THE PLANNING ACT 2008 CREATED A NEW CONSENTING PROCESS FOR NATIONALLY SIGNIFICANT INFRASTRUCTURE PROJECTS (NSIPS). THIS BRIEFING NOTE ACTS AS AN INTRODUCTION TO THE REGIME, OFFERING A SUMMARY OF THE KEY LEGISLATION AND ASSISTING YOU IN UNDERSTANDING WHEN AND HOW IT IS APPLIED.

THE ESSENTIALS

The Planning Act 2008 created a new consenting process for NSIPs. Some projects are automatically NSIPs if they go over a clear threshold, whilst others require an element of judgment. In addition, the Secretary of State can choose to designate a project as an NSIP, subject to certain criteria.

If a project is an NSIP it requires Development Consent. It is a criminal offence to build a project without development consent if it is required. The Development Consent Order (DCO) is drafted by the applicant, submitted along with supporting documents to the Planning Inspectorate (PINS) for examination and determined by the Secretary of State.

The DCO, once confirmed, is often a statutory instrument, depending on the powers it contains. It grants planning permission for the proposed development and can contain other secondary consents including the compulsory acquisition of rights and / or land, licenses and highways powers.

The process is heavily ‘front-loaded’, meaning the applicant is required (by statute) to carry out meaningful pre-application consultation, and to help ensure there are no shocks or surprises during the Examination.

The adequacy of the pre-application consultation is one of the criteria for the acceptance of an application by PINS for Examination.

The cost of an application is dependent on a number of factors, including the number of inspectors appointed to examine the application (between one and five).

Applications fees increased significantly in April 2017 and the Secretary of State has issued updated guidance on calculating fees.

The timescale for examining an application is set down in the legislation and is approximately 16 months from application to decision. Pre-application timescales are in the control of the applicant but on average take between 1 and 2 years.

The Planning Act 2008, as amended by further Acts, defines:

- What qualifies as an NSIP
- What can be included in an application for a Development Consent Order (DCO)
- The process for making an application
- The process for examining an application
- The ‘tests’ for making a decision on an application – including the status of National Policy Statements.
- Compulsory acquisition tests

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1. Pre-application c.1-2 years
2. Acceptance Max 28 days
3. Pre-Examination c.3 months
4. Examination Max 6 months
5. Inspector’s Decision Max 3 months
6. SoS Decision Max 3 months
7. Judicial Review 6 week window

*Timescales in bold are statutory maxima*
WHAT QUALIFIES AS AN NSIP?

**Pre-designated NSIPs, subject to thresholds**

Sections 14-30 of the Planning Act 2008 establish the types of development project that, subject to defined thresholds (see Annex 1), qualify as NSIPs.

<table>
<thead>
<tr>
<th>Energy</th>
<th>Transport</th>
<th>Water</th>
<th>Waste Water</th>
<th>Waste</th>
</tr>
</thead>
<tbody>
<tr>
<td>Generating stations (on and offshore)</td>
<td>Highways</td>
<td>Dams and reservoirs</td>
<td>Waste water treatment plants</td>
<td>Hazardous waste facilities</td>
</tr>
<tr>
<td>Electric lines</td>
<td>Airports</td>
<td>Transfer of water resources</td>
<td>Transfer / storage of waste</td>
<td>Radioactive waste geological disposal facilities</td>
</tr>
<tr>
<td>Underground gas storage</td>
<td>Harbour facilities</td>
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<tr>
<td>Liquid Natural Gas Facilities</td>
<td>Railways</td>
<td></td>
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<td>Gas reception facilities</td>
<td>Rail Freight interchanges</td>
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<tr>
<td>Gas transporter pipelines</td>
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<tr>
<td>Other pipelines</td>
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**PROJECTS SUBJECT TO SECRETARY OF STATE DIRECTION**

Section 35 of PA2008 as amended provides that the following projects can be 'directed into' the regime by the relevant Secretary of State (SoS).

A project that:

a) **Is or forms part of a project in the Energy, Transport, Water, Waste Water or Waste fields**

b) **Is a prescribed Business or Commercial project**

c) **The Secretary of State considers the project is of national significance.**

Direction requests are made directly to the Secretary of State; but the Planning Inspectorate can offer advice before a request is submitted.

