The Planning Inspectorate

Transboundary impacts consultation

Advice note twelve: Development with significant transboundary impacts consultation

This version of advice note twelve supersedes all previous versions. It reflects changes to the Planning Act 2008 ('the Planning Act') made by the Localism Act 2011 which mean that the Secretary of State is the decision-maker and competent authority for the purposes of the Infrastructure (Environmental Impact Assessment) Regulations 2009 (as amended). Reference is also made to 'the Planning Inspectorate', which carries out certain functions related to national infrastructure planning on behalf of the Secretary of State.

Introduction

This advice note sets out the procedures for consultation in association with an application for a Development Consent Order (DCO), where such development has significant transboundary impacts. It sets out how the obligations under regulation 24 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 (as amended) (the EIA Regulations) will be met particularly in the light of the timetable under the Planning Act 2008 (the 2008 Act).

This advice note refers to annexes which can be viewed at:
http://infrastructure.independent.gov.uk/Advice-note-12-Annexes.pdf

All references can be found on the last page of this advice note.

In particular, the advice note addresses the timing of the Planning Inspectorate's notification to other European Economic Association (EEA) States and the necessary consultation.

There are four aspects to the consideration of transboundary impacts:

- the obligations under regulation 24 and the Espoo Convention and EU Directive 85/337/EEC as amended (the EIA Directive);
- requests from other EEA States likely to be significantly affected;
- the role of UK Government departments to ensure that other EEA States are appropriately consulted; and
- the role of developers in helping to ensure the relevant information is available at the appropriate time(s).

These are considered in more detail below, but first the statutory background is explained.

Statutory background

Espoo Convention

The United Nations Economic Commission for Europe (UNECE) Convention on Environmental Impact Assessment in a Transboundary Context was negotiated to promote environmentally sound and sustainable development, whilst also enhancing international co-operation in assessing environmental impact, in particular in a transboundary context. The Convention was adopted in 1991 in the Finnish city of Espoo – hence the 'Espoo Convention'. The Convention requires that assessments are extended across borders between Parties[1] of the Convention when a planned activity may cause significant adverse transboundary impacts[2].

The Convention at Appendix I includes a list of activities[3] that automatically require an application of the Convention if significant impacts may extend across a border (this is included at Annexe 1 of this advice note).

The Convention has undergone two amendments since its adoption. The 2nd Amendment, which was adopted in 2004 (see Annexe 2 of this advice note), includes the following provision:

- potentially impacted states can participate at the scoping stage (see Annexe 2 to this advice note at paragraph 11)[4].

However, this amendment is currently not in force in the UK[5].

Regulation 24

The Espoo Convention has been implemented by the EIA Directive[6] and transposed into UK law by way of the EIA Regulations, specifically under regulation 24 of the EIA Regulations[7]. This means that decisions taken by the Secretary of State on nationally significant infrastructure projects (NSIPs) under the Planning Act regime will be subject to the procedural requirements of regulation 24 of the EIA Regulations.

Regulation 24 applies, where the Secretary of State:

- is notified under regulation 6(1)(b) that an environmental statement is to be provided;

or

- adopts a screening opinion to the effect that development is EIA development; or
- is directed by the Secretary of State that development is EIA development[8]; or
- it comes to the attention of the Secretary of State that proposed development is the subject of an EIA application;
- and the Secretary of State is of the view

that the development is likely to have significant effects on the environment of another EEA State[9]; or

- is requested by another EEA State likely to be significantly affected by such development[10].

Secretary of State's obligations under regulation 24

Under regulation 24, where the Secretary of State is of the view that the development is likely to have significant effects on the environment of another EEA State, the Secretary of State must:

1. 'As soon as possible' and not later than any publication in the London Gazette (regulation 24 (2)(a)) send to the EEA State(s) a description of the development, together with any available information on its possible significant effect on the environment in another EEA State (regulation 24(3)(a)) together with information on the procedures (regulation 24 (3)(b)).

2. Publish a notice in the London Gazette (regulation 24 (2)(b)(i)) (and the Edinburgh Gazette if development is in Scotland (regulation 24(2)(ii)) setting out the information about the proposed development as described in (1) above. Having received this notification, the EEA State(s) can, within a 'reasonable time'(regulation 24(2)(c)), indicate whether it wishes to participate in the procedures.

