



# Using the 'Rochdale Envelope'

## Advice note nine: Rochdale Envelope

### **The Planning Inspectorate and nationally significant infrastructure projects**

The planning process for dealing with proposals for nationally significant infrastructure projects ('NSIPs') was established by the Planning Act 2008 ('the 2008 Act'). The process under the 2008 Act, as amended by the Localism Act 2011, involves an examination of accepted applications for major proposals relating to energy, transport, water, waste water and waste, and includes opportunities for people to have their say before a decision is made by the relevant Secretary of State.



## Introduction

This version of advice note nine dated April 2012 reflects changes to the 2008 Act made by the Localism Act 2011 and supersedes all previous versions. Generally in this advice note reference is made to the Planning Inspectorate ('the Planning Inspectorate'), which now carries out certain functions related to national infrastructure planning on behalf of the Secretary of State. However, when dealing with decision-making in relation to applications or proposed applications for development consent reference is made in this document to the Secretary of State. The content of this document is advice only with no statutory status.

This advice note, which forms part of a suite of such advice provided by the Planning Inspectorate, addresses the use of the 'Rochdale Envelope' approach under the 2008 Act. A number of developers, particularly those for proposed offshore wind farms, have sought advice on the degree of flexibility that would be considered appropriate with regards to an application for development consent under the 2008 Act regime.

Developers have suggested that the approach known as the 'Rochdale Envelope' may be useful in considering applications for development consent under the 2008 Act, especially where there are good reasons why the details of the whole project

are not available when the application is submitted. Such an approach has been used under other consenting regimes (the Town and Country Planning Act 1990 and the Electricity Act 1989) where an application has been made at a time when the details of a project have not been resolved.

This approach is identified in the Overarching National Policy Statement for Energy (NPS) (EN-1) and the NPS for Renewable Energy Infrastructure (EN-3)<sup>1</sup>.

There are a number of key areas when preparing an application for development consent under the 2008 Act where the level of detail and amount of flexibility are particularly relevant. These are:

- during consultation and publicity at the pre-application stage;
- when preparing the environmental impact assessment; and
- in the description of the project within the application documents.

This note provides advice as to the main issues to be considered and suggests a suitable way forward, in the context of the 2008 Act regime. First of all the 'Rochdale Envelope' is explained briefly before considering the concept of the need for flexibility in terms of the three key areas set out above.

<sup>1</sup> See section 4.2 of revised draft NPS EN-1 and paragraph 2.6.43 of NPS EN-3.



There are other areas that are relevant to the matters dealt with in this advice note, but which are not considered here. The Planning Inspectorate has published advice notes on the Habitats Regulations process<sup>2</sup> and on transboundary matters<sup>3</sup> under the 2008 Act regime.

### The Rochdale Envelope

The 'Rochdale Envelope' arises from two cases: *R. v Rochdale MBC ex parte Milne (No. 1)* and *R. v Rochdale MBC ex parte Tew* [1999] and *R. v Rochdale MBC ex parte Milne (No. 2)* [2000]. These cases dealt with outline planning applications for a proposed business park in Rochdale. They address:

- applications for outline planning permission under the Town and Country Planning Act 1990; and
- consideration of an environmental impact assessment in the context of an outline planning consent to enable compliance with the Council Directive 85/337/EEC as transposed by the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1988.

To understand the implications arising from the comprehensive consideration of the issues by the Judge<sup>4</sup> in *Milne (No. 2)*,

<sup>2</sup> See the Conservation of Habitats and Species Regulations 2010/490.

<sup>3</sup> See Regulation 24 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009.

<sup>4</sup> Sullivan J. (as he then was).

it is helpful to note the key propositions. These are set out below<sup>5</sup>:

- the outline application should acknowledge the need for details of a project to evolve over a number of years, within clearly defined parameters;
- the environmental assessment takes account of the need for such evolution, within those parameters, and reflects the likely significant effects of such a flexible project in the environmental statement;
- the permission (whether in the nature of the application or achieved through 'masterplan' conditions) must create 'clearly defined parameters' within which the framework of development must take place. It is for the local planning authority in granting outline planning permission to impose conditions to ensure that the process of evolution keeps within the parameters applied for and assessed;
- the more detailed the proposal, the easier it will be to ensure compliance with the Regulations;
- taken with those defined parameters of the project, the level of detail of the proposals must be such as to enable a proper assessment of the likely environmental effects, and necessary mitigation - if necessary considering a range of possibilities:

<sup>5</sup> Extract from paragraph 3B-949.410.3.1 of the Encyclopaedia of Planning Law and Practice.





