



Environmental
Law Foundation

access to environmental justice for all

Inquiry into the proposals for energy national policy statements

Submission by the Environmental Law Foundation to the Energy and Climate Change Committee

Debbie Tripley
Chief Executive
Environmental Law Foundation
Suite 309
16 Baldwin Gardens
London
EC1N 7RJ
Tel: 020 7404 1030

Inquiry into the Proposals for Energy National Policy Statements Submission to the Energy and Climate Change Committee, 14 January 2010

E.L.F is concerned that the legitimacy and effectiveness of the draft NPSs have been severely compromised by the consultation process and a lack of meaningful parliamentary scrutiny and public participation. Furthermore the NPS Consultation is unlikely to be compliant with the Aarhus Convention.

1.0 Introduction: The Environmental Law Foundation

1.1 The Environmental Law Foundation (E.L.F.) is the leading national UK charity founded in 1992 that helps people use the law to protect and improve their local environment and quality of life. Through its network of specialist lawyers and consultants across the UK, E.L.F. provides free advice and continuing support to those in need of assistance¹.

1.2 This is a response by E.L.F. to the inquiry into the proposals for the energy National Policy Statements (NPSs) being conducted by the House of Commons Energy and Climate Change Committee. It refers to all the energy NPSs (EN-1 - EN-6) and associated documents. In relation to the specified work of the Select Committee this response makes reference to (i) the role of the energy NPSs within the rest of the planning system and (ii) the consultation process.

1.3 The principal issues of concern to E.L.F. are those of fairness, lawfulness and access to environmental justice. This response will focus on a number of legal and factual aspects of the Department of Energy and Climate Change (DECC) Consultation on draft National Policy Statements for Energy Infrastructure (the Consultation)², and the government's wider approach to energy policy, which are likely to give concern to the local communities E.L.F. represents. The opportunities for meaningful public participation in decision making relating to these NPSs will be examined with reference to international conventions, European and national law.

2.0 Executive Summary

- **2.1** The central concern of E.L.F. is that of the fairness and lawfulness of the NPS consultation process.

¹ Further information on the E.L.F. from: <http://www.elflaw.org/site/>

² E.L.F. will submit a separate response to this Consultation.

- **2.2** The Aarhus Convention³ sets out a legal framework for the provision of public participation within environmental decision making and policy formation.
- **2.3** Recent energy policy consultations have been characterised by their abundance, complexity and emphasis on administrative efficiency – rather than their effectiveness at engaging the public. This sets the context for the current NPS consultation.
- **2.4** Public consultation is not sufficient to comprise public participation which includes dialogue, scrutiny, consideration and response.
- **2.5** The E.L.F. do not consider the NPS Consultation compliant with the Aarhus Convention
- **2.6** Substantive participatory issues with the Consultation include:
 - the short inadequate timescale for response;
 - the commencement of Select Committee proceedings before the close of the DECC Consultation;
 - the very large quantity of material associated with the Consultation, amounting to over 3,000 pages, limiting public access;
 - the lack of opportunity to test the technical evidence by means of inquiry;
 - the lack of transparency of decision making with many of the key issues already decided;
 - the removal of the consideration of regulatory Justification from the Consultation and absence of opportunity for parliamentary scrutiny of the Justification decision;
 - the lack of detailed and verifiable health information concerning radiological dose limits within the AoSs and availability of this information to the public.
- **2.7** Whilst E.L.F. regards the NPSs as being of vital national importance for the appropriate development of energy (and other) infrastructure over the coming decades, the legitimacy and effectiveness of the draft NPSs has been severely compromised by a lack of meaningful parliamentary scrutiny and public participation.
- **2.8** It is a false economy to attempt to make the decision making process more efficient by removing important elements of public participation and scrutiny. Attempting to fast track the decision making is likely to backfire in various forms of public opposition including legal challenge and create further alienation from the democratic processes.

³ UN Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, Denmark, 25 June 1998

3.0 Context

The Aarhus Convention and the legal framework for public participation.

3.1 The need for effective public participation in issues of environmental decision making are outlined in the *UN Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters 1998* (Aarhus Convention) which has been ratified by both the UK and the European Union. It provides that citizens must be entitled to participate in environmental decision making, records that public participation enhances the quality and implementation of decisions and commits the Government to guaranteeing the rights of citizens to public participation in decision making in accordance with the Convention⁴.

