

The Planning Act 2008

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Introduction

The 2008 Planning Act is the most radical change to the planning system since World War II. The new Act, made law in December 2008, creates a new system for approving the construction of **major infrastructure projects** including major roads, airports and power stations.

Key parts of the new law:

- Development of new **National Policy Statements (NPS)** for major projects including nuclear power. Questions of safety and other technical issues will be determined here, removing these issues from discussion or testing at public inquiry.
- The creation of a new **Infrastructure Planning Commission (IPC)** of around 35 commissioners to take decisions previously made by the Secretary of State on major infrastructure. This removes democratic accountability from decision-making.
- The end of the **public inquiry system** and its replacement with a limited open floor hearing. This gives no public right to bring witnesses or to conduct cross-examination.
- Very **limited protection from nuisance** generated by construction or works with regard to these major projects.

Friends of the Earth fought a long campaign to secure people's rights and the proper consideration of climate change in the new Act. The Climate Change Committee is now a statutory consultee, following Friends of the Earth campaigning. The National Policy Statements should therefore consider their impact on climate change. However the National Policy Statements out for consultation in early November 2009 demonstrate no coherent or workable strategy to reduce carbon emissions.

Whilst our campaign prevented some of the worst excesses of government policy, we could not prevent the new system being both **undemocratic and unfair**. That doesn't mean that we can all ignore it.

It is vital for our collective future that **communities use all possible means to have their voice heard** in the process.

This briefing is here to help you understand the new Act, so we need your feedback to make it work best for you. Please let us know any parts of it that are unclear or that would help you to have explained further. Some of the words are quite technical, and we've tried to explain these in the **Glossary** (p13) – but if there's anything we've missed out, let us know.

Many aspects of the new Planning Act and how it will work are still being decided by the Government, which is why we haven't been able to give you more detail here. When the information becomes available we will be updating this briefing with the changes and how they affect you.

Purpose of the new Act

The majority of the Planning Act is focused on the creation of a new system for the approval of major infrastructure in order to 'speed up' the process. The system can be broken down into two parts:

1. **National Policy Statements (NPS)** will make clear Government policy on major infrastructure projects, including: airports, power stations, major roads, railways, ports, reservoirs and hazardous waste facilities.
2. **The Infrastructure Planning Commission (IPC)** which will make the final decision on each application.

1 National Policy Statements (NPS)

What are they?

- The **National Policy Statements** should answer questions of 'policy' e.g. in the case of nuclear power, possible locations, safety and technical issues.
- There will be up to 12 of these statements including energy (with possible separate ones on coal and renewable energy), transport networks, waste, and water. Overarching Energy, Fossil Fuels, Renewable Energy, Electricity Networks and Gas Networks, and Ports NPS have now been published (November 2009).
- There is also an NPS on nuclear power out for consultation (November 2009 – February 2010) which is **site specific**. The Aviation NPS is also due to be **site specific** which means that once agreed, a local debate will be marginalised.

NPS are one of the most powerful statements of government policy ever produced. This is not simply because they can be site specific but that new law says decision should be approved in accordance with NPS. To reinforce their power the Government has ensured that no part of the content of an NPS can be questioned when the final decisions are made. That means that e.g. the safety of a nuclear installation cannot be debated by the IPC or by objectors.

Do NPS always have to be followed?

The Infrastructure Planning Commission (IPC) must make their decisions in line with the NPS. There are limited circumstances where the IPC can overturn NPS policy. For example, where there are unacceptable impacts on national or international designated conservation sites.

How do NPS fit in with local and regional plans?