The assessment may conclude that a particular effect may fall within a fairly wide range. In assessing the 'likely' effects, it is entirely consistent with the objectives of the Directive to adopt a cautious 'worst case' approach. Such an approach will then feed through into the mitigation measures envisaged.... It is important that these should be adequate to deal with the worst case, in order to optimise the effects of the development on the environment' (para.122 of the Judgment);

- the level of information required is: 'sufficient information to enable 'the main,' or the 'likely significant' effects on the environment to be assessed...., and the mitigation measures to be described....' (para.104 of the Judgment);
- the 'flexibility' referred to is not to be abused:  
'This does not give developers an excuse to provide inadequate descriptions of their projects. It will be for the authority responsible for issuing the development consent to decide whether it is satisfied, given the nature of the project in question, that it has 'full knowledge' of its likely significant effects on the environment. If it considers that an unnecessary degree of flexibility, and hence uncertainty as to the likely significant environmental effects, has been incorporated into the description of the development, then it can require more detail, or refuse

consent' (para.95 of the Judgment);

- it is for the planning authority to determine what degree of flexibility can be permitted in the particular case having regard to the specific facts of an application. It will clearly be prudent for developers and authorities to ensure they have assessed the range of possible effects implicit in the flexibility provided by the permission. In some cases, this may well prove difficult.

### **Consultation undertaken by the developer during pre-application**

The process introduced by the 2008 Act, places a duty upon developers to engage meaningfully with affected communities, local authorities and other statutory consultees over their proposals at pre-application stage. The developer must produce and publicise a Statement of Community Consultation. In preparing this, they must consult with and have regard to the views of any relevant local authority on the content of the statement.

The 2008 Act regime therefore seeks to ensure there are opportunities for the public, local authorities, consultees and other interested parties to get involved and have their say during the pre-application stage. Clearly for consultation to be effective there will need to be a genuine possibility to influence the proposal and therefore a project should not be so fixed as to be unable to respond to comments from consultees.



The importance of consultation during the pre-application phase cannot be overemphasised, given the 'front loaded' processes under the 2008 Act. Such consultation needs to be appropriate (in terms of content, timing and clarity) and reported fully in the consultation report such that the response of the developer to the comments made in terms of the evolution of the proposals can be clearly understood.

There is opportunity within the statutory pre-application procedure for developers to determine the most appropriate consultation programme for their needs and to time the consultation to appropriate stages in the project evolution. However, the consultation must be undertaken on issues that are easy to identify and on a project that is as detailed as possible. The bodies consulted need to be able to understand the proposals. Therefore the project and details need to be described as clearly and simply as possible. Obviously fewer options and variations within a project description would make it easier to understand, especially by those less familiar with the 2008 Act regime. Developers may also find it helpful to use, for example, figures, cross sections, photomontages or wireframe images to illustrate their proposals. Obviously a balance needs to be made between providing well developed details which may only be possible later in the programme of project development

and offer less opportunity for change; versus less precise details early in the project development which can be more responsive to consultation<sup>6</sup>.

A developer needs to be able to demonstrate, among other things, that the statutory consultation requirements under the Act (sections 42 and 47) have been complied with. It is possible to comply with less than full information on the application, but unless there is a clear iterative consultation process followed and further documentation provided to consultees during the process, the developer could risk being unable to demonstrate that the proposals have been considered in the light of consultation responses received. Care will be needed by the developer to ensure that the project description is clear so that the developer can demonstrate that the statutory requirements regarding consultation have been met.

<sup>6</sup> More information on the Pre-application Stage is set out in the Planning Inspectorate's AN16 - Pre-Application Consultation, Notification and Publicity by the Applicant; and in DCLG Guidance on pre-application consultation.



## Environmental Impact Assessment (EIA)

The first formal contact with the Planning Inspectorate regarding the proposed content of a Development Consent Order is often associated with a request to the Secretary of State for a scoping opinion as part of the preparation for the EIA work<sup>7</sup>. EIA is an iterative process and it would be unlikely that all the details would be resolved at this stage. As a consequence, at the time of the scoping request, it may be necessary to leave certain matters open. For example, details of the project may not have been finalised and, indeed, may not be finalised for some time. The Planning Inspectorate considers that there is an opportunity as part of the consultation process and within the Environmental Statement (ES) to set out the design evolution, including key changes undertaken as the project design progresses towards submission of an application.

All proposals for projects that are subject to Council Directive 85/337/EEC as amended by Council Directive 97/11/EC<sup>8</sup> must be accompanied by an ES describing the aspects of the environment likely to be significantly affected by the project.

<sup>7</sup> Regulation 8 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009.

<sup>8</sup> As transposed in relation to the 2008 Act regime by the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009.

It is likely that most applications for development consent under the 2008 Act will require an EIA. The EIA should assess the proposals as described in the application documents. Sufficient detail should be known about a project to prepare an ES in accordance with Schedule 4 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 (SI 2263 2009) (the EIA Regulations). The ES should support the application for development consent and therefore should be clear as to the scheme being assessed<sup>9</sup>.