3.2 The need for public scrutiny under Aarhus was recognised in the Judicial Review *R (Greenpeace) v Secretary of State for Trade and Industry* [2007] in which the legitimacy of the government consultation on energy policy in the July 2006 Energy Review⁵ was challenged. Justice Sullivan stated:

*“Whatever the position may be in other policy areas, in the development of policy in the environmental field consultation is no longer a privilege to be granted or withheld at will by the executive. The United Kingdom Government is a signatory to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (“the Aarhus Convention”).”*⁶

3.3 Sullivan J also affirmed comments made in *R v Brent London Borough Council, Ex p Gunning* (1985) LGR168 which held:

*“To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken.”*⁷

⁴ A summary of the Aarhus Convention has been usefully provided by the Parliamentary Office of Science and Technology (POST) Report no 256, January 2006. The Committee may also wish to refer to the main text at: <http://www.unece.org/env/pp/documents/cep43e.pdf>.

⁵ Energy Review: the energy challenge, July 2006, DTI (report no CM6887)

⁶ *R (Greenpeace) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin) para 49

⁷ *Ibid.* para 55.

The energy NPSs Consultation in context: energy and related consultations since the 2007 Judicial Review⁸.

3.4 Before detailed consideration of the current NPS Consultation is made, E.L.F. believes that it is worth placing this in the context of recent government energy policy consultations. Since 2007 there have been a plethora of consultations associated with energy policy and with the government's plans for new nuclear build in particular. The Committee is asked to briefly consider, as an illustrative example, the DECC '*Indicative timeline for first new nuclear power stations*' which is included below in section 6.0 annex. This indicates the key steps being taken by the government since 2008 to facilitate new nuclear power by 2018 and includes the consultations being undertaken with these steps. These are represented by green dots and indicated in the key as "milestones".

The public has lost its voice

3.5 It is clear that this timetable involves a very complex strategy and structure which is designed to make the process happen quickly and efficiently. However, many of the steps in this timetable are not the technical or administrative hurdles (or "milestones") that might be assumed to be the case from this chart but are in fact *decision making* points in which the public expects to be involved through consultation and participation. The consultation points are included within the structure but arranged in such a way that there is very little opportunity or possibility of an actual change in policy position whatever the consultation outcome. There is clearly a presumption that the steps will all go through – that new nuclear is, in other words, a 'done deal'⁹. Therefore, whilst there appears to be considerable '*consultation*', E.L.F. is concerned that there is very limited true public *participation*. These concerns will be explored further with respect to the draft energy NPSs below in section 4.0 of this response.

⁸ As referred to in section 3.1 above: *R (Greenpeace) v Secretary of State for Trade and Industry* [2007]

⁹ It is interesting also to note that none of the consultations are included under the timetable key as "Critical Paths" – in contrast to government and regulatory body decision points

4.0 Fairness and Legality

The stated aim for participation and consultation in the new planning system

4.1 As the Committee will be aware, the NPS is the policy statement to be given primary consideration by the Infrastructure Planning Commission for granting new development consents. The NPS Consultation states the purpose of planning reform has been “*designed to create a more efficient, transparent and accessible planning regime*” and “*the new regime aims to be more transparent and to facilitate participation in decision making, strengthening the voice of communities*” (lines 2 and 6, paragraph 1.6 of the Consultation). The Consultation notes that the “*NPSs are intended to remove the need for lengthy planning inquiries on fundamental policy questions at the application stage*” (line 8, paragraph 1.14 of the Consultation). Importantly, the IPC or Secretary of State “*may disregard representations relating to the merits of policy set out in the NPS*” ... and “*may also refuse to allow representations [on NPSs] to be made at a hearing*” (paragraph 1.21 of the Consultation).

The NPS Consultation is not compliant with the Aarhus Convention

4.2 The overall objection to the Consultation raised by E.L.F. is that the process is not compliant with the Aarhus Convention. Commentators have noted that international law generally identifies three motivations for public participation: improving decisions; furthering international human rights; and legitimacy¹⁰. It is commented upon that ‘participation’ in terms of the Aarhus Convention can mean ‘consultation’ but that such consultation must generally aim to improve environmental protection. In addition, to satisfy the Convention consultation must be more than ‘listening’ mode to take ‘due account’ of the outcome of public participation (article 6 (8) of the Convention).

The difference between public participation and public consultation

4.3 The E.L.F. does not consider “public consultation” as equivalent to “public participation”. Consultation is a passive process of asking for representations usually only in writing. However, participation requires active involvement in the decision making process. There is a material and important difference between the two concepts. Consultation, if it is to go beyond mere ‘listening’ mode, must include dialogue, scrutiny, consideration and response. Participation in its fullest

¹⁰ Lee, M. & Abott, C. (2003) *The Usual Suspects? Public Participation under the Aarhus Convention*. The Modern Law Review, Vol.66 (80-108). p.80 footnote 37

sense would require an open forum in which all stakeholders can take an active part and where their views are given equal consideration.

