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Appendix N1

Legal Opinion of Charles Banner KC

10 June 2022

IN THE MATTER OF:
EAST ANGLIA GREEN ENERGY ENABLEMENT PROJECT

OPINION

I. INTRODUCTION

1. I am instructed by Carta Planning to advise East Anglia Pylons Ltd on the adequacy of the public consultation exercise currently being undertaken by National Grid (“NG”) in relation to what NG describes as the East Anglia Green Energy Enablement Project (“**the Project**”).

II. BACKGROUND

2. The public consultation website describes the Project in the following terms:

“What is the East Anglia Green project?”

East Anglia Green is a proposed reinforcement of the transmission network of approximately 180 km of new connection comprising 400 kV overhead lines, including pylons and conductors, between the existing substations at Norwich Main in Norfolk, Bramford in Suffolk, and Tilbury in Essex, with undergrounded cable through the Dedham Vale AONB. East Anglia Green will also connect new offshore wind generation – the North Falls Offshore Wind Farm and Five Estuaries Offshore Wind Farm. Both projects are in development and expected to be operational by 2030 if consented.

Works will also be required at the existing 400 kV substations at Norwich, Bramford and Tilbury, and cable sealing end (CSE) compounds will be required to connect sections of underground cable with the overhead lines.

What works are proposed for East Anglia GREEN?

The network reinforcement that East Anglia GREEN will provide would be achieved by the construction and operation of a new 400 kV electricity transmission line over a distance of approximately 180km and a new 400 kV connection substation.

The reinforcement would comprise mostly overhead line (including pylons and conductors - the 'line' part) and underground cabling through the Dedham Vale Area of Outstanding Natural Beauty (AONB) and a new 400 kV connection substation in the Tendring district.

The new substation site would be fenced and would contain high voltage electrical equipment, such as transformers, circuit breakers and shunt reactors, support structures, control buildings, a permanent access road and parking areas.

Works would be required at the existing 400 kV substations at Norwich, Bramford and Tilbury. Cable sealing end (CSE) compounds would be required to connect sections of underground cable with the overhead lines. Each CSE compound would be fenced, and contain electrical equipment, support structures, a small control building and a permanent access track"

3. The Project is a nationally significant infrastructure project ("NSIP") for the purposes of the Planning Act 2008 ("the 2008 Act"). It will therefore require a Development Consent Order ("DCO") under the 2008 Act rather than planning permission under the Town and Country Planning Act 1990.

III. STATUTORY FRAMEWORK

(a) The 2008 Act

4. Under s.55(3)(e) of the 2008 Act, an application for a DCO may only be accepted by the Planning Inspectorate if it complied with the consultation requirements of Chapter 2 of Part 5 of that Act.
5. Those requirements include, at s.47, a duty to consult the local community.
6. The current consultation is a non-statutory consultation, to be followed by statutory public consultation under s.47 of the 2008 Act in 2023.

(b) NG's duties under the Electricity Act 1989

7. Under paragraph 1(1) of Schedule 9 of the Electricity Act 1989 ("the 1989

Act”), which is given effect by s.38 of the 1989 Act:

“In formulating any relevant proposals, a licence holder or a person authorised by exemption to generate, distribute, supply or participate in the transmission of electricity –

- (a) shall have regard to the desirability of preserving natural beauty, of conserving flora, fauna and geological or physiographical features of special interest and of protecting sites, buildings and objects of architectural, historic or archeological interest; and
- (b) shall do what he reasonably can to mitigate any effect which the proposals would have on the natural beauty of the countryside or on any such flora, fauna, features, sites, buildings or objects.”

8. By paragraph 1(3) of the same Schedule:

““relevant proposals” means any proposals –

- (a) for the construction or extension of a generating station of a capacity not less than 10 megawatts, or for the operation of such a station in a different manner;
- (b) for the installation (whether above or below ground) of an electric line; or
- (c) for the execution of any other works for or in connection with the transmission or supply of electricity.”

9. This plainly includes the Project, thereby engaging the legal duty under paragraph 1(1) of Schedule 9.

(c) **Environmental Impact Assessment**

10. NG accepts that the Project is EIA Development for the purposes of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (“**the 2017 Regulations**”). The intended application for a DCO must therefore be accompanied by an Environmental Statement (“**ES**”). A Preliminary Environmental Information Report will accompany the pre-application statutory consultation.

11. By Regulations 14(2)(d) of the 2017 Regulations, the environmental statement must include, among other things, a description of:

"reasonable alternatives studied by the applicant, which are relevant to the proposed development and its specific characteristics, and an indication of the main reasons for the option chosen, taking into

account of the effects of the development on the environment”.

IV. COMMON LAW PRINCIPLES ON ADEQUACY OF CONSULTATION

12. In *R (Moseley) v. London Borough of Haringey* [2014] 1 W.L.R. 3947, the Supreme Court (Lord Wilson JSC, with whom Lady Hale DPSC & Lords Clarke & Kerr JJSC agreed) set out the following principles of fair consultation (the emphasis in bold is mine):

“25. In *R v Brent London Borough Council, Ex p Gunning* (1985) 84 LGR 168 Hodgson J quashed Brent's decision to close two schools on the ground that the manner of its prior consultation, particularly with the parents, had been unlawful. He said, at p 189:

“Mr Sedley submits that these basic requirements are essential if the consultation process is to have a sensible content. **First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third ... that adequate time must be given for consideration and response and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals.**”

Clearly Hodgson J accepted Mr Stephen Sedley QC's submission. It is hard to see how any of his four suggested requirements could be rejected or indeed improved. The Court of Appeal expressly endorsed them, first in *Ex p Baker* [1995] 1 All ER 73, cited above (see pp 91 and 87), and then in *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213, para 108. In *Ex p Coughlan*, which concerned the closure of a home for the disabled, the Court of Appeal, in a judgment delivered by Lord Woolf MR, elaborated, at para 112:

“It has to be remembered that consultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice. **Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response.** The obligation, although it may be quite onerous, goes no further than this.”

The time has come for this court also to endorse the Sedley criteria. They are, as the *Court of Appeal* said in *R (Royal Brompton and Harefield*

NHS Foundation Trust) v Joint Committee of Primary Care Trusts (2012) 126 BMLR 134 , para 9, “a prescription for fairness”.

26. Two further general points emerge from the authorities. **First, the degree of specificity with which, in fairness, the public authority should conduct its consultation exercise may be influenced by the identity of those whom it is consulting.** Thus, for example, **local authorities who were consulted about the Government's proposed designation of Stevenage as a “new town”** (*Fletcher v Minister of Town and Country Planning* [1947] 2 All ER 496 , 501) **would be likely to be able to respond satisfactorily to a presentation of less specificity than would members of the public, particularly perhaps the economically disadvantaged.** Second, in the words of Simon Brown LJ in *Ex p Baker* [1995] 1 All ER 73 , 91, “the demands of fairness are likely to be somewhat higher when an authority contemplates depriving someone of an existing benefit or advantage than when the claimant is a bare applicant for a future benefit”.

27. Sometimes, **particularly when statute does not limit the subject of the requisite consultation to the preferred option, fairness will require that interested persons be consulted not only upon the preferred option but also upon arguable yet discarded alternative options.** For example, in *R (Medway Council) v Secretary of State for Transport, Local Government and the Regions* [2003] JPL 583 , the court held that, in consulting about an increase in airport capacity in South East England, the Government had acted unlawfully in consulting upon possible development only at Heathrow, Stansted and the Thames estuary and not also at Gatwick; and see also *R (Montpeliers and Trevors Association) v Westminster City Council* [2006] LGR 304, para 29.

28. But, **even when the subject of the requisite consultation is limited to the preferred option, fairness may nevertheless require passing reference to be made to arguable yet discarded alternative options.** In *Nichol v Gateshead Metropolitan Borough Council* (1988) 87 LGR 435 Gateshead, confronted by a falling birth rate and therefore an inability to sustain a viable sixth form in all its secondary schools, decided to set up sixth form colleges instead. Local parents failed to establish that Gateshead's prior consultation had been unlawful. The Court of Appeal held that Gateshead had made clear what the other options were: see pp 455, 456 and 462. In the Royal Brompton case 126 BMLR 134 , cited above, the defendant, an advisory body, was minded to advise that only two London hospitals should provide paediatric cardiac surgical services, namely Guys and Great Ormond Street. In the Court of Appeal the Royal Brompton Hospital failed to establish that the defendant's exercise in consultation upon its prospective advice was unlawful. In its judgment delivered by Arden LJ, the court, at para 10, cited the Gateshead case as authority for the

proposition that “a decision-maker may properly decide to present his preferred options in the consultation document, provided it is clear what the other options are ...” It held, at para 95, that the defendant had made clear to those consulted that they were at liberty to press the case for the Royal Brompton.”

V. RELEVANT FEATURES OF NG’S CURRENT CONSULTATION EXERCISE

13. The website for the Project¹ describes the purpose of the current consultation in the following terms:

“The project is still at an early stage of development and this public consultation will give local communities the first opportunity to see the plans and to provide feedback. National Grid will listen carefully to the views of local people and will take their comments into consideration as they develop the proposals in more detail. There will be another opportunity to comment on the proposals before National Grid submits a planning application to the Planning Inspectorate in late 2024.”

“What are you consulting on?”

During our public consultation, we are asking for your feedback on our preferred route corridor and graduated swathe and the preferred location of the new substation in Tendring District in order to identify and understand the views and opinions of stakeholders and communities that may be affected by our proposals.”

“Will there be further chances to provide comments?”

In 2023 we will hold another round of consultation. We will show how we have developed the design of the project further and how your feedback has influenced our decision-making. This will be the statutory consultation in accordance with the requirements of the Planning Act 2008. If following the statutory consultation further changes need to be made to the project, we may carry out further targeted statutory consultation.

Once the application for development consent has been submitted and the project is in the pre-examination stage of the Development Consent Order process, the public will be able to register with the Planning Inspectorate to become an interested

¹ About East Anglia GREEN | National Grid ET

party and they are able to make a relevant representation.

For more information, please see The Planning Inspectorate's guide to how to participate."

14. Despite the protestation in the first passage quoted above that the project is "*still at an early stage of development*", a single preferred route corridor option is being consulted upon. Alternatives, in particular those involving no or considerably fewer new pylons (including underground and/or undersea cabling and/or upgrading existing infrastructure), have already been discounted by NG. The Project website offers the following rationale for this:

"Why did we present a preferred corridor option at this consultation?"

There are often a number of different ways that we could satisfy the need for a new connection, perhaps involving different locations, technologies or designs. Each time a new connection is needed, we have to make judgements about the best way to achieve it.

In most cases a single preferred option will be identified. However, where it is not possible or appropriate to narrow down the selection to one preferred option, then more than one option may be taken forward. One option may perform better on technical and environmental grounds than another, but at much higher cost. In those cases, we need to make a judgement as to whether the additional benefits of the more expensive option justify the additional cost.

