Decision-making for Major Renewable Energy Infrastructure

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Introduction

The Planning Act 2008 set up a new process for granting development consent to 'nationally significant infrastructure projects' (NSIPs). The application of the Act to large-scale renewable energy projects means that it is enormously significant in the de-carbonisation of the UK's energy infrastructure.[1] The NSIPs process is moreover likely to become more significant with any extension of the regime, to cover for example ancillary housing or major commercial development. The Act, together with associated regulation, provides a number of opportunities for interested parties, including local people, to be consulted on applications for development consent. The strong policy commitment to promoting low carbon energy infrastructure, and the associated strong presumption in favour of renewable energy development under the Planning Act,[2] raises important questions about the ways in which decision makers might take local impacts and the views of affected communities into account.[3] The authors have worked together on an academic study of public participation in renewable energy NSIPs. A closely related strand of this study explores the different ways in which knowledge claims may be introduced into the process, by diverse professional, governmental and lay actors. We examined how different methods of introducing and substantiating these claims affect the ways in which they are heard, and adopted as evidence suitable for providing reasoning and justifications for recommendations.

Our project, *Evidence, Publics and Decision-Making for Major Wind Infrastructure* has produced a number of scholarly papers, containing detailed discussion of our academic and theoretical conclusions.[4] We have also reached a number of conclusions that we think speak

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[1] Onshore wind farms were removed from the Planning Act 2008 by SI 2016/306 Infrastructure Planning (Onshore Wind Generating Stations) Order 2016.

[2] Effectively reversed for onshore wind, ibid.

[3] M. Lee et al., 'Public Participation and Climate Change Infrastructure' (2013) 25 *J. of Environmental Law* 33; Simon Lock et al, 'Nuclear Energy Sounded Wonderful 40 Years Ago: UK Citizen Views on CCS' (2014) 66 *Energy Policy* 428; Yvonne Rydin et al, 'Public Engagement in Decision-making on Major Wind Energy Projects' (2015) 27 *Journal of Environmental Law* 139.

[4] Published work includes M. Lee, 'Knowledge of Landscape in Wind Energy Planning' (2017) 37 *Legal Studies* 3; Y. Rydin et al, 'Artefacts, the Gaze and Sensory Experience: mediating local environments in the planning regulation of major renewable energy infrastructure in England and

more directly and immediately to practice and policy, which are outlined here. This paper draws very heavily on a booklet containing a full set of our findings and recommendations, which can be found online.[5]

Our research findings are based on a study of twelve low-carbon energy infrastructure projects in England and Wales, including two onshore and seven offshore wind farms, a tidal lagoon, an energy from waste project and a biomass plant.[6] Our work has had multiple strands. In addition to analysing the significant archives associated with NSIPs applications, and the legal and policy framework, we have engaged in qualitative explorations of the experiences of those involved in NSIPs renewable energy decisions, through focus groups, interviews and a survey. We analysed this material in its theoretical and scholarly context. The methodology for the project was broadly qualitative in nature, designed to provide insights into how a process is understood and experienced by different participants. The intention is not to provide data that is statistically representative, but rather to uncover meaning within specific contexts. We have however been able to reach some generalisable conclusions from our twelve cases. We report the NSIPs regime as it has been experienced by some participants, which we have found can sometimes differ from the regime as it is intended to operate, and from the aspirations of the professionals involved.

This paper proceeds with a brief outline of the process set out in the Planning Act. We then turn to our findings, followed by our recommendations, before concluding briefly.

Decision making under the Planning Act 2008

Under the Planning Act 2008, the applicant must first inform PINS (the Planning Inspectorate) of its intention to submit an application for a Development Consent Order (DCO). The developer conducts scoping work and other studies. It runs a pre-application consultation, on which it is required to consult the relevant Local Authorities. This pre-application stage can go on for many months or years. The developer then submits an

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Wales' in Kurath et al. (eds) *Rethinking Planning: tracing artefacts, agency and practices* (Routledge, 2017); L. Natarajan et al, 'Navigating the participatory processes of renewable energy infrastructure regulation: A 'local participant perspective' on the NSIPs regime in England and Wales'(2018) 114 *Energy Policy* 201. A number of other papers are currently in draft and under review. Our website will continue to be updated www.ucl.ac.uk/nsips.

