

The Secretary of State for Business, Energy and
Industrial Strategy
c/o Mr Gareth Leigh
Head of Energy Infrastructure Planning
Department for Business, Energy and Industrial
Strategy
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20 May 2021

Your Reference:
Our Reference: MCK/P5785-2

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Dear Sirs

Re: The Secretary of State's request for information following the High Court's decision to quash the Norfolk Vanguard Offshore Wind Farm Order 2020

Introduction

1. We write on behalf of Mr Ray Pearce, an interested party to both the Norfolk Vanguard and Norfolk Boreas applications for development consent. These representations are made in response to the Secretary of State's letter of 29 April 2021 calling for submissions as to the appropriate procedure he should now adopt to redetermine the application for development consent for Norfolk Vanguard following the judgment of the High Court in R (Pearce) v Secretary of State for Business, Energy and Industrial Strategy [2021] EWHC 326 (Admin) ("the Judgment").

Implications of the Judgment

2. We note at the outset that the Judgment rejected the submissions on behalf of the Secretary of State that the procedure for re-determining a development consent order ("DCO") that has been quashed is dictated by rule 20 of the Infrastructure Planning (Examination Procedure) Rules 2010 ("the 2010 Rules"). Instead, rule 20 provides simply for minimum procedural requirements. At [173], Holgate J noted that rule 19 expressly provides for the re-opening of examinations.
3. At [174] Holgate J noted that where a fundamental error had been made affecting the decision-making process, it might be necessary to 'rewind' the process to the beginning. At [175]-[178], referring to [132]-[236] of the Judgment, the High Court set out a non-exhaustive list of matters that would need to be addressed. Those matters include obviously material considerations that were not addressed either by the Secretary of State or the Examining Authority. In our view, they (and the other matters referred to at paragraph 7 below) clearly require re-examination so that the impacts of the Norfolk Vanguard and Norfolk Boreas developments can properly be considered together.

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Projects should be considered together

4. Moreover, there is no remaining logic for insisting on the separate consideration of the two projects given that they are both before the Secretary of State at the same time. It seems to us, therefore, that the Secretary of State should revisit that matter and re-open an examination into both projects. That would enable the justification for co-location of the projects, strategic alternatives and cumulative impacts to be considered. It would also allow any updated matters to be considered (see paragraphs 9-10 below), given that some considerable time has passed since the applications were made (only part of which was caused by our client's challenge).
5. As explained further below, a "specific and targeted joint consultation on onshore landscape impacts" as is proposed by the Secretary of State would be materially deficient unless it considered the cumulative impacts and justification for Norfolk Vanguard and Norfolk Boreas more generally. That is what the applicant improperly avoided by submitting successive applications. However, they are no longer successive. They are concurrent, and can - and should - be considered together.

Scope of re-assessment

6. As Mr Justice Holgate made clear, the Secretary of State's failure to assess cumulative landscape and visual impacts of the two wind farm developments went to the heart of the Secretary of State's assessment of the acceptability of the Norfolk Vanguard wind farm. In particular, it includes an appraisal of the following matters:
 - a. The strategy of co-location of Norfolk Vanguard and Norfolk Boreas (see the Judgment at [132], [134]); it needed to be determined before granting consent for Norfolk Vanguard (the first project) whether the cumulative impacts both of a grid connection at Necton (and the related cable corridor) were acceptable or should be reconsidered [133].
 - b. The acceptability of the choice of Necton as the grid connection point in that context [132].
 - c. Whether the acquisition of land for Norfolk Boreas by the Norfolk Vanguard proposal satisfies a "compelling public interest" test for compulsory acquisition [132].
 - d. A full and complete assessment of the cumulative impacts of the two projects, not limited to design (see paragraphs 11-18 below). As the Judge held, the approach taken by *both* the Secretary of State and the ExAR's recommendation was fundamentally flawed both as a matter of environmental impact assessment ("EIA") and rationality. It omitted from consideration an entire category of impacts. EIA requires that all the information be taken into consideration in making a decision. That cannot be done in a piecemeal way. The Secretary of State must revisit the overall planning balance, which Holgate J noted concluded in favour of the proposed development "on balance" only [159].
7. Furthermore, it is incumbent on the Secretary of State to address (at least) the following matters, which flow from the Judge's conclusions at [132]-[136]:
 - a. First, given the greater magnitude of and thus weight to be afforded to adverse landscape impacts which arise from the cumulation of the two projects, the Secretary of State must consider the weight that is to be afforded to alternatives that avoid or mitigate those adverse impacts. These alternatives exist at both the strategic and the local level, as Mr Pearce (and others) have consistently maintained throughout the examination for both Vanguard and Boreas. In particular:
 - i. Greater weight may fall to be given to local alternatives, such as Top Farm.
 - ii. Greater weight may fall to be given to strategic alternatives, such as an offshore ring main. The case for this has only strengthened recently (see paragraph 10 below). We note that at [59] Holgate J commented adversely on the consideration that had been given by the ExA to this alternative.