Prior to our non-statutory consultation a number of strategic and routing options for East Anglia GREEN were identified and evaluated. These options were identified as being appropriate to achieve the required reinforcement and included consideration of onshore routes, offshore and subsea options.

We will generally consider options to have an advantage if:

- we can use or adapt existing infrastructure, or where we can negotiate different commercial arrangements with our customers to achieve a need, rather than building new infrastructure
- they are shorter, compared with longer routes
- they are financially less expensive compared to other more expensive options

- they avoid or mitigate environmental or socio-economic impacts.

We then compared the technically feasible options to inform the selection of preferred option(s).

The option we have taken forward best meets the technical and physical/geographical constraints and enables the network to operate to the required standards. More information on these options and the process of consideration can be found in our Corridor Preliminary Routeing and Siting Study, available to view [here](https://www.nationalgrid.com/electricity-transmission/document/142461/download) - <https://www.nationalgrid.com/electricity-transmission/document/142461/download>.

We will continue to back-check and review the performance of all our options at each stage of our proposals to understand if there has been a material change

15. The reference to “back-checking” further indicates that decisions have already been made to discount alternative options and NG’s approach is now confined to after-the-event rationalisation. See also the following passage, which speaks of the consideration of alternatives in the past tense:

“What about the alternative route options? / How much would they cost?”

Our Preliminary Corridor Route and Substation Siting Report explains the options that have been considered and why we feel that this option is the right one to take forward. We carefully consider all corridor options, taking into account factors such as visual impact, cost and technical complexity. We believe this option strikes the right balance between all of the factors we must consider, including affordability to electricity bill-payers and the impact of the new connection on the landscape.”

16. Notably, the passage quoted at paragraph 14 above acknowledges that one of the factors bearing upon the merits of a potential routeing option is whether they “*avoid or mitigate environmental or socio-economic impacts.*” This also follows from the legal duty under paragraph 1(1) of Schedule 9 of the 1989 Act. However, the decision to proceed with only one preferred option, having discounted alternatives, has been done before studies of environmental impacts that go to the heart of the merits of the Project (in absolute terms and relative to no-pylon alternatives) have been

undertaken. In particular:

- a. See for example the following passages on the Project website which speak in the future tense about studies that go to the heart of the environmental impacts of the Project (the bold text is my emphasis):

“Has there been any investigation into the local wildlife that may be impacted by this construction project?”

We **will** carry out environmental surveys, including habitat surveys and protected species surveys and the results **will** help inform the design and decision-making process as we finalise our plans for the reinforcement. We will always consider likely significant impacts to habitats and species and any measures required to mitigate or reduce the effects. National Grid || Environmental Sustainability Issue 2: March 2022 4

For major projects, the results of our wildlife assessment will be presented within the Environmental Statement, which will be submitted with the application for development consent. The initial results of the assessment will be found in the Preliminary Environmental Information Report published as part of the statutory consultation material.

What will the impact be on local traffic?

As we develop the proposals for the project we **will** consider potential effects on local traffic and will provide information on this at our next consultation.

To support our application for a Development Consent Order we will prepare an Environmental Impact Assessment which **will consider traffic** and transport effects of our defined proposals. We will also prepare an Outline Construction Traffic Management Plan which will be prepared as part of the application for Development Consent. This will set out the good practice measures proposed to further reduce impacts on the local road network and traffic. It will include measures providing clear signage to make sure our construction traffic uses the agreed routes and construction workers using public transport and car sharing where practicable. We emphasise to our employees and contractors the special care that they need to take when driving to and from the areas we are working in.

How will you protect the environment?

At the beginning of each reinforcement and as we plan the work, we carefully consider potential environmental effects to ensure that we avoid or reduce potential significant effects on the environment. We will consult with local authorities in the area, alongside the Environment Agency, Natural England, Historic England, landowners and other relevant stakeholders and organisations. What these groups tell us and the feedback we receive through the consultations will help us to carefully plan our proposals and how we carry out the works.

Our Environmental Action Plan is our handbook which details our ambitions to further reduce our carbon emissions, reduce our resource use, improve our natural environment and demonstrate leadership for change.

Please find the link for the Environmental Action Plan in the 'More Detailed Information' section. "

- b. There is no consideration in the current consultation material of the environmental impacts (in either relative or absolute terms) of the discounted alternatives. The Preliminary Corridor Route and Substation Siting Report for the Project² talks at paras. 1.23 to 1.29 in very high level terms about landscape, nature and heritage designations which *could* be affected by the alternatives. This is not a description, assessment or study of the *actual* environmental effects of the alternatives.
- c. The Preliminary Corridor and Substation Siting Report contains various assertions about the intentions for mitigation of the environmental impacts of the Project, and some mainly high-level consideration of the environmental considerations which may influence decisions as to how the Project should be sited within the parameters of the preferred route corridor or broadly similar alternatives involving a comparable length of overhead cables and pylons, but it contains no assessment of the relative

² [download \(nationalgrid.com\)](https://www.nationalgrid.com)

environmental impacts of the preferred route corridor compared to the discounted alternative options involving either no or considerably fewer pylons.

VI. CONCLUSIONS

17. In my opinion, when judged against the first two Gunning Principles, the current consultation is deficient.
18. The first Gunning Principle is that *"consultation must be at a time when proposals are still at a formative stage"*.
19. It is plain on the face of NG's own statement quoted above, however, that NG has already resolved to proceed with the Project and to discount alternative options, including in particular alternative which involve no, or considerably fewer, pylons (including underground and/or undersea routes, and/or upgrading existing infrastructure). The Project, including the proposed route corridor, has already been formulated, and by NG's own admission the exercise to be informed by consultation is now one in *"back-checking"*.
20. Further, NG has so resolved without having first evaluated the relative environmental impacts of the preferred route corridor against the alternatives which involve no or considerably fewer pylons. This failing is exacerbated by the fact that NG is under a legal duty, pursuant to paragraph 1(1) of Schedule 9 of the 1989 Act, *"when formulating" its proposals to the "to have regard to to the desirability of preserving natural beauty, of conserving flora, fauna and geological or physiographical features of special interest and of protecting sites, buildings and objects of architectural, historic or archeological interest" and to "do what he reasonably can to mitigate any effect which the proposals would have on the natural beauty of the countryside or on any such flora, fauna, features, sites, buildings or objects"*. In the present case, the proposals have already been formulated, without

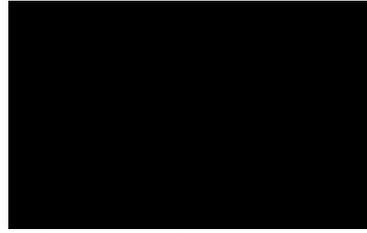
consideration of how the impacts of the preferred route on these statutory considerations compare to the impacts of alternatives which involve no or considerably fewer pylons. To hold that this complies with Schedule 9 would mean that the legal duty in practice has little or no effect, which in my view is contrary to the statutory objective.

21. The second Gunning Principle is that *“the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response”*.
22. In judging what is *“sufficient”* in this context, the following considerations are relevant:
 - a. This is a consultation with lay members of the public, as a result of which there is a heightened duty to inform, with greater specificity required (per Lord Wilson JSC in *Moseley* at para. 26);
 - b. Although the context of the consultation is an intended future application for a DCO for a specific project, there is no statutory limit on the scope of the consultation to the preferred option for the Project. This brings into play the observation of Lord Wilson JSC in *Moseley* at para. 27 that *“sometimes, particularly when statute does not limit the subject of the requisite consultation to the preferred option, fairness will require that interested persons be consulted not only upon the preferred option but also upon arguable yet discarded alternative options.”* That observation was made by reference to the example of the *Medway* case, where it was held to have been procedurally unfair for a consultation on airport expansion in the South East to have discounted Gatwick as an option which the public could advocate through the consultation process.

23. In this respect too, the current consultation falls short in light of the considerations set out at paragraph 16 above. In particular, the lay public consultees have not been provided with anything approaching a sufficient level of information to enable them to make an intelligent comparison of the environmental impacts of the preferred option compared to alternatives which involve no or considerably fewer pylons. Lay members of the public are not in a position to be able to do that assessment themselves or to be able to commission an expert to do so on their behalf in the shorter-than-usual 8 week consultation period. The alternatives have been discounted without member of the public having been given a fair opportunity to scrutinise the rationale for that decision or having been given sufficient information about the alternatives to have a fair opportunity to advocate for those instead.
24. For these reasons I consider that the consultation does not comply with the first two of the Gunning Principles.
25. The current consultation is non-statutory. The deficiencies of the consultation therefore have no immediate legal consequence. What they do mean, however, is that the current consultation cannot be relied upon at that statutory consultation stage. Further, there is a real risk that the legal deficiencies in the current consultation will, if left uncorrected, will infect the later statutory consultation (which would in turn mean that the intended DCO application cannot lawfully be accepted by the Planning Inspectorate). As a minimum, the options which have already been improperly foreclosed would need to be revisited and consulted upon with a demonstrably open mind, providing the public with sufficient information to have a fair opportunity to advocate the alternatives discussed above.
26. I also note that the rationale given so far for discounting the alternatives would not justify excluding them from the category of “reasonable

alternatives” for the purposes of the EIA Regulations.

27. Finally, although bearing on the merits of what is proposed in the consultation as opposed to the legal compliance of the consultation, I note that there are several conspicuous weaknesses in the current evidential case for the Project which if perpetuated at would cause serious difficulties for NG during the examination of its intended DCO application. These are set out in the technical submission of Pylons East Anglia Ltd, campaigning as Essex Suffolk Norfolk Pylons, and include:
 - a. The lack of evidence to demonstrate the need for the Project, noting in particular that:
 - i. On the basis of the Electricity Ten Year Statement, there is no prima facie evidence of the need to reinforce the line between Bramford and Rayleigh at all.
 - ii. In the Network Options Assessment (“NOA”) National Grid themselves give significant disclaimers stating that they expect to publish a new NOA together with a “Holistic Network Design” (“HND”) study in June 2022.
 - b. Given the proposed timeline for the Project, the consultation is premature due to the very imminent publication of the Offshore Transmission Review report and a new NOA to accompany it.
 - c. Errors and inconsistencies in the computation of costs in the Preliminary Corridor and Substation Siting Report.
 - d. Flaws with the Least Worst Regret analysis that forms the financial foundation for the consideration of certain options.
28. I have nothing to add as currently instructed but would be happy to answer any further questions arising out of the advice above, if and when required.



CHARLES BANNER K.C.

