

# ***REFGOV***

***Reflexive Governance in the Public Interest***

## ***Services of General Interest***

### **REFGOV UK ENERGY CASE STUDY: SECURITY OF SUPPLY AND LAND-USE PLANNING**

*Draft for Paris Workshop, 2007*

by Helen Adlard & Tony Prosser

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# REFGOV UK ENERGY CASE STUDY: SECURITY OF SUPPLY AND LAND-USE PLANNING

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## Introduction

The UK case study of reflexive governance will concern the relationship between the development of security of energy supply and the participative arrangements provided by land-use planning law. This may appear an unusual choice, but it is of major relevance to the overall REFGOV project for at least three reasons. Firstly, the central theme in this study will be of the opportunities provided by participative procedures which may (or may not) offer opportunities for mutual learning. The planning process offers an important example of such procedures of great relevance to energy policy. Second, this is an area of considerable current importance; the current reviews of planning and of energy policy propose major, and highly controversial, changes to these procedures in order to facilitate greater security of energy supply through diversity of energy sources (in particular nuclear power), further facilities for gas storage, and related infrastructure developments. Third, this area offers a particularly striking intersection of different public and private interests. There is no single public interest but several, and two in particular may come into conflict; the securing of diverse sources of energy on the one hand and the prevention of undesirable development of land on the other. Nor is there a single private interest; again we have a marked conflict between, on the one hand, the interests of those private companies who will build and operate new nuclear stations, and on the other, the interests of neighbouring property owners and others whose amenity or safety may be affected. This makes an important point; the relationship between public and private interests will never be a simple one of convergence or conflict, but rather a complex web of different interactions, hence heightening the importance of deliberative procedures. A special concern here will be the relationship between the ‘high politics’ of energy policy and the more immediate community-based politics of local implementation. Serious difficulty has been experienced in the development of participatory procedures for the former, although the new government proposals may offer some helpful models.

The theoretical basis for the analysis will be derived from the REFGOV Synthesis Report of May 2006 and, in particular, the draft guidelines based on it and discussed at the Paris meeting in November 2006, setting out four models based on different approaches to social learning. Some preliminary points need to be made at the outset. The first is that this is a specific case-study and so there can be no expectation that we shall cover all the models in

detail here. The second is that we shall be treating the models as ideal types for analysis, not as a form of historical progression.<sup>1</sup> Thus, in addition to finding a mix of different types simultaneously, we could well find that there is some regression from one type to a different one, in particular based on political developments where participatory arrangements are perceived as an obstacle to policy change. We can now examine the four models from the guidelines in more detail to assess their relevance to our later discussion.

## The Theoretical Models and Background

### *a) Institutional Economics*

The theoretical model which is most clearly reflected in the institutional framework in the energy field is that of institutional economics. This largely reflects the fact that the process of ‘marketisation’ of the UK energy sector commenced earlier than in other comparable countries, and in many respects has proved to be more far-reaching. Thus the former state monopoly British Gas was privatised under the Gas Act 1986, and later full competition for both industrial and household users was introduced; the sector is now highly competitive. Similarly, almost all the electricity sector was privatised under the Electricity Act 1989 (the exception was the nuclear stations which proved unsaleable, though the more modern ones were later privatised) including splitting generation into competing enterprises, separate from transmission, distribution and supply. Full competition was introduced in generation and later in supply. Both supply markets are now closely intertwined, with companies offering ‘dual fuel’ deals, though there has been considerable market consolidation since the early days of liberalisation, with now only six major players in the household energy market. The model for both energy sources is thus competition-based, with coordination primarily through bi-lateral contracting between different enterprises and with consumers.

Reflecting the institutional economics approach, however, the process of marketisation was supplemented by regulation. Most obviously, this took the form of the new regulators for gas and electricity, now combined as the Office of Gas and Electricity Markets (Ofgem). In brief, the regulator has a variety of functions which include consumer protection, policing competition, and in some areas, social goals. The regulator is also responsible for setting periodic price controls for the remaining monopoly areas of transmission and distribution. A further important intersection of contractual governance and regulation has occurred in the highly technical question of how the purchase of wholesale electricity from competing suppliers can be co-ordinated (this is particularly complex given that electricity cannot be stored). The initial approach was to use the pool, a form of spot market supplemented by contractual hedging against fluctuations in price. This proved highly unsatisfactory, in particular because it enabled the dominant generators effectively to fix the market in their favour; lower input energy costs and reductions in the capital costs of generators were not passed on to consumers. The pool system was replaced in 2001 by the New Electricity Trading Arrangements (NETA), a complex mixture of self-regulation through an industry code with some regulatory oversight, which was extended to the whole of Great Britain in 2005 as the British Electricity Trading and Transmission Arrangement (BETTA). This combination

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<sup>1</sup> Cf the Synthesis Report at p110 which sees the different approaches as ‘a process leading to an ever deepening understanding of the conditions necessary for the success of the learning operation, and to growing recognition of the necessity for the internalisation of these conditions.’

of self-regulation and some regulatory oversight is precisely what one would expect from the institutional economics approach.

One problem which will be crucial to our latter discussion should be flagged up here, however. One consequence of privatisation and liberalisation was the ‘rush to gas’, the move from dependence primarily on large coal-fired stations as the main source for generation to the use of small gas-powered generating stations. These could be developed quickly, and had a particular appeal to supply companies which wished to branch out into generation, as was permitted by the rules adopted at privatisation. The result is that the UK became heavily dependent on gas as a source of electric power generation; by 2006 gas was used for 40% of electricity generation, and by 2010 the UK was likely to be dependent on imports for 40% of gas, rising to 80%-90% by 2020. Various administrative moves had been taken earlier to prevent over-dependence on gas, notably a temporary moratorium on new gas-powered stations, but, as we shall see, the issue of security of supply has now become central to UK energy policy. Again, however, the public interest is by no means simple as the major objective of energy policy, the need to meet climate change targets for reductions in emissions, actually favours the use of gas stations over coal. However the most favoured solution in Government now appears to be the development by the private sector of a new generation of nuclear stations. Much of the policy behind the recently proposed changes in planning procedures for major infrastructure projects reflects this policy priority.

### ***b) The Collaborative or Relational Approach***

The second model set out in the REFGOV guidelines is that of the collaborative/relational approach to social learning, which is designed to facilitate communications, deliberation and participation among key stakeholders to achieve common understanding or some form of weak consensus through dialogue. Such collaborative or participatory arrangements have traditionally been weak in UK governance, with instead the role of the minister and Parliamentary scrutiny being seen as the major means of participation and accountability. The energy regulator has done something to encourage such participation through consultation before key decisions are reached, normally in the form of detailed consultation documents, and through the giving of reasons for decision; central government itself has also adopted a more structured approach to consultation.<sup>2</sup> Much less has been done in the context of utility regulation, however, to establish collaborative or relational processes between stakeholders themselves; rather the regulator has acted as the passive recipient of information from other actors in the process. The nearest to such an organisation of collaboration has been through the work of the statutory consumer protection body, Energywatch. However, this has been concerned mainly with protecting consumers in the context of individual issues rather than policy development, and Energywatch is about to be abolished in its present form and taken into the general arrangements for promoting the consumer interest across all markets.

It is here that the first link with land-use planning appears, as an important source of participation which has strongly affected energy developments has been through the land use planning process. Land use planning, unlike much other public policy, directly affects the ability of property owners to use and develop their own land. As a result, at least at the level

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<sup>2</sup> See the Cabinet Office *Code of Practice on Consultation* (2004) at: <http://www.cabinetoffice.gov.uk/regulation/documents/consultation/pdf/code.pdf>

of individual planning decisions there has been a greater role for participative procedures than elsewhere; and indeed, since the Skeffington Report of 1969 some form of public participation has been accepted as central to the planning process.<sup>3</sup> Some energy land use decisions have been taken by central government but it is important to note that for the most part town and country planning functions are delegated to local authorities. Although subject to legislation by which they can only perform within powers expressly given by statute they do to a degree self-regulate by instituting appropriate decision-making structures and writing their own standing orders by which they self-administer when carrying out their functions. McAuslan<sup>4</sup> noted in respect of the slow progress towards participation by the public in local authorities' decisions that these authorities had significant discretion to determine the extent of publicity and consultation in relation to the preparation of structure and local plans (i.e. land use policy) for their area. McAuslan's view was that at the stage when Skeffington reported, a 'public interest' ideology still took precedence within the institutions involved in land use planning over an ideology based on participation. The public authorities' officers (who were generally well respected public servants) considered that they knew best what decisions to take in the general public interest and that participation was tolerated (and supported in the courts) because of private property interests of landowners in the area, not because it was a good thing for reasons of principle.