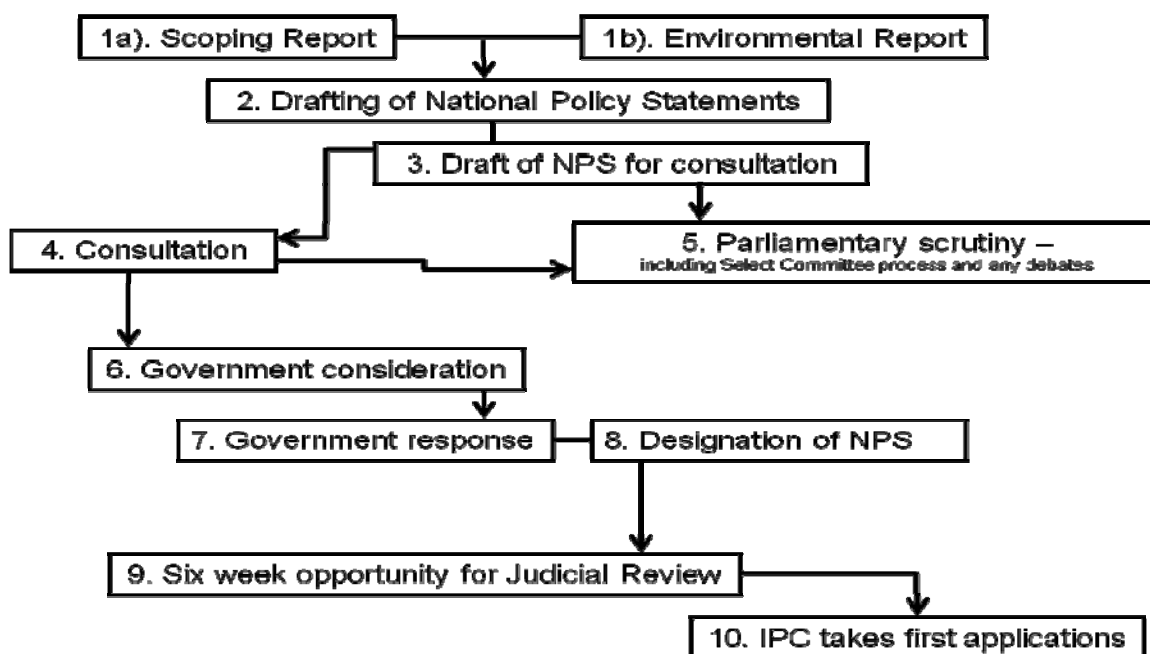
They don't. The relationship between NPS and regional and local plans is unclear. Local Development Frameworks (LDFs) should in time reflect the policy contained within NPS. However, it is clear that in the IPC's decision, NPS will normally outweigh the content of regional and local plans.

Take Action

- The most important message is that you, as a member of the public, have to **get involved** in the formation of National Policy Statements if you are worried about a development which might affect you in your area.
- These documents have been published here: <https://www.energygpsconsultation.decc.gov.uk/>

The process of drawing up NPS goes through a number of defined stages which are illustrated below:

Process of drawing up National Policy Statements



The scrutiny and public consultation process of the National Policy Statements started on the 11 November 2009 (the date of the NPS publication). The consultation responses to the Department for Energy and Climate Change (DECC) are being sent directly to the Energy and Climate Change Select Committee to consider. The public consultation should run for a minimum of 12 weeks from the publication date of the NPS, and the date has actually been set for the end of the consultation for the 22 February 2010. However the Select Committee will only take into account the public submissions up until the 15 January 2010, which is 5 weeks earlier than the suggested minimum public consultation. The Select Committee will attempt to scrutinise the 6 NPS relevant to Energy by the 12 February 2010. They will then draft a report to be delivered before Easter recess of Parliament. Select committees can call a wide range of witnesses, at their discretion, but there is no public right to be heard. There may be a vote in parliament on the content of NPS, but this is up to MPs on the Select Committee and is not guaranteed.

Given the weighty and hugely important content of the NPS (e.g. need and safety of nuclear energy), it is of overwhelming concern to Friends of the Earth that so little time is being given to taking evidence and testing the evidence underpinning these policies. There is in effect **no proper testing** of the NPS taking place in terms of parliamentary scrutiny.