**Keating Chambers
15 Essex Street
London WC2R 3AA**

10th June 2022

Appendix N2

Legal Opinion of Charles Banner KC

6 August 2023

IN THE MATTER OF:
GREAT GRID UPGRADE NORWICH TO TILBURY

OPINION

I. INTRODUCTION

1. I am instructed by Cerda Planning to advise East Anglia Pylons Ltd (“EAPL”) on the legal adequacy of the latest non-statutory public consultation exercise currently being undertaken by National Grid (“NG”) in relation to what NG currently describes as the Great Grid Upgrade Norwich to Tilbury, formerly known as the East Anglia Green Energy Enablement Project (“**the Project**”). I previously advised EAPL on the legal adequacy of the first non-statutory public consultation exercise regarding the Project, in an Opinion dated 10th June 2022 (“**the First Opinion**”).
2. The First Opinion held that, when judged against the first two Gunning Principles, the first public non-statutory consultation on the Project was deficient. I further concluded that, as a minimum, the options which had already been improperly foreclosed would need to be revisited and consulted upon with a demonstrably open mind, providing the public with sufficient information to have a fair opportunity to advocate the alternatives discussed in the First Opinion. I also noted that the rationale given in the context of the first public non-statutory consultation for discounting the alternatives would not justify excluding them from the category of “*reasonable alternatives*” for the purposes of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (“**the EIA Regulations**”).

II. STATUTORY FRAMEWORK

3. This remains as set out in the First Opinion.

III. COMMON LAW PRINCIPLES ON ADEQUACY OF CONSULTATION

4. These remain as set out in the First Opinion.

IV. CONCLUSIONS RELATING TO NG'S LATEST CONSULTATION EXERCISE

5. In my view, the second non-statutory consultation does not cure the deficiencies in the first public non-statutory consultation.
6. The first Gunning Principle is that *"consultation must be at a time when proposals are still at a formative stage"*.
7. In the First Opinion, I noted that:
 - a. the first public consultation a single preferred route corridor was being consulted upon;
 - b. alternatives, in particular those involving no or considerably fewer pylons (including underground and/or undersea cabling and/or upgrading existing infrastructure) had already been expressed to have been discounted by NG; and
 - c. the then and subsequent consultation exercises were described as "back-checking" exercises;
 - d. therefore, the Project, including the proposed route corridor, had already been formulated, with by NG's own admission the exercise to be informed by consultation being merely one of "back-checking"; and
 - e. NG had so resolved without having first evaluated the relative environmental impacts of the preferred route corridor despite it being under a legal duty *"when formulating"* its proposals *"to have regard to"* the various environmental considerations referred to

by para. 1(1) of Schedule 9 to the Electricity Act 1989 (“the 1989 Act”), quoted in the First Opinion.¹

8. I concluded that this was in breach of the first Gunning Principle as well as para. 1(1) of Schedule 9 to the 1989 Act.
9. The current consultation does not purport to reopen any decisions that have previously been made. Essentially the same single preferred route corridor has been presented, subject to some limited localised refinements. A single alternative option - an offshore route from Norwich to Tilbury- is referred to in Chapter 14 of the tellingly named *Strategic Options Backcheck and Review* (June 2023). It is discussed in terms consistent with this being a “back-checking” exercised as previously described by NG: i.e. retro-fitting analysis relating to a decision already made, to be contrasted with early and effective consultation whilst proposals are still being formulated. For example, the Frequently Asked Questions section of the consultation website describes the exercise in the following retrospective terms:²

“Why can’t you build it offshore?”

Before our consultation last year, we looked at a number of options - including subsea cables.

As the cost of all connections ultimately goes onto the electricity bills of domestic and business consumers, the UK government, and our regulator Ofgem require us to develop proposals which represent value for money to consumers.

An offshore connection would have a third of the capacity of an overhead line - to carry the same amount of power generation, three offshore links would be needed as well associated infrastructure such as converter stations near the existing substations at Norwich Main substation and Tilbury.

¹ Notably NG accept that this duty is engaged: see their *Strategic Options Backcheck and Review* (June 2023), [download \(nationalgrid.com\)](#), section 2.7.

² [Norwich to Tilbury frequently asked questions | National Grid ET](#)

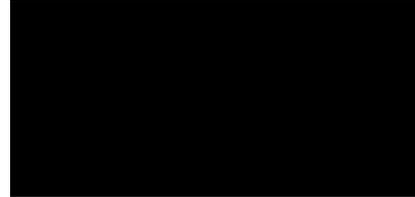
At this consultation we have published our Strategic Options Backcheck and Review (SOBR), which re-examines the work we undertook in 2022. The SOBR concludes that our work and decisions made in 2022 to discount the offshore option remain valid.”

10. Further, this sole alternative is discussed in high level terms and not with anything like the same granularity as the preferred option. 5 pages of the 176 page *Backcheck and Review* report are dedicated to the subject, and most of the text within those five pages is expressed in vague and generalised terms. Moreover, this alternative involves an obviously convoluted route with inevitable expense; there are rational grounds for inferring it has been put up as a ‘straw man’, in place of the more realistic alternatives for which EAPL have been advocating and which NG continue to ignore.
11. For multiple reasons, therefore, the current consultation does not rectify the failure of the first non-statutory consultation to comply with the first Gunning Principle or para. 1(1) of Schedule 9 to the 1989 Act.
12. The second Gunning Principle is that *“the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response”*. In the First Opinion, I concluded that the first non-statutory public consultation was also in breach of this principle because lay consultees had not been provided with a sufficient level of information to enable them to make an intelligent comparison of the environmental impacts of the preferred option compared to alternatives which involves no or considerably fewer pylons. Lay members, I observed, were not in a position to be able to do that assessment themselves or to be able to commission an expert to do so on their behalf in the shorter-than-usual 8 week consultation period. The alternatives had been discounted without members of the public having been given a fair opportunity to scrutinize the rationale for that decision or having been given sufficient information about the alternatives to have a fair opportunity to advocate for those

instead.

13. Save in relation to the sole “straw man” (Norwich to Tilbury offshore) alternative referred to above, the second consultation takes the position no further in this respect. Even in relation to this alternative, the information provided is vague, lacking in granularity, and not equivalent to the level of information provided about the preferred option. The previously identified deficiencies in relation to the second Gunning Principle remain unremedied.
14. A further identified deficiency is the failure of NG to apply the Treasury Green Book to the consideration of the Project and its alternatives. My opinion dated 4th July 2023 explains why NG is wrong in law to take the approach that the Green Book is inapplicable. Properly interpreted, the Green Book is relevant to the appraisal of the Project and its alternatives, and the failure of NG’s consultation to provide any information in this respect exacerbates the other failures to provide “*sufficient reasons for any proposal to permit of intelligent consideration and response*”.
15. For these reasons I remain of the view that NG has not complied with the first two of the Gunning Principles, nor has it complied with para. 1(1) of Schedule 9 to the 1989 Act.
16. As was the case in relation to the matters that were the subject of the First Opinion, the current consultation is non-statutory. The deficiencies of the consultation therefore have no immediate legal consequence. What they do mean, however, is that the current consultation (like the first consultation) cannot be relied upon at that statutory consultation stage. Further, there is a real risk that the legal deficiencies in the current consultation will, if still left uncorrected, infect the later statutory consultation (which would in turn mean that the intended DCO application cannot lawfully be accepted by the Planning Inspectorate).

17. The position also remains that the reasons given so far for discounting the alternatives discussed in the First Opinion would not justify excluding them from the category of "*reasonable alternatives*" for the purposes of the EIA Regulations.
18. I have nothing to add as currently instructed but would be happy to answer any further questions arising out of the advice above, if and when required.



CHARLES BANNER K.C.

**Keating Chambers
15 Essex Street
London
WC2R 3AA**

6th August 2023

Appendix N3

Legal Opinion of Charles Banner KC

23 July 2024

IN THE MATTER OF:
GREAT GRID UPGRADE NORWICH TO TILBURY
("THE PROJECT")

OPINION

1. I am instructed by Cerda Planning to provide further advice to Pylons East Anglia Ltd ("**PEAL**") in relation to the above named Project, which is being promoted by National Grid Electricity Transmission ("**NG**").
2. This follows my earlier opinions dated 12th June 2022 ("**Opinion 1**") , 10th May 2023 ("**Opinion 2**"), 4th July 2023 ("**Opinion 3**"), and 6 August 2023 ("**Opinion 4**"), which should be read alongside this Opinion.
3. Opinion 1 considered the legal adequacy of NG's non-statutory consultation that took place in the summer of 2022 (followed by a further round of non-statutory consultation in 2023). I concluded that this non-statutory consultation did not comply with the first two of the Gunning Principles, in particular because:
 - a. The Project, including the proposed route corridor, had already been formulated, and by NG's own admission the exercise to be informed by consultation was now one in "*back-checking*" ;
 - b. Alternatives which would involve no, or considerably fewer, pylons (including underground and/or undersea routes, and/or upgrading existing infrastructure) had been discounted without NG having first evaluated the relative environmental impacts of the preferred route corridor against the alternatives which involve no or considerably fewer pylons;
 - c. This failing was exacerbated by the fact that NG is under a legal duty, pursuant to paragraph 1(1) of Schedule 9 of the 1989 Act,

“when formulating” its proposals “to have regard to the desirability of preserving natural beauty, of conserving flora, fauna and geological or physiographical features of special interest and of protecting sites, buildings and objects of architectural, historic or archaeological interest” and to “do what he reasonably can to mitigate any effect which the proposals would have on the natural beauty of the countryside or on any such flora, fauna, features, sites, buildings or objects”.

d. The lay public consultees had not been provided with anything approaching a sufficient level of information to enable them to make an intelligent comparison of the environmental impacts of the preferred option compared to alternatives which involve no or considerably fewer pylons. Lay members of the public were not in a position to be able to do that assessment themselves or to be able to commission an expert to do so on their behalf in the shorter-than-usual 8 week consultation period. The alternatives had been discounted without members of the public having been given a fair opportunity to scrutinise the rationale for that decision or having been given sufficient information about the alternatives to have a fair opportunity to advocate for those instead.

4. The summer 2022 consultation was, as I have mentioned, non-statutory. Opinion 1 noted that, as a result, the deficiencies of that consultation had no immediate legal consequence. What they did mean, however, is that this consultation could not be relied upon at the later statutory consultation stage. Further, there was a real risk that the legal deficiencies in the current consultation would, if left uncorrected, infect the later statutory consultation (which would in turn mean that the intended Development Consent Order (“DCO”) application cannot lawfully be accepted by the Planning Inspectorate). As a minimum, the options which have already been improperly foreclosed would need to be revisited and consulted upon with a demonstrably open mind, providing the public

with sufficient information to have a fair opportunity to advocate the alternatives discussed above.

