Response to letter of 7th May 2021 in relation to the procedural objections to the extension of time decision.

Introduction

1. On 7th May 2021, the Planning Inspectorate (PI) responded to the letter of 8th April 2021 from Suffolk Energy Action Solutions (SEAS), Substation Action Save East Suffolk (SASES), Save our Sandlings (SOS), the Aldeburgh Society and Friston Parish Council, complaining about the extension of time granted by the Secretary of State to the Examining Authority in relation to EA1N and EA2. In the PI letter various reasons and explanations are given justifying the decision.
2. A complaint was also made to the Secretary of State. In its letter to the Secretary of State the concern was raised that there was apparent bias in the manner in which this extension had been granted, not least because the only party that could possibly benefit from such an extension was SPR and because – as the position was then understood – neither the ExA nor the Secretary of State had consulted the parties. This was because only SPR had unlimited resources and it could cope with the inquiry continuing for an extra four months far more effectively that could any of the parties opposing the application.
3. No response has yet been received from the Secretary of State.
4. The reasons and explanations in the PI letter are now addressed in the order in which they are set out in the PI letter.
5. This response will be sent to the Secretary of State notwithstanding the absence of a response from the Minister.
6. We respond to the separate letter from the PI (also dated 7th May 2021) in relation to the FOIA request dated 8th April 2021, though this response does take account of new material now made available.

Legal duty to consult.

7. You say:

"In regard to your objection to the extension of the Examinations, the Examining Authorities have no power to revoke decisions made by the Secretary of State for Business, Energy and Industrial Strategy ("the Secretary of State"); however, it is for the Examining Authorities to decide how the remaining elements of the Examinations will take place and I trust you will have seen the Examining Authorities' correspondence on this. The decision to extend an examination is a decision for the Secretary of State and not the Examining Authority and there is no statutory requirement for consultation on such a decision; it should be noted that the question about who (if anyone) to consult before such a decision and on what terms is one for the Secretary of State alone."

8. It is implicit in this statement that the ExA believes that an obligation to consult only arises pursuant to statute. This is wrong in law.

9. The duty to consult is a common law duty, the fact that a duty is not provided for in a statute is irrelevant. The common law is activated when a statutory regime is silent. This is to ensure procedural fairness.

10. In this case the duty to consult arose at common law:

    (i) when the ExA decided to apply to the Minister for an extension. This will have been in the period prior to the application (end of 2020/ start of 2021). It arose because the ExA was seeking a decision from the Secretary of State with serious consequences for all parties to the inquiry. Further, the ExA planned to make its application upon the basis of assumptions about the position of the parties. The ExA was bound to verify the correctness of these assumptions by consulting the parties. It was the duty of the ExA to ensure that the facts it was presenting to the Minister accurately reflected the position of participants; and

    (ii) before the Minister made his decision for the same reasons, i.e., to ensure that any decision was based upon accurate and up to date facts and was thereby a properly informed decision. It is relevant that the ExA sought a decision to their request swiftly and by 22nd February 2021. This was for the obvious reason that absent an extension all parties were preparing upon the basis that they would submit final submissions and evidence to coincide with the end of the examination on 6th April 2021. This was made clear in the ExA application (paragraph 3). The Secretary of State thus knew that the facts underlying the applications for an extension would change significantly if he did not respond by the requested date.

11. In any event the Minister and the ExA <u>did</u> consult. The IP letter however omits to acknowledge the fact that the Minister sought to consult but <u>only</u> the views of SPR. This fact has come to light because of our request under FOIA; had the request not been made the fact that the Minister and the ExA communicated with SPR <u>alone</u> would have remained secret.

12. In our initial letter to the Secretary of State we expressed concerns at apparent bias. We did not know then that the Secretary of State was concerned <u>only</u> to learn the view of SPR, and not of anyone else but in particular those opposing SPR applications. The favouring of SPR in this way has heightened our fears. A reasonable third party who learned that the only party consulted was the applicant would be even more concerned that there was apparent bias, since it is evident that the Secretary of State was only interested in the position of one party in relation to a decision that profoundly affected all parties.

13. Recently, it has been suggested that in fact the Secretary of State also consulted certain local authorities. We do not address that possibility in this response.

14. In short:

    - There was a common law duty on the ExA and the Secretary of State to consult.

- Even though it is now argued that there was no duty to consult, the Secretary of State and the ExA have sought to keep secret the fact that they did consult SPR, but no one else and in particular no one opposing SPR.
- The consultation that did occur was therefore on a discriminatory and biased basis.
- In law this failure to consult strikes at the root of the elementary duty on decision makers to ensure the fairness of decisions.
- In law a decision tainted by procedural unfairness is a nullity.
- In law once procedural unfairness has been established the courts do not consider materiality. However, in this case, for the reasons set out in the original complaint, the extension has caused (and continues to cause) grave prejudice to those opposing the applications and will have the effect of helping SPR, with its unlimited resources.

