

CORONAVIRUS: UK MAJOR INFRASTRUCTURE PROJECTS SIGNIFICANTLY DISRUPTED?

With the outbreak of Coronavirus (Covid-19), the Government has been working overtime to introduce new measures across the board to resolve issues as they arise and, to the extent possible, pre-empt new ones.

Following our recent briefing on the impacts on the Town and Country Planning system, this briefing looks at the ways in which Coronavirus is affecting the consenting of Nationally Significant Infrastructure Projects (NSIPs) throughout England and Wales, and what solutions the Government and the Planning Inspectorate are developing to address the inevitable disruption in the interim.

CURRENT STATE OF PLAY

According to the Planning Inspectorate (PINS) website, there are currently 29 active NSIPs. Of the 29 active projects, five development consent order (DCO) applications are awaiting examination; eight are in the midst of examination; two await a recommendation by the examining authority; and 14 await a decision from the Secretary of State.

The Planning Act 2008 imposes strict timeframes for the examination and determination of DCO applications. Once a preliminary meeting is held, the clock starts: six months to examine the application, three months for the examining authority to make a recommendation to the Secretary of State, and a final three months for the Secretary of State to decide whether to grant or refuse the application. The purpose of these strict statutory timeframes is to avoid marathon planning processes for the consenting of NSIPs such as that experienced for Heathrow's Terminal 5.

DCO EXAMINATIONS

DCO applications that are about to start or are in the midst of examination are likely to experience the greatest disruption as a result of the ongoing Coronavirus situation. The postponement of all examinations will make scheduling and progressing examinations considerably more challenging.

PINS has sought to address some of the biggest uncertainties facing DCO examination by issuing [guidance](#) on 17 March 2020 outlining the Coronavirus measures to be put in place. Notably, the guidance has directed that all preliminary meetings and hearings (issue-specific, open floor and compulsory

Highlights

- 29 active DCO applications at risk of delay due to Coronavirus.
- Planning Inspectorate is seeking to introduce flexible measures to enable consenting processes to continue.
- The courts are also adjusting practices but delays are inevitable. This may impact the Drax Re-Power DCO judicial review and any challenge to the Court of Appeal's decision related to expansion at Heathrow.
- Preparation and designation of new NPSs also likely to be delayed while Government attention remains squarely on Coronavirus management.

purchase) are postponed until further notice. Site inspections in London are also postponed. In all other cases, site visits may go ahead provided the Inspector is able to travel to the site without using public transport, in which case they may go ahead on an unaccompanied basis.

We expect that preliminary meetings and hearings are likely to remain postponed until PINS can implement technological solutions to hold these events in an appropriate fashion. It has been reported that a team of planning barristers from No.5 Chambers and Kings Chambers have already put forward proposals for electronic document sharing and video-conferencing which will be considered by PINS, the Planning and Environmental Bar Association and the Ministry of Housing, Communities and Local Government this week. PINS has also announced that it has been undertaking small-scale tests of technical solutions over the past week and so we expect that they will shortly announce how hearings will be held remotely.

Aside from the preliminary meeting and specific hearings dates, the rest of the examination process is largely written, made up of multiple rounds of written questions and responses. In the circumstances, we think it is likely that the majority of written deadlines will remain unaffected. However, inspectors and examining authorities have discretion to determine how individual cases proceed and, as such, we may see some deadlines shift to accommodate new working arrangements of applicants and interested parties.

PINS is yet to issue guidance addressing whether and if so how applicants should comply with their various statutory obligations during examination which may be otherwise impaired as a result of Coronavirus. For example, the obligation to give notice of specific matters and ensuring documents are made available for public inspection. We expect that some applicants may struggle or be slow to meet their statutory obligations in the coming weeks while they find appropriate workarounds.

Running in parallel throughout the examination are negotiations with statutory undertakers on Protective Provisions and with local authorities on Order Requirements and planning obligations within Section 106 Agreements. Applicants will also need to quickly adopt solutions to enable these discussions to continue amidst Coronavirus restrictions.

Despite the adoption of these various solutions, we may still see requests made of the Secretary of State to extend the six month deadline for some examinations under section 98 of the Planning Act 2008 in recognition of any delays that arise.

DCO DECISIONS

DCO decisions that are currently awaiting a decision from the Secretary of State may also face delays due to the Government's attention being very much focused on Coronavirus. As noted, there are 14 DCO applications that are currently awaiting a decision from the Secretary of State. Of those 14, eight are transport projects while six are energy projects (comprising nuclear, off-shore wind and energy-from-waste).

Notably, decisions on eight of the 14 have already been delayed by more than four months, are overdue and/or still need to be rescheduled. By way of example, the new decision dates for the Lake Lothing Third Crossing and A303 Sparkford to Ilchester Dualling DCO applications (originally due on 5 and 12 December 2019 respectively) were due to be scheduled once Parliament was in session. Parliament has been in session since 19 December 2019 and

yet no new decision dates have been announced. Similarly, the West Midlands Interchange DCO application which was due to be determined on 27 February 2020 remains with the Secretary of State for Transport for determination, also with no new decision date scheduled. Of course, this current spate of delays cannot be blamed on Coronavirus, and is largely attributed by the Government to Brexit, Government elections and the need for additional consultation. Nevertheless, it does not bode well for decisions that are due to be made in the coming months.