[5] http://www.ucl.ac.uk/nsips/pdfs/Final_Findings_Recommendations

[6] Kentish Offshore Wind Farm Extension; Galloper Offshore Wind Farm; Burbo Bank Offshore Wind Farm Extension; Rampion Offshore Wind Farm; Walney Offshore Wind Farm Extension; Triton Knoll Offshore Wind Farm; Brechfa Forest West Wind Farm; Clocaenog Forest Wind Farm; Navitus Bay Wind Farm; Swansea Bay Tidal Lagoon; North Blyth Biomass Plant; Rookery South Energy from Waste Plant. All of the documents can be found at https://infrastructure.planninginspectorate.gov.uk/.

application for development consent, including an Environmental Statement, a draft DCO and a Consultation Report. During this 28-day acceptance stage, PINS determine whether the application meets the required standards or not. If the application proceeds, an Examining Authority is appointed. The examination then lasts a maximum of six months. Evidence from the application, written representations, hearings, site visits, as well as answers to multiple rounds of questioning, is received by the Examining Authority. Whilst our project focuses on the examination stage, the links between this stage and the pre-application stage, which can last several years, must not be underestimated,[7] and both pre-application and post-consent governance arrangements fed into our findings.

The decision stage also lasts a maximum of six months. The Examining Authority has three months to make recommendations and report its 'findings and conclusions' to the Secretary of State, who then takes the decision within a further three months. The decision is open to challenge by judicial review for a period of six weeks.

Key findings

Our findings relate particularly to the twelve low carbon energy infrastructure projects that we have studied, but may also have implications for other examinations under the Planning Act 2008, and indeed other planning processes. We suggested in the introduction that national policy may constrain the scope for lay public objections to planning decisions to be fully considered in decision-making. We did indeed find that National Policy Statements play a powerful role in the reasoning of the Examining Authorities.

We reached a number of findings around the place of participation in the NSIP process. We observed that the importance of the pre-application procedures, including consultation, is not always well understood or appreciated by local communities. Nor is good practice consistently applied by developers or local authorities across cases. Turning to the examination, considerable efforts are made by some Examining Authorities to put lay participants at their ease, and enable them to make their representations at hearings. Nevertheless, at both pre-application and examination stage, structural issues limit and shape the participation of local people and businesses within the NSIPs regime. So in particular, whilst participation makes onerous demands of all stakeholders, the resources and capacities (including time and funding) to meet those demands are unevenly distributed. In addition, some of the local people involved in our research have found the hearings

[7] See also T. Marshall and R. Cowell, 'Infrastructure, planning and the command of time' (2016) 34 *Environment and Planning C: Government and Policy* 1843.

intimidating. Further, heavy reliance on websites and email for communication can be problematic for some local people and businesses.

A major effect of the NSIPs process, including the pre-application consultation as well as the examination, is to allow the negotiation of measures to mitigate project impacts, including financial payments, as well as changes to the infrastructure itself.[8] The monitoring and enforcement of agreements to mitigate the adverse impacts of a project takes place outside the NSIPs regime, and includes obligations on the developer, the local authority and other regulatory bodies, and sometimes ad hoc governance arrangements involving specially constructed local or expert groups. We found that some local people lack confidence that agreements to mitigate will be implemented.

Statements of Common Ground, most often between the applicant and statutory consultees, but sometimes including other interested parties, play a powerful role within the process.[9] They can be a valuable way of streamlining decision making, highlighting open issues, and progressing applications. But, whilst all issues in principle remain open for consideration, in practice, Statements of Common Ground can close down areas for discussion, without the inclusion or even knowledge of a broad range of participants.

