



Campaign to Protect  
Rural England

## ***Regulating Air Transport: Consultation on Proposals to Update the Regulatory Framework for Aviation***

### **A Response by CPRE to the Department for Transport's Consultation**

March 2010

#### **Introduction**

1. The Campaign to Protect Rural England (CPRE) welcomes the opportunity to comment on the *Consultation on Proposals to Update the Regulatory Framework for Aviation*. CPRE has existed since 1926 and seeks to promote the beauty, tranquillity and diversity of rural England by encouraging the sustainable use of land and other natural resources in town and country. CPRE has 60,000 members and supporters, a branch in every county in England and over 2,000 parish councils and 800 amenity societies are affiliated to us.
2. CPRE has been a leading authority on the environmental aspects of aviation for decades. We have worked with academics to devise tranquillity mapping to show the impact of intrusions from aviation noise and movements on rural areas. Besides campaigning for a beautiful countryside, we also campaign for a living countryside. The impact of the tourism deficit on the viability of rural areas, for which domestic tourism can be an economic lifeline, is increasingly recognised.
3. We have a particular interest in the functions of the Civil Aviation Authority (CAA) having contributed to Sir Joseph Pilling's Strategic Review of the CAA in 2007 and having been called to give oral evidence to the Transport Select Committee's inquiry into the Use of Airspace in 2009. In addition we have a significant interest in the planning system, for example, having been involved in the establishment of the planning system back in the 1940s and more recently campaigning in relation to what is now the *Planning Act 2008*.
4. This response firstly sets out our overarching comments in relation to the consultation document and then gives more detailed responses to the specific consultation questions.

#### **Summary**

5. We agree that the part of the *Civil Aviation Act 1982* relating to the regulation of performance by CAA of its functions is unclear and out of date. We would therefore strongly welcome reform to the CAA's objectives to ensure they safeguard the public interest in the use of airspace. The proposals for the CAA to consider environmental impacts are a positive step in the right direction and we were particularly pleased that the consultation document referred to impacts on tranquillity in addition to higher levels of noise.
6. We have four overarching comments about the proposals in the consultation:
  - We support a reworded version of Option 1. The difference between a duty to consider a factor and a duty to act in a certain way needs to be understood: Option 1 should be redrafted to reflect this;
  - The user/non-user distinction should be removed: the CAA's purpose should be to safeguard public interest as to how airspace is used rather than the more narrow issue of benefits for consumers of flights;

- The guidance proposed for the CAA will need to be detailed in order to give this non-elected body sufficient legitimacy to decide what the public interest requires when making regulatory decisions; and
- Careful consideration will be needed to ensure that environmental factors for which there is currently no legal duty (e.g. low level noise in tranquil areas) are given sufficient weight in relation to those for which there is a legal duty, such as high noise levels in agglomerations.

## **Overarching concerns**

### *Regulatory Options*

7. We cannot support any of the options as currently drafted due to the confusion in the consultation between statutory purposes and duties to consider on the one hand and duties to act on the other. This seems to have arisen due to the unclear drafting in section 4 of the 1982 Act.

8. Including environmental factors within a statutory remit makes them ‘relevant considerations’ in the public law sense. In some but not all circumstances there may be conflict between different factors that a body is required to have regard to. In such cases a body would be required to give adequate reasons to explain to any party that might have standing to challenge its decision why it made the decision it did. There would be no appeal to such a decision in that no court could second guess the decision, although the decision could be amenable to judicial review.

9. The phrase ‘where possible and appropriate’ in Option 1 is inappropriate as environmental factors should always be a relevant consideration. The suggestion in Option 2 that an alternative could be enabling but not requiring the CAA to consider environmental factors and that this would be a ‘discretionary power rather than a requirement to act’ (i.e. a duty) suggests some confusion between on the one hand the factors an authority should consider when making a decision and on the other hand the degree of discretion, if any, an authority has when making a decision (including a decision not to act).

10. We therefore favour an amended Option 1 with the omission of ‘where possible and appropriate’. We support the inclusion of the phrase ‘environmental improvements’ although it would be better to state ‘environmental benefits’ to align with the wording of *Delivering a Sustainable Transport System* (DaSTS) challenges.

### *Carbon emissions*

11. Figure E1 in Appendix E shows how the high level framework for aviation and climate change currently relies on the EU Emissions Trading System (EU ETS) to secure reductions in emissions. The Committee on Climate Change’s *Aviation Report* (2009) makes clear that the EU ETS will not be enough itself for aviation emissions to be reduced to 2005 levels by 2050 and that further measures to constrain demand are needed.

