

Planning Act 2008 – Section 88

and

The Infrastructure Planning (Examination Procedure) Rules 2010

**Application by Four Ashes Limited for the West Midlands Interchange
Strategic Rail Freight Interchange.**

Post–Hearing comments required by 7th February 2020

**Representations of Paul Windmill on the Request for Comments of the
letter dated 24 January 2012 from the Department for Transport in
relation to the late representation from Eversheds Sutherland on behalf
of the applicants.**

Paul F Windmill
(Inspectorate reference: 20015760)

Comments of Paul Windmill on the Request for Comments of the letter dated 24 January 2012 from the Department for Transport in relation to the late representation from Eversheds Sutherland on behalf of the applicants.

Summary

I have a number of concerns that the applicant is trying to add to the case already heard in an attempt to inappropriately affect the decision of the Secretary of State. These are explained below.

The concerns are essentially that:-

The applicant is seeking to change its case materially and significantly on matters which were considered in the examination without re-opening to re-hear the applicants' revised case. I consider that to do as the applicant requests, without openness on the part of the Department for Transport and public scrutiny of the revised case of the applicants, would be wrong and could be unlawful.

Comments on the Applicants' late representation

Firstly (as used in the late representation) as regards paragraph 4.83 of National Policy Statement for National Networks (NPSNN).¹

The applicants' Solicitors now appear to be suggesting that it is not necessary to provide a rail freight interchange, merely that "rail provision is capable of being accommodated in the future". In my view this is a fundamental change and could result in a RFI not being provided – ever – just that there is a capability of it being provided should be demonstrated. In the applicants' latest submission there would be no obligation to ever provide it. This seems to be a long way from the words in paragraph 4.83 "**from the outset a rail freight interchange (RFI) should be provided ...**" I hope that the Department for Transport has asked the Examining Authority to comment on this fundamental change as the provision of the RFI in compliance with was a key issue at the Examination and it was probed in some depth by the Inspector (Examining Authority).

I, and others, consider that it is disingenuous to suggest that this late representation is not seeking to create a loophole in order to allow the applicant to defer, provide only a part of the RFI, or never provide a RFI at all. I would suggest that this would be blatant a abuse of National Policy and the intention and detail of the NPSNN.

The absence of an agreement with Network Rail may also indicate a lack of desire or commitment to construct the RFI. If the Secretary of State is minded to grant approval it is requested that no development should be permitted at least until this agreement has been reached and the Secretary of State is content with its provisions. I have commented previously in my evidence

¹ National Policy Statement for National Networks
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/387222/npsnn-print.pdf

about cases elsewhere; for example where agreement has proved 'elusive' even after many years or cases where an RFI ,once provided, has in practice, become non-operational and then unused.

Secondly, (as used in the late representation) in relation to the use of the words 'must' and 'should'. In my experience 'should' is most commonly used in the NPSNN and similar documents such as the NPPF.

In the NPSNN, in the 89 paragraphs of Chapter 4 alone the word 'should' is used over 80 times (see **Appendix 1** of these comments) 'Must' is used only 6 times, mainly in relation to compliance with Statutes - as shown below:-

4.12 In considering applications for linear infrastructure, decision-makers will need to bear in mind the specific conditions under which such developments **must** be designed. The generic impacts section of this NPS has been written to take these differences into account.

4.15 All proposals for projects that are subject to the European Union's Environmental Impact Assessment Directive and are likely to have significant effects on the environment, **must** be accompanied by an environmental statement (ES), describing the aspects of the environment likely to be significantly affected by the project.

4.40 New national networks infrastructure will be typically long-term investments which will need to remain operational over many decades, in the face of a changing climate. Consequently, applicants **must** consider the impacts of climate change when planning location, design, build and operation.

4.44 Any adaptation measures **should** be based on the latest set of UK Climate Projections, the Government's national Climate Change Risk Assessment and consultation with statutory consultation bodies. Any adaptation measures **must** themselves also be assessed as part of any environmental impact assessment and included in the environment statement, which **should** set out how and where such measures are proposed to be secured.

4.88 Applications for a proposed SRFI **should** provide for a number of rail connected or rail accessible buildings for initial take up, plus rail infrastructure to allow more extensive rail connection within the site in the longer term. The **initial**² stages of the development **must** provide an operational rail network connection and areas for intermodal handling and container storage.

² My addition (not included in NPSNN)

Oxford English Dictionary definition of 'initial'
adjective: **initial** - existing or occurring at the beginning.

I do not agree with the point now made by Morag Thomson with regard to the distinction between 'should' and 'must'; nor do I recall this point being made at the Examination, and I therefore consider that the point should be put to the Examining Authority and Inspectorate for comment and potential amendment of the report to the Secretary of State - as well as the legal implications of the Solicitor's interpretation being considered by the legal advisors to the Secretary of State in advance of a decision on the application.

Read in the context of NPSNN, NPPF and other Government Guidance I do not agree with the applicants that the word 'normally' is to be read as

- merely discretionary,
- not a requirement which needs to be met,
- distinguished from, and outside, policy requirements,

Nor do I agree that non compliance with a 'normal' requirement does not make something contrary to policy³.

I accept that the Secretary of State has discretion - but this works both ways, it should not be used to simply favour a narrow interpretation by the applicant but exercised in relation to the totality of both the NPSNN and the individual case before the SofS. If the NPSNN is to be changed and clarified e.g. with definitions of words used such as 'initial' this should be in the form of a proper revision of the 2004 document (As has been done elsewhere e.g. in changes to the NPPF) rather than the partial 'selective interpretation' which the applicant now appears to be seeking from the Secretary of State.

