

# Preparing for take-off

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## Lee May considers some of the planning and legal challenges still to come in the fight to build a third runway at Heathrow

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The government's announcement in October 2016 of support for a new runway at Heathrow Airport has led to a storm of protest over issues such as noise pollution and air quality, and has raised the prospect of legal challenges that could be costly and time-consuming.

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It has taken many decades to get to this point and it is likely to take many years more before this major project comes to fruition. What October 2016 saw was a statement of intent from the government: the real decision is likely to come in 2018 or 2019, when the secretary of state either grants or refuses an application for development consent from the airport operators.

Before then, the government will need to secure the approval of a National Policy Statement (NPS). The decision-making process, and what this means in practice, are explained below.

### Nationally significant infrastructure projects

The planning inquiry into building Terminal 5 at Heathrow sat for 524 days at an estimated cost of ?80m. It took 8 years from the original application being submitted in 1993 to the conclusion of the inquiry in 2001.

A desire by the government to avoid similar delays led to the [Planning Act 2008](#). This created a new, streamlined mechanism for securing planning permission for proposals that were deemed to be of national importance, dubbed nationally significant infrastructure projects (NSIPs).

The original intention was to speed up decision-making by taking it out of the hands of local planning authorities and ? on appeal ? of planning inspectors, and instead giving it to a new body, the Infrastructure Planning Commission (IPC). The IPC did not last long, however, and was abolished in 2012. The power is now vested in the secretary of state, who has responsibility for deciding applications for development consent.

[Section 14 of the 2008 act](#) lists the type of schemes that can qualify as NSIPs. These include 'airport-related development', along with other forms of construction in the fields of

waste, energy, transport, water and wastewater, provided certain thresholds are met.

In the case of a new runway, the threshold is crossed where the alteration is expected to increase passenger capacity by at least 10m annually or cargo capacity by 10,000 flights per year. The government has indicated that the third runway will result in an extra 16m long-haul passenger seats.

The expansion of Heathrow Airport would represent an NSIP for the purposes of the 2008 act. As such, an application for development consent will need to be determined for it under the regime set out in [Part 5 of the act](#), rather than through a planning application made under [Part III of the Town and Country Planning Act 1990](#).

The differences between the two, in terms of process, public involvement and timescale, are significant, and are detailed below. But first the role of NPSs needs to be considered.

## Statements of intent

The 2008 act also introduced NPSs as statements of planning policy designated by the secretary of state in relation to NSIPs. They are designed to set out both the case for major infrastructure development and the decision-making framework that will be used. They should identify any special constraints and bring together an assessment of the relevant economic, social and environmental policy objectives in a development consent application.

*The process has been criticised for not giving [the public] enough say over the final outcome*

NPSs must be approved by parliament and then designated by the secretary of state. Public involvement is secured through a statutory framework of consultation before designation.

While the public has an early opportunity to become engaged in national policy formulation, the process has been criticised for not giving them enough say over the final outcome. In particular, the secretary of state is only obliged to carry out consultation and arrange publicity as they think appropriate.

However, there must be regard to the responses to the consultation and publicity in deciding whether to proceed. This is still, arguably, a lighter-touch regime than the one for the formulation of local planning policies, which require extensive consultation and an examination in public.

Once in place, NPSs will be the primary consideration in determining applications made for development consent for NSIPs. They will carry more weight than other national regional or local planning policies.

The government recently published a draft NPS for airport development, including Heathrow expansion. Consultation on this, which ended on 25 May 2017, included the thorny issues of noise and air quality impacts as well as mitigation measures. The intention is that parliament will vote on the NPS later this year or early in 2018.

Any challenge to an NPS must be made within 6 weeks of designation or, if this is later, publication of the statement. Given the controversy over Heathrow, it is highly likely that a challenge will be forthcoming.

Greenpeace has already indicated that it will seek to challenge any decision, as have a number of local authorities most affected by the runway, including the London Boroughs of Hillingdon, Richmond upon Thames and Wandsworth, and the Royal Borough of Windsor and Maidenhead.

## **Applications for development consent**

Where a developer wishes to secure planning permission for an NSIP, it must apply to the secretary of state seeking development consent.

There is a duty on applicants to carry out pre-application consultation with a number of stakeholders, including the local community, and to publicise their intention to make the application. This presents an opportunity for the public to contribute, but how much influence this will have on a scheme of such proportions is questionable.

Any application for Heathrow expansion will also be submitted to the [Planning Inspectorate](#) for review. The inspectorate will then make a recommendation to the secretary of state, a process that could take a number of months.

In most cases, there will already be an NPS in place dealing with the type of proposal for which consent is sought, and this is the intention with the Heathrow expansion. In such cases, [section 104 of the 2008 act](#) states that when considering development consent the secretary of state must have regard to:

1. any relevant NPS;
2. any applicable local impact report;
3. other matters prescribed; and
4. any other matters that the secretary of state thinks are both important and relevant to the decision.

The application must be decided in accordance with any relevant NPS, except to the extent that the application would:

- lead to the UK breaching any of its international obligations;
- lead to the secretary of state being in breach of any duty imposed by legislation;
- would be unlawful by virtue of any enactment; and
- result in the adverse impact of the proposed development outweighing its benefits.

Any condition prescribed for deciding an application other than in accordance with an NPS should also be met.

*Following the UK's vote to leave the EU, the government is keen to promote the potential for the third runway to boost trade*

The first of the listed criteria is particularly relevant in Heathrow's case, as those opposed to the airport's expansion have already indicated that the proposal will lead to a breach of international obligations on pollution and climate change. A legal challenge would need to be made in the High Court within 6 weeks of the development consent being granted.

The 2008 act gives a timescale of 3 months from receiving the Planning Inspectorate's report and recommendation in which to make a decision.

## Conclusion

Following the UK's vote to leave the European Union in June 2016, the government is keen to promote the potential for the third runway to boost trade with non-EU countries. The Airports Commission has said that the economic boost could be worth up to £151bn, while opponents say that the environmental price is too high.

The government has indicated that a final decision will most likely be made in 2020, and the operators of Heathrow have said that, assuming it is permitted, the new runway could be operational by 2025. In the light of the need for consent, this may be an ambitious time frame.

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## Further information

- Related competencies include: [Economic development](#) ; [Legal/regulatory compliance](#) ; [Planning](#) ; and [Sustainability](#)
- This feature is taken from the RICS *Land journal* (May/June 2017)