SPR EA1N and EA2 PROJECTS

DEADLINE 6 – SUBMISSION ON *PEARCE V SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY* (NORFOLK VANGUARD)

Interested Party: SASES **IP Reference Nos.** 20024106 and 20024110

Date: 24 February 2020 **Issue:** 1

Introduction

1. In *Pearce v Secretary of State for Business, Energy and Industrial Strategy* [2021] EWHC 326 (Admin), the High Court (Holgate J) quashed the Order granting development consent for the Norfolk Vanguard offshore windfarm.

2. SASES considers that the judgment in *Pearce* provides further support for its submissions in respect of the need for assessment of the cumulative effects of EA1N and EA2 with other schemes which are in contemplation and which are anticipated to connect to make use of a grid connection at Friston if it is consented through these applications. Those submissions have been set out at length already. SASES Written Summary of Submissions on Cumulative Impact filed at Deadline 3 is emphasised in particular (see REP3-126) is not repeated here but its contents are relied on in full.

3. The facts of *Pearce* bear strong similarities with the present case. Vanguard proposed a grid connection at Necton, as did another project (Norfolk Boreas). Unlike Friston, Necton is the site of an existing National Grid substation constructed in connection with the Dudgeon offshore windfarm. Both Vanguard and Boreas would require their own substations together with extensions to the existing National Grid substation.

4. The ES for Vanguard provided an assessment of the cumulative effects at Necton of both Vanguard and Boreas proceeding. Cumulative effects were also raised by the local planning authority and local residents (including Mr Pearce, the judicial review claimant). However, the ExA concluded that it should not consider cumulative effects between Vanguard and Boreas *"due to the limited amount of details available. The ExA considers it would most appropriate for cumulative impacts to be considered in any future examination into Norfolk Boreas"* (judgment 63). That conclusion was implicitly accepted by the Secretary of State.

Breach of the EIA regulations

5. The Court found that the decision was in breach of the EIA Regulations. The law on cumulative effects was considered in detail. The Court found that since a significant cumulative effect had been identified in the ES, but not considered by the ExA or Secretary of State, there was a breach of the regulations. The Court found that the ability to assess the cumulative impacts was more straightforward than other cases because (a) the applicant had carried out an

assessment and (b) “there were strong links between the two projects which were directly relevant to this subject”. Whilst factor (a) does not apply here (since the Applicants have refused to assess cumulative effects beyond those between EA1N and EA2 and to a limited extent Sizewell C), factor (b) does.

6. The Court also noted that the pressing need for renewable energy did not justify the failure to consider cumulative effects:

> “124. I have referred to the Defendant's submissions on the importance of avoiding delay to an urgently needed project of national importance. For completeness, I should add that the court was not shown any provision which would enable that factor to overcome any requirement under regulation 17 to obtain additional information, where a decision-maker considers that the details in the ES are inadequate for assessing likely significant adverse environmental effects. In any event, the Defendant's decision letter did not purport to approach the matter on that basis.”

7. Accordingly, it is no answer to the failure of assessment of cumulative effects in the ESs in this case to say that such assessment should not hold up these projects. It plainly should, if that is what is necessary to consider the likely significant effects of the proposals in cumulation with the other projects identified.

Rationality

8. The Court also found that it was irrational not to consider cumulative effects on the facts (i.e., regardless of the EIA regulations). The Court found (emphasis added):