4.4 E.L.F. have reviewed and considered the Consultation document, the draft NPSs, and their ancillary documents. Several aspects of the Consultation may preclude individuals and groups from participating in decision making, contrary to the government's stated aim for the planning policy (section 4.1 above) and in breach of the aims of the Aarhus Convention. E.L.F. does not believe that the consultation process enables the public 'to exert a genuine influence on decisions' suggested by Lee and Abbott as an objective of Aarhus provisions¹¹.

Applicable articles of the Aarhus Convention

4.5 Article 7 of the Aarhus Convention deals with public participation concerning plans, programmes and policies relating to the environment – and therefore the draft energy NPSs. It obliges the Government to make appropriate practical and other provisions for public participation during the preparation of such proposals, within a transparent and fair framework. There must be sufficient time for the public to prepare and participate effectively during the decision making process, and this must be at a stage when all options are open and when public participation can be effective. Due account must be taken of the outcome of the public participation.

4.6 Article 7 specifically applies article 6 (3), (4) and (8) to the decision making process. By virtue of article 6 (4) the information set out at article 6 (2) is also required. The nuclear NPS is distinct as it is site specific and comprises both a national plan for energy and the phased authorisation of aspects of new nuclear build. As such the site specific elements are *beyond the realm of a plan* which is apparent in so far as the IPC will be unable to consider issues such as the siting of new nuclear power stations and the siting of nuclear waste facilities. The E.L.F. contends that therefore the full remit of Article 6 of the Convention should apply to the nuclear NPS in addition to Article 7.¹²

Substantive participatory issues with the NPS Consultation

4.7 Timescale for response. The consultation opened on 9 November 2009 giving just 10 weeks, including the Christmas period, to respond to the consultation. Although formally, the consultation ends on 22 February 2010, which would technically allow 16 weeks for response, any

¹¹ Ibid. p.99

¹² Aarhus Convention text: <http://www.unece.org/env/pp/documents/cep43e.pdf>.

respondent wishing to be able to present oral evidence at this Select Committee on the draft NPSs is required to submit their response some time before 15 January 2009¹³. E.L.F. would note that in general the ability to find and instruct technical or legal experts over this short period, and consequent availability of those experts owing to the Christmas period, may compromise the quality and ability of individuals and groups to submit a response on these important issues.

4.8 Select Committee proceedings. The government has previously stated in parliamentary discussions the process by which national planning policy would be considered and undertook that *“Committees will have at least four to six weeks after the end of the three-month public consultation period to complete their work. This is an important and valuable part of the parliamentary scrutiny process.”* (from Hansard, debate on 20 May 2009, Column 1538). From this the public would legitimately expect that the Select Committee would meet only after the Consultation had been concluded. Any party wishing to make representations capable of being heard by the Committee must do so in a shortened timescale, possibly before that party has yet made its final response to DECC, or otherwise loses a valuable right to participate in the debate. Importantly, the purpose of the Select Committee proceedings is frustrated if it cannot hear the very evidence it was established to consider. More recently we have been informed by the Select Committee itself that there the government’s timetable does not allow us to make oral representations, depriving organisations like E.L.F. of a vital opportunity to have our concerns listened to by an independent forum.

4.9 Volume of Consultation Documents. The quantity of published material associated with the NPSs is very considerable (over 3,000 pages) and limits the ability of the public, individuals, and third sector organisations (especially those with limited resources) to make a detailed response to the Consultation. Over two thirds of this material is associated with the nuclear NPS.

4.10 Structure of Consultation. Although E.L.F. welcomes the accessibility of Consultation documents online, the structure of the Consultation is complex and the Consultation questions belie the volume and significance of the material on which comments are sought. E.L.F. would also note that it is not simply “draft policy” on which consultation views are sought. The draft NPSs also include Appraisals of Sustainability (AoSs) which includes a Strategic Environmental Impact Assessments (SEAs), Habitats Regulations Assessments (HRA) Reports and Impact

¹³ E.L.F. notes that the list of participants scheduled to give oral evidence to the Committee was finalised and distributed in a memorandum issued 17th December 2009 – less than six weeks from start of consultation.