3. Where an EEA State(s) wishes to participate, the Secretary of State must 'as soon as possible' (regulation 24(4)) send that state a copy of the application, the environmental statement and any relevant information on the procedures not provided previously. The EEA State should then be given 'reasonable time' (regulation 24(5)) to forward to the Commission the opinions of its public and of the authorities[11].

4. Consult with the EEA State(s) regarding the potential significant effects of the development on the environment of that state and the measures to reduce or eliminate such effects (regulation 24(6)(a)).

5. Agree a reasonable time period for the duration of the consultation (regulation 24(6)(b)).

6. Inform the EEA State(s), as consulted, of the decision (regulation 24(7)).

The practical application of these procedures in the context of the Planning Act regime is considered in detail later in this advice note under the section entitled 'Procedures' below.

Requests from other EEA States likely to be significantly affected

Whilst it is the Secretary of State's obligation under regulation 24 to contact another EEA State(s) where it is of the view that development is likely to have significant effects on the environment of that state, the requirements of regulation 24 equally apply where another EEA State(s) so requests[12]. If another EEA State considers that it is likely to be significantly affected by development, the state may request an opportunity to participate. It will be the responsibility of the EEA State(s) to ensure that any notification to the Secretary of State is made in a timely manner. In such cases, unless clear procedures are in place, the request could come in via a UK Government Department or directly to the Planning Inspectorate.

Role of developers

Turning to the role of developers, it will be for them and in their best interests, to undertake consultation with specific EEA States where they believe there may be significant impacts on the environment of that state. In addition, developers may wish to consult with environmental bodies within that state and with relevant interest groups.

Developers will be aware of the need to consult and the importance of early consultation as part of any application for a DCO. This should include consideration of the need for consultation on transboundary matters. One of the most difficult aspects with consultation with other countries is to identify the correct organisations to consult and the correct person within those bodies. Although not mandatory, developers should consider working together to help collate names and contact details to help to ensure consistency of approach to save time and effort. It may also be useful to share contacts details with the Planning Inspectorate.

To assist developers to undertake their own consultation with other EEA States, the Planning Inspectorate has identified contacts in the closest countries to the UK and these are set out in Annexe 3 to this advice note.

This is based upon information on the UN website: http://www/unece/org/env/eia and details of contacts supplied from other UK Government Departments.

This will be updated as additional information and details come forward. The details of the link to the contacts on the UN website http://www. unece.org/env/eia/points_of_contact.htm will also be made available on the Planning Inspectorate website.

As part of their request to the Secretary of State for a scoping opinion, developers are strongly encouraged to identify both the possible significant transboundary impacts or, where applicable, why they consider that there would not be any significant impacts on the environment of another EEA State. A clear way of presenting the information would be in the form of a screening matrix and developers are encouraged to adopt such an approach. This will help the Secretary of State to identify in their scoping opinion the matters to be considered in the environmental statement which relate to transboundary impacts.

To maximise the time which is available to the EEA State to form a view on the transboundary impacts, developers are encouraged to send their draft application and draft ES to the relevant EEA State(s) and any identified environmental bodies within that state as soon as these are sufficiently detailed to enable meaningful comments to be made to developers about the potential significant impacts and the proposed mitigation measures.

It will be in a developer's interest to engage in pre-application consultation with the relevant EEA State as early as possible as there is a risk that there may be insufficient time during the examination to allow proper consideration of transboundary impacts. Where the examining authority is not satisfied before the examination concludes that measures have been provided to avoid, reduce and if possible offset the significant adverse transboundary impacts (in accordance with the objective of the Espoo Convention) there may be no alternative at that stage but to refuse development consent[13].

Procedures

This section sets out how the broad stages of the procedures are expected to work in practice.

