

“No changed circumstances” – a half-time commentary on developer arguments on regulatory Compliance and policy conformity

Summary

Noting that a cluster of developer arguments have been deployed to sustain the core legal view that NPS EN1 and EN6 provide “overwhelming” tilted balance support for the SZC project, we offer commentary on elements of the “no changed circumstance” argument in respect of

- 1 its relationship to fundamental - statute – law, to legal authorities, and the status of Governmental policy of conditional need. We also note that while judicial review has frequently and recently relied on the letter of the law being NPS EN1 and 6, the developer’s proposal for IROPI involves what might be described as a higher judicial review. This is arguably substantial, involving supplementary criteria variously regarded a “high hurdles” and “a high threshold” according to the developer’s QC Mr Phillpot – and Mr Jones QC in Humphries National Infrastructure Planning Handbook 2018.
- 2 that pending the expected enactment of the Review of the NPS EN family, our working assumption had been that while the existing NPS EN family should be regarded as necessary, it was by no means sufficient for policy-based appropriate assessment of projects under PA2008, notwithstanding other issues of regulatory conformity.
- 3 changed circumstances (CC) being a supplementary and maybe substantial supplementary criterion under IROPI reasoning, since it was unlikely that a SoS would ignore a Ministerial Statement in his/her reasoning.

4 that there have been many substantial change circumstances to be taken into account should the 2017 Ministerial Statements be regarded as relevant.

We then explored the following supporting arguments of the developer as rehearsed in the hearings, reflecting in particular the Statement of Reasons and Planning Statement, already variously referred to by us at the start of the Examination. We also drew on the Examining Authority's helpful Commentary of 3rd August, 2021.

The developer's supporting arguments in question are:

- 1 the argument that SZC is the same project as HPC.**
- 2 that there are no alternatives requiring to be considered to meet policy and need**
- 3 that new nuclear urgency is an enduring imperative**
- 4 that there are no combined and cumulative impacts of significance**
- 5 that HRA impacts can be mitigated**
- 6 that there is one impact which justifies the triggering of IROPI, this being the permanent loss of a portion of the SSSI which can be compensated as a condition of a successful application for IROPI**
- 7 that new, large scale nuclear capacity at SZC is a substantial and necessary low carbon contributor to climate change Net Zero (2050)**
- 8 that the urgency and need, and absence of infrastructure planning negatives meet the "good design" criterion of PA2008 Section 10,(3),(b), implicitly justifying Rochdale Envelope flexibilities in planning requirements, reinforced by policy urgency and legitimate commercial self-interest. Here we recognised that our early posing of the "good design" imperative had not been engaged with as such, so that it remains as a matter to be explored at the ISH on Policy and Need.**

We then suggested that at "half – time" the developer's arguments might be summarised as posing three legally problematic issues, these being

- (a) the relationship of NPSs EN1 & EN6 to the now substantiated Review of the EN1 - 6 family of Policy Statements, and the publicly declared intention of presenting the revised Statutory Instruments to Parliament by the end of this year**

- (b) the impending passage of the Environment Bill with new BNG targets and provisions**
- (c) the authority of Governmental duties on Climate Change Net Zero and tipping point target dates under IROPI, should it be granted.**

Our commentary on some of these arguments was developed as follows, necessarily and understandably limited by speaking time.

Reference to work we have been doing on “New Developments in Energy Policy and Technology/Projects”, repeated at ISH9, is now appended to our ISH9 report. The delay was caused by the need to include detail of the newly announced Government Strategy on Hydrogen and associated policy initiatives on a hydrogen levy and the comprehensive BEIS £1bn Net Zero Innovation Portfolio. Between the OFH and ISH on Policy and Need, BEIS documents came to light from earlier in the year, so far apparently unmentioned in hearings and WRs, leading us to put them on record at the ISH. We noted in particular three 2018 European Court cases relied on by BEIS in their new Appraisal of Sustainability, one of six NPS EN Review supporting documents.

- 1 Changed Circumstances We suggested that the Ministerial Statement of 2017 as “Statement” had a similar authority as policy to National Policy Statements and while they recognised the need for new nuclear and its urgency, nevertheless has introduced a substantial new qualification that consideration of changed circumstances would be permissible in infrastructure planning considerations. The developer’s adamant rejection of such consideration did not appear to be associated with any appropriate assessment.**

As corroboration of CC as a material consideration, we mentioned our New Developments dossier which was waiting completion for submission. This included the consideration that the arguably overarching policy for a single integrated UK energy market, parallel to European Union single market policies, and the developer’s inability to offer assured completion by the new Net Zero target date of 2035 meant it was no longer a Government designated developer, but simply a market enterprise with a relevant project and a need for funding support and aspiration to support Government policy.

2 SZC is the same project as HPC. Here we suggested that HPC’s direct financial support – the investor protection agreement and the high CfD level – almost double market energy prices – and conditional approval by Brussels competition authorities as new is in stark contrast to the position of the SZC project. Aside from an invitation as an appropriately licensed developer, and an open door to propose an external funding mechanism (RAB), and an indication that a CfD at least 20% less than HPC would be advisable, SZC’s sole secure foothold has been that alternatives have not come to market successfully.

We mentioned other differences:

- these are future ownership, now known to be a minority interest for EDF at SZC, and widely understood to be fixed by direct Government contract for HPC;
- Brexit’s new conditionality for cross border energy trading;
- the arrival of, and Government support for Small and Medium Nuclear reactor development;
- dependency on IROPI;
- difficult community, transport, geological, nature and amenity challenges;
- and change in Climate Change urgency requirements, moving beyond a simple low carbon requirement, plus the arguable requirement at SoS level of a plausible carbon footprint assessment for the actual project including any dependency on carbon credits or offsetting.

3 that no alternative project exists and/or requires to be considered to meet policy and need. This circumstance has changed with the arrival of three new North Wales projects, all linked to the new strategic commitment to hydrogen gas production as a replacement for LNG and LPG. These projects are detailed in our New Developments dossier. In addition, post Brexit linkages to large scale European renewable energy projects have emerged as alternatives in a rapidly changing UK, European Regional and globalised energy market.

Further, we suggested that the scope of the “alternatives” principle might come into play about competitive projects in the energy marketplace, rather than purely through EIA methodology.

Consideration of alternatives was – and is, for this matter - a core principle of the NPS EN1 linkage to EN6 with its 8 nominated SEA sites and 7 needed. While this scenario is no longer tenable, the alternatives principle might arguably be extendable to new circumstances. It is an obvious matter of speculation when we actually have the new NPSs, site selection will change to a new open market regime, if only to accommodate Rolls Royce's SMR project in North Wales which was not an original NPS EN6 nominee.

4 no combined and cumulative impacts of significance. Here we simply endorsed already widely recognised and Examination presented projects on the East Anglian Energy Coast. The “No CC” argument appears equally untenable when applied to the large amount of housing and commercial development in the A12 corridor additional, quite apart from other Energy Coast projects.

5 Other issues will be dealt with in our ISH9 summary and our New Developments dossier.

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