I do not accept the "subsidiary point" raised in the last paragraph of Page 2 of the late representation regarding 'initial take-up'. This matter was thoroughly considered by the Examining Authority in open session and in questions from the Inspector to participants in the Examination. To try to have a 'second bite of the cherry' at this stage, after the Examining Authority has reported to the Secretary of State, is tantamount to trying to subvert the process. What is being said now is not what was considered at the Examination and if the representation from the applicant is not withdrawn the Examination should be re-opened.

In fact, the "subsidiary point" raises a series of points and issues, most of which are related to definitions suggested by the appellants' Solicitors in order to benefit the appellants' apparently different and newly revised position - without acknowledging the changes which they now wish to make have come after the consideration by the Examining Authority and the subsequent report. I would suggest that accepting these changes, interpretations and additions would subvert the whole process. In this case I do not consider that a reference for the comments of the Examining Authority and Inspectorate would not be sufficient, these matters should be considered in public in an Open Hearing of the re-opened Examination.

³ See Appendix 1, attached, which identifies over 80 uses of the word 'norma'l in NPSNN Chapter 4 alone.

If other changes, interpretations and additions stipulated in these paragraphs of the applicants' late representation are accepted by the Secretary of State (whether implicitly or explicitly) at this late stage I consider that this would be both improper and an abuse of system and that such action could result in a legal challenge.

Note;- In the "Secondly" part of the late representation reference is made in the seventh paragraph on Page 3 to Zones A1 and A2 being connected from the outset. I had not thought that this had been confirmed and understood that there were issues of a Pollution Plume and the phasing of development. I had not understood that the situation was as described in the Late Representation but cannot be certain. Mr Singleton, the Examining Authority was clearly concerned about this issue and his Report to the Secretary of State may be definitive on these issues and would provide more clarity on whether the Late Representation reflects the Inspector's conclusion.

Applicants' Interpretation of the Northampton Gateway Report and Decision

I am of the view that this section contains clearly partial assumptions, 'respectful disagreements' 'comparisons' 'interpretations' and other matters advocated by the WMI applicants and their Solicitors where it is considered to help the new position which they are now taking in the late submissions. Consideration of these matters should really not be permitted by the Department of Transport at all - but if they are considered this should only be after the re-opening of the Examination and the holding of a further Open Hearing before the same Examining Authority as the original examination; followed by an additional report to the Secretary of State from the Inspectorate before the SofS makes a decision.

I would also comment that it unacceptable to have imposed such a tight timescale and yet to seek or expect detailed comments on matters raised in the Northampton case which involves a totally different site, case and Examining Authority in order to respond to the late representation. I regret that in the time available I have not been able to make myself adequately familiar with the Report referred to.

I regret that 'Interested Parties' are given such a short time from the DfT's letter dated Friday 24th January 2020 requiring the receipt of all responses by the 7th February (10 working days). This is made worse by the fact that the late representation was dated 13 December 2019 (6 weeks before the DfT letter). I acknowledge that I do not know when the Late Representation was received by the Inspectorate and the DfT and the reason for the delay; as this has not been disclosed to 'third parties' and 'Interested Parties' such as myself.

Response to Applicants' Conclusions

In my view:-

The Secretary of State should not consider the Late Representation unless it has been given proper public examination by the Examining Authority in an Open Hearing and subsequent addendum report by the Examining Authority

provided to the Department for Transport to be considered by the SofS before a decision on the application is made.

1. The Secretary of State should not agree with the WMI applicant's interpretation of the NPSNN.
2. The proposal as now suggested by the applicant is neither NPSNN nor NPPG compliant.
3. The Secretary on State should not feel a need to obey the applicant and explain, justify or compare his/her decision on the WMI proposal in relation to the Northampton, or any other SRFI decisions. If, however, this 'pandora's box' is opened by the SofS then under the laws of natural justice⁴ 'Interested Parties' and third party representees should be given the same opportunity to ask the Secretary on State to explain, justify or compare his/her decision on the WMI proposal in relation to other relevant decisions.

I believe that the Secretary of State should follow normal procedure for cases such as these rather than being 'led by the nose' by late, unjustified and un-examined, submissions and new demands being made by the applicant.

My conclusions

I have found the process up to now to be fair and open. The conduct of the staff of the Inspectorate has been excellent and helpful to all participants without fear or favour. Paul Singleton, Examining Inspector (The Examining Authority) was clearly fair, impartial, always had a clear understanding of the issues and probed with relevant questions. I had complete confidence in his skill, knowledge and independence at all stages.

It is in this context that I regret, and am saddened, that such a far-reaching Late Representation has apparently been accepted by the Department for Transport. This action could so negate and undermine that excellent conduct of the Examination and process followed previously that it could bring the process into disrepute.

I am conscious that this representation may appear short and terse; this was not my intention but it reflects my views on the inappropriateness both of the Late Representation, its contents and true purpose. I am, however, grateful that the representation has been made available for Interested Party comment and Representations; albeit somewhat belatedly and with an unduly tight deadline for response.

⁴ In English law, **natural justice** is technical terminology for the rule against bias (*nemo iudex in causa sua*) and the right to a fair hearing (*audi alteram partem*). ... The mere fact that a decision affects rights or interests is sufficient to subject the decision to the procedures required by **natural justice**.

Appendix 1

Comparison of the usage of the word ‘must’ and ‘should’ in Section 4 of National Policy Statement for National Networks

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/387222/npsnn-print.pdf

(Converted from PDF to Word to allow word search and enboldening. Footnotes have been included as text in the page on which they occurred. Bullet points and page numbers have been included in the text. Underlining is mine and is not in the published document.)

