EXPLANATORY MEMORANDUM TO

THE INFRASTRUCTURE PLANNING (APPLICATIONS: PRESCRIBED FORMS AND PROCEDURE) REGULATIONS 2009 No. 2264

THE INFRASTRUCTURE PLANNING (MODEL PROVISIONS) (ENGLAND AND WALES) ORDER 2009 No. 2265

THE INFRASTRUCTURE PLANNING (ENVIRONMENTAL IMPACT ASSESSMENT) REGULATIONS 2009 No. 2263

THE CONSERVATION (NATURAL HABITATS &C.) (AMENDMENT) (NO.2) REGULATIONS 2009[1]

1. This explanatory memorandum has been prepared by the Department of Communities and Local Government and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This Explanatory Memorandum deals with a suite of statutory instruments that, together with non-statutory guidance documents, set out the procedures which applicants for consent for nationally significant infrastructure projects will be required to follow before and after submitting an application to the Infrastructure Planning Commission ("IPC") under the Planning Act 2008 ("the Act"), and the content of such applications.

2.2 Applicants will be expected to carry out thorough and effective pre-application consultation (including on environmental issues) with a wide variety of persons. Specific requirements for this are given in the regulations on applications and procedures and in the regulations transposing the Environmental Impact Assessment Directive and the Habitats Directive (see below). The statutory instruments also specify in detail how an application should be set out, and what information must, or potentially could, be included. The IPC must satisfy itself before accepting an application that the applicant's pre-application consultation activity and the application contents have met the required standards.

2.3 In particular, the application must include a draft of the order that contains provisions which describe all the development that the applicant is intending to carry out. The Infrastructure Planning (Model Provisions) (England and Wales) Order ("the model provisions Order") sets out model provisions which may be included in the draft proposed order. These model provisions are designed to assist applicants when they are preparing the draft proposed order but they are not mandatory. The IPC are also required to have regard to these model provisions when making an order granting development consent (section 38(2) of the Act).

2.4 Regulations are also included in this suite to transpose the requirements of the Environmental Impact Assessment Directive and the Habitats Directive for the new regime for nationally significant infrastructure.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This is the first use of powers under sections 37, 38, 48, 51, 56, 58 and 59 of the Act. These sections are brought into force on 1st October 2009 by the Planning Act 2008 (Commencement No.2)

[1] This Explanatory Memorandum relates only to Part 2 of the Conservation (Natural Habitats &c.) (Amendment) (No.2) Regulations. That is the Part of the regulations relevant to the application for development consent orders under the Planning Act 2008. Defra has produced another Explanatory Memorandum which covers the whole of those regulations. This and the instrument are due to be laid in early September.

Order 2009 (S.I. 2009/2260). The power to make Orders and Regulations came into force on the day on which the Act was passed – see section 241 of the Act.

4. Legislative Context

4.1 These Regulations are made under the Planning Act 2008 ("the Act"), except for the Conservation (Natural Habitats &c.) (Amendment) (No.2) Regulations ("the Habitat Regulations") and the Infrastructure Planning (Environmental Impact Assessment) Regulations ("the EIA Regulations") which are both made under section 2(2) of the European Communities Act 1972, to legislate to create a new system for dealing with development consent for nationally significant infrastructure projects. The Planning Bill was introduced to Parliament on 27 November 2007, and received Royal Assent on 26 November 2008 as the Planning Act 2008. Parts 1 to 8 of the Act provides for the grant of development consent for development consisting of nationally significant infrastructure projects. Where development consent is required under the Act, there is no need for certain other consents to be obtained – such as planning permission, pipeline authorisation or consent under the Electricity Act 1989 or the Gas Act 1965. The Act also provides for the establishment of the IPC who will examine and, where a national policy statement has been designated, determine applications for development consent.

4.2 Part 5 of the Act sets out the procedure to be followed prior to making an application for development consent and how to make an application. Sections 55 to 59 of Part 6 of the Act deal with what the IPC must take into account when accepting an application and notification procedures that must be followed once an application has been accepted.

4.3 The Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 (regulations 3 and 4) prescribe who, in addition to those bodies and persons set out in the Act, must be consulted as part of the pre-application requirements of the Act. The Act places significant emphasis on wide public consultation before an application is made. The regulations also set out how a notice of consultation must be termed and where it must be placed. In addition the Act requires consultation with the local community in liaison with the local authority who can offer its expertise in reaching the wider community in the best way.

4.4 Section 37 of the Act requires an application for development consent to be made. Regulation 5 provides for a standard form of application, which is in Schedule 2 and sets out all the documents, including a draft of the proposed order that must accompany the application, if relevant to it. Regulation 6 expands on this for specific projects where specialist information might be required.

4.5 Following an application being accepted under section 56, notice must be given of that accepted application and further invitation given for comments and representations. Regulations 8, 9 and 10 set out who must be consulted in addition to those already specified in the Act and how this should be done where details are not on the face of the Act.

4.6 Section 38 of the Act gives the Secretary of State the power to prescribe model provisions for incorporation in the draft proposed order and to which the Commission must have regard when making an order granting development consent. In neither case is it mandatory to use the model provisions.

4.7 Section 51 of the Act gives the Commission power to give advice to applicants and potential applicants. Regulation 11 sets the parameters for giving any advice and the making available of that advice in order to ensure propriety is adhered to while advising any person.

4.8 Regulation 12 sets out transitional matters for applicants who might have already commenced consultation with persons and bodies prior to the regulations coming into force and might not have done so exactly in accordance with the requirements of the Act and the regulations.

4.9 Section 120 of the Act provides that an order granting development consent may impose "requirements" in connection with the development for which consent is granted. The model provisions Order also includes model provisions in respect of these requirements.

4.10 The Environmental Impact Assessment Directive[2] ("the EIA Directive") requires that, before granting "development consent" for any project that is likely to have significant effects on the environment, authorities must carry out a procedure known as environmental impact assessment ("EIA"). The EIA Regulations which form part of this package transpose the EIA Directive in relation to those procedures set up for the IPC which lead to the making of orders granting development consent and to the granting of approvals in respect of requirements imposed by such orders, where these are also covered by the EIA Directive.