Historically, the most important form of public participation was the public inquiry, and although still the most important process for public participation in major project decisions, consultation with local authorities and the use of informal hearings on smaller projects is increasing. In the determination of planning policy (such as Local Development Frameworks and Regional Spatial Strategies) other institutional means for public participation have been used since changes to the planning system were brought into force in 2005, notably the examination in public. Informal public consultation by Government in formulating its policy on land use issues and procedures has grown enormously in recent years in part due to the impact of the Aarhus Convention. The courts have also been more closely involved in arrangements for public participation in planning than elsewhere, again reflecting the effect of such decisions on property rights, although the courts have clarified their limited role in respect of the impact of planning decisions on individual property rights under the Human Rights Act 1998.<sup>5</sup> It is in these traditional modes of participation in planning that we can see a form of collaborative/relational approach, especially as other opportunities for participation in decisions relating to energy policy are highly restricted. What this model does is to accept that there are competing public and private interests, but assumes that a consensus solution can be possible through participation and compromise in each individual decision. Again, the traditional means for participation do not actively organise social interests to facilitate participation, but merely provide a means for inputs by outside interests, in particular by property owners. Thus problems have arisen through the lack of resources of those attempting to participate and an over-dominance of the proceedings by formal public inquiry procedures.

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<sup>3</sup> *Report of the Committee on Public Participation in Planning (the Skeffington Report)*, (1969).

<sup>4</sup> Patrick McAuslan 'The Ideologies of Planning Law' at p20 with specific reference to s8(i) of the Town and Country Planning Act 1971.

<sup>5</sup> *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23.

### c) *Democratic Experimentalism*

When does this participation turn into the third model set out in the guidelines; that of democratic experimentalism, which develops group capacities for learning? According to the guidelines, this model focuses on;

building capacities for learning to enhance the quality of the compromise or cooperative adjustment between the different social forces. The criterion of “success” of this mode of governance refers to the extent of development of the capacities of stakeholders to actively engage and participate in social dialogue and experimentation, and thereby to contribute to the learning process.

There are three conditions which may have occurred in the planning context to form the basis of such transformation. The first is the active organisation of participation by the public authorities in such a way as to enhance the capacities of those participating; this forms part of the process of consensus-based collaborative planning in the 1980s and 1990s. We have seen important attempts to do this in some recent planning reforms.<sup>6</sup> Thus the Planning and Compulsory Purchase Act 2004 and the accompanying 2004 Planning Policy Statement 12 provided new guidance for local authorities on stakeholder engagement, emphasising that this should be early, use methods of involvement relevant to the communities concerned, provide continuing involvement rather than a one-off event, and build involvement into the process for the preparation and revision of the statutory Local Development Documents. A published Statement of Community Involvement was also required. The Local Government Act 2000 had also placed a duty on local authorities to prepare local community strategies, often setting up a Local Strategic Partnership bringing together the public, private, voluntary and community sectors to do so. Examples of particularly well developed consultation practices in response to high profile failures to achieve policy decisions at central government level in relation to radioactive waste management policy and nuclear power will be considered below.

The second condition for the transformation from the second to the third model is the use of the process, either in the forum of the public inquiry or in the courts, by groups as a means of creating a ‘surrogate political process’.<sup>7</sup> The third condition, closely linked to the second, is that some challenges did not concern individual decisions in which government policy was applied, but the general policy itself. Some brief examples will illustrate this. During the 1970s objectors to the extensive road building programme increasingly used public inquiries as a forum for objecting not only to the route of the new road but to the *need* for the individual road or the roads programme. This strategy suffered a major setback in the decision of the House of Lords in the case of *Bushell v Secretary of State for the Environment*<sup>8</sup> in which it was held that the public inquiry was not an appropriate forum for the discussion of either the merits of government policy or the factual evidence on which it was based. Nevertheless, in the energy sector, the inquiry into the Sizewell B station (the last new nuclear station in the UK to date) was characterised by the participation of campaigning groups and by an acceptance that policy was an appropriate issue for discussion.<sup>9</sup> The inquiry decided in favour of constructing the station (on the basis of economic evidence which was largely discredited when it became necessary to provide details of the performance of nuclear

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<sup>6</sup> For an overview, see Department for Communities and Local Government, *Achieving Successful Participation: Literature Review- Spatial Plans in Practice: Supporting the Reform of Local Planning* (2006).

<sup>7</sup> The phrase is taken from Richard Stewart, ‘The Reformation of American Administrative Law’, (1975) 88 *Harvard Law Review*, 1667-1813.

<sup>8</sup> [1981] AC 75.

<sup>9</sup> See M. Purdue et al ‘The Government at the Sizewell B Inquiry’ [1985] *Public Law* 475-89.



stations at the time of privatisation) and there was criticism of the length of the inquiry and of the difficulty of determining what government policy actually was. Consideration had been given to funding objectors to help them prepare their case, but the minister rejected this. The inspector at the inquiry noted that lack of funds did not seem to impair their presentation of their case, although objectors were not able to return to the lengthy inquiry at a later stage to deal with new matters. Campaigning groups also increasingly resorted to use of the courts as a means of challenging government policy, aided by judicial liberalisation of the rules of standing so that it now became possible for such a group to bring a challenge in its own name.<sup>10</sup> Recent court decisions highlight an increasing tendency for the courts to support the importance of the process of participation which in turn has led to more open and well established practices of consultation in policy-making. A notable success in the energy field occurred recently in the case of *R (on the application of Greenpeace Limited) v Secretary of State for Trade and Industry*<sup>11</sup> in which the High Court held unlawful the Government's plans to build new nuclear stations on the ground that there had been inadequate consultation, a decision to which we shall return below.

These changes towards a more active encouragement of participation, the use of the process as a surrogate for politics, and the challenge of general policy, may be necessary conditions for a move to a more democratic experimentalist approach, but they are not sufficient conditions, and most participation in planning remains within the collaborative or relational approach.

#### ***d) The Internal and Pragmatic Approach***

Here then we see a transformation of individual participative arrangements into a form of surrogate political process for groups. It is at this stage difficult say whether this will develop further into the fourth stage, that of an internal and pragmatic approach to social learning. Certainly, something resembling this process is apparent in current debates on land use planning, in particular in calls for 'the notion of "public participation" to be set aside. It is time instead to practice "participatory planning".'<sup>12</sup> This involves a move away from participation led by a planning authority on the assumption that this provides a basis for consensus to providing instead 'a set of processes through which diverse groups and interests engage together in reaching for a consensus on a plan and its implementation. ... The different parties need to exchange information to explore areas of common ground and compromise and to find ways of reducing the extent and intensity of disagreement. No party should lose out entirely'<sup>13</sup> Key tools will be engagement, negotiation, and mediation.

This appears a promising basis for developing a more reflexive approach. However, at this stage it is necessary to point out three potential obstacles to such a progression. The first is that, as we shall see in detail later, the Government is clearly concerned by the administrative cost and the delays imposed by participative arrangements in relation to major energy infrastructure projects, and one of the themes in recent reforms has been increasing control over the participation process at the individual decision-making stage to minimise such costs

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<sup>10</sup> See e.g. *R v HM Inspectorate of Pollution ex parte Greenpeace Ltd (No 2)* [1994] 4 All ER 329, and especially *R v Secretary of State for Foreign Affairs ex parte World Development Movement* [1995] 1 WLR 386.

