

# The Role of Statutory Bodies/Consultees

**Ben Fullbrook**

## Introduction

- The role of statutory bodies
- Who are the statutory consultees/statutory parties
- Key statutory bodies
- Issues and tips

## The role of statutory bodies/consultees

- Pre-application consultee
- Statutory parties to an examination (ss.88(3) and 102(ca) Planning Act 2008)
- Occasionally licensing organisations
- Occasionally supervisory organisations
- “Like a planning application and appeal rolled into one”

## Consultation in Context

- Must be undertaken before application made (s.42 Planning Act 2008)
- Details of consultation to be included in “consultation report”, to be submitted with the application (s.37)
- Report must show:
  - What has been done to comply with consultation requirements
  - Any relevant responses
  - The account taken of relevant responses
- In fact statutory duty to “have regard” to consultation response (s.49)
- It is technically possible to combine consultation under PA 2008 with other consultation requirements (e.g. EIA scoping, but discouraged by PINS)

## Who are the statutory consultees?

- Section 42 Planning Act 2008: the applicant “must” consult:
  - Certain local authorities (s.43).
  - The GLA if the land is in Greater London.
  - The Marine Maritime Organisation (MMO) if development will affect or likely to affect certain “areas” (see below).
  - Those with estates and/or interests in the land and/or those who (after diligent enquiry) the applicant “thinks” would or might be entitled to compensation (s.44).
  - Such persons as may be prescribed

## Other Prescribed Consultees

- The Infrastructure Planning (Applications: Prescribed Forms and Procedures) Regulations 2009 (Reg. 3, Sch. 1, Para. 1)
- Varies depending on whether land in England, Scotland or Wales

<i>Column 1; Consultee</i>	<i>Column 2; Circumstances when that person must be consulted about a proposed application.</i>	<i>Column 3; Circumstances when that person must be notified about an application.</i>
The Welsh Ministers	All proposed applications likely to affect land in Wales	All applications likely to affect land in Wales
The Scottish Executive	All proposed applications likely to affect land in Scotland	All applications likely to affect land in Scotland
The relevant Northern Ireland	All proposed applications likely	All applications likely

## Bodies which must be consulted in all cases (England)

- Health and Safety Executive
- NHS and CCG
- Natural England
- Historic Buildings and Monuments Commission for England (Historic England)
- Fire and Rescue Authority
- Police and Crime Commissioner
- Relevant Parish Council
- Environment Agency
- MMO (applications likely to affect the marine area)
- Others...

## What if the consultee no longer exists?

- It can happen!
- DCLG guidance 2013 advises:
  - No need for strict compliance
  - Identify successor body and consult it
  - If not obvious consult PINS
  - If not possible, explain in report



## Statutory Parties to Examination

- Interested parties are entitled to make representations during the examination process (s.88) and attend hearings (s.91).
- “Interested party” defined in s.102(1)(ca) as including any statutory party
- Statutory party defined in s.88(3A) as a party specified in regulations by the Secretary of State
- The relevant regulations are the Infrastructure Planning (Interested Parties and Miscellaneous Prescribed Provisions) Regulations 2015/462.
- List includes: MMO, Natural England, Historic England, Health and Safety Executive (significant overlap with statutory consultees).

# Key Statutory Bodies – the MMO



- Established under Marine and Coastal Access Act 2009, s.1
- “General Purpose” (s.2) to ensure that activities carried out within its area are managed, regulated or controlled with the objective of making a contribution to the achievement of “sustainable development”, taking account of all relevant facts and matters, in a manner which is consistent and co-ordinated
- For DCO purposes, covers waters in or adjacent to England up to the seaward limits of the territorial sea.
- Applicants should have regard to the Marine Policy Statement (MPS), which forms the framework from MMO’s management of the marine area

# Key Statutory Bodies – the MMO

- MMO has specified that it wants to receive the following from developers:
  - a map and/or chart of sufficient size and scale together with coordinates in an appropriate format so that the proposed location(s) for development can be identified
  - a high level description of the type and size of the project
  - an outline of any project options, including any alternatives to those options already considered;
  - sufficient information to enable the impacts of the proposals on its areas of interest to be assessed;
  - detail of any hazardous materials which may be associated with the construction or subsequent use of the development
  - information regarding any compulsory purchase of land that may be needed, and where relevant, any land to be given in exchange
  - information on whether or not an environmental impact assessment (EIA) is being, or will be carried out
  - the deadline by which responses must be received
  - information on when an application is intended to be submitted to the Planning Inspectorate.