The table below sets out an overview of the activities

Developer	Planning Inspectorate	Other EEA State/public
Consultation with EEA State(s) (as necessary)		
- Notify Planning Inspectorate by means of: - notification of application; or - request for screening for EIA; or - notification that an EIA will be - provided; or - request for a scoping opinion		
Provide matrix to identify potential significant impacts on another EEA State(s)	Screen for potential significant impacts	
	Stage 1 Notification **Notify other EEA State(s)** - **Description of development** - **Information on the process** - **Significant effects on state**	
	Notice in London Gazette (and Edinburgh Gazette as appropriate) (where potential significant impacts on another EEA State(s) identified)	
		Notifies Planning Inspectorate if wishes to participate/confirms does not wish to participate/just to be kept informed
Submit application Including translation of Non Technical Summary		
	Stage 2 Consultation If application accepted, provides other EEA State(s) with - Details of application - ES - Relevant information on procedures (if not supplied previously)	
		Government - Consults public - Forwards public comments - Makes own comments
	Takes account of comments in decision making process Notifies parties about the Secretary of State's decision including the reasons for the decision which should reflect the impact on the affected state	

Note: Timing is dependent upon developers, for example by formal notification under s46 of the Planning Act 2008, or by a request for a scoping opinion under the EIA Regulations 2009.

Screening

The Secretary of State will become aware of a project that requires an EIA as a result of the following events[14]:

- determination that an environmental assessment is necessary (a screening opinion) (regulation 6(1)(a)); or
- receipt of a notification that a developer is to provide an environmental statement in respect of the development (regulation 6(1)(b)[15]); or
- receipt of a scoping request (regulation 8[16]);or
- a direction by the Secretary of State (regulation 5) that the development is EIA development[17];or
- other notification, for example under s46 of the 2008 Act (duty to notify the Secretary of State of proposed application).

If these events occur it will be necessary for the Secretary of State to determine whether or not the development is likely to have significant impacts on the environment in another EEA State. In reaching a view, the precautionary approach will be applied and following the court's reasoning in the Waddenzee case[18] such that 'likely to have significant effects' will be taken as meaning that there is a probability or risk that the development will have an effect, and not that a development will definitely have an effect.

To determine the likelihood of significant effects the Secretary of State will require certain information. This will enable screening of the proposed development as to the likelihood of such significant effects. A screening matrix will be used to assist the determination of the environmental significance of activities.

All NSIPs that are EIA development will be screened by the Planning Inspectorate on the Secretary of State's behalf on a case by case basis for likely significant effects on the environment of another EEA State[19] in order to meet the Regulations. The Planning Inspectorate will exercise reasonable discretion to determine likely significant effects in another EEA State, based in part upon the information supplied by the developer. As a rule of thumb (taking the precautionary approach), unless there is compelling evidence to suggest otherwise, it is likely that the Planning Inspectorate may consider the following NSIPs as likely to have significant transboundary impacts:

- nuclear power stations; and
- off-shore generating stations in a Renewable Energy Zone.

In all cases, developers are advised that unless they are able to demonstrate to the Planning Inspectorate's reasonable satisfaction that their development will not have significant impacts on the environment of another EEA State, they would be well advised to act with caution and undertake the preparation of their application documents, particularly the environmental statement and their consultation, on the basis that there may be transboundary impacts and that the Secretary of State will notify the relevant EEA State as required[20].

It would assist the Secretary of State to meet the duty under regulation 24 of the EIA Regulationss if developers carried out their own preparatory work to complete a screening matrix. This would not require developers to consult with another EEA State, although it could also serve to assist developers to identify the scope for possible transboundary consultation they may

choose to undertake. As stated earlier when considering the role of developers, where by the time the examination concludes, the examining authority are not satisfied that measures have been provided to avoid, reduce and if possible offset the major adverse transboundary impacts, there may be no alternative but to recommend that development consent is refused.

If a scoping opinion is sought, the screening matrix should be submitted at the same time as the scoping opinion request. Where no scoping request is made, the screening matrix should be submitted to the Planning Inspectorate early in the process when the Planning Inspectorate is first made aware of the proposed development. This will enable the Planning Inspectorate to reach a view as to whether the development is likely to have significant transboundary impacts. If such information is not provided voluntarily, the Planning Inspectorate may need to seek further information on which to determine whether or not there are likely to be significant impacts on the environment of another EEA State.

There is no prescribed format for the matrix, although a checklist is provided at *Annexe 4* indicating the level of detail that should be provided. This matrix is based upon the framework for considering the potential significance for adverse impacts across borders as set out under a publication associated with the Espoo Convention (see *Annexe 5* to this advice note) and the selection criteria under the EIA Regulations[21]. Where a screening matrix has been prepared by a developer, the Planning Inspectorate will review the information but come to its own conclusions on the basis of the type of project, its location and the nature of the receiving environment provided by the developer at that time. Where likely significant impacts are drawn to the attention of the Planning Inspectorate by another EEA State, this will also trigger the Planning Inspectorate to seek sufficient information from the developer(s) to enable the Planning Inspectorate to publicise the application and send a formal notification to the EEA State[22]. Even though the Planning Inspectorate may reach a view that development does not have transboundary effects based on the 'screening matrix' this would not preclude other EEA States reaching a different view[23], see also the earlier section entitled '*Requests from other EEA States likely to be significantly affected*'.