<sup>11</sup> [2007] EWHC 311.

<sup>12</sup> Department for Communities and Local Government, *Participatory Planning for Sustainable Communities: International Experience in Mediation, Negotiation and Engagement in Making Plans* (2003). This paper give a useful overview of the subject, including use of examples from overseas.

<sup>13</sup> *Ibid.*, 1.8-9

and delays. Secondly, there is an uncertain relationship between the use of such decentralised techniques and the development of national policy on the framework for electricity generation; a further theme has been to separate more clearly the national and local levels of policy and its implementation. Thirdly, the development towards this reflexive model relies extensively on the existence of trust between the participants, and (as shown in the *Greenpeace* decision above) this is in short supply.

The importance of trust in public administration and in economic life has been increasingly recognised and analysed.<sup>14</sup> Land use planning creates difficult conditions for trust in view of the tensions caused by potential economic gain for developers and landowners, lack of transparency in public authority decision-making and the fact that members of the public are directly or indirectly adversely affected by decisions to develop land, or by public policy decisions which flow into individual decisions in due course. A particularly tense area which frequently undermines trust placed in decision-makers, and subject to a great deal of activity in the courts, has been the negotiations between developers and local authorities for ‘planning gain’; packages of local community benefits which are requested by local authorities or offered by developers to compensate for adverse impacts of the proposed development. These benefits can lead to the grant of planning permission where otherwise permission might not have been forthcoming; however, the courts have supported central government guidance that planning permissions should not be bought or sold<sup>15</sup>.

Despite these problems, we can see some potentially reflexive elements in the Government’s proposals for reform of the planning system for major infrastructure projects. First, however, more needs to be said about the background for these proposals in matters of energy policy.

## Recent Developments in Energy Policy

We described above how unforeseen consequences of the decentralised, market-based energy sector created after privatisation have led to new concern by government to create a policy and regulatory framework founded on two major concerns; addressing the threat of climate change and ensuring security of supply. There were a number of individual attempts to influence the market, notably the moratorium on new gas-powered stations from 1997-2000, but the first major statement of the general problem was in the Energy White Paper of 2003.<sup>16</sup> This concentrated on a framework for dealing with climate change, most importantly through a commitment to a reduction in carbon dioxide emissions of some 60% from 2003 levels by around 2050. The major instrument for achieving this was to be through carbon trading emissions schemes, initially on a voluntary basis but from 2005 as part of the European-wide scheme. The White Paper did not propose that government should set targets for the use of different fuels; instead it should rely on the market framework, but it would provide some further support for renewable sources of energy. The Paper was unenthusiastic about the development of new nuclear generation; ‘current economics make it an unattractive option for

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<sup>14</sup> See for example Onora O’Neill ‘A Question of Trust’ (The BBC Reith Lectures 2002) and Francis Fukuyama ‘Trust: the social virtues and the creation of prosperity’ 1996.

<sup>15</sup> *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 2 All ER 636.

<sup>16</sup> Department of Trade and Industry, *Our Energy Future: Creating a Low Carbon Economy*, Cm 5761 (2003).



new, carbon-free generating capacity and there are also important issues of nuclear waste to be resolved.’<sup>17</sup> It did not, however completely rule out the building of new nuclear stations.

The next major document, the result of the energy review which had examined progress towards the goals in the 2003 White Paper, was published as *The Energy Challenge* in 2006.<sup>18</sup> Rather than emphasising the single goal of coping with climate change, the new paper emphasised the dual challenges of climate change and energy security. Once more, the former was largely to be met by placing a price on carbon and through emissions trading schemes. The most controversial proposals were in relation to security of supply and the energy mix. They included the development of new strategic gas storage facilities, and a related streamlining and simplification of the land use planning process for gas infrastructure projects. For electricity, the report emphasised the need for new generating capacity as older stations come off stream; by 2025, new capacity equivalent to 30% of current capacity will be required. This would be the responsibility of the private sector within a regulatory framework set by government; most controversially of all, the Government accepted that nuclear power would have a role to play in the future UK generating mix. New nuclear stations would be proposed, developed, constructed and operated by the private sector which would also meet decommissioning costs and its share of long-term waste management costs. Planning procedures would be changed so that national strategic issues would be discussed elsewhere than in the public inquiry into individual generating stations. A more detailed policy and regulatory framework would be set out in a White Paper proposed for the beginning of 2007.

As mentioned above, this process met with an unexpected setback when Greenpeace successfully challenged the decision to support the development of nuclear stations in the High Court.<sup>19</sup> The Court held that proper consultation was needed before the decision on the basis of a promise in the 2003 White Paper that there would be ‘the fullest public consultation’ before a decision was taken. Full and effective consultation was also necessary to comply with the Aarhus Convention. The consultation had not been adequate, primarily because inadequate information had been given on the crucial issues of the economics of nuclear power and the disposal of nuclear waste. As a result, the White Paper was postponed until late May 2007 and a process of consultation undertaken alongside it with a decision due in Autumn 2007. In view of this history it is not surprising that the 2007 White Paper had little that was new to say.<sup>20</sup> It did, however, reiterate the Government’s preliminary view that ‘it is in the public interest to give the private sector the option of investing in new nuclear power stations.’<sup>21</sup> The most important proposals for the purpose of this study were, however, contained in the Planning White Paper published earlier in the same week.

It is worth noting that a proposal for a separate system involving solely parliamentary scrutiny of major infrastructure projects before a public inquiry on local matters of detailed implementation had been proposed in 2001 but had not been followed through with the required primary legislation after major opposition to the proposals on the ground that they would seriously diminish opportunities for public participation. The current proposals have therefore been a long time in gestation. Learning from difficulties encountered at public inquiries into Sizewell B in 1985 and Heathrow Terminal 5 in 1995-9 cannot easily translate

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<sup>17</sup> Para. 1.24.

<sup>18</sup> Department of Trade and Industry, *The Energy Challenge: Energy Review Report 2006*, Cm 6887 (2006).

<sup>19</sup> *R (on the application of Greenpeace) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin).

<sup>20</sup> Department of Trade and Industry, *Meeting the Energy Challenge: A White Paper on Energy*, Cm 7124 (2007).

<sup>21</sup> At 17.

into reform of procedure where fundamental changes involving primary legislation are required.

## Energy Land-Use Planning: Planning Reforms

The 2007 Planning White Paper<sup>22</sup> followed recent major reforms to the planning system under the Planning and Compulsory Purchase Act 2004, building on some of those changes and proposing to alter some participatory measures that had been unsuccessful.<sup>23</sup> Prior to the White Paper's publication, impetus for reform had been set out in the *Energy Challenge* in July 2006 (see above) and had been further emphasised in two influential reports produced for the Government by Kate Barker and Rod Eddington in December 2006. These had respectively considered facilitation of sustainable economic growth through the planning system and transport planning in general and on a national scale. Kate Barker stressed the need for a responsive planning system able to cope with increasing challenges of climate change and globalisation and that underpinning the necessary response to these challenges lay the need for infrastructure and public services including security of energy supply. Barker and Eddington both cited the damage that was done to Government objectives by delays caused when consent was sought for infrastructure projects and recommended that a different system should be instituted to bring forward such projects of national or regional importance.

The 2007 White Paper made major new proposals for a move towards a system for nationally significant infrastructure projects to run in parallel to the town and country planning system. This is largely explained in the recommendation that decisions should be taken at the right level: where projects bring benefits on a national basis but these may not be visible to the local community where a proposal is to be sited, it is inevitable perhaps that local issues would dominate the thinking of a locally elected decision-maker. Projects with wider 'spillover' should be considered by a body with its eye on a wider agenda. As we shall see there is a clear difference in procedure between the two systems with regard to participatory planning. The two key elements in the reform were a system of national policy statements, and examination through an Infrastructure Planning Commission rather than by public inquiries; these will be considered in detail below.

