

## DEVELOPMENT CONSENT ORDERS AND THE CORONAVIRUS PANDEMIC

### INTRODUCTION

1. This paper has been produced by the National Infrastructure Planning Association (**NIPA**) to consider and recommend alternative approaches to aspects of the Development Consent Order (**DCO**) regime during the current coronavirus pandemic, when there are severe restrictions on movement and congregation.
2. NIPA would like to emphasise that this paper and its recommendations should be seen in the immediate context that public health and safety clearly come first and that many resources are currently redeployed or unavailable. Where compatible with tackling the virus and saving lives, ensuring good and effective practice in the DCO regime during the pandemic is the starting point given that all of the infrastructure concerned is, by definition, nationally significant, but where that cannot be achieved it will be important to use time productively to ensure that the national infrastructure planning process is in a robust place ready for a strong and effective exit from the current restrictions.
3. In this context NIPA considers it particularly important to find ways to continue, where appropriate, the development of nationally significant infrastructure projects at this time, both to help sustain the economy during the pandemic and to help to restore it as quickly as possible once restricted practices can resume, recognising that this may take a long time and consist of several stages of reductions or fluctuations in restrictions.
4. For the same reasons ongoing (and growing) delays by government departments in making decisions on DCO applications should be addressed, although that subject is not covered further in this paper.
5. NIPA also appreciates that the government and the Planning Inspectorate are currently considering similar issues in the wider planning context, particularly the Town and Country Planning Act regime, and to that end that considerable efforts are already being made by the Planning Inspectorate and planning inspectors to respond and adapt to the current position brought about by the restrictions. These efforts will clearly continue and NIPA members stand ready to assist in them and to help all concerned to adjust, including trialling new arrangements and identifying best practice. NIPA has also noted the Guidance just published by the Department for Transport in relation to publicity requirements when making traffic regulation orders in England<sup>1</sup>.
6. NIPA considers that some of the recommendations in this paper may be beneficial as permanent changes and are aimed at improving overall practice, engagement and delivery.

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<sup>1</sup> Advertising traffic regulation orders during coronavirus (COVID-19), 21 April 2020: see [here](#)

7. The paper covers the following five topics:
  - a. **Documentation** – alternatives when physical inspection is not possible;
  - b. **Consultation and engagement** – how this can continue, particularly without physical attendance at events;
  - c. **Hearings** – how these and other DCO examination meetings can take place remotely;
  - d. **Site access** – approaches to environmental impact assessment (EIA), land referencing and development when access to and around a project site is restricted or not possible; and
  - e. **Implementation of DCOs** – that an extension of the time limits set out in some DCOs ought to be considered.
8. Discussion of each of those topics is set out in the **Appendix**, with the related recommendations to government as to changes in the law, guidance, advice and practice set out in the summary table appearing below.
9. Two general matters are also covered in the same way: the introduction of a waiver direction facility; and equalities and accessibility issues.
10. The former may be a helpful way of introducing a degree of flexibility in the PA 2008 regime during the ongoing COVID-19 restrictions – both generally and for particular applications – and could also continue as a facility beyond if that was considered necessary and an appropriate way to ensuring continued flexibility and proportionality.
11. During the COVID-19 restrictions there is a need to move to greater reliance on digital and technology for consultation, engagement and delivery of the planning process. If not undertaken comprehensively and well this has the potential to be more excluding particularly to some protected characteristic groups and those with least resources or potential access to those resources. Therefore there is a particular need to focus on levelling-up and facilitation and this lies at the heart of the additional general cross-cutting recommendations.

**RECOMMENDATIONS TO GOVERNMENT AS TO CHANGES IN THE LAW, GUIDANCE AND ADVICE**

No.	Issue	NIPA recommendation	Addressed to <sup>2</sup>	Key Appendix paragraph no(s)
<b>General</b>				
1.	General and specific waiver directions re	Introduction into the Planning Act 2008 (PA 2008) of a power to give waiver directions, similar to that available under the Transport and Works Act 1992 regime, and the	MHCLG	80 to 83

<sup>2</sup> NIPA has addressed this paper to MHCLG and the Planning Inspectorate but insofar as other government departments and agencies need to be involved in considering any particular recommendation, e.g. the Ministry of Justice or the Department for Health and Social Care, NIPA assumes that MHCLG will, in the normal way, liaise with them on the issues raised.

No.	Issue	NIPA recommendation	Addressed to <sup>2</sup>	Key Appendix paragraph no(s)
	procedural steps	<p>issuing of related formal guidance.</p> <p>This would be to allow the Secretary of State to direct that procedural provisions of the Act relating to the pre-application, application and implementation stages and steps required to be taken by applicants and others during those stages should not apply if compliance with them would be "unnecessary, impossible or impracticable"<sup>3</sup>, or that they should apply but with specified modifications (e.g. an extended time limit).</p> <p>This power could be expressed as both a general power and a specific power exercisable in relation to proposed or actual applications and their resulting DCOs.</p> <p>Using waiver directions in this way would enable government, the Planning Inspectorate and examining inspectors to respond to the current difficulties both in general terms and where appropriate in individual cases - but in a way that did not involve specific (and possibly permanent) amendments to the legislation concerned, so reflecting the temporary nature of the situation.</p>		
2.	Equalities and accessibility	<p>We request that government considers the scope for providing a funded <i>Planning Aid</i> resource for NSIPs.</p> <p>The approach and adaptations required and taken to ensure full regard is had to equalities and accessibility needs should be reported in the Consultation Report and government advice on the Consultation Report should reflect and encourage this practice.</p> <p>The Examination Guidance should be updated to reflect this and provide the contact details for <i>Planning Aid</i>.</p> <p>Advice Note Eight should also be updated or an additional Advice Note published to reflect these recommendations. In addition these elements would need to be updated within the Planning Inspectorate's Information/Data policy.</p> <p>Once restrictions arising from COVID-19</p>	MHCLG and the Planning Inspectorate	84 to 94

<sup>3</sup> This is the test in the TWA regime.

No.	Issue	NIPA recommendation	Addressed to <sup>2</sup>	Key Appendix paragraph no(s)
		are lifted we would recommend that these equalities and accessibility measures are maintained as they would assist with ensuring accessibility overall.		
<b>Documents</b>				
3.	Enabling online only inspection of documents	To allow online-only inspection of documents, as an equivalent to section 100L of the Local Government Act 1972 <sup>4</sup> amend regulations 4, 8 and 9 of the APFPR 2009, and section 134 of PA 2008, to remove the requirement for documents to be able to be physically inspected.	MHCLG	2 to 6, 8, 10 and 11
4.	Guidance referring to hard copy documents	Guidance should also be updated to reflect that hard copy documents will not be available. Specific references are paragraph 57 of the <a href="#">Guidance on the pre-application process</a> and paragraphs 82 and 83 of the <a href="#">Guidance for the examination of applications for development consent</a>	MHCLG	7 and 8
5.	Working with online documents only	Relevant Guidance and Advice Notes should be updated or supplemented to assist parties in how to participate in and access online material and events, before and during Examinations.	The Planning Inspectorate and MHCLG	12 and 13
6.	Temporary removal of need for site notices	Amendment (or alternatively a general waiver direction in respect of): <ul style="list-style-type: none"> <li>• regulation 9(2) of the APFPRs 2009 [application site notices];</li> <li>• rule 13(6) of the Infrastructure Planning (Examination Procedure) Rules 2010 (EPR 2010) [hearings site notices];</li> <li>• s134(3)(b) of PA 2008 [compulsory acquisition site notices]; and</li> </ul> regulation 51(3)(b) of the Infrastructure Planning (Changes to, and Revocation of Development Consent Orders) Regulations 2011,  to remove temporarily the requirement for site notices to be displayed at, or close to,	MHCLG	3, and Part 1 generally; 56

<sup>4</sup> Inserted by regulation 15 of the Local Authorities and Police and Crime Panels (Coronavirus) (Flexibility of Local Authority and Police and Crime Panel Meetings) (England and Wales) Regulations 2020, [SI 2020/392](#), noting that those modifications only last until 31 May 2021.

