The Sizewell C Project

PDB-4 Written submissions on matters raised orally at Preliminary Meeting Part 1

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CONTENTS

1 WRITTEN SUBMISSIONS ON MATTERS RAISED ORALLY AT PRELIMINARY MEETING: PART 1

1.1 Introduction

1.1.1 The purpose of this document is to provide a written submission on matters raised at the Preliminary Meeting: Part 1 ("**PM1**") that took place on 23 and 24 March 2021. This document addresses matters raised in oral submissions by attendees or where SZC Co. committed to providing the Examining Authority ("**ExA**") with a written response on a particular matter as part of Procedural Deadline B.

1.1.2 In summary, this document covers:

- SZC Co.'s comments on the ExA's initial assessment of Principal Issues.
- SZC Co.'s intended approach to notifications and publicity pursuant to the Infrastructure Planning (Compulsory Acquisition) Regulations 2010 ("**CA Regulations**") and the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 ("**EIA Regulations**"), together with a suggested timetable for such notifications and publicity.
- Any constraints on SZC Co. to respond to, or engage in, specific topics as part of the examination process.
- SZC Co.'s explanation on how responses at the non-statutory consultation stage were taken into account before the proposed changes application was submitted, and the level of engagement undertaken on the proposed mitigation measures.
- An update on the position of Statements of Common Ground with various parties.
- Clarification from SZC Co. on additional land proposed as part of the proposed changes application, with particular reference to the Pakenham fen meadow site.
- An update from SZC Co. on landowner engagement.

1.1.3 A separate document has been prepared and submitted for Procedural Deadline B to provide a written summary of oral submissions (Doc Ref. PDB-3) made by SZC Co. at the PM1.

1.2 Comments on the ExA's Principal Issues

1.2.1 SZC Co. is grateful for the opportunity to comment on the way that the ExA has characterised the principal issues in Annex C of the Rule 6 letter, as supplemented in the Detailed Agenda for the PM1 on 23 March 2021. SZC Co. recognises that this is principally a matter for the ExA and that the ExA will examine all matters it considers to be potentially relevant and important, whether they are included in its current list or not.

1.2.2 At this stage the only comment SZC Co. wishes to make relates the identification of the issues that arise under the heading "Policy and need" in Annex C.

1.2.3 When the ExA comes to consider how best to frame the principal issues that the examination should address under this heading, we would invite it to give careful consideration to the following:

a) The judgment of the Supreme Court in ***R (Friends of the Earth Ltd) v. Heathrow Airport Ltd*** [2020] UKSC 52, and the judgments of the High Court and the Court of Appeal in the challenge to the development consent order granted in relation to the Drax power station: ***R (ClientEarth) v. Secretary of State for Business, Energy and Industrial Strategy*** [2020] EWHC 1303 (Admin); and [2021] EWCA Civ 43. Copies of all three judgments are appended to this note. Whilst the judgments should be read and understood together and in their entirety, the following paragraphs are considered to be of particular relevance to the identification of the principal issues relating to policy and need in this case:

- **Heathrow** [2020] UKSC 52: 20-24, 27-28 and 36.
- **ClientEarth** (High Court) [2020] EWHC 1303 (Admin): 26-31, 37-46, 105-111, 118, 120-125 and 129-142.
- **ClientEarth** (Court of Appeal) [2021] EWCA Civ 43: 5, 48-76 and 98-110.

The ***ClientEarth*** case was one in which the relevant national policy statements "had effect" for the purposes of the proposed development, and the application therefore fell to be determined under section 104 rather than 105 of the Planning Act 2008. The provisions of section 106(1)(b) nevertheless apply equally in both cases.

b) What was said by the ExA appointed to examine the application for the Wylfa Newydd Nuclear Power Station about these issues and the approach to the issue of 'relevant change of circumstances' as referred to in the Written Ministerial Statement (see the Wylfa ExA's

Recommendation Report ("**ExARR**") at section 5.5 (pp. 47-48), and particularly paragraph 5.5.9). A copy of the relevant extract from the Wylfa ExARR is appended to this note for ease of reference. The Wylfa ExARR was issued in July 2019 and was thus unable to take account of the decisions in the ***Heathrow*** or ***ClientEarth*** cases.

1.2.4 At this stage SZC Co. does not seek to comment on the implications of those authorities, and the views of the Wylfa ExA, or the conclusions which the ExA should draw in relation to the related issues of policy and need. Any such comments will be made as appropriate during the examination itself.

1.3 Notifications and publicity

1.3.1 With regard to the notification procedure under Regulations 7 and 8 of the CA Regulations, on the assumption for programming purposes that a decision is made to accept all of the proposed changes by 21 April 2021, SZC Co. intends that the period during which persons may submit relevant representations to the Planning Inspectorate would run from 28 April 2021 to 9 June 2021.

1.3.2 With regard to the voluntary publicity that reflects the requirements of the EIA Regulations, on the same assumption as above, SZC Co. intends that the period during which persons may submit responses to the publicity to SZC Co. would also run from 28 April 2021 to 9 June 2021.

1.3.3 As the relevant newspapers require receipt of the notice within a fixed period in advance of publication, if the decision on whether to accept the proposed changes is made later than 21 April 2021, the above dates would likely need to be altered. We would, therefore, be grateful if the ExA could provide us with as much warning as possible if it expects to make its decision after that date.

1.3.4 Based on the above dates for notification and publicity, we suggest the following timetable. We would be happy to discuss at the Preliminary Meeting: Part 2 whether any amendments to this suggested timetable would be appropriate.

- **9 June 2021**: Deadline for submission of relevant representations to the Planning Inspectorate and for submission of responses on the environmental impact assessment publicity to SZC Co.
- **11 June 2021**: SZC Co. submits to the ExA the certificates required under Regulation 9 of the CA Regulations

- **14 June 2021**: After receipt of the Regulation 9 certificates, the ExA gives 21 days' notice to:
  - each additional affected person and each additional interested party of the date, time and place fixed for any issue specific hearing (under Regulation 14 of the CA Regulations);
  - each additional affected person of the deadline by which that person must notify the ExA of the person's wish to be heard at a compulsory acquisition hearing and the date, time and place fixed for a compulsory acquisition hearing (under Regulation 15 of the CA Regulations); and
  - each additional affected person and each additional interested party of the deadline by which that person must notify the ExA of the person's wish to be heard at an open floor hearing and the date, time and place fixed for any open floor hearing (under Regulation 16 of the CA Regulations)
- **30 June 2021**: Within 21 days of the deadline specified in the notice for submission of relevant representations (ie 9 June 2021), the ExA:
  - makes its initial assessment of the issues arising in connection with the additional land provision (under Regulation 11 of the CA Regulations); and
  - asks any questions about the additional land provision
- **Deadline 4 (23 July 2021)**: Deadline for submission to the ExA of:
  - responses to the ExA's questions on the additional land provision;
  - comments on the relevant representations made on the additional land provision; and
  - copies of responses received by SZC Co. to the environmental impact assessment publicity
- **Deadline 5 (6 August 2021)**: Deadline for submission to the ExA of:
  - responses to the comments on the relevant representations made on the additional land provision;
  - written representations about the additional land provision (under Regulation 13 of the CA Regulations); and
  - comments on the responses to the environmental impact assessment publicity

- **Deadline 6 (3 September 2021)**: Deadline for submission to the ExA of comments on the written representations made on the additional land provision

- **Deadline 7 (24 September 2021)**: Deadline for submission to the ExA of responses to the comments on the written representations made on the additional land provision

1.3.5 Pursuant to Rule 13(6) of the Infrastructure Planning (Examination Procedure) Rules 2010, SZC Co. is required to publish notice of any hearing at least 21 days in advance. The draft examination timetable currently provides for the first hearing (Open Floor Hearing 1) to commence on 19 May 2021. In order for SZC Co. to publish notice of that hearing at least 21 days in advance, SZC Co. would need to have the confirmed, final details of the hearing by no later than 21 April 2021 to allow publication of the notice by 28 April 2021.

1.4 Examination procedure

1.4.1 We are very alive to the challenges for the ExA around the programming of the examination. However, respectfully we ask that any Issue Specific Hearings relating to coastal processes are not held during 24-27 August 2021 as our expert is not able to attend on those dates. We consider their input would be very helpful to the ExA, due to their expertise and involvement in the Project for a significant period, as well as having been a figurehead in the engagement with the various stakeholders on this matter over the years.

1.5 Consultation on SZC Co.'s proposed changes to the application

1.5.1 To elaborate on the points made by John Rhodes on behalf of SZC Co. at the PM1 regarding adequacy of consultation in relation to the proposed changes (see Doc Ref. PDB-3), we can confirm that SZC Co. undertook the following:

- Informal engagement

  – Early engagement took place with host local authorities and other key stakeholders to inform them of the forthcoming material change request and to seek their views on the changes. Many of the proposed changes arose from matters that had been highlighted through earlier engagement. Feedback that was relevant and appropriate informed the proposed changes and was incorporated into the consultation material.

- Throughout the pre-examination stage, SZC Co. conducted a structured process of direct engagement with a number of statutory stakeholders.

- Formal consultation

  - SZC Co. set out its intended approach to consultation in the **Notification Report** [AS-005] sent to the ExA on 6 October 2020. The intended approach was based on the approach provided for in the Planning Inspectorate's Advice Note 16 ("**AN16**"), but exceeded the requirements of the Advice Note. The ExA responded with advice on the intended approach to consultation in its letter of 23 October 2020 [PD-006]. SZC. Co then consulted in accordance with that advice.

  - The AN16 consultation approach was applied to all of the proposed changes, irrespective of whether they were material changes.

  - Whilst there is no statutory requirement to carry out consultation on the proposed changes to the application, SZC Co. carried out non-statutory consultation between 18 November 2020 and 18 December 2020 on each of the proposed changes.

  - As advised in AN16, local authorities, prescribed consultees, the Marine Management Organisation and persons with an interest in land under section 42(1)(a) to (d) of the Planning Act 2008 who would be affected by the proposed changes were consulted. Additionally, the consultation included consultation with all section 42(1)(a) to (d) parties, whether affected or not by the proposed changes. Additionally, members of the public were voluntarily consulted on the proposed changes, including all parties within the area that received information by post during the Stage 4 pre-application statutory consultation.

  - The consultation documents were shared with the local authorities and the DEFRA group ahead of the formal launch of the consultation to aid their review time.

  - A newsletter about the proposed changes went to 40,000+ homes and businesses and advertisements were placed in the local newspapers (including the East Anglia Daily Times) as well as The Times and other publications.

  - An email was sent on 18 November 2020 (the start of the consultation) by SZC Co. to a wide range of local community contacts including the clerks or chairs of the 152 parish councils / parish meetings in East Suffolk, which confirmed that "*Parish*

councils, business organisations and community groups can book a presentation on the proposed changes by emailing us at info@sizewellc.co.uk or calling freephone 0800 197 6102". Five organisations took up the offer (Sizewell Residents Association, Leiston Town Council, Theberton and Eastbridge Parish Council (with Yoxford and Middleton Parish Councils joining), the AONBP and Suffolk Friends of the Earth). SZC Co. also briefed members of the Councils' Joint Local Authorities' Group.

- SZC Co. funded Planning Aid England to support the town and parish councils, in a similar way to the support provided pre-application. Their work included four virtual briefing sessions.
- The consultation document, as well as virtual exhibition boards, were provided online throughout the period.
- The team responded to queries coming in through the enquiries line during this period.
- Responses to consultation were collected via a feedback form, and a **Consultation Report Addendum** [AS-153] was submitted in January 2021 with the change request.

1.5.2 SZC Co. took careful account of the results of consultation and engagement in determining the nature of the proposed changes to the application submitted in January 2021.

1.5.3 Part 1 of the Proposed Changes to the Application [AS-281] takes each proposed change in turn and provides details of:

- a description and the reasons for the proposed change;
- consultation on the proposed change;
- any impact on compulsory acquisition and temporary possession;
- environmental impacts of the proposed change; and
- SZC Co.'s conclusions on the proposed change.

1.5.4 Similarly, the Consultation Report Addendum [AS-153] sets out details of the consultation, the process undertaken to break the consultation responses down into coded topics or issues and the overall results of the consultation. Appendix H of the addendum provides SZC Co.'s response to every issue raised; from which it is apparent that the outcome was closely studied and fully taken into account.

1.5.5 As an overview, it is important to be aware of the following:

- The large majority of the proposed changes arose from engagement with stakeholders – an engagement which has been active, meaningful and long standing throughout the pre- and post-application period. In other words, the draft proposed changes themselves were a response to consultation and engagement.

- Of the 15 proposed changes, only Changes 4 (parameter heights), 7 (tree retention), 8 (surface water outfall) and (some elements of) 14 (main site boundary changes) arose for predominantly technical reasons determined as a result of continued internal design development. All of the other proposed changes arose from and in response to earlier consultation feedback and continuing engagement.

- Unsurprisingly, virtually all of the changes were supported by the outcome of consultation. The results are summarised in **Table 4-2** of the **Consultation Report Addendum** [AS-153]. The proposed changes were generally strongly supported.

- There were limited exceptions to this, as follows:

Table 1.1: Summary of the results contained in Table 4-2 of the Consultation Report Addendum where proposed changes were not supported

Change No.	Consultation response summary
Change 1 (increased trains)	Option 1 (4 days per day) was opposed by 72 responses to 71; with 16 unsure.
Change 3 (5 trains per day)	Opposed by 94 responses to 40.
Change 11 (Pakenham)	Opposed by 68 responses to 47, with 37 unsure.
Change 7 (tree retention)	Opposed by 44 responses to 59, with 41 unsure.
Changes 12 and 13 (boundary changes)	Opposed by 33 responses to 51 and opposed by 30 responses to 49, respectively, with more respondents unsure in each case.

1.5.6 It would be fair to say, however, that, on the whole, the proposed changes were roundly supported in the consultation. This reflects the fact that the proposed changes were very largely intended to enhance the application and reflected the fact that SZC Co. had been listening closely to stakeholders.

1.5.7 The specific account taken of individual responses is recorded in **Appendix H** of the **Consultation Report Addendum** [AS-156], although the summary of SZC Co.'s response to the consultation is set out change by change in the Part 1 submission [AS-281].

1.5.8 In principle, the outcome of the consultation did not come as a surprise. SZC Co. has developed a good understanding of stakeholders' views through intensive engagement and four previous rounds of consultation, as well as engagement since submission of the application. The proposed changes sought to anticipate and respond to the majority view of stakeholders. Nevertheless, as the **Consultation Report Addendum** [AS-153] explains, responses were broken down and coded. The responses in this form were made available to SZC Co. on a virtually live basis, as they were received, so that feedback was received and analysed continuously through the consultation process. At the same time, any longer responses to consultation, such as those from the local authorities and principal stakeholders were additionally downloaded and provided to SZC Co.'s development consent order team.

1.5.9 SZC Co.'s governance structure was then used to reflect upon the feedback and determine whether amendments were necessary to the then draft proposed changes.

1.5.10 As a result of this process, and of the continuing engagement with stakeholders, which has been a hallmark of SZC Co.'s approach, a number of adjustments were made to the draft proposed Ccanges. Examples include:

Change 1 (increased trains)

1.5.11 Whilst the option of 4 trains per day was very marginally opposed, SZC Co. was also aware that there was a large majority in favour of moving away from the freight strategy and reducing HGV movements (107 responses compared with 33). Additionally, there was a strong majority in favour of increased rail movements (92 responses compared with 61). SZC Co. considered that the mixed results might be explained by concerns about night-time train movements. However, SZC Co. was also aware that it would not be possible to meet the principal concern (to reduce HGV movements and increase rail activity) without night-time movements. The change request, therefore, confirmed the proposal to assess an increase number of train movement but recognised the importance of mitigating the effects of night-time trains and included a draft Rail Noise Mitigation Strategy in **Appendix 9.3.E** of the **ES Addendum** [AS-258].

1.5.12 The concern expressed about a 5th daily train and its potential impact on passenger train timetable was noted, and the possibility of a 5th train was only conditionally referenced in the change submission.

Change 2 (BLF)

1.5.13 SZC Co. noted the strong support for the enhanced beach landing facilities expressed in the consultation and through engagement and was encouraged to propose the longer temporary BLF option, noting that option received the strongest support.

1.5.14 The importance attached by consultees to a monitoring and management plan was noted and a **draft Coastal Processes Monitoring and Management Plan** was submitted in **Appendix 2.15.A** of the **ES Addendum** [AS-237]. Similarly, mitigation measures for the construction impacts of the necessary piling were set out in the application as a result of SZC Co.'s continuing internal design development process but also as a direct consequence of feedback from stakeholders.

1.5.15 This approach is consistently apparent across the proposed changes. The proposed changes themselves were either essential changes necessary for the construction of the project or changes which responded directly to stakeholder feedback. It was not surprising, therefore, that the proposed changes did not undergo fundamental change as a result of consultation but it is consistently the case that the proposed change submission in January 2021 developed proposals for the mitigation of effects, often in direct response to the sensitivity revealed through consultation and engagement.

1.5.16 The other principal feedback from stakeholders was a request for more technical information on the proposed changes. The change submission in January 2021 responded with extensive further information in support of the proposed changes.

1.5.17 In respect of some proposed changes, SZC Co. took the decision to proceed notwithstanding that the proposed changes had not been fully supported in the consultation. The instances where that was the case are listed in Table 1.1 above. The changes arising from construction design development were known to be necessary and SZC. Co.'s emphasis was to ensure that sufficient mitigation was proposed for the effect of those changes.

1.5.18 The change proposed at Pakenham received significant support, but not from a majority of responses. This is addressed in Part 1 of the change submission [AS-281] (from paragraph 2.2.174) where SZC Co.'s reasoning is set out. That reasoning included that the January 2021 submission could

show that the environmental effects of the change were positive but also that SZC Co. considered it appropriate to attach weight to the views of key stakeholders expressed through engagement and in response to consultation, particularly Natural England, and to ensure that concerns raised by others, for instance about local impacts, were fully addressed in the submission.

1.6 Update on the status of Statements of Common Ground

1.6.1 SZC Co. is engaging with those stakeholders identified in the Rule 6 letter (dated 23 February 2021) in order to provide Statements of Common Ground ("**SoCG**") at Deadline 1. SZC Co. wishes the ExA to note the following:

- SZC Co. has agreed with the Royal Society for the Protection of Birds and Suffolk Wildlife Trust that there will be a single SoCG with these parties; and it will not include the Suffolk Friends of the Earth group.
- SZC Co. has agreed with Magnox and the Nuclear Decommissioning Authority that there will be a single SoCG with these parties.
- SZC Co. has issued a draft SoCG to the Destination Management Organisation; and this week will be issuing a draft to the B1122 Action Group and the Suffolk Friends of the Earth individually and will follow up with each.
- SZC Co. will submit a unilateral SoCG relating to the East of England Ambulance Trust at Deadline 3 and they will provide their inputs at Deadline 4.
- Through engagement with the Suffolk Preservation Society, they have confirmed that they do not wish to enter into a SoCG with SZC Co. at this time.
- SZC Co. is currently meeting with each parish council individually, where they have indicated a wish to meet. Furthermore, SZC Co. will be providing a bespoke response to each parish/town council's relevant representation at Deadline 1. It is considered that this approach to engagement is effective at understanding each party's position ahead of them preparing their written representation (at Deadline 1) to which SZC Co. will respond (at Deadline 2). Unless otherwise directed by the ExA, SZC Co. will review the need for/benefit of SoCG with town and parish councils after Deadline 2.

1.7 Additional land proposed as part of the change application

1.7.1 Change 11: Extension of the Order Limits to provide for additional fen meadow habitat at Pakenham was identified in the January 2021 proposed change submission as a site for compensatory habitats for fen meadow loss of 0.46ha from the Sizewell Marshes Site of Special Scientific Interest ("**SSSI**"). The proposed change arose in response to continued engagement between SZC Co. and Natural England following submission of the application and notification of the proposed change. Natural England recommended that, given the rarity of fen meadow in the UK and the known difficulty of restoring species rich fen / fen meadow habitat, a larger extent of land (beyond the sites at Benhall and Halesworth identified in the application) should be provided in order to ensure sufficient compensatory habitat is delivered and requested that a multiplier of 9x should be applied to the habitat lost.

1.7.2 Within the Pakenham site, 4.9ha is considered the 'primary locus' for the creation of new fen meadow habitat, with some of the wider areas on the site also having the potential for the creation of new fen meadow habitat. The provision of this site would help compensate for the loss of fen meadow habitat from the Sizewell Marshes SSSI.

1.7.3 The target quantum set for habitat creation in the **Fen Meadow Strategy** [AS-209] is 4.5ha, which would deliver the multiplier of 9x the area of fen meadow lost from the Sizewell Marshes SSSI. However, in the event that all of the three offsite areas for fen meadow habitats proposed by SZC Co. (including the sites at Pakenham, Benhall and Halesworth) are successfully established in all of the areas defined as the 'primary loci' at each site, the Sizewell C Project would provide a maximum total of 8.1ha of new fen meadow habitat compared to 0.46ha of habitat lost. The maximum of 8.1ha provides some contingency, over and above the 4.5ha target, if there is a failure to establish new fen meadow habitats across all of the 'primary loci', for unforeseen hydrological or ecological reasons. However, until works are fully defined in the Fen Meadow Plan (as defined in the **Fen Meadow Strategy**) and then progressed, it is not possible to predict with certainty the precise quantum of new fen meadow habitat which will be successfully delivered.

1.7.4 The Pakenham site also provides an opportunity to deliver wet woodland habitats, to compensate for loss of this habitat type from the Sizewell Marshes SSSI and to provide this habitat in close proximity to the new fen meadow habitats. The proximity of the two habitats is a feature of the Sizewell Marshes SSSI and is likely to be important in providing habitat diversity for invertebrates. A **Wet Woodland Strategy** (in preparation), a draft of which has been shared with Natural England and others, will be

submitted at Deadline 1. The **Fen Meadow Strategy** [AS-209] will also be updated further and re-submitted at Deadline 1.

1.7.5 The Pakenham site was selected following a careful review of candidate sites against a series of criteria as follows (see the **Fen Meadow Strategy**, Section 4):

- underlying peat is currently influenced by groundwater or near-surface seepage and likely to be of suitable quality;
- the water table is near surface and likely to be influenced by areas of upwelling groundwater;
- fen meadow species are present within or close to the site margins; and
- there are broad options for water management and potential for changes to land management.

1.7.6 These criteria greatly limit the sites which are potentially suitable and for this reason the extent of the search for suitable locations included the whole of Suffolk.

1.7.7 The inclusion of the Pakenham site in the application would not result in an application which is different in substance from the submitted development consent application. The site provides compensatory habitats for the impact of the nationally significant infrastructure project, which is itself unchanged. The compensatory habitat is directly comparable to that already proposed in the application at two other sites and its inclusion is intended to enable the achievement of the same outcome as that proposed in the application.

1.7.8 Please refer to Section 2.9 of Chapter 2, Volume 1 of the **ES Addendum** [AS-181] for further details.

1.8 Landowner engagement

1.8.1 SZC Co. has been engaging with affected landowners over a number of years, with the objective of securing all land required for the Project by agreement. This has resulted in some land already being acquired outright (Aldhurst Farm) and a number of other sites secured through Option Agreements. Furthermore, Heads of Terms have been agreed (and signed) with a number of landowners and solicitors instructed to advance the drafting of Option Agreements. Negotiations on Head of Terms have progressed with meaningful discussions having taken place with agents (and the National Farmers Union) for all landowners affected by the

scheme, and it is the expectation that much of the land required for the Project will be acquired through private treaty by the close of the examination. Terms have been offered to all affected land interests.

1.8.2 During the Covid-19 pandemic, SZC Co. and its agents have predominantly engaged with landowners and their agents virtually due to the restrictions in place. SZC Co. understands the aspirations of some landowners to meet in person and it is expected that physical meetings will resume from mid-April 2021 in line with the easing of restrictions. We are aware of matters that are of concern to individual landowners (e.g. drainage proposals or siting of equipment) and SZC Co. is keen to try to resolve these to enable Heads of Terms to be agreed as swiftly as possible.

APPENDIX A: R (Friends of the Earth Ltd) v. Heathrow Airport Ltd [2020] UKSC 52

Michaelmas Term
[2020] UKSC 52
On appeal from: [2020] EWCA Civ 214

JUDGMENT

R (on the application of Friends of the Earth Ltd and others) (Respondents) *v* Heathrow Airport Ltd (Appellant)

before

Lord Reed, President
Lord Hodge, Deputy President
Lady Black
Lord Sales
Lord Leggatt

JUDGMENT GIVEN ON

16 December 2020

Heard on 7 and 8 October 2020

Appellant
Lord Anderson of Ipswich KBE QC
Michael Humphries QC
Richard Turney
Malcolm Birdling
(Instructed by Bryan Cave Leighton Paisner LLP)

Respondent (1)
David Wolfe QC
Peter Lockley
Andrew Parkinson

(Instructed by Leigh Day (London))

Respondent (2)
Tim Crosland, Director, Plan B Earth

Respondents:
(1) Friends of the Earth
(2) Plan B Earth

LORD HODGE AND LORD SALES: (with whom Lord Reed, Lady Black and Lord Leggatt agree)

Introduction

1. This case concerns the framework which will govern an application for the grant of development consent for the construction of a third runway at Heathrow Airport. This is a development scheme promoted by the appellant, Heathrow Airport Ltd ("HAL"), the owner of the airport.

2. As a result of consideration over a long period, successive governments have come to the conclusion that there is a need for increased airport capacity in the South East of England to foster the development of the national economy.

3. An independent commission called the Airports Commission was established in 2012 under the chairmanship of Sir Howard Davies to consider the options. In its interim report dated 17 December 2013 the Airports Commission reached the conclusion that there was a clear case for building one new runway in the South East, to come into operation by 2030. In that report the Airports Commission set out scenarios, including a carbon-traded scenario under which overall carbon dioxide (CO_2) emissions were set at a cap consistent with a goal to limit global warming to 2ºC. The Commission reduced the field of proposals to three main candidates. Two of these involved building additional runway capacity at Heathrow Airport, either to the north west of the existing two runways ("the NWR Scheme") or by extending the existing northern runway ("the ENR Scheme"). The third involved building a second runway at Gatwick airport ("the G2R Scheme").

4. The Airports Commission carried out an extensive consultation on which scheme should be chosen. In its final report dated 1 July 2015 ("the Airports Commission Final Report") the Commission confirmed that there was a need for additional runway capacity in the South East by 2030 and concluded that, while all three options could be regarded as credible, the NWR Scheme was the best way to meet that need, if combined with a significant package of measures which addressed environmental and community impacts.

5. The Government carried out reviews of the Airports Commission's analysis and conclusions. It assessed the Airports Commission Final Report to be sound and robust. On 14 December 2015 the Secretary of State for Transport ("the Secretary of State") announced that the Government accepted the case for airport expansion;

agreed with, and would consider further, the Airports Commission's short-list of options; and would use the mechanism of a national policy statement ("NPS") issued under the Planning Act 2008 ("the PA 2008") to establish the policy framework within which to consider an application by a developer for a development consent order ("DCO"). The announcement also stated that further work had to be done in relation to environmental impacts, including those arising from carbon emissions.

6. In parallel with the development of national airports policy, national and international policy to combat climate change has also been in a state of development. The Climate Change Act 2008 ("the CCA 2008") was enacted on the same day as the PA 2008. It sets a national carbon target (section 1) and requires the Government to establish carbon budgets for the UK (section 4). There are mechanisms in the CCA 2008 to adjust the national target and carbon budgets (in sections 2 and 5, respectively) as circumstances change, including as scientific understanding of global warming develops.

7. In 1992, the United Nations adopted the United Nations Framework Convention on Climate Change. 197 states are now parties to the Convention. Following the 21st Conference of the parties to the Convention, on 12 December 2015 the text of the Paris Agreement on climate change was agreed and adopted. The Paris Agreement set out certain obligations to reduce emissions of greenhouse gases, in particular CO_2, with the object of seeking to reduce the rate of increase in global warming and to contain such increase to well below 2ºC above, and if possible to 1.5ºC, above pre-industrial levels. On 22 April 2016 the United Kingdom signed the Paris Agreement and on 17 November 2016 the United Kingdom ratified the Agreement.

8. An expansion of airport capacity in the South East would involve a substantial increase in CO_2 emissions from the increased number of flights which would take place as a result. The proposals for such expansion have therefore given rise to a considerable degree of concern as to the environmental impact it would be likely to have on global warming and climate change. This is one aspect of the proposals for expansion of airport capacity, among many others, which have made the decision whether to proceed with such expansion a matter of controversy.

9. On 25 October 2016, the Secretary of State announced that the NWR Scheme was the Government's preferred option. In February 2017 the Government commenced consultation on a draft of an Airports NPS which it proposed should be promulgated pursuant to the PA 2008 to provide the national policy framework for consideration of an application for a DCO in respect of the NWR Scheme. A further round of consultation on a draft of this NPS was launched in October 2017. There were many thousands of responses to both consultations. In June 2018 the Government published its response to the consultations. It also published a response

to a report on the proposed scheme dated 1 November 2017 by the Transport Committee (a Select Committee of the House of Commons).

10. On 5 June 2018 the Secretary of State laid before Parliament the final version of the Airports NPS ("the ANPS"), together with supporting documents. As is common ground on this appeal, the policy framework set out in the ANPS makes it clear that issues regarding the compatibility of the building of a third runway at Heathrow with the UK's obligations to contain carbon emissions and emissions of other greenhouse gases could and should be addressed at the stage of the assessment of an application by HAL for a DCO to allow it to proceed with the development. As is also common ground, the ANPS makes it clear that the emissions obligations to be taken into account at the DCO stage will be those which are applicable at that time, assessed in the light of circumstances and the detailed proposals of HAL at that time.

11. On 25 June 2018 there was a debate on the proposed ANPS in the House of Commons, followed by a vote approving the ANPS by 415 votes to 119, a majority of 296 with support from across the House.

12. On 26 June 2018 the Secretary of State designated the ANPS under section 5(1) of the PA 2008 as national policy. It is the Secretary of State's decision to designate the ANPS which is the subject of legal challenge in these proceedings.

13. Objectors to the NWR Scheme commenced a number of claims against the Secretary of State to challenge the lawfulness of the designation of the ANPS on a wide variety of grounds. For the most part, those claims have been dismissed in the courts below in two judgments of the Divisional Court (Hickinbottom LJ and Holgate J) in the present proceedings, [2019] EWHC 1070 (Admin); [2020] PTSR 240, and an associated action ([2019] EWHC 1069 (Admin)) and in the judgment of the Court of Appeal in the present proceedings: [2020] EWCA Civ 214; [2020] PTSR 1446.

14. The Divisional Court dismissed all the claims brought by objectors, including those brought by the respondents to this appeal (Friends of the Earth - "FoE" - and Plan B Earth). FoE is a non-governmental organisation concerned with climate change. Plan B Earth is a charity concerned with climate change.

15. However, the Court of Appeal allowed appeals by FoE and Plan B Earth and granted declaratory relief stating that the ANPS is of no legal effect and that the Secretary of State had acted unlawfully in failing to take into account the Paris

Agreement in making his decision to designate the ANPS. The Court of Appeal set out four grounds for its decision:

> (i) The Secretary of State breached his duty under section 5(8) of the PA 2008 to give an explanation of how the policy set out in the ANPS took account of Government policy, which was committed to implementing the emissions reductions targets in the Paris Agreement ("the section 5(8) ground");
>
> (ii) The Secretary of State breached his duty under section 10 of the PA 2008, when promulgating the ANPS, to have regard to the desirability of mitigating and adapting to climate change, in that he failed to have proper regard to the Paris Agreement ("the section 10 ground");
>
> (iii) The Secretary of State breached his duty under article 5 of the Strategic Environmental Assessment Directive ("the SEA Directive", Directive 2001/42/EC of the European Parliament and of the Council on the assessment of the effects of certain plans and programmes on the environment) to issue a suitable environmental report for the purposes of public consultation on the proposed ANPS, in that he failed to refer to the Paris Agreement ("the SEA Directive ground"); and
>
> (iv) The Secretary of State breached his duty under section 10 of the PA 2008, when promulgating the ANPS, in that he failed to have proper regard to (a) the desirability of mitigating climate change in the period after 2050 ("the post 2050 ground") and (b) the desirability of mitigating climate change by restricting emissions of non-CO_2 impacts of aviation, in particular nitrous oxide ("the non-CO_2 emissions ground").

16. The Court of Appeal also rejected a submission by HAL, relying on section 31 of the Senior Courts Act 1981, that it should exercise its discretion as to remedy to refuse any relief, on the grounds that (HAL argued) it was highly likely that even if there had been no breach of duty by the Secretary of State the decision whether to issue the ANPS would have been the same.

17. HAL appeals to this court with permission granted by the court. HAL is joined in the proceedings as an interested party. It has already invested large sums of money in promoting the NWR Scheme and wishes to carry it through by applying for a DCO in due course and then building the proposed new runway. The Secretary of State has chosen not to appeal and has made no submissions to us. However, HAL

is entitled to advance all the legal arguments which may be available in order to defend the validity of the ANPS.

18. Prior to the Covid-19 pandemic, Heathrow was the busiest two-runway airport in the world. The pandemic has had a major impact in reducing aviation and the demand for flights. However, there will be a lead time of many years before any third runway at Heathrow is completed and HAL's expectation is that the surplus of demand for aviation services over airport capacity will have been restored before a third runway would be operational. Lord Anderson QC for HAL informed the court that HAL intends to proceed with the NWR Scheme despite the pandemic.

The Planning Act 2008

19. We are grateful to the Divisional Court for their careful account of the PA 2008, on which we draw for this section. The PA 2008 established a new unified "development consent" procedure for "nationally significant infrastructure projects" defined to include certain "airport-related development" including the construction or alteration of an airport that is expected to be capable of providing air passenger services for at least 10m passengers per year (sections 14 and 23). Originally, many of the primary functions under the Act were to be exercised by the Infrastructure Planning Commission, established under section 1. However, those functions were transferred to the Secretary of State by the Localism Act 2011.

20. The mischiefs that the Act was intended to address were identified in the White Paper published in May 2007, Planning for a Sustainable Future (Cm 7120) ("the 2007 White Paper"). Prior to the PA 2008, a proposal for the construction of a new airport or extension to an airport would have required planning permission under the Town and Country Planning Act 1990. An application for permission would undoubtedly have resulted in a public inquiry, whether as an appeal against refusal of consent or a decision by the Secretary of State to "call in" the matter for his own determination. As paragraph 3.1 of the 2007 White Paper said:

> "A key problem with the current system of planning for major infrastructure is that national policy and, in particular, the national need for infrastructure, is not in all cases clearly set out. This can cause significant delays at the public inquiry stage, because national policy has to be clarified and the need for the infrastructure has to be established through the inquiry process and for each individual application. For instance, the absence of a clear policy framework for airports development was identified by the inquiry secretary in his report on the planning inquiry as one of the key factors in the very long

> process for securing planning approval for Heathrow Terminal 5. Considerable time had to be taken at the inquiry debating whether there was a need for additional capacity. The Government has since responded by publishing the Air Transport White Paper to provide a framework for airport development. This identifies airport development which the Government considers to be in the national interest, for reference at future planning inquiries. But for many other infrastructure sectors, national policy is still not explicitly set out, or is still in the process of being developed."

21. Paragraph 3.2 identified a number of particular problems caused by the absence of a clear national policy framework. For example, inspectors at public inquiries might be required to make assumptions about national policy and national need, often without clear guidance and on the basis of incomplete evidence. Decisions by Ministers in individual cases might become the means by which government policy would be expressed, rather than such decisions being framed by clear policy objectives beforehand. In the absence of a clear forum for consultation at the national level, it could be more difficult for the public and other interested parties to have their say in the formulation of national policy on infrastructure. The ability of developers to make long-term investment decisions is influenced by the availability of clear statements of government policy and objectives, and might be adversely affected by the absence of such statements.

22. The 2007 White Paper proposed that national policy statements would set the policy framework for decisions on the development of national infrastructure.

> "They would integrate the Government's objectives for infrastructure capacity and development with its wider economic, environmental and social policy objectives, including climate change goals and targets, in order to deliver sustainable development."

The role of Ministers would be to set policy, in particular the national need for infrastructure development (para 3.4).

23. Paragraph 3.11 envisaged that any public inquiry dealing with individual applications for development consent would not have to consider issues such as whether there is a case for infrastructure development, or the types of development most likely to meet the need for additional capacity, since such matters would already have been addressed in the NPS. It was said that NPSs should have more weight than other statements of policy, whether at a national or local level: they

should be the primary consideration in the determination of an application for a DCO (para 3.12), although other relevant considerations should also be taken into account (para 3.13). To provide democratic accountability, it was said that NPSs should be subject to Parliamentary scrutiny before being adopted (para 3.27).

24. In line with the 2007 White Paper recommendation, Part 2 of the PA 2008 provides for NPSs which give a policy framework within which any application for development consent, in the form of a DCO, is to be determined. Section 5(1) gives the Secretary of State the power to designate an NPS for development falling within the scope of the Act; and section 6(1) provides that "[t]he Secretary of State must review each [NPS] whenever the Secretary of State thinks it appropriate to do so".

25. The content of an NPS is governed by section 5(5)-(8) which provide that:

> "(5) The policy set out in [an NPS] may in particular -
>
> (a) set out, in relation to a specified description of development, the amount, type or size of development of that description which is appropriate nationally or for a specified area;
>
> (b) set out criteria to be applied in deciding whether a location is suitable (or potentially suitable) for a specified description of development;
>
> (c) set out the relative weight to be given to specified criteria;
>
> (d) identify one or more locations as suitable (or potentially suitable) or unsuitable for a specified description of development;
>
> (e) identify one or more statutory undertakers as appropriate persons to carry out a specified description of development;
>
> (f) set out circumstances in which it is appropriate for a specified type of action to be taken to mitigate the impact of a specified description of development.

> (6) If [an NPS] sets out policy in relation to a particular description of development, the statement must set out criteria to be taken into account in the design of that description of development.
>
> (7) [An NPS] must give reasons for the policy set out in the statement.
>
> (8) The reasons must (in particular) include an explanation of how the policy set out in the statement takes account of Government policy relating to the mitigation of, and adaptation to, climate change."

As is made clear, the NPS may (but is not required to) identify a particular location for the relevant development.

26. In addition, under the heading "Sustainable development", section 10 provides (so far as relevant to these claims):

> "(1) This section applies to the Secretary of State's functions under sections 5 and 6.
>
> (2) The Secretary of State must, in exercising those functions, do so with the objective of contributing to the achievement of sustainable development.
>
> (3) For the purposes of subsection (2) the Secretary of State must (in particular) have regard to the desirability of -
>
> (a) mitigating, and adapting to, climate change; …"

27. The process for designation of an NPS is also set out in the Act. The PA 2008 imposed for the first time a transparent procedure for the public and other consultees to be involved in the formulation of national infrastructure policy in advance of any consideration of an application for a DCO.

28. The Secretary of State produces a draft NPS, which is subject to (i) an appraisal of sustainability ("AoS") (section 5(3)), (ii) public consultation and

publicity (section 7), and (iii) Parliamentary scrutiny (sections 5(4) and 9). In addition, there is a requirement to carry out a strategic environmental assessment under the SEA Directive as transposed by the Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004/1633) ("the SEA Regulations") (see regulation 5(2) of the SEA Regulations).

29. The consultation and publicity requirements are set out in section 7, which so far as relevant provides:

> "(1) This section sets out the consultation and publicity requirements referred to in sections 5(4) and 6(7).
>
> (2) The Secretary of State must carry out such consultation, and arrange for such publicity, as the Secretary of State thinks appropriate in relation to the proposal. This is subject to subsections (4) and (5).
>
> (3) In this section 'the proposal' means -
>
> (a) the statement that the Secretary of State proposes to designate as [an NPS] for the purposes of this Act or
>
> (b) (as the case may be) the proposed amendment.
>
> (4) The Secretary of State must consult such persons, and such descriptions of persons, as may be prescribed.
>
> (5) If the policy set out in the proposal identifies one or more locations as suitable (or potentially suitable) for a specified description of development, the Secretary of State must ensure that appropriate steps are taken to publicise the proposal.
>
> (6) The Secretary of State must have regard to the responses to the consultation and publicity in deciding whether to proceed with the proposal."

30. A proposed NPS must be laid before Parliament (section 9(2) and (8)). The Act thus provides an opportunity for a committee of either House of Parliament to scrutinise a proposed NPS and to make recommendations; and for each House to scrutinise it and make resolutions (see section 9(4)).

31. An NPS is not the end of the process. It simply sets the policy framework within which any application for a DCO must be determined. Section 31 provides that, even where a relevant NPS has been designated, development consent under the PA 2008 is required for development "to the extent that the development is or forms part of a nationally significant infrastructure project". Such applications must be made to the relevant Secretary of State (section 37).

32. Chapter 2 of Part 5 of the Act makes provision for a pre-application procedure. This provides for a duty to consult pre-application, which extends to consulting relevant local authorities and, where the land to be developed is in London, the Greater London Authority (section 42). There are also duties to consult the local community, and to publicise and to take account of responses to consultation and publicity (sections 47-49; and see also regulation 12 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/572), which makes provision for publication of and consultation on preliminary environmental information). Any application for a DCO must be accompanied by a consultation report (section 37(3)(c)); and adequacy of consultation is one of the criteria for acceptance of the application (section 55(3) and (4)(a)).

33. Part 6 of the PA 2008 is concerned with "Deciding applications for orders granting development consent". Once the application has been accepted, section 56 requires the applicant to notify prescribed bodies and authorities and those interested in the land to which the application relates, who become "interested parties" to the application (section 102). The notification must include a notice that interested parties may make representations to the Secretary of State. Section 60(2) provides that where a DCO application is accepted for examination there is a requirement to notify any local authority for the area in which land, to which the application relates, is located (see section 56A)) and, where the land to be developed is in London, the Greater London Authority, inviting them each to submit a "local impact report" (section 60(2)).

34. The Secretary of State may appoint a panel or a single person to examine the application ("the Examining Authority") and to make a report setting out its findings and conclusions, and a recommendation as to the decision to be made on the application. The examination process lasts six months, unless extended (section 98); and the examination timetable is set out in the Infrastructure Planning (Examination Procedure) Rules 2010 (SI 2010/103) ("the Examination Rules"). In addition to local

impact reports (section 60), the examination process involves written representations (section 90), written questions by the Examining Authority (rules 8 and 10 of the Examination Rules), and hearings (which might be open floor and/or issue specific and/or relating to compulsory purchase) (sections 91-93). As a result of the examination process, the provisions of the proposed DCO may be amended by either the applicant or the Examination Authority, eg in response to the representations of interested parties; and it is open to the Secretary of State to modify the proposed DCO before making it.