Background: Notification at the scoping stage

The second Amendment to the Espoo Convention, which would allow potentially impacted states to participate at the scoping stage to the extent appropriate, is not yet in force (see earlier commentary under 'Statutory Background').

There is no requirement in the EIA Regulations and the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 SI 2264 (The APFP Regulations) for potentially impacted states to participate in the scoping exercise. There is no express duty stated within the EIA Regulations for the Secretary of State to consult other EEA States before adopting a scoping opinion[24].

The Planning Inspectorate will continue to monitor what steps are being taken by the UK government to transpose any changes to the EIA Directive (to incorporate the effect of the Second Amendment) into the EIA Regulations. Procedures will be put in place to take account of amendments to the EIA Regulations when they come into force.

Notification: Stage 1

Initial notification to another EEA State will be made once the Planning Inspectorate are aware of a proposed development that requires an EIA and where the Secretary of State is of the view that the development is likely to have significant impacts on the environment of another EEA State or where another EEA State, likely to be affected by a development, requests that transboundary impacts are addressed.

The information which the Secretary of State must send to any relevant EEA State at this stage will include:

- a description of the development together with available information as to the possible significant impacts; and
- information on the nature of the decision which may be taken by the Secretary of State.

In order to assist and although not required at this stage, the Planning Inspectorate will also provide information about the procedures to be followed under the Planning 2008 Act in order to help EEA State(s) better understand the nature of the decision. This will include

- an overview of the application process and programme;
- how the public may register as an 'interested party'[25]; and
- submit representations.

As explained under 'Screening' above, the relevant state(s) will be identified by the Planning Inspectorate primarily on the basis of the location of the proposals, the nature of the proposed scheme, and the likelihood of significant transboundary impacts. Use will also be made of information provided by the developer regarding their own consultation process and their identification of potential significant impacts on another EEA State(s). It will be made clear in the notification that it will be assumed that if no response is received within a certain time period that the EEA State(s) does not wish to participate[26]. Unless the relevant state provides reasonable representations that a longer period should be allowed it is expected that the time allowed will be 6 weeks.

For this notification stage, the Planning Inspectorate will rely on notifying the named point(s) of contact on the UN website (see Annexe 3) and for these persons to pass the notification to the body(ies) responsible in that country(ies).

The notification will be undertaken by means of emails to the relevant organisations.

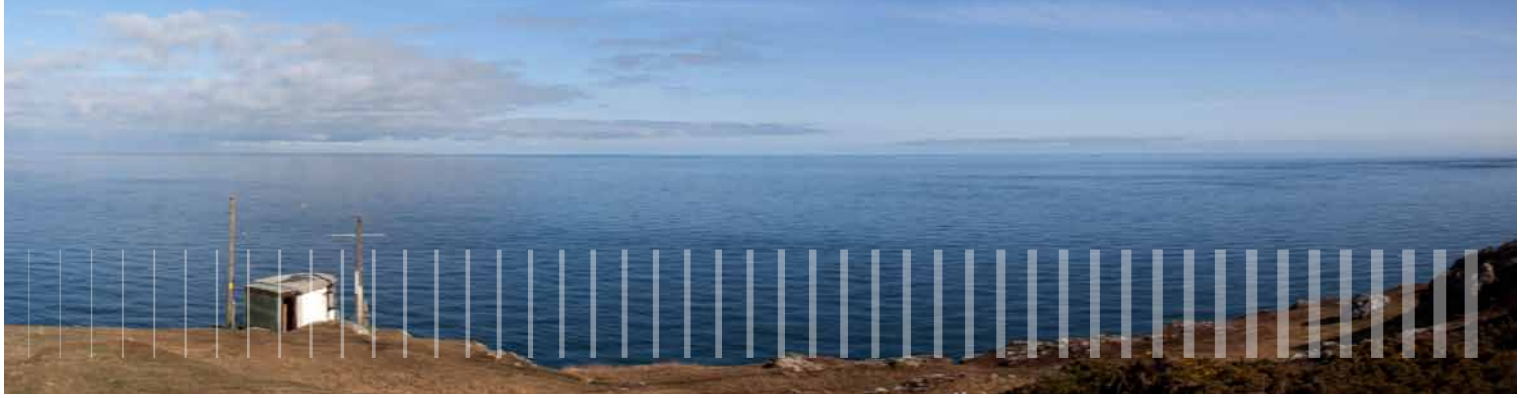
The Planning Inspectorate will publish the relevant information in the London Gazette (and where appropriate in the Edinburgh Gazette)[27].

