

Consultation on Nature Recovery Green Paper

Response by the National Infrastructure Planning Association

Introduction

The National Infrastructure Planning Association (“NIPA”) was established in November 2010 with the aim of bringing together individuals and organisations involved in the planning and authorisation of major infrastructure projects. Our principal focus is the planning and authorisation regime for nationally significant infrastructure projects (“NSIPs”) introduced by the Planning Act 2008. We provide a forum for those with an interest in the planning and authorisation of national infrastructure projects in the UK, particularly those brought forward within the framework of the Planning Act 2008.

In summary, we:

- advocate and promote an effective, accountable, efficient, fair and inclusive system for the planning and authorisation of national infrastructure projects and act as a single voice for those involved in national infrastructure planning and authorisation;
- participate in debate on the practice and the future of national infrastructure planning and act as a consultee on proposed changes to national infrastructure planning and authorisation regimes, and other relevant consultations; and
- develop, share and champion best practice, and improve knowledge, skills, understanding and engagement by providing opportunities for learning and debate about national infrastructure planning.

NIPA welcomes the Department for Environment, Food and Rural Affairs (DEFRA) Consultation on the Nature Recovery Green Paper (“the Consultation”) and the opportunity to comment on the proposals to help shape developing legislation, processes and guidance.

NIPA convened a discussion on the Consultation amongst interested members who are actively engaged in a range of types of NSIP, and represented a cross-section of interests, e.g., developers, consultants, local authorities, and other stakeholders. The discussion identified potential issues and opportunities. Those issues and opportunities are set out below: first a set of overarching comments, followed by a table setting out responses to specific Consultation questions.

NIPA’s response is focused on Questions 7-18 and 25-27, which are most relevant to the NSIP regime, but we have also provided responses in other areas where relevant.

Section 1: Overarching Comments

The Green Paper proposals to reform the legal regime for protected sites and species represent an opportunity not just to promote nature recovery, but also to reduce regulatory burden and deliver the levelling up agenda more effectively by facilitating the infrastructure consenting process.

NIPA is supportive of the use of the planning system to promote and support appropriate nature conservation and recovery. However, this would benefit from being set within a clear deliverable framework. At the moment promoters of NSIPs frequently face significant challenges arising from the implementation and interpretation of legislation protecting nature conservation sites and species. These challenges have led to considerable uncertainty, project delay and increased expenditure. In some cases, refusal of consent or successful judicial review has occurred, not because significant harm was likely to arise to nature conservation sites, but because the regulatory process has been inflexible. The delivery of Net Zero targets is currently

under severe pressure from delays arising from the Habitats Regulations Assessment (HRA) and Appropriate Assessment processes particularly as required for offshore wind and other low carbon energy projects.

NIPA believes that more detailed proposals should focus on providing certainty for all stakeholders engaged in the NSIP process, whether they be developers, their professional advisers, stakeholders, or regulators.

This certainty could be provided by:

- **Streamlining the legislation**

A single statute providing a definitive source and clear framework for the protections afforded to sites and species would provide clarity and reduce regulatory burden.

- **Adopting an outcomes-based approach**

Clarity of what is being designated, and why, will allow all participants in the process to understand what is expected of them. The designation and management process can be more flexible and accommodating to both societal and ecological needs, promoting sustainable development and facilitating adaptation to climate change.

- **Development of statutory guidance**

Clear guidance, produced by government or their statutory advisers, will be needed to accompany any new legislation. Many of the challenges associated with the current regime arise from the varied quality and authorship of guidance, much of which has no formal status.

- **Ensuring that necessary resources are in place**

Nature recovery cannot be delivered without appropriate levels of resourcing and financial commitment from government. It will be essential to ensure that appropriate resources are available to statutory nature conservation bodies (SNCBs) to ensure that the designation and management of protected sites is carried out efficiently and effectively. The NSIP process is currently hampered by a shortage of proactive, pragmatic and evidence-based advice from SNCBs, particularly during the Habitats Regulations Assessment process.

- **Retaining the main elements of case law**

Certainty could also be strengthened by ensuring that much of the relevant case law is retained. While the political perspective of a “clean break” from EU legislation is understood, much of the case law is beneficial and provides developers, stakeholders and regulators with certainty through well understood concepts. Developers and funders of projects would face considerable uncertainty while a new corpus of law was developed, this would be likely to impede investment and slow down infrastructure delivery.