The keeping secret of SPR's response.

15. As to the response of SPR, it expressed concern about the extension but did not outright reject the suggestion. It did however take the opportunity to set out a range of policy submissions designed to make the political case for grant of the applications. They did this knowing that their letter was sought and would be taken into account by the Secretary of State. The ExA has not placed this response in the public domain but has kept it secret.

Resources

16. The PI letter says that a main reason for seeking the extension were concerns about pressure on resources due to lock down and the Covid Pandemic. The application of 9th February 2021 refers to a number of organisations who are said to have expressed concerns sufficient to warrant the ExA seeking the extension.

17. The PI letter says:

"The Examining Authorities invited all parties involved in hearings in January 2021 to make specific procedural submissions to Deadline 5 if they were experiencing difficulty due to public health controls. As stated in the extension request letter dated 9 February 2021, a number of interested parties raised concerns over timing and resource constraints."

18. The ExA files have been carefully reviewed. The picture painted by the ExA in its application is mistaken. No one sought an extension of the sort described in the application. Indeed no one expressed grave concerns at all. A small number of participants expressed case management points. There is nothing in the files supporting the suggestion that participants made submissions which justified an extension. But in any event even had such concerns been expressed given the passage of time that elapsed those concerns because irrelevant.

(i) The facts

19. As set out the ExA invited all parties involved in hearings in January 2021 to make specific procedural submissions to Deadline 5 if they were experiencing difficulty due to public health controls.

20. In the application for the extension the ExA have identified 12 bodies. We set out in Annex A details of responses at deadline 5. It appears:

    - 62 participants in total responded at Deadline 5.
    - Of those only 7 addressed any sort of concern.
    - Of those that did address the issue only 3 expressed reservations, but none sought an extension to the statutory timeframe and, in the light of the timetable set out on 9th February 2021, no one stated that they could not respond or cope.
    - Such concerns as were expressed were little more than case management issues.

21. Such limited concerns as were expressed were best met by the ExA bringing the investigation to a close with maximum expedition and efficiency; it is the extension that has resulted in an intolerable pressure on resources.

(ii) All concerns became water under the bridge

22. However, and most importantly, the Minister did not in fact grant an extension within the time frame sought by the ExA and, on 9th February, the ExA issued a timetable expressly designed to ensure that all outstanding gaps in the evidence were submitted by the parties by the end of the examination in accordance with the statutory timeframe, as indeed the PI letter of 7th May recognised, when it said:

"Following the submission of the request for the extension on 9 February 2021, the Examining Authorities were under a duty to continue to examine the applications, as the outcome of the request was unknown until the end of March 2021."

23. The consequence was that all participants complied assuming that this amounted to the last big effort that had to be made.

24. If the ExA had consulted the parties – as it should have done– and asked whether from the perspective of resources they wished to (i) push on and complete the investigation within the statutory framework or (ii) see the investigation extended for three months until July, the answer would have been unequivocal and would have been against an extension. Indeed, we now know that even SPR had concerns about an extension. As was predicted at the time, the Sizewell inquiry was shortly due to commence, and many participants in this investigation were also to be participants in that inquiry.

The suggestion that outstanding matters at the end of the hearings justified the application to extend.

25. The PI letter says:

"It is acknowledged that some (but not all) matters which were outstanding at the start of February were concluded by the time the Secretary of State's decision to allow an extension was made. "

26. The suggestion, from the phrase "*but not all*", is that that there were matters left outstanding as of the date of the Secretary of State's decision which justified the extension.

27. With respect this is not correct and indeed is illogical.

28. First, the suggestion is illogical because it was no part of the original reasons for the application for the extension. On 9th February 2021 it was impossible to know whether in fact there would have been matters outstanding some 7 weeks later.

29. Second, in any event, as the PI letter accepts, there was never a guarantee that the Minister would grant the extension and in such circumstances the inquiry had to finish within the statutory timeframe. Accordingly, the directions given on 9th February 2021 were structured to ensure that <u>all</u> outstanding matters were completed within time. The ExA had no choice in this since they were compelled to put in place a system which would bring the evidence collection to an end. Equally, the parties were compelled to ensure that their evidence and submissions were complete. There was therefore no scope for gaps or lacunae because the procedure adopted prevented it from occurring.