Existing protocols with other EEA States

It is the duty of the Secretary of State to enter into consultations with affected EEA States who wish to participate. In order to ensure that consultation is effective and timely and that the public of the affected EEA State is properly informed[28] the Planning Inspectorate will use existing government protocols and joint working arrangements to channel communication.

Consultation: Stage 2

Where, after Stage 1, an EEA State confirms that it does not wish to participate in the procedure then the Secretary of State's obligation under regulation 24 to notify that EEA State ends. A state may also indicate that it wishes merely to be kept informed,



in which case the Planning Inspectorate will continue to keep that state informed, by treating them in the same way as an 'interested party', and will send them a copy of the decision.

If an EEA State confirms that it wishes to participate in the procedure for which the EIA Regulations provide, the Secretary of State must send to that state a copy of the application and the environmental statement in accordance with regulation 24(4)(a) and (b). This will include (if not provided earlier) the following information:

- a copy of the application;
- the environmental statement (including, a translation of the Non Technical Summary into a relevant language – see comments under 'Costs' below); and
- details of the procedures to be followed under the 2008 Act.

The application documents, including the environmental statement will also be available on the Planning Inspectorate website and links will be provided in the consultation correspondence to direct states to the relevant part of the website. When beginning the Stage 2 consultation the Planning Inspectorate on behalf of the Secretary of State must send a copy of the application and environmental statement to the relevant EEA State and developers should be aware that the Planning Inspectorate will not have the information required to meet this duty until an application has been accepted. Where developers have sent a copy of their draft application and draft ES to the relevant EEA State(s), this will have helped to maximise the time which is available to the EEA State(s) to form a view on the transboundary impacts (see earlier comments on the 'Role of Developers').

Where an EEA State wishes to participate, the Planning Inspectorate will consult with that EEA State and ensure that the state has an opportunity before development consent is granted to seek the opinion of its public and relevant authorities. To enable the EEA State to provide this information to the Planning Inspectorate the relevant state will be given an opportunity to provide representations on the application and its transboundary impacts through existing government protocols and joint working arrangements.

The Secretary of State must agree a reasonable consultation period with the relevant EEA State and where no agreement is in place with that state, this will be done in each individual case. It is considered that a 6 week period based upon best practice would be reasonable and in order to meet the statutory examination deadline[29] it should in any event close no later than the expiry of the first month in the examination period. For individual applications the Secretary of State must agree the consultation period[30] under Stage 2 with each relevant EEA State.

Transmitting information and consultations

Application documents are submitted to the Planning Inspectorate electronically and these documents will be transmitted in the same format to the relevant contact in the EEA State. It is considered that this format will enable the state to carry out its own consultations most easily with the public and relevant authorities.

Most information will be provided by the Planning Inspectorate to the relevant EEA State in English unless a translation is requested and justified by the affected state, see the further comments on costs below.

Decision

The Planning Inspectorate will provide the EEA State[31] which has been consulted with:

- the content of the decision and any requirements attached to it;
- the main reasons and considerations on which the decision is based including relevant information about the participation of the public; and
- a description, where necessary, of the main measures to avoid, reduce and, if possible, offset the significant adverse impacts of the development.

If an authority or member of the public in that state has registered as an 'interested party' they will also be notified together with the reasons for the decision[32].

Costs

Translation costs

Developers should be aware that for an efficient and timely examination of the application it will be in their interests to ensure that the affected state and public understand the details of the scheme including appropriate safeguards and mitigation measures proposed and that those bodies should have the opportunity to participate. This will require the transmission of information. Although English may be the most appropriate language for documents, being the most widely understood, especially where more than one country is affected, the need for translation will depend upon the language differences of the other EEA States.

