

Updating the electricity generating stations and overhead lines inquiry procedure rules in England and Wales: An energy review consultation

Response from the Nuclear Free Local Authorities

NFLAs welcome the opportunity to comment on these proposals

Comments:

Para 1.1 We have strong reservations about the compliance of the Energy Review with administrative law principles affecting the lawfulness of that consultation.

Para 1.4 NFLAs consider that the premise for these proposals is poorly substantiated. It is assumed that these are required to streamline the decision-making process. Eddington and Barker have pointed to an alternative cause of delay in current practice, viz., the length of time that Ministers take to arrive at decisions on inspectors' recommendations. Whilst we do not favour the replacement of decisions made by accountable politicians at local or national level by those made by unaccountable officials, we favour the recognition of the fact that the time taken by Ministers to arrive at decisions is more open to criticism than the length of any inquiry.

It is stated that the proposed procedures take account of existing best practice i.e. the TCP(MIIP)(E)Rules 2005. What is best for a developer or a government department is not necessarily best for other participants and we have reservations equally about aspects of the 2005 Rules.

Para 1.5 We think it unfortunate that the Government are pre-committed to reform when the case for reform is poorly demonstrated. In our view, for example, the references to any anti-competitive economic elements in development planning regulation in England compared with other jurisdictions are propagandist in nature and poorly researched. They should not provide the basis for unspecific "fundamental reform".

Para 1.7 Improved pre-inquiry procedures

First bullet point

The extent to which an objecting authority may wish to participate may be very difficult to gauge accurately as this will depend on the extent of the developer's case and on the resources available to a QPA, NGO or other objector. The issue of the inequality of arms at an inquiry receives no consideration in these rules and reflects very poorly on Government commitments to fairness and equity in environmental decision-making and will be in breach of the letter and spirit of the Aarhus Convention and EU legislation on environmental assessment. It will ordinarily not be the QPA's fault that for reasons of national policy its area has been chosen to host a facility, yet until now little or nothing has been done to ensure that an authority saddled with this national responsibility is provided with resources commensurate with the need to scrutinise thoroughly any proposal, as it must if it is to discharge its representative responsibilities to its community, and to secure the resources to obtain the specialist technical advice it will

require. This burden may be increased by the need to host the venue for the inquiry and undertake a substantial administrative burden in connection with that.

Second bullet point

We support the use of technical advisers. It is important for their credibility that the selection process is open and transparent and that the local community that are to be affected if any development eventually is approved are consulted in their appointment.

Third and fourth bullet points

No comment

Fifth and sixth bullet point.

The requirement that QPAs and qualifying objectors (QOs) identify areas of disagreement is sensible in an equal contest but impractical if QPAs and QO's are not adequately resourced to identify such areas with the professional and technical competence that the heavily resourced applicant, regulators and Government departments may bring to bear. In the absence of such equality, a prohibition on the later identification of points of interest by a QPA or QO would be inequitable and counterproductive to the rigorous examination of an application. The same arguments, albeit in reverse, apply equally to any statement of common ground.

Para 1.7 Improved Inquiry procedures

First bullet point

To ensure that any timetable would not breach fair hearing principles, the timetable must be expressed as a target or there must be a mechanism available to enable the timetable to be challenged and/or extended appropriately.

Second and third bullet point

No comment

Fourth bullet point

We have serious objections to this power. Concurrent sessions can only be achieved by the appointment of additional inspectors. They can only be practical and fair where QPAs and QOs, which wish to present cases at more than one concurrent session, or observe and listen at more than one concurrent session, have their resources increased by the same multiplier as the inspectorate's resources. This does not extend to mere presentation of a case or attendance at a session but to the timetabling of the use of resources e.g. money, volunteers, technical advisers and time required to prepare documents and notes for cross examination for example. We believe that concurrent sessions will be wholly impractical and subject to legal challenge where a QPA or QO is disadvantaged as envisaged and therefore counterproductive.

Fifth bullet point

The consultation document flags up that the proposed rule would empower the Inspector to direct that certain issues be primarily dealt with through the submission of written evidence and that cross examination on these be refused "to focus the oral hearing of the inquiry on critical issues". This power is intended to be used to curtail evidence and cross-examination on "matters such as national need/energy policy, health and safety and security"¹ It is our view that the use of the proposed power in the way contemplated would be open to legal challenge and would fundamentally undermine confidence in any public inquiry within the area in which it was being held as objectors saw their concerns

¹ P67 Consultation document

being rudely dismissed as irrelevant. Safety is of course fundamental to the acceptability or otherwise of any nuclear development. Is the Government seriously intent on introducing a new rule whose objective will be to prevent local people and their elected authority seeking at any inquiry answers to their concerns about safety? This will not work without serious political damage to the integrity of the planning system and the acceptability of any decision favouring any nuclear development. The proposal is liable to cause the same damage that inquiries into road proposals did in the 60s and 70s when perceptions that public inquiries failed to allow for the proper expression of dissent and the examination of developer's cases led to incidents of civil unrest and in later decades to widespread physical opposition to development on the ground.