- b. Second, even if the Secretary of State concludes that siting at Necton is acceptable in the light of a proper consideration of cumulative impacts between Norfolk Vanguard and Norfolk Boreas, such a conclusion will not avoid the necessary consideration of mitigation measures in order properly to account for those cumulative impacts. Some potential mitigation solutions, such as the lowering of the substations or part concealment by bunding, can only be considered as part of the Norfolk Vanguard process. These are not simply matters of design (see paragraphs 11-18 below).
8. Given the broad scope of the matters affected by the Secretary of State's unlawful failure to assess cumulative landscape and visual impacts, the *only* way in which the Secretary of State can address the consequences of the quashing of the development consent order is to reopen the examination of the application.

New considerations

9. In re-assessing the applications, it will be necessary for the Secretary of State also to take into consideration the cumulative impact with new projects about which there is further information now available (that was not available when environmental statement was compiled in 2018). For example, the combined effect of the cable routes from Norfolk Vanguard and Norfolk Boreas with the proposed Sheringham Shoal and Dudgeon Offshore Wind Farm Extensions is now obviously relevant.
10. Moreover, the case for an offshore transmission network (referred to in earlier as an offshore ring main) solution is now much stronger than it was when Norfolk Vanguard was examined. The Secretary of State is now actively pursuing an "Offshore Transmission Network Review", including exploring the opportunities which exist for early implementation of such measures by projects, such as Norfolk Vanguard, that will be delivered prior to 2030. The Government has also published new policy, including a Ten Point Plan (November 2020), which includes an ambition for the quadrupling of offshore wind energy in the next 10 years. The failure of projects such as Norfolk Vanguard and Norfolk Boreas to support an offshore transmission network could jeopardise the ability of the offshore area of Norfolk to contribute to that ambition. Given Norfolk's proximity to the North Sea and the density of wind farm development which is anticipated to come forward, there is particular scope for such strategic solutions. The applicants for the Norfolk Vanguard and Norfolk Boreas projects have never given proper consideration to such alternatives, but the case for doing so now is stronger than ever. The delay in bringing forward these projects in that way can be turned into an opportunity. Certainly, and importantly, the Secretary of State's reasoning at paragraph 4.11 of the decision letter of 1 July 2020 no longer holds good, and needs to be revisited.

Design

11. We note that at paragraph 4 of the Secretary of State's letter you characterise the reasoning that was quashed as relating, in particular, to the design of the Norfolk Boreas substation. However, that seems to us "an impermissible attempt to rewrite the ExAR and the quashed decision letter" (to borrow the expression from the Judgment at [139]) and not to be a justified reading at all. You assert that "the Secretary of State considered that without some further detail of the design [of the Norfolk Boreas substation], it was not possible to fully assess the potential cumulative effects of it and the Norfolk Vanguard substation." That substantially mischaracterises the findings of the High Court, that there was an inexplicable absence of any reasoning to inform the EIA process in particular, or the decision in general.
12. We therefore consider that limiting redetermination of the application to matters of Boreas substation *design* alone, would not correct the unlawfulness and would not be a sound approach.
13. The task before the Secretary of State is to consider *all* the elements of both Vanguard and Boreas which are capable of contributing to a proper and lawful cumulative impact assessment, as well as all those elements of the Vanguard application which are capable of being affected by the same. He must also, at least, have regard to relevant new considerations.