> “128. There is no dispute that Vanguard and Boreas are separate projects. They did not fall to be treated as a single project for the purposes of EIA legislation. This is not a case where, for example, the developer has sought to define the development for which he seeks permission so as to avoid EIA scrutiny. I also accept the submission of the Defendant and NVL that the proposals for Vanguard and Boreas have been made on the basis that the implementation of the Vanguard DCO is not dependent upon the approval or implementation of a DCO for Boreas… But none of these points address the true circumstances of this case… and so do not assist the Defendant and NVL in resisting this challenge to the DCO.
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> 131. It is inescapable that the only reason given by the Defendant for deferring all consideration of cumulative landscape and visual impacts to the Boreas examination was that the information available on Boreas was "limited". I am in no doubt that this bare statement was, in the circumstances of this case, illogical or irrational. It was common ground in the hearing before this court that the nature and level of information on the two projects for the purposes of assessing landscape and visual impacts of the substation development at Necton was essentially the same. Plainly, the Defendant must have proceeded on the basis that the information on the solus impacts of the Vanguard project was sufficient for him to be able to evaluate and weigh that matter. No basis has been advanced in these proceedings by either the Defendant or NVL for either (a) treating the adequacy of the environmental information on Boreas differently for an evaluation of the cumulative landscape and visual impacts or (b) not making any such evaluation at all in the Vanguard decision. The Defendant's decision is flawed by an obvious internal inconsistency. The decision was all the more perverse because, in accordance with ex parte Milne , NVL's approach employed a "Rochdale envelope" in order to cater for the absence of more detailed information, for the evaluation of (a) the Vanguard solus impacts and (b) the cumulative impacts of both projects in the Necton area. The decision was also irrational in other respects.

132. There were a number of features which plainly required the cumulative impacts of the substations for both projects to be assessed as part of the Vanguard decision and not simply left over to the Boreas decision. **The two projects had been based on a strategy of co-location. Necton and alternative locations for the essential connection to the National Grid were assessed for their ability to accommodate the substations and infrastructure needed for both Vanguard and Boreas. That was important, if not critical, to the decision to select Necton for the grid connection** and to include in the Vanguard DCO authority for the provision of a 60 km cable corridor between Happisburgh and Necton to serve both projects and compulsory acquisition of some land at Necton for Boreas (which would need to satisfy a "compelling public interest" test). **Consequently, consistency required the cumulative impacts of the substation development at Necton to be evaluated in the Vanguard decision. In the circumstances of this case, it was irrational for the Defendant to defer that evaluation.**

133. **If the cumulative impacts in the Necton area had been evaluated when considering the application for the Vanguard DCO, one possible outcome is that they would have been found to be unacceptable**. That could have led the Defendant to decide that Necton was not an appropriate location to provide a grid connection for both projects, as intended by the developer, which would also call into question the appropriateness of the co-located cable corridor leading to that connection point. Even assuming that the Defendant would still have decided all the other issues in favour of the Vanguard proposal, it would have been permissible for him to refuse to grant the DCO on the basis that the location of a grid connection at Necton to serve both Vanguard and Boreas (and the related cable corridor) needed to be reconsidered by the developer. Plainly, that ought to be determined before granting consent for the first project. In that way the promoter could reapply or modify or even abandon its strategic co-locational approach before proceeding with either project. Here, the decision to leave that issue over to consideration of the DCO for the second project prevented that course from being taken.

…

135. …The Defendant's approach has had the effect, absent consideration of those cumulative effects, of making it easier to obtain consent for Vanguard, and providing a "foot in the door" making it easier to obtain consent for Boreas. Although there is no evidence that NVL sought those outcomes, the Vanguard DCO decision has had a "precedent effect" for decision-making in relation to Boreas upon which, understandably, NVL has relied heavily in the Boreas examination. In view of the familiar North Wiltshire line of authority on consistency in decision-making, these were highly likely, if not inevitable, consequences of the Defendant's decision to approve the DCO for Vanguard. These were obviously material considerations which went directly to the rationality of the decision.

136. These considerations underscore the absence of any rational justification in the Vanguard decision letter for refusing to make any evaluation of the cumulative impact issue at that stage. The single, perfunctory reason given for deferral, the limited amount of information available on Boreas, could not, in the circumstances of this case, justify by itself leaving the issue entirely to the second examination, particularly where the information was in front of the Defendant, NVL considered it to be adequate and no one suggested the contrary.