The public have no right to be heard in the parliamentary process even when an National Policy Statement will result in the demolition of their home.

The Department of Energy and Climate Change (DECC) has said on its web site that it will be running consultation events where sites have been named (e.g. the Nuclear National Policy Statement) and this has happened in e.g. Hartlepool. However the Hartlepool consultation event happened 3 days after the National Policy Statements were published.

Take Action

- Ask your MP to support EDMs to call on the Government to rethink the consultation process around NPS, and to call on the Government to rethink its consideration of climate change in the NPS
- Put pressure on your MP to demand a vote in Parliament on the content of an NPS, and ask them to speak up for how the environmental impacts have not been fully taken into account.
- Write to the Secretary of State for Energy and Climate Change with your concerns about the process.

A Strategic Environmental Assessment (SEA) should be done during the Scoping report (1a). However, there is no obligation to carry out an SEA for National Policy Statements. The one exception to this is with the nuclear NPS; the Government have committed that an SEA will have to be done for the nuclear NPS.

Take Action

- A request for Judicial Review of an NPS must be launched within the six weeks after the NPS has been published – during this time you only have to have registered your challenge, not completed the process
- Our lawyers may be able to help you – see below

Timescales for publication:

Ports	9 November 2009
Coal	9 November 2009
Gas	9 November 2009
Renewables	9 November 2009
Grid	9 November 2009
Nuclear	9 November 2009
Aviation	Spring 2010
Transport networks	Spring 2010
Water	2010
Hazardous waste	2010

2 The Infrastructure Planning Commission

What is it?

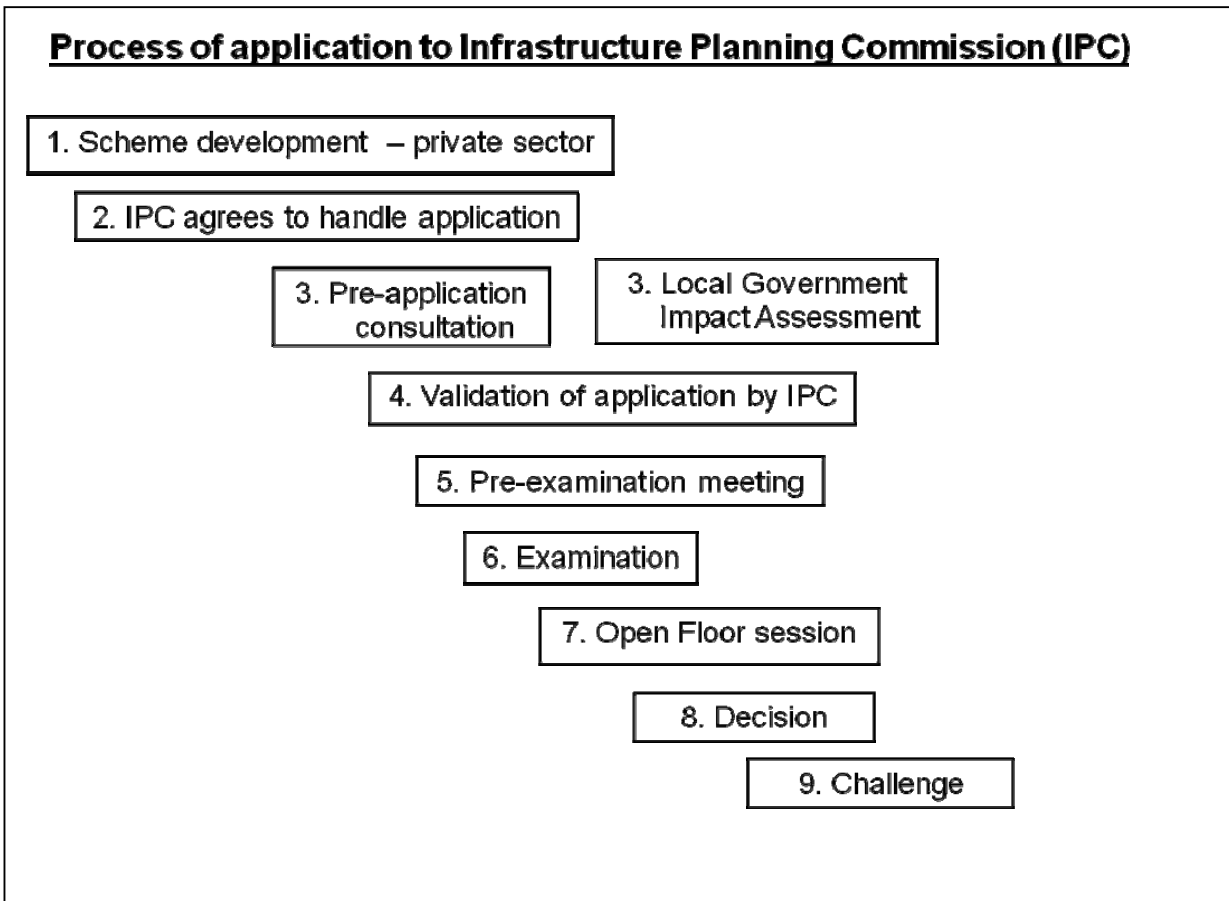
The new national **Infrastructure Planning Commission (the Commission or IPC)** is a body independent from government charged with making the final decisions about major projects. They have the power to give a **unified consent order**. This gives planning permission, allows compulsory purchase, stops up highways all in one legal movement and without the need for a further stage or application (see below).