5. Territorial Extent and Application

5.1 The Infrastructure Planning (Application: Prescribed Forms and Procedure) Regulations and the Infrastructure Planning (Environmental Impact Assessment) Regulations apply to England, Wales and Scotland in accordance with the scope of the Planning Act 2008 (see section 240). The Infrastructure Planning (Model Provisions) (England and Wales) Order applies in relation to England and Wales. They do not apply in relation to Scotland due to the different legislative background. It is proposed that model provisions for Scotland will be provided at a later date. The Conservation (Natural Habitats &c.) (Amendment) (No.2) Regulations apply to England, Wales and Scotland in accordance with the scope of the Planning Act 2008 apart from Regulation 7 which extends to England and Wales only and Regulation 8 which extends to Scotland only.

6. European Convention on Human Rights

As the instruments are subject to negative resolution procedure and do not amend primary legislation, no statement is required.

7. Policy background

What is being done and why

7.1 The Act makes provision for:

- The Government to produce national policy statements ("NPSs") which would establish the case for nationally significant infrastructure development. These will integrate environmental, social and economic objectives, including climate change commitments, for the delivery of sustainable development. They will set out the national need for infrastructure development and set the policy framework for IPC decisions. They will be a major step towards to the overall goal of speeding up the process of delivering infrastructure.
- A new duty on promoters to ensure that proposals are properly prepared and consulted on before they submit an application for nationally significant infrastructure projects
- A new independent body, the IPC, to take over responsibility for considering and deciding such applications. Decisions will be based primarily on the NPS. The examination process will be streamlined. Questioning at hearings will be led by commissioners rather than being adversarial.
- The Secretary of State to prescribe the persons it must have consulted before designating a statement as an NPS. These persons have been set out in The Infrastructure Planning (National Policy Statement Consultation) Regulations 2009 (S.I. 2009/1302) which came into force on 22 June 2009.

7.2 The Government has published an IPC Implementation "Route Map" which sets out in detail how the IPC regime is being implemented, including the timetable for bringing in the legislation and guidance. (See http://www.communities.gov.uk/documents/planning

[2] Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC and Article 3 of Council Directive 2003/35/EC.

Pre-application consultation and application procedures

7.3 The Regulations are made under Parts 5 and 6 of the Planning Act, in order to provide details of the framework of consultation activities which must be undertaken prior to the submission of an application for an order granting development consent. These Regulations also provide for details of how an application should be submitted to the IPC.

7.4 Just as the Planning Act requires applicants to consult widely with a range of bodies and organisations prior to making an application, they are also required to publicise any applications which are accepted by the IPC. These regulations set out how an applicant is required to publicise its development proposals prior to submitting an application to the Commission, and how an applicant must publicise, and also notify prescribed persons, of an application that has been accepted by the Commission. The regulations contain a list of organisations which must be consulted about proposed and submitted applications, and the circumstances in which these organisations should be consulted. These will have the status of statutory consultees for the purpose of nationally significant infrastructure projects and so must, be consulted by the applicant. The Government intends to update this list to include the Marine Management Organisation, subject to the passage of the Marine and Coastal Access Bill. As well as the statutory consultees, it is likely the applicant will also need to consult with other organisations, depending on the proposed development and location in each case.

7.5 The Regulations set out that an application to the Commission must consist of an application form, prescribed documentation and any other information necessary for a particular development proposal. The Regulations include a prescribed application form, which is intended to act as a high-level and non-technical summary with maps clearly showing the location of the proposal and, through the list of accompanying documents, a further indication of the kinds of issues that will need to be considered in order for development consent to be granted. A guidance note will aid the applicant in completing the application form, and provide clarification on the documents that should accompany it.

7.6 These Regulations make transitional provisions relating specifically to applications which are made prior to 1st October 2011, but where the applicant includes in this application details of consultations commenced between 1st October 2007 and 1st October 2009. In these circumstances, the provisions of section 55(3) of the Planning Act are deemed to have been met, subject to certain restrictions. This recognises that some applicants who are planning to submit an application prior to 1st October 2011 may have already engaged in public consultation exercises as regards their proposals. The establishment of new standards for pre-application consultation in October 2009 should not cast doubt on the value of consultation activities undertaken prior to this date.

7.7 There are additional requirements relating to pre-application consultation which flow through from other regulations in this package dealing with EIA. These requirements apply where an application is likely to have environmental effects, where the EIA directive makes consultation on the proposals mandatory. These provisions are discussed below.

Model provisions

7.8 The Order made here sets out model provisions, which are intended to assist the applicant in preparing the draft proposed order, and to enable common issues across all or most applications to be addressed in a consistent manner. This follows the established practice for orders under the Transport and Works Act 1992, where the provision of model clauses (currently in SI 2006/1954) for railways and tramways has proved very useful in terms of ensuring general consistency of approach and helping applicants. It will not be mandatory for applicants to follow model provisions strictly, in order to submit a draft proposed order along with an application for development consent. However, the IPC must take account of the model provisions, when making an order granting development consent.

7.9 The model provisions Order is constructed in such a way that promoters of nationally significant infrastructure projects only need to look to the Schedule which is relevant to the infrastructure type. Schedule 2 sets out a complete set of model provisions to be used in nationally significant infrastructure

projects (NSIP) relating to railways, and is based largely on the contents of the existing Transport and Works (Model Clauses for Railways and Tramways) Order 2006 (SI 2006/1954). Schedule 3 sets out a complete set of model provisions to be used in NSIP harbour projects, and is based on provisions stemming either from existing Transport and Works (Model Clauses for Railways and Tramways) Order 2006 (SI 2006/1954) or from one or more Harbour Revision Orders or Harbour Empowerment Orders.