12. The framework needs to be amended, therefore, as the CAA may need at some point in the future to help deliver greater action on reducing carbon emissions from aviation. The new model of regulation of airspace and air transport needs to be future-proofed as there is unlikely to be a further opportunity in the next decade or so to change it again.

### *Detailed guidance*

13. Failure to respect some environmental factors may lead to breaches of legal obligations, for example in relation to local noise and air pollution limits or in relation to greenhouse gas emissions. A course of action that significantly increases the likelihood of a

breach of a statutory duty is likely to need a compelling reason if it is to be law. These types of issue need to be considered carefully in guidance. We hope that the guidance will be aligned with DaSTS goals, challenges and metrics and would welcome further engagement with the DfT and CAA during the pre-consultation stages of preparing the guidance.

*Consumer focus and public interest*

14. The transport user vs. non-user terminology developed in DaSTS was misleading. Most people walk and drive, but also experience delays, noise and pollution from other people's travel. Similarly many people face burdens as well as benefits from air transport. We create false dichotomies by categorising people as one or the other.

15. We note that the Department recognises the importance of the 'protecting the public interest in aviation' (paragraph 1.3). However, the proposals in the document appear to make little recognition of the majority of the public who do not fly on an annual basis. The interests of people who do not fly, or indeed those who are not flying at a particular time, should have at least equal status but 'putting passengers first' is irreconcilable with this.

16. Care will therefore be needed in drafting the guidance to make it clear that the end user of airspace includes people who have a reasonable expectation of tranquillity, whether they live underneath or simply want accessible tranquil countryside. There are important economic implications in respect of the impact on domestic tourism and the potential contribution of the natural environment to reducing the economic costs of mental ill health.

17. The consumer focus should include giving consumers better information on performance of air transport operators, including environmental issues such as carbon emissions and noise, such as by providing this information at the purchase point.

18. The proposal for a 'strong, competitive market' goes too far: it needs to be made clear that competition need not be just within aviation services but could include rail based alternatives. The market for the travel between London, Paris and Brussels is strong despite the significant decline in aviation due to Eurostar and this could be strengthened following the liberalisation of international rail journeys at the start of 2010.

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## Response to Consultation Questions

*Q4.1 Do you think the three proposed general objectives (in respect to the consumer, safety and the environment) taken together cover the public interest in aviation? If you think other interests should be addressed, please set these out and explain why.*

Yes, they broadly cover the public interest in aviation. We would prefer, however, an approach that integrates better with the five goals in Delivering a Sustainable Transport System (DaSTS), as airspace policy and regulation should fit within the overall policy framework set for the transport system. While it may be possible to do this through the detail of the guidance, it would be better to do so in the CAA's overarching objectives. We are concerned, for example, that 'the environment' will frequently be conflated with the issue of climate change, to the cost of dealing with noise.

*Q4.3 We think the CAA as a whole should have a duty to have regard to the principles of Better Regulation. In addition, for all its non-economic regulatory functions, we think CAA should have a duty to have regard to the Regulators' Compliance Code. This is consistent with the Government's Better Regulation agenda and will align the CAA's regulatory practice with that of other regulators. Do you agree with these proposals?*

While we broadly support a proportionate approach to regulation, we have two particular concerns. First, the CAA should be able to rely on the precautionary principle in deciding whether or not there is a 'clear case for protection' (Hampton principle on economic progress). Second, there may in some circumstances be the need for random enforcement in order to benefit from a deterrence effect: this in itself should count as a reason (Hampton principle on inspections and other visits).

*Q4.4 We propose to extend the duties under Part 4 of the Regulatory Enforcement and Sanctions Act 2008 (to review and remove any unnecessary burdens; and to produce an annual statement on this) to the CAA's air traffic services economic regulation functions. Do you agree with this proposal?*

Yes, as this will help ensure that enforcement is proportionate.

*Q4.5 Do you agree that no further legislative changes are needed to ensure that the CAA is transparent about how it discharges its proposed new objectives? If you do not agree, please explain what more is needed.*

No further changes are needed beyond that proposed in the consultation.

*Q5.1 We are proposing that the main focus for the CAA in pursuing its consumer objective should be on the "end users" of air transport services. This primarily means passengers but also includes freight consumers and the end users of services provided by general aviation; for example, pupils at flight schools. Do you agree with this proposal?*

No, we have concerns about this approach. The use of airspace has wide ranging impacts, not just on those who consume air transport services but also those who live, work or use a tranquil area for recreation. Indeed the carbon impacts will have a wider impact, whether in terms of the cost of heat or transport or amount of the countryside that is given over to renewable energy production. The CAA, as regulator of airspace, should equate the end users with the wider public interest. There may be different consumer interests that could conflict, such as the interest in cheaper flights, versus the interest in reliable and safe flights, and these different interests are covered by different DaSTS goals.

