

Infrastructure 49, National Infrastructure Planning Association

Senedd Cymru | Welsh Parliament

**Pwyllgor Newid Hinsawdd, yr Amgylchedd a Seilwaith | Climate Change,
Environment, and Infrastructure Committee**

Bil Seilwaith (Cymru) | Infrastructure (Wales) Bill

Ymateb gan NIPA | Evidence from NIPA



Infrastructure (Wales) Bill

INTRODUCTION

The National Infrastructure Planning Association (“NIPA”) was established in November 2010 with the aim of bringing together individuals and organisations involved in the planning and authorisation of major infrastructure projects in England and Wales. Our principal focus is the planning and authorisation regime for nationally significant infrastructure projects (“NSIPs”) introduced by the Planning Act 2008. We provide a forum for those with an interest in the planning and authorisation of national infrastructure projects in the UK, particularly those brought forward within the framework of the Planning Act 2008.

In summary, we:

- advocate and promote an effective, accountable, efficient, fair and inclusive system for the planning and authorisation of national infrastructure projects and act as a single voice for those involved in national infrastructure planning and authorisation;
- participate in debate on the practice and the future of national infrastructure planning and act as a consultee on proposed changes to national infrastructure planning and authorisation regimes, and other relevant consultations; and
- develop, share and champion best practice, and improve knowledge, skills, understanding and engagement by providing opportunities for learning and debate about national infrastructure planning.

NIPA is pleased to set out its views in outline on the Bill given experience gained with the operation of the Planning Act 2008.

1. What are your views on the general principles of the Bill, and is there a need for legislation to deliver the stated policy intention?

NIPA is broadly supportive of the general principles of the Bill and welcomes the introduction of a unified consenting process for infrastructure projects in Wales, in particular to meet the energy transition and renewable energy ambitions set out in Future Wales: The National Plan 2040 and Planning Policy Wales.

We consider that the new regime has the potential to address many of the challenges experienced with the existing Welsh consenting regimes.

Potential concerns arise inevitably from the lack of detail in the Bill on certain matters, which will need to be addressed in subordinate legislation and guidance. The Welsh Government intends to consult on the general principles of subordinate legislation and we will welcome the opportunity to provide further comments on the detailed implementation of the Bill.

At the outset, we would wish to emphasise that in order to realise the benefits of a unified consenting process, proper consideration must be given to addressing some of the systemic challenges of existing

consenting processes, including the Planning (Wales) Act 2015 developments of national significance (DNS) and Planning Act 2008 development consent order regimes. Recent experience of both the DNS and DCO consenting regimes is that there is an increasing elongation of the validation, pre-examination, examination and determination stages, driven in part by inadequate and/or out-of-date national policy and a lack of resources and/or substantive engagement by consultees.

As the proposed significant infrastructure project (SIP) regime would represent a move towards a 'one stop shop' for development consents in Wales, it is very likely that existing problems in the consenting processes will be exacerbated as a result of the additional complexity that SIP applications would necessarily involve, unless sufficient steps are taken to address them. Therefore clear and detailed national policy, appropriate resourcing and strict adherence to the proposed statutory timescales are essential to improve the delivery of energy and transport projects through the new system.

2. What are your views on the Bill's provisions (set out according to Parts below), in particular are they workable and will they deliver the stated policy intention?

2.i) Part 1 - Significant infrastructure projects

It is important that the new unified consenting regime is capable of incorporating new and emerging forms of energy generation and associated infrastructure, that may be less well covered under existing regimes. Likewise, clarity and the pace of consent in relation to major developments at locations such as ports for future offshore wind deployment will be essential in helping Wales realise its future ambitions for offshore energy deployment.

In relation to energy SIPs, the Bill generally follows the approach taken by other consenting regimes. Whilst this approach covers existing technologies, it does not encompass the full range of energy infrastructure required to facilitate the energy transition.