The Planning White Paper consultation period ended on 17 August 2007 and the Government's response to representations received is expected by 17 November 2007. The paper itself proposes changes to legislation which would not take effect until 2009. What the Government does with the representations received in the consultation process (whether for example it does change its policy as a result) is of course fundamental to the discussion on social learning to maximize normative expectations. Certainly there is evidence that the Government takes seriously the reporting of responses received to consultation papers.<sup>24</sup> This

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<sup>22</sup> Department for Communities and Local Government, Department for the Environment, Food and Rural Affairs, Department of Trade and Industry and the Department for Transport, *Planning for a Sustainable Future White Paper*, 21 May 2007 ('White Paper'), Cm 7120.

<sup>23</sup> For example the Statement of Community Involvement will no longer be subject to independent examination and instead local authorities will be under a statutory duty to involve its community in the process of plan preparation.

<sup>24</sup> See for example:

<http://www.communities.gov.uk/documents/planningandbuilding/pdf/AnalysisConsultationResponses> which reports responses to a recently closed consultation on the draft Planning Policy Statement: Planning and Climate Change.

referenced report provides a breakdown by type of respondent (e.g. public authorities, planning consultants, developers) of answers to each question which had sought agreement or disagreement with the Government's proposals and the report summarises and quantifies all of the issues raised by respondents.

### *A system for nationally significant infrastructure projects*

The proposal is for the Government to prepare national policy statements on a sectoral basis. The Energy White Paper states that a number of statements will be produced for the energy sector: it is likely there would be an overarching statement and some sub-sectoral statements,<sup>25</sup> such as nuclear power and renewable energy. These would differ from existing planning policy statements by concerning closely defined vertical sectors where the benefits would be primarily national, rather than local such as housing. The primary difference for our purposes, however, is the proposal that these national statements should be given status under statute as the primary consideration for the decision-maker. We shall see in due course that this has implications for the validity of participatory arrangements under the new system, and it will require very careful drafting of the necessary statute.

In the light of the potential importance of these statements the Planning White Paper recognises the need for full and proper consultation on their content. The Government has been made publicly aware of the need for proper consultation to be just that, rather than consultation in name only, by recent court decisions referred to earlier. Indeed the court made clear that even high-level strategic issues are subject to the court's intervention, not least because the UK Government is a signatory to the Aarhus convention.<sup>26</sup> However it is worth noting that the court stated in the *Greenpeace* judgment<sup>27</sup> that 'in the absence of statutory or other well-established procedural rules for taking such strategic decisions it may well be very difficult for a claimant to establish procedural impropriety' (such impropriety being a ground for judicial review). Furthermore, another ground for review, irrationality, is unlikely to be made out if the challenge concerns 'high level or strategic decisions'. Nevertheless, the *Greenpeace* case achieved a declaration that the consultation had been inadequate: first due to the Government's promise to carry out a full consultation, there was a legitimate expectation that it should be carried out. Second, because the courts have established what 'proper' consultation should entail, and the Government's inadequate attempt in the case of a decision as important as one to support the development of new nuclear power stations had clearly not been fair. Specifically this was due to failing to provide necessary relevant information to consultees and to the publication only of an issues paper rather than making it clear that answers were sought to questions raised and that decisions on policy would then follow deliberation on the responses. The Government had raised in argument at the court hearing the fact that Greenpeace's responses to the consultation were very full and covered all of the relevant issues: despite this, it was held by the court that something had gone 'clearly and radically wrong' with the consultation process. Further challenges to policy decisions in the future may be assisted by the presence of the Government's code of practice on consultation.<sup>28</sup> This sets out a number of administrative principles for proper consultation

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<sup>25</sup> Energy White Paper 2007 (above), para 8.53.

<sup>26</sup> Article 7 states '...To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.'

<sup>27</sup> At paragraph 54

<sup>28</sup> See note 2 above.

(such as, in normal circumstances, a minimum period of twelve weeks for responses). Breach of these principles could well be held by the courts to be unlawful as failing to meet a legitimate expectation.

The proposal in the White Paper is to consult the public on the content of the national policy statement prior to a final decision, including consultation channeled through the local authority where a statement is locationally specific. Local authorities have considerable experience of engagement with their electorate and it appears this would be utilized in the process to identify suitable locations for strategic development, but it may be that this will fail to achieve consensus at a local level.<sup>29</sup> The national policy statements will be subject to a right to mount a statutory challenge<sup>30</sup> but as noted in *Greenpeace* the merits of the decision, which can only be challenged if irrational in the legal sense, will be untouchable given that the decision will concern ‘high-level strategic issues’. Parliamentary scrutiny is also proposed, although it is not clear whether it will allow a policy decision to be blocked or whether instead it will lead at most to public debate and potential political embarrassment.<sup>31</sup>

It is clear therefore that if the Government carries out consultation in a fair way the content of national policy statements will be secure from challenge on procedural grounds (though the possibility of challenge on substantive human rights grounds, for example for breach of Article 8 of the European Convention on Human Rights, remains).

In an attempt to meet these requirements, the Government issued a full consultation document on the future of nuclear power immediately after its publication of the Energy White Paper. Its proposal to facilitate the investment by the private sector in new nuclear power stations is based on its view that the benefits of having a low carbon source of energy override the risks. Having stated that the existing regulatory framework means only a very small risk exists in relation to safety, security and health issues connected to the new stations, it limits the remaining issue of waste disposal to an ethical question of *whether or not* to produce more waste. The question can be posed on the basis that the Government is satisfied technical solutions can be found to unresolved geological disposal issues and so the answer to the ethical question depends on the balance between the benefit to the current generation of carbon-free energy and the burden on future generations of a waste legacy. The impact for the planning process now proposed is that waste will be stored on the new stations’ sites potentially for many decades until the geological storage issues are resolved. This is clearly a local issue which will need to be taken into account in the strategic site assessment exercise and also at the examination stage of each proposal. The nuclear power consultation process is using a number of interactive methods to collect information. One such method is the running of day long events at which groups claimed to be ‘demographically representative’ of their region are informed and then canvassed as to their opinions on important issues for a decision on whether to support new nuclear power.<sup>32</sup> It is important to note here that Greenpeace announced that it would not take any part in the consultation on the basis that the

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<sup>29</sup> *Bishop’s working paper 2; Participation in Development Plan Preparation* at [www.communities.go.uk/index.asp?id=1145380](http://www.communities.go.uk/index.asp?id=1145380) provides interesting survey information on local authorities’ experience which shows that where consultation is coerced by statute or the courts it undermines its potential to achieve consensus.

<sup>30</sup> That is on legal grounds only within 6 weeks (rather than 3 months allowed to mount a judicial review) of the decision.

<sup>31</sup> See para. 3.7 of the Planning White Paper.

<sup>32</sup> See <http://nuclearpower2007.direct.gov.uk/> for information on the consultation and the events.

Government's policy to support new nuclear power was already fixed and the consultation process merely a public relations exercise.<sup>33</sup>

As regards the national policy statements themselves, it is critical to understand how they will be used in decisions on particular projects in order to assess whether at that stage of the decision-making process there is some opportunity for social learning that could influence either the process or the policy on energy supply. The decision-maker for major energy projects would be a new infrastructure Planning Commission ('IPC') made up of experts with appropriate expertise who would form a panel of 3-5 members to determine an application for any consents necessary to bring forward the particular proposal.<sup>34</sup> The IPC as decision-taker would be independent and entirely separate from the policy-maker (though appointed by the Government). The Commission's role would be also to advise the developer on the preparation of the required information for the application, with certain individuals nominated for that purpose.<sup>35</sup> Other organizations instituted by government have and will continue to have an advisory role in the preparation of development plans and applications, as will be discussed later. Different individuals from the Commission would form the panel to determine the application following a public inquiry.

The proposal for the Commission's procedure is to provide wide discretion to the panel to determine issues that should be dealt with by way of written representations only, and for them to encourage mediation and agreements to be entered between parties on any areas of common ground and to provide the forum for debate on an inquisitorial basis on other issues. The White Paper stresses the need for a level playing field at the sessions so that these do not unfairly advantage the participants who are represented by legal advocates and so that the public are encouraged to air their views on local issues. The highly technical nature of much of the evidence would therefore either be subject to written representations on its credibility or subject to inquisitorial examination by experts, rather than cross-examination by representatives of parties involved. The Commission would be expected to deal with most of the issues by means of written representations but would have the ability to request that certain issues be dealt with by way of cross-examination (either by the parties' advocates or by itself) if it considered that would better test the evidence. There is no mention of how the IPC's decision may or may not be fed back into policy-making.