35. Section 104 constrains the Secretary of State when determining an application for a DCO for development in relation to which an NPS has effect, in the following terms (so far as relevant to these claims):

> "(2) In deciding the application the Secretary of State must have regard to -
>
> > (a) any [NPS] which has effect in relation to development of the description to which the application relates (a 'relevant [NPS]'), …
> >
> > (b) any local impact report …,
> >
> > (c) any matters prescribed in relation to development of the description to which the application relates, and
> >
> > (d) any other matters which the Secretary of State thinks are both important and relevant to the Secretary of State's decision.
>
> (3) The Secretary of State must decide the application in accordance with any relevant [NPS], except to the extent that one or more of subsections (4) to (8) applies.
>
> (4) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant [NPS] would lead to the United Kingdom being in breach of any of its international obligations.

(5) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant [NPS] would lead to the Secretary of State being in breach of any duty imposed on the Secretary of State by or under any enactment.

(6) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant [NPS] would be unlawful by virtue of any enactment.

(7) This subsection applies if the Secretary of State is satisfied that the adverse impact of the proposed development would outweigh its benefits.

(8) This subsection applies if the Secretary of State is satisfied that any condition prescribed for deciding an application otherwise than in accordance with [an NPS] is met.

(9) For the avoidance of doubt, the fact that any relevant [NPS] identifies a location as suitable (or potentially suitable) for a particular description of development does not prevent one or more of subsections (4) to (8) from applying."

36. Section 104 is complemented by section 106 which, under the heading "Matters which may be disregarded when determining an application", provides (so far as relevant to these claims):

"(1) In deciding an application for an order granting development consent, the Secretary of State may disregard representations if the Secretary of State considers that the representations -

(a) …

(b) relate to the merits of policy set out in [an NPS]….

(2) In this section 'representation' includes evidence."

That is also reflected in sections 87(3) and 94(8), under which the Examining Authority may disregard representations (including evidence) or refuse to allow representations to be made at a hearing if it considers that they "relate to the merits of the policy set out in [an NPS] …".

37. By section 120(1), a DCO may impose requirements in connection with the development for which consent is granted, eg it may impose conditions considered appropriate or necessary to mitigate or control the environmental effects of the development. Section 120(3) is a broad provision enabling a DCO to make provision relating to, or to matters ancillary to, the development for which consent is granted including any of the matters listed in Part 1 of Schedule 5 (section 120(4)). That schedule lists a wide range of potentially applicable provisions, including compulsory purchase, the creation of new rights over land, the carrying out of civil engineering works, the designation of highways, the operation of transport systems, the charging of tolls, fares and other charges and the making of byelaws and their enforcement.

38. Section 13 concerns "Legal challenges relating to [NPSs]". Section 13(1) provides:

> "A court may entertain proceedings for questioning [an NPS] or anything done, or omitted to be done, by the Secretary of State in the course of preparing such a statement only if -
>
> (a) the proceedings are brought by a claim for judicial review, and
>
> (b) the claim form is filed before the end of the period of six weeks beginning with the day after -
>
> (i) the day on which the statement is designated as [an NPS] for the purposes of this Act, or
>
> (ii) (if later) the day on which the statement is published."

It was under section 13 that the claims by objectors to the ANPS were brought.

The Climate Change Act 2008

39. Again, we gratefully draw on the account given by the Divisional Court. As they explain, the UK has for a long time appreciated the desirability of tackling climate change, and wished to take a more rigorous domestic line. In the 2003 White Paper, "Our Energy Future - Creating a Low Carbon Economy", the Government committed to reduce CO_2 emissions by 60% on 1990 levels by 2050; and to achieve "real progress" by 2020 (which equated to reductions of 26-32%). The 60% figure emanated from the EU Council of Ministers' "Community Strategy on Climate Change" in 1996, which determined to limit emissions to 550 parts per million (ppm) on the basis that to do so would restrict the rise in global temperatures to 2ºC above pre-industrial levels which, it was then considered, would avoid the serious consequences of global warming. However, by 2005, there was scientific evidence that restricting emissions to 550ppm would be unlikely to be effective in keeping the rise to 2ºC; and only stabilising CO_2 emissions at something below 450ppm would be likely to achieve that result.

40. Parliament addressed these issues in the CCA 2008.

41. Section 32 established a Committee on Climate Change ("the CCC"), an independent public body to advise the UK and devolved Governments and Parliaments on tackling climate change, including on matters relating to the UK's statutory carbon reduction target for 2050 and the treatment of greenhouse gases from international aviation.

42. Section 1 gives a mandatory target for the reduction of UK carbon emissions. At the time of designation of the ANPS, it provided:

> "It is the duty of the Secretary of State [then, the Secretary of State for Energy and Climate Change: now, the Secretary of State for Business, Enterprise and Industrial Strategy ('BEIS')] to ensure that the net UK carbon account for the year 2050 is at least 80% lower than the 1990 baseline."

The figure of 80% was substituted for 60% during the passage of the Bill, as evolving scientific knowledge suggested that the lower figure would not be sufficient to keep the rise in temperature to 2ºC in 2050. Therefore, although the CCA 2008 makes no mention of that temperature target, as the CCC said in its report on the Paris Agreement issued in October 2016 (see para 73 below):

> "This 2050 target was derived as a contribution to a global emissions path aimed at keeping global average temperatures to around 2ºC above pre-industrial levels."

The statutory target of a reduction in carbon emissions by 80% by 2050 was Parliament's response to the international commitment to keep the global temperature rise to 2ºC above pre-industrial levels in 2050. Since the designation of the ANPS, the statutory target has been made more stringent. The figure of 100% was substituted for 80% in section 1 of the CCA 2008 by the Climate Change Act 2008 (2050 Target Amendment) Order 2019/1056.

43. The Secretary of State for BEIS has the power to amend that percentage (section 2(1) of the CCA 2008), but only:

> (i) if it appears to him that there have been significant developments in scientific knowledge about climate change since the passing of the Act, or developments in European or international law or policy (section 2(2) and (3)): the Explanatory Note to the Act says, as must be the case, that "this power might be used in the event of a new international treaty on climate change";
>
> (ii) after obtaining, and taking into account, advice from the CCC (section 3(1)); and
>
> (iii) subject to Parliamentary affirmative resolution procedure (section 2(6)).

44. Section 1 of the CCA 2008 sets a target that relates to carbon only. Section 24 enables the Secretary of State for BEIS to set targets for other greenhouse gases, but subject to similar conditions to which an amendment to the section 1 target is subject.

45. In addition to the carbon emissions target set by section 1 - and to ensure compliance with it (see sections 5(1)(b) and 8) - the Secretary of State for BEIS is also required to set for each succeeding period of five years, at least 12 years in advance, an amount for the net UK carbon account ("the carbon budget"); and ensure that the net UK carbon account for any period does not exceed that budget (section 4). The carbon budget for the period including 2020 was set to be at least 34% lower than the 1990 baseline.

46. Section 10(2) sets out various matters which are required to be taken into account when the Secretary of State for BEIS sets, or the CCC advises upon, any carbon budget, including:

> "(a) scientific knowledge about climate change;
>
> (b) technology relevant to climate change;
>
> (c) economic circumstances, and in particular the likely impact of the decision on the economy and the competitiveness of particular sectors of the economy;
>
> (d) fiscal circumstances, and in particular the likely impact of the decision on taxation, public spending and public borrowing;
>
> (e) social circumstances, and in particular the likely impact of the decision on fuel poverty;
>
> (f) …
>
> (h) circumstances at European and international level;
>
> (i) the estimated amount of reportable emissions from international aviation and international shipping …"

Therefore, although for the purposes of the CCA 2008 emissions from greenhouse gases from international aviation do not generally count as emissions from UK sources (section 30(1)), by virtue of section 10(2)(i), in relation to any carbon budget, the Secretary of State for BEIS and the CCC must take such emissions into account.

47. The evidence for the Secretary of State explains that the CCC has interpreted that as requiring the UK to meet a 2050 target which includes these emissions. The CCC has advised that, to meet the 2050 target on that basis, emissions from UK aviation (domestic and international) in 2050 should be no higher than 2005 levels, ie 37.5 megatons (million tonnes) of CO_2 ($MtCO_2$). This is referred to by the respondents as "the Aviation Target". However, the Aviation Policy Framework

issued by the Government in March 2013 explains that the Government decided not to take a decision on whether to include international aviation emissions in its carbon budgets, simply leaving sufficient headroom in those budgets consistent with meeting the 2050 target including such emissions, but otherwise deferring a decision for consideration as part of the emerging Aviation Strategy. The Aviation Strategy is due to re-examine how the aviation sector can best contribute its fair share to emissions reductions at both the UK and global level. It is yet to be finalised.

The SEA Directive

48. Again, in this section we gratefully draw on the careful account given by the Divisional Court. As they explain, Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment as amended ("the EIA Directive"), as currently transposed by the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/571), requires a process within normal planning procedures. (For the purposes of these claims, the transposing regulations have not materially changed over the relevant period; and we will refer to them collectively as "the EIA Regulations".) The SEA Directive as transposed by the SEA Regulations concerns the environmental impact of plans and programmes. The SEA Directive and Regulations applied to the ANPS. The EIA Directive would apply when there was a particular development for which development consent was sought, at the DCO stage.

49. Recital (1) to the SEA Directive states:

> "Article 174 of the Treaty provides that Community policy on the environment is to contribute to, *inter alia*, the preservation, protection and improvement of the quality of the environment, the protection of human health and the prudent and rational utilisation of natural resources and that it is to be based on the precautionary principle. Article 6 of the Treaty provides that environmental protection requirements are to be integrated into the definition of Community policies and activities, in particular with a view to promoting sustainable development."

As suggested here, the SEA Directive relies upon the "precautionary principle" where appropriate.

50. Recital (4) states:

> "Environmental assessment is an important tool for integrating environmental considerations into the preparation and adoption of certain plans and programmes which are likely to have significant effects on the environment in the member states, because it ensures that such effects of implementing plans and programmes are taken into account during their preparation and before their adoption."

51. Recital (9) states:

> "This Directive is of a procedural nature, and its requirements should either be integrated into existing procedures in member states or incorporated in specifically established procedures. With a view to avoiding duplication of the assessment, member states should take account, where appropriate, of the fact that assessments will be carried out at different levels of a hierarchy of plans and programmes."

Thus, the requirements of the SEA Directive are essentially procedural in nature; and it may be appropriate to avoid duplicating assessment work by having regard to work carried out at other levels or stages of a policy-making process (see article 5(2)-(3) below).

52. Recital (17) states:

> "The environmental report and the opinions expressed by the relevant authorities and the public, as well as the results of any transboundary consultation, should be taken into account during the preparation of the plan or programme and before its adoption or submission to the legislative procedure."

53. The objectives of the SEA Directive are set out in article 1:

> "The objective of this Directive is to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development, by ensuring that, in accordance with this Directive, an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment."

54. Article 3(1) requires an "environmental assessment" to be carried out, in accordance with articles 4 to 9, for plans and programmes referred to in article 3(2)-(4) which are likely to have significant environmental effects. Article 3(2) requires strategic environmental assessment generally for any plan or programme which is prepared for (inter alia) transport, town and country planning or land use and which sets the framework for future development consent for projects listed in Annexes I and II to the EIA Directive. Strategic environmental assessment is also required for other plans and programmes which are likely to have significant environmental effects (article 3(4)). By virtue of sections 104 and 106 of the PA 2008, the ANPS designated under section 5 sets out the framework for decisions on whether a DCO for the development of an additional runway at Heathrow under Part 6 of that Act should be granted. That development would, in due course, require environmental impact assessment under the EIA Directive and Regulations; and there is no dispute that the ANPS needed to be subjected to strategic environmental assessment under the SEA Directive and the SEA Regulations.

55. Article 2(b) of the SEA Directive defines "environmental assessment" for the purposes of the Directive:

> "'environmental assessment' shall mean the preparation of an environmental report, the carrying out of consultations, the taking into account of the environmental report and the results of the consultations in decision-making and the provision of information on the decision in accordance with articles 4 to 9."

56. Article 4(1) requires "environmental assessment to be carried out during the preparation of a plan or programme and before its adoption ...", which in this instance would refer to the Secretary of State's decision to designate the ANPS.

57. Article 5 sets out requirements for an "environmental report". By article 2(c):

> "'environmental report' shall mean the part of the plan or programme documentation containing the information required in article 5 and Annex I."

In the case of the ANPS the environmental report was essentially the AoS.

58. Article 5(1) provides:

> "Where an environmental assessment is required under article 3(1), an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated. The information to be given for this purpose is referred to in Annex I."

Annex I states, under the heading, "Information referred to in article 5(1)":

> "The information to be provided under article 5(1), subject to article 5(2) and (3), is the following:
>
> (a) an outline of the contents, main objectives of the plan or programme and relationship with other relevant plans and programmes;
>
> (b) the relevant aspects of the current state of the environment and the likely evolution thereof without implementation of the plan or programme;
>
> (c) the environmental characteristics of areas likely to be significantly affected;
>
> (d) any existing environmental problems which are relevant to the plan or programme including, in particular, those relating to any areas of a particular environmental importance, such as areas designated pursuant to [the Habitats and Birds Directives];
>
> (e) the environmental protection objectives, established at international, Community or member state level, which are relevant to the plan or programme and the way those objectives and any environmental considerations have been taken into account during its preparation;
>
> (f) the likely significant effects on the environment, including on issues such as biodiversity, population,

> human health, fauna, flora, soil, water, air, climatic factors, material assets, cultural heritage including architectural and archaeological heritage, landscape and the interrelationship between the above factors;
>
> (g) the measures envisaged to prevent, reduce and as fully as possible offset any significant adverse effects on the environment of implementing the plan or programme;
>
> (h) an outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties (such as technical deficiencies or lack of know-how) encountered in compiling the required information;
>
> (i) a description of the measures envisaged concerning monitoring in accordance with article 10;
>
> (j) a non-technical summary of the information provided under the above headings."

Thus, the information required by the combination of article 5(1) and Annex I is subject to article 5(2) and (3), which provide:

> "(2) The environmental report prepared pursuant to paragraph 1 shall include the information that may reasonably be required taking into account current knowledge and methods of assessment, the contents and level of detail in the plan or programme, its stage in the decision-making process and the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment.
>
> (3) Relevant information available on environmental effects of the plans and programmes and obtained at other levels of decision-making or through other Community legislation may be used for providing the information referred to in Annex I." (Emphasis added)

59. Accordingly, the information which is required to be included in an "environmental report", whether by article 5(1) itself or by that provision in conjunction with Annex I, is qualified by article 5(2) and (3) in a number of respects. First, the obligation is only to include information that "may reasonably be required", which connotes the making of a judgment by the plan-making authority. Second, that judgment may have regard to a number of matters, including current knowledge and assessment methods. In addition, the contents and level of detail in a plan such as the ANPS, the stage it has reached in the decision-making process and the ability to draw upon sources of information used in other decision-making, may affect the nature and extent of the information required to be provided in the environmental report for the strategic environmental assessment.

60. The stage reached by the ANPS should be seen in the context of the statutory framework of the PA 2008, as set out above (see paras 19-38). Section 5(5) authorises the Secretary of State to set out in an NPS the type and size of development appropriate nationally or for a specified area and to identify locations which are either suitable or unsuitable for that development. In addition, the Secretary of State may set out criteria to be applied when deciding the suitability of a location. Section 104(3) requires the Secretary of State to decide an application for a DCO in accordance with a relevant NPS, save in so far as any one or more of the exceptions in section 104(4)-(8) applies, which include the situation where the adverse impacts of a proposal are judged to outweigh its benefits (section 104(7)). Section 106(1) empowers the Secretary of State to disregard a representation objecting to such a proposal in so far as it relates to the merits of a policy contained in the NPS.

61. In the present case, the Secretary of State made it plain in the strategic environmental assessment process that the AoS drew upon and updated the extensive work which had previously been carried out by, and on behalf of, the Airports Commission, including numerous reports to the Airports Commission and its own final report. It is common ground that the Secretary of State was entitled to take that course.

62. Article 6 of the SEA Directive sets out requirements for consultation. Article 6(1) requires that the draft plan or programme and the environmental report be made available to the public and to those authorities designated by a member state under article 6(3) which, by virtue of their specific environmental responsibilities, are likely to be concerned by the environmental effects of implementing plans and programmes. In England, the designated authorities are Natural England, Historic England and the Environment Agency (see regulation 4 of the SEA Regulations). In the case of the ANPS, the Secretary of State also had to consult those designated authorities on the scope and level of detail of the information to be included in the environmental report (article 5(4)).

63. In relation to the consultation process, article 6(2) provides:

> "The authorities referred to in para 3 and the public referred to in para 4 shall be given an early and effective opportunity within appropriate time frames to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan or programme or its submission to the legislative procedure."

64. "The public referred to in [article 6(4)]" is a cross-reference to the rules made by each member state for defining the public affected, or likely to be affected by, or having an interest in the decision-making on the plan. Regulation 13(2) of the SEA Regulations leaves this to be determined as a matter of judgment by the plan-making authority.

65. Article 8 requires the environmental report prepared under article 5, the opinions expressed under article 6, and the results of any transboundary consultations under article 7 to be "taken into account during the preparation of the plan or programme and before its adoption or submission to the legislative procedure".

66. In *Cogent Land LLP v Rochford District Council* [2012] EWHC 2542 (Admin); [2013] 1 P & CR 2, Singh J held that a defect in the adequacy of an environmental report prepared for the purposes of the SEA Directive may be cured by the production of supplementary material by the plan-making authority, subject to there being consultation on that material (see paras 111-126). He held that articles 4, 6(2) and 8 of the Directive, along with their transposition in the SEA Regulations, are consistent with that conclusion; and that none of the previous authorities on the SEA Directive (which he reviewed) suggested otherwise. He held that SEA is not a single document, still less is it the same thing as the "environmental report". Rather, it is a process, during the course of which an environmental report must be produced (see para 112). The Court of Appeal endorsed this analysis in *No Adastral New Town Ltd v Suffolk Coastal District Council* [2015] EWCA Civ 88; [2015] Env LR 28, in deciding that SEA failures in the early stages of an authority's preparation of its Core Strategy (a statutory development plan) were capable of being, and were in fact, cured by the steps taken in subsequent stages (see paras 48-54). We agree with this analysis.

67. It follows that strategic environmental assessment may properly involve an iterative process; and that it is permissible for a plan-making authority to introduce alterations to its draft plan subject to complying with the information requirements in article 5 and the consultation requirements in articles 6 and 7.

68. Regulation 12 of the SEA Regulations transposes the main requirements in article 5 of the Directive governing the content of an environmental report as follows (emphasis added):

> "(2) The report shall identify, describe and evaluate the likely significant effects on the environment of -
>
> (a) implementing the plan or programme; and
>
> (b) reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme.
>
> (3) The report shall include such of the information referred to in Schedule 2 to these Regulations as may reasonably be required, taking account of -
>
> (a) current knowledge and methods of assessment;
>
> (b) the contents and level of detail in the plan or programme;
>
> (c) the stage of the plan or programme in the decision-making process; and
>
> (d) the extent to which certain measures are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment."

Schedule 2 replicates the list of items in Annex I to the SEA Directive. No issue is raised as to the adequacy of that transposition.

69. As the Divisional Court observed, it is plain from the language "as may reasonably be required" that the SEA Regulations, like the SEA Directive, allow the plan-making authority to make a judgment on the nature of the information in Schedule 2 and the level of detail to be provided in an environmental report, whether as published initially or in any subsequent amendment or supplement.

Factual background

70. At the heart of the challenge to the ANPS is the Paris Agreement (para 7 above) which acknowledged that climate change represents "an urgent and potentially irreversible threat to human societies and the planet" (Preamble to the Decision to adopt the Paris Agreement). In article 2 the Paris Agreement sought to enhance the measures to reduce the risks and impacts of climate change by setting a global target of "holding the increase in the global average temperature to well below 2ºC above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5ºC above pre-industrial levels". Each signatory of the Paris Agreement undertook to take measures to achieve that long-term global temperature goal "so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century …" (article 4(1)). Each party agreed to prepare, communicate and maintain successive nationally determined contributions ("NDCs") that it intended to achieve and to pursue domestic mitigation measures with the aim of achieving the objectives of such NDCs (article 4(2)). A party's successive NDC was to progress beyond its current NDC and was to reflect its highest possible ambition (article 4(3)).

71. Notwithstanding the common objectives set out in articles 2 and 4(1), the Paris Agreement did not impose an obligation on any state to adopt a binding domestic target to ensure that those objectives were met. The specific legal obligation imposed in that regard was to meet any NDC applicable to the state in question. So far as concerns the United Kingdom, it is common ground that the relevant NDC is that adopted and communicated on behalf of the EU, which set a binding target of achieving 40% reduction of 1990 emissions by 2030. This is less stringent than the targets which had already been set in the fourth and fifth carbon budgets issued pursuant to section 4 of the CCA 2008, which were respectively a 50% reduction on 1990 levels for the period 2023-2027 and a 57% reduction for the period 2028-2032.

72. Before the United Kingdom had signed or ratified the Paris Agreement two Government Ministers made statements in the House of Commons about the Government's approach to the Paris Agreement. On 14 March 2016 the Minister of State for Energy, Andrea Leadsom MP, told the House of Commons that the Government "believe we will need to take the step of enshrining the Paris goal of net zero emissions in UK law - the question is not whether, but how we do it, and there is an important set of questions to be answered before we do". Ten days later (24 March 2016) Amber Rudd MP, Secretary of State for Energy and Climate Change, responded to an oral question on what steps her department was taking to enshrine the net zero emissions commitment of the Paris Climate Change Conference by stating that "the question is not whether we do it but how we do it."

73. The Government received advice from the CCC on the UK's response to the Paris goal. At a meeting on 16 September 2016 the CCC concluded that while a new long-term target would be needed to be consistent with the Paris goal, "the evidence was not sufficient to specify that target now".

74. In October 2016 the CCC published a report entitled "UK Climate Action following the Paris Agreement" on what domestic action the Government should take as part of a fair contribution to the aims of the Paris Agreement. In that report the CCC stated that the goals of the Paris Agreement involved a higher level of global ambition in the reduction of greenhouse gases than that which formed the basis of the UK's existing emissions reduction targets. But the CCC advised that it was neither necessary nor appropriate to amend the 2050 target in section 1 of the CCA 2008 or alter the level of existing carbon budgets at that time. It advised that there would be "several opportunities to revisit the UK's targets in the future" and that "the UK 2050 target is potentially consistent with a wide range of global temperature outcomes". In its executive summary (p 7) the CCC summarised its advice:

> "Do not set new UK emissions targets now … The five-yearly cycle of pledges and reviews created by the Paris Agreement provides regular opportunities to consider increasing UK ambition."

75. In October 2017 the Government published its "Clean Growth Strategy" which set out its policies and proposals to deliver economic growth and decreased emissions. In Annex C in its discussion of UK climate action it acknowledged the risks posed by the growing level of global climate instability. It recorded the global goals of the Paris Agreement and that global emissions of greenhouse gases would need to peak as soon as possible, reduce rapidly thereafter and reach a net zero level in the second half of this century. It recorded the CCC's advice in these terms:

> "In October 2016 the [CCC] said that the Paris Agreement target 'is more ambitious than both the ambition underpinning the UK 2050 target and previous international agreements', but that the UK should not set new UK emissions targets now, as it already had stretching targets and achieving them will be a positive contribution to global climate action. The CCC advised that the UK's fair contribution to the Paris Agreement should include measures to maintain flexibility to go further on UK targets, the development of options to remove greenhouse gases from the air, and that its targets should be kept under review."

76. In December 2017 Plan B Earth and 11 other claimants commenced judicial review proceedings against the Secretary of State for BEIS and CCC alleging that the Secretary of State had unlawfully failed to revise the 2050 target in section 1 of the CCA 2008 in line with the Paris Agreement.

77. The Secretary of State pleaded:

> "[While] the Government is fully committed to the objectives in the Paris Agreement, the legal obligation upon the Parties is to prepare, communicate and maintain nationally determined contributions to reduce net emissions, with a view to achieving the purpose of holding global average temperature increases to 'well below 2ºC' above pre-industrial levels and pursuing efforts to limit them to 1.5ºC. This is not the same as a legal duty or obligation for the Parties, individually or collectively, to achieve this aim." (Emphasis in original)

The CCC also explained its position in its written pleadings:

> "The CCC recommended no change to the existing UK 2050 target (at that time, October 2016), not because a more ambitious target was unfeasible, but rather because the existing UK target was potentially consistent with more ambitious global temperature goals, including that in the Paris Agreement."

78. At an oral hearing ([2018] EWHC 1892 (Admin); [2019] Env LR 13), Supperstone J refused permission to proceed with the judicial review, holding among other things that the Paris Agreement did not impose any legally binding target on each contracting party, that section 2 of the CCA 2008 gave the Secretary of State the power, but did not impose a duty, to amend the 2050 target in the event of developments in scientific knowledge or European or international law or policy, and that on the basis of the advice of the CCC, the Secretary of State was plainly entitled to refuse to change the 2050 target. Asplin LJ refused permission to appeal on 22 January 2019.

79. In January 2018 the CCC published "An independent assessment of the UK's Clean Growth Strategy". In that report the CCC explained that the aim of the Paris Agreement for emissions to reach net zero in the second half of the century was likely to require the UK to revise its statutory 2050 target to seek greater reductions and advised that "it is therefore essential that actions are taken now to enable these

deeper reductions to be achieved" (p 21). The CCC invited the Secretary of State for BEIS to seek further advice from it and review the UK's long-term emissions targets after the publication of the report by the Intergovernmental Panel on Climate Change ("IPCC") on the implications of the Paris Agreement's 1.5ºC goal.

80. In January 2018 the Government published "A Green Future: Our 25 Year Plan to Improve the Environment" in which it undertook to continue its work in providing international leadership to meet the goals of the Paris Agreement (for example, p 118). In early 2018 governments, including the UK Government, were able to review a draft of the IPCC report and in early June 2018 the UK Government submitted final comments on the draft of the IPCC report.

81. On 17 April 2018 the Government announced at the Commonwealth Heads of Government Meeting that after the publication of the IPCC report later that year, it would seek the advice of the CCC on the implications of the Paris Agreement for the UK's long-term emissions reductions targets.

82. At the same time the Government was working to develop an aviation strategy which would address aviation emissions. In April 2018, after public consultation, the Department for Transport published "Beyond the Horizon: The Future of UK Aviation - Next Steps towards an Aviation Strategy" in which it undertook to investigate technical and policy measures to address aviation emissions and how those measures related to the recommendations of the CCC. It stated (para 6.24):

> "The government will look again at what domestic policies are available to complement its international approach and will consider areas of greater scientific uncertainty, such as the aviation's contribution to non-carbon dioxide climate change effects and how policy might make provision for their effects."

83. On 1 May in response to an oral parliamentary question concerning the offshore wind sector Claire Perry MP, Minister of State for Energy and Clean Growth, stated that the UK was the first developed nation to have said that it wanted to understand how to get to a zero-carbon economy by 2050.

84. On 5 June 2018, the Government issued its response to the consultation on the draft ANPS and the Secretary of State laid the proposed ANPS before Parliament. On the same day, the Secretary of State presented a paper on the proposed ANPS to a Cabinet sub-committee giving updated information on the three short-listed schemes and the Government's preference for the NWR scheme. In

relation to aviation emissions it stated that it was currently uncertain how international carbon emissions would be incorporated into the Government's carbon budget framework, that policy was developing and would be progressed during the development of the Aviation Strategy. The Government's position remained that action to address aviation emissions was best taken at an international level.

85. On 14 June 2018 the Chair of the CCC (Lord Deben) and Deputy Chair (Baroness Brown) wrote to the Secretary of State expressing surprise that he had not referred to the legal targets in the CCA 2008 or the Paris Agreement commitments in his statement to the House of Commons on the proposed ANPS on 5 June and stressing the need for his department to consider aviation's place in the overall strategy for UK emissions reduction. They stated that the Government should not plan for higher levels of aviation emissions "since this would place an unreasonably large burden on other sectors".

86. The Secretary of State responded on 20 June 2018 stating that the Government remained committed to the UK's climate change target and that the proposed ANPS made it clear that an increase in carbon emissions that would have a material impact on the Government's ability to meet its carbon reduction targets would be a reason to refuse development consent for the NWR. He stated that the Government was confident that the measures and requirements set out in the proposed ANPS provided a strong basis for mitigating the environmental impacts of expansion. He explained that the forthcoming Aviation Strategy would put in place a framework for UK carbon emissions to 2050, "which ensures that aviation contributes its fair share to action on climate change, taking into account the UK's domestic and international obligations".

87. After the Parliamentary debate on 25 June 2018 (para 11 above), the Secretary of State designated the ANPS as national policy on 26 June 2018 (para 12 above). Section 5 of the ANPS focused on the potential impacts of the NWR Scheme and the assessments that any applicant would have to carry out and the planning requirements which it would have to meet in order to gain development consent. In its discussion of greenhouse gas emissions the ANPS stated that the applicant would have to undertake an environmental impact assessment quantifying the greenhouse gas impacts before and after mitigation so that the project could be assessed against the Government's carbon obligations. In para 5.82 the ANPS stated:

> "Any increase in carbon emissions alone is not a reason to refuse development consent, unless the increase in carbon emissions resulting from the project is so significant that it would have a material impact on the ability of Government to meet its carbon reduction targets, including carbon budgets."

88. As in this appeal a challenge has been made as to the factual basis of the Secretary of State's decision not to consider the possible new domestic emissions targets which might result from the Paris Agreement, it is necessary to mention the evidence before the Divisional Court on this matter. In her first witness statement Ms Caroline Low, the Director of the Airport Capacity Programme at the Department for Transport, stated (para 458):

> "In October 2016 the CCC said that the Paris Agreement 'is more ambitious than both the ambition underpinning the UK 2050 target and previous international agreements' but that the UK should not set new UK emissions targets now, as it already has stretching targets and achieving them will be a positive contribution to global climate action. Furthermore, the CCC acknowledged in the context of separate legal action brought by Plan B against the Secretary of State for Business, Energy and Industrial Strategy that it is possible that the existing 2050 target could be consistent with the temperature stabilization goals set out in the Paris Agreement. Subsequently, in establishing its carbon obligations for the purpose of assessing the impact of airport expansion, my team has followed this advice and considered existing domestic legal obligations as the correct basis for assessing the carbon impact of the project, and that it is not appropriate at this stage for the government to consider any other possible targets that could arise through the Paris Agreement."

89. Her account was corroborated by Ms Ursula Stevenson, an engineering and project management consultant whom the Secretary of State retained to deal with the process for consideration of the environmental impacts of the NWR Scheme. She stated (witness statement para 3.128) that the Department had followed the CCC's advice when preparing the AoS required by the PA 2008 (see para 28 above) and accordingly had considered existing domestic legal obligations to be the correct basis for assessing the carbon impact of the project. She added:

> "At this stage, it is not possible to consider what any future targets [sic] might be recommended by the CCC to meet the ambitions of the Paris Agreement. It is expected that, should more ambitious targets be recommended and set through the carbon budgets beyond 2032, then government will be required to make appropriate policy decisions across all sectors of the economy to limit emissions accordingly."

She emphasised (para 3.129) that the obligations under the CCA 2008 could be made more stringent in future, should that prove necessary, and that the ANPS provided that any application for a DCO would have to be assessed by reference to whatever obligations were in place at that time.

90. The IPCC Special Report on Global Warming of 1.5ºC was published on 8 October 2018. It concluded that limiting global warming to that level above pre-industrial levels would significantly reduce the risks of challenging impacts on ecosystems and human health and wellbeing and that it would require "deep emissions reductions" and "rapid, far-reaching and unprecedented changes to all aspects of society". To achieve that target global net emissions of CO_2 would need to fall by about 45% from 2010 levels by 2030, reaching zero by 2050.

91. The Government commissioned the CCC to advise on options by which the UK should achieve (i) a net zero greenhouse gas target and/or (ii) a net zero carbon target in order to contribute to the global ambitions set out in the Paris Agreement, including whether now was the right time to set such a target.

92. In December 2018 the Department for Transport published consultation materials on its forthcoming Aviation Strategy. In "Aviation 2050: The future of UK aviation" the Department stated (paras 3.83-3.87) that it proposed to negotiate in the International Civil Aviation Organisation (the UN body responsible for tackling international aviation climate emissions) for a long-term goal for international aviation that is consistent with the temperature goals of the Paris Agreement and that it would consider appropriate domestic action to support international progress. It stated that the Government would review the CCC's revised aviation advice and advice on the implications of the Paris Agreement. In the same month, in a paper commissioned and published by the Department and written by David S Lee, "International aviation and the Paris Agreement temperature goals" the author acknowledged that the Paris Agreement had a temperature-based target which implied the inclusion of all emissions that affect the climate. The author stated that aviation had significant climate impacts from the oxides of nitrogen, particle emissions, and effects on cloudiness but that those impacts were subject to greater scientific uncertainty than the impacts of CO_2. It recorded that examples of CO_2 emission equivalent metrics indicated up to a doubling of aviation CO_2 equivalent emissions to account for those non-CO_2 effects.

93. On 1 May 2019 Parliament approved a motion to declare a climate and environmental emergency.

94. On the following day, the CCC published a report entitled "Net zero: The UK's contribution to stopping global warming", in which they recommended that

legislation should be passed as soon as possible to create a new statutory target of net-zero greenhouse gases by 2050 and the inclusion of international aviation and shipping in that target (p 15). That recommendation, so far as it related to the CO_2 target, was implemented on 26 June 2019 when the Climate Change Act (2050 Target Amendment) Order 2019 amended section 1(1) of the CCA 2008.

95. On 24 September 2019 the CCC wrote to the Secretary of State for Transport advising that the international aviation and shipping emissions should be brought formally within the UK's net-zero statutory 2050 target. The statutory target has not yet been changed to this effect but international aviation and shipping are taken into account when the carbon budgets are set against the statutory target: section 10(2)(i) of the CCA 2008.

96. On 25 June 2020 the CCC published its 2020 Progress Report to Parliament entitled "Reducing UK emissions", in which it recommended that international aviation and shipping be included in the UK climate targets when the Sixth Carbon Budget is set (which should be in 2021) and net zero plans should be developed (p 22). It recommended that the UK's airport capacity strategy be reviewed in the light of COVID-19 and the net-zero target and that action was needed on non-CO_2 effects from aviation (p 180). The parties to this appeal have stated in the agreed Statement of Facts and Issues that it was expected that the Government's Aviation Strategy will be published before the end of 2020.

97. From this narrative of events it is clear that the Government's response to the targets set in the Paris Agreement has been developing over time since 2016, that it has led to the amendment of the statutory CO_2 target in section 1(1) of the CCA 2008 approximately one year after the Secretary of State designated the ANPS, and that the Government is still in the process of developing its Aviation Strategy in response to the advice of the CCC.

98. Before turning to the legal challenges in this appeal it is also important to emphasise that, as we have stated in para 10 above, HAL, FoE and Plan B Earth agree that should the NWR Scheme be taken forward to a DCO application, the ANPS would not allow it to be assessed by reference to the carbon reduction targets, including carbon budgets, that were in place when the ANPS was designated in June 2018. The ANPS requires that the scheme be assessed against the carbon reduction targets in place at the time when a DCO application is determined: para 5.82 of the ANPS which we have set out in para 87 above. There is therefore no question of the NWR Scheme being assessed in future against outdated emissions targets.

The judgments of the Divisional Court and the Court of Appeal

99. A number of objectors to the NWR Scheme and the ANPS brought a large number of disparate claims in these proceedings to challenge the ANPS. The Divisional Court heard the claims on a "rolled up" basis, that is to say by considering the question of whether to grant permission to apply for judicial review at the same time as considering the merits of the claims should permission be granted. The hearing lasted for seven days and involved a full merits consideration of all the claims by the Divisional Court. In a judgment of high quality, described by the Court of Appeal as a tour de force, the Divisional Court dismissed all of the claims. For some claims it granted permission to apply for judicial review and then dismissed them on the merits. For others, it decided that they were not reasonably arguable on the merits and refused to grant permission. After thorough examination, the Divisional Court reached the conclusion that none of the claims which form the subject of grounds (i) to (iv) in the present appeal were reasonably arguable, and accordingly refused permission to apply for judicial review in relation to each of them.

100. In relation to those claims, the Court of Appeal decided that they were both arguable and that they were made out as good claims. Accordingly, the Court of Appeal granted permission in relation to them for the respondents to apply for judicial review of the decision to designate the ANPS and then held that the ANPS was of no legal effect unless and until a review was carried out rectifying the legal errors.

Analysis

Ground (i) - the section 5(8) ground

101. This ground raises a question of statutory interpretation. Section 5(7) and (8) of the PA 2008, which we set out in para 25 above, provide that an NPS must give reasons for the policy set out in the statement and that the reasons must explain how the policy in the NPS "takes account of Government policy relating to the mitigation of, and adaptation to, climate change".

102. Mr Crosland for Plan B Earth presented this argument. Mr Wolfe QC for FoE adopted his submissions. Mr Crosland submits that it was unlawful for the Secretary of State when stating the reasons for the policy in the ANPS in June 2018 to have treated as irrelevant the Government's commitment to (a) the temperature target in the Paris Agreement and (b) the introduction of a new net-zero carbon target. The Government's commitment to the Paris Agreement targets constituted "Government

policy" within the meaning of section 5(8) of the PA 2008 and so should have been addressed in giving the reasons for the ANPS.

103. Plan B Earth advanced this argument before the Divisional Court, which rejected the submission. The Divisional Court held that the Paris Agreement did not impose an obligation on any individual state to implement its global objective in any particular way, Parliament had determined the contribution of the UK towards global targets in section 1 of the CCA 2008 as a national carbon cap which represented the relevant policy in an entrenched form, and the Secretary of State could not change that carbon target unless and until the conditions set out in that Act were met.

104. The Court of Appeal disagreed with the approach of the Divisional Court and held that Government policy in section 5(8) was not confined to the target set out in the CCA 2008. The words "Government policy" were words of the ordinary English language. Taking into account the consequences of the Paris Agreement involved no inconsistency with the provisions of the CCA 2008. Based on the Secretary of State's written pleadings the Court of Appeal concluded that the Secretary of State had received and accepted legal advice that he was legally obliged not to take into account the Paris Agreement and the court characterised that as a misdirection of law. We address that conclusion in the next section of this judgment at paras 124-129 below. The court held that section 5(8) of the PA 2008 simply required the Government to take into account its own policy. The statements of Andrea Leadsom MP and Amber Rudd MP in March 2016 (para 72 above) and the formal ratification of the Paris Agreement showed that the Government's commitment to the Paris Agreement was part of "Government policy" by the time of the designation of the ANPS in June 2018.

105. The principal question for determination is the meaning of "Government policy" in section 5(8) of the PA 2008. We adopt a purposive approach to this statutory provision which expands upon the obligation in section 5(7) that an NPS give reasons for the policy set out in it and interpret the statutory words in their context. The purpose of the provision is to make sure that there is a degree of coherence between the policy set out in the NPS and established Government policies relating to the mitigation of and adaptation to climate change. The section speaks of "Government policy", which points toward a policy which has been cleared by the relevant departments on a government-wide basis. In our view the phrase is looking to carefully formulated written statements of policy such as one might find in an NPS, or in statements of national planning policy (such as the National Planning Policy Framework), or in government papers such as the Aviation Policy Framework. For the subsection to operate sensibly the phrase needs to be given a relatively narrow meaning so that the relevant policies can readily be identified. Otherwise, civil servants would have to trawl through Hansard and press statements to see if anything had been said by a minister which might be

characterised as "policy". Parliament cannot have intended to create a bear trap for ministers by requiring them to take into account any ministerial statement which could as a matter of ordinary language be described as a statement of policy relating to the relevant field.

106. In our view, the epitome of "Government policy" is a formal written statement of established policy. In so far as the phrase might in some exceptional circumstances extend beyond such written statements, it is appropriate that there be clear limits on what statements count as "Government policy", in order to render them readily identifiable as such. In our view the criteria for a "policy" to which the doctrine of legitimate expectations could be applied would be the absolute minimum required to be satisfied for a statement to constitute "policy" for the purposes of section 5(8). Those criteria are that a statement qualifies as policy only if it is clear, unambiguous and devoid of relevant qualification: see for example *Inland Revenue Comrs v MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, 1569 per Bingham LJ; *R (Gaines-Cooper) v Comrs for Her Majesty's Revenue and Customs* [2011] UKSC 47; [2011] 1 WLR 2625, paras 28 and 29 per Lord Wilson of Culworth, delivering the judgment with which the majority of the court agreed, and para 70 per Lord Mance. The statements of Andrea Leadsom MP and Amber Rudd MP (para 72 above) on which the Court of Appeal focused and on which Plan B Earth particularly relied do not satisfy those criteria. Their statements were not clear and were not devoid of relevant qualification in this context. They did not refer to the temperature targets at all and they both left open the question of how the Paris Agreement goal of net zero emissions would be enshrined in UK law. Andrea Leadsom went out of her way to emphasise that "there is an important set of questions to be answered before we do." The statements made by these ministers were wholly consistent with and plainly reflected the fact that there was then an inchoate or developing policy being worked on within Government. This does not fall within the statutory phrase.

107. We therefore respectfully disagree with the Court of Appeal in so far as they held (para 224) that the words "Government policy" were ordinary words which should be applied in their ordinary sense to the facts of a given situation. We also disagree with the court's conclusion (para 228) that the statements by Andrea Leadsom MP and Amber Rudd MP constituted statements of "Government policy" for the purposes of section 5(8).

108. Although the point had been a matter of contention in the courts below, no party sought to argue before this court that a ratified international treaty which had not been implemented in domestic law fell within the statutory phrase "Government policy". Plan B Earth and FoE did not seek to support the conclusion of the Court of Appeal (para 228) that it "followed from the solemn act of the United Kingdom's ratification of [the Paris Agreement]" that the Government's commitment to it was part of "Government policy". The fact that the United Kingdom had ratified the Paris Agreement is not of itself a statement of Government policy in the requisite sense.

Ratification is an act on the international plane. It gives rise to obligations of the United Kingdom in international law which continue whether or not a particular government remains in office and which, as treaty obligations, "are not part of UK law and give rise to no legal rights or obligations in domestic law" (*R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61, para 55). Ratification does not constitute a commitment operating on the plane of domestic law to perform obligations under the treaty. Moreover, it cannot be regarded in itself as a statement devoid of relevant qualification for the purposes of domestic law, since if treaty obligations are to be given effect in domestic law that will require law-making steps which are uncertain and unspecified at the time of ratification.

109. Before applying these conclusions to the facts of this case, it is necessary to consider another argument which HAL advances in this appeal. HAL renews an argument which the Divisional Court had accepted at least in part. HAL argues that because Parliament had set out the target for the reduction of carbon emissions in section 1 of the CCA 2008 and had established a statutory mechanism by which the target could be altered only with the assent of Parliament, "Government policy" was entrenched in section 1 and could not be altered except by use of the subordinate legislation procedure in sections 2 and 3 of the CCA 2008. The statutory scheme had either expressly or by necessary implication displaced the prerogative power of the Government to adopt any different policy in this field. In support of this contention HAL refers to the famous cases of *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508 and *R v Secretary of State for the Home Department, Ex p Fire Brigades Union* [1995] 2 AC 513, to which this court referred in *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61.