- **Alignment with devolved legislative framework**

Alignment with the devolved administrations, and with the marine regime from 12-200 nautical miles (nm), will be essential. Many of the UK’s most important designated sites are situated in river catchments which cross national boundaries – for example the river Severn, river Wye and river Dee SACs (England and Wales) and the river Tweed and Solway SACs (England and Scotland). Current and proposed infrastructure projects in these areas, including the Hinkley Point C nuclear project, future tidal power projects and offshore wind farms (including Burbo Bank extension and Robin Rigg) face a confused and uncertain regulatory regime.

Similar challenges could occur in the offshore environment where an energy project in “English” waters outside 12nm could face different nature conservation regimes for its core project (wind turbines, carbon capture injection and storage) and associated development (cables or pipelines), diminishing the “one stop shop” advantages of the NSIP process.

Section 2: Responses to Consultation questions

Question Number	Question from Consultation Document	Response
7	<p>What degree of reform do we need to ensure a simpler and more ecologically coherent network of terrestrial protected sites?</p>	<p>A tiered level of protection (option 1) would offer a coherent and potentially more easily understood system than lighter touch reform around existing designations (option 2). There is no further information on option 3 (single designation, with a scale of protections) provided in the paper, however without a very clearly delineated scale this may give rise to a lack of clarity for stakeholders, including developers.</p> <p>Further detail would be required to comment in more detail. The distinction between the tiers and the level of protection relevant to each tier would require careful consideration. For example, would <u>all</u> activity be prohibited in respect of a “<i>highly protected</i>” site (page 10) or would some form of imperative reason of over-riding public importance (“IROPI”) test apply to allow future, potentially currently unforeseen, health or sustainable development benefits to be delivered? The test proposed in respect of lower tier (“<i>protected</i>”) sites, that “<i>economic and other activities would need to be sustainable in relation to the conservation objectives of those sites</i>” is broadly similar to the current test under the Habitats Directive (which envisages that sustainable development can take place subject to maintaining site “<i>integrity</i>”, with integrity relating directly to conservation objectives¹). As discussed above, and below (13, 32, 33), to be effective, such tests would require clear guidance, comprehensive conservation objectives (updated as necessary to recognise a changing environment), a well-developed legislative framework (including possible retention of much EU case law) and appropriate resourcing with the SNCBs.</p>
8	<p>What degree of reform for the marine protected area network do we need to meet our biodiversity objectives and commitments?</p>	<p>Similar comments apply as those made in respect of terrestrial sites (see 7 above). Alignment with the terrestrial framework would be beneficial.</p>
9	<p>Do you agree that there should be a single process for terrestrial designation?</p>	<p>Yes, a single process for designation would be beneficial. There is experience of SSSIs being proposed for designation largely as a means of restricting development, rather than in a systematic manner based on best available data. Given that designation is partly a political decision (competing land uses) and partly scientific (conservation value) the example provided (paragraph 3.1.3, page 12) with decisions vested in the appropriate authority [ministers] on the advice of nature conservation bodies seems reasonable if operated on a reasoned and fully reported basis. This approach has worked well</p>

¹ See paragraphs 4.6.3 and 4.4.6, pages 48 and 49 of Commission Notice C (2018) 7621 “Managing Natura 2000 sites. The provisions of article 6 of the Habitats Directive 92/43/EEC”