The process itself together with the proposed restriction on matters which will be considered material to the decision entirely change the basis on which the public can influence decisions. Primary legislation will be required to ensure that national policy statements are to be the primary consideration for the IPC. It appears legislation will also attempt to define (although

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<sup>33</sup> See <http://www.greenpeace.org.uk/files/pdfs/nuclear/2007-consultation-nuclear-dossier.pdf> which is a ten page document setting out detailed reasons why Greenpeace, the Green Alliance, WWF and Friends of the Earth have all withdrawn from the consultation process.

<sup>34</sup> At present there can be a need for multiple consents under different legislation, sometimes from different decision-makers, for example power stations require consent under the Electricity Act 1989 from the Secretary of State of the DTI (who also provides deemed planning permission for the construction) and for confirmation of any compulsory acquisition of land or rights for overhead lines and gas storage may need the SoS of the DTI's authorization for gas storage, and an order providing planning permission under the Gas Act 1965, hazardous substances consent and compulsory acquisition orders under the Planning (Hazardous Substances) Regulations 1992 and the Land Acquisition Act 1981.

<sup>35</sup> Poor preparation of highly technical applications by developers was cited in the White Paper as a further reason for delay in bringing forward such projects which would invariably trigger the need for preparation of an Environmental Statement under the Town and Country Planning (Environmental Impact Assessment) (England) Regulations 1998.



there is some ambiguity in the White Paper) what will be material to a decision on a major infrastructure project. At present any party who engages in a planning decision is entitled to raise any 'material consideration' and this must in law be taken into account by a decision-maker when making a decision.<sup>36</sup> The strong indication is that the public will no longer be able to raise matters of national policy at all before the new commission; this is in line with the proposals in the energy papers referred to earlier.

Furthermore, as part of the gestation of the national policy statement, it will be subject to strategic environmental assessment<sup>37</sup> in which the environmental impact of the plan or programme must be assessed before making a decision on the proposed plan or programme. This means that 'environmental' issues will have been already balanced by the Government against the social and economic impact of the policy. It is difficult to see how any local environmental issues would be significant enough to outweigh at the public inquiry stage a policy which had already had any significant environmental adverse impact assessed through the SEA process.

It is proposed in the White Paper that the local authority for the area in which a major energy project is to be sited would report to the IPC on how the proposal meets or conflicts with local development plan policy but that this would no longer be the primary consideration. In the light of the existing participatory arrangements at the time of formulating local or regional plan policy and the ability to raise material issues at the public inquiry into a proposal, the new arrangements are a regression towards less participation at the individual decision stage, irrespective of the proposal to institute a less intimidating inquiry process. The tendency towards 'front-loading' of participation in decisions on policy matters in which the balance has arguably already been struck between community and individual interests may have legal implications as will be discussed below.

## Existing Participatory Arrangements

Existing arrangements are important because the new system will not be in place before 2009 and also because a number of important energy projects will be dealt with under the town and country planning system already in place, with some relatively minor amendments proposed in the White Paper.

The current land use planning system already has the framework in place to ensure that relevant issues, including those set in national policy and relating to the need for a proposal, are taken into account in decisions. The Government produces national planning policy statements that must be considered by regional and local planning bodies when formulating development plan policy<sup>38</sup> which would then become the primary consideration in planning

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<sup>36</sup> See s70(2) TCPA 1990, and cases concerning material planning considerations e.g. *Stringer v Minister of Housing and Local Government* [1971] All ER 65 which states planning considerations are any matters related to the character and use of land, and *SSE v Edwards* [1994] 1 PLR 62 which concerns the materiality of alternative sites where development plan policy confirmed the need for a specified number of motorway service stations.

<sup>37</sup> under the Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004/1633).

<sup>38</sup> S39(3) PCPA 2004 and note also the statutory requirement to exercise the function of preparing development plan policy with the objective of achieving sustainable development under ss39(2) PCPA 2004.

decisions.<sup>39</sup> The public will be involved from the very earliest stages right through to participation in a public inquiry prior to the grant of planning permission. Applications for existing power stations below certain thresholds<sup>40</sup> are dealt with in this way, as are many renewable energy projects and smaller related infrastructure proposals. It is proposed in the Energy White Paper that this division will remain; the thresholds are described as 'illustrative' however.<sup>41</sup>

The administrative decisions taken both in relation to policy-making and the grant or refusal of consents for development depend on an expert or experts assessing relevant considerations and making an informed judgment on the appropriate balance to apply in the circumstances. This means that national, regional or local policies can be overridden if additional local issues weigh sufficiently against them. The 'expert' will be a professional planning officer advised appropriately by other experts, or an inspector appointed by the Secretary of State. Local authorities determine when the expert officer cannot operate this delegated power and where the decision must be taken by the elected members of the authority, having first taken account of the expert advice. A similar distinction applies for applications of more than local significance where the Secretary of State can recover the decision-taking power from the appointed inspector. This means that the most significant decisions (either in the local or national context) are taken by elected politicians rather than experts with knowledge and experience which is applied to often complex, technical evidence. The proposals for major infrastructure projects takes the power to make the decision to grant consent away from the politician, relying on the planning commission of experts to balance the relevant national and local issues appropriately. The implication is that this would lead to a more transparent system in which the public would have more confidence.<sup>42</sup> Against the view that in such technically complex areas of decision-making experts views should hold sway is the view that the public can provide valid information which is important not only for reasons of enhancing legitimacy but also to ensure the result is a robust one because lay persons' views on ethical and social matters for example are equally important, although of course it should be remembered that this will be within a framework of general policy determined by ministers.<sup>43</sup>

Other proposals require consent under different statutory regimes. For example the consent is required of the Secretary of State of the Department for Trade and Industry under the Electricity Act 1989 for both power stations and overhead lines and under the Gas Act 1965 for underground gas storage authorizations for licensed gas transporters. These processes involve achieving deemed planning permission or an order of the Secretary of State with the same effect, in parallel to the consent regime. There is evidence that the complexity of the process leads to delay and inefficiency,<sup>44</sup> but in addition there is some ambiguity about the issues that would be considered as having primary importance in the decisions to be made.

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<sup>39</sup> S38(6) PCPA 2004 states: 'If regard is to be had to the development plan for the purpose of any determination under the planning Acts the determination must be made in accordance with the development plan unless material considerations indicate otherwise.'

<sup>40</sup> see summary in Table 7.1 at p138 of the Energy Challenge Energy Review Report 2006.

<sup>41</sup> See Box 8.1 of the Energy White Paper.

<sup>42</sup> See Onora O'Neill 'A Question of Trust' (The BBC Reith Lectures 2002) in which she discusses real accountability in public service as depending on active inquiry rather than blind acceptance and analysis by experts with knowledge and time to make informed assessments, whilst acknowledging that we must know that the expert is qualified to make such assessments on which we can rely.

<sup>43</sup> See Jasanoff, S '(No?) Accounting for expertise' Science and Public Policy vol 30, June 2003 and Healey, P 'Collaborative Planning' 1997, chapter 9 on Systemic Institutional Design for Collaborative Planning in particular.

<sup>44</sup> The Government published on 23 May 2007 'Guidance on the Gas Act 1965, under which licensed Gas Transporters proposing to store gas in natural porous strata onshore seek consent from the Secretary of State for

Until the White Paper proposals for nationally significant proposals are in place around 2009 these will continue to be dealt with under the existing multiple consent regime. Recognition of the delays and uncertainty that exists and the impact this has on security of supply has led to attempts to streamline processes within the existing regulatory structure.<sup>45</sup> The latest set of inquiry procedure rules<sup>46</sup> came into force in April 2007 and have given powers to the inspector to appoint a technical adviser who would independently assess highly technical or scientific evidence, and to appoint a mediator where he thinks resolution of any issue could be achieved through mediation. The parties to the inquiry will be entitled to address the inspector on the contents of the mediator's report. These and other procedural changes to the existing system aim to speed up the process to a degree but do not reduce the opportunities for direct input by the public into formulation of the policy with greatest status, nor applying that policy to the specific proposal in question.