137. **In any event, the Examining Authority and the Defendant had powers to obtain further information. Indeed, if the Authority had considered the application of regulation 17 of the 2009 Regulations and decided that additional material should have been included in the ES, they would have been obliged to require that information to be provided and suspend the examination in the meantime.**"

9. This passage is crucial to the present case. The important reasoning is:

    a. The fact that information in respect of cumulative impacts before the examination is "limited" is not a reason for those impacts to be disregarded. There is a power to require more information if the Applicants will not provide it;

    b. Here, as in the case of Vanguard, there is a "strategy of co-location". That is clear beyond argument from the evidence already submitted by SASES and others in respect of the intentions regarding interconnector projects. See for example para. 12 of REP3-126 ("SPR acknowledged in early 2018… that it had made commitments not to sterilise NGV's ability to develop their projects. Further, NGV wrote to PINs in March 2020 accepting that there would be a need to "future proof" the SS for future development");

    c. That strategy has influenced the selection of Friston as a grid connection location: *"A new National Grid 400kV substation will therefore be required somewhere in the Leiston area, beyond the Sizewell site, to connect the two proposed windfarms and the two proposed interconnectors"* (NG Note of 28 June 2018, para. 12 and footnote 2 of REP3-126);

    d. If the cumulative effects *are* considered it is possible that Friston will not be found to be acceptable as a location for all of the cumulative schemes. It would follow that it would may not be an appropriate location for grid connections for these projects;

    e. If cumulative effects are not considered, a "foot in the door" would be provided for those other projects which is "obviously" a material consideration for these projects.

10. In those circumstances, ***Pearce*** confirms that the approach of the Applicants to cumulative assessment, if accepted, is likely to be found to be irrational and unlawful.

Reasons

11. The reasons challenge turned on the terms of the decision letter and ExA's report. However, it emphasises that some clear reasoning would be required to reject the need to assess the cumulative impacts of the proposals

Grid coordination and the Offshore Transmission Network Review

12. It should also be noted that, importantly, Holgate J cast some doubt on the lawfulness of a "single project" approach to addressing issues relating to grid coordination:

> "59. The Examining Authority noted the strongly held view of several participants that in view of the number of offshore wind farm projects coming forward in the region, there should be a strategic approach requiring contributions to an offshore ring main to avoid or reduce onshore environmental impacts. **The Authority considered that because that would require co-ordination between projects, it was not an alternative which could be considered within the remit of an examination of a single offshore wind farm project. Although it is not apparent how well that reasoning sits with the requirements of the 2009 Regulations, particularly as the Examining Authority did consider elsewhere cumulative impacts resulting from a project being undertaken by an independent developer, no such argument was raised in the grounds**

> **of challenge.** That is understandable in view of the way in which the Defendant discounted this particular alternative on the merits in his decision letter (see [71] below).
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> 71. As to the suggestion that an offshore ring main be considered, the Defendant concluded at DL 4.11: -
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> > "Whilst discussions are taking place in respect of the future shape of the offshore transmission network, such discussions are at the preliminary stage. The Secretary of State considers that he must assess the Development in line with current policy as set out in the National Policy Statements. He does not consider that the decision should be delayed to await the outcome of the discussions on the offshore transmission network given the urgent need for offshore wind development as identified in the National Policy Statements."”

13. Thus, whilst the issue did not arise in the grounds in ***Pearce***, the Examining Authority is invited to note the recent doubt cast on the lawfulness of rejecting an argument that a better coordinated approach between projects could be available on the basis that such considerations were not relevant to a decision on development consent for a single project. Moreover, since the absence of challenge on this ground was only “understandable” on the basis that the outcome of the offshore transmission network review was awaited, clearly the outcome of that review will be relevant to the determination of the present applications.

Conclusion

14. ***Pearce*** serves as firm confirmation of SASES’s position on cumulative impacts. A failure to assess the cumulative impacts of other projects intended for a grid connection at the new substation at Friston would be in breach of the EIA Regulations, and irrational.

END