## Key Statutory Bodies– the MMO

- The MMO is also the body responsible for granting marine licences (required for certain works in or around the sea)
- Section 149A Planning Act 2008 allows DCOs for projects which affect the marine environment to deem marine licences.
  - This rolled up approach is broadly encouraged by PINS, although it is open to developers to make a separate application to the MMO
  - Where the two are to be rolled up, PINS advises that applicants agree the terms of draft marine licence before submitting the DCO application
  - Note that the MMO is also responsible for enforcing marine licences, regardless of whether deemed by the DCO
- Similarly the MMO is responsible for granting harbor orders (for changing powers or duties of a harbor authority). Subject to some exclusions, these can also be rolled-up with the DCO application (ss.145 and 33(2)(a) PA 2008)

## Key Statutory Bodies– Natural England



- Established under the NERC Act 2006
- England's statutory nature conservation body.
- Statutory purpose in s.2 NERC Act: *“to ensure that the natural environment is conserved, enhanced and managed for the benefit of present and future generations, thereby contributing to sustainable development.”*
- For DCO purposes, NE has the following functions:
  - Advises on impacts on protected nature conservation sites and designated landscapes within England and out to 12 nautical miles of the English coastline.
  - Consenting and licensing body for protected species in England above mean low-water mark (MMO anything below)

## Key Statutory Bodies– Natural England



- Statutory Nature Conservation Body for offshore renewable projects in English offshore waters (up to 12 nm)
- Statutory consultee for development of “best and most versatile” agricultural land and for the reclamation of minerals and waste sites to agriculture
- Natural England says: *“We can help applicants and the Examining Authority to better understand and value the benefits derived from the natural environment (‘natural capital’). We may advise on opportunities to secure positive environmental benefits from NSIPs. Priorities include delivering high quality, multi- functional green infrastructure, establishing more coherent and resilient ecological networks and providing and enhancing habitats for protected species. We can also advise on approaches and metrics that enable projects to achieve biodiversity net gain...”*

# Key Statutory Bodies– Natural England



- Natural England must also be consulted in relation to:
  - EIA
  - Habitats Regs Assessment
  - Operations likely to damage special interest features of a SSSI (s.28(I) Wildlife and Countryside Act 1981 requires SoS to notify and take account of NE's views on the above).

# Key Statutory Bodies – Historic England



- Established by National Heritage Act 1983, s.33 of which gives specific duties:
  - (a) secure the preservation of ancient monuments and historic buildings situated in England.
  - (b) promote the preservation and enhancement of the character and appearance of conservation areas situated in England, and
  - (c) promote the public's enjoyment of, and advance their knowledge of, ancient monuments and historic buildings situated in England and their preservation,
- “Ancient monument “ in this context includes not only scheduled ancient monuments but also the remains of vehicles, vessels, aircraft or other movable structures which Historic England consider of historic, architectural, traditional, artistic or archaeological interest.

# Key Statutory Bodies – Historic England



- Covers whole of England and all underwater archaeology within the English area of the UK Territorial Sea
- The grant of development consent will obviate the need for certain separate consents, including those under the Ancient Monuments and Archaeological Areas Act 1979 and Planning (Listed Buildings and Conservation Areas) Act 1990.

## Key Statutory Bodies – The Environment Agency

- The Environment Agency regulates certain activities that have the potential to harm the environment and people. It decides if relevant environmental permits and other consents and licences should be issued and, if so, what conditions should be applied. It monitors compliance with the permit / licence conditions and takes enforcement action if appropriate.
- The Environment Agency is a competent authority for the purposes of certain EU Directives and it also maintains an overview of risks to people and the environment from flooding and coastal erosion.
- The Environment Agency's regulatory, licensing and advisory powers and duties derive (inter alia) from a number of Acts and Regulations, including:
  - Environment Act 1995;
  - Environmental Permitting (England & Wales) Regulations 2016;
  - Water Resources Act 1991;
  - Flood and Water Management Act 2010;
  - Salmon and Freshwater Fisheries Act 1975 and Keeping and Introduction of Fish Regulations 2015;
  - The Planning Act 2008 (the PA2008) and secondary legislation made under the PA2008;
  - The Water Environment (Water Framework Directive) (England and Wales) Regulations 2017; and
  - Habitats Regulations.