5. Opinion 2 concerned the statement on 16th January 2023 by the then Minister for Energy Security and Net Zero that *“In most cases, offshore wind developers in the [East Anglia] region already have connection contracts in place with National Grid Electricity System Operator (ESO) and the Government will not, and cannot, force changes to these contracts; any attempt to mandate changes to connection contracts at this stage would be open to legal challenge by developers.”* I noted that this contrasted with the clear evidence that, in the event that a development consent order (“DCO”) is not granted for the Project, the contractual obligation to connect the off shore windfarms in question to it falls away.
6. I concluded that: *“Accordingly, in the event that the decision-making Minister on an application by NG ESO were to refuse to grant the DCO on the basis that the balance of benefits and impacts of one or more alternatives was demonstrably superior, the mischief referred to in the letters quoted above would not, as a matter of law, arise: there would be no question of Government having to “mandate” changes to the contracts; instead, by virtue of the terms of the contracts themselves, the connection obligations under them would cease”* (Opinion 2, para. 10); that the reasoning in the 16th January statement was irrational in the *Wednesbury* sense and, therefore, if it formed part of the reasoning for the eventual grant of a DCO I would not expect it to withstand judicial scrutiny.
7. Opinion 3 concerned the stance of NG in communications with PEAL in the first half of 2023 to the effect that the Treasury Green Book applies only to policies, not projects, and is not relevant to the determination of an application for a DCO under the Planning Act 2008 (“**the 2008 Act**”). I concluded that NG’s approach was legally flawed.
8. Opinion 4 addressed the deficiencies of the second non-statutory

consultation in which I concluded that the consultation process remained deficient, that it did not comply with Gunning Principles, and was in breach of Treasury Green Book guidance, and therefore carried the continued risk of infecting later consultations.

9. I am now asked to update my analysis in the light of NG's statutory consultation under the 2008 Act for the project, which concludes on 26th July 2024.
10. In relation to Opinions 2 and 3, the analysis set out there is entirely unchanged and remains up to date.
11. I have reviewed the analysis in Opinions 1 and 4 in the light of the 2024 statutory consultation documents published on NG's website.¹
12. These documents have the following key features:
 - a. The non-statutory consultations of 2022 and 2023 are relied upon: see e.g. *the Project Background Document*² at pp.5 & 7; and the *Design Development Report* at pp. iii, 1, & 4-6;³ and the *2023 Non-Statutory Consultation Feedback Report* at section 2⁴
 - b. There have been some changes since the non-statutory consultation as set out in, e.g., *the Project Background Document* at pp.25-44, and the quality and detail of the analysis is unquestionably stronger than that set out in the 2022 consultation documents (albeit that is a low bar).

¹ [Norwich to Tilbury | Document library | National Grid ET](#)

² [Project Background Document \(nationalgrid.com\)](#)

³ [Design Development Report \(nationalgrid.com\)](#)

⁴ [2023 NSFBR \(nationalgrid.com\)](#)

c. However, and fundamentally, the starting point has been the pre-formulated route corridor which was the subject of the (legally deficient) summer 2022 consultation, with the approach remaining one of “backchecking” and fine-tuning that preconception: see e.g. the tellingly named *Strategic Options Back Check and Review* at pp.10-12 & 44-52 (inter alia) and the *Design Development Report* at pp. 1 & 4-6.⁵

13. Accordingly, I consider there are cogent grounds for concluding that the deficiencies with the 2022 non-statutory consultation that were identified in Opinion 1 and the 2023 non-statutory consultation that were identified in Opinion 2 (neither of which, tellingly, has NG rebutted in any published legal analysis of its own) have not been cured and that the 2024 statutory consultation remains infected by them – in particular, that there has not been proper consultation, consistent with the Gunning Principles, on the proposals whilst they are truly at a *formative* (as opposed to *preformulated*, subject only to ‘backchecking’ and consequent fine tuning) stage, with sufficient information given at that formative stage for lay consultees to make an intelligent comparison of the environmental impacts of the preferred option compared to alternatives which involve no or considerably fewer pylons. For essentially the same reasons there are cogent grounds for concluding that NG has failed against the Gunning requirement to give ‘conscientious consideration’, with an open mind, to the responses of my client and others to the two previous consultations.
14. It would follow that the 2024 consultation, in the context of the 2022 and 2023 non-statutory consultations, falls short of adequate pre-application consultation sufficient to enable a DCO application to proceed to examination under s.55 of the 2005 Act.

⁵ [Strategic Options Back Check and Review \(nationalgrid.com\)](https://www.nationalgrid.com)

15. Further, professional reports that accompany PPEAL's response to the consultation demonstrate procedural and methodological errors in NG's approach to landscape, heritage & archaeology, soils and the environment, which if not corrected (and any corrections properly consulted upon) would present fundamental difficulties for any DCO application.
16. I have nothing to add as currently instructed but would be happy to answer any further questions arising out of the advice above, if and when required.



LORD BANNER K.C.

**Keating Chambers
15 Essex Street
London WC2R 3AA**

23rd July 2024

Appendix N4

Legal Opinion of Charles Banner KC

19 June 2025

IN THE MATTER OF:
GREAT GRID UPGRADE NORWICH TO TILBURY
("THE PROJECT")

OPINION

I. INTRODUCTION

1. I am instructed by Cerda Planning to provide further advice to Pylons East Anglia Ltd ("**PEAL**") in relation to the above-named Project, which is being promoted by National Grid Electricity Transmission ("**NG**").
2. This follows my earlier opinions dated 12th June 2022 ("**Opinion 1**"), 10th May 2023 ("**Opinion 2**"), 4th July 2023 ("**Opinion 3**"), 6th August 2023 ("**Opinion 4**"), and 23rd July 2024 ("**Opinion 5**") which should be read alongside this Opinion.
3. Opinion 1 considered the legal adequacy of NG's non-statutory consultation that took place in the summer of 2022 (followed by a further round of non-statutory consultation in 2023). I concluded that this non-statutory consultation did not comply with the first two of the 'Gunning Principles'. Those principles are discussed further below.
4. Opinion 1 noted that, because the summer 2022 consultation was non-statutory, the deficiencies of that consultation had no immediate legal consequence. What they did mean, however, is that this consultation could not be relied upon at the later statutory consultation stage. Further, there was a real risk that the legal deficiencies in the current consultation would, if left uncorrected, infect the later statutory consultation. As a minimum, the options which had already been improperly foreclosed would need to be revisited and consulted upon with a demonstrably open mind, providing the public with sufficient information to have a fair opportunity to advocate the alternatives discussed above.

5. Opinions 2 and 3 related to matters other than consultation.
6. Opinion 4 addressed the second non-statutory consultation. I concluded that the consultation process remained deficient, that it did not comply with Gunning Principles and was in breach of Treasury Green Book guidance, and that it therefore carried the continued risk of infecting later consultations.
7. Opinion 5 updated the analysis of Opinions 1 and 4 in the light of NG's statutory consultation for the project under the Planning Act 2008 ("**the 2008 Act**"). I concluded that there were cogent grounds for concluding that the deficiencies with the 2022 non-statutory consultation that were identified in Opinion 1, and the deficiencies with the 2023 non-statutory consultation that were identified in Opinion 2, had not been cured and that the 2024 statutory consultation remained infected by them.
8. I am instructed that the local authorities through whose land the Project will run are currently preparing their "*adequacy of consultation representations*" which are to be made under s.55(5) of the 2008 Act and which will inform the Planning Inspectorate's decision whether to accept NG's intended application for a development consent order ("**DCO**").
9. I am further instructed that at least some of those authorities have suggested that the Gunning Principles (and thus the analysis in Opinions 1, 4 and 5) do not apply to the assessment underpinning their adequacy of consultation responses for the purpose of s.55(5). I am asked to advise on this issue.
10. In summary, I consider that the Gunning Principles plainly apply to the relevant local authorities' assessment underpinning their adequacy of consultation representation for the purposes of the provisions mentioned above. The contrary is not arguable.

II. LEGAL FRAMEWORK

11. By virtue of s.55(5) of the 2008 Act, an “*adequacy of consultation representation*”:

“means a representation about whether the applicant complied, in relation to that proposed application, with the applicant's duties under sections 42, 47 and 48.”

12. The duties under sections 42 and 47 are expressed to be duties to “*consult*”, in the context of an intended application for a development consent order (“*DCO*”) under the 2008 Act. Section 42(1) provides that that the applicant “*must consult*” the bodies listed in sub-subsections (a)-(d). Section 47 is entitled “*Duty to consult local community*”; s.47(1) requires the applicant to prepare a statement “*setting out how the applicant proposes to consult, about the proposed application, people living in the vicinity of the land*”; s.47(2) requires that the applicant “*must consult*” the relevant local authorities ; and s.47(7) provides that the applicant “*must carry out consultation in accordance with the proposals set out in the statement*”. Section 49 requires an applicant to take into account responses to the consultations under ss.42 and 47.

13. There is authority at the highest level that a duty to consult engages the Gunning Principles: see *R (Moseley) v. London Borough of Haringey* [2013] 1 W.L.R. 3947 per Lord Wilson JSC at para. 25:

“In *R v Brent London Borough Council, ex p Gunning*, (1985) 84 LGR 168 Hodgson J quashed Brent’s decision to close two schools on the ground that the manner of its prior consultation, particularly with the parents, had been unlawful. He said at p 189:

“Mr Sedley submits that these basic requirements are essential if the consultation process is to have a sensible content. First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third,... that adequate time must be given for consideration and response and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals.”

Clearly Hodgson J accepted Mr Sedley's submission. It is hard to see how any of his four suggested requirements could be rejected or indeed improved. The Court of Appeal expressly endorsed them, first in the Baker case, cited above (see pp 91 and 87), and then in *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213 at para 108. In the *Coughlan* case, which concerned the closure of a home for the disabled, the Court of Appeal, in a judgment delivered by Lord Woolf MR, elaborated at para 112:

"It has to be remembered that consultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice. Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this."

The time has come for this court also to endorse the Sedley criteria. They are, as the Court of Appeal said in *R (Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts* [2012] EWCA Civ 472, 126 BMLR 134, at para 9, "a prescription for fairness".

14. In *R (Gate) v. Secretary of State for Transport* [2013] J.P.L. 383, Turner J. applied the Gunning Principles in considering a challenge to a DCO on ground that included that the consultation under s.47 had been deficient (a contention which failed on the facts of the case. Having cited s.47 and the associated statutory guidance issued under s.50 at paragraphs 31-34 of his judgment, Turner J. continued at para. 35:

35. In *R. v North and East Devon HA Ex p. Coughlan* [2001] QB 213 the Court of Appeal summarised the general principles relating to consultation within the context of administrative law:

"It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. 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."