No.	Issue	NIPA recommendation	Addressed to <sup>2</sup>	Key Appendix paragraph no(s)
		the site of the proposed development.		
7.	Manner of service of land-related notices	Temporarily disapply the provisions of section 229 PA 2008 which mean that notices relating specifically to land (s.53 (rights of entry) and s.134 (notice of authorisation of compulsory acquisition)) are not currently permitted to be served by normal post or by email.	MHCLG	14 to 17
8.	Documentation relating to proposed compulsory acquisition powers over additional land	Certain provisions of regulations 5 to 19 of the Infrastructure Planning (Compulsory Acquisition) Regulations 2010 will need amending, or alternatively covered by a general waiver direction, as they require physical documentation to be made available for inspection.	MHCLG	18 and 19
<b>Consultation and engagement</b>				
9.	Community consultation	Advice Note 2, section 5, on local authorities' role in Statements of Community Consultation ( <b>SoCCs</b> ) should be updated to provide an advisory paragraph about local authorities facilitating engagement during COVID-19 measures, including by agreeing to proposed SoCCs (or to proposed changes to or renewal of SoCCs) to enable innovative, fair, thorough, effective and proportionate consultation during COVID-19 measures.	The Planning Inspectorate	26, 33 to 37
10.	Making SoCCs available for inspection online	Section 47(6)(za) of PA2008 provides that once the applicant has prepared the SoCC, the applicant must make it available for inspection by the public in a way that is reasonably convenient for people living in the vicinity of the land. This provision should be amended, or disapplied by a general waiver direction, so it is clear that there is no legal requirement for SoCCs to be physically deposited for inspection, such as at local libraries.	MHCLG	45
<b>Hearings and meetings</b>				
11.	Hearings and meetings generally	Amendments to the EPR 2010 to include definition of the term 'place' (used in the context of where a meeting or hearing may be held) to include a virtual place accessed remotely by video and / or audio link.  Amendment to the EPR 2010 to grant specific power to an Examining Authority to	MHCLG	59

No.	Issue	NIPA recommendation	Addressed to <sup>2</sup>	Key Appendix paragraph no(s)
		hold any meeting or hearing remotely by video and / or audio link and to impose a duty on an Examining Authority to publicise details as to the conduct of that meeting or hearing not less than 7 days prior to the first day of the event.		
12.	Hearings and meetings - new advice	<p>Advice should be introduced dealing with the practicalities of conducting meetings and hearings (events) remotely, including:</p> <ul style="list-style-type: none"> <li>a. which platforms (e.g. Microsoft Teams, Skype for Business, or any other proven secure and accessible format, etc.) are permissible;</li> <li>b. who should generally have video access and who should have audio access;</li> <li>c. general guidance on 'muting' online participants when not speaking;</li> <li>d. how invitations to the online event are issued;</li> <li>e. how registration is to be handled as the event takes place;</li> <li>f. use of 'screen sharing' for document display;</li> <li>g. how those wishing to speak make this known;</li> <li>h. agendas for remote events;</li> <li>i. ways in which members of the public who are not participating in an event may access it by live stream and/or recording; and</li> <li>j. acceptable dress and use of 'virtual-backgrounds'</li> </ul>	The Planning Inspectorate	51 and 55
13.	Meetings and hearings – existing guidance and advice	Existing guidance and advice that refers to 'venues' should be amended to more neutral terms such as 'place'. See, for example, DCLG Guidance for the examination of applications (March 2015) at para 78 and the Planning Inspectorate Advice Note 8.5 (v4) at paras 7.1-7.2.	MHCLG and the Planning Inspectorate	48 and 49
<b>Site access</b>				
14.	Site surveys guidance	Guidance should be issued to clarify that site surveys and associated travel are a type of work able to be carried out by those preparing applications for development	MHCLG	62

No.	Issue	NIPA recommendation	Addressed to <sup>2</sup>	Key Appendix paragraph no(s)
		consent.		
15.	Environmental management /mitigation advice	The Planning Inspectorate should consider whether any updated and/or more detailed advice is required on the appropriate environmental controls and mechanisms that a DCO (particularly its requirements) may, depending on the circumstances, need to contain.	The Planning Inspectorate	69
16.	Site inspections during examinations: Guidance	<p>Guidance should be issued to clarify that site inspections (if essential – as these ‘may’ be undertaken) and associated travel are a type of work able to be carried out by the Examining Authority appointed to examine and report on an application for development consent.</p> <p>Guidance should also provide that for the period of the pandemic, site inspections will be considered to have been conducted “in the company of any interested party or their representative” for the purposes of EPR 2010 rule 16(2), where the Examining Authority has consulted interested parties on the proposed route and made a record of the visit (for example with notes, photographs or video recording as appropriate) and that information is published in the usual way on the project web page and referenced in the Examination library.</p>	MHCLG and the Planning Inspectorate	71 and 72
<b>Implementation of DCOs</b>				
17.	Commencement of development – time periods	<p>MHCLG should consider whether to amend those DCOs whose implementation and compulsory acquisition powers are due to expire before 31 March 2021 to extend those powers by 12 months from the stated expiry date(s) and to provide that failure to comply with any provision of a DCO because of the pandemic would be a ‘reasonable excuse’ to avoid criminal liability.</p> <p>A 12 month extension period is suggested given the likely impact of COVID-19 on the construction industry as well as on local government (which could well affect the pre-construction discharge of DCO requirements).</p> <p>If, pending any amendments of the DCOs concerned, any non-material change applications are anticipated to be required,</p>	MHCLG and the Planning Inspectorate	74 to 79

No.	Issue	NIPA recommendation	Addressed to <sup>2</sup>	Key Appendix paragraph no(s)
		the Planning Inspectorate and relevant government departments should prioritise what are likely to be a small number of cases that will need to be dealt with.		

**21 April 2020**

## APPENDIX

*Abbreviations used:*

- **APFPR 2009:** *the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009;*
- **EPR 2010:** *the Infrastructure Planning (Examination Procedure) Rules 2010;*
- **NSIP(s):** *nationally significant infrastructure project(s);*
- **PA 2008:** *the Planning Act 2008; and*
- **SoCC:** *Statement of Community Consultation.*

### PART 1: DOCUMENTATION

1. This part covers hard copy documentation at all stages of the DCO process. It assumes that not only will people be unable to leave their homes to go and inspect something, but also that applicants and prospective applicants are unlikely to have the ability to print large and complex documents or to have the ability to use public buildings (e.g. council offices and public libraries) as deposit locations.