Section 35 (a) offers the scope for projects such as regional airports, local authority highways schemes and strategic rail projects that fall outside of the thresholds but are of more than local significance to benefit from, for example, compulsory acquisition powers, certainty of timescale and the national policy statements.

Section 35 (b) offers the scope for a much wider range of projects with significant economic benefits to be considered as NSIPs under the Business or Commercial regulations – see our guidance note 'Nationally Significant Infrastructure: Business & Commercial Development’ for more details.

**LEGISLATION AND GUIDANCE SUMMARY**

Legislation is at the heart of the National Infrastructure process, and a strong understanding is essential for any project.

_The golden rule – always start with what the legislation says!_

All legislation, guidance and advice can be found on the Planning Inspectorate’s dedicated National Infrastructure webpage.
Here's a summary of key legislation, guidance and advice:

<table>
<thead>
<tr>
<th>Primary Legislation</th>
<th>Secondary Legislation</th>
<th>Guidance</th>
<th>Advice</th>
</tr>
</thead>
<tbody>
<tr>
<td>Acts of Parliament</td>
<td>Gives effect to primary legislation</td>
<td>Statutory guidance which must be taken into account</td>
<td>Non-statutory, non-binding advice produced by Planning Inspectorate</td>
</tr>
</tbody>
</table>

1. Planning Act 2008
   **Amendments**
   2. Localism Act 2011
      Abolished IPC
   3. Growth and Infrastructure Act 2013
      *Business and Commercial included as NSIP category*
   4. The Infrastructure Act 2015
      Process changes
   5. Housing and Planning Act 2016
      *Introduced new infrastructure-related housing category*

   **Wales Act 2017**
   Increased threshold for energy generation projects in Wales; allowed associated development to be included for DCOs in Wales.

   **Rules**
   - Examination procedures
   - EIA
   - Interested parties
   - Business or commercial
   - Prescribed forms and procedures
   - Conservation of Habitats and species
   - Compulsory acquisition
   - Fees
   - Decisions
   - Changes to applications

   A number of parliamentary orders have amended primary legislation.

   **Key Guidance**
   - Pre-application
   - Application forms
   - Examination
   - Associated Development
   - Compulsory acquisition
   - Post application changes
   - Infrastructure related housing
   - Fees
   - Costs

   **Advice Note series**
   Including making an application, EIA matters and working with statutory bodies.

   **Bespoke Advice**
   Section 51 of the Act - PINS publishes all advice it gives.

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**NATIONAL POLICY STATEMENTS**

**National Policy Statements (NPS)** are the primary policy documents for NSIPs and establish the principle of national need.

They are issued by the relevant department’s Secretary of State and must be laid before Parliament before they can be issued.

Where there is a designated NPS, NSIP applications must be decided in accordance with it except where, among other things:

- The decision would be in breach of international obligations (e.g. European legislation)
- The adverse impacts would outweigh the benefits.

See section 104 of PA2008 for the full test.

Where there is no designated NPS a different test applies – see section 105 of PA2008. Here, the Secretary of State must have regard to the Local Impact Report, prescribed matters and any other matters the SoS thinks are both important and relevant. Our experience is that the development plan becomes a primary consideration.

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**Current National Policy Statements**

<table>
<thead>
<tr>
<th>Energy</th>
<th>Transport</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Energy</strong></td>
<td><strong>Transport</strong></td>
<td><strong>Other</strong></td>
</tr>
<tr>
<td>EN1 – Overarching</td>
<td>Ports</td>
<td><strong>Hazardous waste</strong></td>
</tr>
<tr>
<td>EN2 – Renewable energy</td>
<td><strong>Designated 26 January 2012</strong></td>
<td><strong>Designated 6 June 2013</strong></td>
</tr>
<tr>
<td>EN3 – Fossil Fuels</td>
<td><strong>National Networks</strong></td>
<td><strong>Waste water</strong></td>
</tr>
<tr>
<td>EN4 – Oil and Gas Supply and Storage</td>
<td><strong>Designated 14 January 2015</strong></td>
<td><strong>Designated 9 February 2012</strong></td>
</tr>
<tr>
<td>EN5 – Electricity Networks</td>
<td><strong>Airports</strong></td>
<td><strong>Radioactive waste NPS also expected.</strong></td>
</tr>
<tr>
<td>EN6 – Nuclear Power</td>
<td><strong>Revised Draft NPS published 24 October 2017</strong></td>
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<tr>
<td>All designated 19 July 2011</td>
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</tbody>
</table>