These decisions used to be made by ministers, but **the Infrastructure Planning Commission is not directly elected nor directly accountable to Parliament** for its decisions. Given that these will involve demolishing people's homes, it is likely that the IPC will be the focus of a good deal of public anger. The IPC has to follow a process in determining an application which sets aside the old system of public inquiries where people could cross examine and produce witness as a matter of right. The new system gives almost complete discretion to the IPC about whether and how you will be heard.

There is a Chair of the IPC and there will be around 35 commissioners with an expected workload of around 50 applications a year. They are expected to be experienced in the area of major

infrastructure, but not necessarily in planning or in running public inquiries. The Chair of the IPC has said further that he expects “experts” in particular areas such as nuclear, to be one of the Commissioners running the relevant inquiry. Wales will have a Commissioner who will be allocated to the major infrastructure projects inquiries that are located in Wales. They will be based in Bristol.

An annual report will have to be submitted to Parliament to account for money spent, but not for the decisions made. This is not the same as an accountable body.



Thresholds

There will be a variety of thresholds used to determine a major infrastructure project. To read these in detail for each area, you will need to look at s15 of the Planning Act.

This can be found online at: http://www.opsi.gov.uk/acts/acts2008/ukpga_20080029_en_3#pt3-pb1-l1g14

For example, with energy and electricity, a project over 50 megawatts will be dealt with by the IPC, with anything under this threshold going through the local planning system.

This process is supposed to follow a 9 month timescale.

1. Scheme Development

Once an NPS is in place, developers will come forward with applications for specific sites. Applications will be carried out with the advice of the IPC, who will judge whether the

application meets the thresholds required to qualify for the IPC (in other words is it big enough).

2. IPC agrees to handle application

After the IPC has agreed to handle an application the first phase of public consultation begins.

3. Pre-application Consultation

Unlike a normal planning decision where the local authority will organise public consultation, the new act creates a **duty on the applicant** to pay for and run public engagement on **their own applications**. The guidelines and advice on how this should be done are likely to be quite vague, which will make upholding complaints more difficult.

This leaves it hard to see how the quality and impartiality of such consultations can be kept to any kind of account. Because the applicant is not an independent or impartial body their control of public consultation will not be trusted by many local communities, which will reduce the level of public participation even further.