More generally, the local interested parties with whom we engaged for the project held diverse views of the NSIPs processes. Although there were some positive comments, other views were often very negative, including in respects raised above. The participants who responded to our survey perceived imbalances in the power of different actors within the regulatory process, and there was a strong perception among local people that they would not be able to influence the final decision.

Turning to our findings on evidence, first of all, it is worth observing that Examining Authorities have significant freedom to shape the evidence that is provided in the examination, for example by asking questions and requesting fresh data. Contributions from local people can help to guide this process. The evidential demands of the regulatory process are considerable, requiring in some cases the generation of knowledge in challenging and novel areas. The considerable time pressure within the examinations can create problems for the production of convincing evidence and the resolution of conflicts

[8] Eg Rydin et al, above n 4.
[9] Y. Rydin et al, 'Black-boxing the evidence: planning regulation and major renewable energy infrastructure project in England and Wales' (under review).

around evidence. The aspirations for an inquisitorial approach during examination may also be constrained by the strict time limits.

We observed a strong preference, when explaining and justifying its recommendations, for the Examining Authority to rely on technical forms of knowledge, especially when technical methodologies have been accredited by government or professional guidance.[10] Bringing together our findings on participation and evidence, we thought it important to note that evidence from lay publics was more effective when presented in a form equivalent to that produced by experts within statutory agencies and consultancies.[11] Less formalised knowledge held by local communities (such as information on bird habits from bird watchers, or on noise from sleep diaries) is generally not relied on in the explanation of decisions.[12] Site visits can also play an important role in deciding which evidence to rely on in decision-making, particularly with regard to assessing evidence on landscape, seascape and visual impacts.

Robust evidence on socio-economic impacts is often not provided during the examination.[13] Local authorities often present a weak understanding of their local economies. Developers are not willing or able to provide the certainty on choice of port, procurement chains and associated employment, which would underpin a stronger analysis of impacts.

And finally, monitoring the impacts of a project is a frequent condition of DCOs, but data from monitoring is not managed or aggregated, and there is no consistent use of that data in later decisions or policy. This is not an uncommon feature of environmental assessment.[14]

Recommendations

We made a number of recommendations at the end of our project, arising from the findings outlined in the previous section. Our recommendations are directed towards the UK government and Welsh assembly government, local government, PINS, NGOs and local people, and applicants. Our recommendations aim at the improvement of practice under the Planning Act, rather than arguing for any fundamental structural change to decision making on NSIPs.

[10] See Lee, above n 4.
[11] Ibid.
[12] Rydin et al, above n 4.
[13] Y. Rydin et al, 'Do local economic interests matter when regulating Nationally Significant Infrastructure? The case of renewable energy infrastructure projects' *Local Economy* forthcoming
[14] More generally, D.A. Farber, 'Bringing Environmental Assessment into the Digital Age' (2006) *UC Berkeley Public Law Research Paper No. 877625*, 347–349.

To enhance the public participation undertaken during the NSIPs process, a dedicated funding stream should support the involvement of local residents and local business representatives in the NSIPs process, including at the pre-application stage. Funding could provide for training or representation of the public at formal meetings, and assistance to allow those unfamiliar with these sorts of archives to make use of the rich source of information provided by the NSIPs website, as well as the expenses of participation. It is not sufficient to rely entirely on developers' commitment to community engagement at the pre-application stage. In addition to this dedicated funding, local authorities should engage robustly with the pre-application consultations undertaken by the developer, emphasising the importance of full inclusion of local communities. Whilst we recognise the challenges, we are of the view that a website, hosted by a relevant local authority, setting out all pre-application representations received by the developer, and the developer's responses to them, would assist with local communications. This website should remain accessible throughout the process. And at the end of the process, local authorities should take seriously their obligations to monitor and enforce compliance with the DCO, explaining to their local communities exactly what they are doing, and how local people can report concerns.