In this respect, the Secretary of State for Business, Energy and Industrial Strategy did issue his decision to grant development consent for SP Manweb's Reinforcement to North Shropshire Electricity Distribution Network on time on 20 March 2020. Conversely, however, as at the time of writing, there has been no decision by the Secretary of State for Transport for Highway England's A63 Castle Street Improvement-Hull project which was due to be determined by 24 March 2020.

In the pipeline there is the Wylfa Newydd Nuclear Power Station project which is due for determination on 31 March 2020. This decision has already been deferred by five months meaning any further delay is likely to be particularly unwelcome to the promoter. While the Able Marine Energy Park and the Silvertown Tunnel DCOs provide precedent for decisions to be deferred twice, in both instances the total delay amounted to 6.5 months which is only slightly longer than the current deferral timeframe for Wylfa.

For Wylfa and all other DCOs awaiting a decision, the closure of Parliament on Wednesday may cause issues if the Secretary of State seeks to defer decisions to later dates given that they need to do so through a statement to Parliament (section 107 of the Planning Act 2008). It may take a few days before Parliament can put in place technological solutions to enable Parliament business to continue and applicants could be in the dark as to what is happening if alternative processes are not adopted.

DCO JUDICIAL REVIEWS

Unfortunately, not even the courts are spared from the impacts of Coronavirus and, as such, we may also see delays for any NSIPs that are the subject of judicial review proceedings. These include the forthcoming judicial review of the Drax Re-Power DCO and the much anticipated challenge to the Court of Appeal decision's on the Airport National Policy Statement which we discuss in detail in our client briefing: Airports Policy Declared Unlawful on Climate Grounds – Policy and Project Implications, available here (ANPS Briefing).

In this respect, the Government has recognised that the running of Her Majesty's Courts and Tribunals Service is an essential public service and is therefore "adjusting practices and taking steps to minimise any risk to the judiciary, staff, [and] professional and public users" including, for example, actively encouraging the increased use of telephone and video to support remote hearings. However, delays are inevitable while these and other solutions are mobilised. We have already seen the Lord Chief Justice announce a temporary pause on new jury trials in the Crown Court until measures can be put in place to ensure that physical hearings can take place safely and in accordance with the Government's advice on social distancing. Similarly, the Supreme Court Registry has announced that it, and the Registry for the Judicial Committee of the Privy Council, are closed and will remain closed until at least Tuesday 21 April 2020 (the opening date for the Easter sitting law terms) to mitigate the risks of Coronavirus. Any time limits for filing

documents which expire during this shut-down period will automatically extend until 20 April 2020.

While the above-mentioned measures demonstrate a clear desire by the Government and the Courts to keep the judicial system operating as best it can in the circumstances and with minimal interruption, there will be knock-on effects. Therefore, it may be some time before the Drax Re-Power DCO judicial review is set down for hearing in the High Court. Alternatively, if a sitting is available and the matter deemed urgent enough, we may see the case proceed by way of a virtual hearing, although this would be logistically difficult given the complexities of a judicial review proceeding. The closure of the Supreme Court Registry also suggests that it may be some time before we learn whether the Supreme Court will grant Heathrow Airport Limited and Heathrow West (also known as the Arora Group) permission to appeal the Court of Appeal's decision to the Supreme Court.

NATIONAL POLICY STATEMENTS

NSIPs and DCOs are, of course, underpinned by national policy statements (NPSs). While Coronavirus should have no impact on the ongoing operation of the 12 designated NPSs, there are two much anticipated new NPSs that may be further delayed as a result of the Government's focus on Coronavirus management. Namely, the final draft NPS for Water Resources Infrastructure which was due to be laid before Parliament in Autumn 2019 but is still awaited, and the seventh energy-related NPS which is still in preparation. Perhaps of more concern, however, is the much anticipated Energy White Paper which was originally due for publishing in summer 2019, was then delayed until Q1 2020 and may be even further delayed as a result of Coronavirus.

Interestingly, we posed the question in our ANPS Briefing whether the Court of Appeal's decision on the Heathrow case, specifically the express recognition that the Paris Agreement forms part of the Government's policy on climate change, amounts to a "significant change in circumstance" warranting a review of the existing NPSs under section 6 of the Planning Act 2008.

While we expect the Government's appetite to undertake such a comprehensive review to be low given the circumstances, we have learnt that a request specifically seeking a review of the Energy Infrastructure NPSs EN-1 to EN-6 (Energy NPSs) in light of the Heathrow decision, has been made. The claimants are, Dale Vince (founder of Ecotricity), George Monbiot (journalist and campaigner) and Good Law Project Ltd. In their letter before action, the claimants state that if the Secretary of State refuses to undertake a review of the Energy NPSs, they will seek orders from the High Court declaring that, in light of these significant changes, it is irrational for the Secretary of State not to review all or part of the Energy NPSs now (or consider doing so). It will be interesting to see how the Secretary of State responds.

CONCLUSION

Coronavirus is impacting every facet of society, and the planning system is no exception. We can expect delays and disruptions while Government, the Planning Inspectorate and participants, find new ways of working that follow the Government's strict guidelines for mitigating the risks of Coronavirus.

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