

CONSULTATION ON THE DRAFT NATIONAL POLICY STATEMENT FOR WATER RESOURCES INFRASTRUCTURE

Response By The National Infrastructure Planning Association

31 January 2019

Background

1. This is a response to the consultation launched on 29 November 2018 by the Department for Environment, Food and Rural Affairs (DEFRA) on a draft national policy statement (NPS) for water infrastructure intended to be designated by the Secretary of State under the Planning Act 2008 (the PA 08).
2. The National Infrastructure Planning Association (NIPA) is an organisation of over 500 members created to bring together all those involved in the planning and authorisation of nationally significant infrastructure projects (NSIPs) in the UK and to promote best practice.
3. NIPA's members are drawn from a wide variety of organisations including project promoters, local authorities, lawyers, environmental and engineering consultants, planning consultants and surveyors.

Consultation question (2): Do you think the draft NPS makes clear for water undertakers, the Examining Authority and the Secretary of State the relationship between water resources management planning and applying for nationally significant infrastructure project development consent?

4. The draft NPS is considered to describe adequately the relationship between Water Resource Management Plans (WRMPs) and water NSIPs in general terms; however, there are aspects of the relationship, and the reliance on WRMPs in the NPS, that it is considered would benefit from clarification in the NPS to assist in its implementation in a number of respects.
5. WRMPs are statutory plans, subject to defined procedures including public and stakeholder engagement, SEA, HRA and other assessments, and are only able to be finalised with the agreement of the Secretary of State. On this basis it is considered reasonable, as paragraph 1.4.5 proposes, that if an NSIP is identified in a final WRMP then the need for that NSIP should be considered to be established, and the examination of the DCO to take place on that basis.
6. However, for the avoidance of doubt, it is considered appropriate for the qualification “.. provided that the draft WRMP included the identification of the scheme as a potential NSIP and was subject to notification and additional specific consultation on that basis...” to be added to paragraph 1.4.5. The purpose of the clarification is to ensure that meaningful and additional consultation on the potential NSIP was undertaken by the water company

as part of the WRMP preparation and that potential respondents are aware that at the subsequent DCO examination stage the need for the scheme would not be a debatable issue. It would thus be clear that any objections relating to the need for the scheme would have to be made known and pursued through the WRMP process.

7. Adoption of this approach can be readily addressed through the next 5 year review of WRMPs (WRMP24). However, NIPA recognises that for the current round of WRMPs (WRMP19), this may not be possible. Transitional provisions may therefore need to be considered for WRMP19, to ensure that individuals or organisations are not potentially prejudiced at subsequent DCO examinations for NSIPs identified in WRMP19s, and to reduce the risk of legal challenge to decision-making on the WRMPs and water resources DCOs.
8. It is therefore suggested that text is inserted that makes it clear that for NSIPs identified through the current WRMP19 process that the *“Government considers that the need for new water resource NSIPs will have been demonstrated if the WRMP identifies the need for the project and the WRMP has been approved by the Secretary of State and in doing so the Secretary of State has specifically acknowledged that in the process of preparing the plan the water company has to the Secretary of State’s satisfaction complied with all relevant statutory procedures including public and stakeholder engagement.”*
9. Paragraph 2.4.3 indicates that the Government will confirm a national level of resilience, and the NSIPs required to achieve this, following the publication of final WRMPs. It is not clear where such a confirmation will be provided – for example in the final NPS or in a Ministerial statement – nor the status and weight that would be attached to it. It would be helpful if the final NPS can be clearer in this regard.

