NIPA / PINS Event 6th June 2013

A joint event was held between the Planning Inspectorate (PINS) (National Infrastructure Team) and members of the National Infrastructure Planning Association (NIPA).

The event was held on 6 June 2013 in Bristol. A list of attendees is set out below:

PINS / CLG	
Mark Wilson	Susannah Guest
Dave Price	Frances Russell
Jill Warren	Robert Ranger
Kat Chapman	Siobhan O'Connor
Tracey Williams	Olly Blower
John Pingstone	Ewa Sherman
Emma Fitzpatrick	Dan Hyde
Steffan Jones	Kath Haddrell
Jessica Potter	Laura Allen
Sheila Twidle	Andy Luke
Jackie Anderson	Chris White
Kay Sully	Michael Baker
Sian Evans	Melanie Dunn
Rich Price	Tom Carpen
Gareth Watts	Jolyon Wooton
Iwan Davies	Kath Powell
K-J Johansson	Helen Lancaster
James Bunton	Emre Williams
Mark Southgate	Danielle Dimeo
Susan Lovelock (CLG)	

NIPA	
Keith Mitchell	John Rhodes
Jonathan Bower	Julian Boswall
Robbie Owen	

The purpose of the event was to discuss feedback from NIPA members about the quality and scope of advice they were getting from the PINS Case Management Team. This feedback was derived from a questionnaire which had been sent to NIPA members.

Part of the event involved a group based task, looking at a hypothetical project (details attached at Annex 1) and proving advice to an applicant based upon 5 themes. The questions and themes were derived from the questionnaire feedback. The themes were: Pre Application advice; Advising on Merits; Consultation;

Consents; Preliminary Environmental Information.
A summary of the main outcomes from the group discussions is set out below under each Theme.

Pre Application Advice

More information about the Case Management team structure

PINS agreed that developers should be provided with better information about the structure of the National Infrastructure Case Management team. A starter pack was suggested which could include an organogram of the NI Case Management team and how other teams such as the Environmental Services Team, Legal team and Consents Service Unit fit into the overall structure and how those teams come together as part of the team working on a project.

Greater clarity about timescales at the Pre Application Stage

Currently the Advice Notes contain various advice suggesting some things are better done before others; it would be useful to consolidate these snippets in a generic timeline. The premise of the pre application stage is that it is flexible and able to be molded to the specific needs of each project. Developers should use this stage as an opportunity to test and shape their application within the formal framework which the regime provides. It would be good for the developer to share a project plan with the Case Manager as early as possible during the pre application stage.

Could more certainty be provided in terms of the quality and timeliness of advice provided by PINS during Pre Application?

It would not be appropriate for PINS to enter into a PPA with a developer. During pre application PINS has a duty to provide advice to the public, business organisations, local authorities and statutory/ non statutory bodies. In this context it would not be appropriate to single out developers for “special treatment” or be seen to be prioritising advice to them over and above any other party. However, it is recognised that the working relationship with developers is vital and PINS would aim to ensure that advice is provided in a timely fashion, within agreed timescales.

What kind of interventions can PINS make with statutory bodies or local authorities who are not engaging with a developer during pre application?

As a first step we would want to understand from the developer why they think these bodies are not engaging with them; is it because of, resourcing issues or other reasons. Case Managers can contact these organisations directly to advise them of the significant drawbacks of them not engaging with the developer at the pre application stage in what is a front end loaded process. We would advise all parties that the process will not wait for them “to get their act together” and offer support to them in whatever way we can. If the problems persisted we could try to escalate our concerns to a higher authority in the organisation if we felt the manner of their involvement or lack of it had the potential to undermine the reasonable progress of the project. In the recent past we have held tri-partite meetings for larger projects which have involved the participation of local authorities and statutory bodies. These can be a positive way of collectively setting expectations about levels of engagement during pre app.

Can PINS confirm that a targeted consultation is acceptable and provide advice about who should be consulted in such circumstances?