110. The short answer to that submission is that it is possible for the Government to have a policy that it will seek Parliamentary approval of an alteration of the carbon target, which is to be taken into account in section 5(8) of the PA 2008. The ousting of a prerogative power in a field which has become occupied by a corresponding power conferred or regulated by statute is a legal rule which is concerned with the validity of the exercise of a power, and to the extent that exercise of powers might require reference to the target set out in section 1 of the CCA 2008 it would not be open to the Government to make reference to a different target, not as yet endorsed by Parliament under the positive resolution procedure applicable to changes to that statutory target. However, the rule does not address what is Government policy for the purposes of section 5(8) of the PA 2008. If at the date when the Secretary of State designated the ANPS, the Government had adopted and articulated a policy that it would seek to introduce a specified new carbon target into section 1 of the CCA 2008 by presenting draft subordinate legislation to that effect for the approval of Parliament, the Secretary of State could readily record in the ANPS that the Government had resolved to seek that change but that it required the consent of Parliament for the new target to have legal effect. Further, questions such as how to

mitigate non-CO_2 emissions fell outside the carbon emissions target in the CCA 2008.

111. Turning to the facts of the case, it is clear from the narrative of events in paras 70-96 above that in June 2018, when the Secretary of State for Transport designated the ANPS, the Government's approach on how to adapt its domestic policies to contribute to the global goals of the Paris Agreement was still in a process of development. There was no established policy beyond that already encapsulated in the CCA 2008. The Government followed the advice of the CCC. The CCC's advice in 2016 was that the evidence was not sufficient to specify a new carbon target and that it was not necessary to do so at that time (paras 73-74 above). In early 2018 the CCC invited the Government to seek further advice from it after the publication of the IPCC's report (para 79 above). During 2018 the Government's policy in relation to aviation emissions was in a process of development and no established policy had emerged on either the steps to be taken at international level or about which domestic measures would be adopted; it was expected that the forthcoming Aviation Strategy would clarify those matters (paras 83 and 86 above). The Government's consultation in December 2018 confirmed that the development of aviation-related targets was continuing and in 2020 the Government's Aviation Strategy is still awaited (paras 92 and 96 above).

112. Against this background, the section 5(8) challenge fails and HAL's appeal on this ground must succeed. It is conceded that the Paris Agreement itself is not Government policy. The statements by Andrea Leadsom MP and Amber Rudd MP in 2016, on which Plan B Earth principally founds, do not amount to Government policy for the purpose of section 5(8) of the PA 2008. The statements concerning the development of policy which the Government made in 2018 were statements concerning an inchoate and developing policy and not an established policy to which section 5(8) refers. Mr Crosland placed great emphasis on the facts (i) that the Airports Commission had assessed the rival schemes against scenarios, one of which was that overall CO_2 emissions were set at a cap consistent with a worldwide goal to limit global warming to 2ºC, and (ii) that that scenario was an input into Secretary of State's assessment of the ANPS at a time when the UK Government had ratified the Paris Agreement and ministers had made the statements to which we referred above. But those facts are irrelevant to the section 5(8) challenge. It is not in dispute that the internationally agreed temperature targets played a formative role in the development of government policy. But that is not enough for Plan B Earth to succeed in this challenge. What Mr Crosland characterised as a "policy commitment" to the Paris Agreement target did not amount to "Government policy" under that subsection.

113. Finally, Mr Crosland sought to raise an argument under section 3 of the Human Rights Act 1998 that interpreting section 5(8) so as to preclude consideration of the temperature limit in the Paris Agreement would tend to allow major national

projects to be developed and that those projects would create an intolerable risk to life and to people's homes contrary to articles 2 and 8 of the European Convention on Human Rights ("ECHR"). This argument must fail for two reasons. First, as Lord Anderson for HAL submits, the argument was advanced as a separate ground before the Divisional Court and rejected, that finding was not appealed to the Court of Appeal, and is therefore not before this court. Secondly, even if it were to be treated as an aspect of Plan B Earth's section 5(8) submission and thus within the scope of the appeal (as Mr Crosland sought to argue), it is in any event unsound because any effect on the lives and family life of those affected by the climate change consequences of the NWR Scheme would result not from the designation of the ANPS but from the making of a DCO in relation to the scheme. As HAL has conceded and the respondents have agreed, the ANPS requires the NWR Scheme to be assessed against the emissions targets which would be current if and when an application for a DCO were determined.

Ground (ii): the section 10 ground

114. Mr Wolfe for FoE presented the submissions for the respondents on this ground and grounds (iii) and (iv). Mr Crosland for Plan B Earth adopted those submissions.

115. Section 10 of the PA 2008 applies to the Secretary of State's function in promulgating an NPS. In exercising that function the Secretary of State must act with the objective of contributing to the achievement of sustainable development. Sustainable development is a recognised term in the planning context and its meaning is not controversial in these proceedings. As explained in paras 7 and 8 of the National Planning Policy Framework (July 2018), at a very high level the objective of sustainable development involves "meeting the needs of the present without compromising the ability of future generations to meet their own needs"; it has three overarching elements, namely an environmental objective, an economic objective and a social objective. For a major infrastructure project like the development of airport capacity in the South East, which promotes economic development but at the cost of increased greenhouse gases emissions, these elements have to be taken into account and balanced against each other. Section 10(3)(a) provides that the Secretary of State must, in particular, have regard to the desirability of "mitigating, and adapting to, climate change". Unlike in section 5(8) of the PA 2008, this is not a factor which is tied to Government policy.

116. As it transpired, very little divided the parties under this ground. The basic legal approach is agreed. A useful summation of the law was given by Simon Brown LJ in *R v Somerset County Council, Ex p Fewings* [1995] 1 WLR 1037, 1049, in which he identified three categories of consideration, as follows:

> "… [T]he judge speaks of a 'decision-maker who fails to take account of all and only those considerations material to his task'. It is important to bear in mind, however, … that there are in fact three categories of consideration. First, those clearly (whether expressly or impliedly) identified by the statute as considerations to which regard must be had. Second, those clearly identified by the statute as considerations to which regard must not be had. Third, those to which the decision-maker may have regard if in his judgment and discretion he thinks it right to do so. There is, in short, a margin of appreciation within which the decision-maker may decide just what considerations should play a part in his reasoning process."

117. The three categories of consideration were identified by Cooke J in the New Zealand Court of Appeal in *CREEDNZ Inc v Governor General* [1981] NZLR 172, 183:

> "What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the [relevant public authority] as a matter of legal obligation that the court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision."

Cooke J further explained at p 183 in relation to the third category of consideration that, notwithstanding the silence of the statute, "there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by [the public authority] … would not be in accordance with the intention of the Act."

118. These passages were approved as a correct statement of principle by the House of Lords in *In re Findlay* [1985] AC 318, 333-334. See also *R (Hurst) v London Northern District Coroner* [2007] UKHL 13; [2007] 2 AC 189, paras 55-59 (Lord Brown of Eaton-under Heywood, with whom a majority of the Appellate Committee agreed); *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60; [2009] 1 AC 756, para 40 (Lord Bingham of Cornhill, with whom a majority of the Appellate Committee agreed); and *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] UKSC 3; [2020] PTSR 221, paras 29-32 (Lord Carnwath, with whom the other members of the court agreed). In the *Hurst* case, Lord Brown pointed out that it is usually lawful for a

decision-maker to have regard to unincorporated treaty obligations in the exercise of a discretion (para 55), but that it is not unlawful to omit to do so (para 56).

119. As the Court of Appeal correctly held in *Baroness Cumberlege of Newick v Secretary of State for Communities and Local Government* [2018] EWCA Civ 1305; [2018] PTSR 2063, paras 20-26, in line with these other authorities, the test whether a consideration falling within the third category is "so obviously material" that it must be taken into account is the familiar *Wednesbury* irrationality test (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410-411 per Lord Diplock).

120. It is possible to subdivide the third category of consideration into two types of case. First, a decision-maker may not advert at all to a particular consideration falling within that category. In such a case, unless the consideration is obviously material according to the *Wednesbury* irrationality test, the decision is not affected by any unlawfulness. Lord Bingham deals with such a case in *Corner House Research* at para 40. There is no obligation on a decision-maker to work through every consideration which might conceivably be regarded as potentially relevant to the decision they have to take and positively decide to discount it in the exercise of their discretion.

121. Secondly, a decision-maker may in fact turn their mind to a particular consideration falling within the third category, but decide to give the consideration no weight. As we explain below, this is what happened in the present case. The question again is whether the decision-maker acts rationally in doing so. Lord Brown deals with a case of this sort in *Hurst* (see para 59). This shades into a cognate principle of public law, that in normal circumstances the weight to be given to a particular consideration is a matter for the decision-maker, and this includes that a decision-maker might (subject to the test of rationality) lawfully decide to give a consideration no weight: see, in the planning context, *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 (HL), 780 (Lord Hoffmann).

122. The Divisional Court (para 648) and the Court of Appeal (para 237) held that the Paris Agreement fell within the third category identified in *Fewings*. In so far as it is an international treaty which has not been incorporated into domestic law, this is correct. In fact, however, as we explain (para 71 above), the UK's obligations under the Paris Agreement are given effect in domestic law, in that the existing carbon target under section 1 of the CCA 2008 and the carbon budgets under section 4 of that Act already meet (and, indeed, go beyond) the UK's obligations under the Paris Agreement to adhere to the NDCs notified on its behalf under that Agreement. The duties under the CCA 2008 clearly were taken into account when the Secretary of State decided to issue the ANPS.

123. At para 5.69 of the ANPS the Secretary of State stated:

> "The Government has a number of international and domestic obligations to limit carbon emissions. Emissions from both the construction and operational phases of the [NWR Scheme] project will be relevant to meeting these obligations."

This statement covered the Paris Agreement as well as other international treaties. At para 5.71 the ANPS correctly stated that "[t]he UK's obligations on greenhouse gas emissions are set under the [CCA 2008]". As explained above, the relevant NDCs required to be set under the Paris Agreement were covered by the target in the CCA 2008 and the carbon budgets set under that Act. At paras 5.72-5.73 of the ANPS it was explained how aviation emissions were taken into account in setting carbon budgets under the CCA 2008 in accordance with the advice given by the CCC.

124. We have set out the evidence of Ms Low and Ms Stevenson regarding this topic (paras 88 and 89 above) which confirms that, in acting for the Secretary of State in drawing up the ANPS, they followed the advice of the CCC that the existing measures under the CCA 2008 were capable of being compatible with the 2050 target set by the Paris Agreement. The CCC did not recommend adjusting the UK's targets further at that stage. They were to be kept under review and appropriate adjustments could be made to the emissions target and carbon budgets under the CCA 2008 in future as necessary. According to that advice, therefore, sufficient account was taken of the Paris Agreement by ensuring that the relevant emissions target and carbon budgets under the CCA 2008 would be properly taken into account in the construction and operation of the NWR Scheme. The ANPS ensured that this would occur: see para 5.82 (set out at para 87 above).

125. Therefore, on a correct understanding of the ANPS and the Secretary of State's evidence, this is not a case in which the Secretary of State omitted to give any consideration to the Paris Agreement; nor is it one in which no weight was given to the Paris Agreement when the Secretary of State decided to issue the ANPS. On the contrary, the Secretary of State took the Paris Agreement into account and, to the extent that the obligations under it were already covered by the measures under the CCA 2008, he gave weight to it and ensured that those obligations would be brought into account in decisions to be taken under the framework established by the ANPS. On proper analysis the question is whether the Secretary of State acted irrationally in omitting to take the Paris Agreement further into account, or give it greater weight, than in fact he did.

126. In its judgment, the Divisional Court recorded (para 638) that the Secretary of State accepted that, in designating the ANPS, he took into account only the CCA 2008 carbon emission targets and did not take into account either the Paris Agreement or otherwise any post-2050 target or non-CO_2 emissions (these latter points are relevant to ground (iv) below). However, this way of describing the position masks somewhat the way the Paris Agreement did in fact enter into consideration by the Secretary of State. In the same paragraph, the Divisional Court summarised two submissions advanced by counsel for the Secretary of State as to why the Secretary of State's approach was not unlawful: (i) on its proper construction, and having regard to the express reference to the UK's international obligations in section 104(4) of the PA 2008, the PA 2008 requires the Secretary of State to ignore international commitments except where they are expressly referred to in that Act; alternatively, (ii) even if not obliged to ignore such commitments, the Secretary of State had a discretion as to whether to do so and was not obliged to take them into account. The Divisional Court rejected the first argument but accepted the second. It noted that the Secretary of State was bound by the obligations in the CCA 2008, "which … effectively transposed international obligations into domestic law" (para 643). Beyond that, the Secretary of State had a discretion whether to take the Paris Agreement further into account, and had not (even arguably) acted irrationally in deciding not to do so. It therefore refused to give permission for judicial review of the ANPS on this ground. The Court said (para 648):

> "In our view, given the statutory scheme in the CCA 2008 and the work that was being done on if and how to amend the domestic law to take into account the Paris Agreement, the Secretary of State did not arguably act unlawfully in not taking into account that Agreement when preferring the NWR Scheme and in designating the ANPS as he did. As we have described, if scientific circumstances change, it is open to him to review the ANPS; and, in any event, at the DCO stage this issue will be re-visited on the basis of the then up to date scientific position."

127. Mr Wolfe sought to support the judgment of the Court of Appeal in relation to this ground. He argued that the evidence for the Secretary of State had to be read in the light of the first submission made by his counsel in the Divisional Court, and that the true position was that the Secretary of State (acting by his officials and advisers) had been advised that he was not entitled to have regard to the Paris Agreement when deciding whether to designate the ANPS and had proceeded on that basis, with the result that he had not in fact exercised any discretion in deciding not to have further regard to the Paris Agreement. He also submitted that it was obvious that it was a material consideration. Mr Wolfe was successful in persuading the Court of Appeal on these points (paras 203 and 234-238 of its judgment). The Court of Appeal accepted his submissions that there was an error of law in the

approach of the Secretary of State "because he never asked himself the question whether he could take into account the Paris Agreement pursuant to his obligations under section 10" and "[i]f he had asked himself that question … the only answer that would reasonably have been open to him is that the Paris Agreement was so obviously material to the decision he had to make in deciding whether to designate the ANPS that it was irrational not to take it into account".

128. With respect to the Court of Appeal, they were wrong to overturn the judgment of the Divisional Court on this ground. Mr Wolfe's submissions conflated a submission of law (submission (i) above) made by counsel for the Secretary of State as recorded in para 638 of the judgment of the Divisional Court and the evidence of fact given by the relevant witnesses for the Secretary of State. In making his submission of law, counsel was not giving evidence about the factual position. There is a fundamental difference between submissions of law made by counsel and evidence of fact. Clearly, if the Secretary of State had been correct in submission (i) that would have provided an answer to the case against him whatever the position on the facts. This explains why counsel advanced the submission. But it is equally clear that if that submission failed, the Secretary of State made an alternative submission that he had a discretion whether to take the Paris Agreement further into account than was already the case under the CCA 2008 and that there had been no error of law in the exercise of that discretion. That was the submission accepted by the Divisional Court.

129. In our view, both the submissions of Mr Wolfe which the Court of Appeal accepted are unsustainable. The Divisional Court's judgment on this point is correct. On the evidence, the Secretary of State certainly did ask himself the question whether he should take into account the Paris Agreement beyond the extent to which it was already reflected in the obligations under the CCA 2008 and concluded in the exercise of his discretion that it would not be appropriate to do so. As mentioned above, this case is in the class referred to in para 121 above.

130. Mr Wolfe sought to suggest that in deciding the case as it did, the Court of Appeal had acted as a first instance court (since the Divisional Court had refused to give permission for judicial review on this ground) and that it had made factual findings to contrary effect which this court was not entitled to go behind. He also submitted that HAL, in its notice of appeal, had not questioned the factual position as it was taken to be by the Court of Appeal and was therefore not entitled to dispute it on this appeal.

131. Neither of these submissions has any merit. The Divisional Court considered the claims brought against the Secretary of State at a rolled up hearing lasting many days and considered each claim in full and in depth. In respect of all aspects of the Divisional Court's decision, both in relation to those claims on which it granted

permission for judicial review but then dismissed the claim and in relation to those claims (including those relating to grounds (i) to (iv) in this appeal) on which after full consideration it decided they were unarguable and so refused to grant permission for judicial review, the Court of Appeal correctly understood that its role was the conventional role of an appellate court, to examine whether the Divisional Court had erred in its decision. In any event, this court can read the undisputed evidence of Ms Low and Ms Stevenson for itself and has the benefit of an agreed Statement of Facts and Issues which makes it clear what the true factual position was. The Court of Appeal was wrong to proceed on the basis of a different assessment of the facts. On a fair reading of HAL's notice of appeal, it indicated that its case under this ground was to be that the Secretary of State had a discretion whether to have regard to the Paris Agreement, which discretion had been exercised lawfully. In any event, that was put beyond doubt by HAL's written case. FoE and Plan B Earth have been on notice of HAL's case under this ground for a long time and are in no way prejudiced by it being presented in submissions to this court.

132. The view formed by the Secretary of State, that the international obligations of the UK under the Paris Agreement were sufficiently taken into account for the purposes of the designation of the ANPS by having regard to the obligations under the CCA 2008, was in our judgment plainly a rational one. Mr Wolfe barely argued to the contrary. The Secretary of State's assessment was based on the advice of the CCC, as the relevant independent expert body. The assessment cannot be faulted. Further, the ANPS itself indicated at para 5.82 that the up-to-date carbon targets under the CCA 2008, which would reflect developing science and any change in the UK's international obligations under the Paris Agreement, would be taken into account at the stage of considering whether a DCO should be granted. That was a necessary step before the NWR Scheme could proceed. Moreover, as observed by the Divisional Court, there was scope for the Secretary of State to amend the ANPS under section 6 of the PA 2008, should that prove to be necessary if it emerged in the future that there was any inconsistency between the ANPS and the UK's obligations under the Paris Agreement.

133. It should also be observed that the carbon emissions associated with all three of the principal options identified by the Airports Commission (that is, the NWR Scheme, the ENR Scheme and the G2R Scheme) were assessed to be broadly similar. Accordingly, reference to the Paris Agreement does not provide any basis for preferring one scheme rather than another. To the extent the obligations under the Paris Agreement have a bearing on the decision to designate the ANPS, therefore, they are only significant if it is to be argued that there should not be any decision to meet economic needs by increasing airport capacity by one of these schemes. But in light of the extensive work done by the Airports Commission about the need for such an increase in capacity it could not be said that the Secretary of State acted irrationally in considering that the case for airport expansion had been sufficiently made out to allow the designation of the ANPS. The respondents did not

seek to argue that this aspect of his reasoning was irrational. As we have noted above, the concept of sustainability in section 10 of the PA 2008 includes consideration of economic and social factors as well as environmental ones.

134. In light of the factual position, it is not necessary to decide the different question whether, if the Secretary of State had omitted to think about the Paris Agreement at all (so that this was a case of the type described in para 120 above), as an unincorporated treaty, that would have constituted an error of law. That is not a straightforward issue and we have not heard submissions on the point. We say no more about it.

Ground (iii): the SEA Directive ground

135. The SEA Directive operates along with the EIA Directive to ensure that environmental impacts from proposals for major development are properly taken into account before a development takes place. The relationship between the Directives was explained by Lord Reed in *Walton v Scottish Ministers* [2012] UKSC 44; [2013] PTSR 51, paras 10-30. The SEA Directive applies "upstream", at the stage of preparation of strategic development plans or proposals. The EIA Directive requires assessment of environmental impacts "downstream", at the stage when consent for a particular development project is sought. Although the two Directives are engaged at different points in the planning process for large infrastructure projects such as the NWR Scheme, they have similar objects and have to deal with similar issues of principle, including in particular the way in which regard should be had to expert assessment of various factors bearing on that process. These points indicate that a similar approach should apply under the two Directives.

136. The SEA Directive is implemented in domestic law by the SEA Regulations. It is common ground that the SEA Regulations are effective in transposing the Directive into domestic law. Accordingly, it is appropriate to focus the discussion of this ground on the SEA Directive itself.

137. The structure of the SEA Directive appears from its provisions, set out and discussed above. The Directive requires that an environmental assessment of major plans and proposals should be carried out. The ANPS is such a plan, which will have a significant effect in setting the policy framework for later consideration of whether to grant a DCO for implementing the NWR Scheme. Therefore the proposal to designate it under section 5 of the PA 2008 required an "environmental assessment" as defined in article 2(b). The environmental assessment had to include "the preparation of an environmental report" and "the carrying out of consultations". An environmental report for the purposes of the Directive is directed to providing a basis for informed public consultation on the plan.

138. The decision-making framework under the SEA Directive is similar to that under the EIA Directive for environmental assessment of particular projects. Under the EIA Directive, an applicant for planning consent for particular projects has to produce an environmental statement which, among other things, serves as a basis for consultation with the public. Under the SEA Directive, the public authority which proposes the adoption of a strategic plan has to produce an environmental report for the same purpose. In due course, any application by HAL for a DCO will have to go through the process of environmental assessment pursuant to the EIA Directive and the EIA Regulations.

139. FoE and Plan B Earth complain that the environmental report which the Secretary of State was required under the SEA Directive to prepare and publish was defective, in that it did not make reference to the Paris Agreement. Mr Wolfe pointed out that the Secretary of State did not include the Paris Agreement in the long list of legal instruments and other treaties appended to the scoping report produced in March 2016 (ie after the Paris Agreement was adopted in December 2015 but before it was signed by the UK in April 2016 and ratified by it in November 2016) for the purposes of preparing the draft AoS which was to stand as the Secretary of State's environmental report for the purposes of the SEA Directive for the consultation on the draft ANPS. No reference to the Paris Agreement was included in the AoS used for the February 2017 consultation on the draft ANPS, nor in that used for the October 2017 consultation on the draft ANPS.

140. Against this, HAL points out that the carbon target in the CCA 2008 and the carbon budgets set under that Act were referred to in the AoS, as well as in the draft ANPS itself, so to that extent the UK's obligations under the Paris Agreement were covered in the environmental report. Beyond that, the evidence of Ms Stevenson (who led the team who prepared the AoS on behalf of the Secretary of State) makes it clear that the Secretary of State followed the advice of the CCC in deciding that it was not necessary and would not be appropriate to make further reference to the Paris Agreement in the AoS. The existing domestic legal obligations were considered to be the correct basis for assessing the carbon impact of the project, and it would be speculative and unhelpful to guess at what different targets might be recommended by the CCC in the future. Therefore, despite its omission from the scoping report, when the AoS actually came to be drafted the Paris Agreement (which had been ratified by the UK after the scoping report was issued) had been considered and the Secretary of State, acting by Ms Stevenson and her team, had decided in the exercise of his discretion not to make distinct reference to it.

141. As regards the law, the parties are in agreement. Any obligation to make further reference to the Paris Agreement in the environmental report depended on the application of three provisions of the SEA Directive. Under paragraph (e) of Annex I, the AoS had to provide information in the form of "the environmental protection objectives, established at international, Community or member state

level, which are relevant to the plan or programme and the way those objectives and any environmental considerations have been taken into account during its preparation". But, as stated in the introduction to Annex I, this was "subject to article 5(2) and (3)" of the Directive, set out at para 58 above.

142. It is common ground that the effect of article 5(2) and (3) is to confer on the Secretary of State a discretion regarding the information to include in an environmental report. It is also common ground that the approach to be followed in deciding whether the Secretary of State has exercised his discretion unlawfully for the purposes of that provision is that established in relation to the adequacy of an environmental statement when applying the EIA Directive, as set out by Sullivan J in *R (Blewett) v Derbyshire County Council* [2003] EWHC 2775 (Admin); [2004] Env LR 29 ("*Blewett*"). *Blewett* has been consistently followed in relation to judicial review of the adequacy of environmental statements produced for the purposes of environmental assessment under the EIA Directive and endorsed at the highest level. In *Shadwell Estates Ltd v Breckland District Council* [2013] EWHC 12 (Admin) Beatson J held that the *Blewett* approach was also applicable in relation to the adequacy of an environmental report under the SEA Directive. The Divisional Court and the Court of Appeal in the present case endorsed this view (at paras 401-435 and paras 126-144 of their respective judgments). The respondents have not challenged this and we see no reason to question the conclusion of the courts below on this issue.

143. As Sullivan J held in *Blewett* (paras 32-33), where a public authority has the function of deciding whether to grant planning permission for a project calling for an environmental impact assessment under the EIA Directive and the EIA Regulations, it is for that authority to decide whether the information contained in the document presented as an environmental statement is sufficient to meet the requirements of the Directive, and its decision is subject to review on normal *Wednesbury* principles. Sullivan J observed (para 39) that the process of requiring that the environmental statement is publicised and of public consultation "gives those persons who consider that the environmental statement is inaccurate or inadequate or incomplete an opportunity to point out its deficiencies". The EIA Directive and Regulations do not impose a standard of perfection in relation to the contents of an environmental statement in order for it to fulfil its function in accordance with the Directive and the Regulations that it should provide an adequate basis for public consultation. At para 41 Sullivan J warned against adoption of an "unduly legalistic approach" in relation to assessment of the adequacy of an environmental statement and said:

> "… The [EIA] Regulations should be interpreted as a whole and in a common-sense way. The requirement that 'an [environmental impact assessment] application' (as defined in the Regulations) must be accompanied by an environmental

> statement is not intended to obstruct such development. As Lord Hoffmann said in *R v North Yorkshire County Council, Ex p Brown* [2000] 1 AC 397, at p 404, the purpose is 'to ensure that planning decisions which may affect the environment are made on the basis of full information'. In an imperfect world it is an unrealistic counsel of perfection to expect that an applicant's environmental statement will always contain the 'full information' about the environmental impact of a project. The Regulations are not based upon such an unrealistic expectation. They recognise that an environmental statement may well be deficient, and make provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting 'environmental information' provides the local planning authority with as full a picture as possible. There will be cases where the document purporting to be an environmental statement is so deficient that it could not reasonably be described as an environmental statement as defined by the Regulations …, but they are likely to be few and far between."

Lord Hoffmann (with whom the other members the Appellate Committee agreed on this issue) approved this statement in *R (Edwards) v Environment Agency* [2008] UKHL 22; [2008] 1 WLR 1587, para 38.

144. As the Divisional Court and the Court of Appeal held in the present case, the discretion of the relevant decision-maker under article 5(2) and (3) of the SEA Directive as to whether the information included in an environmental report is adequate and appropriate for the purposes of providing a sound and sufficient basis for public consultation leading to a final environmental assessment is likewise subject to the conventional *Wednesbury* standard of review. We agree with the Court of Appeal when it said (para 136):

> "The court's role in ensuring that an authority - here the Secretary of State - has complied with the requirements of article 5 and Annex I when preparing an environmental report, must reflect the breadth of the discretion given to it to decide what information 'may reasonably be required' when taking into account the considerations referred to - first, 'current knowledge and methods of assessment'; second, 'the contents and level of detail in the plan or programme'; third, 'its stage in the decision-making process'; and fourth 'the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment'. These requirements leave the authority with a

> wide range of autonomous judgment on the adequacy of the information provided. It is not for the court to fix this range of judgment more tightly than is necessary. The authority must be free to form a reasonable view of its own on the nature and amount of information required, with the specified considerations in mind. This, in our view, indicates a conventional 'Wednesbury' standard of review - as adopted, for example, in *Blewett*. A standard more intense than that would risk the court being invited, in effect, to substitute its own view on the nature and amount of information included in environmental reports for that of the decision-maker itself. This would exceed the proper remit of the court."

145. The EIA Directive and the SEA Directive are, of course, EU legislative instruments and their application is governed by EU law. However, as the Court of Appeal observed (paras 134-135), the type of complex assessment required in compiling an environmental report for the purposes of environmental assessment is an area where domestic public law principles have the same effect as the parallel requirements of EU law. As Advocate General Léger stated in his opinion in *Upjohn Ltd v Licensing Authority Established Under Medicines Act 1968* (Case C-120/97) [1999] 1 WLR 927, para 50, "[the] court has always taken the view that when an authority is required, in the exercise of its functions, to undertake complex assessments, a limited judicial review of the action which that authority alone is entitled to perform must be exercised, since otherwise that authority's freedom of action would be definitively paralysed …".

146. The appropriateness of this approach is reinforced in the present context, having regard to the function which an environmental report is supposed to fulfil under the scheme of the SEA Directive. It is intended that such a report should inform the public by providing an appropriate and comprehensible explanation of the relevant policy context for a proposed strategic plan or project to enable them to provide comments thereon, and in particular to suggest reasonable alternatives by which the public need for development in accordance with the proposed plan or project could be met. As article 6(2) states, the public is to have an early and "effective" opportunity to express their opinion on a proposed plan or programme. It is implicit in this objective that the public authority responsible for promulgating an environmental report should have a significant editorial discretion in compiling the report to ensure that it is properly focused on the key environmental and other factors which might have a bearing on the proposed plan or project. Absent such a discretion, there would be a risk that public authorities would adopt an excessively defensive approach to drafting environmental reports, leading to the reports being excessively burdened with irrelevant or unfocused information which would undermine their utility in informing the general public in such a way that the public is able to understand the key issues and comment on them. In the sort of complex

environmental report required in relation to a major project like the NWR Scheme, there is a real danger that defensive drafting by the Secretary of State to include reference to a wide range of considerations which he did not consider to be helpful or appropriate in the context of the decision to be taken would mean that the public would be drowned in unhelpful detail and would lose sight of the wood for the trees, and their ability to comment effectively during the consultation phase would be undermined.

147. The appositeness of Sullivan J's analysis in *Blewett* at para 41, quoted above, has been borne out in this case. The draft ANPS issued with the AoS for the purposes of consultation included the statement that it was compatible with the UK's international obligations in relation to climate change. Concerns about the impact of the expansion of Heathrow on the UK's ability to meet its climate change commitments were raised in representations made during the consultation. In the Government's response to the consultation published on 5 June 2018 these representations were noted and the Government's position in relation to them was explained (paras 8.18-8.19 and 8.25). The Government's view was that the NWR Scheme was capable of being compatible with the UK's international obligations and that there was no good reason to hold up the designation of the ANPS until future policy in relation to aviation carbon emissions, which was in a state of development internationally and domestically, was completely fixed. Accordingly, it is clear that the public was able to comment on the Paris Agreement in the course of the consultation and that their comments were taken into account in the environmental assessment required by the SEA Directive. It again appears from this material that the Secretary of State did have regard to the Paris Agreement when deciding to designate the ANPS.

148. As we have said, Mr Wolfe did not challenge the legal framework set out above. In particular, he did not challenge the appropriateness of applying the *Wednesbury* standard in relation to the exercise of discretion under article 5(2) and (3). Instead, in line with his submission under ground (ii) above, his submission was that the Secretary of State had decided that the Paris Agreement was not a relevant statement of international policy falling within Annex I, paragraph (e), because he had been advised that it was legally irrelevant to the decision he had to take as to whether to designate the ANPS. Thus, according to Mr Wolfe, the Secretary of State had never reached the stage of exercising his discretion whether to include a distinct reference to the Paris Agreement in the AoS. The Secretary of State's decision that the Paris Agreement was irrelevant as a matter of law was wrong, and therefore the Secretary of State had erred in law because he simply did not turn his mind to whether reference to it should be included in the environmental report (the AoS). This was the argument which the Court of Appeal accepted at paras 242 to 247. The Court of Appeal's reasoning on this point was very short because, as it pointed out, it followed its reasoning in relation to the respondents' submissions in relation to section 10 of the PA 2008 (ground (ii) above).

149. In our view, as with the ground (ii) above, Mr Wolfe's submission and the reasoning of the Court of Appeal cannot be sustained in light of the relevant evidence on the facts. As we have explained, the Secretary of State did not treat the Paris Agreement as legally irrelevant and on that basis refuse to consider whether reference should be made to it. On the contrary, as Ms Stevenson explains in her evidence, in compiling the AoS as the environmental statement required under the SEA Directive the Secretary of State decided to follow the advice of the CCC to the effect that the UK's obligations under the Paris Agreement were sufficiently taken into account in the UK's domestic obligations under the CCA 2008, which were referred to in the ANPS and the AoS. Further reference to the Paris Agreement was not required. As we have already held above, this was an assessment which was plainly rational and lawful.

150. Therefore, we would uphold this ground of appeal as well. Having regard to the evidence regarding the factual position, the Divisional Court was right to reject this complaint by the respondents (paras 650-656). The Secretary of State did not act in breach of any of his obligations under the SEA Directive in drafting the AoS as the relevant environmental report in respect of the ANPS, and in omitting to include any distinct reference in it to the Paris Agreement.

Ground (iv) - the post-2050 and non-CO_2 emissions grounds

151. This ground concerns other matters which it is said that the Secretary of State failed to take into consideration in the performance of his duty under section 10(2) and (3) of the PA 2008. Those provisions, as we have said, obliged the Secretary of State in performing his function of designating the ANPS to do so "with the objective of contributing to sustainable development" and in so doing to "have regard to the desirability of … mitigating, and adapting to, climate change".

152. FoE has argued and the Court of Appeal (paras 248-260) has accepted that the Secretary of State failed in his duty under section 10 to have regard to (i) the effect of emissions created by the NWR Scheme after 2050 and (ii) the effect of non-CO_2 emissions from that scheme. The Divisional Court dealt with this matter together with the matter which has become ground (ii) in this appeal, namely whether the Secretary of State failed to have regard to the Paris Agreement in breach of section 10, as issue 19 in the rolled up hearing (paras 633-648, 659(iv)) and held that that FoE's case was not arguable. The Court of Appeal (para 256) correctly treated this issue as closely bound up with what is now ground (ii) in this appeal. It is not in dispute in this appeal that in assessing whether the Secretary of State was bound to address the effect of the post-2050 emissions and the effect of the non-CO_2 emissions in the ANPS we are dealing with the third category of considerations in Simon Brown LJ's categorisation in *R v Somerset County Council, Ex p Fewings* (para 116 above). The Secretary of State had a margin of appreciation in deciding

what matters he should consider in performing his section 10 duty. It is also not in dispute that it is appropriate to apply the *Wednesbury* irrationality test to that decision (para 119 above). The task for the court therefore is one of applying that legal approach to the facts of this case.

153. We address first the question of post-2050 emissions before turning to the non-CO_2 emissions.

(i) post-2050 emissions

154. FoE's argument on the relevance to the objectives of the Paris Agreement of the impacts of emissions after 2050 was straightforward. An assessment of the impact of the emissions from aircraft using the North West Runway by reference to a greenhouse gas target for 2050 fails to consider whether it would be sustainable for the additional aviation emissions from the use of the North West Runway to occur after 2050 given the goal of the Paris Agreement for global emissions to reach net zero in the second half of the century.

155. HAL submitted that the Secretary of State's approach is entirely rational. Lord Anderson points out, and FoE accepts, that the Airports Commission assessed the carbon emissions of each of the short-listed schemes over a 60-year appraisal period up to 2085/2086 and that the same appraisal period was used in the AoS which accompanied the ANPS. The Secretary of State therefore did take into account the fact that there would be carbon emissions from the use of the North West Runway after 2050 and quantified those emissions. It was not irrational to decide not to attempt to assess post-2050 emissions by reference to future policies which had yet to be formulated. It was rational for him to assume that future policies in relation to the post-2050 period, including new emissions targets, could be enforced by the DCO process and mechanisms such as carbon pricing, improvements to aircraft design, operational efficiency improvements and limitation of demand growth.

156. In our view, HAL is correct in its submission that the Secretary of State did not act irrationally in not attempting in the ANPS to assess post-2050 emissions against policies which had yet to be determined. It is clear from the AoS that the Department for Transport modelled the likely future carbon emissions of both Heathrow and Gatwick airports, covering aircraft and other sources of emissions, to 2085/2086 (paras 6.11.1- 6.11.3, 6.11.13 and Table 6.4). As we have set out in our discussion of ground (i) above, policy in response to the global goals of the Paris Agreement was in the course of development in June 2018 when the Secretary of State designated the ANPS and remains in development.

157. Further, as we have already pointed out (paras 10 and 98 above), the designation of the NWR Scheme in the ANPS did not immunise the scheme from complying with future changes of law and policy. The NWR Scheme would fall to be assessed against the emissions targets which were in force at the date of the determination of the application for a DCO. Under section 120 of the PA 2008 (para 37 above) the DCO may impose requirements corresponding to planning conditions and requirements that the approval of the Secretary of State be obtained. Under section 104 (para 35 above), the Secretary of State is not obliged to decide the application for the DCO in accordance with the ANPS if (i) that would lead the United Kingdom to be in breach of any of its international obligations, (ii) that would lead the Secretary of State be in breach of any duty imposed by or under any other enactment, (iii) the Secretary of State is satisfied that deciding the application in accordance with the ANPS would be unlawful by virtue of any enactment and (iv) the Secretary of State is satisfied that the adverse impact of the proposed development would outweigh its benefits. There are therefore provisions in place to make sure that the NWR Scheme complies with law and policy, including the Government's forthcoming Aviation Strategy, at the date when the DCO application is determined.

158. There are also mechanisms available to the Government, as HAL submits (para 155 above), by which the emissions from the use of the North West Runway can be controlled.

(ii) non-CO_2 emissions

159. To understand FoE's argument in relation to non-CO_2 emissions, it is necessary first to identify what are the principal emissions which give rise to concern. Mr Tim Johnson, of the Aviation Environmental Federation, explained in his first witness statement that aircraft emit nitrogen oxides, water vapour and sulphate and soot aerosols, which combine to have a net warming effect. Depending on atmospheric humidity, the hot air from aircraft exhausts combines with water vapour in the atmosphere to form ice crystals which appear as linear condensation trails and can lead to cirrus-like cloud formation. Using the metric of radiative forcing (RF), which is a measure of changes in the energy balance of the atmosphere in watts per square metre, it is estimated that the overall RF by aircraft is 1.9 times greater than the forcing by aircraft CO_2 emissions alone, but the RF metric is not suitable for forecasting future impacts. He recognised that there is continuing uncertainty about the impacts of non-CO_2 emissions, which tend to be short-lived, but he stated that there is high scientific consensus that the total climate warming effect of aviation is more than that from CO_2 emissions alone. Scientists are exploring metrics to show how non-CO_2 impacts can be reflected in emission forecasts for the purpose of formulating policy.

160. There is substantial agreement between the parties that there is continuing uncertainty in the scientific community about the effects of non-CO_2 emissions. The Department for Transport acknowledged this uncertainty in the AoS (para 6.11.11):

> "The assessment undertaken is based on CO_2 emissions only … There are likely to be highly significant climate change impacts associated with non-CO_2 emissions from aviation, which could be of a similar magnitude to the CO_2 emissions themselves, but which cannot be readily quantified due to the level of scientific uncertainty and have therefore not been assessed. There are also non-CO_2 emissions associated with the operation of the airport infrastructure, such as from refrigerant leaks and organic waste arisings, however, evidence suggests that these are minor and not likely to be material."

The AoS returned to this topic (Appendix A-9, para 9.11.5):

> "In addition, there are non-carbon emissions associated with the combustion of fuels in aircraft engines while in flight, which are also thought to have an impact on climate change. As well as CO_2, combustion of aviation fuel results in emission of water vapour, nitrogen oxides (NO_x) and aerosols. NO_x are indirect greenhouse gases, in that they do not give rise to a radiative effect themselves, but influence the concentration of other direct greenhouse gases … With the exception of sulphate aerosols, all other emissions cause warming. In addition, the flight of aircraft can also cause formation of linear ice clouds (contrails) and can lead to further subsequent aviation-induced cloudiness. These cloud effects cause additional warming. Evidence suggests that the global warming impact of aviation, with these sources included, could be up to two times that of the CO_2 impact by itself, but that the level of scientific uncertainty involved means that no multiplier should be applied to the assessment. For these reasons the [Airports Commission] did not assess the impact of the non-CO_2 effects of aviation and these have not been included in the AoS assessment. This position is kept under review by DfT but it is worth noting that non-CO_2 emissions of this type are not currently included in any domestic or international legislation or emissions targets and so their inclusion in the assessment would not affect its conclusion regarding legal compliance. <u>It is recommended that further work be done on these impacts by the applicant during the detailed scheme design, according to the latest appraisal guidance</u>." (Emphasis added)

161. This approach of addressing the question of capacity by reference to CO_2 emissions targets, keeping the policy in relation to non-CO_2 emissions under review and requiring an applicant for a DCO to address such impacts by reference to the state of knowledge current at the time of the determination of its application was consistent with the advice of the CCC to the Airports Commission and to the Secretary of State. The Airports Commission recorded that advice in its interim report in December 2013: because of the uncertainties in the quantification of the impact of non-CO_2 emissions, the target for constraining CO_2 emissions remained the most appropriate basis for planning future airport capacity. The approach of reconsidering the effect of all significant emissions when determining an application for a DCO is reflected in the ANPS which addressed the CO_2 emissions target and stated (para 5.76):

> "Pursuant to the terms of the Environmental Impact Assessment Regulations, the applicant should undertake an assessment of the project as part of the environmental statement, to include an assessment of <u>any likely significant climate factors</u>. … The applicant should quantify the greenhouse gas impacts before and after mitigation to show the impacts of the proposed mitigation." (Emphasis added)

The approach remains consistent with the CCC's advice since the designation of the ANPS. In its letter of 24 September 2019 to the Secretary of State recommending that international aviation and shipping emissions be included in a net-zero CO_2 emissions target, the CCC stated:

> "Aviation is likely to be the largest emitting sector in the UK by 2050, even with strong progress on technology and limiting demand. <u>Aviation also has climate warming effects beyond CO_2, which it will be important to monitor and consider within future policies</u>." (Emphasis added)

162. The Government in its response to consultations on the ANPS (para 11.50) stated that it will address how policy might make provision for the effects of non-CO_2 aviation emissions in its Aviation Strategy. That strategy is due to be published shortly.

163. The Secretary of State when he designated the ANPS was aware that the applicant for a DCO in relation to the NWR Scheme would have to provide an environmental assessment which addressed, and would be scrutinised against, the then current domestic and international rules and policies on aviation and other emissions. He would have been aware of his power to make requirements under

section 120 of the PA 2008 and to depart from the ANPS in the circumstances set out in section 104 of that Act (para 157 above).

164. The Court of Appeal (para 258) upheld FoE's challenge stating the precautionary principle and common sense suggested that scientific uncertainty was not a reason for not taking something into account at all, even if it could not be precisely quantified at this stage. The Court did not hold in terms that the Secretary of State had acted irrationally in this regard but said (para 261) that, since it was remitting the ANPS to the Secretary of State for reconsideration, the question of non-CO_2 emissions and the effect of post-2050 emissions would need to be taken into account as part of that exercise.