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**IN CONCLUSION**

The NSIP regime remains complex and continues to be tested and tweaked as projects progress through it. As such our best advice is if, having read this Guidance Note, or our others on this topic, you are still unclear as to how the NSIP process might be applied or its relevance to your proposals, please do contact Ben Lewis or Tom Carpen in our Infrastructure Team, who will be more than happy to offer some advice.
ANNEX 1 – SUMMARY OF NSIP THRESHOLDS
See Planning Act 2008 (as amended) sections 15-30 for specific details for each threshold

<table>
<thead>
<tr>
<th>Field (sector)</th>
<th>Development type</th>
<th>General thresholds (Planning Act 2008 contains more detail)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Energy</td>
<td>Generating stations (onshore)</td>
<td>Construction or extension &gt; 50 MW (Planning Act 2008 contains more detail)</td>
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<tr>
<td></td>
<td></td>
<td>Construction or extension &gt; 350 MW (Planning Act 2008 contains more detail)</td>
</tr>
<tr>
<td></td>
<td>Generating stations (offshore)</td>
<td>Construction or extension &gt; 100 MW (Planning Act 2008 contains more detail)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Construction or extension &gt; 350 MW (Planning Act 2008 contains more detail)</td>
</tr>
<tr>
<td></td>
<td>Electric lines</td>
<td>132KV or above; 2km or more (Planning Act 2008 contains more detail)</td>
</tr>
<tr>
<td></td>
<td>Underground gas storage</td>
<td>Creating or starting to use at least 43 million standard m³ or at least 4.5 million m³ max flow rate (Planning Act 2008 contains more detail)</td>
</tr>
<tr>
<td></td>
<td>LNG</td>
<td>At least 43 million standard m³ or at least 4.5 million m³ max flow rate (Planning Act 2008 contains more detail)</td>
</tr>
<tr>
<td></td>
<td>Gas reception facilities</td>
<td>least 4.5 million m³ max flow rate (Planning Act 2008 contains more detail)</td>
</tr>
<tr>
<td></td>
<td>Gas transporter pipelines</td>
<td>&gt; 800mm diameter and 400 km; &gt; 7 bar gauge; at least 50,000 customers of more than one supplier (Planning Act 2008 contains more detail)</td>
</tr>
<tr>
<td></td>
<td>Other pipelines</td>
<td>England and / or Wales (Planning Act 2008 contains more detail)</td>
</tr>
<tr>
<td>Transport</td>
<td>Highways</td>
<td>England (Planning Act 2008 contains more detail)</td>
</tr>
<tr>
<td></td>
<td>Airports</td>
<td>Construction, alteration, increase in permitted use; at least 10 million passengers/year or at least 10,000 cargo movements (Planning Act 2008 contains more detail)</td>
</tr>
<tr>
<td></td>
<td>Harbour facilities</td>
<td>Container ships – 500,000 TWU; Ro-ro ships – 250,000 units; Cargo (other) – 5 million units (Planning Act 2008 contains more detail)</td>
</tr>
<tr>
<td></td>
<td>Railways</td>
<td>Construction or alteration &gt; 2km (Planning Act 2008 contains more detail)</td>
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<tr>
<td></td>
<td>Rail Freight Interchanges</td>
<td>Construction or alteration (Planning Act 2008 contains more detail)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>At least 60 ha; At least 4 goods trains / day (Planning Act 2008 contains more detail)</td>
</tr>
<tr>
<td></td>
<td>Water Dams and reservoirs</td>
<td>Construction or alteration &gt; 10 million m³ (Planning Act 2008 contains more detail)</td>
</tr>
</tbody>
</table>
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