7.10 We have not set out a complete set of model provisions for other NSIP types, since promoters of such projects are likely to need provisions which are bespoke to that project. However, Schedule 1 sets out a series of model provisions which may be relevant to a large number of infrastructure projects, which cover a number of issues common to large construction projects, such as compulsory acquisition of land and stopping up of streets. In all cases, individual applicants will need to decide if they need to modify the model provisions for the purposes of their own draft development consent orders.

7.11 The model provisions Order also includes (at Schedule 4) a series of model "requirements" (akin to planning conditions under existing regimes). We expect that applicants will include what they consider to be suitable requirements, in the draft proposed order they submit along with their application.

Environmental Impact Assessment (EIA) and Habitats

7.12 The Planning Act 2008 does not directly apply any European Community regulatory provisions – such as the EU Habitats Directive 92/43/EEC (the "Habitats Directive") or the Environmental Impact Assessment Directive (85/337/EC) – to the new bodies and procedures established under the Planning Act 2008. Instead, the relevant provisions of the Directives, in the case of the EIA Directive are applied by the EIA Regulations that transpose the Directive as respects applications for NSIPs and related matters and in the case of the Habitats Directive by the Habitats Regulations which implement the Habitats Directive in Great Britain.

7.13 In particular these EIA Regulations:

- Inform the IPC as the competent authority responsible for determining whether a proposed development requires an EIA, and what should be covered by that EIA (scoping and screening respectively).
- Set out when an EIA is required, what should be contained within an environmental statement, relevant timescales, consultation and publicity requirements and details of the overall process.
- Ensure that consultation exercises and publicity under s.47 or 48 of the Act make provision for consultation and publicity of preliminary environmental information
- Make provision for publicity requirements for offshore developments.
- Provide that the IPC must not accept an application that does not comply with the EIA requirements, or where that application has already been accepted, provide for the IPC to suspend its examination of the application until the requirements are complied with.
- Make provision for ensuring that any requirements imposed by an order granting development consent are if necessary subject to the appropriate EIA.
- Make provisions covering developments with significant transboundary effects, that is to say they prescribe what the IPC must do when an EIA development is likely to have significant environmental effects on a State that is party to the Agreement on the European Economic Areas.

7.14 In particular, these Habitats Regulations:

- Ensure that where the Secretary of State considers it necessary, NPSs will include text which encourages the management of the features of the landscape which are of major importance for wild fauna and flora. This transposes Article 10 of the Habitats Directive which provides that Member States shall endeavour to encourage the management of landscape features whenever they consider it necessary in land-use planning and development policies (see regulation 5).
- Ensure that the IPC is a competent authority and has the same duties and powers as other competent authorities when deciding applications.
- Ensure that where an application for development consent is likely to have a significant effect on a site protected under the Habitats Directive, that the proposal is subject to appropriate assessment as required by article 6(3) of that Directive (see new regulation 67A).

- Require the decision-maker under the Planning Act 2008 to review any development consent orders which come within the scope of Regulation 50 of the Habitats Regulations and ensure they are undertaken in accordance with the procedures set out in Schedule 6 to the Act (where the decision-maker is the Panel or the Council, the IPC will carry out the review – see new regulation 67B). Regulation 50 of the Habitats Regulations provides that an existing consent must be reviewed where the consent is likely to have significant effect on a protected site, where that site has been designated as a protected site after consent has been granted.
- Ensure that where an NPS is likely to have a significant effect on a protected site, that the NPS is subject to appropriate assessment as required by Article 6(3) of the Directive (see regulation 7 and 8).

8. Consultation outcome

8.1 The Government consulted on draft versions of the Regulations and Order made here, between 30 March and 19 June 2009. The consultation document can be found at http://www.communities.gov.uk/documents/planningandbuilding/pdf/consultationpreapplication.pdf

8.2 The Government received 133 responses to this consultation, a brief summary of which are set out below, along with how we have dealt with key issues:

Pre-application consultation and application procedures

8.3 The Infrastructure Planning (Application: Prescribed Forms & Procedure) Regulations contain a list at Schedule 1 of statutory consultees, which the promoter is required to consult about its proposals for a nationally significant infrastructure project, and notify when an application had been received and accepted for consideration by the IPC. A range of opinions were received regarding the proposed list. The majority of responses proposed potential additions to the list. A number of respondents were either content with the list or supportive of the inclusion of particular bodies listed. Some respondents expressed concern that the draft list was too long or that some of the bodies listed were inappropriate for various reasons. There was particular support for the addition of Local Planning Authorities to the final list.

8.4 Some respondents suggested that bodies should be grouped by infrastructure type, or divided into a core list which should be consulted in all cases, and a secondary list of optional consultees which the promoter could consider consulting depending on the nature of the project. However, we are not convinced that such approaches would add greater clarity to these requirements.

8.5 We have carefully considered the suggestions made by respondents, and have thoroughly re-appraised the suitability of each body on the proposed list. As a result, we have removed the Regional Assemblies, the Local Government Association, and Cadw and have added the Joint Nature Conservation Committee, Areas of Outstanding Natural Beauty Conservation Boards and the Royal Commission on Ancient and Historical Monuments of Wales. We have also added some equivalent organisations in respect of Scotland, namely the equivalent Health Board, the Scottish Environment Agency, the Scottish Human Rights Commission and Scottish Fisheries Protection Agency. The entry for the Office of Rail Regulation has been expanded to include approved operators. The local authorities have not been added, as they are already consultees at section 43 of the Act. In addition to these changes, we have sought to ensure greater accuracy and consistency in describing the circumstances governing when bodies should be consulted.

8.6 Respondents were generally supportive of the provisions relating to publicity of applications. A significant number of respondents expressed concern in relation to the requirements for local newspaper adverts in regulation 4(3)(a) that in some areas two local newspapers may not exist. We agree that this is a significant risk, and accordingly have amended the regulations to require publicity in 'one or more' local newspapers. We have also made other minor changes to improve the clarity and accuracy of the text.