Take Action

- It is vital that communities keep a critical eye on how developers deliver their consultation; whether they feel it is fair and reasonable, and has included representative section of the affected people.
- Do not be afraid to submit **complaints**, which should be directed to the Infrastructure Planning Commission.
- An independent survey of the people attending the consultation and their views could be extremely valuable in testing the accuracy of the developers' consultation results as submitted to the IPC.

4. Local Government Impact Assessment

The local authority for the region is now changed with preparing an **impact report** on the possible impacts of the development on the area. This might be how it affects local planning policy and other council strategies. This report is a key opportunity for the local council to express a direct view to the IPC, and it is important that it contains a proper description of local concerns.

Take Action

- Make sure that your local councillors know your opinions and concerns about the proposal.
- Communicate with community groups in the affected area, and arrange to meet with your council officials.

5. Validation of application by the Infrastructure Planning Commission

Both the impact report and the application, together with the results of the consultation are submitted to the Commission and they validate the application.

6. Pre-examination meeting

This will be held by the Infrastructure Planning Commission in the local area.

This meeting is used to **agree the process** of the subsequent examination before it actually begins.

The Commission will decide whether to have hearings or to rely solely on written evidence. If it decides to take written evidence only, individuals can demand an **open floor hearing**. The IPC are legally obliged to allow such a hearing but you cannot raise issues about policy, produce witness or cross examine. The hearing will be conducted by public examiners.

Take Action

- Make sure you **register to speak** at the open floor session; **everyone** who registers must be heard!
- The draft regulations require a written application to be made to speak at the open floor hearing. You should ask to attend even if you haven't submitted a written application.
- You can ask for open floor hearing and argue for other hearings at the pre- examination meeting, or by writing to the IPC.
- **Include climate change** as a key issue in your hearing submission.

You will be told at the pre-examination meeting when deadline for the submission of **written statements** will be.

Take Action

- Guidance will be issued by the Government on the IPC website on how to present **written statements**. Make sure you use this to help you when it's made available.

7. Examination

This is used to take evidence, mostly in written form.

If the Commission decides to hold some hearings on particular issues, then individuals may be able to make longer representations, but still cannot question the national policy. People affected by **compulsory purchase** will also be allowed a hearing but with the same restrictions as an open floor hearing.

There will be **no right** for any individual, even if their property is affected by compulsory purchase (such as in the case of Sipson and Heathrow's Third Runway) to bring **expert witnesses** in to question the developer's evidence and application. This will be at the discretion of the Commission.

The Commission will have a set of legal advisers to advise them on the process of the hearing, but there will be **no free legal advice** available to the public who are involved.

8. Open floor session

You have the right to attend this **only if you have registered** at the pre-examination meeting stage. However, there is no guarantee about how long you will get to speak for.

Everyone who registers has the right to be heard or make a statement.

However, there is no requirement for anything said by the public to be taken into account. This stage of the process has been described as being to the public inquiry what Speaker's Corner is to the House of Commons!

No issues of policy are allowed to be discussed.

Written form.....to apply for open floor session.

Take Action

- Make a request to the Infrastructure Planning Commission to be able to call a **witness or cross-examine**.
- While you cannot do this as a matter of right, it is at the discretion of the Infrastructure Planning Commission and therefore still possible.

9. Decision

The Commission will then make a decision.

There is **no democratic safeguard** on the decision of the Commission.

The decision has the power to override other environmental legislation – it can make orders that override existing legislation through a Unified Consent Order.

Unified Consent Orders

These cover the:

- Consent to build
- Compulsory Purchase
- Changes to highways/footpaths
- Statutory Nuisance

Unified Consent Orders are extremely powerful. They remove the need to seek consent from other environmental legislation. This has a major implication for local communities, who can no longer rely on being able to use their local authority to uphold **statutory nuisance claims**, or on separate public inquiries into the removal of things like public footpaths.

Changes to Statutory Nuisance laws

When the development goes ahead, even if this includes 24-hour disruption to the surrounding area in terms of environmental impacts, the local authority is no longer able to stop the work by pursuing **statutory nuisance**.