It is acknowledged that the Bill includes powers which would enable Welsh Ministers to add to or vary the list of significant infrastructure projects. A commitment from Welsh Ministers to take an active approach to the use of this power (particularly to reflect the pace of technological change) would be welcome. In addition, and perhaps more importantly, the ability of developers to apply for specific projects to be brought into the SIP regime is essential for the new consenting regime to function as a "one stop shop" where most needed. Although some projects may fall within the scope of the Town and Country Planning Act, where multiple consents are required, developers should be able to apply and bring them to the SIP regime.

2.ii) Part 2 - Requirement for infrastructure consent

Supportive of the principle that the SIP regime should be open to other projects which do not meet the criteria set out in the Bill for qualification as 'compulsory SIPs'.

Consultation materials accompanying the Bill refer to the category of 'optional SIPs', however the Bill provides that the ability for projects which do not qualify as 'compulsory SIPs' to access the SIP regime is ultimately at the discretion of Welsh Ministers via the issuing of a direction under clause 22 (akin to the section 35 direction power under the Planning Act 2008). Under the Bill as introduced, applicants do not therefore have the automatic right to opt-in to the SIP regime for projects falling within the criteria of 'optional SIPs'.

Support the removal of the need for a direction from the Bill. Projects which fall within the criteria set out in guidance should have the ability to opt-in to the SIP regime as applicants are best placed to identify which consenting route is best suited to individual projects.

Guidance on the optional SIP thresholds should not be drafted too restrictively and updated regularly to respond to experience of the SIP regime and changes in technology.

In the event that the clause 22 direction power is retained in the Bill, the inclusion of a statutory deadline for deciding on a request for a direction would provide applicants with greater clarity, particularly in the case of novel and emerging technologies not currently covered by Part 1 of the Bill.

2.iii) Part 3 - Applying for infrastructure consent

Much of the detail as to the pre-application procedure will be set out in subordinate legislation.

Whilst NIPA recognises that there are benefits in 'front loading' the consenting process, the detail of the implementing regulations and supporting guidance should strike an appropriate balance to ensure that applicants do not face unnecessary burdens in developing projects. For example, clear guidance on consultation standards to ensure that pre-application consultation is robust but proportionate.

An area of concern in the Bill is the absence of a time limit within which the Welsh Ministers must decide whether or not to accept an application. This should be remedied. Current experience of the DNS process, which has a validation period of 6 weeks in the case of EIA development (itself 2 weeks longer than the equivalent time period for accepting applications for development consent under the Planning Act 2008, for arguably less complex projects) is that Planning and Environment Decisions Wales (PEDW) is estimating between 10-12 weeks for validation. The inclusion of a statutory time period for validation of SIP applications in primary legislation would provide applicants with greater certainty and help to ensure that the headline 52 week determination period for SIP applications is not undermined by an unduly long or uncertain validation period. This is essential.

2.iv) Part 4 - Examining applications

The Bill provides for a number of different procedures for the examination of an application. It is therefore difficult for applicants to gauge upfront the likely cost and resource requirements of the new regime and to budget accordingly. As much of the detail is left to subordinate legislation, there should be clear guidance to provide applicants with greater clarity as to the factors that will influence the choice of procedure.

In order to fast track the delivery of new energy infrastructure in Wales, local inquiries should only be used in exceptional circumstances for the examination of SIP applications. NIPA expects that for most projects the most appropriate form of examination will consist of a primarily written process supplemented by hearings on specific issues where required, e.g. compulsory acquisition or project-specific issues.

NIPA is concerned by the wide powers under clause 50 for Welsh Ministers to direct further examination of an application by examining authorities. Clear parameters are needed in subordinate legislation (or guidance) to clarify the circumstances in which the power may be exercised – should be in exceptional circumstances only if developer confidence in the 52 week consenting period is to be maintained. This approach would also discourage the increasing tendency by some consultees of making late submissions which could and should have been made earlier in the examination process, or earlier still during pre-application consultation where the relevant information was available to enable the consultee to engage at that stage.