*Total uses of ‘should’ more than **86** – emboldened in text below*

*Total uses of ‘must’ - **6** – emboldened in text in paragraphs immediately below*

4.12 In considering applications for linear infrastructure, decision-makers will need to bear in mind the specific conditions under which such developments **must** be designed. The generic impacts section of this NPS has been written to take these differences into account.

4.15 All proposals for projects that are subject to the European Union’s Environmental Impact Assessment Directive and are likely to have significant effects on the environment, **must** be accompanied by an environmental statement (ES), describing the aspects of the environment likely to be significantly affected by the project.

4.40 New national networks infrastructure will be typically long-term investments which will need to remain operational over many decades, in the face of a changing climate. Consequently, applicants **must** consider the

impacts of climate change when planning location, design, build and operation.

4.44 Any adaptation measures **should** be based on the latest set of UK Climate Projections, the Government's national Climate Change Risk Assessment and consultation with statutory consultation bodies. Any adaptation measures **must** themselves also be assessed as part of any environmental impact assessment and included in the environment statement, which **should** set out how and where such measures are proposed to be secured.

4.88 Applications for a proposed SRFI **should** provide for a number of rail connected or rail accessible buildings for initial take up, plus rail infrastructure to allow more extensive rail connection within the site in the longer term. The **initial** stages of the development **must** provide an operational rail network connection and areas for intermodal handling and container storage.

Total uses of 'should' - more than 86 – emboldened in text below (the entire 89 paragraphs of Chapter 4 of the National Policy Statement for National Networks)

Assessment principles

General principles of assessment

4.1 The statutory framework for deciding applications for development consent under the Planning Act 2008 is set out in paragraph 1.2 of this NPS. This part of the NPS sets out general policies in accordance with which applications relating to national networks infrastructure are to be decided.

4.2 Subject to the detailed policies and protections in this NPS, and the legal constraints set out in the Planning Act, there is a presumption in favour of granting development consent for national networks NSIPs that fall within the need for infrastructure established in this NPS. The statutory framework for deciding NSIP applications where there is a relevant designated NPS is set out in Section 104 of the Planning Act.

4.3 In considering any proposed development, and in particular, when weighing its adverse impacts against its benefits, the Examining Authority and the Secretary of State **should** take into account: its potential benefits, including the facilitation of economic development, including job creation, housing and environmental improvement, and any long-term or wider benefits; its potential adverse impacts, including any longer-term and cumulative adverse impacts, as well as any measures to avoid, reduce or compensate for any adverse impacts.

4.4 In this context, environmental, safety, social and economic benefits and adverse impacts, **should** be considered at national, regional and local levels. These may be identified in this NPS, or elsewhere.

4.5 Applications for road and rail projects (with the exception of those for SRFIs, for which the position is covered in paragraph 4.8 below) will normally be supported by a business case prepared in accordance with Treasury Green Book principles. This business case provides the basis for investment decisions on road and rail projects. The business case will normally be developed based on the Department's Transport Business Case guidance and WebTAG guidance. The economic case prepared for a transport business case will assess the economic, environmental and social impacts of a development. The information provided will be proportionate to the development. This information will be important for the Examining Authority and the Secretary of State's consideration of the adverse impacts and benefits of a proposed development. It is expected that NSIP schemes brought forward through 31 the development consent order process by virtue of Section 35 of the Planning Act 2008, **should** also meet this requirement.

4.6 Applications for road and rail projects **should** usually be supported by a local transport model to provide sufficiently accurate detail of the impacts of a project. The modelling will usually include national level factors around the key drivers of transport demand such as economic growth, demographic change, travel costs and labour market participation, as well as local factors. The Examining Authority and the Secretary of State do not need to be concerned with the national methodology and national assumptions around the key drivers of transport demand. We do encourage an assessment of the benefits and costs of schemes under high and low growth scenarios, in addition to the core case. The modelling **should** be proportionate to the scale of the scheme and include appropriate sensitivity analysis to consider the impact of uncertainty on project impacts.

4.7 The Department's WebTAG guidance is updated regularly. This is to allow the evidence used to inform decision-making to be up-to-date. Where updates are made during the course of preparing analytical work, the updated guidance is only expected to be used where it would be material to the investment decision and in proportion to the scale of the investment and its impacts.

4.8 In the case of strategic rail freight interchanges, a judgement of viability will be made within the market framework, and taking account of Government interventions such as, for instance, investment in the strategic rail freight network.

4.9 The Examining Authority **should** only recommend, and the Secretary of State **should** only impose, requirements in relation to a development consent, that are necessary, relevant to planning, relevant to the development to be consented, enforceable, precise, and reasonable in all other respects.⁴⁹ Guidance on the use of planning conditions or any successor to it, **should** be taken into account where requirements are proposed.

4.10 Planning obligations **should** only be sought where they are necessary to make the development acceptable in planning terms, directly related to the

proposed development and fairly and reasonably related in scale and kind to the development.⁵⁰ 48 See also WebTAG guidance on The Proportionate Update Process 49 As defined in section 120 of the Planning Act 2008 50 Where the words “planning obligations” are used in this NPS they refer to “development consent obligations” under section 106 of the Town & Country Planning Act 1990 as amended by section 174 of the Planning Act 2008. See paragraphs 203-206 of the Planning Act 2008. 32 Linear infrastructure

4.11 This NPS deals predominantly with linear infrastructure – road and rail development. These differ from some of the other types of infrastructure covered by the Planning Act for several reasons: These networks are designed to link together separate points. • Consequently, benefits are heavily dependent on both the location of the network and the improvement to it. Linear infrastructure is connected to a wider network, and any • impacts from the development will have an effect on pre-existing sections of the network. Improvements to infrastructure are often connected to pre-existing • sections of the network. Where relevant, this may minimise the total impact of development, but may place some limits on the opportunity for alternatives.⁵¹

4.12 In considering applications for linear infrastructure, decision-makers will need to bear in mind the specific conditions under which such developments **must** be designed. The generic impacts section of this NPS has been written to take these differences into account.