Annual WRMP review

10. Paragraph 2.5.9 of the draft NPS acknowledges that water companies are required to review and report to Defra on their plans annually, preparing and revising their plans at least every five years. The paragraph goes on to suggest that before applying for development consent, the developer should consider whether it needs to revise its WRMP, for example due to some of its content being out of date.
11. We consider an arbitrary review of the WRMP is not necessary; rather, a review would be triggered only if there is a material change of circumstance as established in the water company’s annual report to Defra. Given this is an annual report, it is not considered necessary for a further appraisal of whether the WRMP requires a review ahead of a development consent submission. We therefore consider that this sentence should be removed from the final version of the NPS.
12. Should, however, Defra decide not to remove this paragraph, we do consider the word ‘developer’ should be replaced by ‘water company’. A developer of a nationally significant infrastructure water resource scheme may not necessarily be a water company. For example, the developer could be a Specified Infrastructure Provider. However, under the Water Industry Act 1991 it is the responsibility of the statutory water undertaker to produce a WRMP. Replacing the word ‘developer’ with ‘water company’ will make it clear that it is the responsibility of the water company to review its WRMP.
13. The Draft NPS recognises the potential for a Direction under PA2008 s35 for water resource development schemes outside the defined NSIP thresholds to be treated as nationally significant. It is unclear from the draft NPS wording whether it is the Government’s intention that where such projects are identified in final WRMPs, the need for such projects will be taken as being established and the application examined on that basis, as for other NSIPs. It would be helpful if the final NPS could be clear on this point.

Consultation question (4): Does the draft NPS comprehensively cover the impacts of water resources infrastructure development and the effectiveness

(including avoiding the creation of excessive costs or other potential barriers to the development) of associated mitigation measures? Please tell us your views, including any further impacts or mitigation measures you think should be included.

Abstraction

14. The NPS identifies and provides guidance on potential impacts arising from the physical construction and operation of water resources infrastructure development. However, one aspect of water resources infrastructure development that is absent from the draft NPS is the abstraction of water for transfer through pipelines, or for storage in reservoirs. It is accepted that abstractions are governed by a separate licensing process, however where a water resource NSIP is proposed which is reliant on an abstraction, any impacts arising from that abstraction can be directly related to the NSIP and would need to be assessed in the EIA (and potentially any HRA) for the DCO application and form part of the Examining Authority's consideration.
15. This can equally be the case where a new abstraction licence is required to support the NSIP, or if there is headroom in an existing abstraction licence. In either case, abstraction to the level necessary to facilitate the NSIP project would be taking place as a result of the NSIP. It follows that the abstraction is an essential part of the NSIP project and impacts arising need to be assessed as such. In these circumstances it is considered necessary that the NPS provides guidance to promoters and the examining authority on the full range of potential impacts, both negative and positive, that can be associated with abstractions.

Twin track approach

16. In paragraph 2.4.1 the sentence states 'to meet future needs, water resource infrastructure will be required to supplement demand management action'. The word 'supplement' does not appear to us to fully acknowledge the Government's 'twin track approach' and the urgency to provide new resources. We consider that alternative wording such as "in addition to" would be more appropriate.

General principles of assessment: paragraph 3.1.3

17. It would be helpful if the degree that the proposed water resource development contributes to meeting the water resource need identified in a Water Resource Management Plan (WRMP) is included in paragraph 3.1.3 of the NPS.
18. A water company's WRMP will identify the scale of the water supply deficit and the contribution water resource infrastructure will partake in addressing the water supply deficit. An analysis of the current round of water company draft WRMPs confirms that some water resources will make a considerable contribution to addressing a water company's deficit and a handful of proposed developments could make a considerable contribution to reducing regional water supply deficits and providing a water resource for more than one statutory water undertaker.
19. Therefore, in making their decision on the development consent, it would be helpful for the Examining Authority and Secretary of State to reflect on, and have due regard to, the contribution that the proposed water resource development makes in addressing the water supply deficit for the water company and the region.

Proposed text:

"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 its contribution to meeting the need identified in*

a water company's WRMP and eliminating the regional water supply deficit, 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."