People affected will merely be able to claim compensation.

10. Challenge

A **legal challenge** relating to the procedure of the decision must be brought within 6 weeks.

There is always the chance to bring a **Judicial Review** of the decision, which can be used on a range of issues. These can be such as covered by the Human Rights Act, or related to environmental legislation such as under the Strategic Environmental Assessment and Environmental Impact Assessment.

Friends of the Earth Rights and Justice Centre – Advice Line

Our lawyers in the Rights and Justice Centre may be able to help you, and are particularly interested in legal challenges arising out of the Infrastructure Planning Commission process.

Friends of the Earth are only able to take on a few public interest legal cases every year, but we have an **Advice Line** that you can call for professional legal advice:

- Freephone 0808 801 0405, Wednesdays 6:30-8:30pm (from January 2010, every other Wednesday)
- Or email legal@foe.co.uk

How the Act will threaten your democratic right to be heard

The risk of poor decision-making

The new Act will mean that the Infrastructure Planning Commission will normally make decisions **without public hearings**. Commissioners will decide whether any part of the process will be heard in public. They will decide which witnesses are heard and who can cross-examine. The public retain only one right - to an 'open floor' session - where they cannot ask questions or cross examine.

Cross-examination

Government has made much of the need to remove cross-examination in order to speed up the process. Cross-examination is however an indispensable way of testing expert evidence. What the supporters of the Act fail to understand is that 'expert' testimony is often in practice simply an advocacy statement on behalf of one side or another. You can only test whether such evidence stands up by allowing participants the chance to question it. It is not as if this expert testimony will be trivial in relation to hazardous waste or a nuclear power station.

Unconstitutional, unaccountable

There is quite simply no constitutional precedent for the Infrastructure Planning Commission. The Commission will have powers over legislation and can grant consent orders which remove all other forms of environmental regulation at a stroke. You will no longer be able to complain about the noise of development to your local council because the Commission's consent order removes local authority powers to pursue a statutory nuisance.

The decisions taken by the Infrastructure Planning Commission are **not directly accountable** to anyone. As a result it is hard to see how they will ever be accepted as legitimate. The decision over whether to demolish thousands of houses for the third runway at Heathrow should ultimately be a political judgement.

Will the new Act help tackle Climate Change?

The Government has argued that the Planning Act is vital to deliver the technology to tackle climate change. However, previous to the Friends of the Earth and the Better Planning Coalition campaign, the Act did not include any mention of climate change. Friends of the Earth's campaigning resulted in the concession that Ministers now have to think about climate change during the formation of National Policy Statements. The Government has also conceded that the Climate Change Committee should be a consultee in the preparation of National Policy Statements. However, there is no duty on the Infrastructure Planning Commission to consider climate change in making their final decision.

Opportunities for Activism - how you can get involved – summary and ideas

NB. Refer to **Take Action** sections on previous pages

The Rights and Justice Team at Friends of the Earth is sadly now only able to offer limited planning support. But we will be doing what we can to get information to you about the new system and how it will work as it becomes decided, and suggestions for how you can get involved in the process.

We hope that the **Take Action** points in the briefing and the ideas below will help give you some ideas.

The main advice we can give is don't be intimidated! It may seem daunting, but **any action you take will make a difference – what is most important is that you are using your right to be heard**, getting involved in the process and hopefully encouraging others to do this too.

During formation of National Policy Statements

Each individual National Policy Statement is an opportunity for a campaign – a chance to voice your opinions on the new proposals.

1. Consultation process

Go to the relevant departmental websites and give feedback on the proposals. Encourage others to do the same.

2. Lobby your MP

Ask them to speak up during the parliamentary scrutiny process – to ask parliamentary questions, write to the relevant Minister – to show that there is a strong feeling in your constituency.