165. We respectfully disagree with that approach. The precautionary principle adds nothing to the argument in this context and we construe the judgment as equating the principle with common sense. But a court's view of common sense is not the same as a finding of irrationality, which is the only relevant basis on which FoE seeks to impugn the designation in its section 10 challenges. In any event we are satisfied that the Secretary of State's decision to address only CO_2 emissions in the ANPS was not irrational.

166. In summary, we agree with the Divisional Court that it is not reasonably arguable that the Secretary of State acted irrationally in not addressing the effect of the non-CO_2 emissions in the ANPS for six reasons. First, his decision reflected the uncertainty over the climate change effects of non-CO_2 emissions and the absence of an agreed metric which could inform policy. Secondly, it was consistent with the advice which he had received from the CCC. Thirdly, it was taken in the context of the Government's inchoate response to the Paris Agreement. Fourthly, the decision was taken in the context in which his department was developing as part of that response its Aviation Strategy, which would seek to address non-CO_2 emissions. Fifthly, the designation of the ANPS was only the first stage in a process by which permission could be given for the NWR Scheme to proceed and the Secretary of State had powers at the DCO stage to address those emissions. Sixthly, it is clear from both the AoS and the ANPS itself that the applicant for a DCO would have to address the environmental rules and policies which were current when its application would be determined.

Conclusion

167. It follows that HAL succeeds on each of grounds (i) to (iv) of its appeal. It is not necessary therefore to address ground (v) which is concerned with the question whether the court should have granted the relief which it did. We would allow the appeal.

APPENDIX B: Clientearth (Court of Appeal) [2021] EWCA Civ 43

Neutral Citation Number: [2021] EWCA Civ 43

Case No: C1/2020/0998/QBACF

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(PLANNING COURT)
THE HONOURABLE MR JUSTICE HOLGATE
[2020] EWHC 1303 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/01/2021

Before:

LORD JUSTICE LEWISON
SIR KEITH LINDBLOM, SENIOR PRESIDENT OF TRIBUNALS
and
LORD JUSTICE LEWIS

- -

Between:

R. (on the application of ClientEarth)	**Appellant**
- and -	
(1) Secretary of State for Business, Energy and Industrial Strategy	**Respondents**
- and -	
(2) Drax Power Limited	

- -
- -

Gregory Jones Q.C. and **Merrow Golden** (instructed by **ClientEarth**) for the **Appellant**
Andrew Tait Q.C. and **Ned Westaway** (instructed by the **Government Legal Department**) for the **First Respondent**
James Strachan Q.C. and **Mark Westmoreland Smith** (instructed by **Pinsent Masons LLP**) for the **Second Respondent**

Hearing dates: 17 and 18 November 2020

- -

Approved Judgment

The Senior President of Tribunals:

Introduction

1. This appeal raises questions on the interpretation of the Overarching National Policy Statement for Energy ("EN-1") and the National Policy Statement for Fossil Fuel Electricity Generating Infrastructure ("EN-2"), both designated in July 2011, and their legal effect in the determination of an application for a development consent order to approve a nationally significant infrastructure project ("NSIP"). The NSIP in question is the proposal to construct and operate two gas-fired generating units at the Drax Power Station, near Selby in North Yorkshire.

2. With permission granted by Lewison L.J., the appellant, ClientEarth, appeals against the order of Holgate J., dated 22 May 2020, dismissing its claim for judicial review of the decision of the first respondent, the Secretary of State for Business, Energy and Industrial Strategy, on 4 October 2019, to make the Drax Power (Generating Stations) Order 2019 (S.I. 2019 No.1315) ("the DCO"), approving an application made by the second respondent, Drax Power Ltd. The claim was brought by ClientEarth under section 118 of the Planning Act 2008 ("the Planning Act").

3. The proposed generating units, known as "Unit X" and "Unit Y", would incorporate parts of two coal-fired units currently in operation at the site, which are due to be decommissioned in 2022. They would be fuelled by natural gas. Each would have a capacity of up to 1,800 megawatts, battery storage of up to 100 megawatts and carbon capture and storage reserve space, giving a total capacity of up to 3,800 megawatts, with a designed operational life of up to 25 years. That development is an NSIP.

4. Drax Power made its application for a development consent order under section 37 of the Planning Act, in May 2018. In July 2018 the Secretary of State appointed an examining authority to conduct an examination of the application and report to him with conclusions and a recommendation. The examination began in October 2018 and ended in April 2019. ClientEarth objected to the development, and took part in the examination, submitting written representations. The examining authority's report was produced in July 2019. It recommended that consent be withheld. In her decision letter of 4 October 2019 the Secretary of State disagreed with that recommendation.

The issues in the appeal

5. Lewison L.J. granted permission to appeal on three grounds, which raise these issues: first, whether the Secretary of State misinterpreted EN-1 on the approach to assessing an energy NSIP's contribution to satisfying the need for the type of infrastructure proposed; second, whether the Secretary of State misinterpreted EN-1 on the approach to greenhouse gas emissions; and third, whether the Secretary of State misapplied section 104(7) of the Planning Act.

The Planning Act

6. Section 5 of the Planning Act provides for the designation by the Secretary of State of a national policy statement, which "sets out national policy in relation to one or more specified descriptions of development" (subsection (1)(b)). The policy in a national policy statement "may in particular", among other things, "set out, in relation to a specified description of development, the amount, type or size of development of that description which is appropriate nationally or for a specified area" (subsection (5)(a)), "set out the relative weight to be given to specified criteria" (subsection (5)(c)), and "set out circumstances in which it is appropriate for a specified type of action to be taken to mitigate the impact of a specified description of development" (subsection (5)(f)). Section 6(1) requires the Secretary of State to "review each national policy statement whenever [he] thinks it appropriate to do so".

7. Section 104 governs the determination of an application for a development consent order where a relevant national policy statement has effect. In deciding the application, the Secretary of State is required to "have regard" to any "relevant national policy statement" (subsection (2)(a)), and "any other matters which [he] thinks are both important and relevant to [his] decision" (subsection (2)(d)). Section 104(3) states:

> "(3) The Secretary of State must decide the application in accordance with any relevant national policy statement, except to the extent that one or more of subsections (4) to (8) applies."

Section 104(7) states:

> "(7) This subsection applies if the Secretary of State is satisfied that the adverse impact of the proposed development would outweigh its benefits."

8. Section 106 provides that in deciding an application, the Secretary of State "may disregard representations" if he considers that they "relate to the merits of policy set out in a national policy statement" (subsection (1)(b)).

EN-1

9. EN-1 sets out the Government's policy for the delivery of major energy infrastructure. It is to be read together with five technology-specific national policy statements for the energy sector (paragraph 1.4.1). The relevant technology-specific national policy statement is EN-2. Paragraph 1.7.2 says that the energy national policy statements "should speed up the transition to a low carbon economy and thus help to realise UK climate change commitments sooner than continuation under the current planning system", but recognises the difficulty in predicting "the mix of technology that will be delivered by the market against the framework set by the Government".

10. Part 2 contains the Government's policy on energy infrastructure development. Paragraph 2.1.1 refers to three goals – reducing carbon emissions, energy security and affordability.

11. The text in section 2.2, "The road to 2050", assumed the target then in place under the Climate Change Act 2008 ("the Climate Change Act") of reducing greenhouse gas emissions in 2050 by at least 80% compared to 1990 levels. This would require the "electrification" of

much of the United Kingdom's heating, industry and transport (paragraph 2.2.1). Delivery of this change would be "a major challenge not least for energy providers …" (paragraph 2.2.2).

12. Paragraph 2.2.4 states:

> "2.2.4 Not all aspects of Government energy and climate change policy will be relevant to [Infrastructure Planning Commission ("IPC")] decisions or planning decisions by local authorities, and the planning system is only one of a number of vehicles that helps to deliver Government energy and climate change policy. The role of the planning system is to provide a framework which permits the construction of whatever Government – and players in the market responding to rules, incentives or signals from Government – have identified as the types of infrastructure we need in the places where it is acceptable in planning terms. … ."

13. The proposed transition to a low carbon economy is described, and the role of the Climate Change Act in driving that transition by delivering reductions in emissions through a series of five-year carbon budgets setting a trajectory to 2050 is explained (paragraphs 2.2.5 to 2.2.11). It is stated that "[the] EU Emissions Trading System … forms the cornerstone of UK action to reduce greenhouse gas emissions from the power sector" (paragraph 2.2.12). Paragraph 2.2.19 states:

> "2.2.19 The Planning Act and any market reforms associated with the Electricity Market Reform project will complement each other and are consistent with the Government's established view that the development of new energy infrastructure is market-based. While the Government may choose to influence developers in one way or another to propose to build particular types of infrastructure, it remains a matter for the market to decide where and how to build, as market mechanisms will deliver the required infrastructure most efficiently. Against this background of possibly changing market structures, developers will still need development consent for each proposal. Whatever incentives, rules or other signals developers are responding to, the Government believes that the NPSs set out planning policies which both respect the principles of sustainable development and are capable of facilitating, for the foreseeable future, the consenting of energy infrastructure on the scale and of the kinds necessary to help us maintain safe, secure, affordable and increasingly low carbon supplies of energy."

14. In the following paragraphs emphasis is placed on the security of energy supplies. That the United Kingdom should continue to have "secure and reliable supplies of electricity" as the transition is made to a low carbon economy is said to be "critical". The need for "diversity" in technologies and fuels is stressed (paragraph 2.2.20). Paragraph 2.2.23 says that the United Kingdom "must … reduce over time its dependence on fossil fuels, particularly unabated combustion", but acknowledges that "some fossil fuels will still be needed during the transition to a low carbon economy".

15. Policy for decision-making is set out in Part 3, "The need for new nationally significant energy infrastructure projects". Paragraphs 3.1.1 to 3.1.4 state:

> "3.1.1 The UK needs all the types of energy infrastructure covered by this NPS in order to achieve energy security at the same time as dramatically reducing greenhouse gas emissions.

3.1.2 It is for industry to propose new energy infrastructure projects within the strategic framework set by Government. The Government does not consider it appropriate for planning policy to set targets for or limits on different technologies.

3.1.3 The IPC should therefore assess all applications for development consent for the types of infrastructure covered by the NPSs on the basis that the Government has demonstrated that there is a need for those types of infrastructure and that the scale and urgency of that need is as described for each of them in this Part.

3.1.4 The IPC should give substantial weight to the contribution which projects would make towards satisfying this need when considering applications for development consent under the Planning Act 2008[16].”

A footnote to paragraph 3.1.4 – footnote 16 – states:

> “[16]In determining the planning policy set out in Section 3.1, the Government has considered a range of projections and models that attempt to assess what the UK’s future energy needs may be. Figures referenced relate to different timescales and therefore cannot be directly compared. Models are regularly updated and the outputs will inevitably fluctuate as new information becomes available.”

16. Paragraph 3.2.3 states:

> “3.2.3 This Part of the NPS explains why the Government considers that, without significant amounts of new large-scale energy infrastructure, the objectives of its energy and climate change policy cannot be fulfilled. However, … it will not be possible to develop the necessary amounts of such infrastructure without some significant residual adverse impacts. This Part also shows why the Government considers that the need for such infrastructure will often be urgent. The IPC should therefore give substantial weight to considerations of need. The weight which is attributed to considerations of need in any given case should be proportionate to the anticipated extent of a project’s actual contribution to satisfying the need for a particular type of infrastructure.”

17. The means of addressing the objectives of achieving energy security and reducing greenhouse gas emissions are explained. In a passage headed “Meeting energy security and carbon reduction objectives”, it is stated that the Government “needs to ensure sufficient electricity generating capacity is available to meet maximum peak demand, with a safety margin or spare capacity to accommodate unexpectedly high demand and to mitigate risks such as unexpected plant closures and extreme weather events” (paragraph 3.3.2). Paragraph 3.3.4 states:

> “3.3.4 There are benefits of having a diverse mix of all types of power generation. It means we are not dependent on any one type of generation or one source of fuel or power and so helps to ensure security of supply. … [The] different types of electricity generation have different characteristics which can complement each other …”.

Three types of electricity generation are then mentioned: fossil fuel generation, renewables and nuclear power.

18. Therefore, to meet the challenges of energy security and climate change, the Government "would like industry to bring forward many new low carbon developments (renewables, nuclear and fossil fuel generation with [Carbon Capture and Storage ("CCS")])" within the period up to 2025 (paragraph 3.3.5). The conclusion, in paragraph 3.3.6, again recalls the earlier text in paragraph 3.1.2:

> "3.3.6 Within the strategic framework established by the Government it is for industry to propose the specific types of developments that they assess to be viable. This is the nature of a market-based energy system. The IPC should therefore act in accordance with the policy set out in Section 3.1 when assessing proposals for new energy NSIPs."

19. The need for additional electricity capacity to support the required increase in supply from renewables is recognised. Paragraph 3.3.11 states:

> "3.3.11 An increase in renewable electricity is essential to enable the UK to meet its commitments under the EU Renewable Energy Directive. … However, some renewable sources (such as wind, solar and tidal) are intermittent and cannot be adjusted to meet demand. As a result, the more renewable generating capacity we have the more generation capacity we will require overall, to provide back-up at times when the availability of intermittent renewable sources is low. If fossil fuel plant remains the most cost-effective means of providing such back-up, particularly at short notice, it is possible that even when the UK's electricity supply is almost entirely decarbonised we may still need fossil fuel power stations for short periods when renewable output is too low to meet demand, for example when there is little wind."

Paragraph 3.3.12 says it is "therefore likely that increasing reliance on renewables will mean that we need more total electricity capacity than we have now, with a larger proportion being built only or mainly to perform back-up functions."

20. Under the heading "Future increases in electricity demand", paragraph 3.3.14 states:

> "3.3.14 … As a result of this electrification of demand, total electricity consumption … could double by 2050. … In some outer most circumstances, for example if there was very strong electrification of energy demand and a high level of dependence on intermittent electricity generation, then the capacity of electricity generation could need to triple. The Government therefore anticipates a substantial amount of new generation will be needed."

21. In text headed "The urgency of the need for new electricity capacity", paragraph 3.3.18 states:

> "3.3.18 It is not possible to make an accurate prediction of the size and shape of demand for electricity in 2025, but in order to get a sense of the possible scale of future demand to 2025, one possible starting point is provided by the most recent Updated Energy and Emissions Projections (UEP) which DECC published in June 2010. It

> is worth noting that models are regularly updated and the outputs will inevitably fluctuate as new information becomes available. … The projections do not reflect a desired or preferred outcome for the Government in relation to the need for additional electricity generating capacity or the types of electricity generation required."

22. Paragraph 3.3.21 adds that "[whilst] no such projections of the UK's future energy mix can be definitive, they illustrate the scale of the challenge the UK is facing and help the Government to understand how the market may respond". And paragraph 3.3.23 says that "[to] minimise risks to energy security and resilience, the Government therefore believes it is prudent to plan for a minimum need of 59 GW of new electricity capacity by 2025".

23. Returning to the theme of the earlier text in paragraph 3.1.2, paragraph 3.3.24 continues:

> "3.3.24 It is not the Government's intention in presenting the above figures to set targets or limits on any new generating infrastructure to be consented in accordance with the energy NPSs. It is not the IPC's role to deliver specific amounts of generating capacity for each technology type. The Government has other mechanisms to influence the current delivery of a secure, low carbon, affordable electricity mix. Indeed, the aim of the Electricity Market Reform project … is to review the role of the variety of Government interventions within the electricity market."

24. The important role of renewable electricity generation is described in section 3.4. The United Kingdom's commitment to producing 15% of its total energy from renewable sources by 2020 is confirmed (in paragraph 3.4.1). The role of nuclear power is dealt with in section 3.5. Nuclear power is expected to play an increasingly important role in the move to diversifying and decarbonising sources of electricity (paragraph 3.5.1). It is said to be "Government policy that new nuclear power should be able to contribute as much as possible to the UK's need for new capacity" (paragraph 3.5.2).

25. The role of fossil fuel electricity generation is addressed in section 3.6. Paragraph 3.6.1 says that "[fossil] fuel power stations play a vital role in providing reliable electricity supplies: they can be operated flexibly in response to changes in supply and demand, and provide diversity in our energy mix … as the UK makes the transition to a low carbon economy, and Government policy is that they must be constructed, and operate, in line with increasingly demanding climate change goals". And paragraph 3.6.2 adds this:

> "3.6.2 … Gas will continue to play an important role in the electricity sector – providing vital flexibility to support an increasing amount of low-carbon generation and to maintain security of supply."

26. Paragraph 3.6.3 says that "[some] of the new conventional generating capacity needed is likely to come from new fossil fuel generating capacity in order to maintain security of supply, and to provide flexible back-up for intermittent renewable energy from wind". It is also noted that "new technology offers the prospect of reducing the carbon dioxide emissions of both fuels [i.e. coal and gas] to a level where, whilst retaining many of their existing advantages, they can also be regarded as low carbon energy sources". Paragraph 3.6.4 emphasises the importance of CCS, which is said to have the potential to reduce carbon emissions from fossil fuel generation by up to 90%.

27. Under the heading "The need for fossil fuel generation", paragraph 3.6.8 states:

> "3.6.8 …. [A] number of fossil fuel generating stations will have to close by the end of 2015. Although this capacity may be replaced by new nuclear and renewable generating capacity in due course, it is clear that there must be some fossil fuel generating capacity to provide back-up for when generation from intermittent renewable generating capacity is low and to help with the transition to low carbon electricity generation. It is important that such fossil fuel generating capacity should become low carbon, through development of CCS, in line with carbon reduction targets. Therefore there is a need for [Carbon Capture Ready ("CCR")] fossil fuel generating stations and the need for the CCS demonstration projects is urgent."

28. In Part 4 of EN-1, "Assessment Principles", paragraph 4.1.2 states a presumption in favour of granting consent to applications for "energy NSIPs":

> "4.1.2 Given the level and urgency of need for infrastructure of the types covered by the energy NPSs set out in Part 3 of this NPS, the IPC should start with a presumption in favour of granting consent to applications for energy NSIPs …".

29. Paragraph 4.1.3 says that "[in] considering any proposed development, and in particular when weighing its adverse impacts against its benefits, the IPC should take into account" both "its potential benefits including its contribution to meeting the need for energy infrastructure, job creation and any long-term or wider benefits" and "its potential adverse impacts, including any long-term and cumulative adverse impacts, as well as any measures to avoid, reduce or compensate for any adverse impacts".

30. In Part 5, "Generic Impacts", paragraph 5.2.2 states:

> "5.2.2 CO2 emissions are a significant adverse impact from some types of energy infrastructure which cannot be totally avoided (even with full deployment of CCS technology). However, given the characteristics of these and other technologies … and the range of non-planning policies aimed at decarbonising electricity generation such as EU ETS … , Government has determined that CO2 emissions are not reasons to prohibit the consenting of projects which use these technologies or to impose more restrictions on them in the planning policy framework than are set out in the energy NPSs (e.g. the CCR and, for coal, CCS requirements). Any ES on air emissions will include an assessment of CO2 emissions, but the policies set out in Section 2, including the EU ETS, apply to these emissions. The IPC does not, therefore, need to assess individual applications in terms of carbon emissions against carbon budgets and this section does not address CO2 emissions or any Emissions Performance Standard that may apply to plant."

EN-2

31. EN-2 stresses the "vital role" played by fossil fuel generating stations in "providing reliable electricity supplies and a secure and diverse energy mix as the UK makes the transition to a low carbon economy" (paragraph 1.1.1). It confirms that the Government's policy is to require a substantial proportion of the capacity of all new coal-fired stations to be subject to

CCS, that new stations of that kind will be expected to retrofit CCS to their "full capacity", that other fossil fuel generating stations are expected to be "carbon capture ready, and that all such stations will be required to comply with Emissions Performance Standards (paragraph 1.1.2).

32. Paragraph 2.5.2 of EN-2 states:

> "2.5.2 CO2 emissions are a significant adverse impact of fossil fuel generating stations. Although an ES on air emissions will include an assessment of CO2 emissions, the policies set out in Section 2.2 of EN-1 will apply, including the EU ETS. The IPC does not, therefore, need to assess individual applications in terms of carbon emissions against carbon budgets and this section does not address CO2 emissions or any Emissions Performance Standard that may apply to plant."

The examining authority's report

33. On the question of need, the examining authority accepted ClientEarth's contention that, under EN-1, no weight should be given to the need for the proposed development, because, when current projections and other relevant factors were considered, there was no need for it. It concluded that an assessment of need is required for every energy NSIP and although the national policy statements supported a need for additional energy infrastructure in general, Drax Power had not demonstrated that this development would itself meet an identified need for gas generation capacity when assessed against EN-1's "overarching policy objectives of security of supply, affordability and decarbonisation" (paragraphs 5.2.4, 5.2.24, 5.2.26, 5.2.27 to 5.2.74, 5.3.27, 7.2.7 and 11.1.1 of the examining authority's report).

34. On the likely increase in greenhouse gas emissions, the examining authority concluded that "a reasonable baseline" was likely to be somewhere between the figures assessed by Drax Power and by ClientEarth, and therefore that the increase in greenhouse gas emissions was likely to be higher than had been estimated by Drax Power (paragraph 5.3.22).

35. In the examining authority's view, the proposed development would not accord with the energy national policy statements, and that it would undermine the Government's commitment to cut greenhouse gas emissions, made explicit in the Climate Change Act (paragraphs 5.2.4, 5.3.27, 7.2.7, 7.2.10 and 11.1.2). Striking the balance under section 104(7) of the Planning Act, it concluded that the case for development consent had not been made out, and that development consent should therefore be withheld (section 7.3).

The Secretary of State's decision letter

36. In a section of her decision letter headed "The Principle of the Proposed Development and Conformity with National Policy Statements", the Secretary of State referred to the examining authority's conclusions on "need", in particular its conclusion "that the Development would not be in accordance with the relevant National Policy Statements for the purposes of section 104(3) of [the Planning Act]". She noted that "when considering the planning balance for the purposes of section 104(7) … , the ExA gave no positive weight to the contribution of the Development towards meeting identified need and gave considerable negative weight in the planning balance to both the adverse effects of the Development's

GHG emissions on climate change … and the perceived conflict with the NPSs' overarching decarbonisation objective" (paragraph 4.7). Having referred to paragraphs 3.1.1 and 3.1.3 of EN-1, she quoted the statement in paragraph 3.6.1 that fossil-fuel power stations play a "vital role in providing reliable electricity supplies", and the statement in paragraph 3.6.8 that "there is a need for [carbon capture ready] fossil fuel generating stations" (paragraph 4.10). And she acknowledged that the proposed development – "a gas-fired generating station which would be carbon capture ready (with directly linked battery storage)" – is "a type of infrastructure … covered by EN-1 and [EN-2] and as such the presumption in favour of granting consent … in paragraph 4.1.2 of EN-1 should apply" (paragraph 4.12).

37. She then said (in paragraph 4.13):

> "4.13 The Secretary of State has considered the assessment that [the examining authority] has undertaken to determine whether the Development would meet an identified need for gas generation capacity by reference to the high-level objectives of security of supply, affordability and decarbonisation. However, the Secretary of State is of the view that the NPSs clearly set out the specific planning policies which the Government believes both respect the principles of sustainable development and are capable of facilitating, for the foreseeable future, the consenting of energy infrastructure on the scale and of the kinds necessary to help us maintain safe, secure, affordable and increasingly low carbon supplies of energy. The Secretary of State's view is that these policies, including the presumption in favour of granting consent for energy NSIPs in EN-1 have already taken account of the need to achieve security of supply, affordability and decarbonisation at a strategic level. The NPSs do not, therefore, require decision makers to go beyond the specific and relevant policies they contain to assess individual applications against those high level objectives and there was no need, therefore, for the ExA to make a judgement on those issues when assessing whether this specific application was in accordance with the NPS. The ExA's views on these matters do not, therefore, remove the need to apply the general presumption in favour of Carbon Capture Ready ("CCR") fossil fuel generation which already assumes a positive contribution from such infrastructure."

38. Despite having concluded that "the presumption in favour of fossil fuel generation" applied, she accepted that she "must still consider whether any more specific and relevant policies set out in the relevant [national policy statements] clearly indicate that consent should be refused". The examining authority had "identified that there would be significant adverse effects from the Development in respect of GHG emissions which gave rise to a perceived conflict with the decarbonisation objective of EN-1". She said she had "considered the [examining authority's] arguments on greenhouse gas emissions" (paragraph 4.14).

39. She went on to say (in paragraphs 4.15 to 4.17):

> "4.15 However, in line with paragraph 4.13 above, the Development's impacts on decarbonisation must, in the first instance, be assessed by reference to the specific policies on carbon emissions from energy NSIPs which are contained in the relevant [national policy statements] and which reflect the appropriate role of the planning system in delivering wider climate change objectives and meeting the emissions reduction targets contained in the [Climate Change Act ("CCA")]. In this regard, the Secretary of State has noted that section 2.2 of EN-1 explains how

climate change and the UK's GHG emissions reduction targets contained in the CCA have been taken into account in preparing the suite of Energy [national policy statements]. She has also noted the policy contained in paragraph 5.2.2 of EN-1[, which she then quoted in full].

4.16 This policy is also reflected in paragraph 2.5.2 of EN-2. It is the Secretary of State's view, therefore, that, while the significant adverse impact of the proposed Development on the amount of greenhouse gases that will be emitted to atmosphere is acknowledged, the policy set out in the relevant NPSs makes clear that this is not a matter that … should displace the presumption in favour of granting consent.

4.17 In light of this, the Secretary of State considers that the Development's adverse carbon impacts do not lead to the conclusion that the Development is not in accordance with the relevant NPSs or that they would be inconsistent with the CCA. The Secretary of State notes the need to consider these impacts within the overall planning balance to determine whether the exception test set out in section 104(7) of the 2008 Act applies in this case. The ExA considers that the Development will have significant adverse impacts in terms of GHG emissions which the Secretary of State accepts may weigh against it in the balance. However, the Secretary of State does not consider that the ExA was correct to find that these impacts, and the perceived conflict with NPS policy which they were found to give rise to, should carry determinative weight in the overall planning balance once the benefits of the project are properly considered, including in particular its contribution towards meeting need as explained below."

40. The Secretary of State's conclusions on need were these (in paragraphs 4.18 to 4.20):

"4.18 The ExA's views on the need for the Development and how this is considered in the planning balance have also been scrutinised by the Secretary of State. As set out above, paragraph 3.1.3 of EN-1, and the presumption in favour of the Development already assume a general need for CCR fossil fuel generation. Furthermore, paragraph 3.1.4 of EN-1 states: *"the [decision-maker] should give substantial weight to the contribution which projects would make towards satisfying this need when considering applications for development consent"*. The ExA recommends that no weight should be given to the Development's contribution towards meeting this need within the overall planning balance. This is predicated on its view that EN-1 draws a distinction between the need for energy NSIPs in general and the need for any particular proposed development. The Secretary of State disagrees with this approach. The Secretary of State considers that applications for development consent for energy NSIPs for which a need has been identified by the NPS should be assessed on the basis that they will contribute towards meeting that need and that this contribution should be given significant weight.

4.19 The Secretary of State notes that paragraph 3.2.3 of EN-1 states that *"the weight which is attributed to considerations of need in any given case should be proportionate to the anticipated extent of a project's actual contribution to satisfying the need for a particular type of infrastructure"*. The Secretary of State has, therefore, considered whether, in the light of the ExA's findings, there is any

reason why she should not attribute substantial weight to the Development's contribution to meeting the identified need for new CCR fossil fuel generation infrastructure in this case. In particular, she has considered the ExA's views on the changes in energy generation since the EN-1 was published in 2011, and the implications of current models and projections of future demand for gas-fired electricity generation and the evidence regarding the pipeline of consented gas-fired infrastructure which the ExA considered to be relevant [ER 5.2.40-43].

4.20 The Secretary of State's consideration of the ExA's position is that (i) whilst a number of other schemes may have planning consent, there is no guarantee that these will reach completion; (ii) paragraph 3.3.18 of EN-1 sets out that the Updated Energy and Emissions Projections (on which the ExA partially relies … to reach its conclusions on current levels of need) do not *"reflect a desired or preferred outcome for the Government in relation to the need for additional generating or the types of electricity required"*; and (iii) paragraph 3.1.2 of EN-1 explains that *"[i]t is for industry to propose new energy infrastructure projects within the strategic framework set by Government. The Government does not consider it appropriate for planning policy to set targets for or limits on different technologies"*. These points are reinforced elsewhere in EN-1, for example in paragraphs 2.2.4 and 2.2.19, which explain that the planning system will complement other commercial and market based mechanisms and rules, incentives and signals set by Government to deliver the types of infrastructure that are needed in the places where it is acceptable in planning terms – decisions on which consented energy schemes to build will therefore also be driven by these factors. In light of this, the Secretary of State does not accept that the ExA's findings on these issues should diminish the weight to be attributed to the Development's contribution towards meeting the identified need for CCR gas fired generation within the overall planning balance. The Secretary of State considers that this matter should be given substantial weight in accordance with paragraph 3.1.4 of EN-1. The Secretary of State's overall conclusions on the planning balance are set out at paragraphs 6.1-6.14 below."

41. Under the heading "The Climate Change Act 2008 (2050 Target Amendment) Order 2019: "Net Zero"", the Secretary of State concluded that the amendment to the Climate Change Act, which set a new legally binding target of at least a 100% reduction in greenhouse gas emissions against the 1990 benchmark ("Net Zero"), was "a matter which is both important and relevant to the decision on whether to grant consent for the Development and that regard should be had to it when determining the Application" (paragraph 5.7). She noted that the amendment "does not alter the policy set out in the National Policy Statements which still form the basis for decision making under the Act" (paragraph 5.8). And she did "not consider that Net Zero currently justifies determining the application otherwise than in accordance with the relevant NPSs or attributing the Development's negative GHG emissions impacts any greater weight in the planning balance" (paragraph 5.9).

42. In section 6 of the decision letter, "Conclusions on the Case for Development Consent", the Secretary of State set out the provisions of section 104(3) and (7), and said that she "therefore … needs to consider the impacts of any proposed development and weigh these against the benefits of any scheme" (paragraph 6.1). On the question of whether the proposed development was in accordance with EN-1 for the purposes of section 104(3), she referred again – as she had in paragraph 4.4 – to the fact that the examining authority had not applied

"the policy presumption in favour of granting consent for energy NSIPs set out in EN-1 when determining whether the Development was in accordance with the relevant NPSs". She considered that "the Development should benefit from the presumption because there are no more specific and more relevant NPS policies which clearly indicate that consent should be refused and therefore the Development accords with the relevant NPSs" (paragraph 6.2).

43. Turning to the question of whether the adverse impacts of the development would outweigh its benefits under section 104(7), she summarised the relevant conclusions of the examining authority on matters they had given a "neutral weighting" (paragraph 6.3); on those they had given "positive weight" – namely "biodiversity outcomes, socio-economics and the proposed re-use of existing infrastructure at the Drax Power Station" (paragraph 6.4); on those they had given "considerable negative weight", namely "impacts on decarbonisation and climate change"; and on "landscape and visual impacts", which were "negative" but did "not weigh heavily in the overall consideration of planning balance for the Development" (paragraph 6.5).

44. She then returned to the issue of need (in paragraph 6.6):

> "6.6 The Secretary of State considers that the ExA's interpretation of the need case set out in the NPSs is incorrect. In taking the position it did on need and GHG emissions, the ExA arrived at a position where it recommended that consent for the Development should be refused. The Secretary of State considers that the NPSs support the case for new energy infrastructure in general and, in particular, the need for new CCR fossil fuel generation of the kind which the Development would provide. While acknowledging the GHG emissions from the Development, the generating capacity of the Development in either two- or one-unit configurations is a significant argument in its favour, with a maximum of 3.8GW possible if the Applicant builds out both gas-fired and battery storage units as proposed. Therefore, the Secretary of State considers … that the Development would contribute to meeting the identified need for CCR fossil fuel generation set out in the NPS and that substantial weight should be given to this in the planning balance."

45. On greenhouse gas emissions and the overall balance she said (in paragraph 6.7):

> "6.7 In assessing the issue of GHG emissions from the Development and the ExA's conclusions in this matter, the Secretary of State notes that the Government's policy and legislative framework for delivering a net zero economy by 2050 does not preclude the development and operation of gas-fired generating stations in the intervening period. Therefore, while the policy in the NPS says GHG emissions from fossil fuel generating stations are accepted to be a significant adverse impact, the NPSs also say that the Secretary of State does not need to assess them against emissions reduction targets. Nor does the NPS state that GHG emissions are a reason to withhold the grant of consent for such projects. It is open to the Secretary of State to depart from the NPS policies and give greater weight to GHG emissions in the context of the Drax application but there is no compelling reason to do so in this instance."

46. She accepted the examining authority's "overall weighting" of the visual and landscape impacts. And she found there were "no other negative issues that weigh against the Development" (paragraph 6.8). Her conclusion on section 104(7) was this (in paragraph 6.9):

> "6.9 … [The] ExA identifies positive effects from the Development in respect of biodiversity outcomes, socio-economics and the proposed re-use of existing infrastructure at the Drax Power Station. The Secretary of State's overall conclusion on the planning balance is that there are strong arguments in favour of granting consent for the full, two gas units and two battery storage units, 3.8GW project because of its contribution to meeting the need case set out in the NPSs. On balance therefore [the] Secretary of State considers that the benefits of the Development outweigh its adverse effects."

47. Her overall conclusion was that there was a "compelling case for granting consent for the development". She considered "that the Development would be in accordance with the relevant NPSs and, given the national need for such development as set out in the relevant NPSs, [she did] not believe that its benefits are outweighed by [its] potential adverse impacts, as mitigated by the terms of the Order". She therefore "decided to make the Order granting development consent" (paragraph 7.1).

Did the Secretary of State misinterpret EN-1 on the approach to the assessment of need?

48. The essential argument put forward here – as in the court below – is that the policy on need in EN-1 requires an assessment of the particular contribution a project will make to meeting the need for the relevant type of infrastructure. The Secretary of State erred in simply assuming that, because the proposal fell within one of the types of infrastructure for which a need was said to exist, it would necessarily contribute to that need and thus comply with policy in EN-1. She misinterpreted paragraph 3.2.3 of EN-1, asking herself whether there was any reason for not giving substantial weight to the need for the proposed development under the policy in paragraph 3.1.4. A "quantitative" assessment of need was required. None was provided.

49. In Holgate J.'s view, the fact that EN-1 does not seek to define need in "quantitative" terms, except in some limited respects, is "consistent with (a) the broad indications of the potential need to double or treble generating capacity by 2050 previously given in Part 2 of the NPS … and (b) the unequivocal statement in paragraph 3.1.2 that it is inappropriate for planning policy to set targets for, or limits on, different types of technology" (paragraph 73 of the judgment). In paragraphs 3.1.2 and 3.3.15 to 3.3.24 of EN-1 it is "plain that, apart from indicating need for a *minimum* amount of new capacity by 2025, the references to need in EN-1 were not expressed in quantitative terms". This "is said to be consistent with the market-based system under which electricity generation is provided and the other non-planning mechanisms by which Government seeks to influence the operation of the market" (paragraph 80). Instead, EN-1 "focuses on qualitative need such as functional requirements". Paragraph 3.1.1 states that the United Kingdom needs all types of energy infrastructure covered by EN-1 "in order to achieve energy security while at the same time dramatically reducing GHG", and paragraphs 3.3.2 to 3.3.6 "explain how those twin objectives should be addressed" (paragraph 81).

50. The judge said that, reading EN-1 as a whole, rather than selectively, "[it] is plain that the NPS … does not require need to be assessed in quantitative terms for any individual

application" (paragraph 129), that "[putting] to one side the "interim milestone" which did not feature in the discussion in this case, there are no benchmarks against which a quantitative analysis ([e.g.] consents in the pipeline or projections of capacity) could be related" (paragraph 130); and that "[given] those clear statements of policy in EN-1 there was no justification for the Panel to have regard to the 2017 UEP projections in order to assess the contribution of the Drax proposal to meeting the qualitative need identified in the NPS" (paragraph 131).

51. After those observations, the judge went on to say that the Secretary of State had "assessed the contribution which the proposed development would make to need in terms of both function and scale" (paragraph 133). The effect of the interpretation of EN-1 advanced by ClientEarth, and accepted by the examining authority, was that "any applicant for a DCO for gas-fuelled power generation would need to demonstrate a quantitative need for the development proposed". This, said the judge, "would run counter to the thinking which lay behind the introduction of [the Planning Act] and the energy NPSs" (paragraph 135). He saw the policy on need in EN-1 as "analogous" to that considered in *R. (on the application of Scarisbrick) v Secretary of State for Communities and Local Government* [2017] EWCA Civ 787, where the Court of Appeal had "rejected the argument … that the NPS [for hazardous waste] required the Secretary of State to assess project-specific need when determining an application for a DCO" (paragraph 138). EN-1 expressly provides, in paragraph 3.1.4 that "substantial weight" is to be given to the contribution a project makes to the identified need (paragraph 139). Paragraph 3.2.3 of EN-1 is "entirely consistent with paragraphs 3.1.3 and 3.1.4". It "does not require an assessment of quantitative need for gas-fired generation" (paragraph 141). So the interpretation of EN-1 contended for by ClientEarth had to be rejected (paragraph 142).

52. Mr Gregory Jones Q.C., for ClientEarth submitted to us that the Secretary of State misinterpreted the policy on need in EN-1. She ought to have understood that EN-1 establishes only a need for particular "types" of energy infrastructure, and not that any particular project will necessarily contribute towards meeting that need, or that the level of need for each type is the same (paragraphs 2.1.1 and 3.1.1 of EN-1). It does not support a "flat-rule" approach to the need for different types of infrastructure (paragraph 3.1.3). It differentiates the "scale and urgency" of the need for each type (paragraphs 3.4.5, 3.5.9 and 3.6.8). The need for fossil-fuel infrastructure is limited (paragraphs 2.2.19, 2.2.23, 3.4.2, 3.4.5, 3.5.2 and 3.6.3). Holgate J. was right to say (in paragraphs 73, 80, 129 and 130 of his judgment) that EN-1 does not set any "quantitative" limits or targets on the need for particular types of energy infrastructure, and (in paragraph 81) that EN-1 concentrates on "qualitative need". But he did not recognise that EN-1 does distinguish between the "scale and urgency" of the need for different types of infrastructure.

53. Mr Jones maintained that EN-1 requires the decision-maker to consider, case by case, the "anticipated … actual contribution" of the individual project to satisfying the need for a "particular type" of infrastructure (paragraphs 3.1.3, 3.1.4, 3.2.3 and 4.1.3). He relied in particular on the statement in the last sentence of paragraph 3.2.3 that "[the] weight which is attributed to considerations of need in any given case should be proportionate to the anticipated extent of a project's actual contribution to satisfying the need for a particular type of infrastructure". As the examining authority concluded (in paragraphs 5.2.21 and 5.2.23 of its report), paragraph 3.2.3 of EN-1 distinguishes between the need for energy NSIPs and the need for the proposed development. EN-1 is not to be read as simply telling the decision-maker to give "substantial weight" to a need for certain types of energy infrastructure

established in the policy (paragraph 3.1.1). That would be to adopt an approach of the kind rejected in *Scarisbrick* (at paragraph 31) – "the bigger the project, the greater is the need for it".

54. Although the "scale and urgency" of the need for particular types of infrastructure may be described as "qualitative" factors, this does not mean – Mr Jones submitted – that the decision-maker's approach to giving "proportionate" weight to considerations of need must be confined to a "qualitative" analysis. "Quantitative" considerations are inherent in the project-specific assessment required under paragraph 3.2.3. The national policy statement considered in *Scarisbrick* was different. It did not refer to the different "scale and urgency" of need for different types of infrastructure, nor did it require a consideration of "proportionate weight".

55. I cannot accept that argument. I agree with the submission made to us by Mr Andrew Tait Q.C. for the Secretary of State, adopted by Mr James Strachan Q.C. for Drax Power, that the Secretary of State did not misinterpret, or fail lawfully to apply, relevant policy in EN-1. On its true interpretation, EN-1 does not compel the approach contended for by Mr Jones.

56. As always, it is necessary to undertake the exercise of policy interpretation by construing the language of the relevant policy objectively, in its context, and having regard to its evident purpose (see the judgment of Lord Reed in *Tesco Stores Ltd. v Dundee City Council* [2012] UKSC 13, at paragraphs 17 to 19, the judgment of Lord Carnwath in *Suffolk Coastal District Council v Hopkins Homes Ltd.* [2017] UKSC 37, at paragraphs 22 to 26). These general principles apply equally to the interpretation of national policy statements as they do to the interpretation of other planning policies (see my judgment in *Scarisbrick,* at paragraph 19).

57. Starting with the most salient passages on need in EN-1, in Part 3, one can see seven things. First, there is a recognised need for "all the types of energy infrastructure" within its scope. Secondly, this is compatible, in principle, not only with the aim to "achieve energy security" but also with that of "dramatically reducing greenhouse gas emissions" (paragraph 3.1.1). Thirdly, in the Government's view it would be inappropriate "to set targets for or limits on" different technologies (paragraph 3.1.2). Fourthly, "all applications" for development consent should be assessed "on the basis that the Government has demonstrated that there is a need for those types of infrastructure" and "the scale and urgency of that need is as described in [Part 3]" (paragraph 3.1.3). Fifthly, when development consent is sought, "substantial weight" should be given to "the contribution which projects would make towards satisfying this need" (paragraph 3.1.4). Sixthly, because "without significant amounts of new large-scale energy infrastructure, the objectives of [the Government's] energy and climate change policy cannot be fulfilled", it is right that "substantial weight" should be given to "considerations of need" (paragraph 3.2.3). And seventhly, "[the] weight which is attributed to considerations of need in any given case should be proportionate to the anticipated extent of a project's actual contribution to satisfying the need for a particular type of infrastructure" (paragraph 3.2.3).

58. Those seven points are expanded elsewhere in EN-1. In Part 2 there is a clear emphasis on the "market-based system" (paragraph 2.2.2); on the proposition that "the planning system is only one of a number of vehicles that helps to deliver Government energy and climate change policy" (paragraph 2.2.4); on the place of the EU Emissions Trading Systems as "the cornerstone of UK action to reduce greenhouse gas emissions from the power sector" (paragraph 2.2.12); on the changes being promoted under the Electricity Market Reform

project (paragraph 2.2.15); and on the complementary relationship between the Planning Act and the Electricity Market Reform project, which is "consistent with the Government's established view that the development of new energy infrastructure is market-based", it being "a matter for the market to decide where and how to build, as market mechanisms will deliver the required infrastructure most efficiently" (paragraph 2.2.19).

59. Both in Part 2 and in Part 3 the absence of any quantitative definition of relevant need is striking. No attempt is made to describe in quantitative terms either the general need for the types of generating capacity within the scope of EN-1 or a specific need for any particular type. No targets or limits are set. This is deliberate and explicit. It is stressed that the Government has "other mechanisms", including the Electricity Market Reform project, to influence delivery (paragraph 3.3.24).