There needs to be a clear distinction between the general public, which includes both those who fly and those who do not fly, and specialised consumers with business-to-business

relationships. The invention of an ‘intermediary consumer’ creates complication where none should exist.

*Q7.1 For Option 1 – Do you agree that the CAA’s general environment objective should require the CAA, where possible and appropriate, to have regard for environmental factors and seek environmental improvements? If you think there are environmental issues which would not be addressed by this proposal but should be, please set these out and explain why.*

We would prefer omission of ‘...where possible and appropriate’ because these words are unnecessary. The objective relates to a duty to consider, not a duty to act.

*Q7.2 For Option 2 – Do you think that the CAA should have discretion in relation to its general environment objective and that this should be a second order issue for the CAA below its safety and consumer priorities? If so, please explain why.*

No. Making environmental factors ‘second order’ issues would be contrary to the national Sustainable Development Strategy as well as DaSTS.

There is always more than one way to minimise safety risks to acceptable levels, so the least damaging way of achieving an appropriate level of safety must be chosen, especially given the recognition by Government of the importance of environmental limits, such as but not limited to carbon emissions.

*Q7.5 Do you agree that the Government should give the CAA guidance to help it interpret its environment objective? If you do agree, please set out what you think this guidance should cover and why.*

Yes. We welcome the recognition of trade-offs between climate change and noise but in addition there are trade offs between loud noise and lower levels of noise in tranquil areas. In addition there may be issues of balancing local and national impacts.

For any new guidance to be valid, there will need to be new research on noise disturbance issues. Much of the CAA’s guidance as to noise disturbance issues derives from surveys which are time-expired: the most recent, ANIS, being 25 years old. The results of the much more recent DfT ANASE study, which indicated that the onset of serious annoyance from aircraft noise occurred at substantially lower levels than ANIS assumed and that the number of incidents was more significant than ANIS assumed, was disavowed by DfT and thus CAA has no current basis on which to base environmental decisions.

An urgent replacement for the ANASE study is required, taking into account WHO advice on the noise disturbance issue. Even more urgent revision is needed for the DfT’s ‘Guidance to the Civil Aviation Authority On Environmental Objectives Relating to the Exercise of its Air Navigation Functions’, whose latest version dates from 2002 but, as the text makes clear, elements of the guidance are ‘informed by the work of two Noise Advisory Council (NAC) working groups in the 1960s and 1970s’ with no subsequent test of their continuing validity.

See also our response to Q4.1 above.

*Q7.6 Do you agree that the Secretary of State should have new powers to direct the CAA in regard to its environment objective? If yes, do you agree that the proposals set out in 7.38 and 7.39 are the right ones? Please explain.*

In principle, yes, and we welcome the proposal to expand the range of environmental factors to be

covered. There may also need to be involvement of the Secretaries of State for the Environment, Food and Rural Affairs and for Energy and Climate Change.

Sir Joseph Pilling's stated in his report (paragraph 180) that 'Environmental factors are so important to the population at large that, when it is far from clear how best to reconcile conflicting issues, more time needs to be built into the decision-making process. This will help all issues to be fully explained and ensure that stakeholders know what the environmental impacts of a decision will be.

Whatever decision is taken, it needs to be fully clear what factors were taken into account, what weighting was given to each of them and how the final decision was arrived at.'

*Q7.7 Do you agree that any new funding requirements arising from a new environment objective should be met through the CAA's existing charging schemes?*

Yes, as those that create the externality or the risk of harm should bear the cost of dealing with it.

*Q8.1 Do you agree that the principles of the proposed environment objective (Option 1) should apply to the CAA's planning and management of airspace?*

Yes, this is essential. Decisions taken within the Directorate of Airspace Policy have substantial environmental impacts in terms of noise, visual intrusion and climate change through aviation's activities and these in turn impact substantially on the public interest.

*Q8.2 Are there any areas where the interests of the "end user" and "intermediary users" would diverge in respect of airspace?*

There could be conflicts between the interests of users (of commercial aviation) and the general aviation community where extensions of controlled airspace to facilitate commercial aviation traffic flows were concerned. There are also environmental consequences to the general public in such circumstances, since major sectors of general aviation traffic can be forced into noise corridors, and/or to fly lower and thus noisier to those below, to pass around controlled airspace.