The proposed rule and its intended use present a fundamental attack on the right to be heard since the making of an objector's case depends on stating the arguments for his or her point of view and the counter-arguments to the opposing point(s) of view. Identifying the weakness in an argument is the subject of cross-examination. "...the benefit of cross-examination as an incident to the individual's right to be heard should never be forgotten. It is *paramount*."² (our emphasis). If the rule is introduced and used in the way intended, then adjournments of any inquiry are likely to be sought whilst judicial review proceedings are sought. If any adjournment for such a review were refused by an inspector, that would also be rolled up into the application for a review. The end result in terms of delay and political damage would be wholly counterproductive and extend the length of the inquiry, the exact opposite result of that sought.

Para 1.7

e-Government

There are those without access to or familiarity with computers. It is important that they are not disadvantaged by these proposals

Para 1.19

Q2 See response to Para 1.7 Improved Inquiry procedures Fifth Bullet point above.

Q3 The length of a summary would ordinarily be in proportion to the length of the evidence. A limit of 1500 words may be restrictive.

Q4 Yes it should be open to, but not obligatory for, all parties (other than applicant and QPA) to participate.

Q5 The rules and the use of the powers provided under the rules are unwise and may give rise to legal challenge as identified elsewhere in these comments.

Q6 Technical assessors could certainly not be from regulatory agencies with regulatory decisions to make of their own in connection with the proposed development e.g. HSE, Environment Agency, OCNS, DoT.

Q7, Q8 No comment

Q9 It is entirely disingenuous for the Government to assert that "the new rules will continue to allow the full scrutiny of issues in planning inquiries" Their intent is in part to prevent exactly this.

² Lionel Read QC, JPEL 1997 "Inquiries - the Right to be Heard" p38

Q11 To ensure the effective running of public inquiries, the Government must ensure that the rights and resources for QPAs and QOs and other objectors at inquiries are consistent with its legal and political commitments to participation to be found in the Aarhus Convention, and in EU laws on environmental assessment and public participation and to a fair hearing. A “pot of money” or failing that, counsel with “a roving remit on behalf of the sceptical British public” should be appointed as referred to in the following extract from a lecture given in May last year by Lord Justice Brooke, who as a QC was Counsel to the Sizewell Inquiry:

“...I must go back now to the early 1980s and my experiences at the Sizewell Inquiry. In December 1979 the Government announced its plans to embark on a programme of building ten nuclear power stations, if the necessary consents and licences were forthcoming. In July 1981 the CEGB announced its proposal to build a “first of a kind” pressurised water reactor at Sizewell, and Sir Frank Layfield was appointed to conduct a statutory inquiry under the Electric Lighting Act 1909. The Three Mile Island incident had occurred recently, and there had been huge cost over-runs in the earlier nuclear power station programmes. Add to all this widespread public scepticism about the safety of nuclear power, and its historical links with the nuclear weapons programme, and it is not surprising that the Government promised a full, fair and thorough inquiry. It also announced a long list of issues into which the inspector had to inquire and report. It added that safety was to be paramount, whatever that meant.

It was easy to use words like these, but how was the aim to be achieved? When the Inspector convened the first preliminary meeting, he could see that most of his leading contemporaries at the planning Bar were appearing for the big battalions. The CEGB, the National Nuclear Corporation, who would build the nuclear island, the Department of Energy, the Nuclear Installations Inspectorate, and the Suffolk County Council all instructed leading and junior counsel, backed by cohorts of solicitors, experts and other support resources paid for by the taxpayer or the electricity consumer. At this inquiry the local county council was adopting a neutral role, in contrast to the adversarial role adopted by Cumbria and Somerset at other nuclear inquiries, when they took forward the objectors’ main points of challenge at public expense.