4.13 This NPS does not identify locations at which development of the road and rail networks **should** be brought forward. However, the road and rail networks provide access for people, business and goods between places and so the location of development will usually be determined by economic activity and population and the location of existing transport networks.

4.14 Paragraphs 4.11 to 4.13 do not apply to strategic rail freight interchanges. Environmental Impact Assessment

4.15 All proposals for projects that are subject to the European Union’s Environmental Impact Assessment Directive⁵² and are likely to have significant effects on the environment, **must** be accompanied by an environmental statement (ES), describing the aspects of the environment likely to be significantly affected by the project.⁵³ The Directive specifically requires an environmental impact assessment to identify, describe and assess effects on human beings,⁵⁴ fauna and flora, soil, water, air, climate, the landscape, material assets and cultural heritage, and the interaction between them. Schedule 4 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 sets out the information that **should** be included in the environmental statement 51 See also paragraphs 4.26 to 4.27 on alternatives. 52 Council Directive 92/2011 on the assessment of the effects of certain public and private projects on the environment 53 The Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 (SI 2009/2263) 54 The effects on human beings includes effects on health. 33 including a description of the likely significant effects of the proposed project on the environment, covering the direct effects and any indirect, secondary,

cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the project, and also the measures envisaged for avoiding or mitigating significant adverse effects. Further guidance can be found in the online planning portal. When examining a proposal, the Examining Authority **should** ensure that likely significant effects at all stages of the project have been adequately assessed. Any requests for environmental information not included in the original environmental statement **should** be proportionate and focus only on significant effects. In this NPS, the terms 'effects', 'impacts' or 'benefits' **should** accordingly be understood to mean likely significant effects, impacts or benefits.

4.16 When considering significant cumulative effects, any environmental statement **should** provide information on how the effects of the applicant's proposal would combine and interact with the effects of other development (including projects for which consent has been granted, as well as those already in existence). The Examining Authority may also have other evidence before it, for example from a Transport Business Case, appraisals of sustainability of relevant NPSs or development plans, on such effects and potential interactions. Any such information may assist the Secretary of State in reaching decisions on proposals and on mitigation measures that may be required.

4.17 The Examining Authority **should** consider how significant cumulative effects and the interrelationship between effects might as a whole affect the environment, even though they may be acceptable when considered on an individual basis with mitigation measures in place.

4.18 In some instances it may not be possible at the time of the application for development consent for all aspects of the proposal to have been settled in precise detail. Where this is the case, the applicant should explain in its application which elements of the proposal have yet to be finalised, and the reasons why this is the case.

4.19 Where some details are still to be finalised, applicants are advised to set out in the environmental statement, to the best of their knowledge, what the maximum extent of the proposed development may be (for example in terms of site area) and assess the potential adverse effects which the project could have to ensure that the impacts of the project as it may be constructed have been properly assessed.

4.20 **Should** the Secretary of State decide to grant development consent for an application where details are still to be finalised, this will need to be reflected in appropriate development consent requirements in the development consent order. If development consent is granted for a proposal and at a later stage the applicant wishes for technical or commercial reasons to construct it in such a way that it is outside the terms of what has been consented, for example because its extent will be greater than has been provided for in terms of the consent, it will be necessary to apply for a change to be made to the development consent. 34 The application to change the

consent may need to be accompanied by environmental information to supplement that which was included in the original environmental statement.

4.21 In cases where the EIA Directive does not apply to a project, and an environmental statement is not therefore required, the applicant **should** instead provide information proportionate to the project on the likely environmental, social and economic effects.⁵⁵ Habitats Regulations Assessment

4.22 Prior to granting a Development Consent Order, the Secretary of State **must**, under the Habitats Regulations,⁵⁶ consider whether it is possible that the project could have a significant effect on the objectives of a European site,⁵⁷ or on any site to which the same protection⁵⁸ is applied as a matter of policy, either alone or in combination with other plans or projects.⁵⁹ Applicants **should** also refer to paragraphs 5.20 to 5.38 of this national policy statement on biodiversity and geological conservation and to paragraphs 5.3 to 5.15 on air quality. The applicant **should** seek the advice of Natural England and, where appropriate, for cross-boundary impacts, Natural Resources Wales and Scottish Natural Heritage to ensure that impacts on European sites in Wales and Scotland are adequately considered.

4.23 Applicants are required to provide sufficient information with their applications for development consent to enable the Secretary of State to carry out an Appropriate Assessment if required. This information **should** include details of any measures that are proposed to minimise or avoid any likely significant effects on a European site. The information provided may also assist the Secretary of State in concluding that an appropriate assessment is not required because significant effects on European sites are sufficiently unlikely that they can be excluded.