The Planning Inspectorate does not wish to impose unnecessary burdens on developers by requesting the translation of all application documents into one or more languages. Although when an application is submitted, the Planning Inspectorate will expect developers to provide the Non Technical Summary of the environmental statement translated into the language of the affected EEA State(s). In accordance with precedent and good practice the Planning Inspectorate will also expect developers where it is reasonable to do so:

- to organise and meet the costs of translating documents if a request for translation is made to the Planning Inspectorate by the relevant EEA State (or others); and
- to organise and meet the costs of translating responses received from EEA States, authorities or members of the public.

Consultation costs

If the Planning Inspectorate considers it necessary to publish information in national newspapers of another EEA State, it is expected that the costs associated with the publication will be the responsibility of the developer.

1 A Party is a state that agrees to be bound by a treaty

2 Note the term 'impacts' is used in this advice note, except where this refers specifically to regulation 24 in which case 'effects' is used

3 Activities which are listed in Appendix I of the Espoo Convention would include nationally significant infrastructure projects (NSIPs) which involve major projects within the fields of energy, transport, water, waste water and waste

4 A further provision adds 'major wind farms' to the list of activities as set out in Appendix 1 of the Convention that automatically require an application of the Convention: however major wind farms are NSIPs under s15 of the Planning Act 2008 to which regulation 24 will apply

5 As at June 2011

6 Council Directive 85/337/EEC, as amended

7 If a NSIP is EIA development, regulation 24 applies and the Secretary of State must consider likely significant effects on the environment of another EEA State

8 Regulation 24(1)(a)

9 Regulation 24(1)(b)

10 Regulation 24(1)(c)

11 As referred to in article 6(1) of the Directive. Article 6(1) authorities are those 'likely to be concerned by the project by reason of their specific environmental responsibilities'.

12 Regulation 24 (1)(c)

13 This is because the Secretary of State must not grant development consent if to do so would lead to the UK being in breach of its international obligations

14 These are events defined in regulation 4(2) and other circumstances in which development may come to the attention of the Secretary of State

15 Regulation 6 a notification must be accompanied by: a plan sufficient to identify the land; a brief description of the nature and purpose of the development and its possible effects on the environment; and such other information or representations as the person making the request may wish to provide or make

16 Regulation 8 must include the same information as a notification under regulation 6

17 The Secretary of State may only make a direction that the development is EIA development following acceptance of an application. If this happens there will be significant timing issues for developers as the Examining authority must suspend the examination until an environmental statement is provided.

18 See Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretris van Landbouw (Waddenzee Case No C 127/02/2004

19 Under regulation 24(1)(a) and (b)

20 Under regulation 24(2)

21 EIA Regulations reg.7 schedule 3

22 EIA Regulations reg.24(2)

23 EIA Regulations reg.24(1)(c)

24 Regulation 8(6) of the EIA Regulations – a scoping opinion must be adopted within 42 days of receipt of the request

25 Interested party – see section 102 of the 2008 Act. Registering as an Interested Party enables: the opportunity to take part in the examination process and to be kept up to date with its progress, including: putting a summary of your case in writing (known as making a relevant representation); requesting to speak at the Preliminary Meeting about how the application should be examined; providing a more detailed written representation; requesting that a hearing be held; and requesting to speak at a hearing.

26 In accordance with article 3.4 of the Espoo Convention
27 Regulation 24(2)
28 In accordance with article 3.8 of the Espoo Convention it is the responsibility of both the UK and the affected EEA State to ensure that the public of the affected EEA State is informed of and provided with possibilities for making comments or objections on the proposed activity.
29 Section 98(1) Planning Act 2008 – the examining authority is under a duty to complete the examination of the application within 6 months of the date of the preliminary meeting.
30 Regulation 24(6)(b)
31 Regulation 24(7)
32 In accordance with s107(7) of the Planning Act 2008

Further information

The Planning Inspectorate, National Infrastructure Directorate, Temple Quay House, Temple Quay, Bristol BS1 6PN

Email: enquiries@infrastructure.gsi.gov.uk
Telephone: 0303 444 5000
Web: http://infrastructure.planningportal.gov.uk

This advice note was republished in March 2012 with changes to reflect the IPC being abolished and the work of the IPC transferring to the Planning Inspectorate under the Localism Act 2011.