PINS can confirm in principle that a targeted consultation is acceptable. The onus is on the developer to ensure that they undertake a robust and meaningful consultation in the targeted area. Our advice would be to make sure that if this consultation is additional to what is set out in the SoCC, advice is sought from the relevant local authority and a clear explanation and audit trail is provided in the Consultation Report.

What advice can PINS provide about preparing documents which deal with all the important issues, avoid repetition or insignificant issues, and provide the key purpose of communicating the issues in a way that is comprehensible?

There is an expectation that given the size and significance of these projects that the supporting documentation is of the highest quality. That does not necessarily mean that they have to be voluminous. This is an industry wide issue, not just related to the development consent regime. The PINS Casework team can provide advice which will hopefully reduce the amount of repetition in ESs.

Can PINS provide advice about what are likely to be important issues in the s.55 Checklist and those against which less weight might be attached? Would PINS be happy to provide comments against a completed draft checklist?

PINS case managers find the submission of developer completed s.55 Checklists extremely useful in helping them to navigate the application documentation. Usually s.55 checklists are submitted by a developer at the same time as submission and we would not therefore provide comments on it because it would only duplicate our tasks during the acceptance stage. The usefulness of s.55 checklist is so closely related to the application documents that it would serve little or no purpose for us to provide comments against a developer completed checklist without the necessary documentation. We would urge applicants, however, to use the checklist during (rather than after) the preparation of their application.

Advice on Consultation

If a long time has elapsed between the publication of the Scoping Opinion would PINS be able to issue a new list of consultees?

The purpose of the list is to identify bodies who could provide information to help to inform the ES. The list is not the applicant's consultation list – but can help to inform this. The onus is on the applicant to identify the consultees in relation to compliance with its pre application consultation. PINS do not issue a list of consultees to a developer in relation to the developer's general duties.

Can developers stop consulting with consultees who have requested not to be consulted further about a project at the pre application stage?

An audit trail of any correspondence of this nature should be included in the consultation report to explain any omissions. Ultimately it is a judgment that must be made by the developer. In particular, developers should be alert to the implications of making changes to the project during the course of the consultation especially in

terms of whether these have the potential to reactivate an interest in the project by a previously uninterested consultee. Also, eliminating important statutory consultees is not advised. If there are issues of consultees not wishing to be consulted then the applicant should alert PINS and seek to re-engage the consultee by informing them of the purpose of the pre application stage and the implications for them of not engaging. PINS can assist with this if required.

Is it necessary to re-consult if changes are made after the final stage of the consultation?

The purpose of pre application consultation is to seek comments from and inform consultees about the project and reduce the number of issues that need to be taken to examination. Developers need to apply common sense. If the changes made can be attributed to responses received and can be justified in that iterative context and explained in the Consultation Report then there would be no need to re-consult. Developers need to consider where significant changes are made in response to technical responses from statutory bodies, how the public and other consultees who were not party to these negotiations will react to the change – will they have views on the changes; also there are potential implications for the examination if such changes re-ignite or cut across issues or matters that were previously not creating controversy. Targeted consultation could be useful where a specific change is proposed which may be of interest only to a limited group of stakeholders. In particular, developers should consider the timing of the s.48 element of the pre application consultation and how this is undertaken in terms of capturing and explaining changes made to the project after the s.42 and s.47 consultation has taken place.

Will guidance be provided on the "diligent enquiry" obligation in respect of a s.52 application?

There is no intention to produce guidance about this obligation. Developers should look to existing case law in this area. Consideration of what constitutes diligent enquiry will depend on case specific factors including the location of the project. PINS advice is that reasonable efforts must be made and supported by evidence. PINS has accepted S52 applications where evidence of reasonable efforts has been provided.

Advice on Merits - (the issues below arose from discussion of a fictitious scenario which is set out at Annex 1)

Would PINS be willing to advise about whether the benefits of a project and the need for the new infrastructure likely is to override objections to that project, particularly in the absence of an NPS?