4.24 If a proposed national network development makes it impossible to rule out an adverse effect on the integrity of a European site, it is possible to apply for derogation from the Habitats Directive, subject to the proposal meeting three tests. These tests are that no feasible, less-damaging alternatives **should** exist, that there are imperative reasons of overriding public interest for the proposal going ahead, and that adequate and ⁵⁵ See also paragraphs 4.2 to 4.4 above. ⁵⁶ The Conservation of Habitats and Species Regulations 2010 and the Offshore Marine Conservation (Natural Habitats &c) Regulations 2007 (as amended) ⁵⁷ This includes candidate Special Areas of Conservation, Sites of Community Importance, Special Areas of Conservation and Special Protection Areas, and is defined in regulation 8 of the Conservation of Habitats and Species Regulations 2010. See the Government Circular referred to in the introduction above for further information on the requirements of the Habitats Regulations ⁵⁸ Para 118 of the National Planning Policy Framework ⁵⁹ Further guidance on the requirements of the Habitats Regulations can be found in Government Circular: Biodiversity and Geological Conservation – Statutory Obligations and their impact within the Planning System (ODPM 06/2005, Defra 01/2005)). It **should** be noted that this document does not cover more recent legislative requirements. Where this circular has been superseded, reference **should** be made to the latest

successor document. For road developments HD 44/09 Assessment of Implications (of Highways and/or Roads Projects) on European Sites (Including Appropriate Assessment) is also relevant. 35 timely compensation measures will be put in place to ensure the overall coherence of the network of protected sites is maintained.⁶⁰

4.25 Where a development may negatively affect any priority habitat or species on a site for which they are a protected feature, any Imperative Reasons of Overriding Public Interest (IROPI) case would need to be established solely on one or more of the grounds relating to human health, public safety or beneficial consequences of primary importance to the environment. Alternatives

4.26 Applicants **should** comply with all legal requirements and any policy requirements set out in this NPS on the assessment of alternatives. In particular: The EIA Directive requires projects with significant environmental effects to include an outline of the main alternatives studied by the applicant and an indication of the main reasons for the applicant's choice, taking into account the environmental effects. There may also be other specific legal requirements for the consideration of alternatives, for example, under the Habitats and Water Framework Directives. There may also be policy requirements in this NPS, for example the flood risk sequential test and the assessment of alternatives for developments in National Parks, the Broads and Areas of Outstanding Natural Beauty (AONB).

4.27 All projects **should** be subject to an options appraisal. The appraisal **should** consider viable modal alternatives and may also consider other options (in light of the paragraphs 3.23 to 3.27 of this NPS). Where projects have been subject to full options appraisal in achieving their status within Road or Rail Investment Strategies or other appropriate policies or investment plans, option testing need not be considered by the examining authority or the decision maker. For national road and rail schemes, proportionate option consideration of alternatives will have been undertaken as part of the investment decision making process.⁶¹ It is not necessary for the Examining Authority and the decision maker to reconsider this process, but they **should** be satisfied that this assessment has been undertaken. ⁶⁰ Further information will be available in guidance to be published shortly by Defra. ⁶¹ Investment decisions on strategic rail freight interchanges will be made in the context of a commercial framework. ³⁶ Criteria for "good design" for national network infrastructure

4.28 Applicants **should** include design as an integral consideration from the outset of a proposal.

4.29 Visual appearance **should** be a key factor in considering the design of new infrastructure, as well as functionality, fitness for purpose, sustainability and cost. Applying "good design" to national network projects **should** therefore produce sustainable infrastructure sensitive to place, efficient in the use of natural resources and energy used in their construction, matched by an appearance that demonstrates good aesthetics as far as possible.

4.30 It is acknowledged however, that given the nature of much national network infrastructure development, particularly SRFIs, there may be a limit on the extent to which it can contribute to the enhancement of the quality of the area.

4.31 A good design **should** meet the principal objectives of the scheme by eliminating or substantially mitigating the identified problems by improving operational conditions and simultaneously minimising adverse impacts. It **should** also mitigate any existing adverse impacts wherever possible, for example, in relation to safety or the environment. A good design will also be one that sustains the improvements to operational efficiency for as many years as is practicable, taking into account capital cost, economics and environmental impacts.

4.32 Scheme design will be a material consideration in decision making. The Secretary of State needs to be satisfied that national networks infrastructure projects are sustainable and as aesthetically sensitive, durable, adaptable and resilient as they can reasonably be (having regard to regulatory and other constraints and including accounting for natural hazards such as flooding).⁶²

4.33 The applicant **should** therefore take into account, as far as possible, both functionality (including fitness for purpose and sustainability) and aesthetics (including the scheme's contribution to the quality of the area in which it would be located). Applicants will want to consider the role of technology in delivering new national networks projects. The use of professional, independent advice on the design aspects of a proposal⁶³ **should** be considered, to ensure good design principles are embedded into infrastructure proposals.

4.34 Whilst the applicant may only have limited choice in the physical appearance of some national networks infrastructure, there may be ⁶² Government policy on the infrastructure resilience is set out in Cabinet Office, Keeping the Country Running, and successor documents. ⁶³ Applicants can use the Design Council who can provide support for and encourage design review for nationally significant schemes. ³⁷ opportunities for the applicant to demonstrate good design in terms of siting and design measures relative to existing landscape and historical character and function, landscape permeability, landform and vegetation.

4.35 Applicants **should** be able to demonstrate in their application how the design process was conducted and how the proposed design evolved. Where a number of different designs were considered, applicants **should** set out the reasons why the favoured choice has been selected. The Examining Authority and Secretary of State **should** take into account the ultimate purpose of the infrastructure and bear in mind the operational, safety and security requirements which the design has to satisfy. Climate change adaptation

4.36 Section 10(3)(a) of the Planning Act requires the Secretary of State to have regard to the desirability of mitigating, and adapting to, climate change in designating an NPS.

4.37 This section sets out how the NPS puts Government policy on climate change adaptation into practice, and in particular how applicants and the Secretary of State **should** take the effects of climate change into account when developing and consenting infrastructure. Climate change mitigation is essential to minimise the most dangerous impacts of climate change, as previous global greenhouse gas emissions have already committed us to some degree of continued climate change for at least the next 30 years. Climate change is likely to mean that the UK will experience hotter, drier summers and warmer, wetter winters. There is an increased risk of flooding, drought, heatwaves, intense rainfall events and other extreme events such as storms and wildfires, as well as rising sea levels.

