Wheelabrator TECHNOLOGIES

Deadline 5: Applicant's Response to the Examining Authority's Further Written Questions (ExQ3)

Appendix C – Drax Judgement

Wheelabrator Kemsley (K3 Generating Station) and Wheelabrator Kemsley North (WKN) Waste to Energy Facility Development Consent Order

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June 2020 – Deadline 5

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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.