#### ***Deposit of documents during consultation***

2. There are three strands of statutory consultation, under the PA 2008: sections 42 (direct consultation of statutory bodies and landowners), 47 (community consultation) and 48 (general publicity), each with its own requirements as to documentation:
  - a. s42 does not have any particular hard copy documentation requirements and can therefore continue to be complied with, albeit some best practice measures may not be able to be carried out; documents can be sent to consultees via USB sticks or just in an email or letter with a web address where they may be found;
  - b. s47 requires the SoCC to be made available for inspection by the public in a way that is reasonably convenient for people living in the vicinity of the land, which could be achieved with an online-only version; the SoCC itself could refer to online documentation access and consultation events; and
  - c. a s48 notice must contain 'a statement that the documents, plans and maps showing the nature and location of the proposed development are available for inspection free of charge at the places (including at least one address in the vicinity of the proposed development) and times set out in the notice' (regulation 4(2)(e), APFPR 2009). This is considered further below.
3. While a prospective applicant would have difficulty complying with making the documentation physically available for inspection at an address in the vicinity of the proposed development, even if it managed to do this effectively no-one could, or should actually inspect such documentation so it would serve no practical or beneficial purpose.

4. In 2019 87% of households had internet access, and 79% of households had a smartphone according to Ofcom<sup>5</sup>. In the vast majority of cases, therefore, those in the vicinity of a development will be able to learn about an impending project and access the relevant documentation online; those who are on the internet but who have limited bandwidth should be allowed to request USB copies of documentation to be sent to them. Prospective applicants should still consider whether they can produce limited numbers of hard copies of some or all documents for those with limited or no computer access.
5. That leaves the 13% of households without internet access, although 95%<sup>6</sup> of all households do have a mobile phone (it is not clear how many of the remaining 5% have a landline). The traditional way that they would find out about consultations would have been via newspaper notices, and then going to inspect hard copies in libraries or council offices. Generally local newspapers are still being printed and delivered, but in some cases they are not, so care will need to be taken to check availability if using that method, or if less price-sensitive a regional or national alternative could be used. Alternative ways of publicising a consultation could be by a more detailed and more extensive postal mailshot than would have otherwise been undertaken or a media advertisement such as a radio ad. It may also be possible to identify local electronic message boards and newsletters, for example through parish and town councils, where publicity can also be signposted. At the least agreement should be sought with the local planning authority that copy documentation will be provided locally for inspection on the local authority website planning pages.
6. NIPA recommends that prospective applicants continue to publicise consultations in local newspapers if possible; consider additional further means of notification, particularly in a local context; and include text in the notices to the effect that those without internet access have some ability to learn about the documentation, such as by including a telephone helpline that is staffed by project team members who can explain what is proposed, the likely effects and how to participate in the examination, including giving a consultation response over the phone if necessary, which may have to be recorded. We believe that this would make the consultation fair and accessible and therefore adequate for DCO acceptance purposes.
7. Guidance expects hard copy documentation in additional cases, such as the SoCC being placed at local deposit points (MHCLG Pre-application Guidance, paragraph 57); in general it should be accepted that Guidance affected by the coronavirus pandemic should be adapted appropriately and that the approach taken can be justified in the application documentation explaining how alternative provision has been made.
8. It is helpful that the Local Authorities and Police and Crime Panels (Coronavirus) (Flexibility of Local Authority and Police and Crime Panel Meetings) (England and Wales) Regulations 2020 modify the Local Government Act 1972 so that 'a document being "open to inspection" includes being published on the website of the council'<sup>7</sup>; if that is adequate for local authority meeting purposes NIPA considers it should be confirmed as being adequate for DCO purposes. If this was done it would cure any remaining doubt that the non-availability of physical inspection facilities was satisfactory.

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<sup>5</sup> [Communications Market Report 2019](#)

<sup>6</sup> This 95% figure is taken from stats/data site:

<https://www.statista.com/statistics/289167/mobile-phone-penetration-in-the-uk/>

<sup>7</sup> [Regulation 15](#)

## **Applications**

9. Following a successful trial the Planning Inspectorate now accepts electronic-only applications but they should also routinely be able to be submitted electronically instead of via USB sticks, e.g. by use of a cloud server (provided confidentiality can be maintained). Someone, either the Planning Inspectorate or the applicant, should divide the larger documents up so that those with less powerful computers can still read them; nevertheless, restrictions on email attachment size totals should be waived or dramatically increased where technically possible, even if individual attachments should keep to a maximum size.
10. NIPA asks that a general waiver direction is given (see Part 6 below), or that the APFPR 2009 are amended, such that compliance with s48 publicity required by regulation 4(3)(e) of the APFPR 2009 is not required where all reasonable efforts have been made to provide access free of charges at places in the vicinity of the application through virtual deposit provision on the local authority platform, and if available through other community platforms such as parish and town council websites. Such a waiver direction, or amendments to the APFPR 2009 are necessary given that section 55(3)(e) of PA 2008 provides as an acceptance test that Chapter 2 of Part 5 of PA 2008 has been complied with by the applicant.
11. When accepted applications come to be notified and publicised, similar drafting exists in the APFPR 2009 about inspection (regulations 8(2)(c) and 9(4)(f) respectively); regulation 9 also requires one or more site notices to be displayed. All efforts should be made with a similar approach to publicise and make available virtually, both locally and generally. However, discretion that this is equivalent and adequate will need to be deployed by the Secretary of State, the Planning Inspectorate and all Interested Parties. It will also not be possible for the certification of an accepted application to attest to its publication in the fully correct manner given the requirement to display a notice and make copies available for inspection – the text ‘save for compliance with regulation 9(2) and 9(4)(f)’ or similar should be added before signing. It would also be advisable and beneficial to provide a supporting explanatory statement, to be published on the project web page, setting out why physical compliance has not been possible and how virtual display and copies have been made available for inspection.

## **Examinations**

12. As hearings move online it will no longer be necessary for application and examination documents to be in hard copy, but as with consultation documents, there should be an ability for Interested Parties to receive a USB stick of documents where internet connections are slower or less reliable, or potentially hard copies if they can be printed for those with limited or no computer access.
13. Relevant Guidance and Advice Notes should be updated or supplemented to assist parties in how to participate in and access online material and events, before and during Examinations.

## **Service of notices**

14. Section 229 PA 2008 sets out requirements for the service of notices. Currently, notices relating specifically to land (s.53 (rights of entry) and s.134 (notice of authorisation of compulsory acquisition)) are not permitted to be served by normal post or by email. They

must instead be served by registered/recorded delivery post, or by hand, or may be left at a person's usual or last known place of abode.