III. CONCLUSION

15. It is clear beyond sensible argument that whether or not the pre-application consultation for a prospective DCO was compliant with the Gunning Principles is a relevant, and indeed fundamental, consideration for a local authority charged with preparing an "*adequacy of consultation representation*" under s.55 of the 2008 Act.
16. The Gunning Principles are, as Turner J. observed in *Gate* "*general principles relating to consultation*" which, as that judgment indicates, apply to the consultation duties under ss.42 and ss.47 of the 2008 Act.
17. This analysis is shared by the editors of the *Encyclopedia of Planning Law and Practice* (Sweet & Maxwell), Volume 4 paragraph 2-5687.1 of which cites the Gunning Principles in the context of these duties.
18. Accordingly, if a relevant local authority is not satisfied that the consultation under s.42 and/or s.47 was compliant with the Gunning Principles, it cannot lawfully represent that the applicant complied with its duties under those provisions.
19. Accordingly, in the present case, the relevant local authorities are obliged to grapple with the points made by PEAL as to the non-compliance of the consultation with the Gunning Principles. These points raise material considerations which the local authorities must take into account and address.
20. In principle, an adequacy of consultation representation by a local authority under s.55(5) is likely to be amenable to judicial review as an exercise of public functions by the authority in question, just as a statutory consultee's representation to a local planning authority in relation to judicial review is amenable to judicial review: cf. *R (Swainsthorpe Parish*

Council) v. Norfolk County Council [2021] EWHC 1014 (Admin). The authorities in question therefore need to take care to ensure that they do not misapply the law when preparing their adequacy of consultation representations.

21. I have nothing to add as currently instructed but would be happy to answer any further questions arising out of the advice above, if and when required.



LORD BANNER K.C.

**Keating Chambers
15 Essex Street
London WC2R 3AA**

19th June 2025

Appendix N5

Legal Opinion of Russell Harris KC
(Advice to National Grid 8 August 2025)

Pre-application Consultation.

Proposed application for a DCO.

Norwich to Tilbury.

Opinion

1. I am asked to advise National Grid (NG). It is engaged in a pre-application consultation process in relation to a proposed application for a Development Consent Order which (if made) would in substantial part involve the erection of above ground electricity lines to reinforce the transmission network between Norwich and Tilbury.
2. I am asked to advise in the context of a series of opinions¹ from Leading Counsel² who is advising Pylons East Anglia Ltd, a private non-trading company limited by guarantee, which exists to oppose the siting of pylons in East Anglia and to promote the reinforcement of the grid by way of an offshore connection.
3. The essential thrust of the opinions insofar as they deal with pre-application consultation is that:
 - a. the consultation documentation on its face discloses that the proposed route corridor for the proposed development has already been pre-formulated or **predetermined**;
 - b. **alternatives** which would involve no or considerably fewer pylons (including underground or undersea routes) have been inappropriately discounted without evaluation of their comparative environmental impacts contrary to NG's duties under Schedule 9 of the Electricity Act 1989 and common law; and
 - c. insufficient information has been provided during pre-application consultation to enable the public to make an intelligent comparison between the emerging project and "alternatives" which involve no or fewer pylons (such as subsea cables) or to scrutinise the rationale for discounting none or fewer pylon options.
4. As a result, it is said that the pre-application consultation process is legally flawed when judged against common law principles known as the Gunning Principles.
5. That, in turn, it is suggested would be sufficient to infect the lawfulness of any grant of a Development Consent Order relating to the project pursuant to the Planning Act 2008.

¹ Six opinions of various dates.

² Charles Banner KC, then Lord Banner KC.

6. Most recently, a further allegation has arisen. It is suggested that the local planning authorities along the route of the linear project (the host authorities) have failed properly to consider the Gunning Principles and, as such, their responses to the pre-application process might be susceptible to judicial review.
7. I have (alongside Michael Humphreys KC) been advising NG on all aspects of the pre-application process to date.
8. In my clear opinion³ for the reasons set out below, the suggestions that the pre-application consultation process is legally flawed are incorrect. Thus:
 - a. When the specific consultation requirements for projects of this nature provided for by Parliament are properly understood and the nature and form of the pre-application consultations undertaken are accurately examined, it can be seen that the process of pre-application consultation meets (and exceeds) the relevant statutory requirements, their associated Ministerial Guidance and the relevant Gunning Principles when seen in context and is, in all respects, fair and proportionate. The host authorities considering these requirements will have had regard to the Gunning Principles as they apply to the context of this project. No specific incident of failure to have regard to a relevant Gunning Principle by a host authority is, or can be, identified.
 - b. Further and in any event, no application for consent has yet been submitted and the Planning Act 2008 (the 2008 Act) and its associated guidance contain mechanisms and checks to ensure the adequacy of pre-application consultation **before** an application can proceed to Examination. The Planning Inspectorate has been given by Parliament the discretion to consider and to rule on the adequacy of consultation for these purposes, before accepting an application and thus admitting the application to statutory examination.
9. In this opinion all emphases added are mine.

The Statutory Provisions and associated guidance.

(1) The Statute and pre-application process

10. The 2008 Act identifies certain major infrastructure projects as “nationally significant infrastructure projects” (NSIPs).
11. Section 14 of the 2008 Act sets out which projects may be considered NSIPs. In section 14(1) a “project which consists of (inter alia) the installation of an electric line above ground” is so identified.

³ A view shared by Mr Humphreys KC.

12. Under the “Energy” projects part of the section, it is made clear that it is the installation of electricity lines above ground with a nominal voltage greater than 132kv that are NSIPs.
13. Development of an NSIP must, and can **only**, be authorised by a Development Consent Order (DCO). The Act provides for no other power or process to authorise such development.
14. Applications for a DCO are made to the Planning Inspectorate (PINS), which decides whether or not to accept the application having regard, inter alia, to the adequacy of pre-application consultation (see below).
15. If accepted, PINS then examines the project and makes a recommendation in relation to it to the relevant Secretary of State.
16. In the case of electricity lines above ground, it is the Energy Secretary who has the final decision on whether to grant consent.
17. Electricity Lines placed underground or subsea are not identified as NSIPs and are not the subject of the NSIP statutory regime (unless they are associated development forming part of a wider project which is an NSIP).
18. The pre-application process for NSIPs is specific and substantial. It is governed by an entire Chapter (Chapter 2) of the 2008 Act. Section 41 of the Act places duties on a potential applicant for a DCO and records that the “Chapter applies before application is made”.
19. It refers to such duties as relating to **“the proposed application”** and to **“the proposed development”**.
20. “The proposed development” is defined as “the development for which the proposed application (if made) would seek development consent”.
21. Accordingly, “the proposed **development**” for these specific purposes can only be development of a project of the type which the 2008 Act has (by Section 14) identified as an NSIP requiring a DCO.
22. It follows, then, that the “proposed **application**” for the purposes of this Chapter can also only relate to an application for a project of the type which requires authorisation via the DCO process.
23. Section 41 defines “the land” as the “land to which the proposed application [and hence the proposed project and proposed development] relates”. The identification of the relevant related land delimits the physical extent or extents of the consultation exercise required by the rest of the Chapter (see below).

24. The logic for the definition of “land” to be restricted to land to which the proposed application relates, reflects the need for proportionality and realism at the “proposed application” stage of the process.
25. By definition, NSIPs are of potential national importance. There may, in theory, be many ways in which the need for the project might be met covering a large and dispersed part of the nation. If there were a s41 obligation to consult those wider areas, communities and landowners, in detail, about wider options and alternatives which did not form the “proposed application” for the purposes of pre-application consultation, then, that consultation would be cumbersome, potentially impractical, and would not properly represent the applicants’ properly assessed “proposed application”. Such an exercise would subvert the intention of Parliament.
26. Section 42 of the Chapter contains the direct pre-application duty to consult. The section states that “the applicant must consult the following [bodies and persons defined by reference to “the land” relating to the proposed development]”. And then it provides clearly that the **consultation** should relate to “**the proposed application**”.
27. It follows, as a matter of both logic and law, that Parliament, in requiring the applicant to consult prior to the “proposed application” on the “proposed application” and in relation to “the relevant land”, expects the Applicant to have formed at least a preliminary judgment or “proposal” prior to the said consultation that its “proposed application” (if made) would consist of a project that would be a relevant NSIP and would thus require a development consent on the relevant “land”.
28. If this were not the case, then of course the statutory pre-application mechanisms would have nothing upon which to bite. The structure of the Act thus contemplates and, indeed, requires the Applicant to have a “proposal” to frame the “proposed application” the subject of pre-application consultation.
29. In relation to the extent of the consultation, Parliament is also clear that it is “the proposed application” which is required to be the subject of the relevant statutory consultation exercise. That is a deliberate (and necessary) limitation of the extent of the required consultation. There is no statutory requirement in s.42 to consult prior to a proposed application on alternative potential projects which are not “proposed” (whether they would be other NSIPs or not) .
30. This does not mean that the existence of alternative potential projects or means of meeting the project need is not **relevant** to the s.42 consultation process, or to the merits of the project for which a DCO is sought (see below as to those issues). But it is the “proposed application” which is deliberately identified as the subject of consultation and **not** a range of potential alternative applications representing potential alternative developments.

31. Section 49 of the 2008 Act requires an Applicant to take account of relevant consultation responses when deciding whether the “proposed application” should remain “in the same terms” as that which has been the subject of statutory consultation.
32. This requirement to have regard to consultation responses is, of course, unsurprising.
33. The words of the section make it clear that “proposed application” is to be understood in the sense of the nature and form – “the terms” – of the (then) anticipated proposed application.

(2) The Statutory Guidance

34. The structure of the statute in this respect is mirrored in the statutory “guidance”.
35. Section 50 of the Chapter is important. It provides that “Guidance may be issued (by the Secretary of State) about how to comply with the requirements of this Chapter (of the Statute)”. It also provides that the applicant “**must** have regard to any guidance under this section.”
36. The guidance referred to in s.50 has been issued by the Secretary of State. It is kept up to date. The most recent version of the guidance was issued in April 2024 – but it took the place of predecessor guidance notes which have been in place for a number of years.
37. It provides under the heading “**The purpose of this guidance**” that it “advises all those likely to be involved in the pre-application stage of NSIPs about the process” and that it “informs the main participants in National Infrastructure Planning including the Planning Inspectorate and consultees... of their roles in the pre-application process [to] **ensure that they are clear what is expected of them**”.
38. Its importance is underscored by this statement which reflects the provisions of the Act – “**Under section 50 [this] guidance covering pre-application procedures is statutory and applicants must have regard to it**”.
39. Such statutory guidance on pre-application consultation for the purposes of framing a 2008 Act application will clearly have been drafted having regard to the common law principles applicable to consultation generally (the Gunning Principles) in the very specific and particular context of the 2008 Act. And, as will be seen, the provisions of the guidance reflect those principles and apply them to the specific context and needs of Infrastructure Consenting in England and Wales.

40. The more general “Introduction to National Infrastructure Planning Guidance” April 2024 also states as relevant:

“The National Infrastructure Planning Guidance is non-statutory except where it applies to the pre-application stage... In [this] instance..., guidance is statutory pursuant to:

- **[section 50 of the Planning Act](#) and prospective applicants must have regard to it; ...**

The extent to which an applicant has had regard to [this] [section 50](#) guidance will be taken into account by the Planning Inspectorate when deciding whether to accept an application for examination.”