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		in respect of designations in the marine environment.
10	Should we reform the current feature-based approach to site selection and management to also allow for more dynamic ecological processes?	Yes, as outlined above the selection and management of sites should be outcomes-focussed and include the ability to adapt to, or pre-empt, responses to climate change and other dynamic ecological processes. This should be the case for both marine and terrestrial sites. To provide certainty to developers, regulators and other stakeholders those outcomes should be clearly defined, possibly through the regular review of a site's conservation objectives. Broadly drafted, aspirational and generic, conservation objectives should be avoided.
11 & 12	<p>How do we promote nature recovery beyond designated protected sites?</p> <p>Do you see a potential role for additional designations?</p>	<p>The promotion of nature recovery can only be successful if delivered at a "landscape" level, including in the habitat matrix beyond designated protected sites. There is a potential role for additional designations at this level – particularly in terms of policy designations in local plans (as is currently the case with Local / County Wildlife Sites).</p> <p>However, whilst supporting the promotion of nature recovery, care would be required in expanding designations further because they could be used to impede the delivery of sustainable infrastructure. For example, linear projects (railways, roads, pipelines, cables) face significant challenges during route selection and must carry out significant ground investigations and other surveys along those routes, often over consecutive years, before a DCO application is submitted or Hybrid Bill introduced. In that context the aim of designating "at pace" is of concern, particularly where it may be with "willing landowners" (page 13) seeking to frustrate project development. Lower-level designations may need to be assessed and considered against the value of proposals for alternative, nationally significant, uses of the land. Where biodiversity net gain (BNG) is required (as will be the case with NSIPs) such over-riding powers or clear policy direction would not impede overall nature recovery plans and delivery.</p>
13	Do you agree we should pursue the potential areas for reforms on assessments and consents?	<p>Yes, reform around the Habitats Regulations Assessment (HRA) outlined at pages 15-17 should be pursued. However, this is a complex area, and we believe that the HRA Review Working Group's findings are insufficiently comprehensive to guide the necessary reforms.</p> <p>As discussed above, the promoters of NSIPs frequently face significant challenges arising from the implementation and interpretation of legislation protecting nature conservation sites and species. These challenges have led to considerable uncertainty, project delay and increased expenditure. In some cases, refusal of consent or successful judicial review has occurred, not because significant harm was likely to arise to nature conservation sites, but because the regulatory process has been inflexible. The delivery of Net Zero targets is currently under severe pressure from delays arising from</p>

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		<p>the approach to Habitats Regulations Assessment (HRA) and Appropriate Assessment processes required, for example, in relation to offshore wind and other low carbon energy projects.</p> <p>In addition to the overarching principles outlined at section 1 above, further consideration should be given to the following issues:</p> <ul style="list-style-type: none"> Scientific uncertainty and the Precautionary Principle <p>The observations on pages 15 and 16 of the Green Paper reflect frustrations around the application of the <i>Waddenzee</i>² judgment which are shared by many promoters of NSIPs. We agree with the direction of travel outlined on these pages and the need to improve assessments and decision-making to deliver good sustainable outcomes.</p> <p>However, it is also important to note that the Precautionary Principle is an important element in environmental protection and is adopted in the preamble to the Convention on Biodiversity, to which the UK is a signatory.</p> <p>Many of the problems presented by <i>Waddenzee</i> could be readily addressed by an appropriate UK focused articulation of the Precautionary Principle and, as highlighted above, by the provision of statutory guidance. Pages 15 and 16 do not provide sufficient nuance on this issue which we believe requires significant further thought if a coherent management regime for protected sites is to be developed and sustained.</p> <ul style="list-style-type: none"> Parity of treatment between different potentially impacting sectors <p>As highlighted at page 16 of the paper, the approach to assessment should focus on threats and pressures which will make the greatest difference, driving nature recovery while enabling truly sustainable development. We share this vision. Parity of treatment between different sectors is vital if the protected area network is to function effectively. Infrastructure developers onshore and offshore have been, and continue to be, unduly burdened by the HRA process while unregulated activities (most notably farming and fisheries) give rise to significant environmental impacts on the same sites. Nature Recovery cannot be effectively delivered without balanced and proportionate assessment of impacts. The delivery of sustainable benefits, including marine</p>

² Case C-127/02 Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij.

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		<p>renewable energy, should not be unreasonably hampered by administrative process whilst more harmful activities are allowed to continue.</p> <ul style="list-style-type: none"> • Need for clear conservation objectives and regular reviews of their contents <p>It will not be possible to deliver an improved assessment process without clear, updated conservation objectives for protected sites. Conservation objectives are frequently poorly drafted and generic in nature and are rarely updated. Developers, regulators, advisors and other stakeholders require clearer guidance on a site-specific basis about what a site has been designated for and what the significant threats to the site are. Resources need to be in place to provide for regular review of conservation objectives, including adaptive management in the context of climate change.</p>
18	<p>Do you have suggestions for improving the EIA scope and process for the Defra EIA regimes?</p>	<p>The DEFRA EIA regimes apply to NSIPs in the water resources and wastewater sectors. Projects currently being promoted under the NSIP regime would benefit from EIA reform proposals being considered collaboratively more widely across government with a consistent and integrated approach, of which NIPA is very supportive. In the context of this consultation, we believe that closer alignment between EIA and HRA (or the equivalent successor process) would be beneficial. HRA screening and scoping could more effectively and pragmatically be delivered as part of the EIA process with duplication of effort between EIA and HRA activities being reduced.</p> <p>The availability of resources for SNCBs to engage fully in the EIA process are limited and, as discussed above in section 1 and below (31, 32), improvement in this area would likely increase levels of engagement and assist with nature recovery and sustainable outcomes.</p>
25	<p>Do you agree we should pursue the potential areas for reforms for species?</p>	<p>Reform of the species protections and licensing process would be hugely beneficial.</p> <p>However, there is insufficient information in the Green Paper to meaningfully comment further. The three-tiered approach set out on page 28 would address some of the current challenges faced by developers – particularly in respect of uncertainty around the relationship between protected species and the loss of potentially suitable habitat (for example in respect of bats).</p> <p>The learnings from the district licensing scheme for Great Crested Newt should be explored further (as highlighted by the</p>