2.v) Part 5 - Deciding applications for infrastructure consent

NIPA welcomes the provision in the Bill for infrastructure policy statements to guide decision-making on SIP applications. The potential role of the policy statements in the SIP regime is strengthened by the clarification in clause 53 that in the event of conflict with the national development framework and marine plans, the policy statements will prevail. The introduction of infrastructure policy statements to guide the decision-making process for SIPs is also a key opportunity for Wales to influence, and lead, on the approach to low carbon and renewable energy projects and associated developments.

It is understood however that Welsh Government considers the relevant Bill provisions to be reactive powers and does not propose to introduce policy statements other than for novel technologies or issues. This is a major concern and NIPA strongly encourages the Welsh Government to reconsider the position and to introduce policy statement(s) covering the development of new energy and transport infrastructure. Whilst Future Wales contains a strong degree of general support for new renewable energy development, NIPA considers that the successful delivery of Wales' renewable energy targets requires the need case for additional energy and transport infrastructure to be expressed in the clearest and strongest possible terms, with a strong starting presumption in favour of development and an acknowledgement that it will not be possible to deliver the infrastructure required without some residual adverse impacts arising. Such policy

statements should also provide wide support to all types of decarbonisation including changes to existing projects converting into low carbon generation.

Similarly, it is essential that policy statements provide clear direction to decision-makers on how the national need for new energy development and local impacts should be balanced in the decision-making process. Otherwise, there will be a continued risk of uncertainty, delay and inconsistency in decision-making where projects are refused for reasons of local impact despite meeting the general national need identified in policy.

NIPA welcomes the powers in the Bill that would enable examining authorities to make decisions on particular types of SIP application. Whilst further detail is awaited as to the circumstances in which applications would be decided by examining authorities, in principle it is a practical tool which should enable decisions on less complex applications to be made earlier than the 52 week decision deadline.

Whilst the overall 52 week statutory timeframe for decisions on SIP applications is strongly welcomed, the Bill does not prescribe time limits on the various stages of the process, e.g. the examination of the application by the examining authority, the time spent by the examining authority in preparing its report of findings and conclusions on the application and overall recommendation and the consideration and decision by Welsh Ministers, which could potentially vary significantly from project to project depending on the circumstances. We strongly encourage the inclusion of statutory periods for each stage of the examination and decision-making process to provide applicants and other parties with more certainty.

Confidence in the statutory timeframe for decisions is a very important aspect of maintaining developer and investor confidence in the planning system and for securing crucial inward investment in renewable energy development, and for investment in transport Infrastructure. Statutory deadlines also help to focus participation in examination by local authorities, consultees and other affected parties.

2.vi) Part 6 - Infrastructure consent orders

The drafting of the Bill has understandably been influenced by other consenting regimes in Wales and England. The following comments are informed by extensive experience of using these regimes and of the difficulties that can be encountered in practice.

Infrastructure consent orders should be flexible instruments which provide applicants with sufficient scope post-consent to make changes to projects to respond to information available following site investigations and the input of contractors who may identify opportunities for environmental improvements in the final detailed design. It will be important that any guidance on the drafting of infrastructure consent orders enables a proportionate degree of flexibility to be built-in to the consent.

The ability to include other consents in an infrastructure consent order (whether 'deeming' the other consent to have been given or disapplying the need for it) is a welcome tool for developers and will help

the development of the new SIP regime as a 'one stop shop' for development consents for significant projects in Wales.

However, the extent to which the Bill will deliver a true 'one stop shop' is likely to be limited as under the Bill as drafted consenting bodies can simply block the inclusion of other consents in an infrastructure consent order. It is noted that regulations made under the Bill can override the need for consent from other consenting bodies in specified cases. NIPA supports regulations under the Bill conferring extensive exceptions to the need for the consent of other bodies to be obtained in order for those other consents to be included in an infrastructure consent order. The examination process will provide an adequate opportunity for the views of other consenting bodies to be raised and taken into account by the examining authority in making a recommendation on whether a proposed deemed consent or disapplication is appropriate in the particular circumstances of the case.

The provisions relating to special category land should also be simplified. In particular, there should be greater scope to authorise the compulsory acquisition of special category land where it can be demonstrated that the benefits of the development (particularly in the case of low carbon and renewable energy development which contributes to wider Net Zero targets) outweigh the harm that the loss of the land would give rise to.