15. This creates difficulties about certainty of delivery in the COVID-19 climate, which are not alleviated by Royal Mail's COVID-19 adaptations to its recorded delivery service (see <https://www.royalmail.com/d8/coronavirus-changes-service>)<sup>8</sup>.
16. In short, whilst Royal Mail will no longer require a signature upon delivery, they still will not leave post at the property (e.g. by posting it through the letterbox) – if there is no answer at a property, they will take the item away and put a card through the door, requiring it to be collected from a depot. Clearly, this creates difficulties for persons who are self-isolating, or who consider that collecting unsolicited post qualifies as non-essential travel. It also creates an anomaly, given that where such notices are delivered by hand rather than by post, they may simply be left at the premises.
17. NIPA's recommendation is that during the pandemic, service of s.53 and s.134 notices could be legally effected by email or by 'normal' (i.e. not recorded) postal delivery. This could be achieved by a temporary general waiver direction given by the Secretary of State under the waiver direction power recommended in Part 6 below.

#### ***Proposed compulsory acquisition powers over additional land***

18. The points made above apply equally to cases where, during the examination of a DCO application, the applicant wishes to seek powers for the compulsory acquisition of additional land. Where the landowners concerned do not agree to this, the process is governed by regulations 5 to 19 of the Infrastructure Planning (Compulsory Acquisition) Regulations 2010.
19. A brief review of these regulations yields the following analysis:
  - a. Regulation 7(2)(h) requires copies of documents to be available in places, including at least one 'address' in the 'vicinity' of the additional land – this would need amendment or a general waiver direction;
  - b. Regulation 8(2)(f) – this provides similarly and so would also need amendment or a general waiver direction;
  - c. Regulations 17(2)(c) and 17(3)(c) – these refer to a 'place' on a website for the inspection of documents, which confirms the view referred to above that a 'place' does not have to be an actual physical place – no amendment or general waiver direction is therefore considered necessary; and
  - d. Regulation 18 dealing with the service of notices requires service at a last known 'place of abode' or another 'address' and only permits electronic service with the recipient's consent in advance – but as ordinary post is otherwise permitted for these notices no amendment or general waiver direction is considered necessary.

## **PART 2: CONSULTATION AND ENGAGEMENT**

20. This part is focused on consultation and engagement at the pre-application stage of the PA 2008 consenting process, although some recommendations may also equally apply to post-

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<sup>8</sup> Last updated on 20 April 2020.

consent consultation requirements (e.g. in connection with the discharge process for DCO requirements). It assumes that people and organisations cannot:

- a. leave their homes to go and present or inspect something;
- b. meet, assemble or congregate in groups of more than two in non-family or household groups, unless necessary for work purposes;
- c. print large and complex documents and materials in any quantity; or
- d. make use of public buildings (e.g. council offices or public libraries) as deposit locations.

21. The issue of deposit documentation required during consultation is set out in Part 1 above.

### ***Engagement and consultation***

22. Engagement and consultation are required at different stages in the DCO process and most notably at key statutorily prescribed stages including scoping for Environmental Impact Assessment (EIA); EIA itself; and pre-application consultation.

23. Engagement and consultation are key to the front-loaded DCO process which has a deliberate and heavy focus on pre-application statutory consultation. Whilst some consultation activities may be able to continue relatively unaffected, there are clearly areas which present challenges such as a lack of physical deposit venues for 'hard copy' consultation documents, disrupted postal, delivery and distribution services, and public exhibitions and drop-in events which, during the COVID-19 pandemic, can no longer safely take place in a 'live' format.

24. Exhibitions and drop-in events are often important means by which the local community engage with and take part in a pre-application consultation process. They provide access to both information on the scheme and to project team members who can provide explanations in a way documents cannot. Exhibitions and drop-in events may be particularly beneficial for those who do not use the internet or have other protected characteristics or needs.

25. For projects that are part progressed through the pre-application process, exhibitions and drop-in events are very likely to have been trailed in the applicant's SoCC, and as compliance with the SoCC is one of the acceptance tests considered by the Secretary of State (as delegated to the Planning Inspectorate) on submission of a DCO application, it is not likely to be an option to simply cancel them and rely on other consultation methods, even with a justification. To amend or renew a SoCC may be an option, but doing so will require consultation with the host local authorities, and then notification and publicity of new consultation added into the project programme, allowing for at least minimum statutory periods for the SoCC consultation, and then notice of any new or different consultation and time for engagement with and response to this. Redrafted SoCCs should be flexible to deal with the likely changing circumstances.

26. Assuming the SoCC can be amended or hasn't yet been finalised, NIPA advises that applicants discuss with host local authorities, remembering that as public authorities they have significant calls on their time for emergency measures combined with staff furlough, redeployment and absence due to illness, isolation and caring responsibilities. Discussions

should focus on how the local community can be engaged without exhibitions, drop-in events or other 'live' methods and activities which, in the current circumstances, cannot go ahead. The key is to focus and engage in collaboration with local authorities on what is possible (not what has been done in the past) and take it forward on an agreed basis, whilst ensuring an effective and quality engagement process. For instance, many applicants already use highly effective and inclusive forms of digital consultation methods such as:

- a. interactive webpages, e.g. <https://stage1.bradwellb.co.uk/intro>. This is an alternative way for people to interrogate the proposals, allowing them to focus in on specific aspects, use interactive maps and visuals, and be pointed towards ways to find out more information; and
  - b. virtual exhibitions, e.g. <https://bradwellb.co.uk/virtual-exhibition/>. This allows the user to view the exhibition boards in a visually engaging way and get the same level of information as if they had attended an event.
27. Digital EIA is also becoming more widespread, meaning that there is a wider range of digital tools being used to help local communities understand NSIP proposals. By their nature these are online, meaning that there has already been, and will continue to be, a move away from traditional consultation and presentation methods.
28. In order to provide local communities with the opportunity to ask questions and have access to members of the team who may have otherwise been available at consultation events, it may be appropriate for applicants to use surgery-style Q&A sessions, focusing on specific themes where those living near the site can seek further information about the proposals serving a function similar to that provided by public exhibitions. This could also include webinars with telephone dial-in facilities and podcasts could be produced, perhaps combined with a scaled-up approach to a community letter drop (if this can be practically printed and distributed) and other electronic and smart phone applications could be brought into use and effect. Overall, there will also be a need to consider timescales for responding in these changed circumstances, which are likely to need to be longer.
29. As noted in Part 1 above, there are very few people in the UK without access to a telephone, so even those without internet access would not be prevented from engaging with the project and the applicant's team if that bundle of methods was adopted. Parish councils and community groups could also be used to greater effect to channel feedback using online or telephone briefing, along with the potential of organisations such as Planning Aid England to provide independent support to individuals in helping to navigate complex documentation and prepare responses to consultation. Whilst that approach is not the same as holding public exhibitions in a 'live' and present format, these new formats and methods have the potential to reach a wider range of individuals than traditional formats would have. NIPA considers that it is therefore clear that fair, reasonable and proportionate engagement with consultees and statutory consultation compliance is possible without traditional public exhibition and drop-in events.
30. Although we set out above the improving position on digital connectivity, a move to a digital communications strategy will come with significant responsibility to ensuring inclusion, particularly with hard to reach groups, and those with protected characteristics such as age and disability, which may be disproportionately disadvantaged if particular care and attention is not paid to reaching these groups and those without social means. It will therefore be

essential for applicants to ascertain the existence of equalities and social groups in the locality of the proposed application and work much more closely with local authorities and community groups and representatives on identifying those who cannot access digital resources. Once established, community groups and representatives may be able to assist with engagement through telephone, audio messages, easy to access infographics and documents provided direct, particularly whilst considerable numbers of people are in isolation.