30. Thirdly, the ExA's position is that they have not been able to digest the evidence submitted so that it cannot therefore be their position that they had formed a considered view when they sent the extension decision out, that they thought there were gaps. See comments at paragraphs 31-37 below.

<u>Paragraphs 7 of the application: The inability of the ExA to cope</u>

31. Paragraph 7 of the application of 9th February 2021 says the following:

"In addition to the IPs who have informed the ExA's of their difficulties, three members of the Panels and also members of the Case Team in support of the Examinations have school aged children who have now been at home since December. The demands of home schooling has had a large impact on the ability of the Panels to sufficiently resource the projects and dedicate the necessary time needed to properly digest the information submitted into the examinations in order to thoroughly examine it. The need to resource the Examinations has led to unsustainable work patterns in which shifts are worked over evenings and weekends without breaks or leave for many weeks at a time."

32. In paragraph 9 the ExA also explains that they have not been able to "*engage properly and effectively in the process*". They admit to a substantial "*backlog*" in the examination of issues that had "*accumulated*" as of that date.

33. The application thus explained to the Minister that as of 9th February 2021 the ExA was unable to cope with the work involved in understanding or "*digesting*" the evidence. It follows from the explanation of the problem that the inability to cope had been in existence for some considerable time, probably stretching back into the latter part of 2020.

34. Whilst of course it is acknowledged that the task confronting the ExA has been a heavy one, it remains the case that at no point – even now – has the ExA raised with the parties its admitted inability to cope, or that it had a substantial backlog in the assessment of issues, or that it considered that it did not have the resources to cope, or that it could not "*digest*" the evidence and submissions that were being made.

35. In principle, all parties to any examination or inquiry are entitled to be confident that the tribunal is able to cope. If for whatever reason that is not the case, then it is the duty of the tribunal to raise the issue with the parties so that appropriate case management steps can be taken.

36. The ExA's concerns should, in all fairness, have been raised months ago. All parties have proceeded upon the basis that their submissions and evidence had been received, understood and assessed.

37. Throughout, many participants have noted that the Inspectors did not raise questions on many important matters but have always assumed that they were in effect keeping their own wise counsel. It never occurred to anyone that the lack of questions or challenge from the Inspectors to evidence was *because* of an inability to cope.

38. This raises the real concern that the powerful evidence submitted by those opposing these applications has simply not been understood or taken on board. The failure by the ExA to raise their difficulties with the parties is a procedural failing which seriously undermines the fairness of the examination.

39. However, none of this warranted an extension of time for yet f*urther* evidence to be collected and submitted, which could only compound the problem. At its highest it warranted an extension so that the ExA could evaluate the evidence that was submitted at the end of the normal statutory deadline. It has always been accepted that there would have been no objection to the ExA having extra thinking and drafting time, following completion of the evidence.

No power to revoke the decision

40. The PI letter states that the ExA has no power to revoke the decision. As to this:

    (i) The Decision is permissive and does not compel the ExA to extend time; nor does it compel the ExA to use all of the extra time or require the parties to devote more time and effort to preparing evidence and submissions for which they have inadequate resources.

    (ii) Since the application was made on a mistaken legal and evidential basis the ExA can and should invite the Secretary of State to withdraw the extension.

    (iii) The ExA could use the time now allowed to evaluate the evidence that was submitted as at the end of the statutory period.

    (iv) The Secretary of State should now take appropriate remedial steps.

Liaison between the ExA and the Secretary of State

41. In the conduct of this investigation the ExA is required to act with scrupulous independence and impartiality so that when it makes a recommendation to the Secretary of State the public has confidence in its objectivity. In this connection our concerns have been exacerbated by the apparent closeness of the relationship between relevant Ministers and the ExA.

42. First, we are concerned that the Secretary of State saw fit to use the ExA as, in effect, a post box or message carrier instead of directly communicating with SPR and we are also concerned that the ExA allowed itself to be used in this regard. How can the ExA be seen to be acting with independence if it allows itself to be used in this manner?

43. Secondly, we note from the disclosed documents that at paragraph 18 of the application to the Minister dated 9th February 2021 the ExA planned to coordinate with the Government's relevant press officers (in BEIS and HMCLG) over the extension decision in order to "*agree*" upon "*media lines*" i.e., jointly to spin the appropriate message to the "*public, industrial and local media*".

44. Thirdly, we are concerned that the ExA and the Secretary of State jointly formed the conclusion that (i) the fact that they have consulted with SPR over the extension but no one else and (ii) the fact that they received from SPR a substantive submission, should <u>both</u> be kept secret.

