The City of London Law Society

4 College Hill
London EC4R 2RB

Tel +44 (0)20 7329 2173
Fax +44 (0)20 7329 2190
DX 98936 – Cheapside 2

mail@citysolicitors.org.uk

www.citysolicitors.org.uk

BY POST AND EMAIL (majorinfrastructure@communities.gsi.gov.uk)

Planning: Infrastructure & Environment Team
Department for Communities and Local Government
Zone 1/J6 Eland House
Bressenden Place
London SW1E 5DU

7 January 2013

Dear Sirs

PLANNING & ENVIRONMENTAL LAW SUB-COMMITTEE RESPONSE TO DCLG CONSULTATION " *Nationally significant infrastructure planning: expanding and improving the 'one stop shop' approach for consents*"

The City of London Law Society ("**CLLS**") represents approximately 15,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees. Please accept this letter as a formal response on behalf of the City of London Law Society Planning and Environmental Law Sub-Committee to the above consultation launched on 26 November 2012.

We thank the DCLG for the opportunity to comment on the proposed amendments to the consenting regime for nationally significant infrastructure projects and attach our response to the questionnaire.

Yours sincerely

Alasdair Douglas
Chair, CLLS

THE CITY OF LONDON LAW SOCIETY
PLANNING & ENVIRONMENTAL LAW SUB-COMMITTEE

Individuals and firms represented on this Sub-Committee are as follows:

Rupert Jones (Weil Gotshal & Manges LLP)(Chairman)
Mrs V.M. Fogleman (Stevens & Bolton LLP)(Vice Chairman)
J. Bowman (Field Fisher Waterhouse LLP)
S. Charles (K & L Gates LLP)
M.D. Cunliffe (Forsters LLP)
A.G. Curnow (Ashurst LLP)
P. Davies (Macfarlanes LLP)
M. Elsenaar (Addleshaw Goddard LLP)
D. Field (Wragge & Co LLP)
M. Gallimore (Hogan Lovells International LLP)
I. Ginbey (Clyde & Co LLP)
Ms S. Hanrahan (Winckworth Sherwood LLP)
R. Holmes (Farrer & Co LLP)
N. Howorth (Clifford Chance LLP)
Ms H. Hutton (Charles Russell LLP)
B.S. Jeeps (Stephenson Harwood LLP)
R.L. Keczkes
Dr. R. Parish (Travers Smith LLP)
T.J. Pugh (Berwin Leighton Paisner LLP)
J.R. Qualtrough (Bircham Dyson Bell LLP)
J. Risso-Gill (Nabarro LLP)
Ms. P.E. Thomas (Pat Thomas Planning Law)
D. Watkins (Linklaters LLP)
S. Webb (SNR Denton UK LLP)
M. White (Herbert Smith Freehills LLP)
C. Williams (CMS Cameron McKenna LLP)
B.J. Greenwood (Osborne Clarke)(Secretary)

How to respond:

The closing date for responses is Monday 7 January 2013.

This response form is saved separately on the DCLG website.

Responses should be sent preferably by email: majorinfrastructure@communities.gsi.gov.uk

Written response to:

Planning: Infrastructure & Environment Team
Department for Communities and Local Government
Zone 1/J6 Eland House
Bressenden Place
London SW1E 5DU

About you:

i) Your details:

Name:	Anthony G. Curnow
Position:	Member
Name of organisation (if applicable):	City of London Law Society: Planning & Environmental Law Sub-Committee
Address:	Ashurst LLP, Broadwalk House, 5 Appold Street, London EC2A 2HA
Email:	anthony.curnow@ashurst.com
Telephone number:	0207 859 1375

ii) Are the views expressed on this consultation an official response from the organisation you represent or your own personal views?

