electronically to the IPC and to consultees/notifications. This could be agreed by the IPC and need not form part of legislation.
Sec.4.	<p>Notice of appointment of panel or single commissioner</p> <ul style="list-style-type: none"> Proposers should be able to make representations as to how many commissioners are appointed and for how many days. Proposers would welcome information on whether all commissioners will sit for all of the days.
Sec.5.	<p>Initial Assessment</p> <ul style="list-style-type: none"> It would be useful if the IPC were to produce a report and/or summary of the initial examination.
Sec.6 & 7	<p>Notice of preliminary and other meetings</p> <ul style="list-style-type: none"> Proposers would welcome the ability to refuse the first date offered (as per current s78 appeals) if it is undesirable. Proposers would welcome the ability to suggest other parties to attend meetings. Please clarify who organises the venue of the preliminary meeting.
Sec.7	<p>Preliminary Meeting</p> <ul style="list-style-type: none"> Proposers would welcome the ability to make representations on the matters to be discussed (the agenda) at the meeting. Please clarify if the report/minutes of the meeting be formally published.
Sec.8.	<p>Timetable</p> <ul style="list-style-type: none"> We question whether applicants must agree separate 'Statements of Common Ground' with each Interested Party or can one single document suffice? If agreement cannot be reached, which is not always achievable then the emphasis must be on creating a helpful document.
Sec.10.	<p>Written Representations</p> <ul style="list-style-type: none"> We recommend that people who submit written representations should know that they may be asked to submit representatives at examination stage. This will engage people's mind at an early stage as it creates the potential for the IPC to require persons who just object to incur the cost and time of appearing at a Hearing. We agree that 3rd party objectors should state the aspects of the scheme that they agree and disagree with. This forces people to consider the whole application.
S14	<p>Procedure at Hearings</p> <ul style="list-style-type: none"> We agree that persons should be able to make oral representations that were previously not identified by the IPC; and be able to refer

	<p>to other issues at the IPC's discretion.</p> <ul style="list-style-type: none"> • We agree that oral cross-examination may be conducted subject to the IPC's discretion (as long as this is the case for all parties). • The timetable should not be the only consideration in deciding whether or not to hear oral questioning. • We agreed that persons should be able to represent themselves or be represented by a nominated person. We would welcome clarification as to whether this can change 'mid-session'. E.g. can evidence be given on behalf of persons where there is no indication that they are to be cross-examined?
S.15	<ul style="list-style-type: none"> • We question the practicalities of holding two or more hearings concurrently. This may bring concerns about openness and having to have dual legal representations. Commissioners will be unable to deal with the 'planning balance' if they haven't heard all the relevant evidence. We would welcome guidance on when such hearings are applicable.
S.17	<p>Further Information</p> <ul style="list-style-type: none"> • We support the ability to request further information but would welcome guidance on the notification requirements (who does it and for how long).
Annex 2	Infrastructure Planning (Interested Parties Regs)
Sec.4.	<p>Relevant Representation</p> <ul style="list-style-type: none"> • We support the criteria that determine what a relevant representation will entail. However, we recommend some discretion for 'relevant representations' to be valid even if they do not incorporate all of this information.
Annex 6	Draft Infrastructure Planning (Compulsory Acquisition) Regulations 2010
Sec.8	<p>Duty to publicise proposed provision</p> <ul style="list-style-type: none"> • Guidance is needed on the definition of 'local newspapers which are likely to come to the attention of those likely to be affected by the proposed development'
Annex 8	Draft Infrastructure Planning (Fees) Regulations 2010
Sec.5.	<ul style="list-style-type: none"> • We agree that fee must be refunded if the application is not accepted.