4.38 Adaptation is therefore necessary to deal with the potential impacts of these changes that are already happening. New development **should** be planned to avoid increased vulnerability to the range of impacts arising from climate change. When new development is brought forward in areas which are vulnerable, care **should** be taken to ensure that risks can be managed through suitable adaptation measures, including through the provision of green infrastructure.

4.39 The Government has published a set of UK Climate Projections and has developed a statutory National Adaptation Programme.⁶⁴ In addition, the Government's Adaptation Reporting Power⁶⁵ will invite reporting authorities (a defined list of public bodies and statutory undertakers, including Highways Agency, Network Rail and the Office of Rail ⁶⁴ s.58 of the Climate Change Act 2008. ⁶⁵ s.62 of the Climate Change Act 2008. 38 Regulation) to build on their climate change risk assessments and report on progress implementing adaptation actions.

4.40 New national networks infrastructure will be typically long-term investments which will need to remain operational over many decades, in the face of a changing climate. Consequently, applicants **must** consider the impacts of climate change when planning location, design, build and operation. Any accompanying environment statement **should** set out how the proposal will take account of the projected impacts of climate change.

4.41 Where transport infrastructure has safety-critical elements and the design life of the asset is 60 years or greater, the applicant **should** apply the UK Climate Projections 2009 (UKCP09) high emissions scenario (high impact, low likelihood) against the 2080 projections at the 50% probability level.

4.42 The applicant **should** take into account the potential impacts of climate change using the latest UK Climate Projections available at the time and ensure any environment statement that is prepared identifies appropriate mitigation or adaptation measures. This **should** cover the estimated lifetime of the new infrastructure. **Should** a new set of UK Climate Projections

become available after the preparation of any environment statement, the Examining Authority **should** consider whether they need to request additional information from the applicant.

4.43 The applicant **should** demonstrate that there are no critical features of the design of new national networks infrastructure which may be seriously affected by more radical changes to the climate beyond that projected in the latest set of UK climate projections. Any potential critical features **should** be assessed taking account of the latest credible scientific evidence on, for example, sea level rise (e.g. by referring to additional maximum credible scenarios such as from the Intergovernmental Panel on Climate Change or Environment Agency) and on the basis that necessary action can be taken to ensure the operation of the infrastructure over its estimated lifetime through potential further mitigation or adaptation.

4.44 Any adaptation measures **should** be based on the latest set of UK Climate Projections, the Government's national Climate Change Risk Assessment and consultation with statutory consultation bodies. Any adaptation measures **must** themselves also be assessed as part of any environmental impact assessment and included in the environment statement, which **should** set out how and where such measures are proposed to be secured.

4.45 If any proposed adaptation measures themselves give rise to consequential impacts the Secretary of State **should** consider the impact in relation to the application as a whole and the impacts guidance set out in this part of this NPS (e.g. on flooding, water resources, biodiversity, landscape and coastal change). 39

4.46 Adaptation measures can be required to be implemented at the time of construction where necessary and appropriate to do so.

4.47 Where adaptation measures are necessary to deal with the impact of climate change, and that measure would have an adverse effect on other aspects of the project and/or surrounding environment (e.g. coastal processes), the Secretary of State may consider requiring the applicant to ensure that the adaptation measure could be implemented **should** the need arise, rather than at the outset of the development (e.g. reserving land for future extension, increasing the height of an existing sea wall, or requiring a new sea wall). Pollution control and other environmental protection regimes

4.48 Issues relating to discharges or emissions from a proposed project which affect air quality, water quality, land quality and the marine environment, or which include noise and vibration, may be subject to separate regulation under the pollution control framework or other consenting and licensing regimes. Relevant permissions will need to be obtained for any activities within the development that are regulated under those regimes before the activities can be operated.

4.49 The planning and pollution control systems are separate but complementary. The planning system controls the development and use of land in the public interest. It plays a key role in protecting and improving the natural environment, public health and safety, and amenity, for example by attaching requirements to allow developments which would otherwise not be environmentally acceptable to proceed, and preventing harmful development which cannot be made acceptable even through requirements. Pollution control is concerned with preventing pollution through the use of measures to prohibit or limit the releases of substances to the environment from different sources to the lowest practicable level. It also ensures that ambient air and water quality meet standards that guard against impacts to the environment or human health. Environmental Permits cannot control impacts from sources outside the facility's boundary.⁶⁶

4.50 In deciding an application, the Examining Authority and the Secretary of State **should** focus on whether the development itself is an acceptable use of the land, and on the impacts of that use, rather than the control of processes, emissions or discharges themselves. They **should** assess the potential impacts of processes, emissions or discharges to inform decision making, but **should** work on the assumption that in terms of the control and enforcement, the relevant pollution control regime will be properly applied and enforced. Decisions under the Planning Act **should** ⁶⁶ More information on Environmental Permits can be found on Defra's website: and the Environment Agency's website: ⁴⁰ complement but not duplicate those taken under the relevant pollution control regime.

4.51 These considerations apply in an analogous way to other environmental regulatory regimes, including those on land drainage and flood defence and biodiversity.

4.52 There is a statutory duty on applicants to consult the Marine Management Organisation (MMO) on nationally significant projects which would affect, or would be likely to affect, any relevant marine areas as defined in the Planning Act (as amended by section 23 of the Marine and Coastal Access Act 2009). The Secretary of State's consent may include a deemed marine licence and the MMO will advise on what conditions **should** apply to the deemed marine licence. Where appropriate, the MMO **should** actively participate in examinations, and Examining Authorities engage with such matters, to help ensure that nationally significant infrastructure projects are licensed in accordance with environmental legislation, including European directives.