8.7 Respondents were overwhelmingly in agreement that there should be a prescribed application form. Various suggestions were made on how the proposed form could be improved. As far as was appropriate, we have reflected these in the final version of the form, which is at Schedule 2 in the statutory instrument. There was also strong support for a guidance note to accompany the form. Again, various comments were made on the draft, particularly regarding the need for it to give as much assistance to the promoter by more fully explaining why certain information is needed. We have reflected a lot of the suggestions in the final version of this guidance note.

8.8 A main concern raised by respondents was that the Regulation 5 seemed to suggest the promoter was required to potentially submit the same information more than once, for example some of the information normally required for an Environmental Statement was also separately listed elsewhere. This was not the intention, and we have amended the application form and guidance note, to make clear that information should not be duplicated throughout the application, but that appropriate cross-referencing should be used to identify where the information can be found within the documents.

8.9 Several suggestions were made for additional documents and information that should be included within the application, particularly a transport assessment, design and access statement and an economic impact report. We have decided to not include more prescribed documents, but instead make clear in guidance that the promoter needs to consider supplying any information that it believes will be required by the IPC for considering the application and that will either support its case or address concerns of respondents. Many respondents felt it would be too onerous and unnecessary for applicants to submit copies of all consultation responses. We agree, and have removed this requirement, with applicants instead required simply to make these available for the IPC to inspect, if it so wishes.

8.10 Respondents were overwhelmingly supportive of the use of electronic versions of application documents for consultation and submission to the IPC. However, many respondents expressed concern about the limitations of electronic formats - files may be very large or in an inaccessible format, and the internet is not always available and reliable. The use of CD/DVD formats was strongly supported, as was the continuing need for paper versions of forms to be made available. We agree with the benefits of information being provided in electronic formats as much as possible, but that paper versions will still be needed, for example for depositing at public locations and otherwise made available in that format to those who wish to view or receive them that way. In certain parts of the regulations we have retained the need for paper versions, but an applicant is now only required to submit to the IPC paper versions of an application where the IPC specifically requests this. We have emphasised in guidance that as much use as possible should be made of electronic versions.

Model provisions

8.11 The predominant view of respondents was that the model provisions were helpful, and would assist applicants when they come to formulate an application to the IPC. At the same time, respondents noted that there was an explicit recognition that individual applicants will need to modify the model provisions for the purposes of their own draft development consent order.

8.12 Several consultation responses were received, asking for provisions to be set out specifically for each infrastructure type: we have attempted to do this. However, we have found it impossible to fulfil all such requests, as many infrastructure types would only require "general" model provisions, or would need provisions that are so specific to the project in question that model provisions would not assist. In particular, we sympathise with the request of energy and offshore respondents, that there be specific model provisions for offshore projects – but we have found that formulations on issues such as safety zones, alteration of shipping lanes etc. are particular to specific projects, and a standardised model provision on the subject would be so vague as to not assist greatly. We believe individual applicants should draft additional provisions on offshore issues, after consulting with relevant statutory consultees, drawing from examples like previous Harbours Act orders.

8.13 We agree with respondents who asked for specific provisions related to highways NSIPs. We will consider how best to standardise the provisions of various Highways Act orders, but will only be able to return to this at a later date.

8.14 Some respondents asked for the general model provisions to act as a comprehensive list that identifies all the consents and licences that can be provided by a development consent order. We do not believe this is an appropriate function of model provisions, not least since the Act makes clear that the matters contained in a development consent order are not limited to matters prescribed in model provisions.

8.15 We received extensive technical comments from the Law Society and the Society of Parliamentary Agents, which we have reflected on, and the final version of the model provisions incorporates many of these changes where we believe they are justified.

Environmental Impact Assessment and Habitats

8.16 The vast majority of respondents felt that the draft regulations did not omit any of the principles that are established in the EIA Directive. There were mixed responses to whether there should be a time limit placed on promoters for providing the IPC with further information in order for it to make screening and scoping opinions. The majority felt it was unnecessary or inappropriate, since there could be practical reasons preventing compliance with a time limit such as if some environmental data is only available at certain times of the year. We agree there are strong arguments against having a time limit, and have decided the Regulations will not require this.

8.17 On the question of how to ensure that any requirements placed on a development consent order by the IPC are subject to an EIA, many respondents recognised the need for the Regulations to provide for this, although the majority felt that, in practice, most of the issues would have been fully discussed and addressed with the IPC during the examination process. We have decided to provide for a process that will mean the applicant can apply to the IPC for screening to determine if the requirements would be subject to EIA. But we are also providing for the applicant to move straight to submitting an updated environmental statement, without having to go through the screening process. Where requirements are deemed to be subject to EIA, the updated environmental information must be consulted on and publicised.

8.18 The consultation document set out our intention to combine the information in Annex 2 of the EU Directive and the thresholds of Part 3 of the Act to form a Schedule 2 in the EIA Regulations. In further considering this approach, we found this to not be a practical solution, as the respective thresholds did not allow for an acceptably straightforward process for alignment. Therefore, we have decided that the two proposed schedules will now equate respectively to Annexes 1 and 2 of the EU Directive.

8.19 Respondents also made other suggestions on the Applications: Prescribed Forms & Procedure Regulations. In particular, many were concerned that it was inappropriate to require applicants to undertake pre-application consultation on a draft environmental statement. We agree, and have amended the requirement so that applicants must consult on preliminary environmental information at the pre-application stage; although clearly in order to be able to consult properly, any pre-application consultation will need to identify the likely environmental effects of the proposal. Some respondents felt that it would be better for the EIA and the applications and procedure regulations to be combined into a single document. Given the length and complexity of these two regulations, we consider there would not be a significant advantage gained in that approach. However to respond to those concerns we have made a number of changes to both the Applications: Prescribed Forms & Procedure Regulations and the EIA Regulations to align the requirements wherever possible.

8.20 For the draft Habitats Regulations, the predominant view of respondents was that the draft amendments were appropriate, and would successfully transpose the requirements of the Habitats Directive for the new regime under the Act. It was strongly suggested that the IPC must have regard to

the tests of the Habitats Directive regarding alternatives and the test of Imperative Reason of Overriding Public Interest, when it decides on an application which would impact on a European site.