The Planning Inspectorate could share more fully the considerable good practice of some Examining Authorities in enabling lay people to feel that they have had adequate opportunity to put their views and concerns forward. They should make greater efforts to engage with lay knowledge when it is relevant to the application, but is not expressed in formal or approved methodologies or approaches. At the beginning of the process, when PINs decides whether to accept an application for a DCO, they should make use of the opportunity to scrutinise the substance and quality of pre-application consultation. And it should be possible for all interested parties to understand agreements made in Statements of Common Ground, for example by making them swiftly available on a register. Opportunities should be provided to respond to these agreements before consent is granted.

Local interested parties should give consideration to coordinating with each other and / or to consolidating their representations through an umbrella NGO. NGOs and local stakeholders will have the greatest possible influence if they engage fully with the process (including the pre-application process, attending hearings, joining site visits and responding to rounds of questions put by the Examining Authority), and if they provide evidence that is commensurate in rigour and depth with that offered by the applicant and expert agencies. They should be aware of the importance of sourcing relevant expertise. Similarly, as well as

presenting their own views and concerns as rigorously as possible, local interested parties should critique the representations of others where appropriate. They should keep a careful watch on the development of Statements of Common Ground.

Applicants should recognise that additional time building trust and community relations, from the pre-application stage all the way through the process, contributes to more meaningful exchanges in consultations. Best practice in consultation should always be followed. The practical issues that were most striking in our research included: varied scheduling of events to enable access for different audiences; accessible location of events; avoidance of last minute changes to venues and timing; a variety of communication options; avoidance of jargon, careful explanation of technical points. They should also (as some do) consistently appoint a named individual for the public to speak to directly, and publicise this opportunity widely. Applicants would benefit from helping publics to understand the significance of all stages of decision making, especially the ways in which the pre-application consultation can set the scope of the issues that are open for discussion during the examination.

Turning to the construction of evidence during the NSIPs process, the UK Government and the Welsh Assembly Government need to provide adequate funding for statutory bodies (Natural England, the Environment Agency, Natural Resources Wales, etc.) to meet the demands placed on them by the NSIPs process, and its calls for evidence-based decision making. Protocols for involving and recognising the impacts on local businesses beyond the fishing industry should be established. And an accessible central government repository for the collection, aggregation and management of data from monitoring of NSIPs should be provided. Local authorities need to invest adequately in Local Impact Reports, so that these properly represent the local area; local authorities should also develop better intelligence on their local area, especially the local economy.

Conclusions

Our recommendations make some explicit, and a number of implicit (but deliberate and important), recommendations that adequate funding be provided for the NSIP process. If the inclusion of local people and the adequate understanding of impacts is important in the consenting of major infrastructure, and we think it is, it needs to be funded so that it does not overwhelm the participants, especially statutory consultees, NGOs and local stakeholders of various sorts.

We are interested in the legitimacy of processes that provide legally guaranteed rights for publics to participate, but in a context that may restrict the potential for public concerns and aspirations to influence final regulatory decisions in any substantial way. We are concerned that negative perceptions and experiences of the NSIPs process may undermine the legitimacy of decision making, particularly for some local people in the vicinity of these infrastructure projects. Planning does many things, but it is an important part of a democratic structure of decision making. There are genuine, and probably insoluble, dilemmas of scale in the impact of major infrastructure that has been considered necessary (perhaps through a robust process) in the national interest, but which has significant impacts on particular communities. We do not suggest that local people should have any sort of veto in these cases. But we have identified areas where processes could be improved. Perhaps most striking is the issue that seems to have little to do with public participation – the mistrust among some local people that the detailed terms of the DCO will be complied with. But mitigation is especially significant in our cases. The strong presumption in favour of consent means that public participation is ultimately about the 'how' not 'whether'.[15] Confidence in the robustness of agreements reached is necessary for that participation to be meaningful.

[15] Lee et al, above n 3.