



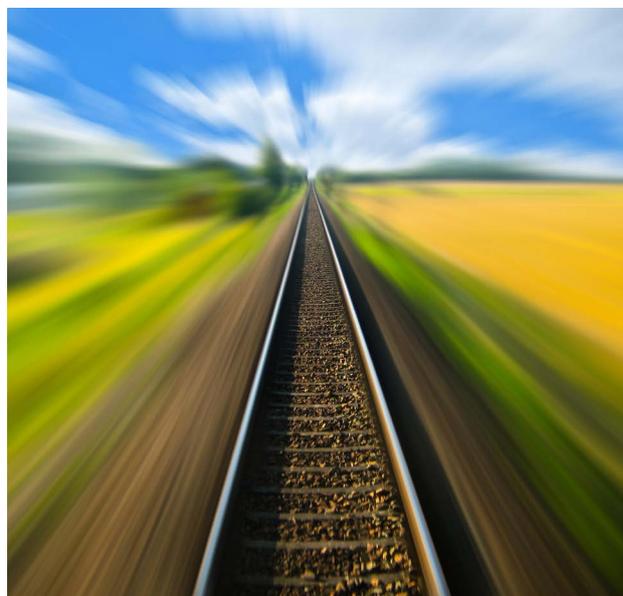
Planning and infrastructure: latest developments

NPS and NIP

The past couple of months have seen the publication of some significant Government policy on infrastructure. The long-awaited draft National Policy Statement for National Networks (the Networks NPS) was published before Christmas for consultation. Once designated, the Networks NPS will be the principal policy used in the determination of nationally significant networks development, which includes developments to the strategic road network, the national rail network and for additional strategic rail freight interchanges. Section 104(3) of the Planning Act 2008 requires decisions on nationally significant infrastructure projects to be determined in accordance with the National Policy Statements unless to do so would put the Government in breach of any statutory obligations or if the adverse impact of the development would outweigh its benefits.

Following the approach and wording of the designated NPSs for energy, hazardous waste, ports and waste water infrastructure the Networks NPS articulates the Government's commitment to infrastructure development by identifying a "compelling need for an expanded network of strategic rail freight interchanges". Interestingly, in the energy NPS the need is expressed as *urgent*, the use of the word compelling for the National Networks is perhaps an indication of the time that these projects take to develop and deliver. The statements in the Networks NPS should be warmly welcomed by the rail freight industry as, in other areas such as energy and hazardous waste they have served to focus the examination of project that fall within the regime on the specific proposal and its potential impacts, not on whether the developer has suitably demonstrated the need for the project. For SRFIs, it is express recognition that more schemes are needed if the Government is to hit its own transport and environmental objectives (as well as those of the industry) and ensure that the current state of infrastructure inertia does not persist to constrain economic growth.

In line with the other NPSs, the Networks NPS provides a list of 'Assessment principles' that are relevant to the preparation of applications and key issues for environmental impact assessment. Of note is the need for a transport business case



(TBC) to be provided as part of the application which should set out the economic, environmental and social impact of the development. For SRFIs, a judgement of 'viability' will be taken in the light of this and any Government intervention (i.e. investment) in the proposed scheme. The DfT has its own guidance on how the TBC should undertaken focussing on five criteria – (i) the need to demonstrate a robust case for change, (ii) the value for money of the scheme, (iii) the commercial viability of the scheme, (iv) the financial affordability of the scheme and (v) the achievability of the scheme. Ensuring that the development is both affordable and deliverable are priorities for the Treasury.

The Networks NPS does not seek to identify suitable locations for development, which follows the approach taken in other NPSs, (save for EN6 which covers nuclear energy and new build and the waste water NPS where certain projects have been identified by the Environment Agency). However, general guidance is provided, such as the need for interconnectedness with the strategic road network and some general advice in respect of the scale and design is put forward too. The consultation closes on 26 February at 12:00pm.