When considering a proposal the Planning Inspectorate must be satisfied that the likely significant effects, including any significant residual effects taking account of any proposed mitigation measures or any adverse effects of those measures, have been adequately assessed.

The Planning Inspectorate understands that in the early stages of preparing a DCO application it may not be possible for a developer to have resolved all the details of a project. The Planning Inspectorate accepts that the details of a project may change as it progresses through the pre-application stages. For example, in relation to offshore wind farms detailed information on a project that may not be available at the time of making the request for a scoping opinion could include:

<sup>9</sup> See revised draft NPS EN-1 paragraph 4.2.4.





- type and number of turbines;
- foundation type (this may depend upon the height and type of turbine and the seabed conditions);
- location of the export cable route (whether this is buried or on the seabed);
- location of the landfall point;
- the definitive location of any onshore substation;
- location of the grid connection point;
- construction methods and timing; and
- re-powering.

In the course of preparing the ES, a developer should seek to identify those aspects that are likely to give rise to significant adverse impacts, such that the maximum potential adverse impacts of a project have been properly assessed and can be taken into account as part of the examination, and decision-making process. The Overarching NPS for Energy (EN-1) and the NPS for Renewable Energy Infrastructure (EN-3) both identify the need to address the maximum potential adverse impacts<sup>10</sup> to ensure that the likely impacts of a project as it may be constructed have been properly assessed.

Matters that could affect the maximum adverse impact are:

- topic (or aspect) specific impacts;

<sup>10</sup> See NPS EN-1 paragraph 4.2.8 and NPS EN-3 paragraph 2.6.43.

- inter-relationships between topics<sup>11</sup> (or aspects); and
- cumulative impacts<sup>12</sup>.

The ES should not be a series of separate unrelated topic reports. The inter-relationship between aspects of the proposed development should be assessed and careful consideration should be given by the developer to explain how inter-relationships have been assessed in order to address the environmental impacts of the proposal as a whole. It need not necessarily follow that the maximum adverse impact in terms of any one topic impact would automatically result in the maximum potential impact when a number of topic impacts are considered collectively. In addition, individual impacts may not be significant but could become significant when their inter-relationship is assessed. It will be for the developer to demonstrate that the likely significant impacts of the project have been properly assessed.

<sup>11</sup> Inter-relationships consider impacts of the proposals on the same receptor. These occur where a number of separate impacts, eg. noise and air quality, affect a single receptor such as fauna.

<sup>12</sup> Cumulative impacts consider other proposed development within the context of the site and any other reasonably foreseeable proposals in the vicinity.



The EIA should support the application for development consent by being clear and assessing the potential likely significant impacts of the project as described in the application documents. This will necessitate the assessment of variations of the proposals where certain details remain unresolved. The EIA should assess the likely worst case in terms of the potential variations within a project but the detailed design of the project and the variations should not vary beyond these limits so that the proposals as built would not have been assessed, thereby rendering the ES inadequate.

It will also be the developer's responsibility to present the assessment of possible variations of the project, where certain parameters are not yet fixed, in a manner that aids the making of recommendations to and decisions by the relevant Secretary of State. The assessment should not be presented in an over-complex manner so that it is difficult to understand.

Therefore, a developer may find it helpful in terms of presenting the assessment outcome to have limited the potential range of options within the proposed development. This should make managing the presentation of the options easier and make it clearer to understand that the project as finally built does not go beyond the limits set out in the ES and so render the ES inadequate. Where elements have yet to be finalised, these should be clearly identified in the ES with reasons provided to explain why these cannot be finalised at this stage.

The potential cumulative impacts with other major developments will also need to be carefully identified such that the likely significant impacts can be shown to have been identified and assessed against the baseline position (which would include built and operational development). In assessing cumulative impacts, other major development should be identified through consultation with the local planning authorities and other relevant authorities on the basis of those that are:

- under construction;
- permitted application(s), but not yet implemented;
- submitted application(s) not yet determined;
- projects on the Planning Inspectorate's Programme of Projects;
- identified in the relevant Development Plan (and emerging Development Plans - with appropriate weight being given as they move closer to adoption) recognising that much information on any relevant proposals will be limited; and
- identified in other plans and programmes (as appropriate) which set the framework for future development consents/approvals, where such development is reasonably likely to come forward.

In preparing such information, it should not be forgotten that the purpose of an EIA is to inform the examination, and decision making process. The EIA should be clear and practical.





At the time of application, any proposed scheme parameters should not be so wide ranging as to represent effectively different schemes. The scheme parameters will need to be clearly defined in the draft DCO and therefore in the accompanying ES. It is a matter for the developer, in preparing an ES, to consider whether it is possible to robustly assess a range of impacts resulting from a large number of undecided parameters. The description of the development in the ES must not be so wide that it is insufficiently certain to comply with requirements of paragraph 17 of Schedule 4 Part 1 of the EIA Regulations.