8.21 Some respondents suggested that rather than amend the existing the Conservation (Natural Habitats &c.) Regulations, the Government should make a bespoke set of Habitats Regulations for the purposes of NSIPs. We do not agree that this would improve the transparency of the Habitats regime as regards NSIPs.

9. Guidance

9.1 These Regulations are being made at the same time as guidance documents are published by the Secretary of State on:

- how applicants should conduct pre-application consultation to the standards required by the Planning Act 2008 and these Regulations;
- what types of development could be included in development consent orders, as development "associated" to development mentioned in Part 3 of the Planning Act 2008 ; and
- how applicants should complete the prescribed application forms

These guidance documents are titled as follows and copies can be made available if required:

- Planning Act 2008: Guidance on Pre-Application Consultation
- Planning Act 2008: Guidance on Associated Development
- Planning Act 2008: Nationally Significant Infrastructure Projects Application Form - Guidance Note.

10. Impact

An Impact Assessment has not been prepared for most of this consultation as the policy options do not have an additional impact on business, charities or the public sector beyond that examined in the Impact Assessment that accompanied the Planning Act 2008.

However, an impact assessment has been prepared in relation to the transitional provisions of the Regulations on application procedures. This assessment has been placed in the library of each House of Parliament and copies may be obtained from the NSID, Department of Communities and Local Government, Eland House, Bressenden Place, London, SW1E 5DU (telephone 020 7944 0810).

11. Regulating small business

The legislation technically applies to small businesses, but the Government believes it is unlikely that a small business will apply for a development consent order under the Planning Act 2008, given the nature and scale of NSIPs.

12. Monitoring & review

This package of legislation may need to be updated over time. CLG will revise it as appropriate. Subsequent additional legislation may affect the bodies who need to be statutory consultees, and CLG will continue to work with other Government Departments to ensure that the list is appropriate and up to date.

13. Contact

Donald Stark at the Department of Communities and Local Government (tel: 020 7944 0815 or email: Donald.stark@communities.gsi.gov.uk) can answer any queries regarding the instruments.

Summary: Intervention & Options

Department /Agency:	Title:	
CLG	Impact Assessment of transitional/savings provisions for Nationally Significant Infrastructure Projects (NSIPs)	
Stage: Final	**Version:** 2	**Date:** 2 September 2009
Related Publications: (i) Planning Bill Impact Assessment (Nov 2007); (ii) Annex to the Planning Bill Impact Assessment - Royal Assent (Jan 2009)		

Available to view or download at:

http://www.communities.gov.uk/publications/planningandbuilding/planningbill

Contact for enquiries: Donald Stark **Telephone:** 020 7944 0815

What is the problem under consideration? Why is government intervention necessary?

The Planning Act 2008 requires promoters of Nationally Significant Infrastructure Projects (NSIPs) to undertake consultation with affected parties prior to submitting an application for development consent. The precise requirements of the new regime as regards pre-application consultation is unlikely to be identical to the requirements of many of the existing consent regimes.

This IA considers whether transitional provisions are needed for a limited period after the new regime commences, so that consultations already carried out do not need to be repeated solely for the purpose of compliance

What are the policy objectives and the intended effects?

The policy objective is that promoters of NSIPs will not be required to repeat public consultations, if these consultations are of a high standard, are recent, and consult with the people who are mentioned in the Planning Act 2008. Our aim is to avoid duplication of time and expense.

What policy options have been considered? Please justify any preferred option.

Options considered include:

1) a "do-nothing" option under which all applications would have to meet the new requirements;

2) deeming the certain requirements to be complied with, where consultation began before Oct 2009;

3) giving the IPC discretion to waive certain requirements of Part 5 of the Act; and

4) disapplying the requirements of Part 5 for all applications submitted up till a certain date.

Option 2 is the preferred option, since it meets the policy intention most closely, while reducing the risks of legal challenge

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

Ministers have promised that there will be a review of the way in which the IPC is operating, 2 years after the first application is accepted.

Ministerial Sign-off For final proposal/implementation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) the benefits justify the costs.

Signed by the responsible Minister:

John Healey.....Date:2nd September 2009

Summary: Analysis & Evidence

Policy Option: 2	Description: Transitional discretion for the IPC to accept additional applications

COSTS

ANNUAL COSTS	
One-off (Transition) **Yrs**	Description and scale of **key monetised costs** by 'main affected groups'
£ 0	No annual costs are assumed
Average Annual Cost (excluding one-off)	
£ 0	**Total Cost** (PV) **£ 0**

Other **key non-monetised costs** by 'main affected groups'

BENEFITS

ANNUAL BENEFITS	
One-off **Yrs**	Description and scale of **key monetised benefits** by 'main affected groups'
£ 9.4m 1.5	Promoters of NSIPs (benefits for not having to repeat consultations)
Average Annual Benefit (excluding one-off)	£280,000 per application for 35 applications over 18 months = £9.4m over 18 months
£	**Total Benefit** (PV) **£ 9.4 m**

Other **key non-monetised benefits** by 'main affected groups'

Key Assumptions/Sensitivities/Risks

Key assumptions and risks are set out on the next page, but principally relate to numbers and weighted cost of consultations which may need to be repeated. There is a risk from the policy that applications are accepted where pre-application consultation is not at the appropriate standard.

Price Base Year 2009	Time Period Years 1	**Net Benefit Range** (NPV) **£ 4.2m - 14.8m**	**NET BENEFIT** (NPV Best estimate) **£ 9.4m**

What is the geographic coverage of the policy/option?			England and Wales	
On what date will the policy be implemented?			October 2009	
Which organisation(s) will enforce the policy?			IPC	
What is the total annual cost of enforcement for these organisations?			£ 0	
Does enforcement comply with Hampton principles?			Yes	
Will implementation go beyond minimum EU requirements?			No	
What is the value of the proposed offsetting measure per year?			£ n/a	
What is the value of changes in greenhouse gas emissions?			£ n/a	
Will the proposal have a significant impact on competition?			No	
Annual cost (£-£) per organisation (excluding one-off)	Micro **0**	Small **0**	Medium	Large
Are any of these organisations exempt?	No	No	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices) (Increase - Decrease)

Increase of £ Decrease of £ **Net Impact** £

Key: **Annual costs and benefits: Constant Prices** **(Net) Present Value**

[Use this space (with a recommended maximum of 30 pages) to set out the evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Ensure that the information is organised in such a way as to explain clearly the summary information on the preceding pages of this form.]