Whilst it is appropriate that special category land receives protection and applicants will try to avoid the loss of such land, the possibility of special Senedd procedure applying to the compulsory acquisition of special category land in certain circumstances should be removed from the Bill. This process would duplicate the consideration and scrutiny that the SIP application will already have been the subject of as part of the examination process and is not consistent with the urgency in the scaling-up of low carbon and renewable energy infrastructure that will be required to meet Wales' decarbonisation objectives.

In relation to Crown land, the need to obtain the consent of the appropriate Crown authority should be limited to compulsory acquisition powers only, and not for other provisions in an order which relate to Crown land. NIPA's experience under other consenting regimes is that some Crown bodies require applicants to explain and justify the potential application of individual provisions of an order to each parcel of Crown land within the boundary of a project, which adds unnecessary time and cost to the process.

Whilst the power to make regulations dealing with the correction of errors is welcomed, and it is to be hoped that the powers would only need to be used sparingly, experience of the Planning Act 2008 regime is that a 'final' as made development consent order will often contain minor errors and inconsistencies which require correction. Under the Bill, the need for an applicant to request the correction of errors (where the errors are contained in an infrastructure consent order) gives rise to additional delay. In this regard, a practice that would assist in minimising the need for a correction order (and which is followed in other consenting regimes) would be for the Welsh Ministers to circulate to the applicant, on a without prejudice basis, the final version of an infrastructure consent order which it is proposed to be made in order for the applicant to comment on any minor drafting points. This is what currently happens with other types of statutory authorisations, e.g. Transport and Works Act Orders.

Powers to make amendments to infrastructure consent orders post-consent are to be welcomed. Implementing regulations should include a clear timetable for applications to amend orders to be determined. It should also be possible to amend orders even after works have been implemented.

2.vii) Part 7 - Enforcement

2.viii) Part 8 - Supplementary functions

NIPA welcomes the inclusion of a statutory duty on consultees to respond to consultation by the Welsh Ministers or examining authority and for Welsh Ministers to give directions to public authorities requiring them to take particular steps in relation to an application. It will be important for the statutory powers to be reflected in resourcing allocations and funding settlements to ensure that consultees can respond appropriately.

2.ix) Part 9 - General provisions

It is important for proposed transitional provisions to be consulted on with applicants and communicated at the earliest opportunity, particularly given that developers will have a pipeline of pending projects at different stages of development in the existing consenting regimes.

3. What are the potential barriers to the implementation of the Bill's provisions and how does the Bill take account of them?

The biggest barrier to successful implementation of the new regime is likely to be the resourcing and capability constraints facing consultees and other statutory bodies involved in the process. Public authorities should be adequately resourced to respond to SIP applications and engage at an early stage with applicants on proposals. This is the clear experience gained from the Planning Act 2008.

4. How appropriate are the powers in the Bill for Welsh Ministers to make subordinate legislation (as set out in Chapter 5 of Part 1 of the Explanatory Memorandum)?

5. Are any unintended consequences likely to arise from the Bill?

The Bill is being promoted at a time when the UK government is carrying out a review of the Planning Act 2008 regime, which similarly to the Bill introduced a unified consenting process for major infrastructure projects. The UK government has recently consulted on operational reforms to that system as part of its NSIP Action Plan and there are a number of lessons which can be drawn from the operation of that regime in designing and implementing the new SIP regime. NIPA has been actively participating in this review and consultation exercises.

It is imperative that Welsh Ministers take heed of the difficulties that have arisen in the Planning Act 2008 system when implementing the new SIP regime in Wales and, in particular, the need for (a) clear and detailed national policy, (b) statutory guidance, (c) efficient and proportionate examinations; and (d) adherence to statutory deadlines for decisions on all SIP developments.

6. What are your views on the Welsh Government's assessment of the financial implications of the Bill as set out in Part 2 of the Explanatory Memorandum?

7. Are there any other issues that you would like to raise about the Bill and the accompanying Explanatory Memorandum or any related matters?

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