41. Given this direct applicability of this guidance, which is statutory and sits alongside comprehensive statutory machinery for the consideration and determination of application for NSIPs, I am bound to say that I am surprised that **not one** of the suite of Counsel’s opinion alleging unlawful and deficient pre-application consultation contains any detailed grappling with its directly relevant **statutory** pre-application provisions.

42. The failure to deal accurately with the statutory provisions or with the direct statutory guidance as to pre-application consultation is clearly a serious (indeed fatal) flaw in this suite of opinions.

43. The s.50 guidance explains the comprehensive nature of the pre-application process, most of which is in play precisely to ensure that communities are able to understand, object to and/or to shape the emerging project in line with the Gunning Principles as applied to this very specific context.

44. Thus, applicants are reminded by the statutory guidance of their duties inter alia to:

- a. notify the Planning Inspectorate of a proposed application before any consultation – this intention will then be republished by the Inspectorate;
- b. notify the Planning Inspectorate that they intend to provide an Environmental Statement;
- c. prepare in consultation with the relevant local authorities for the “land” a Statement of Community Consultation;
- d. make available and to follow a Statement of Community Consultation (SoCC);
- e. identify and consult statutory consultees, local authorities and all persons with interests in the relevant land; and to
- f. **have regard to [the statutory s.50] guidance.**

45. The issue of the consideration of **alternatives** at pre-application consultation stage (one of the suite of opinions' main concerns) is dealt with at Paragraph 15 of the guidance. The statutory guidance provides:

“There are particular occasions in the NSIP consenting process where alternatives to the proposed development must be examined as required by legislation. For example, to meet the requirements of the EIA Regulations.”

“However, this does not extend to the preparation or examination of the application for development consent as a whole. There is no general requirement to consider alternatives for specific applications. The decision to make an Order granting development consent for an application is based on its own merits, not that there may be better or different alternatives either elsewhere or at a later stage.

...

That said applicants do now routinely set out in brief the main alternatives to their preferred scheme which were considered early during the pre-application stage and the consultees' response to them. Applicants are encouraged to do so as this can demonstrate how project designs have been refined to take into account environmental, socio-economic and community effects. Any such consideration of alternatives should be submitted as part of the Application, perhaps as part of the Planning Statement. All this will help reinforce the applicant's case for promoting the NSIP in the particular form of the submitted application.” (emphasis added).

Very exceptionally, there may be some real alternatives to elements of a proposed NSIP which the applicant chooses to put forward for examination on the basis that the Examining Authority could be able to recommend a preference to the Secretary of State. There may also be circumstances where an element of a proposed NSIP is so exceptional it is in the applicant's interest to provide a more particular consideration of alternatives to help demonstrate their eventual preference in the light of the policy requirements of the relevant NPS. In such cases, the applicant will need to ensure that sufficient technical material is included as part of the application to enable it to be properly investigated during the examination without leading to substantial delays.

46. The guidance reminds Applicants that the adequacy of the pre-application consultation as a matter of law is determined by the Inspectorate. Thus:

“without adequate pre-application consultation in line with legislation the subsequent application when it is submitted to the Planning Inspectorate will not be accepted to proceed to examination.”

47. Further, local authorities also have a role in examining the adequacy of pre-application consultation. The guidance explains (as set out above) the statutory need for a SOCC to be agreed with the Local Authority and continues:

“The Planning Inspectorate takes into account the responses received from local planning authorities during the acceptance period to determine on behalf of the Secretary of State whether the consultation is adequate”.

48. Finally, Government, through PINS, has issued a Pre-Application Prospectus which is relevant to the issue of pre-application consultation (June 2024).

49. In addition to its powers to accept or reject an application set out above, the Inspectorate operates, as one of its five primary service features, an Adequacy of Consultation Milestone (AoCM).

50. This service seeks to allow early consideration of the adequacy of the pre-application consultation undertaken.

51. The AoCM is programmed to occur early enough to enable applicants to consider how to undertake **any additional engagement** that may be needed. It reduces the potential for non-acceptance of the application and increases the prospect that an application will be found to have complied with the s.50 guidance and statutory duties.

52. **In addition** to the pre-application requirements under the 2008 Act, the Guidance provides advice on the timing and content of an Environmental Statement (ES).

53. The proposed application in the present case is clearly EIA development.

54. The Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (EIA Regulations 2017) require that the ES itself should **accompany a DCO application**. The provision of, and consultation upon, an ES is therefore **not** a pre-application requirement. For the purposes of the 2008 Act or the relevant EIA Regulations.

55. Regulation 14 (and Schedule 4) of the EIA Regulations 2017, do require that an ES **accompanying an application** includes a description of the reasonable alternatives studied by the applicant and an indication of the main reasons chosen, including a comparison of the effects of the development on the environment.

56. The s.50 guidance notes that “Inadequate consideration of alternatives has been used as a vehicle for legal challenge. Applicants are advised to fully document all optioneering exercises and decision-making on alternatives from the inception of their projects in their application and reference this **appropriately in their Environmental Statement**”.
57. This advice is clear. It suggests reference is made to the consideration of alternatives in the ES. The suggestion does not - and deliberately does not - extend to pre-application consultation.
58. Regulation 12 does require the publication of a Preliminary Environmental Impact Report (PEIR) at pre-application stage.
59. The guidance is equally clear that this document’s purpose is to allow consultees in relation to a proposed application to develop an early and, as the name suggests, preliminary view of the likely significant effects of the **proposed development**.
60. The information required to be included in a PEIR is not separately identified in the EIA Regulations 2017 and, that absence of statutory requirement for any degree of particularity of content in a PEIR is also highlighted in terms in the statutory guidance.
61. Finally, the Electricity Act 1989 (the 1989 Act) provides in Schedule 9 that:
- 1(1) In formulating any relevant proposals, a licence holder or a person authorised by exemption to [generate, [distribute, supply or participate in the transmission of] electricity]—**
- (a) shall have regard to the desirability of preserving natural beauty, of conserving flora, fauna and geological or physiographical features of special interest and of protecting sites, buildings and objects of architectural, historic or archaeological interest; and**
- (b) shall do what he reasonably can to mitigate any effect which the proposals would have on the natural beauty of the countryside or on any such flora, fauna, features, sites, buildings or objects.**
62. The provisions of the 2008 Act and the s.50 guidance related to proposed applications have evidently been drafted with a clear understanding of the existence of these provisions.
63. Indeed and further, the specific relationship between these duties and the provisions of the 2008 Act are dealt with in relevant National Policy

Statements (NPS) designated by the Government and authorised by Parliamentary process (see s.5 and s.9 of the 2008 Act).

64. Summing up thus far therefore, the 2008 Act (the entire Chapter 2) and the s.50 Statutory Guidance have been produced to guide applicants on the extent and nature of the pre-application process required in relation to linear, nationally significant electricity proposals. Taken together, the provisions of the 2008 Act and Guidance do not require consultation (much less consultation on an equal basis) on projects or alternatives which are not preferred by an applicant.
65. The Guidance (which has been framed by reference to the Gunning Principles as applied to the statutory context) suggests that an applicant may wish to “set out in brief” the alternatives that have been considered early in the pre-application stage and the consultee’s response to them as part of the “planning statement ... accompanying the application”.
66. Local Authorities are required to follow the provisions of the 2008 Act as part of their pre-application consideration of adequacy of consultation and, will have had regard to the provisions of the Gunning Principles as they apply to the applications under the 2008 Act if they have considered the statutory Guidance.
67. I return briefly to these conclusion below.

National Policy Statements and their relevance to pre-application consultation.

68. The Planning Act 2008 requires that where an NPS has effect, the Secretary of State must decide an application for energy infrastructure in accordance with the relevant NPSs unless very specific statutory exceptions apply.⁴
69. The most recent suite of NPSs relevant to Energy were published in January 2024 and have been considered and authorised by Parliament. These Statements replaced earlier versions, which contained different (but similar) guidance, particularly on electricity transmission systems.
70. The relevant provisions which have been superseded are set out in Appendix 1 of this opinion for completeness.
71. Applicants are also obliged to have regard to the provisions of NPSs when considering major energy infrastructure projects.

⁴ The exceptions are that the decision would:

- a. Lead to the UK being in breach of its international obligations;
- b. Be in breach of any statutory duty that applies to the Secretary of State;
- c. Be unlawful;
- d. Result in adverse impacts from the development outweighing the benefits; and
- e. Be contrary to regulations about how its decisions are to be taken.

72. NPSs will, for the reasons set out above, thus be a relevant and usually powerful consideration to which to have regard when determining the shape and nature of a project.

73. Two NPSs are specifically relevant to the present case. They are the Overarching National Policy Statement for Energy (EN-1) and the technology specific NPS for the electricity transmission and distribution network (EN-5).

74. EN-1 provides at paragraph 3.2.6-8 that:

3.2.6 The Secretary of State should assess all applications for development consent for the types of infrastructure covered by this NPS on the basis that the government has demonstrated that there is a need for those types of infrastructure which is urgent, as described for each of them in this Part.

3.2.7 In addition, the Secretary of State has determined that substantial weight should be given to this need when considering applications for development consent under the Planning Act 2008.

75. At 3.3.61, the Statement introduces the concept of a Critical National Priority (CNP) and asserts a CNP for the provision of nationally significant low-carbon infrastructure.

76. It is made clear, so urgent is the need for such infrastructure, that the need for CNP Infrastructure will “in general outweigh other residual impacts not capable of being addressed by application of mitigation”.

77. CNP Infrastructure, we are told, should be progressed “as quickly as possible”.

78. And at 3.3.65 and 67 dealing with East Anglia in particular:

“There is an urgent need for new electricity network infrastructure to be brought forward at pace to meet our energy objectives.

The volume of onshore reinforcement works needed to meet decarbonisation targets is substantial. National Grid ESO forecasts that over the next decade the onshore and offshore transmission network, some of which is located offshore will require...substantial reinforcement in East Anglia to handle increased power-flows from offshore wind generation”.

79. At 4.2.17, the extent and urgency of the need for new electricity infrastructure is so critical that we are told that the Secretary of State will take, as a starting point, that CNP Infrastructure will meet even the following list of tests:
- a. Very special circumstances justifying development in the Green Belt;
 - b. The outweighing of impact to a Site of Special Scientific Interest;
 - c. The establishment of exceptional circumstances in nationally designated landscapes; and
 - d. The outweighing of substantial harm to designated heritage assets.

80. EN-5 provides that:

“1.1.5 As identified in EN-1, government has concluded that there is a critical national priority (CNP) for the provision of nationally significant low carbon infrastructure. This includes: for electricity grid infrastructure, all power lines in scope of EN-5 including network reinforcement and upgrade works, and associated infrastructure such as substations. This is not limited to those associated specifically with a particular generation technology, as all new grid projects will contribute towards greater efficiency in constructing, operating and connecting low carbon infrastructure to the National Electricity Transmission System. These are viewed by the government as being CNP infrastructure and should be progressed as quickly as possible.”

