



# Rail projects and the Infrastructure Planning Commission

April 2010

## The Infrastructure Planning Commission

The Infrastructure Planning Commission (IPC), which is based in Bristol, opened its doors for energy and transport applications on 1 March 2010.



The aim of the IPC is to provide a new and efficient consenting regime for large scale projects, referred to as Nationally Significant Infrastructure Projects (NSIPs). For the rail industry this covers (i) construction of a railway within England run by an operator both approved under the Railways Act 1993 and designated by the Secretary of State (currently Network Rail Infrastructure Limited and Network Rail (CTRL) Limited) and (ii) rail freight interchanges within England that cover 60 hectares or more and have the capacity to deal with at least 4 goods trains per day from more than one consignee/consignor, i.e. facilities for exclusive use by a single operator will not be caught.

Where a development falls within these parameters the application must be submitted to the IPC, and it is not possible to elect out of the new regime. For schemes that are beneath the threshold, the existing planning regime and Transport and Works Act Orders will continue to be used.

These definitions have already created some difficulties. For example, it is not yet clear whether the IPC, when assessing the 60 hectare development area, will look at just the rail freight element of a scheme, or the wider development of which it may form part. Any consent obtained under the wrong regime is likely to be considered invalid if legally challenged. In light of this, and the pre-application obligations associated with an IPC application, if there is any doubt as to whether a development may constitute a NSIP, developers should confirm the position with the IPC in the clearest possible terms at the outset.

## Applications to the IPC

The new regime places considerable emphasis on the front loading of applications. Before an application can be submitted, extensive pre-application consultation with local authorities, stakeholders and third parties must be undertaken. The IPC will assess the consultation process and if it does not consider it to be adequate, it is entitled to refuse to accept an application. It is clear that the IPC is expecting potential applicants to take the pre-application process very seriously, and it has already instructed one potential applicant to undertake more extensive consultation before it will accept its application.

Two emerging issues are that the system appears to have hard-wired an excessive amount of superfluous pre-application consultation of particular technical consultees, and the challenge of deciding what level of detail should be consulted on at the pre-application stage to meet the somewhat conflicting requirements of the regulations and guidance.

The IPC should determine applications within 12 months, which, if achieved, would represent a very significant improvement to the existing regime. To help meet this target, a streamlined inquiry process has been established.

Applicants and objectors are expected to submit the majority of their evidence in writing, and there will be only limited oral evidence on matters identified by the IPC. There will also be limited examination of other parties' witnesses, with the IPC expected to lead questioning. The IPC is also expecting applications to be in, or very close to, final form when they are submitted. Applicants will not be permitted to make significant changes to their schemes during the application process. This "design freeze" means applicants must be confident they have a scheme that is both deliverable and desirable at the time their application is lodged.

Similarly to the Transport and Works Act, the development consent order (DCO) issued by the IPC will contain not just planning permission for a scheme but also, if necessary, authorisation for the stopping-up of highways, footpaths etc and for the compulsory purchase of land. Again like a TWA Order, the applicant is expected to draft the consent they require and submit this with the application.

### National Planning Statements

Another feature of the new regime is the introduction of National Planning Statements (NPS). The NPSs provide the planning policy framework against which the IPC must assess applications. Where an application complies with the relevant NPS, the IPC must approve it unless the local impacts of the scheme would be unacceptable. The IPC is not entitled to consider matters addressed in the NPS. This means that objections based on the need for new infrastructure, which were responsible for taking up large amounts of inquiry time, will not be permissible.

Whilst the suite of draft NPSs on energy schemes were released late last year, the draft NPS on National Networks (which covers road and rail) is still awaited. Due out last month, its publication has been delayed by the General Election and it is expected later this year. Although the IPC can accept applications for rail schemes, the absence of the policy document against which such applications would be assessed makes it difficult for applicants to prepare proposals that they can be confident will be granted a DCO. Likewise, it is debatable how much meaningful pre-application consultation can be done before the NPS is available. The absence of the NPS no doubt explains why, of the 29 projects received by the IPC to date, only 1 of those relates to rail development.

### IPC - the Future

Although it has just opened its doors for applications, the IPC may already be under threat. In their Green Paper on planning reform, the Conservatives confirmed their intention to abolish the IPC as an independent body and incorporate it within the Planning Inspectorate as a Major Consents Unit. The Major Consent Unit would consider and make recommendations on applications, with the final decision taken by the Secretary of State. Although they have only produced outline guidance of their proposed changes, it appears that the Conservatives would retain NPSs and a streamlined inquiry process. However, citing HS2 as an example, the Conservatives have also indicated they would continue to use Hybrid Bills for the consenting of large scale linear projects. This would require changes to primary legislation and would not, of course, affect rail freight interchange applications.

### Burges Salmon and the IPC

Burges Salmon are advising on some of the very first IPC applications and have first hand experience of what is involved in the consenting process, including pre-application consultation and the drafting of Development Consent Orders. Coupled with our existing expertise on rail, we are uniquely placed to advise on IPC rail projects and would be happy to discuss any aspects of the new regime.

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