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		<p>Habitats Regulations Assessment Review Working Group).</p> <p>NIPA would also welcome there being a review of the legislation that relates to all breeding birds. This legislation can considerably hamper the bringing forward and delivery of sustainable infrastructure projects whilst having very limited biodiversity benefit.</p>
31	<p>What are the benefits and risks of bringing all environmental regulation into a single body?</p>	<p>We have provided our comments on these three issues as a single response, focussing on the experience of our engagement with the SNCBs / ALBs across a variety of projects. Consistent feedback from members is that engagement between Natural England, developers and regulators on HRA and EIA issues is rarely proactive, looking for solutions and sustainable outcomes, and can often be seen as sub-optimal and overly officious in its approach to the HRA process. This when coupled with resourcing challenges, represents a significant impediment in terms of time, cost and delivery of many NSIPs.</p>
32	<p>What are the opportunities for consolidating environmental delivery functions into a single body? Which programmes and activities would this include?</p>	<p>As we highlighted in our response to the BEIS consultation on National Policy Statements for Energy³, <i>“the NSIP regime can only be as effective as those participating in it. The regime is undermined by the lack of resource within the SNCBs, such as Natural England. There are instances of SNCBs being unable to participate in hearings due to resource constraints. If BEIS and other government departments are serious about expediting the NSIPs regime and, more generally, “Project Speed”, then adequate resourcing of key stakeholders must be made available so that they are able to engage effectively in the regime.”</i></p>
33.	<p>Please provide your views on how more effective cost recovery for regulation would affect: a) environmental protections b) businesses.</p>	<p>Part of this resourcing challenge could be addressed by consolidating delivery functions of the ALBs into a single body, as has occurred with Natural Resources Wales (NRW) where the merger of three agencies has provided cost savings and a more “joined up” approach to infrastructure development (particularly in respect of the interaction between ecology and regulated discharges).</p> <p>The statement in the Green Paper that the burden of providing advice and regulation should not fall fully on the taxpayer is not contentious. However, it should be noted that NSIP promoters already expend significant amounts through Discretionary Advice Services agreements with Natural England⁴, often without receiving cooperative solutions-based or timely advice. In the context of an average NSIP budget, modest increases in fees from regulators and statutory advisers could likely be tolerated, however any increased cost recovery should also result in a significant increase in the levels of service received by business from those bodies.</p> <p>In addition to the ALBs, ecological advice is provided to NSIP promoters by County ecologists or other local advisers. The</p>

³ [https://www.nipa-uk.org/uploads/news/BEIS_-_NPS_Review_-_NIPA_Response_291121\(128318255.1\).pdf](https://www.nipa-uk.org/uploads/news/BEIS_-_NPS_Review_-_NIPA_Response_291121(128318255.1).pdf)

⁴ <https://infrastructure.planninginspectorate.gov.uk/legislation-and-advice/advice-notes/an11-annexc/>

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		<p>important role played by local officers and specialists should not be overlooked. Engagement with local authorities is central to the DCO consultation process, however many authorities do not have the resource to adequately engage or provide information on local/County wildlife sites. An improved nature network is likely to require funding for advice at local as well as national level.</p> <p>Finally, having expert and appropriately resourced SNCBs will ensure that the process of nature recovery as a positive product of development is easier. It will mean less reliance on rigid, and often unbalanced guidance, and a need only to meet due process. Rather it will help inform a pragmatic approach to biodiversity enhancement, informed by expert ecological opinion and is likely to, for these reasons, be more successful in delivering better and sustainable outcomes for all.</p>

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