Assessments. The AoS for Nuclear Power Generation (EN-6) also includes site-level reports. These are significant site-specific issues on which the public will not be able to make any future representations, once approved, as argument on NPSs may be excluded from any future scrutiny at the IPC consent stage of the planning process. The structure of the Consultation, particularly this “bundling” or incorporation of key information within national “policy” statements is potentially misleading.

4.11 Comments made by the House of Lords in *Berkeley v Secretary of State for the Environment* (2001) 2 AC 603 (affirmed by Sullivan J., see para 3.3 above) equally apply to the current consultation situation particularly in relation to the SEA process. E.L.F. contend that these documents have been produced in a similarly disparate fashion and many are traceable ‘*only by a person with a good deal of energy and persistence*’ (per Lord Hoffman). One example is in the context of radiological health whereby the health impacts can only properly be understood by means of accessing the technical documents provided in the concurrent consultation process into justification.

4.12 Moreover, the opportunity to put forward technical evidence on these important legal issues, or to raise further questions for clarification purposes, appears extremely limited, if not wholly curtailed by the volume of consultation documents in question.

4.13 Right to test the technical evidence by means of inquiry. From a practical perspective, anyone wishing to challenge the technical evidence upon which decisions concerning the permitting of nuclear power station sites and the justification of nuclear reactors must lodge representations to this consultation. There is no opportunity to test the assertions upon which the evidence is based. In light of this, Article 6 (7) of the Convention allows for a public hearing ‘where appropriate’¹⁴. In this context, E.L.F. consider it is entirely reasonable for the public to expect a hearing into these very important issues in order to ensure the legitimacy of both the plan and the partial authorisation granted to already to new nuclear facilities through the site selection process.

4.14 E.L.F. has further concerns about whether the failure to hold a public inquiry into the technical evidence of radiological detriment on dose constraints and limits to the critical group of individuals living within close proximity to the reactor might not be considered a breach of article 6 and 8 of the European Convention of Human Rights (ECHR) or indeed whether these technical

¹⁴ on the basis that Article 6 applies generally in the case of the site specific nuclear NPS.

issues would be better expressed before the IPC. E.L.F. note that under the Planning Act 2008 of citizen's claiming interference to their right to a private life under article 8 of the ECHR (as a result of the significant health impact from radiological emissions, discharges to air and sea, and volumes of nuclear waste stored on site, will have no opportunity for a fair hearing of those issues before any independent tribunal – such as a planning inspector.

4.15 Transparency of decision making. A number of statements in the consultation document reflect the wider assertion that planning policy has already been decided. E.L.F. notes that the Secretary of State of DECC, Ed Milliband, in the opening pages of the Consultation makes a case for certain aspects of the energy policy, for example, that nuclear will be required as part of an energy mix. Taken overall, there is a real concern that the government has pre-determined the issues and may have failed to have an open mind to alternatives or to genuinely broadening the scope of meaningful public participation. By the time communities are engaged, the issues of real substance may already have been decided and the scope of the consultation may be limited to issues only of implementation. In other words: *“Your new power station goes here – (what colour would you like the gates?)”*¹⁵. This is a further breach of the Aarhus Convention which requires that full public participation takes place early and before any decisions have been taken.

4.16 This is further illustrated by the manner in which the AoSs (and therefore SEAs) have been approached. As they were conducted following the identification of potential nuclear sites in the Strategic Siting Assessment (SSA) they have become a ‘backend’ process rather than the front end process as they were intended and can therefore have little potential to impact on planning. Instead measures resulting from adverse assessments made by the SEA simply result in statements and promises of mitigation measures. Clearly there is no assurance of the outcome of these. In any event, any proper SEA and AoS process ought to be able to demonstrate the mitigation measures that will be taken to reduce environmental harm *and involve the public* in a determination of the robustness of the measures concerned. In particular, E.L.F. have real concern that the UK government is not properly conforming to article 6 of the EU Habitat's Directive as there will be no opportunity for the IPC to reconsider the assessments and thereby undertake the type of scrutiny that satisfies the purpose of the Directive.

¹⁵ Quoted in Paul Thompson *Major infrastructure projects – where to now?* [2002] JPL (Occasional Papers No 30) 25 at 27.

4.17 E.L.F. also notes that the Secretary of State, who may in some cases be responsible for independently deciding planning cases, may have expressed views in the Consultation which do not reflect independent and unbiased opinion. The government's approach appears to belie the aim of the Aarhus Convention that requires participation 'sufficiently early' in the process and before any decisions are taken.