Once the application process begins (1 March 2010)

3. Engage with private sector consultation

The Infrastructure Planning Commission web site has a map of all developments. Check this out for new developments to see if any are being built near you, and spread awareness among the affected communities

- Arrange a local meeting
- Invite councillors and your MP. Arrange a meeting with them beforehand so that they understand the issues and why this is important to the local area.
- Use the local media – write a letter to the local paper, try to get a photo in
- Attend the pre-application consultation, and provide your own feedback directly to the Infrastructure Planning Commission. There are no guarantees that the developer will be independent when transmitting your consultation response.

4. Get involved in the Local Government impact assessment

Lobby your local councillors on issues that concern you

- Arrange a meeting with the Council
- Ensure that impact assessment covers issues that are important to you and the community: think about wider impacts

5. Register for open-floor session – get as many people as possible to register

You must register to be heard. However, EVERYONE who registers must be heard although the regulations are trying to limit the open floor hearing through requiring a written application.

6. Submit a written statement

7. Demand a hearing at the examination

Particularly on the climate issue

8. Judicial Review – legal challenge

The only real way to challenge decisions made by the Infrastructure Planning Commission and bring issues to attention that have not been covered.

9. Stunts, protest, spread awareness, use local media, generate local feeling, use power of numbers! Fight for your right to be heard!

Frequently Asked Questions

1. How big does a scheme have to be to be treated as major infrastructure?

For detailed classification see the Planning Act, Part 3:

http://www.opsi.gov.uk/acts/acts2008/ukpga_20080029_en_3#pt3-pb1-l1g14

2. Will any other categories of Major Infrastructure Projects (MIPs) now called Nationally Significant Infrastructure Projects (NSIPs) be added, beyond those mentioned in the briefing note?

We can't rule out that this could happen – in theory the Government does have the power to add more categories. However we know of no current plans for the Government to do this.

3. Can you use the Environmental Impact Assessments (EIA) to challenge scheme development?

Yes. If it is not up to standard i.e. missing key information or is inaccurate. You can find out more information about EIAs and how you can use them using section 4.2 of our Community Rights Resource Pack which you can find online at:

http://www.foe.co.uk/resource/local/planning/rights_resource_pack.html

4. How do Local Government powers impact on National Policy Statements (NPS)? Can they override them? Are they bound by them?

National Policy Statements will be higher order policy documents so will outrank the plans of Local Government.

The only role for local authorities in the new system, and the only way for them to have input, will be to prepare a Local Government Impact Assessment when a planning application has been made.

This will be a formal process by which the local government can comment to the Infrastructure Planning Commission (IPC), although it remains unclear how this will happen. Local Government will therefore be bound by NPS and cannot override them.

5. If Heathrow goes ahead, will it go through the new Planning Act system?

Any application for major infrastructure (as defined by the new Act) submitted once the National Policy Statements (NPS) have been finalised will go through the new system.

It is highly likely that proposals for Heathrow will not be submitted until the NPS for airports have been finalised, and therefore that it will go through the new system.

Any current application should therefore go through the old planning system.

6. Will core regional strategies, Local Development Frameworks and Planning Policy Statements stay the same? How will they be affected by/impacted on by this new system?

Planning Policy Statements, and core regional strategies will stay the same.

However, there will be changes to the process for producing Local Development Frameworks – one stage of the consultation will be removed.

7. What's the point/role of Statements of Community Involvement?

These will still be very important for local planning, but will have no influence over the Infrastructure Planning Commission or National Policy Statements.

8. What policies are they using to draw up National Policy Statements (NPS)? Who and what is/will inform these policy statements?

Individual departments will draw up the NPS for their area, eg Department for Energy and Climate Change will produce NPSs for energy. NPSs will be based on existing national policy and other relevant documents, eg the Energy White Paper.

9. How can we lobby Local Government on the National Policy Statements?

One way would be to find out which authority/department is responsible for the particular National Policy Statement/s (NPS), and to get involved with their consultation process.