60. That is the background to the first basic concept in paragraph 3.1.3: that proposals are to be assessed on the basis that need has been demonstrated for the types of infrastructure covered by the energy national policy statements. The second basic concept in paragraph 3.1.3 – that proposals are to be assessed on the basis that the "scale and urgency" of the demonstrated need is "as described in this part" – is also enlarged in the subsequent text. It extends to the fundamental policy in paragraph 3.1.4 that, in decision-making, "substantial weight" is to be given to the contribution that projects make to the satisfaction of need. It embraces the reference in footnote 16 to the "projections and models" considered by the Government when it prepared the policy in section 3.1 being "regularly updated" with "outputs" that "inevitably fluctuate as new information becomes available". It includes the recognition in paragraph 3.3.18 that "it is not possible to make an accurate prediction of the size and shape of demand for electricity in 2025", and that the projections published in June 2010 "do not reflect a desired or preferred outcome for the Government in relation to the need for additional electricity generating capacity or the types of electricity generation required", and in paragraph 3.3.21 that "no such projections … can be definitive". And it carries the caution in paragraph 3.3.24 that the figures mentioned in the preceding paragraphs are not intended by the Government to set "targets or limits on any new generating infrastructure …", that decision-making is not expected to "deliver specific amounts of generating capacity for each technology type", and that there are "other mechanisms to influence the current delivery of a secure, low carbon, affordable electricity mix".

61. These are all general statements of policy. They apply to fossil fuel generating capacity as well as other types of infrastructure. But the "vital role" of fossil fuel power stations in providing "reliable electricity supplies" is recognised throughout Part 3: their "important role" in the "energy mix" as the transition is made to a low carbon economy (paragraph 3.6.1); the requirement for "some fossil fuel generating capacity to provide back-up" for intermittent renewable generating capacity (explained in paragraphs 3.3.11 and 3.3.12), and "to help with the transition to low carbon electricity generation", the importance of such fossil fuel generating capacity becoming "low carbon, through development of CCS", and thus "a need for CCR fossil fuel generating stations …" (paragraph 3.6.8).

62. The principles guiding the consideration of applications, in Part 4, flow from the text on decision-making in paragraphs 3.1.1 to 3.1.4. They provide a "presumption in favour of granting consent to applications for energy NSIPs" (paragraph 4.1.2). They also include as a potential benefit, in the balancing of "adverse impacts" against "benefits", a proposed development's "contribution to meeting the need for energy infrastructure" (paragraph 4.1.3).

63. None of the passages to which I have referred stipulates that a "quantitative" assessment of need must always be carried out in a development consent order process. Nor is that done anywhere else in EN-1. The same may also be said of EN-2.

64. It is necessary to come back now to paragraph 3.2.3, which became a focus of the argument we heard on this issue. That paragraph must be read in the context set by the other relevant passages of EN-1. It confirms that "without significant amounts of new large-scale energy infrastructure" it will be impossible to fulfil the objectives of [the Government's] energy and climate change policy. And it refers to the explanation, in Part 3, of the Government's view that "the need for such infrastructure will often be urgent". No reference is made to the scale or limits of that need, either in general terms or specifically for any particular type of infrastructure.

65. The meaning of the final two sentences of paragraph 3.2.3 was controversial between the parties. But when those two sentences are read as continuing the thrust of the previous three, and in the wider context of the policies on need taken together, their sense is clear. The penultimate sentence looks back to what has just been said, with the connecting word "therefore". It makes plain that the matters referred to in the first three sentences are the reasons why, in decision-making, "substantial weight" should be given to "considerations of need". And this is wholly consistent with what has already been said in paragraphs 3.1.1 to 3.1.4 – in particular, paragraph 3.1.4.

66. It is with this point firmly established – "substantial weight" should be given to "considerations of need" – that one comes to the final sentence of the paragraph, which concerns decision-making "in any given case". From the sentence itself three things are clear. First, while the starting point is that "substantial weight" is to be given to "considerations of need", the weight due to those considerations in a particular case is not immutably fixed. It should be "proportionate to the anticipated extent of [the] project's actual contribution to satisfying the need" for the relevant "type of infrastructure". To this extent, the decision-maker – formerly the IPC and now the Secretary of State – may determine whether there are reasons in the particular case for departing from the fundamental policy that "substantial weight" is accorded to "considerations of need". Secondly, the decision-maker must consider this question by judging what weight would be "proportionate" to the "anticipated extent" of the development's "actual contribution" to satisfying the need for infrastructure of that type. These are matters of planning judgment, which involve looking into the future. Thirdly, beyond the description of the decision-maker's task in those terms, there is no single, prescribed way of performing that task, and there are no specified considerations to be taken into account, or excluded. It is not stated that the issue of what is "proportionate" to the proposal's "actual contribution" must, or should normally, be approached on a "quantitative" rather than a "qualitative" basis.

67. There is, in my view, no justification for reading such a requirement into the policy. The way in which a decision-maker's task is to be carried out in a particular case is for him to resolve. The policy leaves him with an ample discretion to decide how best to go about making the evaluative judgment required. As its language makes clear, the assessment of weight must be grounded in reality. But it demands a predictive assessment: hence the reference to the "anticipated extent" of the development's "actual contribution" to satisfying the relevant need. It should be remembered that paragraph 3.2.3 applies not merely to fossil fuel generating capacity, but to every kind of energy infrastructure to which EN-1 relates, including renewable energy projects. Even without there being in the relevant national policy

statements a specific target or limit for a particular type of infrastructure, or a range of the likely requirement for such capacity within a given timescale, it might still be possible to carry out a "quantitative" assessment of need. And there may be circumstances in which, for a particular type of infrastructure, or a particular proposal, it is appropriate to undertake a "quantitative assessment". The important point here, however, is that paragraph 3.2.3 does not compel the decision-maker to do it.

68. Properly understood, paragraph 3.2.3 is not in tension with the other policies. It supports them. Based, as it is, on the fundamental policy that "substantial weight" is to be given to the contribution made by projects towards satisfying the established need for energy infrastructure development of the types covered by EN-1, including CCR fossil fuel generation infrastructure, it ensures that the decision-maker takes a realistic, and not an exaggerated, view of the weight to be given to "considerations of need" in the particular case before him, which should be "proportionate to" the "actual contribution" the project is likely to make to "satisfying the need" for infrastructure of that type. That is its function.

69. One must be careful not to read across unjustifiably from the court's interpretation of a different policy in another national policy statement. But there is, in my view, a parallel between the policies we are considering here and those considered by this court in *Scarisbrick*. Among the policies considered in that case was one indicating that a need for the relevant infrastructure should be taken as demonstrated, and a presumption in favour of consent being granted. From these policies there arose, in this court's view, "a general assumption of need for such facilities", which "applies to every relevant project capable of meeting the identified need, regardless of the scale, capacity and location of the development proposed" (paragraph 24). A difference between that case and this is that the policies there did not indicate the level of weight to be given to need in decision-making. Here they do.

70. Did the Secretary of State proceed on the correct interpretation of the relevant policies on need? In my view she did. She concluded, as she was entitled to do, that the presumption in favour of granting consent, in paragraph 4.1.2 of EN-1, should apply (paragraph 4.12 of the decision letter). She reminded herself that although the "presumption in favour of fossil fuel generation" applied, she "must still consider whether any more specific and relevant policies … in the relevant NPSs clearly indicate that consent should be refused" (paragraph 4.14). She went on to do that, in the light of the examining authority's conclusions. It is not suggested that in doing so she ignored or misunderstood any relevant conclusion of the examining authority, or that her reasons for differing from the examining authority are inadequate or unclear.

71. She considered the issue of need in paragraphs 4.18 to 4.20 of her decision letter. In my view she did so impeccably. She acknowledged "the presumption in favour of the [proposed development]", the assumption of "a general need for CCR fossil fuel generation", and the requirement that the decision-maker "should give substantial weight to the contribution which projects would make towards satisfying this need …". She noted that the examining authority had recommended that no weight be given to the development's contribution to meeting this need. She made it clear that she disagreed with the examining authority's approach. In her view applications for consent for energy NSIPs for which a need had been identified by the national policy statements "should be assessed on the basis that they will contribute towards meeting that need and that this should be given significant weight" (paragraph 4.18). This seems an accurate understanding of what EN-1 says.

72. The issue was not left there. The Secretary of State applied the principle in the final sentence of paragraph 3.2.3 of EN-1. Again, in my view, she did so impeccably. First, she quoted the relevant words. Secondly, she made it clear that her mind was open to the possibility of reducing the weight given to the development's contribution to satisfying the relevant need. She said she had considered whether, in light of the examining authority's findings, there was "any reason why she should not attribute substantial weight to the Development's contribution to meeting the identified need for new CCR fossil fuel generation infrastructure in this case". Thirdly, she pointed to the three considerations relevant to this question: the examining authority's "views on the changes in energy generation since … EN-1 was published in 2011", the "implications of current models and projections of future demand for gas-fired electricity generation", and "the evidence regarding the pipeline of consented gas-fired infrastructure" (paragraph 4.19). It is not suggested that this was an incomplete description of the three main points in the examining authority's assessment.

73. The Secretary of State explained why she was not persuaded by the examining authority's assessment to conclude that less than "substantial weight" should be given to the identified need. There were three points: first, the lack of any "guarantee" that other schemes with consent would "reach completion"; second, as paragraph 3.3.18 of EN-1 says, the updated projections on which the examining authority had relied did not reflect "a desired or preferred outcome … in relation to … need …"; and third, the principle, in paragraph 3.1.2, that it is the responsibility of "industry" to propose new infrastructure "within the strategic framework set by Government", and "the Government does not consider it appropriate for planning policy to set targets for or limits on different technologies". All three of these points were, in the Secretary of State's view, reinforced by other passages in EN-1. The examining authority's findings did not, in her view, "diminish the weight to be attributed to the [development's] contribution towards meeting the identified need for CCR gas fired generation …". This, she concluded, "should be given substantial weight in accordance with paragraph 3.1.4 of EN-1" (paragraph 4.20).

74. There is, in my view, no legal error there. The Secretary of State's conclusions show that she had interpreted the relevant policies correctly, and proceeded to apply them lawfully.

75. The same may also be said of the Secretary of State's conclusions on need in paragraph 6.6 of her decision letter, where she stated again, that the development's contribution to the "identified need for CCR fossil fuel generation set out in [EN-1]" should, in her view, be given "substantial weight … in the planning balance". Like those in paragraphs 4.18 to 4.20, these conclusions demonstrate a correct interpretation and lawful application of the policies on need in EN-1 and EN-2.

76. I conclude, therefore, that on this issue the appeal should fail.

Did the Secretary of State misinterpret EN-1 on the approach to greenhouse gas emissions?

77. ClientEarth's argument on this issue is, essentially, that the Secretary of State misinterpreted EN-1 as requiring the decision-maker to treat the greenhouse gas emissions of the development either as irrelevant or as having no weight.

78. Holgate J. saw no force in that argument. In his view it was "plain … that the Secretary of State did not treat GHG emissions as irrelevant, nor did she treat them as something to which

no weight should be given". In paragraph 4.17 of the decision letter she moved from her conclusions on section 104(3) and (5) to the balance under section 104(7). She accepted that the examining authority's finding on the "significant adverse impacts of GHG emissions" from the development "could be weighed in the balance against the proposal". But she disagreed with their "evaluation of the benefits of the proposal, including its contribution towards meeting policy need". Once those benefits were "correctly weighed", she found "the impact of GHG emissions should not "carry determinative weight in the overall planning balance"". This, said the judge, "can only mean that the disbenefits did not carry more weight than the benefits"; it was "the other way round". In paragraph 4.17 the Secretary of State was "describing a straight forward balancing exercise … in no way dependent upon the terms of paragraphs 5.2.2 of EN-1 or 2.5.2 of EN-2". She returned to this exercise in paragraphs 6.3 to 6.9 of the decision letter (paragraph 167 of the judgment).

79. The judge did not see the approach in paragraph 5.2.2 of EN-1 as "legally objectionable". It accorded with section 5(5)(c) of the Planning Act, and was also "supported by established case law on the significance of alternative systems of control (see e.g. [*Gateshead Metropolitan Borough Council v Secretary of State for the Environment* (1996) 71 P. & C.R. 350])" (paragraph 170). In paragraph 6.7 of the decision letter, when carrying out the exercise required by section 104(7), the Secretary of State did not suggest that the policy in paragraph 5.2.2 of EN-1 and paragraph 2.5.2 of EN-2 treats greenhouse gas emissions as "an irrelevant consideration in a development consent order application or as a disbenefit to which no weight may be given" (paragraph 172). EN-1 and EN-2 "proceed on the basis that there is no justification in *land use planning terms* for treating GHG emissions as a dis-benefit which in itself is dispositive of an application for a DCO" (paragraph 178). EN-1 does not preclude greenhouse gas emissions being given "greater weight" in the section 104(7) balance, "so long as [they are] not treated as a freestanding reason for refusal" (paragraph 179).

80. Mr Jones submitted that the judge's interpretation of EN-1 was wrong. Neither EN-1 nor EN-2 prevents greenhouse gas emissions being a reason for withholding consent for an energy NSIP, overriding the presumption in paragraph 4.1.2 of EN-1. The statement in paragraph 5.2.2 of EN-1 that CO2 emissions are not "reasons to prohibit the consenting of projects which use these technologies …" is in general terms. It reflects the selection of some of the types of energy infrastructure covered by EN-1, including developments that will emit CO2. It does not dictate how greenhouse gas emissions are to be considered in decision-making on an individual project.

81. This understanding of paragraph 5.2.2, submitted Mr Jones, is confirmed by its reference to the environmental statement for a project, which, it says "on air emissions … will include an assessment of CO2 emissions". Under the Environmental Impact Assessment Directive 2011/92/EU (as amended) ("the EIA Directive") and the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 ("the EIA Regulations"), greenhouse gas emissions would have to be assessed and taken into account within the "environmental information" before the decision-maker when considering whether to grant consent (regulation 21). Under the regime for environmental impact assessment, a significant environmental effect such as CO2 emissions must potentially be capable of providing a reason for refusing consent for a project. EN-1 could not prevent that outcome, because it must be interpreted in accordance with EU law (see *Marleasing SA v La Comercial Internacional de Alimentacion SA* (1990) C-106/89), and otherwise would be overridden by the statutory exceptions under section 104(5) and (6) of the Planning Act. It was not open to the Government, through national policy, to prevent greenhouse gas emissions and their

contribution to climate change from being, as Mr Jones put it, a "material consideration" in a decision on an application for a development consent order (see the speech of Lord Hoffmann in *Tesco Stores Ltd. v Secretary of State for the Environment* [1995] 1 W.L.R. 759, at pp.764, 780, 783 and 784; and *R. (on the application of Wright) v Forest of Dean District Council* [2019] UKSC 53, at paragraphs 42, 52 and 53). That there are other means by which the United Kingdom seeks to reduce greenhouse gas emissions from existing infrastructure, including the EU Emissions Trading System, does not bear on this analysis.

82. Mr Jones submitted that the judge was wrong to conclude that greenhouse gas emissions cannot, in themselves, be the basis for a refusal of consent under EN-1 whilst nevertheless accepting that they can be an "adverse impact" to which weight can be given in the balancing exercise under section 104(7). If greenhouse gas emissions can be given weight in the balance, it must be possible for them to weigh against the grant of consent, whether in combination with other "adverse impacts" or on their own. It is illogical and artificial for greenhouse gas emissions, on their own, to be incapable of founding a reason for refusing consent, but capable of doing so in combination with some other adverse impact, regardless of how powerful that second factor was.

83. Finally, Mr Jones submitted that the Secretary of State did not, in fact, take greenhouse gas emissions into account as a "significant adverse impact". Though she referred to greenhouse gas emissions, it is clear that she gave them no weight – because she misinterpreted relevant policy in EN-1 and EN-2.

84. Those submissions do not, in my view, demonstrate that the Secretary of State's relevant conclusions on this issue were legally flawed. Her conclusions were, I think, entirely lawful.

85. The policy in paragraph 5.2.2 of EN-1 must be read in its entirety, and in its context. It should not be read in a way that puts it into conflict with other provisions in EN-1. The first sentence of the paragraph recognises that CO2 emissions are "a significant adverse impact from some types of energy infrastructure which cannot be totally avoided (even with full deployment of CCS technology)". The second sentence begins with a reference to "the characteristics of these and other technologies, as noted in Part 3 of this NPS" and to "the range of non-planning policies aimed at decarbonising electricity generation such as EU ETS …". It is clear therefore that the policy is seen by the Government as compatible with the policies on need in Part 3. There is no suggestion that it removes or qualifies the general "presumption in favour of granting consent to applications for energy NSIPs" in paragraph 4.1.2, which is founded on the "level and urgency of need for infrastructure of the types covered by the energy NSIPs set out in Part 3" – including fossil fuel generating capacity.

86. Seen in this context, the policy itself is plain in its meaning. It says that "… CO2 emissions are not reasons to prohibit the consenting of projects which use these technologies …". And it adds that although an assessment of CO2 emissions will be included in an environmental statement for a proposed development, the policies in Part 2 of EN-1 apply to them, and in decision-making it is unnecessary "to assess individual applications in terms of carbon emissions against carbon budgets …". The same policy, but specifically for "fossil fuel generating stations", appears in paragraph 2.5.2 of EN-2, which acknowledges that "CO2 emissions are a significant adverse impact of fossil fuel generating stations".

87. The force of the policy, therefore, is not that CO2 emissions are irrelevant to a development consent decision, or cannot be given due weight in such a decision. It is simply that CO2

emissions are not, of themselves, an automatic and insuperable obstacle to consent being given for any of the infrastructure for which EN-1 identifies a need and establishes a presumption in favour of approval. If they were, the policy need and the policy presumption would effectively be negated for certain forms of infrastructure supported by EN-1, and those essential provisions contradicted. Paragraph 5.2.2 does not diminish the need for relevant energy infrastructure established in national policy or undo the positive presumption. But nor does it prevent greenhouse gas emissions from being taken into account as a consideration attracting weight in a particular case. How much weight is for the decision-maker to resolve. It follows that, in a particular case, such weight could be significant, or even decisive, whether with or without another "adverse impact". This, I accept, differs from the judge's conclusion, in paragraph 179 of his judgment, that greenhouse gas emissions are not capable of being "treated as a freestanding reason for refusal".

88. The Secretary of State's understanding of the policy was, in my view, the correct one. Having concluded that "the presumption in favour of fossil fuel generation" applied, she directed herself to consider "whether any more specific and relevant policies … in the relevant NPSs clearly indicate that consent should be refused", given the examining authority's conclusion that "there would be significant adverse effects from the [development] in respect of GHG emissions which gave rise to a perceived conflict with the decarbonisation objective of EN-1" (paragraph 4.14). She thought not, for three reasons. First, as she reminded herself in the light of section 2.2 of EN-1, "climate change and the UK's GHG emissions reduction targets contained in the [Climate Change Act] have been taken into account in preparing the suite of Energy NPSs" (paragraph 4.15 of the decision letter). Secondly, having in mind the policy in paragraph 5.2.2 of EN-1 and paragraph 2.5.2 of EN-2, she acknowledged "the significant adverse impact of the proposed Development on the amount of greenhouse gases that will be emitted to atmosphere", but recognised that the policy "makes clear that this is not a matter that … should displace the presumption in favour of granting consent" (paragraphs 4.15 and 4.16). And thirdly, she concluded, unequivocally, that "the Development's adverse carbon impacts do not lead to the conclusion that the Development is not in accordance with the relevant NPSs or that they would be inconsistent with the [Climate Change Act]" (paragraph 4.17).

89. That, however, was not the end of the Secretary of State's consideration of greenhouse gas emissions. As she went on to say, she was aware of the "need to consider these impacts within the overall planning balance to determine whether the exception test set out in section 104(7) of [the Planning Act] applies in this case". She referred to the examining authority's conclusion that the development would have "significant adverse impacts in terms of GHG emissions", which she accepted "may weigh against it in the balance". But she disagreed with the examining authority's finding "that these impacts and the perceived conflict with NPS policy … should carry determinative weight in the overall planning balance once the benefits of the project are properly considered, including in particular its contribution towards meeting need …" (paragraph 4.17). In saying this, the Secretary of State was accepting that greenhouse gas emissions had a place in the balancing exercise she was going to conduct, though she concluded that they should not have "determinative weight". There is no legal flaw in this conclusion. It is faithful to the policy in paragraph 5.2.2 of EN-1.

90. So too is the Secretary of State's subsequent conclusion, heeding the commitment to "Net Zero" in the amendment to the Climate Change Act, that this did not justify "… attributing the Development's negative GHG emissions any greater weight in the planning balance" (paragraph 5.9).

91. When she came to the balancing exercise under section 104(7) (in paragraphs 6.1 to 6.9 of the decision letter), the Secretary of State expressly considered the examining authority's view that "considerable negative weight" should be attached to "impacts on decarbonisation and climate change" (paragraph 6.5). She referred to "the GHG emissions from the Development" when considering the weight to be given to the need for it under EN-1 (paragraph 6.6). She dealt specifically with the weight given to greenhouse gas emissions as "a significant adverse impact" of fossil fuel generating stations, which EN-2 acknowledges it to be in paragraph 2.5.2. She said, rightly, that EN-1 and EN-2 did not require her "to assess [greenhouse gas emissions] against emissions reduction targets", which matches the similar statement in paragraph 5.2.2 of EN-1 and paragraph 2.5.2 of EN-2. She also said, again rightly, that EN-1 does "[not] state that [greenhouse gas emissions] are a reason to withhold the grant of consent for such projects", which corresponds to the statement in paragraph 5.2.2 that they are "not reasons to prohibit the consenting of projects which use these technologies …". She accepted it was "open" to her to "depart from the NPS policies" and "give greater weight to GHG emissions in the context of the Drax application". But she found "no compelling reason to do so" in this case (paragraph 6.7).

92. Paragraph 6.7 of the decision letter, and especially the reference to her having decided not to give them "greater weight" than is indicated in national policy, shows that the Secretary of State did give weight to greenhouse gas emissions in the balancing exercise as a "significant adverse impact", in accordance with the relevant policies in EN-1 and EN-2. Her acknowledgment that she was free to give this consideration "greater weight", and to "depart from the NPS policies" is, I think, telling. This paragraph of the decision letter betrays no misunderstanding of the relevant policies. It makes it impossible to submit that "greenhouse gas emissions" were excluded from the balance, or given no weight. To suggest that the Secretary of State meant to say, though she did not, that greenhouse gas emissions had no place in the balance is mistaken. Nor can it be said that she was not entitled to assess weight in the way she did. The policy was properly interpreted and lawfully applied.

93. In the striking of the balance, the weight given to greenhouse gas emissions in combination with the weight given to the "negative visual and landscape impacts" (paragraph 6.8), as "adverse effects" of the development, was not as strong as the weight the Secretary of State gave to its "positive effects", including its "contribution to meeting the need case set out in the NPSs" (paragraph 6.9). This was a classic balancing exercise, in which weight was lawfully given to each of the relevant factors.

94. The Secretary of State did not misdirect herself on the meaning and effect of the policy in paragraph 5.2.2 of EN-1 and paragraph 2.5.2 of EN-2, or misapply it. She did not read it as purporting to make CO2 emissions, or greenhouse gas emissions, irrelevant in a decision on an application for a development consent order. She clearly did not regard herself as constrained by EN-1 to treat greenhouse gas emissions as having no bearing on her decision on the Drax project – either because there are other means by which the United Kingdom seeks to reduce greenhouse gas emissions from infrastructure, including the EU Emissions Trading System, or for any other reason.

95. One cannot say that she misunderstood the purpose of environmental impact assessment under the EIA Directive and the EIA Regulations, or the relevance of an assessment of CO2 emissions in an environmental statement for a project within the scope of EN-1 and EN-2. As Mr Tait submitted, the requirement to assess the environmental impacts of a development,

under regulation 21 of the EIA Regulations, is not incompatible with a statement of national policy in which the Government explains how impacts of a particular kind are viewed, and how they are being addressed by different means. And there is no basis here for the submission that the Secretary of State thought the policy in paragraph 5.2.2 of EN-1 could, in principle, prevent greenhouse gas emissions, if assessed as a likely significant effect on the environment in an environmental statement, from warranting a refusal of development consent. This was not a conclusion she reached, nor implicit in any she did.

96. The law on "material considerations" in the sphere of decision-making on applications for planning permission under section 70 of the Town and Country Planning Act 1990 does not assist Mr Jones' argument. It does not go to the issue we are concerned with, which is whether the Secretary of State, in making her decision on the Drax proposal, misinterpreted and misapplied policies in national policy statements produced under the self-contained statutory regime for such projects in the Planning Act. The relevant provisions for decision-making in that statute do not refer to "material considerations" – though of course normal public law principles will apply to proceedings challenging a development consent order. But in any event the relevant policies here, in EN-1 and EN-2, exemplify the wide scope of the policy-making power in section 5(5) of the Planning Act, in particular subsections (5)(c) and (5)(f). Their merits as policy are not contested in these proceedings, and could not be. It is enough for us to conclude, as I think we should, that they were neither misinterpreted nor misapplied by the Secretary of State when making her decision on the Drax project.

97. On this issue, therefore, as on the first, I think the appeal should fail.

Did the Secretary of State misinterpret and misapply section 104(7) of the Planning Act?

98. The essence of ClientEarth's argument on this issue is that the Secretary of State failed to discharge her obligation under section 104(7) of the Planning Act to weigh the "adverse impact" of the proposed development against its "benefits", simply repeating her assessment under section 104(3). Though ClientEarth accepts that policy in a national policy statement is relevant to the exercise under section 104(7), it contends that the Secretary of State erred by taking the same approach to the issues of need and greenhouse gas emissions, in paragraphs 6.6 and 6.7 of the decision letter, as she had already taken in considering the policies in the national policy statements under section 104(3). In effect, she fettered her assessment under section 104(7).

99. Holgate J. saw no difficulty in rejecting this ground of the claim. Citing the decision of this court in *R. (on the application of Thames Blue Green Economy Ltd.) v Secretary of State for Communities and Local Government* [2015] EWCA Civ 876, and at first instance in the same case ([2015] EWHC 727 (Admin)), and also that of the Divisional Court in *R. (on the application of Spurrier) v Secretary of State for Transport* [2020] P.T.S.R. 240, he acknowledged that section 104(7) may not be used to "circumvent the application of ss.87(3), 104(3) and 106(2)" of the Planning Act (paragraph 176 of the judgment). But the Secretary of State was "legally entitled to … give "substantial weight" to the need case in accordance with the NPS", and "fully entitled to take that assessment into account under s.104(7)" (paragraph 177 of the judgment). In paragraph 6.7 of the decision letter she recognised that in EN-1 greenhouse gas emissions are accepted to be a "significant adverse impact", and then went on to consider whether, in the section 104(7) balance, that factor should be given "greater weight" in the case of the Drax proposal. The proposal also gave rise to landscape and visual

impacts, which were "further disbenefits". The suggestion that the Secretary of State looked at the balance under section 104(7) "solely through the lens of, or improperly fettered by, the NPSs" was "untenable" (paragraph 179). She decided not to give "greater weight" to greenhouse gas emissions because she found there to be "no compelling reason in this instance". To criticise this as improperly introducing a "threshold test" was "an overly legalistic approach to the reading of the decision letter". The Secretary of State was "simply expressing a matter of planning judgment", and "saying that there was no sufficiently cogent reason for giving more weight to this matter". She was "entitled to exercise her judgment in that way". She went on, in paragraph 6.9, to "weigh all the positive and negative effects of the proposal before concluding that the benefits outweighed the adverse effects of the proposal" (paragraph 180).

100. Mr Jones submitted that the availability of the power to review under section 6 of the Planning Act does not prevent reduced weight being given to policies in a national policy statement that have become out-of-date, or greater weight to other "material considerations" because circumstances have changed since the designation of the national policy statement – such as greenhouse gas emissions in the light of the target of "Net Zero" (see *Spurrier*, at paragraph 109). If that balancing exercise results in "adverse impacts" outweighing "benefits", the obligation under section 104(3) to determine the application in accordance with the national policy statement is released. The section 104(3) assessment must not be allowed to override the operation of section 104(7).

101. Yet, Mr Jones submitted, that is what the Secretary of State did in her assessment under section 104(7). She assumed the project would contribute to the identified need in EN-1 for CCR fossil fuel generation simply because it was a project of that type, but failed to consider the weight to be given to its actual contribution to meeting a national need. And in dealing with greenhouse gas emissions, she merely asked herself whether to give them "greater weight" than was contemplated in the relevant policy in EN-1. This was wrong. Section 104(7) involves a balancing exercise in which any "adverse impact" should be considered, no matter how that kind of impact is addressed in the relevant national policy statement. While an objector in a development consent order examination cannot challenge the need for a type of energy infrastructure included in EN-1 or contend that consent should be refused because the development is of a type that generates greenhouse gas emissions, it can argue under section 104(7) that the greenhouse gas emissions of this proposed development are an "adverse impact" outweighing its "benefits". This does not offend the principle that matters settled by a national policy statement should not be revised or re-opened in a development consent order process (see *Spurrier*, at paragraphs 103 to 105 and 107, and the first instance judgment in *Thames Blue Green Economy Ltd.*, at paragraphs 8 and 9, and 37 to 43).

102. In my view, as Mr Tait and Mr Strachan submitted, this argument is not sound. The Secretary of State did not adopt an unlawful approach to the assessment required under section 104(7). She did not fetter that assessment. She carried out the balancing exercise required, taking into account the considerations relevant to it and giving them lawful weight. No legal error was made.

103. The reasoning on this issue largely coincides with that on the previous two, which need not be repeated. There are six main points.

104. First, the purpose of the balancing exercise in section 104(7) is to establish whether an exception should be made to the requirement in section 104(3) that an application for

development consent must be decided "in accordance with any relevant national policy statement". The exercise involves a straightforward balance, setting "adverse impact" against "benefits". It is not expressed as excluding considerations arising from national policy itself. It does not restrain the Secretary of State from bringing into account, and giving due weight to, the need for a particular type of infrastructure as recognised in a national policy statement, and setting it against any harm the development would cause (see the judgment of Sales L.J. in *Thames Blue Green Economy Ltd.*, at paragraph 16).

105. Secondly, however, as Mr Tait and Mr Strachan submitted, section 104(7) may not be used to circumvent other provisions in the statutory scheme, including section 106(1)(b), which enables the Secretary of State, when deciding an application for development consent, to "disregard representations" relating to "the merits of policy set out in a national policy statement". It does not provide a means of challenging such policy, or of anticipating a review under section 6, which is the process for accommodating changes of circumstances after designation (see *Spurrier*, at paragraphs 106 to 110).

106. Thirdly, in this case the Secretary of State identified her task under section 104(7) in paragraph 6.1 of the decision letter. She did so accurately by setting out the provisions of both subsection (3) of section 104 and subsection (7), and directing herself that she would "need to consider the impacts of any proposed development and weigh these against the benefits of any scheme".

107. Fourthly, the Secretary of State concluded in paragraph 6.2, on the basis of her earlier conclusions in paragraphs 4.8 to 4.20, that the proposed development was "in accordance with EN-1", having satisfied herself that it "should benefit from [the policy presumption in favour of granting consent for energy NSIPs in EN-1] because there are no more specific and more relevant NPS policies which clearly indicate that consent should be refused" and that "therefore the Development accords with relevant NPSs". This was a lawful conclusion.

108. Fifthly, the Secretary of State undertook the balancing exercise under section 104(7) in paragraphs 6.3 to 6.9, concluding in paragraph 6.9 that "[on] balance … the benefits of the Development outweigh its adverse effects". This too was a lawful conclusion. There is nothing illogical or unlawful in recognising the general policy that greenhouse gas emissions are "not reasons to prohibit the consenting of projects", but considering whether to "give greater weight to GHG emissions in the context of the Drax application" and deciding not to do so. In undertaking the section 104(7) balance, this was perfectly appropriate.

109. Sixthly, there is no question of the Secretary of State having fettered herself in striking the section 104(7) balance, either by proceeding as if she had to adhere slavishly to the policies in EN-1 and EN-2, including the policies on need and on greenhouse gas emissions, or in any other way. She took those policies into account. But she did not regard herself as unable to give such weight to the proposal's compliance with them as she thought was right in the circumstances. In weighing the adverse effect of greenhouse gas emissions in paragraph 6.7, she took account of "the Government's policy and legislative framework for delivering a net zero economy by 2050". She acknowledged that she was free to "depart from the NPS policies and give greater weight to GHG emissions" in this case, but decided not to do so. I do not read her reference to there being "no compelling reason" as setting some unduly onerous test. She was merely expressing a lawful planning judgment on the facts of the case – as she also did on the question of need in paragraph 6.9, where she recognised that there were

"strong arguments" weighing in favour of granting consent for a development of this capacity, because of its "contribution to meeting the need case set out in the NPSs".

110. In my view, therefore, the appeal should not succeed on this issue.

Conclusion

111. For the reasons I have given, I would dismiss the appeal.

Lord Justice Lewis

112. I agree.

Lord Justice Lewison

113. I also agree.

APPENDIX C: Clientearth (High Court) [2020] EWHC 1303

Neutral Citation Number: [2020] EWHC 1303 (Admin)

Case No: CO/4498/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/05/2020

Before :

THE HON. MR JUSTICE HOLGATE

- -

Between :

The Queen on the application of ClientEarth	**Claimant**
- and -	
Secretary of State for Business, Energy and Industrial Strategy	**Defendant**
-and-	
Drax Power Ltd	**Interested Party**

- -
- -

Mr Gregory Jones QC and Ms Merrow Golden (instructed by **ClientEarth**) for the **Claimant**
Mr Andrew Tait QC and Mr Ned Westaway (instructed by **Government Legal Department**) for the **Defendant**
Mr James Strachan QC and Mr Mark Westmoreland Smith (instructed by **Pinsent Masons LLP**) for the **Interested Party**

Hearing dates: 28th – 30th April 2020

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, released to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 14:00 on the 22th May 2020

Mr Justice Holgate :

Introduction

1. The Claimant, ClientEarth, applies under s. 118 of the Planning Act 2008 ("PA 2008") for judicial review of the decision by the Defendant, the Secretary of State for Business, Energy and Industrial Strategy, on 4 October 2019 to grant the application made by Drax Power Limited ("Drax") for a development consent order ("DCO") for a "nationally significant infrastructure project" ("NSIP"): the construction and operation of two gas-fired generating units situated at the existing Drax Power Station near Selby in North Yorkshire ("the development"). The Order made by the Secretary of State is The Drax Power (Generating Stations) Order 2019 (SI 2019 No. 1315) ("the Order").

2. The Claimant is an environmental law charity. Its charitable objects include the enhancement, restoration, conservation and protection of the environment, including the protection of human health, for the public benefit.

3. This challenge raises important issues on (a) the interpretation of the Overarching National Policy Statement for Energy ("EN-1") and the National Policy Statement for Fossil Fuel Electricity Generating Infrastructure ("EN-2"), both of which applied to the proposal, and (b) their legal effect in the determination of the application for a DCO, particularly as regards the need for the development and greenhouse gas emissions ("GHG"). These National Policy Statements ("NPSs") were designated in July 2011.

4. The proposal by Drax gave rise to a number of controversial issues which were considered during the examination of the application. Some of those issues are raised in grounds of challenge in these proceedings. It is important to emphasise at the outset that it is not for the court to consider the merits of the proposed development or of the objections made to it. It is only concerned with whether an error of law was made in the decision or in the process leading up to it.

5. On 29 May 2018 Drax made its application under s. 37 of PA 2008 for the Order. On 26 June 2018 the Secretary of State accepted the application under s. 55. On 16 July 2018 a panel comprising two members was appointed to be the examining authority (the "ExA" or "Panel"). Their responsibility was to conduct the examination of the application and to report on it to the Secretary of State with conclusions and a recommendation as to how it should be determined (under chapters 2 and 4 of Part 6 of PA 2008). The examination began on 4 October 2018 and was completed on 4 April 2019.

6. The Panel produced their report dated 4 July 2019. They recommended that consent for the development be withheld. The Secretary of State disagreed with that recommendation and on 4 October 2019 decided to make the Order (with minor modifications). The decision was taken by the Minister of State acting on behalf of the Defendant.

The development

7. The development involves the construction of two gas-fired units (units X and Y) utilising some of the existing infrastructure of two coal-fired units currently in operation at the site (units 5 and 6 with a total output of 1320 MW), which are due to be

decommissioned in 2022. Each unit would comprise combined cycle gas turbine ("CCGT") and open cycle gas turbine ("OCGT") technology, with a capacity of up to 1,800 MW. Each unit would also have battery storage of up to 100 MW, giving the development an overall capacity of up to 3,800 MW.

8. The development also includes switchgear buildings, a natural gas reception facility, an above ground gas installation, an underground gas pipeline, underground electrical connections, temporary construction areas, a reserve space for Carbon Capture Storage ("CCS"), landscaping and biodiversity measures, demolition and construction of sludge lagoons, removal of an existing 132 kV overhead line, pylons and further associated development. The development would also involve a 3 km gas pipeline connecting to the National Grid Feeder lying to the east of the site.

9. The construction of Unit X was expected to begin in 2019/2020 and be completed by 2022/2023. If Unit Y were to be built, the construction was expected to start in 2024 and be completed by 2027. The development is designed to operate for up to 25 years, after which Drax has stated that it would review the development's continued operation. The Order does not contain any condition restricting the period for which the facility may be operated.

Need for the development

10. The Claimant participated in the examination, by attending hearings and submitting a number of written representations. The Claimant objected to the development on the grounds that its adverse impacts outweighed its benefits, both as assessed under the NPSs and through the application of the balancing exercise required by s 104(7) of PA 2008 (see below). The Claimant's position was that there was no need for the proposed development and that it would have significant adverse environmental impacts, particularly in respect of likely GHG emissions, the risk of "carbon lock-in" and impact on climate change.

11. Drax's position throughout the examination was that the need for the development, being a type of generating station identified in Part 3 of NPS EN-1, was established through that NPS and that substantial weight should be attributed to the contribution the development would make to meeting the needs for additional energy capacity (both security of supply and to assist in the transition to a low carbon economy). Drax contended that the substantial weight attributable to the development's actual contribution to meeting needs identified in EN-1 was not outweighed by the adverse impacts of the development.

Climate change and GHG emissions

12. The Environmental Statement ("ES") submitted with the application contained an assessment of the likely significant effects of the development upon climate change. It estimated that the development would cause GHG emissions to increase from 188,323,000 tCO2e to 287,568,000 tCO2e over the period 2020 to 2050 against the baseline position, a 90% net increase. But at the same time, there would be an increase in the maximum generating capacity from 1320 MW to 3600 MW for the development (excluding the battery storage capability), representing an increase of 173% in the maximum electricity generating capacity.

13. Relating the emissions produced to the generating capacity, the ES assessed that the GHG emissions *intensity* for the existing coal fired units would be 840 gCO2e/kWh in the period 2020 to 2025 and fall to 450 gCO2e/kWh in the period 2026 to 2050 in the baseline scenario. For the development, the figure would be 380 gCO2e/kWh, representing a 55% reduction in GHG intensity for the period 2023 to 2025 and a 16% reduction in the period 2026 to 2050.

14. According to the Claimant's assessment, the development would result in a 443% increase in emissions intensity (using an average baseline emissions intensity of 70 gCO2e/kWh) and a 488% increase in total GHG emissions.

15. There was no disagreement as to the possible extent of future emissions from the proposed development; the disagreement was over the baseline against which they should be assessed and thus the likely net effect of the development. It was common ground between the parties during the examination that an increase in total GHG emissions of 90% represented a significant adverse effect.

An overview of the conclusions of the Panel and the Secretary of State

16. The Panel concluded that "a reasonable baseline was likely to be somewhere in between" the figures assessed by Drax and by the Claimant and so the increase in GHG emissions was likely to be higher than had been estimated by Drax (paras. 5.3.22 and 5.3.27-5.3.28).

17. The Panel concluded that whilst the NPSs supported a need for additional energy infrastructure in general, Drax had not demonstrated that the development itself met an identified need for gas generation capacity when assessed against EN-1's overarching policy objectives of security of supply, affordability and decarbonisation. It found that the development would not accord with the Energy NPSs and that it would undermine the Government's commitment to cut GHG emissions, as set out in the Climate Change Act 2008 ("CCA 2008") (paras. 5.2.4, 5.3.27, 7.2.7, 7.2.10, and 11.1.2)

18. Applying the balancing exercise in s. 104(7) of the PA 2008, the Panel concluded that the adverse impacts of the development outweighed the benefits, the case for development consent had not been made out and so consent should be withheld (section 7.3).

19. The Secretary of State disagreed with the Panel's recommendation and decided that the Order should be made, concluding at DL 7.1 that "there is a compelling case for granting consent for the development" and that:-

> "…The Secretary of State considers that the Development would be in accordance with the relevant NPSs and, given the national need for such development as set out in the relevant NPSs, the Secretary of State does not believe that its benefits are outweighed by the Development's potential adverse impacts, as mitigated by the proposed terms of the Order. As such, the Secretary of State has decided to make the Order granting development consent ….."

20. The Secretary of State disagreed with the Panel on need. In summary, she decided that EN-1 assumed a general need for fossil fuel generation and did not draw any distinction

between that general need and the need for any particular proposed development. She also stated that substantial weight should be given to a project contributing to that need.

21. The Secretary of State noted the significant adverse impact that the development would have, through the amount of GHGs that would be emitted to the atmosphere, but at DL 4.15-4.16 she relied upon paragraph 5.2.2 of EN-1 and paragraph 2.5.2 of EN-2 to conclude that those emissions did not afford a reason for refusal of consent or to displace the presumption in the policy in favour of granting consent (see also DL 6.7).

22. In DL 6.8 and 6.9 the Secretary of State referred to negative visual and landscape impacts and to the positive effects of the development regarding biodiversity and socio-economic matters and the proposed re-use of existing infrastructure at the power station. She concluded that "there are strong arguments in favour of granting consent for the full, two gas units and two battery storage units, 3.8 GW project because of its contribution to meeting the need case set out in the NPSs". She therefore considered that the benefits of the proposal outweighed its adverse effects for the purposes of s. 104(7) of the PA 2008.

23. Originally the Claimant advanced 9 grounds of challenge to the Secretary of State's decision. In summary the raised the following issues:

> **Ground 1:** The Defendant misinterpreted the NPS EN-1 on the assessment of the "need" for the Development.
>
> **Ground 2:** The Defendant failed to give adequate reasons for her assessment of the "need" for the Development.
>
> **Ground 3:** The Defendant misinterpreted NPS EN-1 on the assessment of GHG emissions.
>
> **Ground 4:** The Defendant misinterpreted and misapplied section 104(7) of the Planning Act 2008.
>
> **Ground 5:** The Defendant failed to assess the carbon-capture readiness of the Development correctly in accordance with EN-1.
>
> **Ground 6:** The Defendant failed to comply with the requirements of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017.
>
> **Ground 7:** The Defendant's consideration of the net zero target was procedurally unfair and, or in the alternative, the Defendant failed to give adequate reasons for her consideration of the net zero target.
>
> **Ground 8:** The Defendant failed to fully consider the net zero target, including whether to impose a time-limiting condition on the Development.
>
> **Ground 9:** The Decision was irrational.