The removal of the consideration of Justification from the Consultation

4.18 The Committee will be aware that Justification is a statutory process applicable to all new activities or type of practices involving emissions from ionizing radiation in advance of their adoption or authorisation. Concurrent to the NPS Consultation process the government is consulting on the draft Justification decision.

4.19 The government is at pains to present Justification as a 'high level regulatory requirement' which is not of particular relevance or interest to the public. It is presented as a technical and expert-driven process. The consultation currently underway reflects this. (It is much more low key and less accessible than the NPS Consultation). However, the issues embedded within Justification include the broad range of overarching pros and cons to nuclear power (*inter alia*, safety, waste disposal, cost to public, ethics, climate change) which could not be of greater interest and importance to the public. There has been no public inquiry into the significant technical and value judgements made as part of this process.

4.20 E.L.F. has real concerns about the approach adopted here on two counts. First, the draft justification decisions will not be subject to specific scrutiny at this Parliamentary Select Committee. Following the consultation (ending 22 Feb 2010) the final justification decision is incorporated into Statutory Instruments and put before parliament in normal manner. Thus scrutiny of justification is being limited and separated from the NPSs. It is accepted that once Justification has been finalised these higher level questions concerning the benefits and disbenefits of nuclear energy will not be capable of reconsideration.

4.21 Second, E.L.F. are concerned that there is a lack of detailed health information provided to the public within the SEA process (and embedded within the AoS documents) to be sufficiently compliant. We assume that this is because the government expect the public to make reference to the Justification process in order to properly consider these issues. Instead, the government argues that radiological dose limits and constraints will fall within regulatory limits and therefore there are no significant environmental effects or impacts on human health.

4.22 However, this assumption is based solely on the technical data provided for the health detriment with regards the operation of the nuclear facility. There is a lack of information provided to the public on the radiological and environmental impacts from the site as a whole when one takes into account all operations on the site, including decommissioning of existing old reactors and the on site storage of new volumes of waste including highly radioactive spent fuel. Instead, assertions are made that high level waste will be stored underground in deep repositories. The government has created a policy for the future management and disposal of radioactive waste but does not have any concrete plans for this at present.

IAEA Joint Convention on the safety of spent fuel management and on the safety of radioactive waste management ('Joint Convention')¹⁶

4.23 Related issues pertaining to the availability of adequate information to the public apply to Article 6 of the Joint Convention which concerns the siting of proposed facilities for spent nuclear fuel. The EURATOM has declared that article 6 falls within the competence of the European Union. Thus, the Convention in this respect is binding upon the UK government and is applicable UK law.

Article 6 (1): Each Contracting Party shall take the appropriate steps to ensure that procedures are established and implemented for a proposed spent fuel management facility: (iii) to make information on the safety of such a facility available to members of the public.

4.24 Such information is not fully contained within the AoSs and indeed details for the spent fuel stores at the new reactor sites are as yet undisclosed. In order to comply with the Joint Convention this information will need to be made publicly available at the point of development consent applications to the IPC.

¹⁶ Text available from: <http://www.iaea.org/Publications/Documents/Infcircs/1997/infcirc546.pdf>

5.0 Recommendations & Conclusion

5.1 Whilst E.L.F. regards the NPSs as being of vital national importance for the development of energy (and other) infrastructure over the coming decades, the legitimacy and effectiveness of the draft NPSs has been severely compromised by the lack of meaningful parliamentary scrutiny and public participation.

5.2 It is a false economy to attempt to make the decision making process more efficient by seeking to remove important elements of public participation in decisions on nationally significant energy infrastructure projects. While the government is concerned to provide a process that reduces delay, uncertainty and upfront cost, E.L.F. believes that this may result in a system that is less fair and transparent, especially for communities who will bear the impacts of those decisions for many years to come. Decisions that have been subject to full and fair public participation will secure greater public acceptance and will strengthen trust between the state and the community.

5.3 Attempting to fast track the decision making is likely to backfire in various forms of public opposition including legal challenge. If people and communities affected by proposed individual projects feel that they have not been able to adequately influence the relevant NPS they may try to halt developments by other legal means such as seeking judicial review of the validity of the consultation carried out. More importantly, the government will find it increasingly difficult to obtain public legitimacy for the plans and will produce the undesired belief in the public that they are intrinsically undemocratic and poor decisions.

Debbie Tripley

Chief Executive

Environmental Law Foundation

Suite 309

16 Baldwin Gardens

London

EC1N 7RJ

Tel: 020 7404 1030; e mail: Debbie@elflaw.org

14 January 2010