PINS is unlikely to give this type of advice, a least not without very significant qualifications. There are a number of reasons for this but principally (a) PINS could not advise (particularly at early pre-application stage) without the benefit of full information, (b) it is for developers to decide whether or not to proceed with a prospective application and developers should take their own professional advice and (c) PINS would be obliged to publicise any advice given on its website, which the developer may find is unwelcome. Case Managers could advise on the range of considerations that were likely to be important and relevant to the DCO examination, including their potential materiality and weight. Case managers would be likely to suggest that developers discuss the different strands of policy and other issues with

relevant statutory consultees and be prepared to defend their interpretation at the examination if it differs from them. Any debate of this nature (in writing or verbally) would inform the Examining Authority's consideration of the issues at the examination and help them to frame their questions. Ultimately, however, it would be for developers to take decisions about whether and how to proceed with an application.

In the absence of clear policy – particularly the absence of an NPS – would Case Managers give detailed advice on the likely significance of technical impact measurements, such as decibel levels?
While our Environmental Services Team would have some knowledge in this area, developers should not assume there are specialists within PINs from whom Case Managers can obtain detailed technical advice about such issues. The advice from PINS would be for applicants to talk to statutory consultees such as the Environment Agency or the local authority and use the pre application process to develop statements of common ground. This issue could also be explored early on at the scoping stage.

How can Case Managers assist a prospective developer to understand the weight or otherwise that it likely to be attached to a particular objection – such as development affecting a SSSI?
The developer would need to talk to Natural England and look to how other similar cases were dealt with in respect of mitigation measures and habitats considerations. PINS could assist at the pre application stage by setting up a tri partite meeting(s) between the developer and relevant statutory consultees.

What about the situation where a prospective applicant and a statutory consultee has a different view on the correct policy approach – for instance, where a potential conflict arises between local policy and an interpretation of the NPPF on transport issues?
Any conflicting views from different parties would need to be explored and considered by the Examining Authority during the examination. PINS advice would be that the developer would need to engage closely with the relevant consultees and seek professional advice, to weigh the relevant policies against the benefits and impacts of the project.

In the absence of a NPS, what is the policy framework that PINS will apply and is prematurely to an NPS likely to be a compelling objection?

PINS would consider the policy framework identified by the developer at the pre application stage and explore any potential gaps. PINS officers could provide advice about any emerging or extant policy document that the developer had not taken into account, but would not be able to tell a developer what weight they should attach to policies. Any emerging NPS would need to be taken account of, although its weight would vary according to the stage it had reached in the drafting, consulting and designation process. Developers would need to demonstrate that they are alive to any clear steers being given in any draft NPS documents in order to manage the risk of the NPS being designated before the SoS's decision.

If PINS provided advice on merits how much of it would be published?

PINS is legally required to publish any advice it gives about making an application.

Should PINS produce an Advice Note to identify how it will respond to requests for advice on the merits of an application?

There are no current plans to publish an Advice Note about Merits. If an advice note were produced the most useful thing it could do would be to provide clarity and manage developers' expectations about the scope and nature of advice Case Managers are able to give on the merits of an application, particularly at the pre application stage.

Do PINS intend to provide more training to Case Managers on issues relating to policy, impacts and merits given the increased expectation following the Localism Act that Case Managers will be asked about the merits of a proposed application/ related to this, do PINs intend to maintain the involvement of Planning Inspectors in the pre-application process?

A programme of training events provided by internal and external providers, including industry professionals, is being developed. Case Managers come from a variety of professional backgrounds including the private and public sector and therefore have a range of experience to draw upon. There are no plans to removed Examining Inspectors from providing advice at the pre application stage. They represent a resource which is much in demand and as such their involvement during pre application is subject to their availability.

Advice on Consents - (please refer to the fictitious scenario at Annex 1 – the questions below relate specifically to that scenario, although they illustrate some matters of general application)

The development is keen to maximise its sustainability. It proposes to have a biomass power station of 49MW as part of the scheme, which will be 1km away from the main site. 10MW of the electricity will be used by the airport and the developer intends to transfer/sell the relevant part of the DCO to a completely separate entity for construction and operation after consent. The remainder of the electricity will be exported to the grid. Can PINS confirm that this will be accepted as associated development?