31. For EIA scoping, due to the very short prescribed timescales for statutory consultees to respond and for the Planning Inspectorate under delegation from the Secretary of State to provide a scoping opinion, it may be that applicants should adopt non-statutory pre-engagement on the proposed scoping before formal submission. This would allow organisations to manage resourcing more effectively and to agree and document approaches to baseline, survey and projection in constrained times. This is more likely to result in an effective process and considered, well-informed and timely responses in a managed and effective way. It would also be advisable for the Planning Inspectorate and key consultees to consider a staged approach so that any scoping can endure for the most severe COVID-19 restrictions and as those restrictions are partially and intermittently lifted over time, which may be for a considerable period. This will avoid the need to re-scope and enable an application to be submitted in accordance with the last scoping opinion.
32. In terms of consultation on environmental information there are three critical areas that need to be considered: EIA and preliminary environmental information, Habitats Regulations Assessment and the Water Framework Directive. These are all areas that normally require significant primary data collection over continuous periods of times and seasons. It is likely that there will need to be agreement with the statutory environmental bodies on how this is to be provided for without significant delay to project planning, which often requires two years of continuous data, and how a precautionary modelled approach can be adopted that is verified and monitored as time and restrictions allow. This is set out more fully in Part 4 of this Appendix.

### ***What is consultation and engagement aiming for?***

33. In each case any change in the approach to consultation will have to be considered against the legal tests and government guidance as well as achieving quality consultation and protecting the health and safety of those involved. The PA 2008 and its related regulations set out what an applicant must do, but equally relevant will be other legal principles such as those in equalities legislation or that are derived from case law, as well as what is the right and proper action to take in the current circumstances. An applicant will also need to assess its proposed approach against the government's formal guidance on the pre-application process (March 2015) which applies to all DCO applications and which inherently reflects many of the same legal principles.
34. Unsurprisingly there is nothing in the formal guidance which is directly relevant to the present circumstances, but there are various overarching principles which need to be achieved or complied with, not least that consultation should be thorough, effective, fair and proportionate.
35. There is helpful advice on the role of the host authorities in relation to the draft SoCC, including that when commenting on consultation methods the authority's aim should "*be to ensure that people affected by the development can take part in a thorough, accessible and effective consultation exercise about the proposed project*".

36. Specifically the guidance notes that consultation techniques should be a topic for discussion with host authorities, including "*the appropriateness of... electronic-based ones*", and later identifies that applicants should "*use a range of methods and techniques to ensure that they access all sections of the community*".
37. It is for the applicant to make the case to the local authority that any update to the applicant's proposed consultation approach can achieve what the guidance requires. The Secretary of State by delegation to the Planning Inspectorate is the arbiter at the application acceptance stage of whether consultation has been adequate, but the views of the host authorities are always important in that respect.

### ***Alternatives to statutory consultation***

38. For projects where statutory consultation cannot go ahead owing to the COVID-19 restrictions, applicants can still seek to make the best use of time in the meantime. For some it may be possible to carry out a non-statutory round of consultation, which often features in the pre-application approach on many schemes in any case. The legislative requirements in the PA 2008 would not apply directly (although other requirements and principles of course will still be relevant) – the increased flexibility may mean that a different form of consultation round can proceed that is particularly approachable, interactive and engaging.
39. Engagement with statutory consultees may well be able to continue, using the ways of working which we are all now adopting as normal. However, it will be important to take into account the impacts of the current situation on those parties' resources, and their ability to resource and ring fence adequate time and understanding will need to be provided for. Indeed the best means of contacting them should be established in advance in case work email accounts are not being monitored or incoming post is not being distributed. Therefore illness or redeployment or furlough amongst key officers need to be considered and discussed, but subject to this and with adequate time and communication there is nothing to prevent applicants from continuing to discuss and document the technical and environmental aspects of their schemes with host authorities, Natural England, the Environment Agency, other statutory bodies and landowners. Those discussions are invariably valuable in shaping the project, its design and mitigation, helping to mediate and resolve issues before the relative inflexibility of the DCO application and examination stages.
40. Of course applicant teams can also use the time for a project review, to refresh the risk matrix (not least to add COVID-19) and to move consultation or application documents forward as much as possible.
41. It is not suggested that alternatives to statutory consultation in any way substitute for or relieve the applicant of the requirement ultimately to undertake at least one round of appropriate statutory consultation prior to submitting a DCO application for acceptance.

### ***So what does NIPA recommend and ask for?***

42. Overall it is very likely that there will be delays to some projects, but equally others may well be able to use the coming months to continue to make progress whilst allowing for resource constraints and the need to afford adequate time for engagement.
43. How can a realistic and fair process be achieved in the current circumstances? What is a fair approach or an acceptable risk for one project may not be for another and quality and equality

in the process still needs to be maintained. Views on what is fair and appropriate could also differ between those promoting and those responding to, examining and determining projects. Secondly, infrastructure consenting is a long process – whilst delay is never welcomed, some applicants may choose to sit tight and wait for 'business as usual' to return. However, that in itself entails a degree of risk given the uncertainty around when it will happen and there may also be other triggers and deadlines such as land deals and access licences.

44. As a broader point if projects across the board choose or are forced to pause we will all suffer the consequences - be it from delays to energy projects needed to support the national grid in achieving net zero, transport schemes that will help to (re-)connect us, or water resources necessary to tackle drought. Today's infrastructure consenting projects are the building blocks of our lives tomorrow and beyond and so to the extent possible and while maintaining openness and fairness in these emergency times, we should seek to maintain fair and effective progress in delivering sustainable nationally significant infrastructure.
45. There is one specific change to the law which NIPA recommends is considered, although in the alternative this point could be dealt with by a general waiver direction if that suggestion (see Part 6) is taken forward. Section 47(6)(za) of PA2008 provides that once the applicant has prepared the SoCC, the applicant must make the SoCC available for inspection by the public in a way that is reasonably convenient for people living in the vicinity of the land. This requirement is often interpreted as requiring and being fulfilled by the deposit of hard copies of the SoCC in local venues such as libraries, and that is current practice not least given that the corresponding DCLG guidance explicitly requires local deposit points but given the current restrictions those are not possible.

### **PART 3: HEARINGS**

46. This part explores the legal, policy and practical implications of COVID-19 for the continuation of examination hearings and other meetings under the PA and the EPR 2010<sup>9</sup>.
47. As a generality it may be said that the PA 2008 regime is particularly well-suited to holding meetings and hearings remotely, although there are clearly some important issues to examine which is done below.
48. In broad terms, the PA 2008 and the EPR 2010 give an Examining Authority wide discretion as to the conduct of hearings and as to the place where hearings may be held. Section 87(1) states that "*It is for the Examining authority to decide how to examine the application.*" This is supplemented by rule 13(5), which provides that "*The place at which a hearing is to be held shall be determined by the Examining authority in consultation with the applicant and, where the Examining authority is satisfied, having regard to the nature of the application, that it is reasonable to do so, the Examining authority may direct that different parts of a hearing shall be held at different locations*". Furthermore, section 94(3) states that it is for the Examining Authority "*to decide how the hearing is to be conducted*". Although these last two provisions are expressed in terms of a hearing, there does not appear to be any greater fetter on the discretion of an Examining Authority to hold and conduct a meeting, such as a Preliminary Meeting (s.88(2)) or other meeting (s.88(5)).

