



## Major Infrastructure Projects

### Submission for the proposed Planning White Paper The Royal Society for the Protection of Birds February 2007

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The Royal Society for the Protection of Birds (the RSPB) is the charity that takes action for wild birds and the environment. We are the largest wildlife conservation organisation in Europe with over one million members. We own or manage approximately 135,000 hectares of land for nature conservation on 200 reserves throughout the UK.

We believe that sustainability should be at the heart of decision-making. The RSPB's policy and advocacy work covers a wide range of issues including planning and regional policy, climate change, energy, marine issues, water, trade and agriculture. As well as commenting on national planning policy issues, the RSPB's professional conservation and planning specialists make representations on around 800 items of planning casework each year throughout the UK, including regional planning, development plans and individual planning applications and proposals. We thus have considerable planning experience.

## **Summary**

### *Statements of Strategic Objectives*

The RSPB welcomes the production of a strategic national framework to aid decision making for major infrastructure. Any new legislation for major infrastructure projects should include an objective to contribute to the achievement of sustainable development. If these statements are based on sound evidence and fully integrate environmental considerations they could represent a major step forward for strategic planning, although our preferred option is for an overarching National Spatial Framework, as argued in our separate paper.

### *Independent Planning Commission*

The proposed Planning Commission, if set up, must be properly accountable, have environmental expertise, give adequate opportunities for public participation, give the opportunity to scrutinise evidence through cross examination, and allow the merit of decisions to be legally challenged.

## **Statements of Strategic Objectives**

It is vital that the statements are as unambiguous as possible if they are to be used to properly inform the inquiry. This is a particularly significant issue for developments that risk harming Natura 2000 sites as alternatives must be examined in detail and it must be determined whether there are imperative reasons of overriding public interest. Furthermore, the Statements of Strategic Objectives must be produced with full public participation in order to take the concerns of local stakeholders into account as early as possible.

Any new legislation for Major Infrastructure Projects should include an objective for the Secretary of State and the proposed Planning Commission to contribute to the achievement of sustainable development, consistent with that in section 39 of the Planning and Compulsory Purchase Act 2004. This should cover Statements of Strategic Objectives as well as decisions made on individual projects. To achieve this, SSOs should be subject to a high-level sustainability appraisal as an integral part of their preparation.

The Eddington Report (p349) highlights the Aviation White Paper as an example of the issues a Strategic Statement of Objectives should address. The RSPB has reservations about using a document adopting a “predict and provide” model to airport expansion while ignoring environmental limits as a template for the statements. The statements must be consistent with the principles of sustainable development and should therefore respect environmental limits and seek to minimise impacts on biodiversity.

### *Freedom of the Private Sector*

The Eddington Report (page 351) suggests that *'In drawing up the Statement, government will therefore need to determine the appropriate balance between providing sufficient detail to establish a framework for later decisions, while still supporting the freedom of the private sector to bring forward commercially sensible proposals, where this is appropriate'*

In our view, Statements of Strategic Objectives should be able to create a sensible and integrated framework for decision-making. These statements should incorporate an appropriate level of detail to create certainty about the future of major developments, but must not prejudice the ability of local communities to have a voice in developments which affect them

From an environmental point of view, the information gathered to complete strategic environmental assessments and/or inform the appropriate assessment of plans should be used to inform such statements.

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### **Independent Planning Commission**

The RSPB is not against the principle of forming an Independent Planning Commission. However, the following issues need to be considered if it is to work effectively:

- Democratic accountability
- The composition of the Commission
- Information on which the Commission makes its decisions
- The ability to challenge the merit of decisions
- The need for cross examination during the Inquiry process
- Stakeholder involvement
- Decision making on mitigation

### *Accountability*

The RSPB strongly objects to the lack of direct democratic accountability of the Planning Commission. The proposed split between policy-making ministers and a Planning Commission which makes quasi-judicial decisions is unrealistic and unacceptable. It is unrealistic because in practice, decisions on planning projects invariably involve not just technical and legal judgements but political judgements too. This is even more so the case where the policy framework is not up to date – which could apply to Statements of Strategic Objectives as much as the development plan.

We note that, even in the current planning system, concerns are expressed by the public at the lack of accountability of regional planning bodies. This is so despite

their membership largely being drawn from local authorities. The lack of direct democratic accountability of the Planning Commission would seriously compromise the legitimacy of its decisions in the eyes of the public and stakeholders.

While we consider the Planning Commission could have an important role to play in the decision-making process, our preferred model is that it should be an advisory body only, and that the final decision on major infrastructure projects should rest with ministers.

#### *Composition of the Independent Planning Commission*

The Commission should have a strong focus on sustainable development and should therefore include experts on environmental issues. We agree that the decision-making at the national level can add a strategic advantage to the planning system if carried out correctly.

Given the amount of ecological knowledge needed to weigh up possible biodiversity impacts, the increased importance placed on the ability of a development to mitigate and adapt to climate change and the increasingly specialist nature of this knowledge, we would recommend that the Planning Commission consider appointing experts in **both** ecology<sup>1</sup> and wider environmental issues.

It is also crucial that the decision makers appointed to the Planning Commission have adequate knowledge of a number of areas. For example with regard to internationally important sites, experience of complex legal arguments such as the alternative tests relating to the Conservation (Natural Habitats, &c.) Regulations 1994 would be necessary.