81. And that:

“1.1.11 Applicants should ensure that their applications, and any accompanying supporting documents and information, are consistent with the instructions and guidance given to applicants in this NPS, EN-1 and any other NPSs that are relevant to the application in question.”

82. The issue of how the critically needed electricity infrastructure should be provided in terms of technology choice is set out in 2.9.7 and 2.9.20-25. These sections are critically important to the circumstances of the present pre-application process and are set out in full below.

Landscape and Visual Impact

2.9.7 While the government does not believe that the development of overhead lines is incompatible in principle with applicants’ statutory duty under Schedule 9 to the Electricity Act 1989, to have regard to visual and landscape amenity and to reasonably mitigate possible impacts thereon, in practice new overhead lines can give rise to adverse landscape and visual impacts.

Undergrounding and subsea cables.

2.9.20 Although it is the government's position that overhead lines should be the strong starting presumption for electricity networks developments in general, this presumption is reversed when proposed developments will cross part of a nationally designated landscape (i.e. National Park, The Broads, or Area of Outstanding Natural Beauty).

2.9.21 In these areas, and where harm to the landscape, visual amenity and natural beauty of these areas cannot feasibly be avoided by re-routing overhead lines, the strong starting presumption will be that the applicant should underground the relevant section of the line.

2.9.22 However, undergrounding will not be required where it is infeasible in engineering terms, or where the harm that it causes (see section 2.11.4) is not outweighed by its corresponding landscape, visual amenity and natural beauty benefits. Regardless of the option, the scheme through its design, delivery, and operation, should seek to further the statutory purposes of the designated landscape. These enhancements may go beyond the mitigation measures needed to minimise the adverse effects of the scheme.

2.9.23 Additionally, cases will arise where – though no part of the proposed development crosses a designated landscape – a high potential for widespread and significant adverse landscape and/or visual impacts along certain sections of its route may result in recommendations to use undergrounding for relevant segments of the line or alternatively consideration of using a route including subsea cabling.

2.9.24 In these cases, and taking account of the fact that the government has not laid down any further rule on the circumstances requiring use of underground or subsea cables, the Secretary of State must weigh the feasibility, cost, and any harm of the undergrounding or subsea option against:

- the adverse implications of the overhead line proposal;
- the cost and feasibility of re-routing overhead lines or mitigation proposals for the relevant line section; and
- the cost and feasibility of the reconfiguration, rationalisation, and/or use of underground or subsea cabling of proximate existing or proposed electricity networks infrastructure.

2.9.25 In such cases the Secretary of State should only grant development consent for underground or subsea sections of a proposed line over an overhead alternative if they are satisfied that the benefits accruing from the former proposal clearly outweigh any extra economic, social, or

environmental impacts that it presents, the mitigation hierarchy has been followed, and that any technical obstacles associated with it are surmountable. In this context it should consider:

- **the landscape and visual baseline characteristics of the setting of the proposed route, in particular, the impact on high sensitivity visual receptors (as defined in the current edition of the Landscape Institute’s Guidelines for Landscape and Visual Impact Assessment), residential areas, designated landscapes, valued landscapes, designated heritage assets and Heritage Coasts (including, where relevant, impacts on the setting of designated features and areas), noting the policy in EN-1 section 5.4.53 on regional and local designations;**
- **the additional cost of the proposed underground or sub-sea alternatives, including their significantly higher lifetime cost of repair and later upgrading.**
- **the potentially very disruptive effects of undergrounding on local communities, habitats, archaeological and heritage assets, marine environments, soil (including peat soils), hydrology, geology, and, for a substantial time after construction, landscape and visual amenity. (Undergrounding an overhead line will mean digging a trench along the length of the route, and so such works will often be disruptive – albeit temporarily – to the receptors listed above than would an overhead line of equivalent rating);**
- **the potentially very disruptive effects of subsea cables on the seabed and the species that live in and on it, including physical damage to and full loss of seabed habitats. Cable protection can also be required where cables cross each other, or where they cannot be buried deep enough to protect them from becoming exposed. Such protection causes additional impacts that are often greater than those of the cable itself due to the large areas covered. There can also be issues where subsea cables make landfall, as much coastal land is protected habitat with environmental and heritage designations and landfall connections could cause additional disruption to coastal communities and the environment.**
- **the applicant’s commitment, as set out in their ES, to mitigate the potential detrimental effects of undergrounding works on any relevant agricultural land and soils (including peat soils), particularly regarding Best and Most Versatile land, including development and implementation of a Soil Resources and Management Plan.**

83. In considering the nature of any “proposed application” to be the subject of pre-application consultation clearly, again, this policy advice (which is deliberately couched to reflect and to respect the 1989 Act requirements) must be taken into account and applied.

Summary of effect of Statutory, Guidance and National Policy Statement position.

84. The Planning Act 2008 provides a clear, comprehensive and bespoke pre-application consultation framework for relevant projects which are NSIPs.
85. It requires there to be a “proposed application” for “proposed development” over relevant “land”.
86. The “proposed application” would have to be for an NSIP.
87. The Act requires pre-application consultation on that “**proposed application**”.
88. The Act thus assumes that, at the time of the pre-application consultation, there is already in existence a form of proposal which frames what it calls the “proposed application”.
89. In constructing that proposal, NG (as Applicant) is obliged to have regard to its duties under Schedule 9 of the 1989 Act and also the relevant National Policy Statements as a whole (which also reflect and explain how the Schedule 9 duties are to be discharged in the circumstances of the 2008 Act).
90. These Statements include (but are not limited) to a general “strong starting presumption in favour of overhead lines”, which presumption is reversed only where “transmission lines cross over national landscape designations.” This set of presumptions is, again, self-evidently and expressly stated to be consistent with the statutory duties under the 1989 Act Schedule 9.
91. The Act does **not** require pre-application or any consultation on alternative schemes or projects or potential applications for alternative infrastructure that are **not** proposed. Again, pre-application consultation is specifically required in relation to the “proposed application”.
92. These provisions do not mean that the Applicant’s consideration of alternatives is not material to the determination of an eventual application, but they do deliberately frame and delimit the nature and extent of the required pre-application consultation.
93. The s.50 guidance on pre-application consultation (which was constructed with a clear understanding of the judge-made Gunning Principles as applied to the NSIP regime) does **not** require specific consultation on alternative projects either. The reasons for this become clear when the way in which the Courts have addressed the Gunning Principles is considered (below).
94. It (the statutory guidance), as set out above, encourages, but does not require Applicants to set out “in brief, the main alternatives to their preferred scheme which were considered early during the pre-application stage and the consultees’ response to them **as part of the application documentation**” (and note **not as part of the pre-application consultation documentation**).

95. The guidance points out that a consideration of alternatives might also be necessary in relation to the EIA Regulations 2017. The regulations require this information also as part of **“the application documentation”**.
96. Where a particular element of a proposed NSIP is “so exceptional”, it is in the applicant’s interest, states the guidance for an Applicant, to provide a more particular considerations to help demonstrate their eventual preference, in the light of the policy requirements of the NPS. In such cases, the Applicant will need to ensure that sufficient technical material is included again **“as part of the application to enable it to be properly investigated during the examination without leading to substantial delay.”**
97. Further, the Statute and guidance provide that the adequacy of pre-application consultation is determined by the Inspectorate, which is required to have regard to the statutory requirements (including the local authority’s position on adequacy) and the extent to which the s.50 guidance has been adhered before accepting an application for examination.
98. There is also now a pre-submission non-statutory Adequacy of Consultation Milestone process as part of the pre-application process, which allows the Inspectorate to indicate early if consultation to that date is inadequate or deficient. This project has already successfully navigated this Milestone.⁵
99. The scheme, therefore, provides requirements, guidance and staged checks to ensure that prior to acceptance of an application for examination on the merits, there has been adequate pre-application consultation.
100. A proposed application which meets these requirements, complies with the statutory guidance and has passed the PINS-led staged checks, is likely to be procedurally sound and fit for examination.

Assessment of pre-application consultation to date having regard to the criticisms of consultation in Counsel’s opinions.

101. NG is required prior to the submission of an application to consult on the “proposed application”. This is a clear and deliberate framing of the nature of the consultation required for the purposes of the 2008 Act.
102. That is what NG has done.
103. It has framed and shaped its “proposed application” by reference to its statutory duties and to the clear guidance in the relevant NPSs.

⁵ See s.51 Advice from the Inspectorate dated 30 June 2025.

104. NG has also had regard to the guidance on pre-application procedures set out in s.50 of the 2018 Act, including the specific guidance on the treatment of alternatives.
105. Having regard to such matters in strategic terms and for the reasons set out at pre-application stage, the “proposed development” (if made) presently consists of a largely OHL provision with underground cables where justified by the evidence entirely in line with the provisions of the relevant National Policy Statements.
106. Contrary to the submissions of Leading Counsel for objectors in a number of the Opinions, there is no duty in the Act or the guidance to consult the public or others on other alternative potential schemes (whether requiring separate statutory consents or otherwise) as part of the 2008 Act pre-application process.
107. Neither, for obvious reasons of proportionality, is there a duty to consult the wider and wildly different set of communities, landowners and stakeholders in the vicinity of any such potential alternatives.
108. Nor is there even, in fact, a **requirement** in the 2008 Act or the Guidance to explain strategic choices in relation to alternatives as part of the pre-application consultation process. There is, as set out above, a suggestion that applicants might benefit from such a “brief explanation” **in the application documents** – specifically and potentially in the **Planning Statement**. **There is also a requirement to identify alternatives considered in the Environmental Statement, again required to be provided alongside the application (but not necessarily before).**
109. Notwithstanding these provisions and significantly **in advance** of the application stage, at two non-statutory stages and again in the statutory pre-application stage, NG **has** explained its strategic decision not to prefer (at this stage) alternatives such as offshore cabling or significantly wider undergrounding and has actively and transparently engaged with the public on such matters. It has consistently, by its words and actions, stated that these strategic decisions are the subject of constant backcheck and review.
110. Such explanations as to the proposed Strategic Option preference, reviews and backchecks have been the subject of substantial public comment and consideration and there have been (thus far) two full reconsiderations or Backcheck and Review exercises of that strategic decision as part of the pre-application process.
111. These Backcheck and Review exercises have been appropriately documented as part of the pre-application consultation process.