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<sup>9</sup> This part is a high-level summary of a more detailed analysis with recommendations in a full paper by Michael Humphries QC on this topic dated 6 April 2020 (version 2).

49. Common to all meetings and hearings ('events') is the requirement that the Examining Authority must give notice of "the date, time and *place*" (emphasis added) of any event. Whilst at first reading this might suggest that this must be a 'physical' place, closer analysis suggests otherwise. Both textual and comparative analysis indicates strongly that a 'place' can include a 'virtual' place and that a fully 'remote' hearing can, therefore, comply with the legal requirements of the PA 2008 regime. That the Judiciary is now holding fully 'remote' hearings in the context of s.71 of the Senior Courts Act 1981 is instructive.
50. There is a requirement for all types of hearing to be "*in public*" (s.94(2)). This can be secured by 'live audio streaming' and/or 'audio recording' and posting on the Planning Inspectorate's website (as at present). This reflects the approach in the Civil Procedure Rules ('CPR') Practice Direction 51Y (24 March 2020). The requirement for a hearing to be 'in public' does not, however, give all members of the public the right to 'participate' at the hearing (in the sense of making oral representations). The entitlement to make oral representations is limited to 'Interested Parties', 'Affected Persons' and those who have been permitted to participate by the Examining Authority; although this needs to be understood in the context that any person may make a 'relevant representation' and, thereby, become an 'Interested Party' (s.102(1)(e)) and any person 'interested in the land' to which the compulsory acquisition request relates is an 'Affected Person' (s.59(4)). Thus 'virtual' hearings being 'in public' does not mean that just any member of the public can demand to participate (i.e. make an oral representation), but it does mean there should be public access to what has been said. Furthermore, "*The Examining authority may proceed with a hearing in the absence of a person entitled to appear at it*" (rule 14(7)) and s.96 deals with the situation where a person asks to make oral representations at a hearing, but (for whatever reason) is not able to. In such a case the person may make written representations and the Examining Authority must consider those representations (s.96(2)).
51. Wider public law requirements relating to 'fairness' and 'openness' can be met by the way in which 'remote' events are conducted. Planning Inspectorate procedures under the PA 2008 are already fully directed to achieving these aims, but some adaptation of them may be necessary<sup>10</sup>. This could helpfully be the subject matter of guidance from MHCLG or advice from the Planning Inspectorate and NIPA has made some suggestions on this in the Table at the beginning of this paper. NIPA would be willing to engage further on this.
52. Although it would be particularly important for an Examining Authority to be sensitive about the way in which a remote compulsory acquisition hearing (CAH) was conducted, because of the human rights implications, there is no objection, in principle, to such hearings being conducted remotely. Indeed, equally sensitive issues are regularly being dealt with remotely by the High Court, including the Planning Court. Furthermore, for those without access to a video link, a remote CAH by audio link would also observe rules on fairness and respect human rights. As noted in Part 1 there are few, if any, nowadays that do not have access to a telephone.
53. It is clear that there has always been contemplation within the PA 2008 that means of making a representation, other than written representation or oral representation at a hearing, may be required or beneficial within the examination process, thus section 90(2) specifically provides that an examination is to take the form of written representations, unless there is (a) a requirement to hold a hearing under sections 91 to 93 or:

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<sup>10</sup> The full paper noted earlier discusses some of these issues.

*“(b) any decision by the Examining authority that any part of the examination is to take a form that is neither-*

*(i) consideration of written representations, nor*

*(ii) consideration of oral representations made at a hearing.”.*

54. This seems to contemplate directly representations being made in ways other than by written representation or a traditional hearing at a venue.
55. Advice will also be needed from the Planning Inspectorate and possibly individual Examining Authorities on preparation for and the conduct of events under the EPR 2010. Examples of the types of issues to be considered in such Advice are set out in the Table at the beginning of this paper. NIPA would be happy to agree a protocol with the Planning Inspectorate on such issues. Whilst these issues need to be resolved, they should not prevent the holding of remote events, and there is much experience in the Courts and Tribunals Service to draw upon which we are aware that the Planning Inspectorate is closely following.
56. There is a requirement to post a site notice for hearings. In the Table at the beginning of this paper NIPA recommends a possible amendment to rule 13(6) of the EPR 2010 in this regard. Site notices are also dealt with in Part 1 of this Appendix.
57. Examinations that have commenced with rule 8 published timetables will need to be facilitated and supported to complete effectively. This may involve extension of Examination timetables and changes to hearings and submission deadlines. There are existing powers and rules that can be utilised to amend timetables and for the Examining Authority to make procedural decisions (s.89 PA 2008 and EPR 2010 rule 8(3) and rule 9) and with any extension of overall time still required from the relevant Secretary of State (s.98 PA 2008 and EPR 2010 rule 23). NIPA recommends that this is considered in full discussion with applicants and relevant Interested Parties to enable agreed approaches and revised timetables to be adopted through effective facilitation that has regard to all parties' ability to resource and other critical external time limitations.
58. The ability of parties (such as the host local authority and community groups) to resource and participate in examinations will also be a consideration for the Examining Authority when considering the timing of the Preliminary Meeting and therefore the start of the examination, even if the Preliminary Meeting is to be held virtually. Local authorities are operating under severe restrictions, with many staff deployed to core services and their ability to work on non-core services suspended or restricted.
59. Subject to the language used in the PA 2008 and the EPR 2010 being interpreted in the way that is suggested is correct above and in the full paper, there is no pressing need for legislative amendments to the PA 2008 regime. Although, when Parliamentary time is available, amendments could be made to the legislation to make some points clearer and to grant additional powers to Examining Authorities. These are indicated in the Table at the beginning of this paper. In NIPA's view, however, this is not necessary during the short term to allow the PA 2008 regime to function properly with remote events. As indicated above, however, some further guidance from MHCLG and Advice from the Planning Inspectorate would be helpful and this is again identified in the Table at the beginning of this paper.

## **PART 4: SITE ACCESS**

60. This part covers the need for access to project locations and their surroundings at all stages of the DCO process. It assumes that prospective applicants may be unable to do extensive site surveys, that those with the benefit of made DCOs may not be able to carry out development and that visits by land referencers to verify desktop land referencing both before and after a DCO has been made may not be able to take place.