Background

The Planning Act 2008 ("the Planning Act" or "the Act") provides for a more efficient, transparent and accessible planning system for nationally significant transport, energy, water, waste and waste-water infrastructure projects. Nationally significant infrastructure projects (NSIPs) are defined according to thresholds in Part 3 of the Act, which specify size levels above which energy, transport, water, waste and waste-water infrastructure projects are to be classed as nationally significant.

In particular, it makes provision for the creation of a new independent body, the Infrastructure Planning Commission ("IPC"), which will take over responsibility for considering and deciding on major infrastructure applications; and for the Government to produce National Policy Statements ("NPS") which will provide clarity on what the national need for infrastructure is and set the policy framework for IPC decisions.

The new regime is based on thorough and effective pre-application consultation, and the Planning Act places for the first time a legal requirement on developers to carry out such consultation. Part 5 of the Act sets out a framework of consultation activities which must be undertaken prior to submission of an application for an order granting development consent. It provides for the manner and form in which an application is to be submitted to the Commission. It also provides for how the Commission should handle the giving of advice to a potential applicant and others. Part 6 includes the actions required of the applicant to publicise that an application has been accepted by the Commission. The framework set out in the Act is supplemented by a series of regulations which are due to come into force on 1 October 2009. Section 55 of the Act ("acceptance of applications") provides that the IPC may accept an application only if it concludes that the requirements of these regulations and Part 5 of the Act have been complied with.

We have held discussions with a number of developers of major infrastructure since the reforms were first announced. These discussions showed strong support from developers for the idea of mandatory pre-application consultation with local communities, which many developers considered to be their existing practice. There was widespread support for the idea that all NSIP applications should be subject to high-quality consultation in line with industry best practice.

However, we also received representations from developers, which said that they frequently undertake consultations up to four years before a formal application is made. Since the regulations setting out the formal requirements for consultation are only going to come into force on 1 October 2009, some developers believe that this would mean that consultations done prior to 1 October 2009 would not meet the new requirements, and would therefore need to be repeated. In particular, concerns were raised as to the requirement for applicants to notify the IPC of a proposed application, since the IPC will only be formally established on 1 October 2009.

The result of this situation would be that applicants would be required to repeat consultation exercises, even where their existing consultation exercises were of high quality, leading to wasted resource.

The aim of this impact assessment is to assess the consequences of a set of transitional provisions, which could allow consultation exercises to be deemed to meet the standards in Part 5 of the Act, where these exercises took place before 1 October 2009 and did meet certain minimum standards. Transitional provisions would be included with the regulations on applications, which are due to come into force on 1 October 2009.

It should be noted, that this Impact Assessment was prepared as a supplement to the wider Impact Assessment on the Planning Act, which has already given a broad overview over the examination procedures as set out in the Act itself.

The Impact Assessment on the Planning Bill can be found at
http://www.communities.gov.uk/documents/planningandbuilding/pdf/561912.pdf

and an update to this document was posted when the Planning Bill received Royal Assent:
http://www.communities.gov.uk/publications/planningandbuilding/ anneximpactassessment

The impact assessment on transitional provisions was consulted on between March-June 2009, as part of the consultation document *Planning Act 2008: Consultation on the Pre-Application Consultation and Application Procedures for Nationally Significant Infrastructure Projects*
http://www.communities.gov.uk/documents/planningandbuilding/pdf/consultationpreapplication.pdf
We received no comments on the assumptions made within it. There was widespread agreement with the proposed policy, with most respondents believing that transitional provisions would be necessary to avoid unnecessary repetition of efforts by applicants.

Options for transitional provisions

Industry respondents sought a set of transitional provisions, attached to the regulations which set out the requirements for pre-application consultation. These would allow the IPC, for a transitional period, to accept formally (using its powers under s.55 of the Act) applications which had been subject to high quality pre-application consultation, even where these did not meet all the requirements of Part 5 of the Act.

The government considered a number of options during the development of this policy, notably over how such a policy might be structured. In particular, four options were considered:

1. no transitional provisions are made. This would mean that the IPC could only accept an application if it believes it has met the requirements of the Act on pre-application in full
2. transitional provisions would be included in the application regulations, allowing the provisions of s.46 (“duty to notify Commission of proposed application”) and s.47 (“duty to consult local community”) to be deemed to have been complied with, as long as the application was submitted before October 2011, and the consultations referred to were commenced before October 2009
3. transitional provisions would be included in the application regulations which give the IPC extra discretion to accept applications it would not otherwise be able to do under s.55 of the Act
4. transitional provisions would be included in the application regulations which disapply the need for applications to meet the standards in s.55(3) of the Act, if these are formally submitted in a window lasting 18 months after March 2010.

Option (3) was disregarded, since transitional provisions made in this way could introduce uncertainty into the application process, and increase the risk of legal challenges. In particular, the Infrastructure Planning Commission could be judicially reviewed over how it judged whether a particular application should be accepted.

Option (4) was disregarded, since it would not require promoters to make any serious efforts to consult widely prior to submitting a formal application for an NSIP. This approach would be incompatible with the commitments given in Parliament during the passage of the Planning Bill.

Given the above, Options (1) and (2) were investigated further. Option (1) provides a “do-nothing”, against which Option (2) could be usefully evaluated.

We believe that Option (2) would lead to additional benefits beyond Option (1), since it would not require promoters who had carried out pre-application consultation professionally, but in a manner which did not meet subsequently-published standards, to repeat this consultation. It is proposed that Option (2) is adopted.