The 2004 Act reforms had placed greater emphasis on engagement with local communities to ensure the public's views were taken into account at the earliest stage when creating plans to implement the Government's goals at a local or regional level. The need for such engagement and the methods used have been the subject of extensive research, much of it commissioned by the Government, both before and after the 2004 Act reforms.<sup>47</sup>

It is clear that authorities, stakeholders and practitioners are still feeling their way through the new system, and that the overall objective of achieving better spatial plans from a better evidence base through the participatory arrangements is not yet being achieved across the board. The requirement to carry out 'front-loaded' consultation so that the plan is not greatly amended once formal representations are received does not appear to be yet to have met with great success.<sup>48</sup> Furthermore the formal debate at the examination in public (EiP) in front of an independent inspector is dominated by representative organisations, professionals and lawyers and still has characteristics of the old style local plan public inquiry and does not appear so far to have speeded up the production of development plans as fast as the Government would have liked.<sup>49</sup>

In order to assist the learning process required in implementing reforms the Government has funded the Planning Advisory Service which has been proactive in connection with the rollout of the 2004 Act reforms to the development plan system. This organization explicitly states on its website:<sup>50</sup> 'The Planning Advisory Service (PAS) aims to facilitate self-sustaining change and improvement in the local authority planning sector. PAS helps councils provide faster, fairer, more efficient and better quality services.' Furthermore it has an arm

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Trade and Industry: A consultation' which tries to clarify the procedures but nonetheless stresses the need to take independent legal advice.

<sup>45</sup> The Town and Country Planning (Major Infrastructure Project Inquiries Procedure) (England) Rules 2005, Circular 7/2005 and Electricity Generating Stations and Overhead Lines (Inquiries Procedure) (England and Wales) Rules 2007.

<sup>46</sup> Electricity Generating Stations and Overhead Lines (Inquiries Procedure) (England and Wales) Rules 2007.

<sup>47</sup> See for example *Bishop* (2001) Working Paper 2; Participation in Development Plan Preparation, ODPM and Spatial Planning papers see note 6.

<sup>48</sup> DPD Examinations – PINs Early Experiences; Spring 2007 Seminar Programme of the Planning Advisory Service.

<sup>49</sup> White Paper at para 1.19

<sup>50</sup> <http://www.pas.gov.uk/>

specifically charged with advising local authorities on major applications.<sup>51</sup> This is an example of the importance placed on the knowledge base within local authorities in dealing with a complex system and one which involves much technical and scientific evidence. There is thus some concern to ensure that the framework is in place for a reflexive approach to learning achieved through engagement with the community in the planning process and across different authorities.

This use of representative organizations and their skills is an example of progression within the land-use planning system towards the fourth, internal and pragmatic approach to social learning, of the models set out in the REFGOV guidelines, the proposals in the two White Papers published in May 2007 will take the major energy projects with most impact on security of supply largely outside this system. The remaining direct link will be through the involvement of local authorities in the IPC process when it will assess proposals against the development plan and particularly when being directly consulted on potential sites for nuclear power stations.

## Institutional proposals

There has been considerable work done by and on behalf of Government to explain the advantages of treating policy-making and decision-taking on strategic matters of national, or at least regional, importance in a different way to decisions with primarily a local impact. The proposals in the Energy and Planning White Papers published in 2007 are to institute different systems in relation to participation by the public both in land use policy formulation and decisions. Our paper supports that distinction as a justifiable approach to allow the wider range of pragmatic and political concerns at the strategic national level to be prioritised in decision-making. However it will be seen from the examples of good practice provided in relation to policy-making that the philosophy underlying the engagement, and in some respects the practice itself of engaging with the ‘public’ (if not its regulatory framework) is the same whether at a national or local level. If the proposals in the white papers are fleshed out and followed, in accordance with the good practice already instituted in relation to consultation on radioactive waste management, or at least advocated in recent planning reforms, there is a possibility that participation in land use decisions will move from the achievement (on occasion) of a weak consensus as in the second model to the democratic experimentalism model with the possibility of internalisation through the process of social learning. That said, the need for trust between actors, as social capital which could lubricate the wheels of these processes and speed them up (which is essential in the case of the urgent need to respond to the dual problems of energy security and climate change), remains in short supply. It is proposed that **the way in which engagement is undertaken and followed through**, and the avoidance of high profile failures of the processes which are all too frequently aired in the courts, will be critical to ensure the Government is seen to be taking seriously its promise to legislate and administer in a transparent and accountable manner. The well-publicised current refusal of environmental campaigning groups such as Greenpeace to take part in the Government’s latest consultation on nuclear power is one very clear example of the total distrust in one sector of society of public authority policy-makers.

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<sup>51</sup> ‘The Advisory Team for Large Applications (ATLAS) is also part of PAS. ATLAS offers direct support to individual local authorities that are delivering key government objectives such as large-scale housing developments or regeneration projects’ (PAS website).

Decisions on whether to grant consent for energy infrastructure are proposed to be taken in different ways for major projects, taking the decisions away from the politicians or the administration. It has been seen earlier that this has been proposed for what would appear to be primarily reasons of legitimacy in an attempt to restore public confidence. This paper supports such a proposal as most likely to achieve ‘real accountability’ but any scepticism about the appointment of members of the independent panel may undermine the attempt to restore trust in experts on whose advice the public can rely and potentially fall foul of the ECHR’s criteria for independent tribunals for the purposes of Article 6<sup>52</sup>. It is important to note that the appointments will be made under the ‘Nolan Rules’ which do attempt to introduce a greater degree of transparency into public appointments and to ensure that they are made on merit; however the ultimate decision remains for the minister.<sup>53</sup>

As we have seen participation in both individual decisions and in policy making is equally important in the land-use sphere. The following example of participation in related policy making provides an interesting example for our institutional proposals.

### ***Radioactive waste management consultation***

What is to be done with radioactive waste is inextricably linked to the question of future electricity production by nuclear means. The lack of information on the proposals for long term waste disposal was one of the key failures of the Government’s attempted consultation in the Energy Review Report in 2006. The information that had been provided referred to concurrent work being undertaken by the Committee of Radioactive Waste Management (CoRWM) who had been quoted (and misrepresented according to Lord Justice Sullivan) in the *Greenpeace* case referred to earlier. One of the reasons the information was not available by the time the Government consulted on proposals to facilitate the construction of new nuclear power stations, was the length of time taken by CoRWM to carry out the consultation process. It had taken extremely seriously its brief to recommend a long-term waste management solution that would inspire public confidence and to come to its recommendations in an open and transparent way. CoRWM’s constitution and brief had resulted from the fact that the management of nuclear waste has been a problem which has long dogged the UK government: public participation in high profile planning inquiries had been instrumental in causing extreme delay or the failure in securing planning permission for waste related developments in the light of primarily social rather than technical concerns. This had led to a ‘crisis’ in 1997 such that the government had no credible policy for the disposal of nuclear waste and was extremely sensitive to public opinion on the issue.<sup>54</sup>

Linked to the consultation on the future of nuclear power but issued a month later was the Government’s consultation on radioactive waste disposal based on the CoRWM report.<sup>55</sup> The proposals for selection of sites for long-term radioactive waste disposal follow the CoRWM proposals for implementation of its recommendations and build on CoRWM’s experience of

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<sup>52</sup> Bryan v UK (1996) 21 E.H.R.R. 342

<sup>53</sup> For details see <http://www.ocpa.gov.uk/>

<sup>54</sup> For a very useful report on the subject see CARL Country Report – UK Final, July 2006 (Simmons, Bickerstaff and Walls) which is a report in a social science research project into the effects of stakeholder involvement on decision-making in radioactive waste management.