24. This judgment is structured as follows (with paragraph numbers):-

25. Before going any further, I would like to express my gratitude for the way in which this case was presented and argued by Counsel and Solicitors on all sides and for the help which the court received. There was a good deal of co-operation in the production of electronic bundles to ensure that these complied with the various protocols and guidance on remote hearings and were relatively easy to use despite the amount of material which needed to be included.

The Planning Act 2008

The White Paper: Planning for a Sustainable Future

26. The statutory framework of the Planning Act 2008 was summarised by the Divisional Court in R (Spurrier) v Secretary of State for Transport [2020] PTSR 240 at [20] to [40]. This bespoke form of development control for NSIPs had its origins in the White Paper published in May 2007, "Planning for a Sustainable Future" (Cm. 7120). A key problem which the legislation was designed to tackle was the lack of clear statements of national policy, particularly on the national need for infrastructure. This had caused, for example, significant delays at the public inquiry stage because national policy had to be clarified and need had to be established through the inquiry process for each individual application. Sometimes the evidence at individual inquiries might not have given a sufficiently full picture. Furthermore, there was no prior consultation process by which the public and interested parties could participate in the formulation of national policy, which might only emerge through ad hoc decisions by ministers on individual planning appeals.

27. Paragraph 3.2 of the White Paper pointed out that the absence of a clear national policy framework can make it more difficult for developers to make investment decisions which by their nature are often long term in nature and "therefore depend on government policy and objectives being clear and reasonably stable."

28. Paragraph 3.4 stated that NPSs:-

> "would integrate the Government's objectives for infrastructure capacity and development with its wider economic, environmental and social policy objectives, including climate change goals and targets, in order to deliver sustainable development."

29. Paragraph 3.8 explained that NPSs would need to reflect differences between infrastructure sectors, so that in contrast to projects dependent on public funding where Government has a large influence on what goes ahead:-

> "where government policy is primarily providing a framework for private sector investment determined by the market, policy statements are likely to be less prescriptive."

Likewise, paragraph 3.9 recognised that in the energy sector:-

> "the precise energy mix, and therefore the nature of infrastructure needed to meet demand, is determined to a large extent by the market."

30. Paragraph 3.11 stated:-

> "There should therefore be no need for inquiries on individual applications for development consent to cover issues such as whether there is a case for infrastructure development, what that case is, or the sorts of development most likely to meet the need for additional capacity, since this will already have been addressed in the national policy statement. It would of course be open to anyone to draw the Government's attention to what they believe is new evidence which would affect the current validity of a national policy statement. Were that to happen, the relevant Secretary of State would then decide whether the evidence was both new and so significant that it warranted revisions to national policy. The proposer of the new evidence would be informed of the Secretary of State's decision. This would ensure that inquiries can focus on the specific and local impacts of individual applications, against the background of a clear assessment of what is in the national interest. This, in turn, should result in more focused and efficient inquiry processes."

31. So the object was for policies on matters such as the need for infrastructure to be formulated and tested through the process leading up to the decision to adopt a national policy statement and to that extent they would not be open to challenge through subsequent consenting procedures. New evidence, such as a change in circumstance since the policy was adopted, would be addressed by the Secretary of State making a revision to the policy, in so far as he or she judged that to be appropriate. In essence, the 2008 Act gave effect to these principles.

Statutory Framework

32. Section 5(1) of the 2008 Act enables the Secretary of State to designate a NPS setting out national policy on one or more descriptions of development. Before doing so the Secretary of State must carry out an appraisal of the sustainability of the policy (s.5(3)). In addition, the Secretary of State will normally be required to carry out a strategic environmental assessment ("SEA") in compliance with the Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004 No 1633). The SEA process itself involves consultation with the public and relevant authorities.

33. The Secretary of State must also comply with the publicity and consultation requirements laid down by s.7 and the proposed NPS must undergo Parliamentary scrutiny under s.9.

34. Section 5(5)(a) provides that a NPS may "set out, in relation to a specified description of development, the amount, type or size of development of that description which is appropriate nationally or for a specified area." Thus, policy in a NPS may determine the need for a particular infrastructure project, or development of a particular type (Spurrier at [99]). It may describe that need in quantitative or qualitative terms, or a mixture of the two.

35. Section 5(5)(c) enables policy in a NPS to determine "the relative weight to be given to specific criteria." So, for example, a NPS may determine that the need for a development should be given "substantial weight" in the decision on an application for a DCO.

36. Section 5(7) requires a NPS to "give reasons for the policy set out in the statement." As the Divisional Court explained in Spurrier, that obligation deals with the supporting rationale for the policies in the NPS which the Secretary of State decides to include ([118] to [120]). In that context, section 5(8) requires those reasons to include "an explanation of how the policy set out in the statement takes account of Government policy relating to the mitigation of, and adaptation to, climate change."

37. Section 6(1) obliges the Secretary of State to review a NPS whenever he thinks it appropriate to do so. Under section 6(3):-

> "In deciding when to review a national policy statement the Secretary of State must consider whether—
>
> > (a) since the time when the statement was first published or (if later) last reviewed, there has been a significant change in any circumstances on the basis of which any of the policy set out in the statement was decided,
> >
> > (b) the change was not anticipated at that time, and
> >
> > (c) if the change had been anticipated at that time, any of the policy set out in the statement would have been materially different."

Section 6(4) employs the same three criteria for reviews of part of a NPS.

38. So the Secretary of State must consider not only whether there has been a significant change in circumstance on the basis of which policy in the NPS was decided, and which

was not anticipated when the NPS was first published, but also whether if that change had been so anticipated, the policy would have been materially different. If not, then the power to review is not engaged and the NPS continues in force unamended. But if a review is carried out, any revised policy is also subject to sustainability appraisal, SEA, publicity, consultation and Parliamentary scrutiny. Thus, the 2008 Act proceeds on the legal principle that significant changes in circumstances affecting the basis for, or content of, a policy may only be taken into account through the statutory process of review under s.6 (Spurrier at [108]).

39. Section 10(2) requires the Secretary of State to exercise his functions under ss.5 or 6 "with the objective of contributing to the achievement of sustainable development." By s.10(3) the Secretary of State must (in particular) have regard to the desirability of *inter alia* "mitigating, and adapting to, climate change." In Spurrier the Divisional Court held that the PA 2008 and the CCA 2008 should be read together. They were passed on the same day and the language which is common to ss.5(8) and 10(3) of the PA 2008 refers to the very objective of the CCA 2008. As Hansard shows that is confirmed by the way in which these provisions were introduced into the legislation (see Spurrier at [644] to [647]).

40. Thus, EN-1 and EN-2 had to satisfy all these statutory requirements, including the obligation to promote the objective of CCA 2008, before they could finally be designated. Even then, they could have been the subject of legal challenge by way of judicial review under s.13 of PA 2008.

41. Once a NPS has been designated, sections 87(3), 94(8) and 106(1) enable the examining authority during the examination of an application for a DCO, and the Secretary of State when determining an application for a DCO, to disregard *inter alia* representations, including evidence, which are considered to "relate to the merits of policy set out in a national policy statement."

42. Mr. Tait QC for the Secretary of State and Mr. Strachan QC for Drax submitted that these provisions give effect to the principle that the policy laid down in an NPS, for example on the need for particular infrastructure, is to be treated as settled for the purposes of examining and determining an application for a DCO, and thus not open to challenge in that process. That principle has been considered by the courts in R (Thames Blue Green Economy Limited) v Secretary of State for Communities and Local Government [2015] EWHC 727 (Admin); [2015] EWCA Civ 876; [2016] J.P.L. 157; R (Scarisbrick) v Secretary of State for Communities and Local Government [2017] EWCA Civ 787; and Spurrier at [99] to [111], to which I return below.

43. The Claimant in this case seeks to protect environmental and health interests of great public importance which it says argue strongly against any development of the kind proposed taking place. But those matters are not freestanding. There are also other public interest issues which operate in favour of such development, such as its contribution to security and diversity of energy supply and the provision of support for the transition to a low carbon economy. Policy-making in this area involves the striking of a balance in which these and a great many other issues are assessed and weighed, This is carried on at a high strategic level and involves political judgment as to what is in the public interest.

44. The scheme in the PA 2008 for the making of national policy accords with well-established constitutional principles. As the Divisional Court said in Spurrier [2020] PTSR 240 at [153]:-

> "Under our constitution policy-making at the national level is the responsibility of democratically-elected governments and ministers accountable to Parliament. As Lord Hoffmann said in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, paras 69 and 74: "It does not involve deciding between the rights or interests of particular persons. It is the exercise of a power delegated by the people as a whole to decide what the public interest requires."

45. Also in Alconbury Lord Clyde stated at [140]:-

> "Planning and the development of land are matters which concern the community as a whole, not only the locality where the particular case arises. They involve wider social and economic interests, considerations which are properly to be subject to a central supervision. By means of a central authority some degree of coherence and consistency in the development of land can be secured."

and at [141]:-

> "Once it is recognised that there should be a national planning policy under a central supervision, it is consistent with democratic principle that the responsibility for that work should lie on the shoulders of a minister answerable to Parliament."

46. Under the PA 2008 responsibility for the content and merits of policy in a NPS, or for the merits of revising any such policy, lies with the relevant Secretary of State who is accountable to Parliament. For example, it is open to Parliament to raise questions with a Minister as to whether a NPS needs to be reviewed because of a change in circumstances. The court's role is limited to the application of principles of public law in proceedings for judicial review brought in accordance with the terms of the Act.

47. Part 3 of PA 2008 defines those developments which qualify as NSIPs to which the DCO code and the relevant NPS apply. By s.15 a generating station with a capacity in excess of 50 MW if located onshore or 100 MW if located offshore, is treated as a NSIP. Smaller scale generating projects are excluded from this statutory scheme and fall within the normal development control regime under the Town and Country Planning Act 1990 ("TCPA 1990").

48. Section 104 applies to the determination of an application for a DCO where a NPS is applicable. Section 104(2) requires the Secretary of State to have regard to (inter alia) a relevant NPS. Section 104(3) goes further:-

> "The Secretary of State must decide the application in accordance with any relevant national policy statement, except to the extent that one or more of subsections (4) to (8) applies."

It is important to note the words in s.104(3) "except to the extent that", recognising that an exception in subsections (4) to (8) may only have the effect of disapplying the obligation in s.104(3) as regards part of a NPS, or perhaps part of a project.

49. Section 104(5) provides:-

> "This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the Secretary of State being in breach of any duty imposed on the Secretary of State by or under any enactment."

50. Section 104(7) provides:-

> "This subsection applies if the Secretary of State is satisfied that the adverse impact of the proposed development would outweigh its benefits."

51. Where an application is made for a DCO for development to which a NPS applies, and the Secretary of State considers that the NPS should be reviewed under s.6 before the application is determined, he may suspend the examination of that application until the review is completed (s.108).

52. Section 116 imposes on the Secretary of State an obligation to give reasons for the decision under s.114 whether to grant or refuse development consent.

The National Policy Statements on energy infrastructure

EN-1

53. EN-1 sets out the overarching policy for delivery of major energy infrastructure. It is to be read alongside 5 technology-specific NPSs for the energy sector (para. 1.7). In the present case EN-2 is relevant.

54. EN-1 falls into 5 parts. Following an introductory section, Part 2 sets out Government policy on "energy and energy infrastructure development", including section 2.2 "The road to 2050". Part 3 is devoted to the Government's policy on the need for new NSIPs in the energy sector. Part 4 contains assessment principles for matters not falling within Parts 3 or 5. Part 5 addresses "generic impacts", in the sense of impacts arising from any type of energy infrastructure covered by the NPSs, or impacts arising in similar ways in relation to at least two energy NPSs. Technology-specific impacts are generally covered in the relevant NPS (para. 5.1.1).

55. Section 1.7 refers to the Appraisal of Sustainability ("AoS") carried out for all the energy NPSs, incorporating material required for SEA. The primary function of the AoSs was to inform consultation on the draft NPSs by providing an analysis of the environmental, social and economic impacts of granting DCOs for large-scale energy infrastructure projects in accordance with those policies (para. 1.7.1).

56. Paragraph 1.7.2 states that the energy NPSs should speed up transition to a low carbon economy and thus help to realise UK climate change commitments; but it recognised uncertainty because of difficulty in predicting "the mix of technology that will be delivered by the market against the framework set by the Government".

57. In accordance with the requirements of the 2004 Regulations for SEA, the AoS assessed "reasonable alternatives" to the policies set out in EN-1 at a strategic level (para. 1.7.5). Alternative A3 placed more emphasis on reducing CO_2 emissions which would be beneficial for climate change (para.1.7.8). It was concluded that it would not be possible

to give practical effect to that alternative *through the planning system* in the next 10 years or so without adverse risks to the security of supply. Alternative A3 was not preferred to the policies in EN-1, but the Government said that it would consider other ways in which to encourage industry to accelerate progress towards a low carbon economy, particularly through the Electricity Market Reform project addressed in section 2.2 of the NPS (para.1.7.9). Paragraph 1.7.12 explained that because all the alternatives were "assessed as performing less well than EN-1 against one or more of the criteria for climate change or security of energy supply that are fundamental objectives of the plan" the Government's preferred option was to proceed with EN-1 to EN-6.

58. The Government's policy on energy infrastructure development in Part 2 of EN-1 is critical to understanding the policies on need, on which key parts of this challenge have focused.

59. Paragraph 2.1.1 states that there are three key goals, namely reducing carbon emissions, energy security and affordability. Large scale infrastructure plays a "vital role" in ensuring security of supply (para. 2.1.2).

60. Section 2.2 of EN-1 is entitled "the road to 2050". It was based upon the target then enshrined in the CCA 2008 of reducing GHG in 2050 by at least 80% compared to 1990 levels. Analysis of "pathways" produced to 2050 shows that this requires not only cleaner power generation but also the electrification of much of the UK's heating, industry and transport (para. 2.2.1). That "electrification" could itself double the demand for electricity over the period to 2050 (para. 2.2.22). In the same vein, paragraph 3.3.14 states that in order to be robust in all weather conditions the total capacity of electricity generation may need to more than double. If there were to be, for example, "very strong electrification of market demand and a high level of dependence on intermittent electricity generation" (e.g. renewables), then the capacity of electricity generation might need to triple.

61. Delivery of this "transformation" is to take place "within a market based system" and so the Government's focus is "on developing a clear, long-term policy framework which facilitates investment in the necessary new infrastructure (by the private sector) …" (para. 2.2.2).

62. Paragraph 2.2.4 states:-

> "…the planning system is only one of a number of vehicles that helps to deliver Government energy and climate change policy. The role of the planning system is to provide a framework which permits the construction of whatever Government – and players in the market responding to rules, incentives or signals from Government – have identified as the types of infrastructure we need in the places where it is acceptable in planning terms."

63. The transition to a low carbon economy is dealt with at paragraphs 2.2.5 to 2.2.11. The UK needs to wean itself off a high carbon energy mix, to reduce GHG emissions, and to improve the security, availability and affordability of energy through diversification. Under some of the "illustrative" 2050 pathways electricity generation would need to become virtually emission-free (para. 2.2.6).

64. The CCA 2008 has been put in place in order to drive the transition needed, by delivering emission reductions through a series of 5 year carbon budgets setting a trajectory to 2050 (para. 2.2.8).

65. Paragraphs 2.2.12 to 2.2.15 explain how the EU Emissions Trading System ("EU ETS") "forms the cornerstone of UK action to reduce greenhouse gas emissions from the power sector." The system sets a cap on emissions for different sectors of industry, including electricity generation. The cap translates to a finite number of allowances to emit GHG, which can be traded between operators, creating a carbon price, which in turn makes the production of electricity from carbon intensive power stations less attractive and creates an incentive for investment in cleaner electricity generation. The Government proposed to increase the emissions reduction target from 20% to 30% by 2020 and intended to go further than EU ETS to ensure developers invest in low carbon generation "to decarbonise the way in which we produce electricity and reinforce our security of supply, …" through its "Electricity Market Reform project" described in paragraphs 2.2.16 to 2.2.19. Paragraph 2.2.17 of EN-1 described a package of reforms which included an emissions performance standard.

66. Paragraph 2.2.19 makes this important statement:-

> "The Planning Act and any market reforms associated with the Electricity Market Reform project will complement each other and are consistent with the Government's established view that the development of new energy infrastructure is market-based. While the Government may choose to influence developers in one way or another to propose to build particular types of infrastructure, it remains a matter for the market to decide where and how to build, as market mechanisms will deliver the required infrastructure most efficiently. Against this background of possibly changing market structures, developers will still need development consent for each proposal. Whatever incentives, rules or other signals developers are responding to, the Government believes that the NPSs set out planning policies which both respect the principles of sustainable development and are capable of facilitating, for the foreseeable future, the consenting of energy infrastructure on the scale and of the kinds necessary to help us maintain safe, secure, affordable and increasingly low carbon supplies of energy."

67. It is fundamental to a proper understanding of the policies in Part 3 on need that they be seen within the overall policy context in EN-1. Thus, planning operates in a market-based system and is only one of a number of vehicles for the delivery of energy and climate change policy. Planning provides a framework which allows the construction of whatever Government, or "players in the market" responding to rules, incentives or signals from Government, identify as the types of infrastructure needed in locations acceptable in planning terms. The "incentives" and "signals" (further explained in para. 2.2.24) may be given through the EU ETS and Electricity Market Reforms.

68. Paragraph 2.2.20 to 2.2.26 address security of energy supplies. It is said to be "critical" for the UK to continue to have secure and reliable supplies of electricity as it makes the transition to a low carbon economy. To manage the risks to supply, the country must have sufficient capacity to meet variations in demand at all times, both simultaneously and continuously, given that electricity cannot be stored. This requires a safety margin of spare capacity to meet unforeseen fluctuations in supply or demand. There is a need for diversity in terms of technologies and fuels.

69. Paragraph 2.2.23 states that:

> "The UK must therefore reduce over time its dependence on fossil fuels, particularly unabated combustion. The Government plans to do this by improving energy efficiency and pursuing its objectives for renewables, nuclear power and carbon capture and storage. However some fossil fuels will still be needed during the transition to a low carbon economy."

70. According to paragraph 2.2.25 the two main challenges to security of supply during that transition are:-

> "• increasing reliance on imports of oil and gas as North Sea reserves decline in a world where energy demand is rising and oil and gas production and supply is increasingly politicised; and
>
> • the requirement for substantial and timely private sector investment over the next two decades in power stations, electricity networks and gas infrastructure."

71. Part 3 begins with the following policies for decision-making:-

> "3.1.1 The UK needs all the types of energy infrastructure covered by this NPS in order to achieve energy security at the same time as dramatically reducing greenhouse gas emissions.
>
> 3.1.2 It is for industry to propose new energy infrastructure projects within the strategic framework set by Government. The Government does not consider it appropriate for planning policy to set targets for or limits on different technologies.
>
> 3.1.3 The IPC should therefore assess all applications for development consent for the types of infrastructure covered by the energy NPSs on the basis that the Government has demonstrated that there is a need for those types of infrastructure and that the scale and urgency of that need is as described for each of them in this Part.
>
> 3.1.4 The IPC should give substantial weight to the contribution which projects would make towards satisfying this need when considering applications for development consent under the Planning Act 2008."

The functions of the "IPC" (the Infrastructure Planning Commission) for determining applications for DCOs were transferred to the Secretary of State by the Localism Act 2011.

72. Mr. Jones QC for the Claimant laid much emphasis on the reference in paragraph 3.1.4 to the contribution made by a project to satisfying need, which also appears towards the end of paragraph 3.2.3:-

> "This Part of the NPS explains why the Government considers that, without significant amounts of new large-scale energy infrastructure, the objectives of its energy and climate change policy cannot be fulfilled. However, as noted in Section 1.7, it will not be possible to develop the necessary amounts of such infrastructure without some significant residual adverse impacts. This Part also shows why the Government considers that the need for such infrastructure will often be urgent.

> The IPC should therefore give substantial weight to considerations of need. The weight which is attributed to considerations of need in any given case should be proportionate to the anticipated extent of a project's actual contribution to satisfying the need for a particular type of infrastructure."

73. However, Mr. Jones QC accepted that although paragraph 3.1.3 states that the "scale" and "urgency" of need is described for each type of infrastructure, EN-1 does not seek to define need in quantitative terms (save in the limited respects mentioned below). In my judgment, this is consistent with (a) the broad indications of the potential need to double or treble generating capacity by 2050 previously given in Part 2 of the NPS (see paragraph 60 above) and (b) the unequivocal statement in paragraph 3.1.2 that it is inappropriate for planning policy to set targets for, or limits on, different types of technology.

74. One aspect of quantitative need concerns the requirement to replace power stations which have to be closed (paras. 3.3.7 to 3.3.9). Within the UK at least 22 GW of existing generating capacity will need to be replaced, particularly during the period to 2020, as the result of stricter environmental standards and ageing power stations. The closure of about 12 GW capacity relates to coal and oil power stations and results from controls under the Large Combustion Plant Directive (Directive 2001/80/EC) on emissions of sulphur and nitrogen dioxide. In addition, approximately 10 GW of nuclear generating capacity is expected to close by about 2031. The imposition of even stricter limits on emissions of sulphur and NO_X is likely to result in additional closures of power stations. It will be recalled that the present proposal is for the construction of two gas fired units in place of 2 coal fired units which are to be decommissioned in 2022.

75. The second element of need which has been quantified is that required by a "planning horizon of 2025" for energy NPSs in general and nuclear power in particular. It is within the context of that "interim milestone" that the following passage in paragraph 3.3.16 appears, upon which Mr. Jones QC placed some reliance:-

> "A failure to decarbonise and diversify our energy sources now could result in the UK becoming locked into a system of high carbon generation, which would make it very difficult and expensive to meet our 2050 carbon reduction target. We cannot afford for this to happen."

76. Paragraph 3.3.18 warned that it was not possible to make an accurate prediction of the size and shape of demand for electricity in 2025, but used "Updated Energy and Emissions" projections ("UEP") published by the former Department of Energy and Climate Change ("DECC") as a "starting point" to get "a sense of the possible scale of future demand to 2025". It is also essential to note the further warning that:-

> "The projections do not reflect a desired or preferred outcome for the Government in relation to the need for additional electricity generating capacity or the types of electricity generation required."

Paragraph 3.3.21 added that the projections helped to illustrate the scale of the challenge faced by the UK and the Government to understand *how the market might respond.*

77. Based on one of the scenarios studied, paragraph 3.3.22 indicated that by 2025 the UK would need at least 113 GW of total electricity generating capacity, compared to 85

GW in 2011, of which 59 GW would be new build. Around 33 GW of new capacity by 2025 would need to come from renewable sources, and it would be for industry to determine the exact mix of the remaining 26 GW within the strategic framework set by Government. After allowing for projects already under construction, the NPS suggested that 18 GW remained to be provided as new non-renewable capacity by 2025. The Government stated that it would like a significant proportion of that balance of 18 GW to be provided by new low carbon generation and, in principle, nuclear power should be free to contribute as much as possible towards this need up to the interim milestone of 2025. Footnote 36 expressed the judgment that it would not be prudent when determining national policy to take into account consents for other energy projects where construction had yet to begin.

78. Paragraph 3.3.23 stated that:-

> "To minimise risks to energy security and resilience, the Government therefore believes it is prudent to plan for a *minimum* need of 59 GW of new electricity capability by 2025." (emphasis added)

79. To avoid any misunderstanding of the exercise carried out in paragraphs 3.3.15 to 3.3.23 of EN-1, paragraph 3.3.24 repeated the approach which had already been clearly laid down in Part 2 and in paragraph 3.1.2:-

> "It is not the Government's intention in presenting the above figures to set targets or limits on any new generating infrastructure to be consented in accordance with the energy NPSs. It is not the IPC's role to deliver specific amounts of generating capacity for each technology type. The Government has other mechanisms to influence the current delivery of a secure, low carbon, affordable electricity mix. Indeed, the aim of the Electricity Market Reform project (see Part 2 of this NPS for further details) is to review the role of the variety of Government interventions within the electricity market."

80. Thus, it is plain that, apart from indicating need for a *minimum* amount of new capacity by 2025, the references to need in EN-1 were not expressed in quantitative terms. That is said to be consistent with the market-based system under which electricity generation is provided and the other non-planning mechanisms by which Government seeks to influence the operation of the market.

81. Instead, EN-1 focuses on qualitative need such as functional requirements. Thus, paragraph 3.1.1 states that the UK needs all types of energy infrastructure covered by the NPS in order to achieve energy security while at the same time dramatically reducing GHG. Paragraphs 3.3.2 to 3.3.6 explain how those twin objectives should be addressed.

82. Paragraphs 3.3.2 to 3.3.3 state:-

> "3.3.2 The Government needs to ensure sufficient electricity generating capacity is available to meet maximum peak demand, *with a safety margin or spare capacity to accommodate unexpectedly high demand and to mitigate risks such as unexpected plant closures and extreme weather events*. *This is why there is currently around 85 GW of total generation capacity in the UK, whilst the average demand across a year is only for around half of this*.

> 3.3.3 The larger the difference between available capacity and demand (i.e. the larger the safety margin), the more resilient the system will be in dealing with unexpected events, and consequently the lower the risk of a supply interruption. This helps to protect businesses and consumers, including vulnerable households, from rising and volatile prices and, eventually, from physical interruptions to supplies that might impact on essential services." (emphasis added)

83. Paragraph 3.3.4 explains the need for a diverse mix of all types of power generation, so as to avoid dependency on any one type of generation or source of fuel or power and to help ensure security of supply. The different types of electricity generation have different characteristics complementing each other:-

> "• fossil fuel generation can be brought on line quickly when there is high demand and shut down when demand is low, thus complementing generation from nuclear and the intermittent generation from renewables. However, until such time as fossil fuel generation can effectively operate with Carbon Capture and Storage (CCS), such power stations will not be low carbon (see Section 3.6).
>
> • renewables offer a low carbon and proven (for example, onshore and offshore wind) fuel source, but many renewable technologies provide intermittent generation (see Section 3.4); and
>
> • nuclear power is a proven technology that is able to provide continuous low carbon generation, which will help to reduce the UK's dependence on imports of fossil fuels (see Section 3.5). Whilst capable of responding to peaks and troughs in demand or supply, it is not as cost efficient to use nuclear power stations in this way when compared to fossil fuel generation."

84. Accordingly, in order to meet the twin challenges of energy security and climate change the Government "would like industry to bring forward many new low carbon developments, renewables, nuclear and fossil fuel generation with CCS" within the period up to 2025 (para. 3.3.5). This section then concludes in paragraph 3.3.6 by bringing the reader back to the policy contained in section 3.1.2:-

> "Within the strategic framework established by the Government it is for industry to propose the specific types of developments that they assess to be viable. This is the nature of a market-based energy system. The IPC should therefore act in accordance with the policy set out at in Section 3.1 when assessing proposals for new energy NSIPs."

85. Paragraphs 3.3.10 to 3.3.12 address an important subject, namely the need for additional electricity capacity *to support* the required increase in supply from renewables. Paragraph 3.3.11 explains:-

> "An increase in renewable electricity is essential to enable the UK to meet its commitments under the EU Renewable Energy Directive. It will also help improve our energy security by reducing our dependence on imported fossil fuels, decrease greenhouse gas emissions and provide economic opportunities. However, some renewable sources (such as wind, solar and tidal) are intermittent and cannot be adjusted to meet demand. As a result, the more renewable generating capacity we have the more generation capacity we will require overall, to provide back-up at

> times when the availability of intermittent renewable sources is low. If fossil fuel plant remains the most cost-effective means of providing such back-up, particularly at short notice, it is possible that even when the UK's electricity supply is almost entirely decarbonised we may still need fossil fuel power stations for short periods when renewable output is too low to meet demand, for example when there is little wind."

This paragraph draws an important distinction between the capacity of a power station and the periods for which it is operational.

86. Paragraph 3.3.12 then makes a statement which was directly relevant to the present case:-

> "It is therefore likely that increasing reliance on renewables will mean that we need more total electricity capacity than we have now, with a larger proportion being built only or mainly to perform back-up functions."

87. It will be recalled that paragraph 3.1.3 of EN-1 says that the "scale" and "urgency" of the need for each type of infrastructure is indicated in the following sections of Part 3. Section 3.4 describes the important role of renewable electricity generation. Paragraph 3.4.1 refers to the UK's commitment to producing 15% of its total energy from renewable sources by 2020. Paragraph 3.4.5 states:-

> > "To hit this target, and to largely decarbonise the power sector by 2030, it is necessary to bring forward new renewable electricity generating projects as soon as possible. The need for new renewable electricity generation projects is therefore urgent."

88. Section 3.5 addresses the role of nuclear power. It is a low carbon, proven technology, which is anticipated to play an increasingly important role in the move to diversifying and decarbonising sources of electricity (para. 3.5.1). According to paragraph 3.5.2, "it is Government policy that new nuclear power should be able to contribute as much as possible to the UK's need for new capacity", before going on to acknowledge that it is not possible to predict whether or not there will be a reactor (or more than one reactor) at each of the eight sites identified in EN-6.

89. Paragraph 3.5.6 states that new nuclear power forms one of the three key elements of the strategy for moving towards a decarbonised, diverse electricity sector by 2050 comprising (i) renewables, (ii) fossil fuels with CCS and (iii) new nuclear capacity. With regard to "urgency of need", paragraph 3.5.9 says that it is important that new nuclear power stations are constructed and start to generate electricity "as soon as possible and significantly earlier than 2025." In 2011 it was thought to be realistic for new nuclear power to begin to be operational from 2018.

90. Section 3.6 of EN-1 deals with the role of fossil fuel electricity generation. Paragraph 3.6.1 states:-

> "Fossil fuel power stations play a vital role in providing reliable electricity supplies: they can be operated flexibly in response to changes in supply and demand, and provide diversity in our energy mix. They will continue to play an important role in our energy mix as the UK makes the transition to a low carbon

> economy, and Government policy is that they must be constructed, and operate, in line with increasingly demanding climate change goals."

91. Paragraph 3.6.2 states:-

> "Fossil fuel generating stations contribute to security of energy supply by using fuel from a variety of suppliers and operating flexibly. Gas will continue to play an important role in the electricity sector – providing vital flexibility to support an increasing amount of low-carbon generation and to maintain security of supply."

92. Paragraph 3.6.3 states:-

> "Some of the new conventional generating capacity needed is likely to come from new fossil fuel generating capacity in order to maintain security of supply, and to provide flexible back-up for intermittent renewable energy from wind. The use of fossil fuels to generate electricity produces atmospheric emissions of carbon dioxide. The amount of carbon dioxide produced depends, amongst other things, on the type of fuel and the design and age of the power station. At present coal typically produces about twice as much carbon dioxide as gas, per unit of electricity generated. However, as explained further below, new technology offers the prospect of reducing the carbon dioxide emissions of both fuels to a level where, whilst retaining many of their existing advantages, they also can be regarded as low carbon energy sources."

This passage needs to be read together with paragraphs 3.3.12 (see paragraph 86 above) and 3.3.14 (see paragraph 60 above).

93. Paragraph 3.6.4 explains the importance of Carbon Capture and Storage ("CCS") which has the potential to reduce carbon emissions from fossil fuel generation by up to 90%. Whilst there is a high level of confidence that CCS technology will be effective, there is uncertainty about its impact on the economics of power station operation and hence its development. CCS needs to be demonstrated on a commercial scale. Consequently, the Government was providing support for four commercial scale demonstration projects on coal fired stations (paras. 3.6.5 and 4.7.4). Paragraph 3.6.6 requires all commercial fossil fuel power stations with a capacity over 300 MW to be constructed Carbon Capture Ready ("CCR"). This requirement is explained in more detail in paragraphs 4.7.10 to 4.7.17 of EN-1.

94. The need for fossil fuel electricity generation was addressed in paragraph 3.6.8:-

> "As set out in paragraph 3.3.8 above, a number of fossil fuel generating stations will have to close by the end of 2015. Although this capacity may be replaced by new nuclear and renewable generating capacity in due course, it is clear that there must be some fossil fuel generating capacity to provide back-up for when generation from intermittent renewable generating capacity is low and to help with the transition to low carbon electricity generation. It is important that such fossil fuel generating capacity should become low carbon, through development of CCS, in line with carbon reduction targets. Therefore there is a need for *CCR fossil fuel generating stations* and the need for the CCS *demonstration* projects is *urgent*." (emphasis added)

95. We have seen that paragraphs 3.1.4 and 3.2.3 address the weight to be given to the contribution which a project makes to the need for a particular type of infrastructure. In the "Assessment Principles" in Part 4, paragraph 4.1.2 sets out a presumption in favour of granting consent to applications for energy NSIPs:-

> "Given the level and urgency of need for infrastructure of the types covered by the energy NPSs set out in Part 3 of this NPS, the IPC should start with a presumption in favour of granting consent to applications for energy NSIPs. That presumption applies unless any more specific and relevant policies set out in the relevant NPSs clearly indicate that consent should be refused. The presumption is also subject to the provisions of the Planning Act 2008 referred to at paragraph 1.1.2 of this NPS."

EN-2

96. EN-2 applies to fossil fuel electricity generating infrastructure, including gas-fired power stations with a capacity over 50 MW (para. 1.8.1). It is to be read in conjunction with EN-1, which covers *inter alia* the need and urgency for new energy infrastructure to be consented and built with the objective of contributing to a secure, diverse, and affordable energy supply and supporting the Government's politics on sustainable development, in particular by mitigating and adapting to climate change (para. 1.3.1). Paragraph 1.1.1 refers to the "vital role" played by fossil fuel generating stations in "providing reliable electricity supplies and a secure and diverse energy mix as the UK makes the transition to a low carbon economy."

97. The Government's policy is to require a substantial proportion of the capacity of all new coal-fired stations to be the subject of CCS. It is expected that new stations of that type will retrofit CCS to their "full capacity" during the lifetime of the plant. Other fossil fuel generating stations are expected to be "carbon capture ready". All such stations will be required to comply with Emissions Performance Standards (para. 1.1.2).

General Legal Principles

98. The general principles upon which the court may be asked under s.288 of the TCPA 1990 to review a planning appeal decision have been summarised in, for example, Seddon Properties Limited v Secretary of State for the Environment (1981) 42 P & CR 26, 28 and Bloor Homes East Midlands Limited v Secretary of State for Communities and Local Government [2017] PTSR 1283 at [19]. The basis upon which the court may review the legal adequacy of the reasons given in a decision has been explained more fully in Save Britain's Heritage v Number 1 Poultry Limited [1991] 1 WLR 153 and South Bucks District Council v Porter (No. 2) [2004] 1 WLR 1953. The same approach applies to a judicial review under s.118 of the PA 2008 to a decision on a DCO application, so long as the specific requirements of that statutory code are kept in mind.

99. In R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council [2020] PTSR 221 the Supreme Court endorsed the legal tests in Derbyshire Dales District Council [2010] 1 P & CR 19 and CREEDNZ Inc v Governor General [1981] 1 NZLR 172, 182 which must be satisfied where it is alleged that a decision-maker has failed to take into account a material consideration. It is insufficient for a claimant simply to say that the decision-maker did not take into account a legally relevant consideration. A legally relevant consideration is only something that is *not* irrelevant or immaterial, and therefore something which the decision-maker is *empowered or*

entitled to take into account. But a decision-maker does not *fail* to take a relevant consideration into account unless he was *under an obligation* to do so. Accordingly, for this type of allegation it is necessary for a claimant to show that the decision-maker was expressly or impliedly required by the legislation (or by a policy which had to be applied) to take the particular consideration into account, or whether on the facts of the case, the matter was so "obviously material", that it was irrational not to have taken it into account.

100. It is also plain from the endorsement by the Supreme Court in Samuel Smith at [31] of Derbyshire Dales at [28], and the cross-reference to Bolton Metropolitan Borough Council v Secretary of State for the Environment [2017] PTSR 1063 but solely to page 1071, that principles (2) and (6) in the judgment of Glidewell LJ in Bolton at p 1072 (which were relied upon in the Claimant's skeleton under grounds 3 and 4) are no longer good law.

Interpretation of Policy

101. The general principles governing the interpretation of planning policy have been set out in a number of authorities, including Tesco Stores Limited v Dundee City Council [2012] PTSR 983; Hopkins Homes Limited v Secretary of State for Communities and Local Government [2017] 1 WLR 1865; East Staffordshire Borough Council v Secretary of State for Communities and Local Government [2018] PTSR 88; R (Mansell) v Tonbridge and Malling Borough Council [2019] PTSR 1452; St Modwen Developments Limited v Secretary of State for Communities and Local Government [2018] PTSR 746; Canterbury City Council v Secretary of State for Communities and Local Government [2019] PTSR 81; and Samuel Smith [2020] PTSR 221.

102. These principles apply also to the interpretation of a NPS, as was held by Lindblom LJ in Scarisbrick at [19]:-

> "The court's general approach to the interpretation of planning policy is well established and clear (see the decision of the Supreme Court in *Tesco Stores Ltd. v Dundee City Council* [2012] UKSC 13, in particular the judgment of Lord Reed at paragraphs 17 to 19). The same approach applies both to development plan policy and statements of government policy (see the judgment of Lord Carnwath in *Suffolk Coastal District Council v Hopkins Homes Ltd. and Richborough Estates Partnership LLP v Cheshire East Borough Council* [2017] UKSC 37, at paragraphs 22 to 26). Statements of policy are to be interpreted objectively in accordance with the language used, read in its proper context (see paragraph 18 of Lord Reed's judgment in *Tesco Stores v Dundee City Council*). The author of a planning policy is not free to interpret the policy so as to give it whatever meaning he might choose in a particular case. The interpretation of planning policy is, in the end, a matter for the court (see paragraph 18 of Lord Reed's judgment in *Tesco v Dundee City Council*). But the role of the court should not be overstated. Even when dispute arises over the interpretation of policy, it may not be decisive in the outcome of the proceedings. It is always important to distinguish issues of the interpretation of policy, which are appropriate for judicial analysis, from issues of planning judgment in the application of that policy, which are for the decision-maker, whose exercise of planning judgment is subject only to review on public law grounds (see paragraphs 24 to 26 of Lord Carnwath's judgment in *Suffolk Coastal District Council*). It is not suggested that those basic principles are inapplicable to the NPS

> – notwithstanding the particular statutory framework within which it was prepared and is to be used in decision-making."

103. In Samuel Smith the Supreme Court reinforced the distinction between the proper scope of the legal interpretation of policy by the courts and the use of planning judgment in the application of policy. They did so when considering the concept of "openness" in paragraph 146 of the National Planning Policy Framework (2019), holding that the issue of whether visual effects may be taken into account is not a matter of legal principle. It is not a mandatory consideration which legislation or policy requires to be taken into account. Instead, it is a matter of judgment for the decision-maker whether to have regard to that factor, subject to the legal test whether, in the circumstances of the case, it was so "obviously material" as to require consideration ([30] to [32] and [39]).

104. Planning policies should not be interpreted as if they were statutory or contractual provisions. They are not analogous in nature or purpose to a statute or a contract. Planning policies are intended to guide or shape practical decision-making, and should be interpreted with that purpose in mind. They have to be applied and understood by planning professionals and by the public to whom they are primarily addressed. Decision-makers are entitled to expect both national and local planning policy to be as clearly and simply stated as it can be and, however well or badly it may be expressed, the courts to provide a straightforward interpretation of such policy (Mansell at [41]; Canterbury at [23]; Monkhill at [38]).

The Planning Act 2008

105. The Secretary of State and Drax relied upon the legal analysis by the Divisional Court in Spurrier at [99] to [112]. This was not the subject of any criticism by the Claimant.

106. The merits of policy set out in a NPS are not open to challenge in the examination process or in the determination of an application for a DCO. That is the object of ss.87(3), 94(8) and 106(1).

107. Furthermore, section 104(7) cannot be used to circumvent s.104(3), so, for example, where a particular NPS stated that there was a need for a particular project and ruled out alternatives, it was not permissible for that subject to be considered under s.104(7), even where a change of circumstance has occurred or material has come into existence after the designation of the NPS (see Thames Blue Green Economy Limited [2015] EWHC 727 (Admin) at [8] to [9] and [37] to [43] and [2016] JPL 157 at [11] to [16]; Spurrier at [103] to [105] and [107]).

108. This inability to use s. 104(7) to challenge the merits of policy in a NPS also precludes an argument that there has been a change in circumstance since the policy was designated so that reduced, or even no, weight should be given to it. Although that is a conventional planning argument in development control under the TCPA 1990, it "relates to the merits of policy" for the purposes of the PA and therefore is to be disregarded. The appropriate procedure for dealing with a contention that a policy, or the basis for a policy, has been overtaken by events, or has become out of date, is the review mechanism in s.6 (Spurrier at [107] to [108]).

109. The NPS for Hazardous Waste considered in Scarisbrick is expressed in much more general terms than the highly specific NPS considered in Thames Blue Green Economy. Paragraph 3.1 identified a national need for additional hazardous waste facilities and a range of technologies that could be put forward to meet that need. However, the NPS did not indicate the scale of the need to be met, whether on a national or any regional or local basis. It did not indicate how much weight should be given to need, unlike EN-1.

110. The Hazardous Waste NPS was set in the context of the "waste hierarchy" in the Waste Framework Directive, which placed landfill at the bottom. There was to be a reduction in the use of landfill, which was only to be considered as a last resort. Nevertheless, the NPS identified a need for NSIPs falling within "generic types" which included hazardous waste landfill (Scarisbrick [14] to [16]). Paragraph 4.1.2 of the NPS set out a presumption in favour of granting consent for hazardous waste NSIPs which clearly met the need established in the NPS. Potential benefits were said to include "the contribution" of a project "to meeting the need for hazardous waste infrastructure" (para. 4.1.3).

111. The preclusive or presumptive effect of a NPS is dependent upon the wording of the policy and its proper interpretation, applying the principles set out above.

112. The Court of Appeal held in Scarisbrick that the language of the NPS established the need for *all*, not merely some, NSIPs falling within the generic types to which paragraph 3.1 referred. The policy identified a general, qualitative need for such facilities. It did not define a quantitative need or set an upper limit to the number or capacity of the facilities required. It created a "general assumption" of need for the facilities identified, applicable to "every relevant project capable of meeting the identified need, regardless of the scale, capacity and location of the development proposed." An applicant for a DCO was entitled to proceed on that basis ([24]). But the presumption in favour of granting consent was "not automatically conclusive of the outcome of a particular application" for a DCO. The balancing exercise in s.104(7) remained to be carried out ([28]). Given that the NPS in the Scarisbrick case did not prescribe the weight to be given to need, that weight remained to be assessed as a matter of planning judgment in the particular circumstances of each case ([31]).

113. In his decision letter in the Scarisbrick case the Secretary of State agreed with the examining authority that by paragraph 3.1 of the NPS need was taken to be established for the proposed development and that the applicant had not been required to demonstrate a specific local or regional need. He gave "considerable weight" to the need identified in the NPS ([47] to [48]).