# Key Statutory Bodies – The Environment Agency



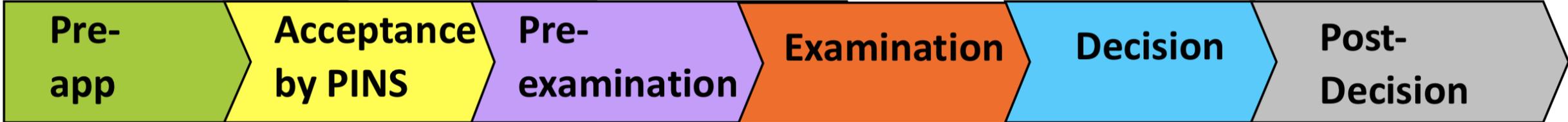
- Environmental Permitting Regulations 2016 (EPR).
  - Require operators of certain facilities, which could harm the environment or human health, to obtain permits from the Environment Agency in addition to the DCO
  - Permit assessments can significantly inform an inspector's determination of a DCO. But EA will not say whether it will grant permit or not until it issues final decision (or draft decision for public consultation)
  - Therefore applicants need to carefully consider timing. If permit decision not made then EA may not be able to comment on detailed technical matters raised during DCO examination
  - EA recommends submitting permitting application at same time as DCO

# Environmental Permit Regime

Applications submitted for permits

EA draft decision position to PINS

EA decision on permits



Application submitted to PINS

Secretary of State decision

# Development Consent Order

## The weight given to the views of statutory bodies

- In general, the Inspector must make up his/her own mind, but see ***Shadwell Estates v Breckland DC*** [2013] EWHC 12 (Admin), per Beatson J at §72:
 

*“72. Secondly, a decision-maker should give the views of statutory consultees, in this context the “appropriate nature conservation bodies”, “great” or “considerable” weight. A departure from those views requires “cogent and compelling reasons”: see R (Hart DC) v Secretary of State for Communities and Local Government [2008] EWHC 1204 (Admin) at [49] per Sullivan J, and R (Akester) v Department for the Environment, Food and Rural Affairs [2010] EWHC 232 (Admin) at [112] per Owen J. See also R (Jones) v Mansfield DC [2003] EWCA Civ. 1408 per Dyson LJ at [54].”*

## The weight given to the views of statutory bodies

- Also note requirements in specific National Policy Statements (NPS) – e.g. Airports NPS §5.12:
 

*“The applicant will need to demonstrate that Highways England, Network Rail and any relevant highway and transport authorities and transport providers have been consulted, and are content with the deliverability of any new transport schemes or other changes required to existing links to allow expansion within the timescales required for the preferred scheme as a whole, the requirements of the Airports NPS and other statutory requirements”*

## Issues facing statutory bodies

### Agency protecting English environment reaches 'crisis point'

**Exclusive: Natural England struggling to protect important sites after suffering budget cuts**



### Environment Agency budget cuts lead to drop in pollution prosecutions

News 14 Mar 2019 **Abi Kay**

Deep cuts to the Environment Agency (EA) budget have led to a drop in prosecutions for offences such as pollution, according to a legal expert.

### HSE business plan reveals further budget cuts

Chris Warburton

1 April 2016

HSE, Regulation



The HSE's annual funding from central government will be cut by a further 12.5% by 2019/20, bringing the total reduction since 2009/10 to 46%.

The money the HSE receives from its parent department, the Department for Work and Pensions (DWP), will decrease year on year throughout the current parliament. In the final

### Action against illegal fishing falls after cuts at enforcement agency

**Data released to Greenpeace in response to FOI requests show number of prosecutions has dropped significantly in recent years**



▲ Written warnings about illegal fishing activities have also fallen, by 66% in the last five years. Photograph: Cathal McNaughton/PA

## What if the statutory body does not respond?

- Planning Act 2008 does not oblige statutory bodies to participate in process
- Some do regard it as a “discretionary service” (e.g. MMO Feb 2019)
- Arguably failure to participate might be a failure to act in accordance with statutory purpose and could be subject to JR
- Unless their involvement is essential (see e.g. of airports NPS above), an applicant can proceed without a response from a statutory body and inform the inspector that he/she will have to decide the matter without the benefit of evidence from the statutory body

## Can statutory bodies charge fees?

- Will depend on powers of specific bodies.
- MMO announced plans to charge (£122/h) pursuant to s.27 MCA “discretionary service”
- NE will not usually charge for s.42 consultations and during examination
- EA will provide limited amount of pre-permitting advice for free, but will otherwise charge £100/h plus VAT

## General Guidance for dealing with statutory bodies

- The earlier you engage, the better – especially where technical input is required
- The more fluid the plan at this stage the easier it will be to adapt to consultation response
- The more detail provided, the more informed and definitive the consultation response will be
- Tension between these principles can sometimes be resolved by an iterative, phased consultation:

*“For example, applicants might wish to consider undertaking an early consultation at a stage where options are still being considered, followed by a further, possibly shorter consultation on a preferred option to inform the public and to gather views on that option.”*

## General Guidance for dealing with statutory bodies

- Get agreement about methods and standards of assessment to be adopted.
- Get agreement in writing.
- Think about the big picture – e.g. do I also need a separate licence, permit or consent; will this impact on the DCO process?
- Look carefully at the NPS and establish which consultees might be particularly important to your application

**Thank you for listening**

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