Not much has been made in the press of the National Infrastructure Plan 2013 though its findings and aspirations to grow the infrastructure of the UK over the next decade are worth a mention. The Plan bolsters Government policy and recognises its commitment to rail freight in order to support

business and growth. It identifies the need to support transport by freight which will increase the capacity of the road network and recognises that HS2 will help to free up capacity on the conventional rail network allowing more rail freight to be moved on the major north-south lines (particularly the WCML). It also acknowledges that the Felixstowe to Nuneaton route improvements are a priority project for the Government. These are all encouraging signs for the rail freight industry.

NSIP - Judicial Reviews and HS2

Away from policy, there have been interesting developments in the NSIP regime. The High Court determined two judicial review claims to determinations in the past two months. The first was An Taisce's (the National Trust for Ireland) claim against the Secretary of State's decision to grant a development consent order (DCO) for the Hinkley nuclear power station. An Taisce claimed that the failure by the developer to consult with the Irish government over possible trans-boundary effects (i.e. in the event of a UK Fukushima) did not comply with the requirements of the Environmental Impact Assessment Directive. The potential for transboundary impacts from NSIPs is something that the Planning Inspectorate must consider and a transboundary screening matrix has been developed to assist in the determination of whether there will be likely significant transboundary effects. Where such effects are likely the Planning Inspectorate will consult with the bodies likely to be affected and they will be invited to participate in the examination of the project. With regard to Hinkley, the High Court ruled that as the risk of a nuclear accident was between 1 in 50,000 and 1 in 33,000,000 this was not a "likely" occurrence. This decision is also interesting in that it confirms that the appropriate time to challenge a part of the NSIP process (here consultation) is after the scheme has been determined.

The second decision was a claim brought by Halite Energy Group, challenging the Secretary of State's 'unfair' decision to refuse a DCO for an underground gas storage facility. The claim was successful on the basis that although the Examining

Authority had recommended approval of the scheme and in doing so was clearly satisfied as to the likely impacts of the proposal, the developer had not been given an opportunity to address issues that were determinative for the Secretary of State, namely geological safety, and will now have to be re-determined by the Secretary of State. The likelihood is that this will involve a re-running of the whole 6 month examination.

And finally, the Supreme Court has dismissed the appeal brought by objectors to the HS2 proposal. The objectors, amongst other things, attacked the way that HS2 is being progressed (i.e. by way of a hybrid bill). However, the Supreme Court concluded that the process complies with European law and is procedurally robust - which is helpful to the Government as it is the same approach as was taken for Crossrail. The objectors have indicated that they are going to proceed with an appeal directly to the Court of Justice of the European Union but this is unlikely to delay progress of the scheme. The fact that HS2 is now on track is good news for rail freight, especially if the recently announced increase in use of the HS1 line for freight is anything to go by.

Contact

If you require further information please do not hesitate to contact:



Elizabeth Dunn

Partner

+44 (0)117 902 2738

elizabeth.dunn@

burges-salmon.com



Stephen Humphreys

Solicitor

+44 (0)117 902 2709

stephen.humphreys@

burges-salmon.com

Burges Salmon LLP, One Glass Wharf, Bristol BS2 0ZX Tel: +44 (0) 117 939 2000 Fax: +44 (0) 117 902 4400
6 New Street Square, London EC4A 3BF Tel: +44 (0) 20 7685 1200 Fax: +44 (0) 20 7980 4966

www.burges-salmon.com

Burges Salmon LLP is a Limited Liability Partnership registered in England and Wales (LLP number OC307212) and is authorised and regulated by the Solicitors Regulation Authority. A list of members, all of whom are solicitors, may be inspected at our registered office: One Glass Wharf, Bristol BS2 0ZX.

© Burges Salmon LLP 2014. All rights reserved. Extracts may be reproduced with our prior consent, provided that the source is acknowledged. Disclaimer: This briefing gives general information only and is not intended to be an exhaustive statement of the law. Although we have taken care over the information, you should not rely on it as legal advice. We do not accept any liability to anyone who does rely on its content.

Data Protection: Your details are processed and kept securely in accordance with the Data Protection Act 1998. We may use your personal information to send information to you about our products and services, newsletters and legal updates; to invite you to our training seminars and other events; and for analysis including generation of marketing reports. To help us keep our database up to date, please let us know if your contact details change or if you do not want to receive any further marketing material by contacting marketing@burges-salmon.com.