114. Mr. Scarisbrick contended that the Secretary of State had misunderstood the NPS by treating it as requiring him to assume a need for a facility falling within the scope of the policy, irrespective of the size proposed and precluding any evaluation of evidence and submissions on the extent of the real need for the project proposed ([53]). The argument was similar to that advanced by ClientEarth in the present case.

115. The Court of Appeal rejected that argument. The examining authority and the Secretary of State had gone no further than to decide that the NPS had established a generic, qualitative need for the type of project proposed; without going on to say that the NPS identified a requirement for a facility of a particular size. The existence of that national

need according to the policy did not depend upon the scale, capacity or location of the facility proposed. The NPS did not set any target level of provision, or limit to the capacity or location of new facilities, leaving it to operators to use their judgment on those matters ([57] to [59]). In my judgment, that NPS is similar to EN-1 in this respect.

116. The Court of Appeal went on to hold that no legal criticism could be made of the Secretary of State for having given "considerable weight" to the need established by the NPS. That had been a matter of planning judgment for him, subject only to a challenge on the grounds of irrationality (Tesco Stores Limited v Secretary of State for the Environment [1995] 1 WLR 759 per Lord Hoffmann at p.780F). The Court held that to give "considerable weight" to that need was consistent with the presumption in the NPS in favour of granting consent (a similar presumption to that contained in paragraph 4.1.2 of EN-1). The Secretary of State had not increased that weight because of the large size of the project, nor had he treated the need established by the NPS as a conclusive or automatically overriding factor ([62] to [63] and [72]). The Court did not accept that the Secretary of State had been obliged to assess the individual contribution that the proposed development would make to meeting national need.

Grounds 1 and 2

117. It is convenient to take these two grounds together.

Ground 1

118. Under ground 1 the Claimant submits that on a proper interpretation of EN-1 the decision-maker is required to assess the individual contribution that any particular project will make towards satisfying the general need for a type of infrastructure set out in the NPS. This is said to be based upon paragraphs 3.1.4 of EN-1, which accords substantial weight to the "contribution" which a project makes towards satisfying "this need" (i.e. the need described in 3.1.1 to 3.1.3), and paragraph 3.2.3 which states that the weight attributable to need in any given case should be "proportionate" to that contribution. Mr. Jones QC submits that the Secretary of State erred in law in deciding that there was no requirement for the individual need for the proposal to be assessed. The decision-maker wrongly assumed that because the proposal fell within one of the types of infrastructure said to be needed, it would necessarily contribute to that need for the purposes of EN-1. The Claimant argues that a quantitative assessment was required by the NPS (paras. 46, 52 and 74 of skeleton). It is also submitted that the Secretary of State misinterpreted paragraph 3.2.3 of EN-1 by posing the question whether there was any reason for not giving substantial weight to the need for the proposal in accordance with paragraph 3.1.4.

119. Under ground 2, the Claimant criticises DL 4.19 to 4.20 for failing to give legally adequate reasons for disagreeing with the Panel's conclusions as to why no weight should be given to the need for the proposed development (paras. 7.2.4 and 7.2.7 of the Panel Report). It is submitted that where the Minister disagreed with specific findings of the Panel, she was under a heightened duty to provide "fuller" reasons for that disagreement, seeking to rely upon Horada v Secretary of State for Communities and Local Government [2016] PTSR 1271.

The examination

120. In summary, the case for ClientEarth in the examination was that there was no need for the proposal, having regard to Government projections of energy infrastructure and consents already granted. Indeed, ClientEarth went so far as to say that "the UK does not need *any* new-build large gas power capacity to achieve energy security" (emphasis added) (paras. 4.2.4 and 5.2.32 to 5.2.34 of the Panel's Report).

121. The Panel first considered whether the issue of the individual need for the proposal was a matter for the examination. Drax submitted that it was not, whereas the Claimant said that it was relying upon paragraph 3.2.3 of EN-1. The Panel asked Drax to justify the need for the proposal with regard to "national targets and UK energy need/demand", and the specific need for the proposed units X and Y (Report para. 5.2.12). Another objector, Biofuelwatch, relied upon 3.3.18 of EN-1 to argue that it was implicit in the NPS that "the assessment of need should be informed by the latest government models and projections alongside the NPS." Drax responded that material of that kind, and the issue of whether the weight given by policy to need should change, were matters for a future review under s.6 of the PA 2008, and not for determination through individual applications for DCO (para. 5.2.14 of the Report).

122. However, the Panel concluded that because EN-1 had been based on "a road map and direction of travel for future energy generation sources," it was necessary, when applying paragraphs 3.1.3 and 3.2.3 of the NPS, to take account of the changes in energy generation capacity during the passage of time since its publication in 2011. Because the need to increase low carbon technology and to reduce the dependence on fossil fuels had "become increasingly significant" over that period, the Panel concluded that it should consider current information on energy generation and the "individual contribution of the proposed development to meeting the overarching policy objectives of security of supply, affordability and decarbonisation" and hence to meeting the need for infrastructure (paras. 5.2.22 to 5.2.26 of the Report).

123. In relation to security of supply the Panel concluded in summary that:-

    (i) Current models and projections, in particular BEIS's 2017 UEP, "should be taken into account in determining the need for fossil fuel generation in the proposed development" (para. 5.2.40);

    (ii) Gas generation capacity for which consents had already been granted exceeded the capacity projected in the 2010 and 2017 UEP projections. Although not all that capacity was guaranteed to be delivered, the realistic likelihood was that "some" would be built out, thereby calling into question the need for more fossil fuel development and, in particular, the proposal (para. 5.2.41 to 5.2.42);

    (iii) The need for the proposed development was likely to be limited to "system inertia".[1] Plants such as Drax may sometimes be brought on, ahead of, or as a replacement to, renewable generation, to maintain an adequate level of system inertia. This amounted to "low level need and urgency" (para. 5.2.42). The need

[1] It is agreed that "system inertia" is necessary to address imbalances between electricity generation and variations in demand, resulting in changes to frequency on the network. The greater the system inertia, the slower the change in frequency and therefore the more time the network operator has to restore the balance between generation and demand.

for the proposal was otherwise limited to providing flexibility to support renewable energy generation (para. 5.2.42 to 5.2.43).

124. The Secretary of State referred to the Panel's view that EN-1 drew a distinction between the need for energy NSIPs in general and the need for any particular development and so it had been appropriate to consider changes in energy generation since its publication in 2011 (DL 4.4 to 4.5). Having referred to a number of policies in EN-1, the Secretary of State decided that the proposal was for a type of infrastructure to which EN-1 applied and so the presumption in paragraph 4.1.2 in favour of granting consent applied (DL 4.9 to 4.12). In DL 4.13 the Secretary of State explained why she considered that EN-1 continued to provide policies which are capable of facilitating, for the foreseeable future, the consenting of energy infrastructure on the scale and of the kinds necessary to meet the objectives of the NPS. In her view the policies in EN-1 took account of the need to achieve security of supply, affordability and decarbonisation at a high strategic level and there was no requirement for a decision-maker to assess whether a proposed development would meet an identified need for gas generation capacity by reference to those objectives. The Secretary of State then addressed issues relating to GHG emissions and decarbonisation (DL 4.14 to 4.17).

125. She returned to the subject of need at DL 4.18 to 4.20 and DL 6.6:-

> "4.18 The ExA's views on the need for the Development and how this is considered in the planning balance have also been scrutinised by the Secretary of State. As set out above, paragraphs 3.1.3 of EN-1, and the presumption in favour of the Development already assume a general need for CCR fossil fuel generation. Furthermore, paragraph 3.1.4 of EN-1 states: *"the [decision maker] should give substantial weight to the contribution which projects would make towards satisfying this need when considering applications for development consent".* The ExA recommends that no weight should be given to the Development's contribution towards meeting this need within the overall planning balance. This is predicated on its view that EN-1 draws a distinction between the need for energy NSIPs in general and the need for any particular proposed development. The Secretary of State disagrees with this approach. The Secretary of State considers that applications for development consent for energy NSIPs for which a need has been identified by the NPS should be assessed on the basis that they will contribute towards meeting that need and that this contribution should be given significant weight.
>
> 4.19 The Secretary of State notes that paragraph 3.2.3 of EN-1 states that *"the weight which is attributed to considerations of need in any given case should be proportionate to the anticipated extent of a project's actual contribution to satisfying the need for a particular type of infrastructure"*. The Secretary of State has, therefore, considered whether, in light of the ExA's findings, there is any reason why she should not attribute substantial weight to the Development's contribution to meeting the identified need for new CCR fossil fuel generation infrastructure in this case. In particular, she has considered the ExA's views on the changes in energy generation since the EN-1 was published in 2011, and the implications of current models and projections of future demand for gas-fired electricity generation and the evidence regarding the pipeline of consented gas-fired infrastructure which the ExA considered to be relevant [ER 5.2.40-43].

> 4.20 The Secretary of State's consideration of the ExA's position is that (i) whilst a number of other schemes may have planning consent, there is no guarantee that these will reach completion; (ii) paragraph 3.3.18 of EN-1 sets out that the Updated Energy and Emissions Projections (on which the ExA partially relies on to reach its conclusions on current levels of need) do not *"reflect a desired or preferred outcome for the Government in relation to the need for additional generating or the types of electricity required*"; and (iii) paragraph 3.1.2 of EN-1 explains that *"[i]t is for industry to propose new energy infrastructure projects within the strategic framework set by Government. The Government does not consider it appropriate for planning policy to set target for or limits on different technologies"*. These points are reinforced elsewhere in EN-1, for example in paragraphs 2.2.4 and 2.2.19, which explain that the planning system will complement other commercial and market based mechanisms and rules, incentives and signals set by Government to deliver the types of infrastructure that are needed in the places where it is acceptable in planning terms – decisions on which consented energy schemes to build will therefore also be driven by these factors. In light of this, the Secretary of State does not accept that the ExA's findings on these issues should diminish the weight to be attributed to the Development's contribution towards meeting the identified need for CCR gas fired generation within the overall planning balance. The Secretary of State considers that this matter should be given substantial weight in accordance with paragraph 3.1.4 of EN-1. The Secretary of State's overall conclusions on the planning balance are set out at paragraphs 6.1 – 6.14 below.
>
> 6.6 The Secretary of State considers that the ExA's interpretation of the need case set out in the NPSs is incorrect. In taking the position it did on need and GHG emissions, the ExA arrived at a position where it recommended that consent for the Development should be refused. The Secretary of State considers that the NPSs support the case for new energy infrastructure in general and, in particular, the need for new CCR fossil fuel generation of the kind which the Development would provide. While acknowledging the GHG emissions from the Development, the generating capacity of the Development in either two- or one-unit configurations is a significant argument in its favour, with a maximum of 3.8GW possible if the Applicant builds out both gas-fired and battery storage units as proposed. Therefore, the Secretary of State considers, that the Development would contribute to meeting the identified need for CCR fossil fuel generation set out in the NPS and that substantial weight should be given to this in the planning balance." (original emphasis)

Analysis

126. The essential issue under ground 1 is whether the Secretary of State misinterpreted EN-1 when she rejected the Panel's view that the NPS draws a distinction between the need for energy NSIPs in general and the need for any particular proposed development (DL 4.18). She added that applications for a DCO for energy NSIPs for which a need has been identified in EN-1 should be assessed on the basis that they will contribute towards meeting that need and that contribution should be given significant weight. Nonetheless, the Secretary of State went on to consider whether the Panel's findings provided any reason for not giving that weight to the proposal (DL 4.19 to 4.20).

127. It is common ground between the parties that the interpretation and legal effect of the NPS in order to resolve the issue under ground 1 are objective questions of law for the Court. I have summarised relevant principles in paragraphs 101 to 116 above.

128. The Claimant's argument places great emphasis upon the use of the word "contribution" in paragraphs 3.1.4 and 3.2.3 of EN-1 in order to justify a requirement that the need for a proposed project should be individually assessed. The Claimant goes so far as to contend that that individual need must be assessed on a quantitative basis (see paragraph 118 above). Indeed, it is necessary for the Claimant to advance this argument because the Panel's reasoning, with which the Secretary of State disagreed, was based upon its quantitative assessment (see Report at 5.2.40 to 5.2.42, 7.3.2 and 7.3.14). The Panel considered that the evaluation of need for this project should be based upon the changes in generation capacity since 2011, the latest UEP projections, and the "pipeline" of consented gas-fired infrastructure.

129. But it is necessary to read EN-1 as a whole, rather than selectively. It is plain that the NPS (as summarised in paragraphs 53 to 97 above) does not require need to be assessed in quantitative terms for any individual application. The only quantitative assessments in the document related to the need to replace certain fossil-fuel plant and the estimate of a *minimum* need requirement for new build capacity by the "interim milestone" of 2025, along with the broad statement that overall generating capacity might need to be doubled or trebled by 2050 (see paragraphs 73 to 78 above). It is not suggested that either ClientEarth or the Panel sought to relate the capacity of the Drax proposal to any of those matters.

130. The NPS does not set out a general requirement for a quantitative assessment of need in the determination of individual applications for DCOs. Putting to one side the "interim milestone" which did not feature in the discussion in this case, there are no benchmarks against which a quantitative analysis (eg. consents in the pipeline or projections of capacity) could be related. Indeed, the document makes it clear that the 2010 UEP projections should not be taken as expressing "a demand or preferred outcome" in relation to need for additional generating capacity or types of generation required (para. 3.3.18). Paragraph 3.3.20 explained that those projections assumed that electricity demand would be no greater in 2025 than in 2011, but went on to add that that demand could be underestimated as moves to decarbonise may lead to increased use of electricity (see eg. paragraph 60 above). Both paragraphs 3.1.2 and 3.3.24 make it plain that it is not the function of planning policy to set targets or limits for different technologies and the 2010 UEP figures were not to be used for that purpose (see paragraphs 75 to 80 above). As Mr Tait QC explained, EN-1 adopts a market-based approach and relies in part upon market mechanisms for the delivery of desired objectives.

131. Given those clear statements of policy in EN-1 there was no justification for the Panel to have regard to the 2017 UEP projections in order to assess the contribution of the Drax proposal to meeting the qualitative need identified in the NPS. Likewise, an analysis of the consents for gas-fuelled power stations was irrelevant for that purpose. Moreover, the Panel's assessment was benchmarked against the 2017 UEP projections, which self-evidently do not form the basis for the policy contained in EN-1.

132. The case advanced by ClientEarth was a barely disguised challenge to the merits of the policy. As we have seen, they contended that because of what had taken place since

2011 there was no need for any future new large gas-fuelled power stations to be built. Indeed, the conclusions reached by the Panel would be equally applicable to any other similar proposal. That flies in the face of EN-1 which states that there is a qualitative need for such development, for example the vital contribution it makes to the provision of reliable electricity supplies (para. 3.6.1), security of energy supply from different sources and vital flexibility to support an increasing amount of low carbon generation (para. 3.6.2). ClientEarth's case and the conclusions of the Panel effectively involved rewriting those and other passages (e.g. paragraph 3.6.8). Consequently, whereas EN-1 specifically gives substantial weight to the qualitative need it establishes, the logic of the Panel's reasoning led them to give effectively no weight to that need.

133. Mr Jones QC described the role of the proposed development as merely to provide back-up to renewable sources (referring to paras. 5.2.39 and 5.2.42 of the Panel's report). But paragraphs 3.3.11 and 3.3.12 of EN-1 explain the importance given to that role (see paragraphs 85 to 86 above). The Secretary of State had those matters well in mind (see e.g. DL 4.10). The Secretary of State assessed the contribution which the proposed development would make to need in terms of both function and scale (eg. DL 4.12 to 4.13, 4.18 to 4.20, 5.5, 6.6 and 6.9).

134. Whatever may be the merits of ClientEarth's arguments which found favour with the Panel (something which it is not for this court to consider), they were not matters which should have been taken into account in the examination (s.87(3) of PA 2008). Instead, these arguments about the current or continuing merits of the policy on need could be relevant to any decision the Secretary of State might be asked to make on whether or not to exercise the power to review the NPS under s.6 of PA 2008. No such decision has been taken and this claim has not been brought as a challenge to an alleged failure to act under s.6.

135. The effect of the interpretation of EN-1 advanced by ClientEarth, and accepted by the Panel, is that any applicant for a DCO for gas-fuelled power generation would need to demonstrate a quantitative need for the development proposed. Indeed, because paragraphs 3.1.3 and 3.2.3 of the NPS apply to all types of energy infrastructure, their interpretation would apply across the board. There is no reason to think that that could have been the object of these policies. It would run counter to the thinking which lay behind the introduction of the PA 2008 and the energy NPSs. EN-1 has not been drafted in such a way as to produce that result.

136. The Panel considered that all that EN-1 established was that "the principle of need for energy NSIPs in general is not for debate" but it was appropriate to consider the specific need for the development proposed "because of the evidence presented into this examination" (paras. 5.2.23 and 5.2.69). Thus, in paragraph 5.2.24 they considered that because the evidence showed that energy generation is moving to lower carbon sources, in line with the policy objective in EN-1 requiring transition to a low carbon economy over time, "it follows that requirements from each energy NSIPs must too continually change with time, to reflect the transitioning energy market." I do not accept the proposition that the proper interpretation of a policy such as a NPS, an objective question of law, depends on the evidence which happens to be presented in one particular examination.

137. It may well be that the Panel thought that they had moved on to the *application* of policy in EN-1. That, of course is a separate matter which should not be elided or confused

with the interpretation of policy (Tesco [2012] PTSR 983 at [18] to [19]; Hopkins [2017 1 WLR 1865 at [26]; Scarisbrick [2017] EWCA Civ 787 at [19]; and Samuel Smith [2020] PTSR 221 at [21] to [22]). But the problem with the Panel's approach is that it begs the prior question whether they had understood EN-1 correctly. Here, EN-1 contained no language to indicate that the "requirements" or "needs" for each type of energy NSIP set out in EN-1 should be reassessed from time to time, in the consideration of individual applications for a DCO, or were dependent upon quantitative need being shown. That approach would amount to a revision of the policy and belongs to the process of review under s.6.

138. The policy on need in EN-1 is analogous to that considered in Scarisbrick. Mr. Jones QC sought to support the Claimant's interpretation of the need policies in EN-1 by referring also to paragraph 4.1.3 which provides that in "considering any proposed development" the Secretary of State should take into account (inter alia) "its contribution to meeting the need for energy infrastructure" (skeleton para. 30). This may have been the passage which the Panel had in mind in paragraphs 5.2.23 and 5.2.69 of their Report. But it does not support their approach to the policy on need. The same policy appeared in the NPS considered in Scarisbrick (see [17]) and yet the Court of Appeal rejected the argument of the Claimant in that case, that the NPS required the Secretary of State to assess project-specific need when determining an application for a DCO. The policy created a "general assumption of need" for all infrastructure proposals of a type falling within its ambit, to which the Secretary of State had been entitled to give considerable weight ([24], [53] and [57] to [59] – see paragraphs 112 to 116 above).

139. In Scarisbrick the Court of Appeal also stated that the weight to be given to the "general assumption" of need established by the NPS was a matter to be evaluated in each case, but in that case the policy did not prescribe the weight to be given to the identified need [31]. Here, EN-1 is different, in that it expressly provides that "substantial weight" is to be given to the contribution which a project makes to that need (para. 3.1.4). The "need" is that defined in paragraph 3.1.3 which is said to be described in the following sections in terms of "scale" and urgency for each type of infrastructure. Given that EN-1 does not set targets or limits for different types of technology, "scale" could only refer to the expression of *minimum* need by the "interim milestone" of 2025 (paras. 3.3.16 and 3.3.22 to 3.3.24), which was not in play in this challenge.

140. The other factor referred to in paragraph 3.1.3 is "urgency of need". So, for example, paragraph 3.5.9 refers to the importance of new nuclear power stations being constructed as soon as possible and significantly earlier than 2025. Similarly, paragraph 3.4.5 states that it is necessary to bring forward renewable generating projects as soon as possible. The importance of fossil fuelled power stations is explained in section 3.6 of EN-1. In that context paragraph 3.3.12 explains that increasing reliance on renewables will mean that total electricity capacity will need to increase, with "a larger proportion being built *only or mainly* to perform back-up functions" (see also para. 3.3.14).

141. Paragraph 3.2.3 does not alter this analysis. It states that the weight attributable to need in any given case should be proportionate to the extent to which the project would actually contribute "to satisfying *the need for a particular type of infrastructure*" (emphasis added). It does not call for that contribution to be assessed relative to the need for each type of infrastructure covered by EN-1 Paragraph 3.2.3 is therefore

entirely consistent with paragraphs 3.1.3 and 3.1.4. The need for fossil fuel generation is dealt with by reference to section 3.6 and related paragraphs which describe the role played by that technology. Paragraph 3.2.3 does not require an assessment of quantitative need for gas-fired generation. Bearing in mind that EN-1 does not express the need for energy infrastructure in quantitative terms (other than figures given for the 2025 "interim milestone"), the words "proportionate", "extent" and "contribution" are consistent with need being assessed in qualitative terms.

142. For these reasons, the interpretation of EN-1 for which ClientEarth has contended, and which the Panel accepted, and upon which ground 1 is dependent, must be rejected. The Secretary of State was entirely correct to dismiss that approach at DL 4.13 and 4.18.

143. The Claimant raises a subsidiary issue criticising DL 4.19 in which the Secretary of State went on to apply the last sentence of paragraph 3.2.3 of EN-1 by asking whether, in the light of the Panel's findings, there was "any reason why she should not attribute substantial weight to the Development's contribution to meeting the identified need for new CCR fossil fuel generation infrastructure in this case." The Claimant submits that this involved asking the wrong question or applying the wrong policy test; in other words something which was not compatible with EN-1.

144. There is nothing in this point. The Secretary of State's decision did not involve increasing the weight attributed to need beyond "substantial". Logically therefore, she devoted her reasoning in the circumstances of this case to the merits of the arguments as to why that weight should be *reduced*. That was an entirely proper approach to take to paragraphs 3.14 and 3.2.3 of EN-1 in the context of the issues which were raised before her in this case.

145. For all these reasons ground 1 must be rejected.

Ground 2

146. I cannot accept the Claimant's submission that the Secretary of State's decision to disagree with the Panel's conclusions gave rise to a heightened obligation to give fuller reasons (see para. 119 above). True enough, Horada was a case where the Secretary of State disagreed with the reasons given by the Inspector for recommending that the compulsory purchase order should not be confirmed, but the Court of Appeal did not lay down any more stringent test for judging the legal adequacy of his reasoning than is generally applied. That would have been inconsistent with the decision of the House of Lords in the Save case (see Lord Bridge at [1991] 1 WLR 153, 165H to 166H and see also the Court of Appeal in Secretary of State for Communities and Local Government v Allen [2016] EWCA Civ 767 at [19]). It would also be inappropriate to judge the adequacy of the reasoning in the decision letter in this case by making a comparison with that criticised by the Court of Appeal in Horada, an exercise which the Court of Appeal firmly discouraged in Mordue v Secretary of State for Communities and Local Government [2016] 1 WLR 2682 at [27].

147. I accept the submission made for the Secretary of State and for Drax that if, as I have concluded, the Panel's interpretation of EN-1 was wrong and that of the Secretary of State was correct, then ground 2 adds nothing to ground 1. The Secretary of State had no need to address the reasons given by the Panel for attributing no weight to the case

on need, because they involved discounting that need by reference to a quantitative assessment.

148. In saying that, I acknowledge that the Panel did also rely upon one qualitative aspect, namely their view that "the need for the proposed development in the context of the consented gas generation capacity, is likely to be limited to system inertia" which they treated as showing "low level need and urgency" (para. 5.2.42). They subsequently broadened that to add "flexibility to support renewable energy generation" (paras. 5.2.43 and 5.2.71). Mr. Jones QC submits that the Secretary of State failed to address that factor in DL 4.20.

149. In a reasons challenge, there is a single indivisible question, namely whether the claimant has been substantially prejudiced by an inadequacy in the reasons given (Save at p. 167D). In other words, it is insufficient for a claimant simply to show one of the examples of "substantial prejudice" given by Lord Bridge at p. 167F-H. In addition, it must be shown that the reasons given may well conceal a public law error, or that they raise a substantial doubt as to whether the decision is free from any flaw which would provide a ground for quashing the decision (p. 168B-E).

150. It is plain from the cross-reference at the end of DL 4.19 to the Panel's report that the Secretary of State had well in mind their views on the function or role of the proposed development. It cannot be said that there is anything to indicate a substantial doubt about whether she had regard to that matter. Furthermore, I accept the Secretary of State's submission that this factor is built into the relevant parts of EN-1. That is plain from the analysis of the NPS set out earlier in this judgment. The Secretary of State made that very point in DL 4.13. She even referred specifically to the proposed battery storage units and the "important role" they play under EN-1, reinforcing her conclusion on weight in DL 4.20 (see DL 5.5). There is nothing in the Claimant's criticism.

151. As the Claimant pointed out (para. 67 of skeleton), the three quantitative aspects of the Panel's findings were concerned with:-

(i) Changes in energy generation capacity since 2011;

(ii) The implications of current models and projections of future demand for gas-fired electricity generation; and

(iii) The pipeline of consented gas-fired infrastructure.

152. Although the Secretary of State was under no legal obligation to give further reasons on these matters because (as I have already explained) they all arose from the Panel's misinterpretation of EN-1, which she had already addressed, and moreover they involved questioning the merits of NPS policy, she nonetheless gave legally adequate reasoning on each of them in DL 4.20. This was sufficient to enable a participant in the examination, familiar with the issues, to understand why the Secretary of State did not consider that all or any of these matters justified reducing the weight to be given to the need for the proposal. She was entitled to do so by relying (in part) upon relevant passages in EN-1, which she correctly understood. In relation to point (iii), it is obvious from DL 4.20 that the Secretary of State was treating the uncertainty about the implementation of consents previously granted as a significant factor.

153. For the reasons set out above ground 2 must be rejected.

Ground 3

154. This ground is concerned with the way in which the Secretary of State treated the assessment of GHG emissions from the proposed development, having regard to EN-1 and EN-2.

155. Paragraph 5.2.2 of EN-1 states:-

> "CO_2 emissions are a significant adverse impact from some types of energy infrastructure which cannot be totally avoided (even with full deployment of CCS technology). However, given the characteristics of these and other technologies, as noted in Part 3 of this NPS, and the range of non-planning policies aimed at decarbonising electricity generation such as EU ETS (see Section 2.2 above), Government has determined that CO_2 emissions are not reasons to prohibit the consenting of projects which use these technologies or to impose more restrictions on them in the planning policy framework than are set out in the energy NPSs (e.g. the CCR and, for coal, CCS requirements). Any ES on air emissions will include an assessment of CO_2 emissions, but the policies set out in Section 2, including the EU ETS, apply to these emissions. The IPC does not, therefore need to assess individual applications in terms of carbon emissions against carbon budgets and this section does not address CO_2 emissions or any Emissions Performance Standard that may apply to plant."

156. Paragraph 2.5.2 of EN-2 states:-

> "CO_2 emissions are a significant adverse impact of fossil fuel generating stations. Although an ES on air emissions will include an assessment of CO_2 emissions, the policies set out in Section 2.2 of EN-1 will apply, including the EU ETS. The IPC does not, therefore need to assess individual applications in terms of carbon emissions against carbon budgets and this section does not address CO_2 emissions or any Emissions Performance Standard that may apply to plant."

157. The Panel addressed GHG emissions primarily in section 5.3 of their report. They concluded that the percentage increase in these emissions from the baseline position would lie somewhere between the estimates presented by ClientEarth and by Drax. They acknowledged that it was difficult to establish an accurate baseline in view of the wide range of assumptions involved and the potential for rapid changes over a relatively long time frame (para. 5.3.22). It had been agreed between the parties at the examination that the total percentage increase in emissions, as estimated in the ES produced by Drax, should be treated as "a significantly adverse effect". Consequently, the Panel concluded that their finding indicated an impact of greater severity and that this was a negative factor in the planning balance (paras. 5.3.27 to 5.3.28, 7.2.11 and 7.3.6). They added that whether the DCO should be granted turned on the balancing exercise under s.104(7) (para. 7.3.7).

158. When the Panel came to consider the application of s.104 of PA 2008, they identified firstly a number of positive benefits, namely bio-diversity, socio-economics and the re-use of existing infrastructure which attracted "significant weight" (paras. 7.3.11 to 7.3.12). They then identified various factors which were judged to have a neutral effect

(para. 7.3.13). Finally, they brought together the negative impacts of the proposal in paragraph 7.3.14:-

(i) the decarbonisation objective would be undermined by increasing gas-fired capacity where that already exceeds UEP forecasts;

(ii) a significant increase in GHG emissions would have a significant adverse effect on climate change;

(iii) the development would have a significant adverse effect on landscape and visual receptors.

159. The Panel attached "considerable weight" to (i) and (ii), but they said that (iii) had "not weighed heavily" in their overall conclusions. The Panel struck the overall balance in paragraph 7.3.15, concluding that factors (i) and (ii) outweighed the benefits of the proposal. In reaching that judgment they relied upon their assessment that the *actual* contribution that would be made by the proposed development to need was "minimal" and so no significant weight should be given to that matter.

160. It is therefore apparent that the Panel's overall conclusion turned on the significance they attached to the UEP projections compared to consented capacity and the implications that had for their assessment of the proposal's contribution to need and the decarbonisation objective, weighed against the benefits of the proposal.

161. In her decision letter the Secretary of State noted at DL 4.15 the explanation in section 2.2 of EN-1 as to how climate change and GHG has been taken into account in the preparation of the Energy NPSs (see paragraphs 60 to 70 above). She then quoted paragraph 5.2.2 of EN-1.

162. In DL 4.16 and 4.17 she stated:-

> "4.16 This policy is also reflected in paragraph 2.5.2 of EN-2. It is the Secretary of State's view, therefore, that, while the significant adverse impact of the proposed Development on the amount of greenhouse gases that will be emitted to atmosphere is acknowledged, the policy set out in the relevant NPSs makes clear that this is not a matter that that should displace the presumption in favour of granting consent.
>
> 4.17 In light of this, the Secretary of State considers that the Development's adverse carbon impacts do not lead to the conclusion that the Development is not in accordance with the relevant NPSs or that they would be inconsistent with the CCA. The Secretary of State notes the need to consider these impacts within the overall planning balance to determine whether the exception test set out in section 104(7) of the 2008 Act applies in this case. The ExA considers that the Development will have significant adverse impacts in terms of GHG emissions which the Secretary of State accepts may weigh against it in the balance. However, the Secretary of State does not consider that the ExA was correct to find that these impacts, and the perceived conflict with NPS policy which they were found to give rise to, should carry determinative weight in the overall planning balance once the benefits of the project are properly considered, including in particular its contribution towards meeting need as explained below."

163. It is important to note that in the middle of DL 4.17 the Secretary of State accepted that GHG emissions did represent "significant adverse impacts" which could be weighed in the balance against the proposed development. But she considered that once the project's contribution to policy need and, thus its overall benefits, were correctly evaluated, the adverse carbon and GHG impacts were not determinative. In other words, she considered that the weight to be given to those disbenefits was outweighed by the benefits of the proposal. The submission in paragraph 89 of the Claimant's skeleton that the Secretary of State did not weigh the GHG impacts in that manner fails to read the paragraph as a whole and instead focuses unrealistically on a single word "may". That approach to reading the decision letter involves excessive legalism of the kind deprecated in a number of authorities, including East Staffordshire Borough Council v Secretary of State for Communities and Local Government [2018] PTSR 88 at [50].

164. In DL 6.6 (quoted in paragraph 125 above) the Secretary of State returned to the subject of need and went on to address GHG emissions and the overall balance in DL 6.7:-

> "In assessing the issue of GHG emissions from the Development and the ExA's conclusions in this matter, the Secretary of State notes that the Government's policy and legislative framework for delivering a net zero economy by 2050 does not preclude the development and operation of gas-fired generating stations in the intervening period. Therefore, while the policy in the NPS says GHG emissions from fossil fuel generating stations are accepted to be a significant adverse impact, the NPSs also say that the Secretary of State does not need to assess them against emissions reduction targets. Nor does the NPS state that GHG emissions are a reason to withhold the grant of consent for such projects. It is open to the Secretary of State to depart from the NPS policies and give greater weight to GHG emissions in the context of the Drax application but there is no compelling reason to do so in this instance."

165. In summary, the Claimant criticises the decision letter on the grounds that the Secretary of State misinterpreted EN-1 as requiring the decision-maker to treat the GHG emissions of the proposal either as irrelevant or as having no weight.

Analysis

166. Treating a consideration as irrelevant is not the same thing as giving it no weight. As Lord Hoffmann pointed out in Tesco [1995] 1 WLR 759, 780F-G, there is a distinction between deciding whether a consideration is relevant, which is a question of law for the court, and deciding how much weight to give to a relevant consideration which is a question of fact for the decision-maker. If a consideration is relevant, it is entirely a matter for the decision-maker (subject only to Wednesbury irrationality) to determine how much weight to give to it, which includes giving no weight to it. A determination that no weight should be given to a matter does not mean that it has been treated as legally irrelevant.

167. In fact, it is plain from the passages in the decision letter to which I have already referred that the Secretary of State did not treat GHG emissions as irrelevant, nor did she treat them as something to which no weight should be given. In DL 4.17 the Secretary of State moved from her conclusions on s.104(3) and s.104(5) to considering the balance under s.104(7). She accepted that the Panel's finding on the significant adverse impacts of GHG emissions from the development could be weighed in the balance against the

proposal. But she disagreed with the Panel's evaluation of the benefits of the proposal, including its contribution towards meeting policy need. Once those benefits were correctly weighed, she found that the impact of GHG emissions should not "carry determinative weight in the overall planning balance." That can only mean that the disbenefits did not carry more weight than the benefits. Rather, it was the other way round. Thus, in DL 4.17 the Secretary of State was describing a straight forward balancing exercise which was in no way dependent upon the terms of paragraphs 5.2.2 of EN-1 or 2.5.2 of EN-2. She returned to this exercise in DL 6.3 to DL 6.9.

168. The Claimant's criticisms are really directed at the Secretary of State's reliance upon EN-1 and EN-2 in DL 4.16 and DL 6.7. It should be noted, however, that DL 4.16 forms part of the Secretary of State's reasoning in support of the conclusion that the proposal accorded with the NPSs for the purposes of s.104(3), not the balancing exercise under s.104(7). On the other hand, DL 6.7 formed part of the balancing exercise under section 104(7) carried out between DL 6.3 and DL 6.9.

169. Before examining the passages in the decision letter criticised by the Claimant, it is necessary to consider the meaning of the relevant policies in the NPS. Paragraph 5.2.2 of EN-1 plainly states that the CO_2 emissions from a proposed energy NSIP do not provide a reason for refusing an application for a DCO. The rationale for that statement is that such emissions are adequately addressed by the regimes described in section 2.2 of EN-1. There has been no challenge to the legality of that part of EN-1. Any such challenge would now be precluded by the ouster clause in s.13(1) of PA 2008.

170. In any event, I do not see how it could be legally objectionable for a NPS to state that a particular factor is insufficient by itself to justify refusal of a planning consent because it is addressed by other regimes. Section 5(5)(c) enables a NPS to prescribe how much weight is to be given to a particular factor in a decision on a DCO application, which could include giving no weight to it. The approach in paragraph 5.2.2 is also supported by established case law on the significance of alternative systems of control (see e.g. Gateshead Metropolitan Borough Council v Secretary of State for the Environment (1996) 71 P & CR 350) and, to some extent, by Regulation 21(3)(c) of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017 No. 572) (see Ground 6 below).

171. In DL 4.16 the Secretary of State merely said that the policy in the NPSs makes it clear that GHG emissions are "not a matter which should displace the presumption in favour of granting development." That was a reference to the presumption in paragraph 4.1.2 of EN-1 (see paragraph 95 above). Given that EN-1 also states that the matter of GHG emissions should not itself be treated as a reason for refusal, it is plain that that would not be sufficient to override the presumption in paragraph 4.1.2 of EN-1. The Secretary of State's reliance upon those NPS policies in that way when considering the application of s.104(3) of PA 2008 is wholly unobjectionable.

172. In DL 6.7 the Secretary of State was in the midst of carrying out the exercise required by s.104(7). No criticism can be made of either of her statements that (a) she did not need to assess GHG emissions against emissions reduction targets or (b) such emissions are not a reason for refusing to grant consent. They accurately summarise relevant parts of paragraph 5.2.2 of EN-1 and paragraph 2.5.2 of EN-2. Neither of those policies treat GHG emissions as an irrelevant consideration in a DCO application or as a disbenefit to which no weight may be given. The Secretary of State did not suggest otherwise in

her decision letter, either in her reliance upon those policies or in her treatment of the subject.

173. For all these reasons ground 3 must be rejected.

Ground 4

174. ClientEarth submits that the Secretary of State failed to comply with her obligation under s.104(7) of PA 2008 to weigh the adverse impact of the proposed development against its benefits. Instead, the Secretary of State merely repeated the assessment she had already carried out under s.104(3). It is said that she unduly fettered her discretion on the issue posed by s.104(7) by looking at that matter exclusively through the lens of the NPSs.

175. ClientEarth accepts (skeleton paras. 106-107) that policy contained in the NPSs is relevant to the exercise under s.104(7), for example the statement of national need (see Thames Blue Green Economy at [16]). However, the Claimant criticises the decision taken in this case because the same approach was taken to (i) need at DL 6.6 (see paragraph 125 above) and (ii) GHG emissions at DL 6.7 (see paragraph 164 above) as had previously been applied in the consideration of NPS policies under s. 104(3) (skeleton para. 109). ClientEarth submits that the same policy tests should not be applied when s.104(7) is considered.

Analysis

176. The relationship between s.104(3) and (7) should also be considered in the context of ss.87(3) and 106(2). The object of the latter provisions is that matters settled by a NPS which has been subjected to SEA and has satisfied all the procedural requirements of the legislation should not be revisited or reopened in the DCO process. Where the Secretary of State considers it appropriate, policy in a NPS can be reviewed under s.6 of PA 2008, a process which is subject to the same requirements for *inter alia* SEA, consultation, public participation and parliamentary scrutiny. That statutory scheme also avoids policy being made *ad hoc* or even "on the hoof". Section 104(7) may not be used to circumvent the application of ss.87(3), 104(3) and 106(2) (Thames Blue Green Economy in the High Court and the Court of Appeal; Spurrier [103] to [108]).

177. For the reasons I have already given under ground 1, both ClientEarth and the Panel misunderstood the policy in EN-1 on need. The Secretary of State was legally entitled to reject their approach and to give "substantial weight" to the need case in accordance with the NPS. As Thames Blue Green Economy confirms (e.g. Sales LJ at [16]), the Secretary of State was fully entitled to take that assessment into account under s.104(7). No possible criticism can be made of DL 6.6.

178. As we have seen under ground 3, EN-1 and EN-2 do not state that GHG emissions may not be taken into account in the DCO process. They do not prescribe how much weight should be given to such emissions as a disbenefit, except to say that this factor does not in itself justify a refusal of consent, given the other mechanisms for achieving decarbonisation. The NPSs proceed on the basis that there is no justification in *land use planning terms* for treating GHG emissions as a disbenefit which in itself is dispositive of an application for a DCO.

179. In DL 6.7 the Secretary of State repeated these considerations, as she was entitled to do. She also stated that GHG emissions are treated in the NPS as a significant adverse impact (see EN-2 para. 2.5.2) and then went on to consider whether, in the s.104(7) balance, that factor should be given greater weight in the case of the Drax proposal. The NPSs did not preclude that possibility, so long as GHG emissions were not treated as a freestanding reason for refusal. In this case the proposal also gave rise to landscape and visual impacts which were treated as further disbenefits (DL 6.5 and 6.8). Plainly the suggestion that the Secretary of State looked at the balance under s.104(7) solely through the lens of, or improperly fettered by, the NPSs is untenable.

180. The Secretary of State decided not to give greater weight to GHG emissions because she found there to be "no compelling reason in this instance." ClientEarth criticise that phrase as improperly introducing a "threshold test". Once again, this is an overly legalistic approach to the reading of the decision letter. The Secretary of State was simply expressing a matter of planning judgment. She was simply saying that there was no sufficiently cogent reason for giving more weight to this matter. She was entitled to exercise her judgment in that way. The Secretary of State then went on to weigh all the positive and negative effects of the proposal before concluding that the benefits outweighed the adverse effects of the proposal (DL 6.9).

181. For all these reasons, ground 4 must be rejected.

Ground 5

182. ClientEarth submits that the Secretary of State failed to assess the compliance of the proposal with policy requirements for CCR contained primarily in EN-1 in particular the economic feasibility of CCS forming part of the development during its lifetime.

183. These policy requirements are based upon Article 33 of the EU Directive on the Geological Storage of Carbon Dioxide (Directive 2009/31/EC), which inserted Article 9a into the Large Combustion Plants Directive (Directive 2001/80/EC). These provisions have been transposed into domestic law by the Carbon Capture Readiness (Electricity Generating Stations) Regulations 2013 (SI 2013 No. 2696) ("the 2013 Regulations"). No criticism is made of that transposition.

184. The effect of Regulation 3(1) is that the Secretary of State may not make a development consent order for the construction of a "combustion plant" (as defined) with a rated electrical output of 300 MW or more unless she has determined whether "the CCR conditions" are met in relation to that proposal. The Drax proposal engaged this provision. Regulation 2(2) defines how the CCR conditions are to be met:-

> "For the purposes of these Regulations, the CCR conditions are met in relation to a combustion plant, if, in respect of all of its expected emissions of CO_2—
>
> (a) suitable storage sites are available;
>
> (b) it is technically and economically feasible to retrofit the plant with the equipment necessary to capture that CO_2; and
>
> (c) it is technically and economically feasible to transport such captured CO_2 to the storage sites referred to in subparagraph (a)."

185. So it is necessary for it to be shown that sites suitable for the storage of carbon dioxide emissions from the plant are available, and that it is technically and "economically feasible" to retrofit the plant necessary to capture those emissions and to transport them to those storage sites. When the Directive and Regulations were passed the practical and commercial feasibility of CCS technology had not been demonstrated. Hence, it is necessary to reserve land for that purpose and to consider the retrofitting of the technology. This demonstration of technical and economic feasibility involves looking into the future.

186. Regulation 3(2) requires that the Secretary of State's determination under regulation 3(1) be made on the basis of a CCR assessment proposed by the applicant for a DCO (in this case Drax) and "any other available information, particularly concerning the protection of the environment and human health."

187. The Claimant does not suggest that there has been any failure to comply with the 2013 Regulations as such. Instead, it is said that there was a failure to comply with one aspect of the policy in EN-1 which elaborates upon those statutory requirements. Paragraph 4.7.13 of EN-1 states:-

> "Applicants should conduct a single economic assessment which encompasses retrofitting of capture equipment, CO_2 transport and the storage of CO_2. Applicants should provide *evidence of reasonable scenarios*, taking into account the cost of the capture technology and transport option chosen for the technical CCR assessments and the estimated costs of CO_2 storage, which make operational CCS economically feasible for the proposed development." (emphasis added)

188. Paragraph 4.7.10 of EN-1 also refers to guidance given by the Secretary of State in November 2009 which stated that the Government would not grant consent where the applicant could not "envisage any reasonable scenarios under which operational CCS would be economically feasible."