Preferred Option

Option (2) would mean that transitional provisions would be included in the application regulations, allowing for certain provisions of Part 5 of the Act to be deemed complied with. These provisions would be those in s.46 (which require applicants to notify the IPC of a proposed application at the same time it launches a consultation exercise) and s.47 (which require applicants to consult the local community, after having consulted the local authority about a statement on how this local community consultation would take place). Option (2) would only deem these provisions to have been complied with, if the formal application was submitted before October 2011, and the consultations referred to were commenced before October 2009.

Option (2) would not deem the other requirements of Part 5 of the Act to have been met.

To meet the standards of consultation that we envisage, applicants who have conducted work prior to the new regime will be deemed to have met the necessary requirements if they have:

- commenced consultation with the persons set out in section 42 of the Act (ie local authority, statutory consultees and people with an interest in the land);

- commenced consultation with the local community, having first consulted the local authority about the best way to do so;

- publicised the proposed application in accordance with regulation 4 of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009.

These regulations will however need to make transitional provision for certain procedural requirements which would otherwise be prohibitively difficult to meet.

Risk

There is a potential risk through option (2) that an application could be accepted, although in fact the pre-application consultation wasn't of an adequate standard.

We believe the likelihood of this risk is small, since the transitional provisions still require minimum standards for pre-application consultation to be met. These are that the applicant must in all cases a) consult with the local planning authority, statutory consultees & people with an interest in the land; b) consult with the people living in the vicinity of the land, after having first consulted with the local authority about how to conduct the consultation; and c) publicise the proposed application in the manner prescribed.

We believe the impact of this risk is small, since the fact that an application is accepted for formal examination does not imply that the project itself can be approved. The provisions of the Act always require publicity of the proposed application, with interested parties having the ability to put representations directly to the IPC.

Calculating the costs and benefits of Option (2)

For the purpose of this impact assessment, the calculation of the costs and benefits of the transitional provisions is made against a comparison with the “do-nothing” option (ie Option (1) of the options considered) and assumes that, in the absence of the transitional provisions, applicants will need to meet all the requirements set out in Part 5 of the Act for pre-application consultation, thus leading to them needing to repeat consultation exercises in some instances.

We do not believe that transitional provisions attached to the application regulations would impose additional costs on the IPC. Applications submitted to the IPC must be accompanied by

an application fee, which covers the IPC's costs for validating an application and pre-examination. Part of this fee is reimbursed if an application is rejected (ie no pre-examination work is required), but the IPC's costs are covered. Further fees are due once an application formally proceeds to examination. Regulations for the levels of these fees are covered in a separate impact assessment, and the policy is currently out for consultation (closing date 2 October 2009).

We do not believe that transitional provisions attached to the application regulations would impose any additional cost burdens on promoters. This is because the do-nothing position is that applicants must meet the new standards in full, repeating consultation exercises if necessary. Option (2) would exempt them from this, with the result that costs are not incurred.

We have looked at whether there might be costs to third parties from these transitional provisions, which might arise in the event that an application is accepted which hasn't been consulted on to the standards expected by the Act. We have concluded that this is unlikely.

The biggest source of potential benefits for a transitional provision would be that promoters would not have to repeat consultation exercises which they had previously undertaken, but which did not meet the new requirements for pre-application consultation to the letter. In order to calculate the size of these potential benefits, the following assumptions have been made:

- The requirements of the new regulations on pre-application consultation would apply to all consultations which begin after October 2009
- Transitional standards would apply for applications which are submitted to the IPC between March 2010 and October 2011, and which include details of pre-application consultations which commenced between October 2007 and October 2009;
- 45 major applications are expected each year (see overall Impact Assessment for the Planning Act), making a total over 18 months of 67 applications. We assume that of these 67 applications, 35 might have to repeat consultation exercises in order to meet the requirements of the Act, if there were no transitional provisions;
- If a promoter was required to repeat a consultation, the cost would be approximately
    - £50,000 - 40%
    - £100,000 - 20%
    - £200,000 - 20%
    - £1,000,000 - 20%

The size of consultation exercises represent the cost of a range of sizes of consultation exercises, as provided by a range of promoters and stakeholders in early 2009. They have been given a weighting, which corresponds to the likelihood of such sums of money needing to be spent in order to undertake a consultation exercise for an NSIP project.

This is to say that all consultation exercises for NSIPs will involve paying for correspondence with interested parties and stakeholders and some publicity work. In 40% of cases, this would be the total amount paid. However many promoters will spend substantially larger sums of money, in order to undertake more comprehensive consultation exercises involving road-shows, newspaper adverts and other expenditure. Based on responses from promoters of energy, and transport projects, we believe the range is between £50,000 and £1m.

A weighted average cost of consultation could be used as a proxy for the amounts of money which a promoter would have to pay in order to repeat a consultation exercise which took place before but which did not meet the standards.

Given this, the weighted average cost of a consultation would be £280,000.

We estimate that in the 18 months between April 2010 and October 2011, 35 of the predicted total of 67 NSIP applications will rely on consultations which commenced before the new standards came into force. The cost to promoters of having to repeat this consultation would be:

Year	# of applications	Total weighted cost	Discount factor	PV
2010/11	23	£6.44m	0.9662	£6.22m
2011/12	12	£3.36m	0.9335	£3.14m
Total				**£9.36m**

So the **overall benefit to business is estimated to be £9,360,000**, over 18 months.

NB – there may also be benefits for the IPC from reduced levels of investigation it will need to conduct when deciding whether or not to accept an application. However, the levels of savings are likely to be extremely low, since instead of judging the application against the requirements of the applications regulations, it will need to judge the application against the transitional provisions. Levels of admin burden are therefore likely to be approximately equal, and so we have not included any assumed level of admin burden savings in this impact assessment. There is nothing in the admin burden baseline for business relating to the specific measure covered here and therefore this impact assessment does not specify the savings for business as admin burdens savings

Source of assumptions

The assumptions on numbers of cases requiring repeated consultation are based on discussions in early 2009 with a range of promoters and stakeholders, notably in the transport, energy and water-supply sectors, about projects where they planned to submit formal applications in the period 2010-11. In around half of these cases, promoters have already begun consultation exercises or planned to begin them before 1 October 2009. We have projected that half of the 67 cases which the Planning Act impact assessment foresees for the first 18 months of the IPC would also require repetition of consultation exercises but for any transitional provisions.