<sup>55</sup> ‘Managing Radioactive Waste Safely – A framework for implementing geological disposal’, A public consultation by Defra, DTI and the Welsh and Northern Irish devolved administrations, at: <http://www.defra.gov.uk/corporate/consult/radwaste-framework/consultation.pdf>



public engagement in reaching its recommendations. The proposal is to select sites using an approach based on ‘voluntarism’.<sup>56</sup> The precise way in which the affected community will volunteer to host a radioactive waste disposal site is not spelled out but the consultation paper clearly envisages a different definition of the ‘community’ to the representative local authority’s area. The consultation recognises that a host community is likely to be smaller than its planning authority’s area and appears to recognise that democratically elected representatives of a larger area would not necessarily carry out sufficient local research and debate before approving the development of a waste disposal facility<sup>57</sup>. The first such step would be an expression of interest which could be put forward by a landowner or anyone from within a host community if there was evidence to support the fact that others who may be affected by a decision had been involved in discussions or whose opinion had been canvassed. This is a clear example of a proposal for informal associations to operate in a way apparently unconstrained by imposed rules or regulation in order to set in motion a process of site selection. These informal processes would operate alongside formal processes under environmental impact legislation where the public as a whole has an opportunity to make representations and would precede any formal planning approval process. It appears to be an attempt to hand some power to communities as without an expression of interest it appears there would be no proposal to site a geological waste facility.

The basis for this approach was explained within the CoRWM’s recommendations:

‘CoRWM’s approach to implementation is novel in a UK context. The starting point was the failure of all previous attempts to make progress. Having explored the possibilities CoRWM concluded that the only way forward was through a process whereby communities were willing participants in a process which recognised them as equal partners with the implementing body’.<sup>58</sup>

The innovative ways for working with communities would be based on the ‘concepts of fairness, enhanced well-being and participation in decision-making’.<sup>59</sup>

It is worth here noting the CoRWM’s experience of stakeholder and public involvement in preparing and reporting its recommendations to Government. CoRWM’s brief has been mentioned before; the terms of reference emphasised public engagement and participation in order to secure confidence in the recommendations. The consultation process in many ways followed established practices, for example involving a much larger group in less intensive consultation and a smaller group in extended engagement. Methods such as discussion groups, citizens’ panels, round tables, open and bi-lateral meetings, web-based consultation were all used.<sup>60</sup> The CARL research project referred to earlier had concluded that the consultation exercise carried out by CoRWM had been ‘the most elaborate and extensive to have been carried out for this kind of policy issue...Overall, CoRWM has attempted to adopt

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<sup>56</sup> see para 5.7: ‘...‘an approach based on voluntarism’ means one in which communities express an interest in taking part in the process that will ultimately provide a site for a geological disposal facility, and in subsequent stages decide to continue in the process rather than withdraw from it’

<sup>57</sup> See para 5.5 ‘Government recognises that the process of siting a geological disposal facility may be controversial.... Citizens may have concerns about their elected representatives approving the development of a radioactive waste disposal facility, without having had the opportunity to be involved in extensive local research and debate.’

<sup>58</sup> Chapter 17 para 3 at p134 of CoRWM’s Final Report.

<sup>59</sup> *ibid* para 33 at p139.

<sup>60</sup> *ibid* Table 7.1 at p45 and chapter 7 as a whole.

a highly reflective approach to its task, scrutinizing its own assumptions and methods to an extent that contrasts markedly with the technocratic approach taken in the past.’<sup>61</sup>

Key to success would also be the involvement of an independent overseeing body throughout the staged decision-making process. Experience from Sweden and Finland had demonstrated to the committee how crucial to success had been the involvement of regulators in the process. It was noted however that members of the committee who had visited Sweden and Finland had been ‘impressed by the high level of trust that both the local councils and the communities had in the national waste management organisation and the national regulator.’<sup>62</sup>

Proposals for future management of radioactive waste recognise the need to involve a trustworthy body capable of dealing with highly complex technical issues, which are likely to be controversial for primarily social reasons. They also recognise the need for an expressed willingness to host a site by the affected community. Important points of detail on the framework for expressing a willingness are yet to be considered but the proposals do point to the possibility of instituting a process with strong reflexive elements and yet operating within a strong regulatory framework.

Research carried out in the radioactive waste management field<sup>63</sup> points to a number of tensions resulting from increased public participation in policy-making in this area. These confirm points raised in literature about improving participation in the planning system<sup>64</sup> and indeed in part are reflected in some examples of the increased use of the courts by representative groups in particular. They also point to some areas which REFGOV institutional proposals could further consider. In summary an increase in stakeholder involvement in the radioactive waste management field was shown to fail or have less robust results in various circumstances. These included where there were financial or time limits on those participating (smaller local authorities suffered in this respect); where consultation fatigue from excessive, unstructured consultation on issues of varied importance resulted; where consultation on overlapping policy areas undermined the validity of the results; or where there was some doubt about the legitimacy of the representatives taking part in the process<sup>65</sup> and this included situations where parties withdrew from the process to maintain a moral position that the consultation was a sham (as in Greenpeace’s recent action).

Indeed in relation to the consultation on the future of nuclear power Greenpeace’s recent withdrawal from the consultation process after successfully challenging in the courts the inadequacy of the consultation on the future of nuclear power within the 2006 Energy Review, is a very clear example of tension within the participatory process. In this example the tension was caused in great part by the campaigning group’s belief that the consultation exercise would not result in any policy change because alternative views were only considered far too late in the process.

The proposed processes used for consultation on policy issues of strategic national importance may provide examples of good practice to maximise mutual learning, subject to the

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<sup>61</sup> Simmons, P and Bickerstaff, K ‘CARL Country Report UK Summary’, March 2006.

<sup>62</sup> *ibid* para 5 at p135 referring to the CoRWM document 715.

<sup>63</sup> at note 56.

<sup>64</sup> at notes 6 and 30.

<sup>65</sup> ‘*You can’t expect to shoehorn positional campaigners into a stakeholder dialogue*’ (British Nuclear Fuels Ltd comment in The Environment Council’s Evidence Report – Influence, Productivity and Impact of the Dialogue, 2002.

qualifications relating to trust referred to above. Elements of this approach can also be found in participatory processes carried out by local authorities in relation to plan making at a local level. The restoration of trust in decision-makers who finally determine how to balance conflicting interests will in part depend on how early in the gestation of policy ideas public participation takes place and the extent to which the public sees its concerns reflected in the authority's response and in policy changes. These are important factors in the success of the process of consultation. It will also be interesting to consider how much impact the increasing importance placed on strategic issues such as climate change and security of supply which cut across most individual interests will enhance the importance the individual places on its community interests and whether that will increase the willingness of communities to trust its policy-makers and decision-takers. If the 'community' extends to a national scale for significant national policy issues this could have a positive on the success of consultation at a national level.

### *The Courts' role*

The courts provide a guarantee that public authorities should act in a way that fulfils the purpose behind legislation which affects individuals and society as a whole. The courts are therefore an important part of a system which allows actors to benefit from mutual learning. The use of the courts both to guarantee the interests of those with private property interests or representative groups is on the increase, perhaps in part due to the greater awareness of environmental issues which in turn stems from the legislation which requires that information and the opportunity for participation is afforded to the public in environmental decision-making. This increase is also in part due to the growth of the concept of legitimate expectation by which the public is entitled to rely on established practices or on promises made by public authorities. There are recent examples of the how the courts have indirectly influenced the substance of Government consultation as a result of finding that previous attempts had been unfair. Behind the growth of this method of involvement lies the judiciary's application of the 'purposive approach' to interpreting legislation. Legislation which may have come into being from the EU directives or through reflecting policy priorities of Government, which certainly in environmental matters has had to respond to global issues such as climate change, reflects the changing expectations of the community, whether national or international.