S.115 of the Act is relevant. The Developer would need to take a risk based approach and apply common sense when determining how different elements of the project can be defined. The case needs to be made that the associated development was subsidiary to the NSIP and that the function of the associated development was predominantly to facilitate the construction and/ or operation of the NSIP. In the scenario this does not seem to be the case and the developer may wish to consider applying to the relevant SoS to direct the Biomass proposal to be handled under the PA2008 regime, given that its energy output is so close to the NSIP threshold. If successful PINS could deal with both NSIPs in the same application and jointly examine them taking account of the links between them.

Parts of the scheme will require a marine licence as it involves works to the foreshore and the placing of various pipes into the sea. Does PINS recommend that the applicant seeks an express marine licence from the MMO, or include it as a deemed marine license in the DCO? The pipes will serve the biomass power station. Will it be possible for the marine license to be split as part of the partial transfer of the DCO so that the license for the pipes is transferred to the new owner of the power station?

What is the best legal route to achieving this?

The answer depends on circumstances – eg a separate license may be useful if the developer wanted to do advance works.

A Marine licence cannot be transferred in part. There are a number of options open to the developer:

- Contractual splitting (post consent)
- Separate deemed Marine Licenses
- Overlapping Marine Licenses (switch on / switch off)
- PA2008 allows for the dis-application of the Marine and Coastal Areas Act (MCAA).

Another option would be for the SoS to override or change the MCAA. Early discussion with the PINS case team may aid the applicant's decision making in terms of which route to take.

The developer does not have a signed grid connection offer for the biomass power station, and it does not know which substation the power station will need to connect to. It proposes to include in the DCO compulsory purchase powers to cover the three most likely substation locations, so as to not hold up the delivery of the connection when it is resolved. Is this an acceptable approach – will the DCO be examinable? Does it matter if the Environmental Statement does not assess any of the grid connection options – will this give rise to a material risk of "non-acceptance"?

There is nothing in statute to prevent a developer including more than one option in terms of grid connection routes. However, the ES must support the DCO; it is an aid to decision making and must assess the application and the likely significant effects of its potential outcomes.

The airport is expected to disturb birds at a nearby SPA, such that it will have a likely significant effect and an adverse impact on integrity in its own right, subject to mitigation. The developer considers it has put forward an adequate mitigation package to avoid a conclusion of adverse impact on integrity. Natural England will not agree to this package in part because it considers that the applicant has not properly taken into account the in-combination effects of a proposed offshore wind farm, which will not be submitted for over 18 months and whose impact is necessarily uncertain. The developer wants to deal with this on a high-level qualitative basis but Natural England want a worst case quantitative assessment. Will PINS advise on the correct approach to the uncertainty in relation to the impact of the offshore wind farm as part of the HRA? If the developer leaves open the question of in-combination effects in the submitted HRA report will the project be at risk of non-acceptance?

This is primarily a judgment that the developer must make. In particular the following questions would be pertinent: with regard to the HRA, is there sufficient information for the competent authority to carry out the appropriate assessment? How much risk is the developer willing to take? How confident is the developer in their package of mitigation measures? Case Managers can work with the applicant to help them gain an understanding of all the issues that are likely to be relevant at acceptance and at application but it will be for the applicant to take their own decisions about how or whether to proceed.

Advice on Scoping and on Preliminary Environmental Information

To what extent will PINS be prepared to agree to a realistic scoping out of

environmental receptors that are not considered by the applicant to be relevant? How would PINS identify matters that might be candidates for scoping out? Can PINS clarify what level of detail they expect in the applicant's request for a scoping opinion?

Scoping out is possible but the developer needs to be clear about what they are seeking to scope out and provide reasonable justification and evidence in support of any request to scope matters out of the EIA. Consideration should be given to providing this information in a table format as this would assist the SoS.
Where the applicant wishes to scope matters out it is preferable that this is supported by evidence of agreement with the relevant consultation bodies.