45. Fourthly, the FOIA request has not been fully answered and the documents and other material which it is said will be refused would cover what are said to be "*mostly*" processing documents. We infer that these will include documents and materials evidencing communication between relevant Ministers and the ExA and could also include communications with third parties such as SPR. The refusal to disclose such material is further cause for concern. We address this separately.

<u>Conclusion</u>

46. The facts now emerging establish the following:

    (i) The application of 9th February 2021 was factually inaccurate. No participant had sought an extension of time. Such concerns that were expressed were related to such matters as the imposition of realistic deadlines by the ExA. No participant has suggested that at the end of the evidence collection process they had not been able to cope.

    (ii) The extension being sought in the application had the potential to be a highly controversial case management matter which would cause real prejudice to many parties. The application was made without the parties having been consulted as to whether it was a good idea. Had they been consulted the overwhelming response would have been that no extension was sought or justified.

    (iii) Once the application was made the Secretary of State and the ExA did then consult, but only with SPR, the applicant.

    (iv) At all times, the Secretary of State and the ExA have kept this process of discriminatory consultation with SPR secret.

(v) The ExA has moreover failed to publish the submission made by SPR, even though it went well beyond merely responding to the narrow question whether it wished to have an extension and raised issues of substantive argument and policy.

(vi) The ExA have explained to the Secretary of State that they have been unable to cope with the demands of the inquiry. The ExA has regrettably kept this fact secret and it was not raised with the parties, as it should have, since it raised an issue which goes to the heart of the fairness of the proceedings. If a court, tribunal or other body presiding over public hearings, with a duty to evaluate the evidence and form a view, cannot cope it is critical that it raises the problem with the parties at the earliest opportunity.

(vii) The ExA and Secretary of State have refused to disclose relevant documents subject to the FOIA request thus keeping secret material that on its face is likely to be relevant to the procedural concerns expressed.

47. The extension decision should be revoked forthwith. We reserve all rights.

Dated 18 May 2021

Fiona Gilmore

For and on behalf of Suffolk Energy Action Solutions

CC Secretary of State for Business, Energy and Industrial Strategy

Substation Action Save East Suffolk (for the attention of Michael Mahony)

Save our Sandlings (for the attention of Paul Chandler)

The Aldeburgh Society (for the attention of Katherine Mackie)

Friston Parish Council (for the attention of The Clerk)

The Rt Hon Dr Therese Coffey MP

ANNEX A: Submissions of affected participants at Deadline 5 on concerns about timing or resources etc.

This Annex sets out the position of those participants that the ExA has relied upon as having expressed concerns of such severity and magnitude that a lengthy extension was said to be justified.

The evidence demonstrates that there were no concerns expressed which justified the application. There is no evidence to suggest that any of these bodies considered that as at the end of the statutory period and/or when the ExA communicated its decision on extension to the parties, that they had been unable to cope.

SASES:

"Request for Exceptional Issue Specific Hearing in respect of Noise and Flood Risk issues- ISH5 Action Point 13

Notwithstanding the presence of noise and flood risk issues on the agenda for ISH4, SASES suggests that these topics would benefit from further oral examination at an exceptional issue specific hearing in the week commencing 8th March 2021. The reasons for this are as follows:

1. As has been seen from both the written and oral submissions on these topics to date, these are very technical subjects involving complex issues. Whilst some time has already been spent examining them, given their complexity it is submitted that more time is needed so that the issues can be more fully explored with the relevant experts all present in a single hearing.

2. As will have been noted, there are very substantial differences of opinion between the applicants on the one hand and the local authorities (SCC in relation to flood and ESC in relation to noise) and SASES on the other, and an oral hearing will provide greater clarity as to the nature and substance of those differences.

3. Noise and flood are the two issues which are of the greatest concern to the residents of Friston. These are not conceptual issues. Residents fear that: a. the quiet and tranquil environment in which they currently live will be permanently blighted by noise from the Scottish Power and National Grid NSIPs; and b. the risk of flood which a number of residents already face, and other residents are fearful of, will be made worse. This is not a theoretical issue. Residents in the village have already had their homes flooded in past years. Anyone who has had their home flooded knows how unpleasant that can be. Accordingly, these issues must be, and must be seen to have been, fully and fairly examined."

The exceptional issue specific hearing into Flood risk and Drainage took place on the 10th March, ISH11. At the end of the hearing Richard Turney for SASES expressed "*disquiet*" that SPR were, at this late stage, submitting new operational drainage management plan at deadline 8 meaning SASES had to redeploy experts when the issues had been flagged by SASES, ESC and SCC early in the whole process and should have been prepared by SPR long before deadline 8.

No application was made for an extension.

On 10th March 2021, Ms Caroline Jones, for the ExA, cancelled reserved hearing dates set for 23rd and 26th March 2021 saying that they were "*not required*".