4.53 When an applicant applies for an Environmental Permit, the relevant regulator (the Environment Agency) requires that the application demonstrates that processes are in place to meet all relevant Environmental Permit requirements. In examining the impacts of the project, the Examining Authority may wish to seek the views of the regulator on the scope of the permit or consent and any management plans (such as any produced for noise) that would be included in an Environmental Permit application.

4.54 Applicants are encouraged to begin pre-application discussions with the Environment Agency as early as possible. It is however expected that an applicant will have first thought through the requirements as a starting point for discussion. Some consents require a significant amount of preparation; as an example, the Environment Agency suggests that applicants **should** start work towards submitting the permit application at least 6 months prior to the submission of an application for a Development Consent Order, where they wish to parallel track the applications. This will help ensure that applications take account of all relevant environmental considerations and that the relevant regulators are able to provide timely advice and assurance to the Examining Authority.

4.55 The Secretary of State **should** be satisfied that development consent can be granted taking full account of environmental impacts. This will require close cooperation with the Environment Agency and/or the pollution control authority, and other relevant bodies, such as the MMO, Natural England, Drainage Boards, and water and sewerage undertakers, to ensure that in the case of potentially polluting developments: the relevant pollution control authority is satisfied that potential• releases can be adequately regulated under the pollution control framework; and 41 the effects of existing sources of pollution in and around the project• are not such that the cumulative effects of pollution when the proposed development is added would make that development unacceptable, particularly in relation to statutory environmental quality limits.

4.56 The Secretary of State **should** not refuse consent on the basis of regulated impacts unless there is good reason to believe that any relevant necessary operational pollution control permits or licences or other consents will not subsequently be granted. Common law nuisance and statutory nuisance

4.57 Section 158 of the Planning Act provides a defence of statutory authority in civil or criminal proceedings for nuisance. Such a defence is also available in respect of anything else authorised by an order granting development consent. The defence does not extinguish the local authority's duties under Part III of the Environmental Protection Act 1990 ("the 1990 Act") to inspect its area and take reasonable steps to investigate complaints of statutory nuisance and to serve an abatement notice where satisfied of its existence, likely occurrence or recurrence.

4.58 It is very important that during the examination of a nationally significant infrastructure project, possible sources of nuisance under section 79(1) of the 1990 Act, and how they may be mitigated or limited are considered by the Examining Authority so they can recommend appropriate requirements that the Secretary of State might include in any subsequent order granting development consent. More information on the consideration of possible sources of nuisance is at paragraphs 5.81-5.89.

4.59 The defence of statutory authority is subject to any contrary provision made by the Secretary of State in any particular case by an order granting development consent (section 158(3) of the Planning Act). Safety Road safety

4.60 New highways developments provide an opportunity to make significant safety improvements. Some developments may have safety as a key objective, but even where safety is not the main driver of a development the opportunity **should** be taken to improve safety, including introducing the most modern and effective safety measures where proportionate. Highway developments can potentially generate significant accident reduction benefits when they are well designed.

4.61 The applicant **should** undertake an objective assessment of the impact of the proposed development on safety including the impact of any 42 mitigation measures. This **should** use the methodology outlined in the guidance from DfT (WebTAG) and from the Highways Agency.

4.62 They **should** also put in place arrangements for undertaking the road safety audit process. Road safety audits are a mandatory requirement for all trunk road highway improvement schemes in the UK (including motorways).

4.63 Road safety audits are intended to ensure that operational road safety experience is applied during the design and construction process so that the number and severity of collisions is as low as is reasonably practicable. 4.64 The applicant **should** be able to demonstrate that their scheme is consistent with the Highways Agency's Safety Framework for the Strategic Road Network and with the national Strategic Framework for Road Safety. Applicants will wish to show that they have taken all steps that are reasonably required to: minimise the risk of death and injury arising from their• development; contribute to an overall reduction in road casualties;• contribute to an overall reduction in the number of unplanned• incidents; and contribute to improvements in road safety for walkers and cyclists.•

4.65 They will also wish to demonstrate that: they have considered the safety implications of their project from• the outset; and they are putting in place rigorous processes for monitoring and• evaluating safety.

4.66 The Secretary of State **should** not grant development consent unless satisfied that all reasonable steps have been taken and will be taken to: minimise the risk of road casualties arising from the scheme; and• contribute to an overall improvement in the safety of the Strategic• Road Network. Safety on the railways

4.67 Since the railways are one of the safest forms of transport, safety is unlikely to be the main driver for development. However, the opportunity **should** usually be taken to introduce the most modern and effective safety measures.

4.68 The rail industry is required by law to consider the impact on safety of any proposed changes to the rail network, through rigorous risk assessment.

The principle of “so far as is reasonably practicable” (SFAIRP) is applied through the Railways and Other Guided Transport Systems (Safety) Regulations 2006 (ROGS) which were made under the Health and Safety at Work Act, etc. 1974, and are enforced by the Office of Rail Regulation (ORR – the independent rail safety regulator).⁶⁷

4.69 For significant developments, the rail industry is also required by EU legislation to comply with Common Safety Methods published in the Official Journal of the European Union.

4.70 The Secretary of State **should** expect the applicant to have complied with all relevant regulations, industry guidance and regulatory guidance from the ORR.

4.71 The Secretary of State **should** expect the safety assessment to have considered the safety implications during the construction, commissioning and operational phases of the development.