Any ES submitted with an application for development consent should demonstrate that the likely significant environmental impacts have been assessed. Any limitations in the assessment should be identified and explained. The environmental information submitted should be sufficient for an Examining Authority to make a recommendation, and for the relevant Secretary of State to make a decision on the application.

During the examination of an application, if it comes to light that the ES should contain further information, consideration of the application would be suspended pending receipt of further information (Regulation 17 of the EIA Regulations). Clearly this has time and cost implications and could result in uncertainty which all parties would wish to avoid, but could occur for example where the potential significant impacts from any variations associated with a wide range

of flexible options within an application had not been fully assessed. In the event that the proposals changed, and the likely significant impacts are different as a result of any change, then further environmental information may be needed to supplement the original ES.

### **Application Documents**

#### **Content of the Development Consent Order**

The purpose of the 2008 Act was to introduce a streamlined system that speeded up the consenting process for nationally significant infrastructure projects. As such, the consideration of an application is undertaken in a relatively short period but following substantial pre-application consultation. The Secretary of State cannot accept an application unless, among other things, the quality of the developer's statutory and public consultation has been adequate.

NPS EN-3 states (paragraph 2.6.43) that the '....wind farm operators are unlikely to know precisely which turbines will be procured for the site until sometime after the consent has been granted'. This is not to say that the use of the 'Rochdale Envelope' should be used as an excuse not to provide sufficient details. Developers should make every effort to finalise as much of the project as possible prior to submission of their application for development consent. Indeed, as explained earlier in this note, it will be in all parties' interests for the developer to provide as



much information as possible to inform the pre-application consultation process; to form a clear basis for the EIA (providing as many details as possible should facilitate a clearer ES and avoid the possibility of a delay in the examination process<sup>13</sup> or a successful legal challenge on the adequacy of the EIA); and to enable development consent (if granted) to be for a distinct project.

One practical way forward would be for the draft Development Consent Order (DCO), submitted with an application for development consent, to set out specified maximum and minimum. For example, for offshore wind farms, these could be in terms of:

- maximum number of turbines;
- minimum number of turbines;
- maximum nacelle (hub) height;
- minimum nacelle (hub) height;
- maximum blade tip height;
- minimum blade tip height;
- minimum clearance above mean sea level;
- minimum separation distances between turbines.

Developers should be in a position to be able to identify the most likely variations of options and so provide a more focused

description. However, any flexibility should not permit such a wide range of materially different options such that each option in itself might constitute a different project for which development consent should be sought and an ES provided, nor allow a scheme to be implemented which is materially different from that assessed in the EIA.

The Planning Inspectorate can confirm that developers may submit draft DCOs in advance of submitting an application, including properly drafted requirements, to the Planning Inspectorate and when so doing it may assist the discussion to provide legal submissions making reference to relevant case law to demonstrate that the draft provisions and requirements being proposed may be lawfully made and imposed.

If approved, any flexibility of the project will also need to be reflected in appropriate DCO articles and requirements, and any conditions on any deemed marine licence.

### **Changes to a DCO**

Changes to a DCO must be made under the 2008 Act in the prescribed manner. The Infrastructure Planning (Changes to, and Revocation of, Development Consent Orders) Regulations 2011, set out the detailed procedures for making changes to a DCO.

<sup>13</sup> Regulation 17 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009.



It should be noted however, that any changes would need to comply with the obligations in relation to EIAs. Under case law<sup>14</sup> the EIA would need to consider the development as modified and not just the modification.

## Conclusions

The 'Rochdale Envelope' is an acknowledged way of dealing with an application comprising EIA development where details of a project have not been resolved at the time when the application is submitted.

The approach set out in this advice note seeks to provide an acceptable solution, under the 2008 Act regime, to address areas of uncertainty as proposals progress towards making the application. The approach used needs to be clear and robust.

The key areas where the level of detail needs to be addressed are during pre-application consultation; in the EIA; and

within the description of the project in the application documents.

Pre-application consultation forms an important element of the 2008 Act regime. Developers must be able to demonstrate, among other things, that they have complied with their duties under sections 42 and 47 of the 2008 Act. Under the 2008 Act it is important to consult comprehensively on the project and to report fully on that consultation. The process should be clear and thorough.

The challenge for the EIA will be to ensure that all the realistic and likely worst case variations of the project have been properly considered and clearly set out in the ES and as such that the likely significant impacts have been adequately assessed.

It may be possible to draft a DCO in such a way as to allow some flexibility in the project. The project should be described in such a way that a robust EIA can be undertaken.

<sup>14</sup> See R v. Bromley LBC Ex p. Barker (Court of Appeal [2002], ECJ [2006]).

## Further information

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