To gain the most from a scoping opinion, developers need to consider the timing of when they seek a scoping opinion. Where applicants seek to request a scoping opinion it should be on the basis that there is sufficient detail / certainty about the description of the proposed development and the main elements of the proposed NSIP likely to give rise to environmental effects in order that SoS and the consultees are able to provide a meaningful and useful response. Early scoping is likely to result in a wider scope. The applicant should consider that there may be insufficient detail in the scoping request to enable the SoS to agree to scope out certain elements at an early stage.

Can PINS summarise its understanding of the purpose of PEI and the policy objective behind providing it?

Based on experience so far, our key message is that there is unnecessary angst amongst developers and others about the provision of PEI. The focus should be on the purpose of the PEI. It is not a legal document and its purpose is to provide information to consultees so that issues are “flushed out” at an early stage. It’s one part of an iterative EIA process, a snapshot in time.
The information and scope of the consultation that developers undertake in terms of PEI will determine what they will get out of the process at that time. They should use the PEI to test information and start to gain an understanding about consultees’ reaction to it.

How preliminary or indeed how advanced does PINS think the PEI needs to be? What does PINS see as being the difference between the PEI Report and the ES, if both are required to contain information reasonably required to assess the environmental effects of a project. Surely 'preliminary' means something and the CLG Guidance makes it clear that the PEI report is not expected to replicate or be a draft of the ES. PEI might be produced before detailed on-site assessments have been undertaken, and so can it be made up of desktop studies?

Key issues should not be left out of PEI and the local authority can provide this level of scrutiny (if they chose to) at the SOCC stage. There is an element of flexibility, however, and the legislation is not proscriptive about what PEI is. While the scoping opinion is the starting point for most ESs, the publication of PEI is recognised as an early stage in an iterative process. No party is bound by the views it provides at this stage and it is expected that the scope and nature of the information will evolve through the pre application stage to submission.

A relative absence of PEI does not mean that there may not be a benefit in early

consultation before too many decisions have been made about the location, scale or nature of the project.

Applicants should consider the most appropriate form in which to the present PEI. There may be more than one version of PEI.

The level of detail and type of information may vary depending:

- when in the design process the consultation is carried out;
- the target audience; and
- the complexity of the project.

The timing and level of detail provided may affect the level of detail in the consultees responses and how useful this is to inform the EIA and the design of the proposed NSIP. Applicants may wish to consider whether taking forward PEI at a more advanced stage, and containing more information, may generate more detailed responses and provide a more effective consultation exercise. The use of a two stage consultation process, however, can enable early consultation before detailed PEI is available as well as more detailed consultation on the preferred scale, type and location of the development.

It is clear from CLG guidance that PEI does not have to be the draft ES, although the use of material equivalent to a draft ES may be appropriate when consulting with the statutory consultees later in the pre-application stage on specific aspects of the project.

END

ANNEX 1

Fictitious Scenario

1. The owners of Waterbeach Airport on the coast in Suffolk are developing proposals for substantial investment including a new terminal building, cargo and maintenance facilities which would allow the airport to increase by at least 10 million passengers per annum, the number of passengers for whom the airport is capable of providing air passenger transport services.

2. Waterbeach is a small, former military airfield which has been used for commercial purposes for the last 10 years but at a relatively low level (say 1 million passengers per annum). The runway has existed since the war and local planning permissions have been granted to allow its commercial use. A major international investor has bought the airfield and has started to promote a limited number of regular services to European and UK destinations.

3. The site is in a rural area subject to restrictive planning policies but the Local Authority has recognised some tourism and economic benefit in granting the consents so far. The proposal is being made in real time today at a time when the Government has established an Airport's Commission to consider the future of the UK's airport hub. Waterbeach does not propose to be that hub, however, simply a significant regional airport. The owners argue that applications can be considered against the Government's Aviation Policy Framework, the NPPF, local policy and other relevant and important considerations. The scale of development makes the project an NSIP under Section 23 of the 2008 Act. The owners wish to discuss their prospective DCO application with PINS.