Opposed to them were a miscellaneous array of NGOs and private individuals who had no access to public funding, with Ken Livingstone’s GLC playing a rather idiosyncratic role. Nearly all the other objectors had to raise funds by appeals to the public, coffee mornings, bring and buy sales and any other honest way of raising enough money to mount a respectable case against what they perceived to be a massive threat to the environment. After all, it was not one but ten nuclear power stations which were really in issue. There were other objectors, like a consortium of Yorkshire councils, which intervened to state their case on discrete issues, such as the threat that such a programme posed to the way of life of their mining community. And there came a time when the Inspector invited the nationalised Scottish electricity authority to present the case for continued investment in gas-cooled reactors.

But in general the scene at those early meetings resembled a cadre of Goliaths, with their clubs and battle axes, in the red corner, and a squad of Davids, with their slings and pea-shooters, in the blue corner. After hearing submissions from the parties the Inspector reported to the Minister that he could not undertake a fair inquiry on this basis. He transmitted the objectors' wish that a "pot" of public money should be allocated to help them mount their cases with proper support. They had already divided among themselves different aspects of the opposition: the CPRE concentrated on opposing the economic case, the Friends of the Earth the nuclear safety case, and so on. But there would inevitably be a limit to what they could achieve with the sums they were likely to raise.

The Minister said "no". I believe that the Department of Energy might have been prepared to help, in order to save the integrity of its inquiry, but the Department of the Environment, which was much more heavily involved in the public inquiry scene, was anxious that no kind of precedent should be created. The Inspector convened another meeting to help him decide what to do next.

This time he reported that he could not conduct an inquiry fairly on this basis if he were to be both inquisitor and judge. At the very least, he said, counsel to the inquiry must be appointed, so that he and his assessors would be able to deploy leading counsel to pursue the inquiries they wished to pursue.

And this is where I came in. Sir Frank had structured the inquiry so that it would start in January 1983 and the first 40 days would be taken with the proposers' witnesses reading their proofs of evidence and then answering questions posed to clarify what they were saying. When this stage was over the witnesses would return, one by one, to be cross-examined. About four days after the inquiry started, I was invited by the Treasury Solicitor to act as Counsel to the Inquiry. My job was not to present a case, but to pursue such lines of inquiry into the proposals as I, or the Inspector and his assessors, wished to pursue. In essence I had a roving remit on behalf of the sceptical British public to probe every aspect of the case that was being put forward for this massive new public investment in nuclear power. I remember meeting Harry Woolf at that time when he said it must be one of the most interesting tasks ever given to an English silk. I did not disagree.

This is not the occasion to say very much about the details. I started asking questions in April 1983 and I went on asking questions until the evidence stage of the Inquiry ended 21 months later. I was allotted junior counsel, a solicitor, and eventually an administrative assistant as well. I was also allowed access to expert advice on matters on which the Inspector and his assessors were not qualified to instruct me, or on which I needed additional help. Although one never earned a fortune when acting for the Crown, I am sure that the cost of my team's involvement was greater than the cost of providing a pot of money for objectors would have been. On my last day at the Inquiry the Inspector was good enough to say that he did not know how he could possibly have conducted the Inquiry without me.

What is much more relevant in the present context is my impression of this method of ensuring appropriate protection for environmental issues at a major inquiry. In this country we are wedded to our love of adversarial confrontations at courts and inquiries. We think that inquisitorial methods of inquiry savour of a continental way of doing things, and that they aren't likely to elicit all the facts or satisfy people that controversial proposals have been properly looked into. From my own experience I know that I could not have done that job properly if there had not been a substantial adversarial element on which I could build. I would read the expert evidence produced by the Town and County Planning Association ("TCPA") or the CPRE or the Friends of the Earth or the Electricity Consumers' Council. After questioning their witnesses I would have a foundation on which to continue to probe the merits of the proposals after those objectors had run out of money. The TCPA, for instance, was represented by its director, another David Hall, and they were grateful when I picked up points their witnesses had made and pressed them home when I was cross-examining relevant witnesses.

In many respects the Sizewell Inquiry may have been a one-off, because the subject-matter was so important and so difficult, the volume of public scepticism so intense, and the strength of the competing parties so lop-sided. *The experience taught me, however, that when matters of great public interest are to be examined at a public inquiry, something extra may have to be done to level the playing-field if the public are to be satisfied that the inquiry process being conducted in their name is really full, fair and thorough, and not a public relations whitewash.* I was interested to see that the Friend of the Earth reiterated recently the points they made to Sir Frank Layfield in 1982 about the need for public funding of objectors when the public interest warranted it.