Organisational response

iii) Please tick the box which best describes you or your organisation:

District Council

Metropolitan district council

London borough council

Unitary authority/county council/county borough council

Parish council

Community council

Non-Departmental Public Body (NDPB)

Planner

Professional trade association

Land owner

Private developer/house builder

Developer association

Voluntary sector/charity

Residents' associations

Other

Please comment: Professional Body (City of London Law Society)

iv) What is your main area of expertise or interest in this work (please tick one box)?

Chief Executive

Planner

Developer

Surveyor

Member of professional or trade association

Councillor

Planning policy/implementation

Environmental protection

Other

Please comment: Planning Lawyer

v) Would you be happy for us to contact you again in relation to this questionnaire**?**

Yes

Consultation Questions

Please refer to the relevant parts of the consultation document for narrative relating to each question.

Question1: Do you support the proposal to establish new bespoke consent management arrangements within the Planning Inspectorate? Do you have any comments about the structure and governance of the arrangements? Do you think these arrangements will make the overall consents process more efficient? If not, what further reforms would you suggest, including a greater role for the Planning Inspectorate? [Paras 20-25]

Response:

The arrangements have the potential to make the process more efficient. It would be particularly helpful if PINS could engage at an early stage with the other regulators and the promoter to define which issues/aspects of the project will be considered and consented by PINS or the other regulators. Two specific areas in which bespoke management arrangements could streamline the process would be:

- **To provide for PINS to put in place liaison arrangements between it and the relevant regulator (as has previously been done by way of Memorandum of Understanding) which would co-ordinate the timing of granting of other consents or "minded to grant" confirmations. This would address the problem of PINS seeking confirmation that other consents have been granted prior to the DCO being recommended for confirmation where some regulators have indicated that they will not grant related consents until the DCO has been granted.**
- **To provide for PINS to be the "lead" competent authority in situations where more than one competent authority is required to undertake an appropriate assessment (as envisaged in by the July 2012 DEFRA Guidance on the Habitats Directive "*Guidance on competent authority coordination under the Habitats Regulations*"[1])**

Given the sophisticated nature of most promoters, use of the proposed arrangements should be entirely optional as there may be good reasons not to use them in particular cases, for example where promoters have existing lines of communication in place with the relevant regulators.

Where use is made of the proposed arrangements, the interrelationship between PINS and promoters will need to be clear, for example who is accountable for ensuring compliance with any proposed timetable and who has overall responsibility for coordinating matters. Any timetables imposed should be flexible enough to accommodate subsequent programme revisions resulting from design and other changes. Promoters should not be penalised for timetable changes, especially if they result from consultation, nor should timetables be used to force promoters into fixing the details of a project too early in the process.

The consultation states that the unit will have no formal powers and it is important that this should be the case, to avoid adding an additional layer of mandatory timescales and regulations to the DCO application procedure.

The consultation also states that the proposed arrangements will be free of charge but that this will be kept under review. Any proposal to introduce a fee

[1] http://www.defra.gov.uk/publications/files/pb13809-habitats-guidance.pdf

should take care not to undermine the cost-saving and streamlining objectives of the DCO process itself.

Marine Licences under the Marine and Coastal Access Act 2009 should also be included in this process. Whether marine licences are to be included as deemed under the DCO (under s149A) or applied for separately, the MMO's requirements for information will still need to be addressed.

Question 2. Do you agree with the proposal to streamline the list of consents that are administered by consenting bodies outside of the Development Consent Order process (Annex B)? Have we identified the right consents to be removed? [Paras 26-27]

Response:

Items 16, 17 and 18 of Part 3 of Annex B *(Consents no longer applicable – subsumed within other legislation)* have already been removed from the Infrastructure Planning (Miscellaneous Prescribed Provisions) Regulations 2010 by virtue of regulation 20 of the Environmental Permitting (England and Wales) (Amendment) Regulations 2012 (SI 2012/630).