189. Inevitably a CCR assessment has to involve projections into the future. The projections upon which Drax relied involved making assumptions about future carbon trading prices. The Claimant makes no criticism about that as a matter of principle. But instead, drilling down into the evidence before the Panel, the complaint is that Drax only put forward certain carbon price scenarios in which CCS would be economic "and did not clarify that these were reasonable." This is said to be "crucial" (paras. 121 and 123 of the Claimant's skeleton).

Analysis

190. The Panel was satisfied that the requirements of the 2013 Regulations and of EN-1 in relation to CCR were met, including the economic and technical feasibility requirements (paras. 3.3.49 to 3.3.53 and 5.4.1 to 5.4.12 of the Report). The Secretary of State agreed in DL 4.29 to 4.31. I would have thought that it was obviously implicit that a conclusion that it would be "economically *feasible*" to install and operate CCS in future was based upon reasonable assumptions. There would be little point in legislating for this matter on the basis that unreasonable projections would be compliant. The "reasonable scenarios" criterion seems to be no more than a statement of the obvious and in reality is not a separate or additional requirement.

191. Mr. Jones QC accepted that during the examination ClientEarth did not raise any issue regarding the "reasonable scenarios" criterion. Their case was that a condition should be imposed requiring the provision of CCS from the outset (which was, in effect, a challenge to the merits of policy in the NPS which makes it plain that proposals for new fossil fuel plants only have to demonstrate that they are Carbon Capture Ready).

192. Although there is no absolute bar on the raising of a new point which was not taken in a planning inquiry or examination, one factor which may weigh strongly against allowing the point to be pursued is where it would have been necessary or appropriate for submissions or evidence to have been advanced, so that the decision-maker would have been able to make specific findings on the point (see e.g. Trustees of the Barker Mill Estates v Test Valley Borough Council [2017] PTSR 408 at [77]). There is a public interest in points being raised at the appropriate stage in the appropriate fact-finding forum, partly in order to promote finality and to reduce the need for legal challenge. If ClientEarth had followed that normal approach to the narrow issue now raised under ground 5, the matter could, if necessary, have been dealt with by some brief clarification of the material before the examination. If there was a genuine dispute about the matter, it could have been tested through cross-examination, or by the production of evidence to the contrary, in the normal way. However, I am satisfied that the material before the Panel and the Secretary of State adequately addressed this point in any event.

193. Paragraph 4.7.14 of EN-1 puts this ground of challenge into a sensible context:-

> "The preparation of an economic assessment will involve a wide range of assumptions on each of a number of factors, and Government recognises the inherent uncertainties about each of these factors. There can be no guarantee that an assessment which is carried out now will predict with complete accuracy either in what circumstances it will be feasible to fit CCS to a proposed power station or when those circumstances will arise, but it can indicate the circumstances which would need to be the case to allow operational CCS to be economically feasible during the lifetime of the proposed new station."

194. The CCR statement by Drax put forward scenarios and explained why those met the requirements of the 2013 Regulations and EN-1 and EN-2 and the Government's Guidance on CCR. Paragraph 40 of a submission to the Panel by ClientEarth, responded to submissions by Drax on CCS in the following terms:-

> "In line with this principle, the courts have established that is possible to impose a condition prohibiting the implementation of a consent until that condition has been met – even where there are no reasonable prospects of the condition being met. However, in the context of the present application, the Applicant appears to believe that there is a reasonable prospect of CCS being economically and technically feasible "by the mid-2020s"."

195. In other written representations ClientEarth commented favourably on the reasonableness of the assumptions made about future prices in the CCR assessment by Drax in contrast to its treatment elsewhere of the baseline for climate change analysis:-

> "Moreover, it has made its assumption of economic feasibility entirely contingent on "the end price of electricity" without assessing the reasonableness of such assumptions about future prices. This is in contrast to the approach taken in the

> Applicant's CCR Statement where the Applicant has carried out a detailed assessment of the future economics, including wholesale electricity prices, to arrive at a set of justified conclusions about the economic feasibility of CCS."

196. The attempt by Mr. Hunter-Jones (the Solicitor representing ClientEarth) in his second witness statement to explain certain of these passages, with respect, amounts to no more than special pleading.

197. Ground 5 is wholly without merit. It should not have been raised.

Ground 6

198. ClientEarth submits that the Secretary of State failed to comply with requirements in regulations 21 and 30 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017 No. 572) ("the 2017 Regulations") regarding measures for the monitoring of GHG emissions. A "monitoring measure" is defined by regulation 3(1) as:-

> "a provision requiring the monitoring of any significant adverse effects on the environment of proposed development, including any measures contained in a requirement imposed by an order granting development consent"

199. Regulation 21 deals with the consideration of whether a DCO should be granted. Paragraph (1) provides:-

> "When deciding whether to make an order granting development consent for EIA development the Secretary of State must—
>
> (a) examine the environmental information;
>
> (b) reach a reasoned conclusion on the significant effects of the proposed development on the environment, taking into account the examination referred to in sub-paragraph (a) and, where appropriate, any supplementary examination considered necessary;
>
> (c) integrate that conclusion into the decision as to whether an order is to be granted; and
>
> (d) if an order is to be made, consider whether it is appropriate to impose monitoring measures."

200. It will be noted that sub-paragraphs (a) to (c) apply irrespective of whether the decision is to grant or to refuse consent. However, the consideration under sub-paragraph (d) of whether monitoring measures should be imposed only arises if it is decided that the DCO should be granted. In that event, regulation 21(3) provides:-

> "When considering whether to impose a monitoring measure under paragraph (1)(d), the Secretary of State must—
>
> (a) if monitoring is considered to be appropriate, consider whether to make provision for potential remedial action;

(b) take steps to ensure that the type of parameters to be monitored and the duration of the monitoring are proportionate to the nature, location and size of the proposed development and the significance of its effects on the environment; and

(c) consider, in order to avoid duplication of monitoring, whether any existing monitoring arrangements carried out in accordance with an obligation under the law of any part of the United Kingdom, other than under the Directive, are more appropriate than imposing a monitoring measure."

201. The Claimant submits that Regulation 21 must be interpreted in the context of the preventative and precautionary principles of EU law (Article 191 of the Treaty on the Functioning of the European Union).

202. Regulation 30 provides for the contents of decision notices. Regulation 30(1) requires that the notice of the decision on the application for a DCO must contain the information specified in paragraph (2) which provides (in so far as relevant):-

"The information is—

(a) information regarding the right to challenge the validity of the decision and the procedures for doing so; and

(b) if the decision is —

(i) to approve the application—

(aa) the reasoned conclusion of the Secretary of State or the relevant authority, as the case may be, on the significant effects of the development on the environment, taking into account the results of the examination referred to, in the case of an application for an order granting development consent in regulation 21, and in the case of a subsequent application, in regulation 25;

(bb) where relevant, any requirements to which the decision is subject which relate to the likely significant environmental effects of the development on the environment;

(cc) a description of any features of the development and any measures envisaged in order to avoid, prevent or reduce and, if possible, offset, likely significant adverse effects on the environment; and

(dd) any monitoring measures considered appropriate by the Secretary of State or relevant authority, as the case may be; or

(ii) ..…"

203. Regulation 30(2)(b)(i)(aa) requires a reasoned conclusion to be given by the decision-maker on the significant effects of the development taking into account the examination of environmental information under Regulation 21(1). In effect, the reasoned conclusion required under regulation 30(2) relates to the requirements in Regulation 21(1)(a) to (c), but not sub-paragraph (d). There is no requirement in regulation 30 to give a "reasoned conclusion" in relation to any "monitoring measures" considered

appropriate. Instead, Regulation 30(2)(b)(i)(dd) simply requires the decision notice to set out the monitoring measures considered to be appropriate. There is no requirement in the 2017 Regulations to give "reasoned conclusions" on that matter. Mr. Jones QC did not argue to the contrary.

204. The Claimant submits that there is no indication in the decision letter that the Secretary of State considered whether monitoring measures would be appropriate "particularly (but not only) in relation to GHG emissions (para. 142 of skeleton).

Analysis

205. Mr. Tait QC pointed out that the decision made by the Secretary of State, which includes the DCO itself, involved the imposition of a number of monitoring measures. They are set out in schedule 2 to the Order under requirements 8(1) -(2), 15(3), 16(5), 21(2)-(3) and 23 and cover monitoring of such matters as ecological mitigation, ground contamination mitigation, archaeological interest, noise, and CCR. These matters are addressed where appropriate in the Panel's report and in the decision letter.

206. I therefore agree that the Secretary of State had well in mind the requirement in Regulation 21 to consider whether it was appropriate to impose monitoring measures.

207. The legislation to which I have referred makes it plain that there is no requirement for the Secretary of State to give reasons for a decision not to impose a particular monitoring measure, for example, in respect of GHG emissions, whether because it would be inappropriate or because other existing monitoring arrangements required by law are more appropriate. Accordingly, I accept Mr. Tait's submission that the Secretary of State's obligation under s.116(1) of PA 2008 to give reasons for her decision would only apply to the "principal important controversial issues" in the examination (see Save [1991] 1 WLR 153 at p.165 and South Bucks District Council [2004] 1 WLR 1953 at [34] and [36]).

208. In the present case the Panel referred to the need for Drax to obtain a Greenhouse Gas Permit from the Environmental Agency under the Greenhouse Gas Emissions Trading Scheme Regulations 2012 (SI 2012 No. 3038) ("the 2012 Regulations") to deal with GHG emissions from the proposed development (see Report at para. 1.7.1).

209. Ordinarily, a monitoring measure is imposed to see that a development conforms to certain parameters, failing which remedial measures may be taken, or to ensure that mitigation measures are effective. The 2017 Regulations do not require the imposition of monitoring simply for the sake of monitoring. This may be seen in recital (35) of Directive 2014/52 (which inserted article 8a into Directive 2011/92/EU) :-

> "Member States should ensure that mitigation and compensation measures are implemented, and that appropriate procedures are determined regarding the monitoring of significant adverse effects on the environment resulting from the construction and operation of a project, inter alia, to identify unforeseen significant adverse effects, in order to be able to undertake appropriate remedial action."

210. Mr. Jones QC submitted that the monitoring of GHG emissions under the 2017 Regulations was necessary here because of the wide divergence in the estimates before the Panel of the percentage increase in emissions (para. 141 of skeleton). This is a

wholly spurious point. As paragraph 12 of the Agreed Statement of Facts prepared for this hearing plainly states, there was no disagreement over the projections of the total emissions that would be produced by the proposed development. The disagreement related instead to the baseline scenarios, the existing coal-powered generation or replacement thereof elsewhere on the National Grid (see the Panel's Report at paras. 5.3.7 to 5.3.17). Plainly, monitoring measures imposed on the new gas-fired power station could achieve nothing whatsoever in relation to that difference.

211. It is common ground that during the examination process no one, including ClientEarth, suggested that the DCO should contain a monitoring measure for GHG and what significant purpose that would achieve which would not otherwise be achieved under the 2012 Regulations.

212. I have already referred to the approach taken by the courts to the raising of a new point in a legal challenge which could have been, but was not, pursued in a public inquiry or examination (paragraph 192 above). If ClientEarth had raised the matter in the normal way in the examination, issues of the kind which are now mentioned in paragraph 147 of their skeleton could have been covered and if necessary tested at that stage and appropriate findings made by the Panel. Although I will address the remaining arguments under ground 6, I do so with some hesitation as to whether it is appropriate.

213. The 2012 Regulations were made in order to give effort to a series of EU Directives establishing a scheme for trading in emission allowances for GHG, otherwise referred to in EN-1 as EU ETS. The monitoring arrangements they contain were made in order to give effect to EU Regulation 601/2012 and EU Regulation 2018/2067. The scheme is focused on achieving decarbonisation.

214. Regulation 9 prohibits the carrying on of a "regulated activity" at an "installation" without a permit issued by the Environment Agency. This would apply to the operation of the gas-fired generating units. The application for a GHG emissions permit may be granted if the Agency is satisfied that the applicant will be able to monitor and report emissions from the installation in accordance with the requirements of the permit (Regulation 10(4)). An application for a permit must contain a defined monitoring plan and procedures (paragraph 1(1) of schedule 4). The permit must contain (inter alia) the monitoring plan, monitoring and reporting requirements (to cover "the annual reportable emissions of the installation") and a requirement for verification of the report (para. 2(1) of schedule 4).

215. In relation to the anti-duplication provision in Regulation 21(3)(c) of the 2017 Regulations, ClientEarth submits that the GHG permit regime does not qualify as an "existing" monitoring arrangement. I cannot accept that argument. The statutory requirement for a permit is in place along with a detailed specification of what the permit must contain in order to comply with the "Monitoring and Reporting Regulation" (i.e. EU Regulation 601/2012). The content of these requirements is sufficiently defined to qualify as an "existing monitoring arrangement" for the purposes of regulation 21(3)(c) of the 2017 Regulations. No specific case was advanced by ClientEarth which would enable the court to conclude otherwise.

216. The 2017 Regulations operate within the EU ETS regime summarised in EN-1 at paragraphs 2.2.12 to 2.2.15. All of this must have been well-known to the Panel and the Secretary of State. The ETS scheme involves a gradually reducing cap on GHG

emissions from large industrial sectors such as electricity generation which translates into finite allowances to emit GHG available to specific operators. Paragraph 5.2.2 of EN-1 envisages that the decarbonising of electricity generation is to be achieved through the regimes described in section 2.2. I therefore accept the Secretary of State's submission that EN-1 proceeds on the basis that GHG emissions will be separately controlled. It is unsurprising therefore, that no one suggested during the examination that GHG emissions should be controlled under the PA 2008, or what cap or caps should be imposed, without which it is difficult to see what purpose GHG monitoring under the terms of the DCO would serve. Ultimately, Mr. Jones QC submitted that monitoring would enable it to be seen whether the projected total emissions had been estimated accurately. It was not explained why that could not be achieved under the 2012 Regulations, if that was thought to be necessary.

217. Looking at the position as a whole, I am satisfied that no breach of Regulation 21 of the 2017 Regulations has occurred. However, even if I had taken a different view, I am also certain that it would be inappropriate to grant any relief. The focus of the Statement of Facts and Grounds and of the Claimant's skeleton is to seek an order quashing the DCO. In R (Champion) v North Norfolk District Council [2015] 1 WLR 3710 the Supreme Court held that even where a breach of EIA Regulations is established, the Court may refuse relief where the applicant has in practice been able to enjoy the rights conferred by European legislation and there has been no substantial prejudice [54].

218. I accept the submissions for the Secretary of State and Drax that in substance the requirements and objectives of Regulation 21 have been met and no substantial prejudice has occurred. The legal issue raised under ground 6 would not affect whether the project is consented and may go ahead. There is an existing monitoring regime under the 2012 Regulations. GHG emissions will be monitored, recorded, validated and passed to the EA. This is within the context of the ETS regime which is focused on achieving decarbonisation over time. No evidence has been filed to explain how any real prejudice has been caused by the alleged breach of regulation 21 (see, for example, Ouseley J in R (Midcounties Co-operative Limited) v Wyre Forest District Council [2009] EWHC 964 (Admin) at [104]-[116]). ClientEarth has not indicated the nature of any monitoring condition (including measures consequent upon the results obtained) which, they say, ought to have been imposed on the DCO. It is simply said that monitoring measures could be linked to further "requirements" in the DCO, without saying what they might be (paragraph 147 of the Claimant's skeleton). If there had been any real substance in such points, ClientEarth had every opportunity to raise them during the examination process in the normal way; but they did not take it. This is a hollow complaint.

219. I have also been asked to consider applying s.31(2A) of the Senior Courts Act 1981. Given the need for compliance with the GHG permitting regime and for the other reasons set out above, I am satisfied that if the monitoring of GHG emissions under the DCO had been addressed during the examination or in the Secretary of State's consideration of the matter, it is highly likely that the outcome would not have been substantially different. The DCO would still have been granted and there is no reason to think, on the material before the court, that GHG monitoring would have been included as an additional requirement of the order. Nothing has been advanced which would justify the grant of relief in reliance upon s.31(2B).

220. One further point has been raised by the Claimant which the Secretary of State has addressed in paragraph 90 of her skeleton:-

> "[Paragraph 150 of the Claimant's skeleton] introduces a separate and unparticularised assertion that "*the Secretary of State failed lawfully to comply with* …… Reg.30 of the EIA Regulations. The point made appears to be that the Secretary of State did not include a "*reasoned conclusion ... on the significant effects of the development on the environment*" as required by Reg.30(2)(b)(i)(aa). That is a new ground outside the scope of the SFG that has nothing to do with monitoring and is baseless. The DL, read with the ExA, sets out detailed conclusions on the environmental impacts of the Drax Power proposal."

I agree.

221. For all these reasons ground 6 must be rejected.

Ground 7

Introduction

222. On 27 June 2019 the target for the UK's net carbon account for 2050 set out in s.1 of the CCA 2008 was changed from 80% to 100% below the 1990 baseline (see the Climate Change Act 2008 (2050 Target Amendment) Order 2019 (SI 2019 No. 1056)). This is referred to as "the net zero target". In paragraph 3.4.2 the Panel explained that because this amendment had occurred after the close of the examination and only one week before they were to submit their report to the Secretary of State, it had not formed the basis for their examination of the application or had any bearing upon their final conclusions. They suggested that it would, nonetheless, be a matter for the Secretary of State to consider in the planning balance.

223. Although in paragraphs 7.2.10 and 7.3.6 of their report the Panel concluded that the projected increase in total GHG emissions of more than 90% above the current baseline for Drax would undermine the Government's commitment to cut GHG emissions, as contained in the CCA 2008, at paragraph 7.3.8 the Panel stated that they had received no evidence that the proposed development would in itself lead to a breach of s.1 of that Act. Accordingly, they concluded that the exception to s.104(3) provided by s.104(5) (see paragraph 49 above) did not apply.

224. In DL 4.28 the Secretary of State agreed with the conclusion at paragraph 7.3.8 of the Panel's Report and said that the implications of the amendment to the CCA 2008 would be addressed subsequently. At DL 5.7 she stated that the "net zero target" was "a matter which was both important and relevant to the decision on whether to grant consent for the [proposed] development and that regard should be had to it when determining the application."

225. At DL 5.8 to 5.9 the Secretary of State stated:-

> "5.8 The Secretary of State notes with regard to the amendment to the CCA that it does not alter the policy set out in the National Policy Statements which still form the basis for decision making under the Act. Section 2.2 of EN-1 explains how climate change and the UK's GHG emissions targets contained in the CCA have

been taken into account in preparing the suite of Energy NPSs. As paragraph 2.2.6 of EN-1 makes clear, the relevant NPSs were drafted considering a variety of illustrative pathways, including some in which *"electricity generation would need to be virtually [greenhouse gas] emission-free, given that we would expect some emissions from industrial and agricultural processes, transport and waste to persist."* The policies contained in the relevant NPSs regarding the treatment of GHG emissions from energy infrastructure continue to have full effect.

5.9 The move to Net Zero is not in itself incompatible with the existing policy in that there are a range of potential pathways that will bring about a minimum 100% reduction in the UK's emissions. While the relevant NPSs do not preclude the granting of consent for developments which may give rise to emissions of GHGs provided that they comply with any relevant NPS policies or requirements which support decarbonisation of energy infrastructure (such as CCR requirements), potential pathways may rely in future on other infrastructure or mechanisms outside the planning regime offset or limit those emissions to help achieve Net Zero. Therefore, the Secretary of State does not consider that Net Zero currently justifies determining the application otherwise than in accordance with the relevant NPSs or attributing the Development's negative GHG emissions impacts any greater weight in the planning balance. In addition, like the ExA, the Secretary of State does not consider there to be any evidence that granting consent for the Development would in itself result in a direct breach of the duties enshrined in the CCA, given the scope of the targets contained in the CCA which apply across many different sectors of the economy. This remains the case following the move to Net Zero and therefore she does not consider that the exception in section 104(5) of the 2008 Act should apply in this case." (original emphasis)

226. In summary the Secretary of State concluded that:-

(i) The policy in the NPSs had not been altered by the amendment to the CCA 2008 and still remained the basis for decision-making under the 2008 Act;

(ii) The UK's target of an 80% reduction in GHG emissions had been taken into account in the preparation of the energy NPSs;

(iii) The net zero target was not in itself incompatible with those policies, given that there was a range of potential pathways that will bring about a minimum 100% reduction in GHG by 2050;

(iv) Developments giving rise to GHG emissions are not precluded by the NPSs provided that they comply with any relevant NPS policy supporting decarbonisation of energy infrastructure, such as CCR requirements. Potential pathways may rely in future on other infrastructure or mechanisms outside the planning regime to offset or limit those emissions to help achieve net zero;

(v) Accordingly, the net zero target did not justify determining the application otherwise than in accordance with the NPSs or increasing the negative weight in the planning balance given to GHG emissions from the development;

(vi) Given that the targets in the CCA 2008 apply across many different sectors of the economy, there was no evidence that the proposed development would in itself result in a breach of that Act and so s.104(5) did not apply.

227. In DL 6.12 the Secretary of State concluded:-

> "In the case of section 104(5), notwithstanding the ExA's conclusions on the Development's adverse climate change impacts, it also found that there was no evidence to suggest that granting consent for the Development would in itself lead to the Secretary of State to be in breach of the duty set out in the CCA to ensure that the UK's target for 2050 is met. The Secretary of State agrees with this conclusion."

228. At DL 6.18 to 6.20 the Secretary of State dealt with "late submissions", that is representations made by Pinsent Masons on behalf of Drax after the close of the examination. This challenge is only concerned with their 11 page letter dated 4 September 2019, which sought to address the amendment of the CCA 2008. At DL 6.20 the Secretary of State stated that:-

> "In respect of the second submission, the Secretary of State does not consider that this provides any information that alters her conclusions set out in paragraphs 5.6 – 5.9 and 6.7 above."

229. Under ground 7A ClientEarth submits that the Secretary of State acted in breach of her duty to act fairly by having regard to the letter dated 4 September without supplying a copy of it to the other participants in the examination and giving them an opportunity to make representations about its contents.

230. ClientEarth does not challenge the evidence in the witness statement of Mr. Gareth Leigh (Head of the Energy Infrastructure Planning Team in the Energy Development and Resilience Directorate of BEIS) that the letter from Pinsent Masons was not taken into account by the Secretary of State herself. Nonetheless, it is accepted that it was read by officials to see whether it was a matter that should be referred to the Minister, and so ClientEarth submits it has influenced, or there is a risk that it has influenced, the advice that they did in fact give to her on the decision to be taken.

231. In response to a question from the court, ClientEarth submits in the alternative that, putting the letter from Pinsent Masons to one side, it was in any event unfair for the Secretary of State to have regard to the issue whether the amendment to the CCA 2008 had implications for her decision on the application for a DCO without giving the Claimant and other participants in the examination to make representations on that matter. This became the subject of an application to amend the Statement of Facts and Grounds to rely upon this contention as an additional ground 7B. It was agreed between the parties that the question of whether permission to amend should be granted depended on whether this additional ground is arguable. Counsel for the Secretary of State and Drax confirmed that they were able to deal with the point during the hearing and on the material already before the court. Accordingly, it was agreed that the question of whether the permission to amend should be granted ought to be left to be dealt with in this judgment.

Ground 7A

232. Mr. Jones QC referred to Rule 19(3) of the Infrastructure Planning (Examination Procedure) Rules 2010 (SI 2010 No. 103) ("the 2010 Rules") which provides that:-

> "(3) If after the completion of the Examining authority's examination, the Secretary of State-
>
> (a) differs from the Examining authority on any matter of fact mentioned in, or appearing to the Secretary of State to be material to, a conclusion reached by the Examining authority; or
>
> (b) takes into consideration any new evidence or new matter of fact, and is for that reason disposed to disagree with a recommendation made by the Examining authority, the Secretary of State shall not come to a decision which is at variance with that recommendation without —
>
> (i) notifying all interested parties of the Secretary of State's disagreement and the reasons for it; and
>
> (ii) giving them an opportunity of making representations in writing to the Secretary of State in respect of any new evidence or new matter of fact."

233. Mr. Jones QC accepts that this case does not fall within sub-paragraph (b), given that the Secretary of State did not disagree with the Panel's recommendations because of the letter from Drax's Solicitors. However, it is well-established that procedural rules of this nature may not necessarily exhaust the requirements of natural justice. He relies upon the purpose and spirit of rule 19(3).

234. More particularly, Mr. Jones QC relies upon statements in Bushell v Secretary of State for the Environment [1981] AC 75 at 102A and Broadview Energy Developments Limited v Secretary of State for Communities and Local Government [2016] EWCA Civ 562 at [25] to [26], to the effect that a decision-maker should not "accept" fresh evidence from one side supporting their case without giving other parties an opportunity to deal with it. In a much earlier authority, Errington v Minister of Health [1935] 1 KB 249, it was held that the Minister had acted unlawfully by taking into account and relying upon material from one side (the authority promoting a housing clearance order) without giving landowners an opportunity to make representations about it. Broadview was in some ways a striking case where the Minister received oral representations privately from the local constituency MP. But the court did not intervene because the representations had not added materially to what had been addressed at the public inquiry and they could not have materially influenced the outcome.

235. The present case is very different. As I have said, neither the letter from Pinsent Masons, nor a summary of its contents was provided to the Secretary of State. She had no actual knowledge of any such material. In R (National Association of Health Stores) v Department of Health [2005] EWCA Civ 154 the Court of Appeal held at [23] to [38] that what is known to the officials in a Minister's department is not to be imputed to the Minister when he or she reaches a formal decision. A Minister is treated as having taken into account only those matters about which he or she actually knew.

236. Mr. Jones QC accepted that this principle applied in the present case. But he submitted that the process had nonetheless been unfair because the officials who advised the Secretary of State read the letter from Pinsent Masons and those representations influenced, or may have influenced, their briefing to the Secretary of State.

237. I do not accept that submission. The position has been very clearly explained in the witness statement of Mr. Leigh, in particular at paragraphs 20 to 24. The conclusions in the decision letter to which I have already referred were informed by internal communications with other officials in the Department dealing with the net zero target. They were asked to advise on the implications of the amended target for the policy in EN-1 and EN-2 dealing with unabated gas fired electricity generation. The approach set out in their response reflected the existing policy in the NPSs.

238. The reasoning in DL 5.8 clearly relates to material in EN-1. In a written note Mr. Tait QC showed how relevant parts of DL 5.9 related back to passages in EN-1. Thus, when paragraph 17 of Mr. Leigh's witness statement is read in the context of the later parts of his evidence, and with the further explanation provided by Mr. Tait QC, I accept that DL 5.6 to 5.9 were essentially dealing with matters of existing Government policy set out in EN-1. One of the main conclusions in DL 5.9 was the Secretary of State's judgment that the policies in the relevant NPSs on the treatment of GHG emissions from energy infrastructure continued to have full effect. That is why Mr. Leigh stated that neither the Secretary of State nor her officials needed submissions on policy from Drax. They had reached their own conclusions on those matters for themselves.

239. I appreciate that the letter from Pinsent Masons also covered matters other than the implications of the net zero target for EN-1, but those matters did not form any part of the reasoning in the decision letter, or the briefing to the Secretary of State. Mr. Jones QC did not suggest otherwise.

240. I have therefore reached the firm conclusion that the advice actually given by officials to the Secretary of State was not influenced or tainted by the letter from Pinsent Masons. There was no requirement for the Secretary of State to refer that letter to ClientEarth and to other parties for comment before she reached her decision in order to discharge her duty to act fairly.

241. But even if I had taken the contrary view ground 7A would still fail. The relevant legal test for determining both grounds 7A and 7B is whether "there has been procedural unfairness which materially prejudiced the [claimant]" (Hopkins Developments Limited v Secretary of State for Communities and Local Government [2014] PTSR 1145 at [49]). This reflects the principle previously stated by Lord Denning MR in George v Secretary of State for the Environment (1979) 77 LGR 689 that:-

> "there is no such thing as a 'technical breach of natural justice'… One should not find a breach of natural justice unless there has been substantial prejudice to the applicant as the result of the mistake or error that has been made."

and by Lord Wilberforce in Malloch v Aberdeen Corporation [1971] 1 WLR 1578, 1595 that:-

> "A breach of procedure, whether called a failure of natural justice, or an essential administrative fault, cannot give him a remedy in the courts unless behind it there is something of substance which has been lost by the failure."

242. Mr. Jones QC identified the prejudice upon which ClientEarth relies in terms of the additional submissions and/or evidence which it would have wished to produce to the Secretary of State had it been given an opportunity to comment, as summarised in paragraphs 21 to 34 of Mr. Hunter-Jones's first witness statement and paragraphs 11 to 18 of his second witness statement. It is plain that the object of these submissions would have been to undermine the basis upon which policies in EN-1 on GHG emissions and gas fired electricity generation were prepared and adopted. By way of example, it is said that to be compatible with the net zero target, gas fired power stations would have to operate with CCS, and not merely be consented with CCR. Alternatively, a "more rigorous standard" than CCR should have been required in this case. In addition, ClientEarth would have contended that the DCO should have been subject to a condition preventing the operation of the facility beyond 2050 without CCS. It is plain that the thrust of ClientEarth's contentions is that the net zero target is incompatible with existing policy in EN-1 and EN-2.

243. I accept the submission made by the Secretary of State and by Drax that ClientEarth's contentions would have been disregarded under s.106(1) of PA 2008 as relating to the merits of policy in the NPSs. Mr. Jones QC did not argue to the contrary. The import of ClientEarth's points is that key policies in EN-1 and EN-2 are out of date by virtue of the net zero target enshrined in the CCA 2008. It is not the function of the court to say whether that view is right or wrong. But it is the function of the court to say that this line of argument undoubtedly falls outside the scope of the process created by Parliament by which an application for a DCO is examined and determined. Instead, it is a matter which could only be addressed through a decision to carry out a review under s.6 of PA 2008 (see above). There has been no such decision and no claim for judicial review relating to any allegation of failure to institute such a review.

244. It therefore follows that the way in which the Secretary of State's officials handled the letter from Pinsent Masons has not caused the Claimant to lose an opportunity to advance a case which would have been admissible under PA 2008 or could have affected the determination of Drax's application for a DCO. The Claimant has not shown that any relevant prejudice has been suffered by virtue of the matters about which it complains.

245. For all these reasons ground 7A must be rejected.

Ground 7B

246. ClientEarth's additional argument is that it was unfair for the Secretary of State to have regard to the issue whether the substitution of the net zero target in section 1 of the CCA 2008 had implications for the determination of the application for the DCO without giving the parties an opportunity to make submissions.

247. Mr. Jones QC accepted that ordinarily a Minister is entitled to reach a decision on a planning appeal or an application for a DCO relying upon advice from officials without disclosing that advice to the parties so that they can make representations. If that were not so, the system would be unworkable. This was recognised by the Court of Appeal

in R v Secretary of State for Education ex parte S [1995] ELR 71, subject to one qualification, namely where a new point is raised by the advice upon which the parties have not had any opportunity to comment (see also the National Association of Health Stores case at [34]). Mr. Jones QC submits that the implications of the amendment to the CCA 2008 amounted to a new point and participants in the examination had had no opportunity to address it before that process was completed.

248. A similar situation arose in Bushell. Following the closure of the public inquiry into a motorway scheme, the relevant Government department issued (a) new design standards that treated the capacity of existing roads as greater than had previously been assumed and (b) a revised national method of predicting traffic growth that produced lower estimates of future traffic than had previously been given. So objectors to the scheme asked for the inquiry to be reopened so that they could contend that the need for the new scheme had been undermined. The Secretary of State refused to reopen the inquiry and in his decision letter stated that the new publications did not materially affect the evidence on which the Inspector had decided to recommend that the scheme should be approved; the estimation of traffic need using the revised methods did not differ materially from the earlier assessment. The House of Lords held that this procedure had not involved any unfairness because the objectors were not entitled to use the forum of a local inquiry to criticise and debate the merits of the revised methods, which were a form of Government policy ([1981] AC at 99-100 and 103D).

249. Thus, the duty to act fairly may not entitle a party to be given an opportunity to make representations on a "new point" in so far as his challenge relates to the *merits* of a new Government policy, for example whether it should be applied nationally to the assessment of schemes. This aspect of the decision in Bushell presaged the approach taken by Parliament in ss.6, 87(3) and 106(1) of PA 2008. Challenges to the merits of existing policy in a NPS are not a matter for consideration in the examination and determination of individual applications for a DCO. Such policy is normally applicable to many DCO applications and the appropriate forum for arguments of that nature is a review under section 6.

250. As I have already explained when dealing with Ground 7A, the additional arguments that ClientEarth says it would have wished to advance fall outside the legitimate ambit of the DCO process and therefore no prejudice has occurred. Accordingly, ground 7B is unarguable, it must be rejected and the application for permission to amend the Statement of Facts and Grounds refused.

251. For completeness I mention a faint suggestion by ClientEarth that the Secretary of State failed to comply with her duty to give reasons in relation to this topic. With respect, that contention is hopeless.

Conclusion

252. For all the above reasons, grounds 7A and 7B must be rejected.

Ground 8

253. There was some overlap in the arguments advanced by the Claimant under grounds 7 and 8. It was said that the advice which Mr. Leigh's team took from other officials on the implications of the net zero target for EN-1 and EN-2 in relation to unabated gas-

fired electricity generation ought to have been made publicly available before it was taken into account. I have dealt with that issue under ground 7.

254. Then it was submitted that officials and the Secretary of State asked the wrong question, namely whether the proposed development would lead to a breach of the CCA 2008 or would result in incompatibility with the net zero target, because those questions cannot be answered at this point in time (para. 174 of skeleton). However, the Secretary of State did address those questions and concluded that the proposed development was not incompatible with the net zero target (DL 5.9 and 6.12). That was a matter of judgment for the Secretary of State which could only be challenged on the grounds of irrationality. Here it is appropriate to have in mind the discussion of the Divisional Court in Spurrier on intensity of review ([2020] PTSR 240 at [141] et seq.) and in particular cases dealing with challenges to consents, such as Newsmith Stainless Limited v Secretary of State for the Environment, Transport and the Regions [2017] PTSR 1126 at [6] to [8] and R (Mott) v Environment Agency [2016] 1 WLR 4338 at [75] et seq. ClientEarth have put forward reasons as to why they disagree with the Secretary of State on this subject, but the Court is in no position to say on the material which has been produced that her judgment was irrational.

255. Next, the Claimant submitted that the Defendant failed to "fully consider, and grapple with, the impact of the Development on achieving Net Zero by 2050 and whether current NPS policy concerning unabated fossil fuel generation was consistent with the new target" (para. 174 of skeleton and see also paras. 176-178). A criticism that a decision-maker has failed to take into a material consideration is now to be dealt with in accordance with the principles settled in the Samuel Smith case (see paragraphs 99 to 100 above). As I have already explained under ground 7, the Secretary of State did in fact address that question.

256. Where a decision-maker decides to have regard to a matter then it is generally a matter for his or her judgment as to how far to go into it, something which may only be challenged on the grounds of irrationality (R (Khatun) v Newham London Borough Council [2005] QB 37 at [35]. Mr. Jones QC relied upon the requirement in Article 8a(4) of Directive 2011/92/EU (as amended) that Member States shall ensure that measures are implemented by the developer to avoid, prevent, reduce or offset "significant adverse effects on the environment" and regulation 21(1)(b) and 30(2)(b) of the 2017 Regulations. However, the general approach to judicial review of the adequacy of compliance with requirements of this nature, whether in the context of SEA or EIA, is for the court to intervene only if the decision-maker has acted irrationally (see e.g. Spurrier [2020] PTSR 240 at [434] and R (Plan B Earth) v Secretary of State for Transport [2020] EWCA Civ 214 at [126] to [144]). Once again, there is no material here upon which the court could conclude that the Secretary of State's approach was irrational.

257. Mr Tait QC and Mr Strachan QC submitted that as a matter of judgment the Secretary of State was entitled to rely upon other mechanisms outside the planning system, such as the Electricity Market Reform and the EU ETS, to control emissions from fossil fuel electricity generation when potential pathways are drawn up to help achieve the net zero target, consistently with policies contained in EN-1 (DL 5.9). I agree that that reasoning does not disclose any error of law.

258. ClientEarth takes a different view on the compatibility of NPS policy with the net zero target, but for the reasons previously given this was not a matter which, even if it had been raised by ClientEarth between the amendment of CCA 2008 and the issuing of the decision letter, could properly have been considered and resolved in a determination on an application for a DCO. It would have been a matter for review under s.6 of the Act (with all the related procedural safeguards) if the Secretary of State considered that to be appropriate in terms of s.6(3). No challenge has been made by ClientEarth in these proceedings to a failure on the part of the Secretary of State to act under s.6. It does not appear that ClientEarth raised the review mechanism under s.6 as a matter which the Secretary of State ought to address.

259. In paragraph 179 to 181 of their skeleton ClientEarth submit that the Secretary of State failed to consider whether a "time-limiting condition" was necessary to address GHG emissions from the proposed development after 2050. It is suggested that the Secretary of State should at the very least have "considered" imposing a condition preventing the development from being operated after 2050 without "further consideration of appropriate offsetting and/or CCS requirements." It is plain that the Secretary of State had regard to the position up to 2050 and beyond. She dealt with the CCS issue in accordance with the policy in EN-1 and EN-2. For the reasons I have already given, she was entitled in law to do so. The implication of the complaint that those policies should be revised was not a matter for consideration in the DCO process, nor is it a matter for this court in this challenge to the decision to grant the DCO.

260. For all these reasons ground 8 must be rejected.

Ground 9

261. This was a bare allegation that the decision to grant the DCO was irrational because the decision "did not add up" or was tainted by erroneous reasoning which "robbed the decision of logic." No particulars were given. Mr. Jones QC withdrew ground 9. He was right to do so. Ground 9 added nothing.

Conclusion

262. For the reasons set out above, the claim for judicial review must be dismissed.

APPENDIX D: Wylfa Examining Authority's Recommendation Report ("ExARR") section 5.5 (pp. 47-48)

5.5. THE EXA'S CONSIDERATION

5.5.1. The ExA is satisfied that, on the basis of what it has read and heard, there is a clear need for energy and new energy infrastructure. Furthermore, the ExA accepts that, in order for the UK to meet its 2050 target with regards to reductions in carbon emissions, going forward this infrastructure would need to be low carbon. The ExA recognises that nuclear power is a proven low carbon technology and as a consequence accept that the Application could, along with other technologies, contribute to addressing the UKs need for low carbon energy.

5.5.2. As outlined above a number of IPs argued that with advances made in renewable technologies, the drop in the costs of this technology and the improvements in its reliability since the adoption of the NPS's, mean that the baseload and levels of energy required could now be delivered more efficiently and cost effectively through the use of renewable technology. As a result, they consider that nuclear power is no longer required.

5.5.3. It is clear from the evidence submitted to the Examination that whilst there may be alternative ways, including through the increased use of renewables, as to how to provide the energy required these schemes are not before the ExA. Furthermore, the ExA has no knowledge as to whether such schemes would come forward; how much energy they would generate; the costs involved or how quickly they could be implemented. Consequently, the ExA does not consider that they prove that there is no need for nuclear power.

5.5.4. The ExA accepts that EN-6 seeks the development of new nuclear power stations by 2025 and preferably significantly earlier given "*the urgent need to decarbonise our electricity supply and enhance the UK's energy security and diversity of supply*" (paragraph 2.2.2).

5.5.5. The proposed development would not meet this target, as it would deploy post 2025. As set out in its Planning Statement the Applicant states:

5.5.6. "*Whilst the application does not need to be determined in accordance with the NPS pursuant to section 104(3) of the Planning Act 2008 [RD1]), the ministerial statement is clear that NPSs EN-1 and NPS EN-6 remain important and relevant matters which would carry significant weight in determining the application under section 105. Indeed, NPSs EN-1 and EN-6 continue to represent the primary policy basis for a decision made by the SoS on this application for an order for development consent for the Wylfa Newydd DCO Project*". [APP-406]

5.5.7. Whilst it is clear to the ExA that although the "urgency" of the need as referenced in EN-6 has not transpired in the way that the Government originally predicted, there continues to be a need for energy; that this need for energy is likely to increase in the future (EN-1 paragraph 2.2.22 and the WMS) and that this energy will need to be low carbon. The proposed development provides a low carbon energy solution which would assist in meeting this need.

5.5.8. In the ExA's view, the fact that the nuclear power provision envisaged for and encouraged to be delivered by 2025, has not materialised, does not mean either the "need" or the "urgency" to generate, low-carbon electricity from nuclear are negated. EN-6 in particular does not, as suggested by the IPs [paragraph 4.2.1.3 REP4-035] offer a 'statutorily approved 2025 timeframe'. Paragraph 1.6.1 of EN-6 points out that the NPS will remain in force in its entirety unless withdrawn or suspended in whole or in part by the Secretary of State. Paragraph 2.3.2 makes it clear that the potential nuclear generation sites identified in EN-6 are those "potentially suitable for the deployment of new nuclear power stations in England and Wales by the end of 2025". The NPS is silent on the status of these sites if they are not deployed by 2025; nor can it be inferred that "the policy" is that they be deployed by 2025 and if this fails to happen the requirement falls away and the ambition is no longer valid. The fact that, in principle, they were deemed to be "capable" of being deployed by 2025 does not necessarily mean that if this deployment fails to happen within the 2015 timeframe their "capability" has disappeared.

5.5.9. The ExA recognises that, as several IPs pointed out, circumstances in relation to the generation of electricity, particularly from renewable technologies, have changed significantly since 2011 when the NPSs were produced; however, the WMS states that it is likely that significant weight would (continue) to be given to the policy in EN-1 and EN-6 so long as "there is no relevant change of circumstances". It is not the ExA's role to make policy, its role is to make recommendations within the context of existing policy. For the ExA "relevant change of circumstances" must mean changes in relation to policy, assessment criteria or the identification, in principle, of a particular site. The ExA sees no relevant change in the circumstances of (a) the need for a variety of technologies to generate low-carbon electricity, including nuclear; (b) the urgency of that task and (c) the identification of Wylfa as a potentially suitable site.

5.6. SUMMARY

5.6.1. When considering the matter of need against the criteria set out in s105(2) of the PA2008, as outlined above (paragraph 1.1.13.-1.1.15.) the LIRs acknowledge the need for the development (s105(2)(a)) and there are no matters prescribed in relation to need (s105(2)(b)).

5.6.2. With regards to other matters which would be important and relevant to the SoS decision (s105(2)(c)) for the reasons set out above and in the WMS the ExA accept that there is a clear and urgent need for new low carbon energy infrastructure and that the Application could contribute to meeting this need.