14. As we explain above, we consider that would be best achieved by re-opening the examination for both projects together, but it at least needs to be done for Norfolk Vanguard ahead of any consent for Norfolk Boreas.
15. Moreover, your letter proposes basing the updated information about the cumulative impacts from both projects on the updated (August 2020) Design and Access Statement (“DAS”) for Norfolk Boreas, in particular the Preliminary Design Report at Appendix 3 of that document.
16. We note that the DAS pre-dated the successful challenge by Mr Pearce and is based upon the assumptions that underlay the challenge - and require cumulative examination on any redetermination (e.g. alternatives and strategic site selection - see section 4.3.1). The detailed design process and the Preliminary Design Report are limited to subsidiary matters and (in any event) relate only to one of the substation developments. It is clear that “functionally non-negotiable” elements that are already determined by the co-location decision of the two projects will not be capable of being revisited (see DAS at paragraph 68).
17. Paragraph 73 of the DAS confirms this very clearly:

“The development of the Design Guide will enable local stakeholders to provide feedback on local preferences in relation to colour and material finish for the convertor buildings, with the purpose of ensuring the substation developments are sensitive to place, with visual impacts minimised as far as practicable. It is also recognised that the local community have experience of growing trees and other plants in this local area. Through consultation on the Design Guide, the Applicant would welcome the opportunity to share local knowledge on native species that are suited to local conditions. This would ensure that the ‘palette’ of species selected would present the best opportunity for successful establishment and growth.”
18. The Preliminary Design Guide itself reiterates that it relates to “design, building materials, layout, coloration and finishes” but that “the exact functional requirements ... must be adhered to”. Limiting the reconsideration of cumulative impacts to this, in our view, would be quite incapable of addressing the reasons for which the DCO was quashed.

Proposed way forward

19. In answer to the questions at paragraph 8 of the Secretary of State’s letter:
 - a. The procedure that the Secretary of State now proposes to follow is deficient and would not correct the fundamental errors identified by the Court.
 - b. The only way to ensure that all relevant matters are properly examined is to re-open the examination, and we would suggest that this be done for both Norfolk Vanguard and Norfolk Boreas together.
 - c. We strongly disagree that the only additional materials required to assess cumulative impacts are some minor details about a prospective design process put forward by the applicant for the Norfolk Boreas development. There needs (at least) to be proper consideration of the nature of the cumulative impact, the consequence of that for the decision, alternatives and mitigation measures.
20. Moreover, we would add that prior to a reopened examination, the applicant should be required to update the environmental statement. The revised environmental statement should (inter alia):
 - a. Explain how the applicant has considered strategic alternatives to its pre-determined co-location approach at Necton, including under the ‘Early Opportunities’ workstream within the Offshore Transmission Network Review, and update that position in the light of emerging and pending wind farm projects such as Sheringham Shoal and Dudgeon Offshore Wind Farm Extensions and the pending application for development consent for the East Anglia Hub.

- b. Include new and/or updated information on cumulative impacts with the wind farm projects noted in paragraph 20a above and the (now) consented Hornsea Project, for which further details are now available.
 - c. Integrate the approach as to design coordination upon which it has relied in the Norfolk Boreas examination and referred to at paragraph 5 of the Secretary of State's letter into its consideration of impact and mitigation.
21. Following the preparation of an updated environmental statement, there should be a further period of consultation upon its contents prior to the reopening of the examination.

Conclusion

22. We welcome the Secretary of State's further consideration of this matter. However, Mr Pearce maintains that the steps set out above are the minimum necessary to enable the Secretary of State to respond adequately to the quashing of his original decision in respect of Norfolk Vanguard.

If you have any questions please contact the writer, Matt Gilks, on the details provided above.

Please kindly acknowledge safe receipt.

Yours faithfully



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