Environmental net gain and biodiversity

20. Environmental Net Gain is addressed primarily at paragraph 3.4 of the draft NPS. It cross-refers generally to section 4 of the draft NPS. Section 4 includes reference to net biodiversity gain (4.3.7) and the approach to be taken. NIPA's view is that, in light of the current DEFRA consultation on the issue of (biodiversity) net gain (which opened in December 2018 and closes in February 2019), that the draft NPS may leave the decision-maker attaching inappropriate weight to environmental net gain (see 3.4.1 referring to 'significant benefits and enhancements'). In addition the draft would appear to pre-empt the outcome of the separate consultation mentioned above.
21. Insofar as Environmental Net Gain is to form part of this NPS (and NIPA notes the Government 25-year plan in that regard, referred to at 4.3.1 & 4.3.6), NIPA believes that the NPS needs to offer guidance to the decision-maker as to how to treat any Environmental Net Gain (and that it is not determinative). Paragraph 3.1.3 sets out the matters to be taken into account, and that addresses benefits, which could be said to include Environmental Net Gain. However NIPA believes that greater clarity is required at 3.4, particularly given the relatively early stage that Environmental Net Gain has reached in its evolution.
22. It appears from the description within the NPS that the intention is to deliver Biodiversity Net Gain, which would reflect and deliver the work within the Government's 25 Year Environment Plan and the new consultation on Biodiversity Net Gain.
23. There is a risk that using the terms environmental enhancements and environmental net gain interchangeably with biodiversity net gain could lead to misunderstanding and uncertainty in project development and NPS requirements.
24. The requirements set out in paragraph 3.4.3 that applications must be accompanied by a statement demonstrating how opportunities for environmental enhancement have been incorporated need to be clearly defined and identified so any applicant, consultee and the ExA can understand clearly what is required to fulfil these requirements and that they are clearly and proportionately related to the planning of the particular project and its locality.
25. At the moment there is not enough clarity and definition to ensure the intended matters are addressed and proportionately and fairly delivered.
26. We would suggest that throughout the NPS it is clear that Biodiversity net gain is what is required and to be delivered and that this is consistent with the Government's plan and emerging policy and methodology in this area.
27. Paragraph 3.4.2 should be qualified to recognise that only some water resources infrastructure projects will have the potential to deliver environmental net gain. In the case of a reservoir, for example, there may be inevitable large environmental 'losses' which cannot realistically then provide a starting point for a net gain overall.
28. If enhancements for Biodiversity net gain are to be delivered through DCO projects then it will be important for the NPS to make it clear that works being brought forward for these purposes can meet the tests for Compulsory Acquisition. Water resources NSIPs will normally require compulsory acquisition powers, which must meet stringent tests under the Planning Act 2008 to justify their grant when balancing the public interest with the interference with private rights. At the moment there is too much uncertainty in the text

in section 3.4 as to what test will be applied by the decision-maker regarding the need for environmental enhancement to know whether compulsory acquisition powers for the necessary land to deliver enhancement can be justified.

29. We consider that the use of the word “maximised” in paragraph 4.3.15 is disproportionate and should be softened by referring to what is possible and reasonable. The reference to maximising opportunities is running the risk of being disproportionate and unreasonable to demonstrate without being qualified by being proportionate and relevant to the planning and likely significant impacts of the project. The use of maximising could distort purpose and meaning unintentionally and become a criterion that is never capable of being effectively fulfilled and demonstrated as in effect there will always be more that can be done, but this may not be reasonable or proportionate to the planning of the project and its locality.

Criteria for Good Design

30. In paragraph 3.6.1 reference is once again made to environmental enhancement and this needs to be changed to biodiversity net gain. Paragraph 3.6.1 would also benefit from reflecting the test set out in paragraph 3.6.4 reflecting the importance of functional design, operational and safety standards. This paragraph and paragraph 3.6.4 would also benefit from reference to resilience in this context.
31. Within paragraph 3.6.2 reference is made to the possible appointment of a project board-level design champion and a representative design panel – this is only one approach to incorporating good design and this should be clear. It should be clear that it is for each project to ensure and set out how good design is embedded and this may include a design champion and design panel approach, but should ensure that consultation and consultees are not fettered or bypassed and that the use of such resources are considered as to the value they can add on a project by project basis.
32. It is not clear in paragraph 3.6.4 what is intended by the phrase “Appropriate weight should be given to outstanding or innovative designs which promote high levels of sustainability”. It is important for applicants, those engaged in the process and reporting and determining to be clear on when and how weight is to be given and what if anything this overrides.