4.72 The Secretary of State **should** not grant development consent unless satisfied that all reasonable steps have been taken, and will be taken to: minimise the risk of deaths or injury arising from the scheme; and • contribute to an overall improvement in societal safety levels; • noting that railway developments can influence risk levels both on • and off the railway networks.

4.73 The Secretary of State **should** not consent to development which would lead to a disproportionate increase in the risk of death or injury. Security considerations

4.74 National security considerations apply across all national infrastructure sectors. The Department for Transport acts as the Sector Sponsor Department for the national networks and in this capacity has lead responsibility for security matters in that sector and for directing the security approach to be taken. The Department works closely with Government agencies including the Centre for the Protection of National Infrastructure (CPNI) to reduce the vulnerability of the most ‘critical’ infrastructure assets in the sector to terrorism and other national security threats.

4.75 Government policy is to ensure that, where possible, proportionate protective security measures are designed into new infrastructure projects at an early stage in the project development. Where applications for development consent for infrastructure covered by this NPS relate to potentially ‘critical’ infrastructure, there may be national security considerations. ⁶⁷ Guidance on ROGS can be found on the ORR website ⁴⁴

4.76 Where national security implications have been identified, the applicant **should** consult with relevant security experts from CPNI and the Department for Transport, to ensure that physical, procedural and personnel security measures have been adequately considered in the design process and that adequate consideration has been given to the management of security risks. If CPNI and the Department for Transport (as appropriate) are satisfied that

security issues have been adequately addressed in the project when the application is submitted, they will provide confirmation of this to the Secretary of State, and the Examining Authority **should** not need to give any further consideration to the details of the security measures during the examination.

4.77 The applicant **should** only include such information in the application as is necessary to enable the Examining Authority to examine the development consent issues and make a properly informed recommendation on the application.

4.78 In exceptional cases, where examination of an application would involve public disclosure of information about defence or national security which would not be in the national interest, the Secretary of State can intervene and may appoint an examiner to consider evidence in closed session. Health

4.79 National road and rail networks and strategic rail freight interchanges have the potential to affect the health, well-being and quality of life of the population. They can have direct impacts on health because of traffic, noise, vibration, air quality and emissions, light pollution, community severance, dust, odour, polluting water, hazardous waste and pests.

4.80 New or enhanced national network infrastructure may have indirect health impacts; for example if they affect access to key public services, local transport, opportunities for cycling and walking or the use of open space for recreation and physical activity.

4.81 As described in the relevant sections of this NPS, where the proposed project has likely significant environmental impacts that would have an effect on human beings, any environmental statement **should** identify and set out the assessment of any likely significant adverse health impacts.

4.82 The applicant **should** identify measures to avoid, reduce or compensate for adverse health impacts as appropriate. These impacts may affect people simultaneously, so the applicant, and the Secretary of State (in determining an application for development consent) **should** consider the cumulative impact on health. Strategic rail freight interchanges Rail freight interchange function

4.83 Rail freight interchanges are not only locations for freight access to the railway but also locations for businesses, capable now or in the future, of supporting their commercial activities by rail. Therefore, from the outset, a rail freight interchange (RFI) **should** be developed in a form that can accommodate both rail and non-rail activities. Transport links and location requirements

4.84 Given the strategic nature of large rail freight interchanges it is important that new SRFIs or proposed extensions to RFIs upgrading them to SRFIs, are appropriately located relative to the markets they will serve, which will focus largely on major urban centres, or groups of centres, and key supply chain routes. Because the vast majority of freight in the UK is moved by road,

proposed new rail freight interchanges **should** have good road access as this will allow rail to effectively compete with, and work alongside, road freight to achieve a modal shift to rail. Due to these requirements, it may be that countryside locations are required for SRFIs.

4.85 Adequate links to the rail and road networks are essential. Rail access will vary between rail lines, both in the number of services that can be accommodated, and the physical characteristics such as the train length and, for intermodal services, the size of intermodal units that can be carried (the 'loading gauge'). As a minimum a SRFI **should** ideally be located on a route with a gauge capability of W8 or more, or capable of enhancement to a suitable gauge. For road links, the Government's policy is set out in Circular 02/2013 The Strategic Road Network and the delivery of sustainable development.

4.86 SRFIs tend to be large scale commercial operations, which are most likely to need continuous working arrangements (up to 24 hours). By necessity they involve large structures, buildings and the operation of heavy machinery. In terms of location therefore, they often may not be considered suitable adjacent to residential areas or environmentally sensitive areas such as National Parks, the Broads and AONBs, which may be sensitive to the impact of noise and movements. However, depending on the particular circumstances involved, appropriate mitigation measures may be available to limit the impacts of noise and light.

4.87 SRFIs can provide many benefits for the local economy. For example because many of the on-site functions of major distribution operations are relatively labour intensive, this can create many new job opportunities. The existence of an available and economic local workforce will therefore be an important consideration for the applicant. 46 Scale and design

4.88 Applications for a proposed SRFI **should** provide for a number of rail connected or rail accessible buildings for initial take up, plus rail infrastructure to allow more extensive rail connection within the site in the longer term. The initial stages of the development **must** provide an operational rail network connection and areas for intermodal handling and container storage. It is not essential for all buildings on the site to be rail connected from the outset, but a significant element **should** be.

4.89 As a minimum, a SRFI **should** be capable of handling four trains per day and, where possible, be capable of increasing the number of trains handled. SRFIs **should**, where possible, have the capability to handle 775 metre trains with appropriately configured on-site infrastructure and layout. This **should** seek to minimise the need for on-site rail shunting and provide for a configuration which, ideally, will allow main line access for trains from either direction.