Thus the courts have a potentially important role in ensuring that promises of participation are actually complied with, and that institutional arrangements for participation are not by-passed in practice. On the issue of the Convention rights to fair procedure, the leading case of *Alconbury* in relation to Article 6 rights within planning in the UK clarified that a planning inspector was not an independent tribunal because such planning decisions could be overridden by the minister of state, who also had responsibility for formulating the policy on which the decision was based. However it was held for the purposes of the Article 6 right to a fair hearing where civil rights of individuals are concerned, the fact that the court could review the decision on legal grounds without reviewing the merits of the decision was sufficient. In relation to matters of policy or expediency it was stated that if decisions were made by an '*independent and impartial body with no electoral accountability [this] would not only be a recipe for chaos: it would be profoundly undemocratic*'<sup>66</sup>. It may be that the proposed process for consultation and parliamentary scrutiny of the national policy statements

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<sup>66</sup> *Alconbury* (see note 5) Lord Nolan at para 60.

which will be the IPC's primary consideration in the detailed decision is intended to demonstrate that sufficient electoral accountability is retained on policy matters. However the potential for predetermination of the individual decision resulting from the removal of opportunities to participate in relation to policy matters at the hearing stage will perhaps raise the question of whether substantive rights are being disproportionately interfered with. *Alconbury* stressed that the whole process is to be considered in relation to a potential interference with Article 6 rights. It is also important to consider the balance to be struck in relation to substantive human rights where decisions concern both individual facts and policy decisions. This issue has been considered in a recent case.<sup>67</sup> Here it was reiterated that an interference with the property rights of an individual would not be unlawful where the interference was in the public interest and proportionate; the courts do involve themselves in assessing the balance made by the decision-maker in relation to individual and general interests.<sup>68</sup> In the same judgment it was also confirmed that legislation itself could already have struck the right balance between individual and community interests in which case the courts are entitled to say that unless the legislation itself can be attacked the application of it to an individual decision must be left intact.<sup>69</sup>

There is therefore a risk that the proposals put forward for reform of the process of obtaining planning permission for major energy infrastructure projects could fall foul of both procedural and substantive human rights law, unless the detailed framework allows affected individuals a fair hearing at some point in the process and unless it can be demonstrated that the interference with rights protecting property and family lives is proportionate for the benefit of the community as a whole.

The courts provide an important opportunity for checking and balancing the rights and interests of individuals against communities. The influence of the checks provided in particular should not be underestimated as having affected the development and maintenance of opportunities for participation in both national policy areas and individual decisions.

## Conclusions

The major conclusion to be drawn from this case study is that of the complexity of participative arrangements and the difficulty of finding any acceptable single model in such a complex area of social life as energy policy and its implementation. This justifies our approach of using the models set out in the REFGOV guidelines as ideal types for identifying elements with a complex reality, rather than as evolutionary stages of social development.

In the economic regulation of energy markets, there is little which goes beyond the first model, that of institutional economics. The overall approach is one of markets subject to limited regulation, and that regulation is carried out through procedures which are in largely technocratic involving the application of the regulator's economic expertise. Participatory techniques have been developed, through consultation before major decisions and through the

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<sup>67</sup> *Miss Behavin' Ltd v Belfast City Council* [2007] UKHL 19.

<sup>68</sup> paras 98 – 102.

<sup>69</sup> paras 35 – 36.

institutional representation of the consumer interest, but none of these go beyond the second model, that of the collaborative and relational approach. In particular, the regulator acts as the passive recipient of input from those consulted, and does not go further to organise stakeholder interests or to assist in the development of participative skills.

The other major area of public involvement, that of land use planning, presents us with a much more complex picture. Largely because of its association with infringements of private property rights, land use planning has for many years seen commitments to public participation as an integral part of the process. Traditionally this also fitted the collaborative or relational approach, being concerned to provide institutional means for the resolution of disputes between developers and objectors with the public interest represented by the local authority. More recently, more sophisticated procedures for stakeholder involvement have developed through processes of collaborative planning. Indeed the framework, including the use of the Planning Advisory Service, for development plan preparation by local authorities has the potential to fit the third democratic experimentalism model if local authorities persevere with community engagement at an early stage in the process and disseminate their knowledge of the process and the evidence collected to support policy proposals to other local authorities and its own community. Interest groups have also become more directly involved in the process.

It is here where the current plans for changing the procedures for major infrastructure projects are so important. The crucial point to make is that they involve decisions on major issues of policy where local-based approaches to participation are less effective, and indeed may result in a fundamental confusion between national and local needs. On the one hand, the proposed procedures include a commitment to new forms of participation (indeed, the Aarhus Convention and particular provisions of European Community law require this). Thus there are to be consultations on national policy statements which are ‘thorough, effective and provide opportunities for public scrutiny of and debate on government proposals.’<sup>70</sup> Local authorities will also have a key role in representing the needs of local communities. At the stage of examination by the panel of the Infrastructure Planning Commission, the Commission itself will have the role of ensuring that developers have properly consulted with those affected. All these sections in the proposals hint at moves towards a more democratically experimentalist, and perhaps reflexive, approach. We propose as an example of good practice the radioactive waste management consultation discussed in detail above.

Against this must be contrasted the major role of the proposals in speeding up the planning process for major infrastructure projects, itself a major theme of the energy proposals. This will be conducted through giving the Commission a much more directive role and much greater control over the overall process; and, most fundamentally of all, the opportunities for debate over national policy will be severely curtailed given the central importance in the decision of the policy statements, which cannot themselves be reopened in each examination before the commission. In this sense the proposals could be seen as a reversion from a more democratically experimentalist mode to one in which there is very limited participation, certainly nothing going beyond the collaborative or relational approach. It is already apparent from the withdrawal of major environmental groups from the process that the necessary trust has not been created for the successful development of a more inclusive approach.

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<sup>70</sup> Planning White Paper, 52.



Two implications of this change are particularly paradoxical. The first is that the policy issues discussed in this case study have resulted from the limitations of a decentralised, market-based approach. One reason why this has not worked is that decentralised decision-making has led to a neglect of the security of supply issue at national level. However, most of the procedures for participation have themselves been decentralised in nature. They are thus likely to lead to the same sorts of neglect of such issues of national concern through privileging local over national concerns. It remains an open question to what extent more reflexive procedures can properly take on issues of national dimensions, where the difficulty in designing institutions to represent all stakeholders will be much more difficult, and where issues are likely to be more complex, more multi-faceted and it will be necessary to look many years ahead.

This raises the question of how to effect participation in national policy decisions. The traditional UK response is that this is through the forum of Parliament. However, given the effective power of the Government to control Parliamentary decision-making through party discipline, this is no longer accepted as a means of conferring legitimacy, at least on its own, as the fate of earlier proposals to use only Parliamentary procedures to scrutinise policy statements showed. Moreover, international obligations will require going beyond Parliamentary debate in major areas of planning. The result could well be that the major forum for enforcing effective participation moves to the courts.<sup>71</sup> Standing has been widened in English law to permit interest groups to bring cases directly to the courts, and the *Greenpeace* case has suggested that the courts will adopt a vigorous approach in determining what will and will not constitute proper consultation. The Human Rights Act 1998 also provides important new tools for strengthening the role of judicial review. However, the role of the courts will inevitably be a negative one; they can overturn decisions which do not meet procedural norms, but can do little to design more effective procedures for the future. Indeed, in principle the courts should not provide the forum for participation in policy formation but should act as a quality control over the participative processes. However, due to perceived weaknesses in the other institutional, the courts are being increasingly expected to act as major fora for participation themselves. The paradox lies in the fact that over the last three decades a major theme in public law has been to develop more flexible institutions to provide opportunities for alternative dispute resolution without the need for full legal procedures (or for the use of expensive lawyers!). Indeed, this stress on the need to avoid legalism and formality has been central to the Government's proposals for planning reform. Yet the effect of the proposals could well be that of a greater use of legal challenge as other institutions are perceived as inadequate to permit any effective means of influencing public policy. It will indeed be ironic if the most reflexive procedures in relation to national policy turn out to be the most traditional; the use of courts through judicial review

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<sup>71</sup> For a similar suggestion, see Keith Lindblom and Richard Honey, 'Planning for a New Generation of Power Stations' *Journal of Planning Law* 2007, JUN, 843-62.