The Environment Agency submission

"We have reviewed the Agenda, and it is our view that we have no further specific points that we would wish to raise at this time in relation to the broad issues outlined for discussion. In light of this, and significant workload and staffing pressures, we regretfully send our apologies as we will be unable to resource attendance at the session. We are of course, happy to review any relevant questions arising from the sessions and provide written responses in a timely manner".

The Agency referred to schooling only as context for an apology for non-attendance at the hearing. It did not seek an extension and it did not suggest that it could not cope with any evidential issues that arose.

East Suffolk Council

"As with all other stakeholders and Interested Parties East Suffolk Council (ESC) is also experiencing difficulties with resourcing the examination and hearings. This is specifically as a result of the national lockdown and school closures. This has meant that a number of officers are juggling, home-schooling, childcare, WIFI and internet capability in some areas of the District, in addition to the pressures of the examinations. It is understood that the Panel are also experiencing similar pressures.

We appreciate that where we have made special requests to the Examining Authority in relation to the timetabling of agenda items at specific hearings they have been taken on board and we really appreciate the adaptations that have been made in the past. We have however set out below some additional matters we would welcome the Examining Authority's consideration of:

• It is very helpful when there are a number of hearings in close proximity to one another if all the agendas are published together. I think this has on the whole been done. This avoids the potential in a week of four hearings on Tuesday-Friday, that the agenda for a hearing on the fourth day being published just before the hearing on day one for example. In this scenario it is helpful that all the agendas for the hearings are published at least five days in advance of the first hearing.

• The provision of as detailed agendas as possible. This helps when preparing for the hearing so we can understand the matters to be discussed and ensure the appropriate officers are available for these discussions. In previous hearings we have made available technical experts but then the matters we have assumed would be discussed have not been. It is appreciated that sometimes discussions may deviate from those matters on the detailed agenda but this would provide a really useful starting point. For example, if the Examining Authority has specific questions which they would like discussed, if we know these in advance, we can ensure that we provide the appropriate information during the hearing and ensure the relevant technical experts are available. ESC acknowledge that some agendas have contained these specific questions and it is considered that this format has helped the productivity of the event.

• The provision of the detailed agendas more than five days in advance of the hearing. Due to the current difficulties experienced with juggling competing demands, the earliest the publication of the hearing agendas the greater the preparation time available, and the ability to properly resource hearings.

• The provision of an approximation of timings for specific agenda items so that relevant officers could ensure they are available at the appropriate time."

No request for an extension to the hearings was sought. All that was asked for was agendas to be more detailed and published in advance; this is a low-level case management issue.

Save our Sandlings

Save our Sandling made no reference to difficulties at deadline 5.

The RSPB

The RSPB made no submissions at all at deadline 5.

The Wildlife Trust

The Wildlife Trust made no reference to reference to difficulties at deadline 5.

Suffolk CC

Suffolk CC made no reference to difficulties at deadline 5.

Natural England

"Natural England wishes to reiterate the ongoing difficulties we continue to have with meeting examination deadlines during Covid-19 lockdown restrictions. The National Lockdown, especially the closing of schools, continues to impact on the overall capacity of NE, which has implications for our delivery throughout the EA1N and EA2 examination process".

No application for an extension was made. It was not said that the lockdown or schooling issues caused National England, ultimately, to fail to adduce the evidence that it saw fit.

The Marine Management Organisation

"The MMO has concerns on the remaining time left within the Examination and the time to provide a detailed response at each deadline, however, the MMO may request a slight extension to a future deadline to provide the best quality information at the earliest opportunity".

A slight extension to a future deadline is not a request for a lengthy extension at the end of the inquiry.

In reference to Natural England's cover letter the MMO said:

"The MMO has reviewed this document. The MMO recognises NE's concerns regarding their ability to respond to deadlines due to the Covid-19 pandemic and its associated implications, the MMO urges the ExA to take this into consideration should they request further information from other interested parties, the MMO has no further comments to make on this submission".

No application for an extension was made. To the contrary all that the MMO sought was to urge the ExA to take lock down into account in the setting of deadlines.

The AEPA

The AEPA said:

"This evening's latest deadline for comments on the examination of these projects does not sit well with a local community already under immense pressure due to the current renewed lockdown."

They made clear that they would cope nonetheless:

"we will continue to defend our communities to the best of our ability, although as we have said before this process ought to have been halted until normal social behaviour can be safely resumed".

No application for an extension was made. As of the end of the statutory timeframe there is no suggestion from AEPA that they sought a further extension or had not coped.

Historic England

No application for an extension was made.