#### *Information on which the Planning Commission makes decisions*

The proposal in the Eddington Review (p355) is that the Planning Commission 'would determine whether the main aims of a planning application are consistent with the objectives set out in a strategic statement, within a sustainable development context. Where they are consistent, there would be a presumption in favour of granting permission for the scheme, subject to ensuring that the scheme is compatible with:

- EC law, including EC environmental law requirements;
- ECHR law requirements;
- Any other exceptional circumstances that Ministers may have specified in the Strategic Statement.'

As formulated by Eddington, this presumption in favour of development is heavily guarded by caveats. Even so, the RSPB objects to it because it undermines sustainable development and is not even-handed towards planning applications.

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<sup>1</sup> Including marine ecology, if the Planning Commission is also to be responsible for determining offshore renewable schemes.

Although the presumption would provide ‘increased certainty for all interested parties’, it would be likely to tilt the playing field in favour of economic interests, as we argue in our separate paper on the plan-led system, and would make it difficult for local communities to engage in meaningful debate about planning applications.

The RSPB’s alternative proposal provides a more suitable decision-making framework:

Firstly, Eddington refers to a ‘sustainable development context’ without making clear how this would be made to work. Legislation for Major Infrastructure Projects should include a sustainable development objective, at least equivalent to that contained in section 39 of the Planning and Compulsory Purchase Act 2004<sup>2</sup>. This would provide an important safeguard for sustainable development.

Secondly, there should be no presumption in favour, but instead a statutory requirement for the decision-maker to take into account:

- *The Statement of Strategic Objectives*
- *EC law, including environmental law requirements*
- *ECHR Law requirements*
- *Applicable National government policy produced after the statement of strategic objectives*
- *Any other exceptional circumstances that Ministers may have specified in the strategic statement*
- *The development plan*

These suggested amendments to the decision making criteria would allow a robust and flexible process that is reactive to changes in the policy environment but not slowed down significantly by them. Adopting this strategy would eliminate uncertainty between reviews of the statements.

#### *The ability to challenge decisions*

We feel very strongly that the right to challenge the decision of the Planning Commission or the adoption of the Statements of Strategic Objectives should not be restricted to a *process based* challenge, as recommended in the Eddington report (page 363). The evidence base for a decision and the quality of the decision making itself should be open to challenge, if the need arises. These proposals raise very serious issues about accountability, if it is only the process that can undergo judicial scrutiny and not the actual decisions. Furthermore, consideration should be given to whether not allowing the merits of a decision to be challenged is compatible with EU legislation.

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<sup>2</sup> Note that, in debate over the Planning and Compulsory Purchase Bill, the RSPB and others argued in favour of a stronger sustainable development **duty**. This is still our preferred solution, but we recognise the advantages of wording more similar to the Act as passed.

Opening up the grounds for challenge will not necessarily slow down the process if the consultation phases of the Statements of Strategic Objectives are carried out properly and all major concerns are addressed.

*The need for cross-examination during the inquiry process*

We understand the rationale for a less adversarial approach to the inquiry process but are concerned that the need and benefits of cross-examination have been overlooked. There are many instances where information has only come to light through the cross-examination process. The RSPB has been involved in many major cases that have required cross-examination in order to properly scrutinise the evidence base for decision-making, especially where the evidence is scientific.

The Planning Commission would require an unprecedented level of specific ecological expertise to be capable of determining a complex case involving a Natura 2000 site involving the assessment of impacts on specific species, without the need of cross-examination of expert witnesses. There are no details in the Eddington report about how this process will work in practice.

The RSPB also considers that potential time savings arising through removing cross-examination from the process will be far outweighed by the loss of the ability to scrutinise evidence in greater detail. The ability to cross-examine witnesses and experts is very important in aiding the quality of decision making and uncovering potential problems with an application.

*Stakeholder involvement*

Public involvement should be a priority in the Planning Commission's considerations of proposals. By approving projects in principle at the strategic level, there is the potential to disempower local communities and distance them from the decision making process.

We do not agree that the presumption in favour of written representation set out in the Eddington Report will encourage public involvement in the inquiry process. Written representation in itself is a formal and legalistic process that may be daunting for individuals. The public will be more able and therefore likely to participate in the process if they are able to address the Planning Commission in person.

*Decision making on mitigation*

The Eddington report (page 358) suggests that '*in drawing up their Statement, Ministers could consider whether they wish to set out in the statement any policy parameters which decisions should consider, such as in what circumstances particularly costly mitigation would be appropriate to consider (e.g. tunnelling).*'

Given that the type and extent of impacts that developments can have on specific habitats and species depend entirely on the site, the RSPB is concerned that the effectiveness of proposed mitigation should be decided on a case-by-case basis. It is

for this reason that the government must ensure that Planning Commission has sufficient expertise to make such decisions.

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### **Reducing the Number of Cases Called in by the Secretary of State (SoS)**

The RSPB is very concerned that recommendation 12 of the Barker Review is based solely on the quantity of decisions being called in rather the quality of the decision-making. The ability of the SoS to call in decision is a valuable mechanism for scrutinising decision-making at the local level and allows the SoS to intervene where necessary.

The focus should not be on reducing the types of application that can be referred to the SoS but on improving the decision making of local authorities, which will achieve the same objective of reducing the number of call ins. By focusing on local decision-making, the quality of decision making would be improved without compromising the ability of the SoS to intervene where necessary.

The Eddington Report emphasises the importance of applicants engaging with stakeholders early on, even before the application phase, in order to address and reduce concerns about developments at the earliest possible stage. From our experience, we feel strongly that by advocating such best practice the quality of application is certain to improve, which will in turn reduce the burden of decision making on the SoS.

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