### ***Site surveys in preparation for applications***

61. Sites and locations around them are generally required to be accessed in order to take measurements for the purposes of environmental impact assessment. In the current pandemic this may be difficult for several reasons, including that:
- a. whilst it is understood from major consultancies which are NIPA members that most surveys (particularly time critical and/or seasonal surveys) are continuing, it could be clearer that site surveying is covered by exemptions in the COVID-19 legal restrictions and so can be carried out, subject to complying with health guidance for construction sites, which would include continuing use of statutory land access powers for surveys under the PA 2008 and the Housing and Planning Act 2016;
  - b. some surveying may need several staff who may not be able to perform the survey due to social distancing and related health requirements or their inability to stay in hotels overnight;
  - c. even if they could be carried out, some surveys would be unrepresentative of normal life, such as traffic counts, air quality and noise readings; and
  - d. land may be more difficult to access than usual, if it is occupied or access to it locked.
62. Positive government comment on the ability to overcome many of these issues would be helpful to encourage surveys to continue during these restrictions wherever safe and possible, including perhaps with reference to those engaged in surveys being seen as 'key workers'<sup>11</sup>. The implications of delays can be severe – if seasonal ecological surveys are not able to be carried out this may lead to a delay of a year or even two until the season comes around again and a continuous period of survey secured. A combination of seasonal survey losses or discontinuity could delay submission of a project by at least two years.

### ***Land referencing***

63. Although there is no definition of the obligation of 'diligent inquiry' in determining owners and occupiers of land for the purpose of statutory consultation and preparation of a book of reference, a frequent step has been to visit premises to confirm information or establish

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<sup>11</sup> We have noted in finalising this Paper the recent publication (16/04/2020) of Natural England's guidance *Coronavirus – Guidance on implications for Natural England's development management advice and wildlife licensing* which refers to "Government advice .... that ecologists and environmental professionals should be able to continue with outdoor work, including ecological surveying and supervision, where they can continue to follow Public Health England guidelines. Work that does not require travel, such as desk-based surveys and report writing, should be completed from home where possible."

missing information. It should be assumed that this can no longer take place owing to the COVID-19 restrictions.

64. Consideration will need to be given to the stage a project has reached, especially with regard to the sending out of requests for information on land. Time will need to be realistically built into any land referencing process that fully takes into account matters such as postal delays, offices being shut or intermittently visited, site visits becoming more challenging and door knocking curtailed and any approach and strategy needs to find ways of communication and diligence that goes beyond these and standard practice and means. Applicants will need to work hard to seek to identify everyone as far as possible and use all means available that have full regard to limitations in effect at the time of the exercise.
65. In this regard there is a case for an update to paragraph 50 of the DCLG Pre-application consultation guidance, such as: "It is the applicant's responsibility to demonstrate at submission of the application that due diligence has been undertaken in identifying all land interests, *in the context of the methods available at the time of the consultation*, and applicants...". NIPA considers that although difficult and more time consuming, discharging the obligation of diligent inquiry should still be possible during this crisis. Virtual steps (e.g. use of Google Street View) and a greater use of amended postal, email and telephone communications could be employed to compensate for the inability to visit in person, while acknowledging that this may take longer and involve new and innovative approaches. This could be done in the same way that sites like [192.com](http://192.com), which contain electoral register and other information, are regularly used in initial desk-based data collection. The inability of applicants to pick up postal responses may encourage the gathering of responses through alternative means, such as helplines, as suggested in paragraph 6 above.

#### ***Preparation of applications with incomplete surveys***

66. If it is not possible to complete surveys as planned, that does not necessarily mean that applications cannot proceed. Although the principle must of course be maintained that legally-compliant environmental impact assessment should be carried out before any decision on the application is made, it is not uncommon and necessarily inconsistent with that principle for full surveys not to have been carried out by the time an application has been made, and therefore for the Environmental Statement to declare the limitations that have affected the undertaking of the EIA.
67. Generally the approach has been that the surveys carried out are considered to show the greatest presence of species, historical remains, etc., that the site could accommodate. A sliding scale of mitigation is designed and put in place through the DCO that addresses a reasonable worst case downwards, and describes what would happen in order to implement the mitigation scheme, such as suspending construction until further approvals had been obtained or adaptive monitoring, management and mitigation has been put in place. The DCO would then oblige the applicant to implement the mitigation scheme but the DCO could leave it open for the applicant to carry out further surveys and then to implement less mitigation if fewer species, for example, are in fact found to be present. The downside to this approach is the likely over-reporting of environmental effects and the need to design more mitigation, potentially affecting more land, than is likely to be actually required.
68. This approach is less likely to be acceptable where no or hardly any surveys are able to be carried out or there are environmental impacts engaging particular protection such as those

affected by the Habitats Regulations or the Water Framework Directive. In those cases it may be that a project cannot proceed until sufficient physical surveying can and has been carried out.

69. NIPA considers that this whole area (of enabling the consented development to be carried out whilst protecting the environment in line with the Environmental Statement) would benefit from the Planning Inspectorate considering whether any updated and/or more detailed Advice is required on the appropriate controls and mechanisms in this respect that a DCO (particularly its requirements) may, depending on the circumstances, need to contain.

### ***Site notices***

70. At times during the DCO process it is a requirement to erect site notices for various reasons. This is clearly not always feasible for the same reason as survey access, and also fairly redundant given that the notices are less likely to be seen. This topic is covered in Part 1 above since the notices often have to say where documentation can be inspected.

### ***Site Inspections during Examinations***

71. Unaccompanied and accompanied site inspections are a regular activity in the examination process. The EPR 2010 rule 16 sets out that the Examining Authority may make site inspections and what they must do with regard to notification of date, time and place if they do.
72. As recommended in the table at the start of this paper we suggest that there is clarity around the ability of unaccompanied site inspections to take place safely and then, as is the general practice, a note of the inspection made and published for all participants to see and understand. As this is a discretionary requirement already and does not need attendance of more than one member of an Examining Authority, this is something that should be capable of management. Guidance should provide that for the period of the COVID-19 restrictions, site inspections will be considered to have been conducted “in the company of any interested party or their representative” for the purposes of rule 16(2) of EPR 2010 where the Examining Authority has consulted interested parties on the proposed route and made a record of the visit (for example with notes, photographs or video recording as appropriate) and that information is published in the usual way on the project web page and referenced in the Examination library.

## **PART 5: IMPLEMENTATION OF DCOs**

### ***Pre-commencement surveys***

73. Pre-commencement surveys (i.e. when after a DCO has been made the land is revisited to confirm the findings in the Environmental Statement before construction starts) may be restricted in the same way as pre-application surveys. Again a worst-case scenario approach may need to be adopted, but in any event discussion with the relevant statutory body would be essential.