112. There is no evidence that these exercises have been undertaken with anything other than an open mind. There is no suggestion that the contents of EN-1 or EN-5 set out above have been misidentified, misapplied or misunderstood as part of the exercise.
113. This extent of consideration of alternatives, its discussion and engagement with the public on such matters at the pre-application stage considerably and clearly **exceeds** the requirements of the statutory scheme and also the statutory Guidance on pre-application processes for the purposes of this statutory scheme, as set out in summary above.
114. It is also the case (as would be expected given that the Guidance would have been constructed with the Gunning Principles and the 2008 Act provisions in mind) that the extent of pre-application consultation also exceeds any requirement set by those principles and requirements.
115. In the Moseley case (*R. (Moseley) v LB Haringey* [2014] UKSC 56) the Supreme Court considered the application of the Gunning principles. The Court made it clear that the application of the Gunning principles is context-specific and that the most important context driving the consideration of the principles is the statute giving rise to the consultation requirement.
116. The Supreme Court distinguished between cases where statute limits the scope of the relevant consultation and those where it does not.
117. In the present case the subject of the **required** pre-application consultation has as a matter of fact and law been limited by Parliament to pre-application consultation on the “proposed application” for the “proposed development” in relation to the relevant “land” as defined (see above).
118. In such circumstances, the Supreme Court is clear that “where the subject of the requisite consultation is limited to the then preferred option, fairness may ... require **passing reference** to be made to arguable yet dis-guarded alternative options” (per Wilson). This, it is to be noted, is entirely consistent with the guidance on alternatives set out in the pre-application Guidance.
119. Lord Reid (also in Moseley) indicates clearly that in circumstances where a statutory framework exists, there should be “less emphasis upon the common law duty to act fairly and more upon the statutory context and purpose of the particular duty of consultation with which (the decision maker) is concerned.”
120. This comment is especially pertinent in a case where an entire Chapter of the relevant Act contains detailed requirements relating to pre-application consultation and provides for specific statutory guidance on these very provisions.

121. For the reasons set out above, the present pre-application consideration of other strategic options and the engagement with the public on such options, as well as the backchecking and review of such options, significantly exceeds the requirements of the Gunning principles (and the Guidance) in that respect and in the context of the 2008 Act.
122. The consideration of and engagement with the public and its representatives in relation to subsea and underground cable options, for example, constitutes significantly more than the “brief outline” or “passing reference” referred to in the Guidance and Mosely respectively.
123. Indeed, on a proper consideration of the consultation exercises undertaken to date, the consideration of strategic alternatives to the “proposed application” (including those involving subsea and wider underground cabling) has, in context, been the subject of such comprehensive consideration as to mean that even if the view is (clearly incorrectly) taken that the 2008 Act does not limit the extent of the requisite consultation, then the pre-application exercises undertaken to date would still be seen to be fair and proportionate.
124. An examination of the Backcheck and Review of Strategic Options documentation makes it clear that options (including subsea and wider undergrounding) were in strategic terms reconsidered fully. The extent of information necessary to form a strategic judgment (and for objectors to do the same) set out in these documents is substantial, and is at least proportionate and sufficient for the pre-application stage.
125. The fact that more detailed analysis **of the proposed application (however it is expressed post consultation) will then** be undertaken (“expressed in the future tense” says Leading Counsel for the objector group) as part of the application documentation, and that it will include an Environmental Statement, does not alter this position.
126. Such further analysis of the proposed application and its environmental effects is exactly what is anticipated, contemplated and required by the Act and Parliament.
127. Further, any suggestion such as that made by objectors’ Leading Counsel that alternatives cannot be assessed or preferred as a matter of judgment in the absence of a full environmental statement in relation to each of those alternatives, is also clearly incorrect having regard to the statutory framework, guidance and common law.
128. There is nothing in the statute or the guidance or the Gunning Principles to support the suggestion that the ruling out of alternatives requires a detailed Environment Statement to be produced for each of those alternatives.

129. Neither is there any support for a requirement for an “ES-type” examination of the detail and specificity of potential alternatives in order for a DCO to be lawful.
130. Parliament has not considered such an approach to be necessary or proportionate. Further it would, in the circumstances of this case, likely frustrate the urgent meeting of needs identified in the statutory guidance and NPSs.
131. Criticism of the Backcheck and Review processes by Objectors’ counsel, on the basis that the reconsiderations are called “backchecks” of a previously made proposal, are also misplaced.
132. What is important is the relevant consideration of the consultation exercise as a whole and the nature of the reconsiderations of the proposed application in the context of the statutory scheme and of the consultation responses.
133. Clearly, for any project which may be an NSIP to progress, there must at any relevant time exist a “proposed application”.
134. That “proposed application”, if reconsidered by an applicant later as part of the process towards application and/or as a result of consultation responses can appropriately, and without any suggestion of legal inadequacy, be called (among other things) a backchecking and/or review process.
135. The use of the term “Backcheck and Review” to reconsider such a strategic preference (or proposed application at a given stage) does not mean that the subsequent reconsiderations of the appropriateness of a previously made proposition are “confined to after the event rationalisations” as suggested. There is no justification in fact or in substance for such an allegation.
136. Neither does the consideration of alternatives “in the past tense” at all suggest that thereafter minds are closed to the re-opening of the potential for other strategic alternatives **if supported by policy and/or evidence on reconsideration**. The use of the past tense reflects the fact that the previous consideration of strategic options was in the past. It does not delimit the reasonable and proportionate reconsideration of alternatives in the future **if** the facts alter, or suggest, or require reconsideration. But the process of meeting the need for the project and the delivery of a DCO, by definition, requires forward motion, having regard to the Statutory Guidance and the provisions of the NPSs. There will be decisions properly described as being in the past.
137. Interestingly, Leading Counsel in Opinion 1 states that: “as a minimum, the options (subsea and wider areas of undergrounding) which have already been improperly foreclosed would need to be revisited and consulted upon with a

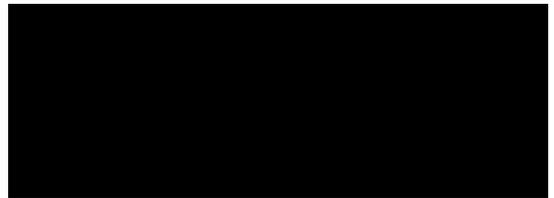
demonstrably open mind providing the public with sufficient information to have a fair opportunity to advocate the alternatives discussed above.”

138. Such an opinion misstates and overstates that which is required by the statute, the guidance or by the Gunning principles at pre-application stage (see above). But as a matter of fact in this case, the subsequent **reconsideration** of the Strategic Options, **including in relation to subsea and wider undergrounding, clearly took place.**
139. There is, and can be, no evidence that the reconsideration was undertaken with a closed mind. Each of the strategic options was presented with sufficient information to allow a judgment as to the consistency of the Option with inter alia the relevant policies in the NPS (and as a result Schedule 9 of the 1989 Act).
140. Further, it is clear that in making objections to the scheme, objectors clearly took the view that they were “at liberty to press the case” for their preferred subsea etc. alternatives and it is also clear that they **did**, in fact, press those alternatives. It is further clear on the face of the documents that such representations were, at all material times, identified, taken into account, grappled with and considered as part of the continued backcheck and review process.
141. Leading Counsel for the objectors recognises that NG did, indeed, consider and reconsider an offshore option as part of its strategic options exercise.
142. However, he is rather driven to state in relation to this that there are “rational grounds for inferring that it has been put up as a “straw man” in place of the more realistic alternatives for which PEAL have been advocating and which NG continue to ignore.”
143. Such an assertion is strained, implausible and is simply unsupported on the evidence. At all material times, it is clear from the public feedback reports that PEAL’s (and other) copious submissions on alternatives have **not** been ignored, but have been carefully considered and engaged with on their face. This continues to be the case.
144. Further, the “straw man” allegation (which is, after all, one of deliberate misleading) is not properly particularised, either as to fact or motivation, and appears to be based on the suggestion that the subsea route tested in an “obviously convoluted route with inevitable expense”.
145. As to this, the route chosen is indicative and cannot reasonably be seen as convoluted. The reasons given for the proposed alternative route have been explained and are clear, and any other reasonable route would, for the reasons identified in the Backcheck and Review, have resulted in very similar costs in comparative terms to the proposed alternatives.

146. Where subsea options exist and can be justified in terms of the statute, guidance and the NPS documentation, then they are adopted. In this wider project, NG has consistent with these provisions promoted a subsea cable option known as Sea-Link. It has formed the clear judgment having regard to these relevant matters that the justification for a subsea component in the present case is, on the evidence, unjustifiable.
147. Finally, the checks and balances in relation to adequate pre-application consultation contained within the structure of the 2008 Act and its guidance have already been at play, and will continue to be applied by the relevant bodies up until and beyond the acceptance of the application for examination.
148. Thus:
- a. The consultation strategy (including the current pre-application strategy) is set out and has been agreed with the relevant local authorities.
 - b. The Inspectorate has considered the adequacy of the pre-application consultation as part of the Adequacy of Consultation Milestone process in summer 2025.
 - c. The Inspectorate will not accept an application for examination if the pre-application process is inadequate (in so considering it will inter alia have regard to the s.50 guidance).
 - d. The adequacy of the consideration of alternatives as a substantive matter can be raised as an objection to the granting of a permission as part of the Examination process.
149. Leading Counsel's most recent opinion proceeds on the assumption that "he has been told" that some Councils are asserting that the Gunning Principles do not apply to the circumstances of the present application. No evidence is provided in support of that assertion.
150. For the reasons set out above and not repeated fully here, the Gunning Principles of fairness in relation to consultation fall to be considered by the relevant Councils (as advised by the Supreme Court) in the particular circumstances of the relevant statute requiring the consultation, in this case, the 2008 Act and its guidance.
151. Again, for the reasons set out above and not repeated, the pre-application process in the present case exceeds the requirements of the statute, the statutory guidance and the Gunning Principles as they fall to be understood in that specific statutory context.
152. There is, in my respectful opinion, nothing in the Opinions of Leading Counsel for the objectors, to suggest that a court would, or should, intervene in the statutory acceptance process by PINS on an alleged and unproved assertion that a host authority is failing to consider the proposed application in accordance with law.

Overall Conclusion.

153. For the reasons set out above, the pre-application consultation to date complies with the statutory provisions and exceeds the requirements of the **relevant** Statutory Guidance and Gunning Principles.
154. It follows that Leading Counsel's attacks on the processes thus far are misplaced and inaccurate. Astonishingly, they fail to have any real regard to the specific requirements of the 2008 Act and its associated (and Gunning compliant) statutory guidance.
155. The potential application is still at statutory pre-application consultation stage and is thus still short of becoming an application. NG is under a continuing duty to consider all statutory consultation responses and to take them and any other evidence or policy position into account in deciding whether there needs to be any changes to the "proposed application". That process is ongoing.
156. The suggestions contained in Leading Counsel's opinions as to the inadequacy of pre-application consultation are unjustified and incorrect.



Russell Harris KC
8 August 2025

National Grid plc
National Grid House,
Warwick Technology Park,
Gallows Hill, Warwick.
CV34 6DA United Kingdom

Registered in England and Wales
No. 4031152
nationalgrid.com