This is all I want to say about some of the steps that may have to be taken to protect the integrity of the public inquiry process when the environment is at risk"³ (our emphasis)

Paragraph 1.20 to 1.21

We note that it is intended that the rules will come into force on 6th April i.e. 9 weeks after the close of the consultation and that the rules will be laid "as soon as parliamentary time allows following the closure of the consultation." This does little to engender confidence that comments will be given careful thought. We would like to be notified by email

- when the rules are first laid;
- when the responses and the Government's response are published by the DTI.

We assume the latter will take place before the former.

³ Professor David Hall Lecture, May 2006, Environmental Justice: the Cost Barrier, Brooke LJ

2 Summary of proposals

Para 2.1 This states, inter alia, “ we believe that the measures will not adversely affect the ability of interested parties to engage in the consideration of a specific proposal for a new large electricity infrastructure project.” We remain to be satisfied that this belief is wholehearted. The Department should be more honest and admit that the intention is to curtail this ability with a view to reducing delay as it sees it.

Para 2.5 It is wrong that a QO’s time limit for objecting (28 days) is so much shorter than a QPA’s (4 months) QO’s time limits should be extended to match QO’s. Objectors who currently fail to meet the 28 day deadline should not be forced to rely on the discretion of the Inspector to appear, but should have improved rights by the increase in the time limit as argued for here.

Para 2.18 The Inspector’s note of the pre-inquiry meeting should not be restricted to the main participants but should be sent to all those who attended the meeting.

Para 2.19 The information on the timetable and evidence should be circulated not just to those “entitled” to attend but also to those who *wish* to attend.

There should be provision for a review of the timetable where it manifestly cannot meet the requirements to consider all relevant matters in the time originally provided for.

Paras 2.22 to 25 Concurrent hearings

We have expressed our concerns about the practicality and fairness of these measures

Para 2.27 Prohibition of cross-examination

We have already stated our major concerns on this aspect of the proposed rules. The proposed exercise of this rule proceeds in our view in any event on a legally flawed and politically unacceptable strategy to prevent members of the public and their municipal and non-governmental organisations raising entirely legitimate and relevant matters in any inquiry. We have already proposed a joint inquiry process that would have the merits of ensuring that all relevant matters were rigorously considered within an inquiry format.

2.30 Site Inspections.

We find it odd indeed to think an inspector would not need to inspect the site and do not see the merit of removing this obligation.

Regulatory Impact Assessment

2.1 We question the use of the word “efficient” Short “efficient” inquiries were held of less than a day each in many instances when the first tranche of nuclear power stations were built. Their waste products now loom large in the simply colossal estimates for dealing with the wastes, currently in the region of £75 billion. An efficient inquiry must rigorously expose the project to a proper consideration of all its potential disadvantages

and allow scrutiny of these by way of cross-examination. This patently did not happen in these earlier short inquiries.

Major cost overruns affecting the current Finnish new nuclear build project provide a clear warning. It will be important to be sure that the economics of any project are properly examined to ensure that, regardless of protestations that no public subsidy would be required, the public is not required

- to subsidise construction when a more realistic appreciation of the economics of new build begins to be uncovered or, in due course,
- to finance liabilities that arise on the bankruptcy of the utility

2.3 and 5.1.3 and 5.2.3 To argue that shorter inquiries are advantageous because they will, in part, lessen the burden on objectors because ... they will be given less opportunity to make their case and ...therefore spend less money is disingenuous.

It is fundamentally disadvantageous to an objector to take away the practical opportunities they would otherwise have to make their objection. It also shows a poor appreciation of reality to say of an objector, frequently unable to afford legal representation in the first place, that a shorter inquiry will reduce the costs of his or her legal representation.

The evidence referred to shows that 36 months was the average period to achieve consent, but this was considerably affected by the failure of the Secretary of State to make a prompt decision. For the Department to, in essence, rely tacitly on its *own* failings as part of a rationale for depriving objectors of their right to examine a proposal in all its major aspects is an unhappy state of affairs. The London International Freight decision was with the Government for 15 months of the total of 41 months from application to decision and the Tyne Tunnel decision, which took some 30 months to be decided was with the Government for decision for some two years of that period.

5.1.3 Environmental

We do not agree with the conclusions of the Energy Review on nuclear.

Annex C Draft Guidance. Appendix 2 Exemplars of Different Inquiry Procedures

We object to the fourth and fifth bullet points under the heading Discretionary Streamlining Measures on grounds already explained.

ENDS

31 January 2007

J.K.Woolley, LLB (Hons), MA (Environmental Law), Solicitor
Legal Adviser, UK Nuclear Free Local Authorities
Solicitors Office, 41 Rupert Rd, Sheffield S7 1RN
Tel/Fax: 0114 220 4452
Email: jkwoolley@gn.apc.org