### ***Commencement of development***

74. Once a DCO has been made it is invariably time limited as to when development can commence; this is normally within five years of the DCO coming into force. Although steps to commence development may not involve much actual work they do involve some and must be carried out for the purpose of implementing the development. If site access is not possible or such activities are not allowed to take place, then the powers in the DCO will eventually lapse.
75. In Scotland, paragraph 9 of Schedule 7 to the recent [Coronavirus \(Scotland\) Act 2020](#) provides that planning permissions due to lapse during the first six months of the Act coming into force (6 April) are automatically extended to a year after the date on which the Act comes into force.
76. Government should consider the justification for an equivalent provision for DCOs, in terms of extending the period within which, and by the end of which, certain steps have to have been taken. Such a blanket provision would be preferable to requiring each DCO beneficiary to submit a non-material change application to amend the implementation time and compulsory acquisition time in their DCO; this would certainly add to the pressure on the Planning Inspectorate and each Government department's Planning Team's resources at a time when they are particularly stretched, as well as adding to the pressure on the DCO beneficiary's resources.
77. NIPA would very much support and urge the earliest delivery of a similar change through an overall provision in a Bill specifically amending each DCO concerned, as this would avoid the need for each and every DCO affected going through the non-material change process in respect of implementation and compulsory acquisition statutory deadlines and the consequential workload this would create. Government should also consider the justification for including in such a Bill a provision nullifying any potential breach of a DCO that was caused by the COVID-19 extraordinary measures and was beyond the control and ability of the beneficiary of the DCO to rectify or comply with in the restricted period. This would avoid the unintended breach of the DCO resulting in criminal liability when it was beyond remedy without breaching the COVID-19 extraordinary measures.
78. A 12 month extension period is suggested given the likely impact of COVID-19 on the construction industry as well as on local government (which could well affect the pre-construction discharge of DCO requirements).
79. Depending on the timing of any blanket approach that is adopted by the Government, NIPA also recommends that any DCO beneficiary who has less than 3 months remaining to start to implement the DCO should urgently seek to identify any commencement works that can be achieved within the terms of the COVID-19 extraordinary measures and also then documented and reported to the relevant local planning authority and the Planning Inspectorate as commencement. If this is not possible or practicable, NIPA recommends that the DCO beneficiary discusses as early as possible with the Planning Inspectorate and relevant Government department the submission of a non-material change application to extend the relevant periods and agrees a process and determination timeline to ensure the DCO's powers are not lost. To this end NIPA would ask that the Planning Inspectorate and relevant Government departments prioritise what are likely to be a small number of cases that will need to be dealt with before such a Bill making blanket provision can be passed.

## **PART 6: GENERAL**

### ***Waiver directions***

80. One general change to the law that NIPA recommends, and which could be framed to apply to each of the five topic areas covered above, is to allow applicants to apply for specific waiver directions in respect of procedural steps required to be taken in connection with DCOs. A similar concept has always been permissible under the Transport and Works Act 1992 infrastructure consenting regime and has in fact already been employed during the current COVID-19 restrictions for a Network Rail project.
81. The introduction into the PA 2008 of a power of waiver similar to that available under the Transport and Works Act 1992 regime<sup>12</sup> would allow prospective and actual DCO applicants and beneficiaries to discuss anticipated and actual procedural compliance issues in any particular instance with the Planning Inspectorate (to whom such a power could be delegated by the Secretary of State). The Planning Inspectorate would be able to consider the acceptability of any alternative approach proposed by the applicant, including whether the approach would be fair, reasonable and proportionate, as part of considering whether to give the waiver direction sought.
82. In addition, this power could be expressed as a general power for the Secretary of State to waive compliance with procedures, so avoiding a large number of specific waivers needing to be applied for and causing an unnecessary burden on prospective and actual DCO applicants and beneficiaries and the Planning Inspectorate. Such a general power to issue waiver directions would also be an alternative means of achieving some of the specific changes to the law recommended earlier in this Appendix.
83. For example, a general waiver direction could provide that during the COVID-19 pandemic, service of s.53 and s.134 PA 2008 notices could be legally effected by email or by 'normal' (not recorded) postal delivery; and a specific waiver direction could recognise that it may not always be possible to publish notices in local newspapers in two successive weeks, as required by regulations 4(2) and 9(1) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 (APFPR 2009).

### ***Equalities and accessibility***

84. Right at the outset of implementation of the PA 2008 there was a request from the then Infrastructure Planning Commission for the organisation *Planning Aid* to be funded to provide independent support to those least able to engage and represent themselves in communities potentially affected by NSIPs. With increasing pressure on government expenditure and austerity the funding of *Planning Aid* by central government generally was reduced and eventually withdrawn and the consequential support regularly available removed or reduced.
85. At a time when social distancing and isolation is limiting interaction in person, there is a need more than ever to ensure equality, particularly for protected characteristic groups and those with social inequalities. This is particularly important with the increasing move to electronic

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<sup>12</sup> Section 6(4) of that Act allows the power to be introduced, and Rule 18 of the Transport and Works (Applications and Objections Procedure) (England and Wales) Rules 2006 contains the current power and related procedural provisions.

consultation and virtual examination, during these extraordinary times and as practice develops generally.

86. The use of *Planning Aid* as an independent facilitator to build capacity of understanding and engagement in the PA 2008 process has been well demonstrated to good effect most recently at Sizewell in respect of the Sizewell C proposals.
87. We therefore request that government considers the scope for providing a funded *Planning Aid* resource for NSIPs. The reason for government funding is twofold. First, to show commitment to the urgent need to deliver nationally significant infrastructure; and secondly, to overcome an often unfounded belief that if funds are provided by the NSIP applicant there will not be true independent representation.
88. As well as providing independent resource at the consultation stage, this could also provide for advisers to act at the examination stage as the equivalent of a *McKenzie Friend* in the England and Wales courts system. This would provide improved practice and equity than the current system of examination in person and the heavily weighted written process.
89. In terms of identifying potential protected characteristic groups and social needs, from the outset of a project all applicants should be diligent in identifying such groups and people. Early engagement with local authorities, parish and town councils and identified groups and representatives, including the traditionally 'hard to reach' groups, is required and the creation of an action plan to ensure information and opportunity are genuinely provided for these groups at each stage of the application process. This should seek to identify any particular reasonable adaptations that may be required to genuinely engage with these groups. The approach and adaptations required and taken should be reported in the Consultation Report and government advice on the Consultation Report should reflect and encourage this practice.
90. At the relevant representations stage we would like to see an option to capture any protected characteristic group or social needs. This would allow for needs to be planned for and addressed from the pre-examination stage and taken fully into account by the Examining Authority and the applicant. This would be similar, for example, to the current practice of requesting and accommodating the Welsh language, or any other particular needs, in the hearing notification and joining instructions, but taken a step earlier and further. This information would need to be captured voluntarily and the Planning Inspectorate's information/data policy updated to reflect this so it can be held and used for the purposes of the PA process.
91. Hearings held virtually already have the ability for parties to be represented. The use of *Planning Aid* for equalities and social needs groups in a similar facilitating and representative role as a court *McKenzie Friend* would create an improved model for fairness and accessibility, in terms of gaining access to the examination process for engaging in writing, in person or in virtual hearings. This is something that could also be added to the preliminary meeting and for anyone to identify that they need support in this way.
92. It would be particularly helpful for the Examination Guidance to be updated to reflect this and provide the contact details for *Planning Aid*. Advice Note Eight should also be updated to reflect these recommendations about facilitation of engagement and making needs known. In addition these elements would need to be updated within the Planning Inspectorate's

Information/Data policy and also ideally referenced in applicants' Information/Data policy publicised and made known during their consultation stage.

93. This greater facilitation could be used to ensure fuller engagement with the application documentation and examination documentation throughout. *Planning Aid* can give assistance in writing, telephone or electronically, therefore providing for most eventualities.
94. Once restrictions arising from COVID-19 are lifted we would recommend that these general equalities and accessibility measures are maintained as they would also work well in the traditional live hearing format and assist with ensuring a more accessible process overall.