The assumptions on costs are as a result of estimates provided by a number of promoters based on costs for their previous projects.

Inevitably, different infrastructure types require different levels of consultation, which have different cost profiles. For example the majority of highway schemes requiring Highways Act orders are at the lower end of the cost-spectrum, while consultation exercises relating to new reservoirs or airport development have been considerably more expensive. We have arrived at a weighting, based on the expected profile of cases which will be submitted to the IPC in the years 2010-12. This is a combination of the profile already included in the Planning Bill impact assessment, and our understanding of individual cases which are likely to come to the IPC within its first 2 years of operation.

Sensitivity testing

The base case described above represents the best estimate of the benefits given the information provided by promoters and stakeholders on the numbers of schemes affected and an assessment of the likely profile of cases in terms of the cost of consultation.

However, as there is some uncertainty around the assumptions made in estimating the benefits, a sensitivity analysis has been conducted to assess the impact of the proposal when the number of applications affected is varied, and when the costs of consultation are weighted differently.

The results of the sensitivity analysis are summarised below and show the range in the estimated benefits when the key assumptions on number of applications and weighted costs are

varied and combined to give a low end estimate of benefits and a high end estimate of benefits. These figures have been used to inform the range of net benefits on the summary sheet.

Discounted benefits under different scenarios:

	Low number of applications/low weighted costs	**Base case**	**High number of applications/high weighted costs**
Year 1	£2.86m	£6.22m	£10m
Year 2	£1.38m	£3.14m	£4.8m
Total	**£4.24m**	**£9.36m**	**£14.8m**

The details of the assumptions made in the sensitivity analysis are shown below. These assumptions are not informed by any particular evidence and are intended to be illustrative. Clearly, if fewer applications are affected and the weighted cost is less than is assumed in the base case, the estimated benefits will be considerably reduced. Similarly, if more applications avoid the need to repeat consultations and the weighted cost is higher than estimated in the base case, then the benefits from the measure will be greater.

a) Sensitivity analysis around numbers of cases benefiting from transitional provisions (weighted costs as in base case)

If 1/3 more applications

Year	# of applications	Total weighted cost	Discount factor	PV
2010/11	30	£8.40m	0.9662	£8.1m
2011/12	15	£4.20m	0.9335	£3.9m
Total				**£12m**

If 1/3 less applications

Year	# of applications	Total weighted cost	Discount factor	PV
2010/11	16	£4.48m	0.9662	£4.3m
2011/12	8	£2.24m	0.9335	£2.1m
Total				**£6.4m**

b) Sensitivity analysis – different weighting of costs of cases benefiting from transitional provisions (number of applications as in base case)

Case 1 - consultation exercises at a higher cost than base case:

Cost	Weight	Total cost
£50,000	20%	£10,000
£100,000	25%	£25,000
£200,000	30%	£60,000
£1,000,000	25%	£250,000
Weighted cost		£345,000

Year	# of applications	Total weighted cost	Discount factor	PV
2010/11	23	£7.9m	0.9662	£7.7m
2011/12	12	£4.1m	0.9335	£3.9m
Total				**£11.6m**

Case 2 – consultation exercises at a lower cost than base case:

Cost	Weight	Total cost
£50,000	50%	£25,000

£100,000	20%	£20,000
£200,000	20%	£40,000
£1,000,000	10%	£100,000
Weighted cost		£185,000

Year	# of applications	Total weighted cost	Discount factor	PV
2010/11	23	£4.3m	0.9662	£4.1m
2011/12	12	£2.2m	0.9335	£2.1m
Total				**£6.2m**

Specific impact tests

We have considered the impacts specified in the checklist overleaf, and do not consider that the proposed policy would have any effect on any of the considerations. The only persons who would be affected by transitional provisions are applicants to the IPC for an order granting development consent. These are extremely likely to be large companies.

Competition assessment

There is no impact on competition from this proposal.

Small Firms' Impact Test

There is not expected to be a disproportionate impact on small firms from this proposal as developers who make applications to the IPC are almost certain to be large firms due to the size of the projects involved.

Legal Aid Impact Test

There will be no legal aid impact from this proposal.

Sustainable Development, Carbon Assessment, other Environment

This proposal will not have negative economic, environmental or social impacts and will not have a negative impact on future generations. This proposal will not lead to increased carbon and other green house gas emissions, nor have a negative impact on the Environment.

Health Impact Assessment

There are no detrimental health impacts from this proposal.

Race, Disability, Gender and Other Equality

The policy amendment will present minimal risks of adverse impact. The transitional provisions continue to require applicants to undertake community consultation prior to submitting an application, and they must also demonstrate how any relevant responses to this consultation have been taken into account when deciding the terms of their application. If the application is accepted, the IPC will ensure further opportunities for views to be expressed during the examination.

Human Rights

The policy amendment will present minimal risks of adverse impact. The transitional provisions continue to require applicants to undertake community consultation prior to submitting an application, and they must also demonstrate how any relevant responses to this consultation have been taken into account when deciding the terms of their application. If the application is accepted, the IPC will ensure further opportunities for views to be expressed during the examination.

Rural Proofing

We do not believe this proposal will have a negative impact on rural areas.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	*Results in Evidence Base?*	*Results annexed?*
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	Yes	No
Sustainable Development	Yes	No
Carbon Assessment	Yes	No
Other Environment	Yes	No
Health Impact Assessment	Yes	No
Race Equality	Yes	No
Disability Equality	Yes	No
Gender Equality	Yes	No
Human Rights	Yes	No
Rural Proofing	Yes	No

Annexes

We have considered the impact tests given in the check list above, and do not believe that the proposed policy will have any effect on any of the groups mentioned.

We have specifically considered the potential impact on Equalities, and do not consider that the proposed policy will have an impact.