Landscape and Visual Impacts

33. Paragraph 4.9.10 appears on the face of the criteria to be inconsistent with the earlier sections of the NPS on need and the presumption that need is established by projects within the WRMP and by the other steps set out. This paragraph would benefit from reflecting this and cross-referring to the need requirements. It is important that the NPS is internally consistent throughout the document.
34. Where exceptional circumstances is referred to in this paragraph it would assist to have parameters and context in this regard so it will be clear when an applicant has met this test and also how this is balanced where need is demonstrated? For example will the demonstrable need for the nationally significant infrastructure project in this locality provide exceptional circumstances?

Associated development

35. One area that should be covered we believe is an update to the MHCLG guidance on associated development to give examples of potential associated development that might be included in an application for a water resources DCO. Generally, the guidance has not kept up with changes to the NSIPs covered by the Planning Act 2008 regime and this could be another example. Developers find associated development guidance very helpful in deciding what to include in their DCO applications.

Focus on delivery

36. In September 2016 NIPA commissioned a team from the Bartlett School of Planning at University College London to undertake research into the extent and impact of the level of detail in the DCO process. The full report and summaries can be found on our website-<https://www.nipa-uk.org/news/NIPA-Insights-Research-REPORTS-LAUNCHED> The very first recommendation, as set out on page 23 of the summary document is

“Public trust and engagement starts with the National Policy Statements. Tackling deliverability upfront in an NPS would set the right direction and ensures appropriate consideration of the need for flexibility during scheme preparation, examination and delivery in practice. When NPSs are reviewed, sector specific needs for flexibility, and the circumstances requiring detail, should be addressed.”

37. We feel that the NPS as currently drafted at paragraphs 3.2.7-3.2.9 does not provide enough guidance in this regard, and in fact is rather grudging about flexibility as a concept, and we feel that a discrete section on flexibility should be included in Section 3. It would be helpful for example when considering the transfer of water resources to recognise that limits of deviation for the route of the pipeline will be required that are likely to be at least 30m and to note that construction methodologies that require the input of information that can only be provided by the contractor are appropriate matters for requirements. It would also be helpful if there were a discussion on the merits of adopting a wording in any consent that considers alternatives that are “not environmentally worse than “ the scheme applied for.

Other points

38. We consider that the NPS should be clarified to remove a potential ambiguity over the water that can be transferred. NSIPs for the transfer of water resources under s28 PA08 cannot relate to the transfer of drinking water. The NPS does not define “drinking water”. Paragraphs 1.2.1 and 1.3.1 refer to “water resources infrastructure” and paragraph 1.3.1 includes a cross-reference to the relevant sections of the Planning Act. Paragraphs 2.6.8-2.6.10 refer in more detail to the transfer of water but still do not clarify that this is not a reference to drinking water. We consider there could be more clarity for the reader who does not have easy access to the 2008 Act to indicate that the transfer of water resources does not include drinking water.

- 1.3.3 The NPS is not site specific. But what about WRMP specific detail?
- 1.4.5 If once a project is within an approved WRMP, then according to the draft NPS, need is established. Is there any prospect of a scheme not being within an WRMP, but is for whatever reason agreed anyway?
- 1.4.5 When the NPS talks of ‘need’, does it mean the need for that scheme on that site? Or the need for the scheme in principle but site tbc. Perhaps most likely is the scheme insofar as detailed in the WRMP – in which case the level of detail in the WRMP takes on a greater importance.
- 2.6.2 Refers to the ‘need’ for types – but in truth isn’t the NPS just summarising ‘facets’ of the 3 types?
- 2.6.15 Does the last sentence relate to both aquifer recharge, and effluent reuse? Isn’t it overstating matters to say that development is ‘likely’ to be AD? Shouldn’t it say it ‘could’ be, i.e. there is a discretion as to how to treat it?
- 3.7.5 Is it right that only ‘critical’ features of design which may be seriously affected by climate change. What about ‘important’ elements? And ‘critical’ to what?