For example, the first round of National Policy Statements (NPS) are due to be completed this year. These will relate to energy; renewables, fossil fuels, gas storage, pipelines, electricity, ports and nuclear power. The relevant department to input into will therefore be the Department of Energy and Climate Change (DECC).

10. What about the Sustainable Communities Act? Why can the Infrastructure Planning Commission do what it likes and not be accountable or have to comply with this bit of the law?

The Sustainable Communities Act (SCA) covers the process of consultation for local authorities and has no jurisdiction over the Infrastructure Planning Commission (IPC). The IPC is not accountable to any local authority. Decisions taken by the IPC can override the SCA.

11. Even if there will be no free legal advice available to the public at open hearings, can people *hire* a lawyer?

You cannot have a lawyer present as a right, only at the discretion of the Infrastructure Planning Commission (IPC). You would have to write to the IPC to request permission for this.

12. If you've submitted written evidence, can you still refer to that or make the same points in an open hearing?

As in any hearing, you can refer to your submitted written evidence, but are not encouraged to read or repeat it. Doing this could shorten your speaking time.

13. Has this been referred to the EU? Is there a Human Rights breach to this new Act?

Our legal opinion (see below) suggests that there are vulnerabilities to European Union and Human Rights law in the new Act. Our lawyers will continue to pursue possibilities to take on cases that challenge the new Planning Act.

Glossary

Please help us make this more useful by telling us what would be useful for us to add to this list or describe here in more detail.

Compulsory Purchase – when land is taken without the agreement of the owner. Housing authorities and highway authorities are among the bodies that have compulsory purchase powers

CLG – Communities and Local Government

DECC – Department for Energy and Climate Change

EIA – Environmental Impact Assessment

ER – Environmental Report

Impact Report – a report drawn up by the local authority which provides feedback on the potential social, economic and environmental impact of the proposed development.

IPC – Infrastructure Planning Commission

Judicial Review – a procedure by which the High Court may review the reasonableness of decisions made by local authorities, the first Secretary of State or lower courts, on for example a planning decision.

MIP – Major Infrastructure Project (same as a NSIP)

NPS – National Policy Statements

NSIP – Nationally Significant Infrastructure Project (same as a MIP)

Open Floor Hearing – At an open-floor hearing, each interested party is allowed (subject to the examining authority's powers of control over the conduct of the hearing) to make oral representations about the application.

Site specific – proposals that identify the precise location for the development

SEA – Strategic Environmental Assessment – The systematic process of identifying and assessing the likely effects on the environment of plan or programme at the earliest possible opportunity before a decision is made on its adoption. Assesses all plans and programmes

Select Committee – a committee made up of a small number of MPs appointed to deal with particular areas or issues

Statutory Nuisance – this is broadly defined as unreasonable interference with the enjoyment of your property, such as excessive and continual loud noise.

Unified Consent Order – **this draws together all the legal permissions to carry out development**

White Paper – A white paper issued by the Government will lay out a proposed policy for a particular topic. It usually lays out the Government's intentions and directions for a new or revised law.

Useful websites/resources etc

For a full copy of **The Planning Act 2008**:

http://www.opsi.gov.uk/acts/acts2008/ukpga_20080029_en_1

Or type Planning Act 2008 into Google!

To access Friends of the Earth **Community Rights Resource Pack** and download briefings that help explain the planning system, your right to know and your right to challenge:

http://www.foe.co.uk/campaigns/fair_future/resource/rights_resource_pack.html

Planning Aid

Go here for free advice and support on planning issues

<http://www.planningaid.rtpi.org.uk/>

Town and Country Planning Association

For information, advice and resources about planning

<http://www.tcpa.org.uk/>

Infrastructure Planning Commission

For locations of planned developments & information

<http://infrastructure.independent.gov.uk/>

Climate Change Committee

To read more about their role and their work visit their website at:

<http://www.theccc.org.uk/>

Wildlife and Countryside Link

Information from the former Planning Disaster Coalition, known as the Better Planning Reform coalition:

<http://www.wcl.org.uk/>