Aside from shortening Part 1 of the Schedule to the Infrastructure Planning (Miscellaneous Prescribed Provisions) Regulations 2010 (the "2010 Regulations") , we query whether the deletion of items 1 to 15 of Part 3 of Annex B will streamline the infrastructure consents process in practical terms. Paragraph 27 of the consultation stresses that developers would still need to engage with these consent requirements where they are relevant (even if this is unlikely in the context of nationally significant infrastructure). What this means is that the "one-stop-shop" approach is actually being made unavailable for those cases where such consents are necessary. Developers would be obliged to seek those consents separately to a DCO and would be denied the opportunity of seeking a DCO provision removing the need for such consents. This actually reduces flexibility for promoters. We would prefer to see a full list of consents in the 2010 Regulations.

Streamlining may be better achieved if any of the full list of consents could be included within a DCO or disapplied without consent from the relevant regulator. This would be a helpful change. It may make limited difference in practice, since the relevant regulator will likely still want to understand the effect of any inclusion/ disapplication and may object if not satisfied, but such objection would be captured within the DCO process rather than stand outside of it.

There is an apparent conflict between some of the consents listed in 2010 Regulations and the wording of section 150(1) of the 2008 Act. An example is a consent under s23 of the Land Drainage Act 1991. Under section 23(6) of the 1991 Act, the requirement for consent itself does not apply where the works in question are being carried out under an Act or an order having the force of an Act (such as a DCO made as a Statutory Instrument). It is not entirely clear how this sits with s150 of the 2008 Act, which provides that consent of the relevant body is needed if a DCO is to include a provision the effect of which is to remove the requirement for the prescribed consent. In such cases, it would be helpful for it to be made clear if the consent of the relevant body is not required where the development would be carried out under a DCO made as a Statutory Instrument.

Question 3. Do you consider that the list of prescribed consultees should be reviewed? Do you agree with the suggested amendments as outlined in Annex C? If not, what are your alternative proposals? [Paras 28-30]

Response:

We agree that the list of prescribed consultees should be reviewed and updated for clarity. However, it is not clear in each case why certain bodies are proposed to be removed, in particular those relating to railways. It would therefore be helpful to have an explanation to assist with commenting on this list.

Question 4. Do you agree with the proposition to amend the current definition of the word 'relevant' to exclude the mandatory consultation of bodies that are more distant from the development site? [Paras 31-32]

Response:

We agree with the proposal to amend the current definition of the word "relevant". This will avoid unnecessary consultation and promoters may still consult these bodies voluntarily where appropriate.

Question 5. We would also welcome views on or practical examples of how the consenting regime is currently working for nationally significant infrastructure projects and other suggestions on where the regime could be improved. We are also interested to understand more about the costs involved in applying for consents and would welcome responses on this issue.

Response:

In practice promoters have sometimes found it difficult to get consent from other regulators as the relevant body under s150 of the 2008 Act, so the use of s150 'disapplications' has been limited to date. The proposed arrangements may help with this by giving a more structured process for the regulators to set out what information they will require for giving their consent under section 150 rather than requiring a separate application. However, in practice the more detailed technical information that the regulators tend to require for some of the other consents may not in any event be available until a later stage of the project so separate consents (or protective provisions) could still be required.

With regard to costs, clarity is required as to the mode of charging for the DCO examination process, given the current uncertainty as to whether the correct basis is the number of examination hearing days or the total number of days spent by Inspectors during the overall examination process.

There are still a number of inconsistencies and a lack of clarity within parts of the DCO system and targeted guidance on matters such as those noted below could usefully be developed:

- **Content and scope of preliminary environmental information reports.**
- **Direction as to the types of costs which do and do not appropriately form part of PPA agreements.**

- **Better co-ordination of EIA work being undertaken by local planning authorities and developers within the area to reduce duplication and costs.**

We note this consultation is limited to England, however DCLG is working closely with Wales in considering streamlining proposals. We support this liaison with Wales and note there are a number of areas in which DCOs in Wales could be streamlined.