Net Zero Teesside Project

Planning Inspectorate Reference: EN010103

Land at and in the vicinity of the former Redcar Steel Works site, Redcar and in Stockton-on-Tees, Teesside

The Net Zero Teesside Order

Document Reference: 9.2 – Written Summary of Oral Submission for Issue Specific Hearing 1 (ISH1)

The Planning Act 2008

Applicants: Net Zero Teesside Power Limited (NZT Power Ltd) & Net Zero North Sea Storage Limited (NZNS Storage Ltd)

Date: May 2022

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1.0 INTRODUCTION

1.1 Overview

1.1.1 This Written Summary of Oral Submission for Issue Specific Hearing 1 ('ISH1') (Document Ref. 9.2) has been prepared on behalf of Net Zero Teesside Power Limited and Net Zero North Sea Storage Limited (the 'Applicants'). It relates to the application (the 'Application') for a Development Consent Order (a 'DCO'), that has been submitted to the Secretary of State (the 'SoS') for Business, Energy and Industrial Strategy ('BEIS'), under Section 37 of 'The Planning Act 2008' (the 'PA 2008') for the Net Zero Teesside Project (the 'Proposed Development').

1.1.2 The Application was submitted to the SoS on 19 July 2021 and was accepted for Examination on 16 August 2021. A change request made by the Applicants in respect of the Application was accepted into the Examination by the Examining Authority on 6 May 2022.

1.2 Description of the Proposed Development

1.2.1 The Proposed Development will work by capturing CO_2 from a new the gas-fired power station in addition to a cluster of local industries on Teesside and transporting it via a CO_2 transport pipeline to the Endurance saline aquifer under the North Sea. The Proposed Development will initially capture and transport up to 4Mt of CO_2 per annum, although the CO_2 transport pipeline has the capacity to accommodate up to 10Mt of CO_2 per annum thereby allowing for future expansion.

1.2.2 The Proposed Development comprises the following elements:

- **Work Number ('Work No.') 1** – a Combined Cycle Gas Turbine electricity generating station with an electrical output of up to 860 megawatts and post-combustion carbon capture plant (the 'Low Carbon Electricity Generating Station');
- **Work No. 2** – a natural gas supply connection and Above Ground Installations ('AGIs') (the **'Gas Connection Corridor'**);
- **Work No. 3** – an electricity grid connection (the **'Electrical Connection'**);
- **Work No. 4** – water supply connections (the '**Water Supply Connection Corridor'**);
- **Work No. 5** – waste water disposal connections (the **'Water Discharge Connection Corridor');**
- **Work No. 6** – a CO_2 gathering network (including connections under the tidal River Tees) to collect and transport the captured CO_2 from industrial emitters (the industrial emitters using the gathering network will be responsible for consenting their own carbon capture plant and connections to the gathering network) (the 'CO_2 Gathering Network Corridor');
- **Work No. 7** – a high-pressure CO_2 compressor station to receive and compress the captured CO_2 from the Low Carbon Electricity Generating Station and the CO_2

Gathering Network before it is transported offshore (the '**HP Compressor Station'**);

- **Work No. 8** – a dense phase CO_2 export pipeline for the onward transport of the captured and compressed CO_2 to the Endurance saline aquifer under the North Sea (the **'CO_2 Export Pipeline'**);
- **Work No. 9** – temporary construction and laydown areas, including contractor compounds, construction staff welfare and vehicle parking for use during the construction phase of the Proposed Development (the **'Laydown Areas'**); and
- **Work No. 10** – access and highway improvement works (the '**Access and Highway Works'**).

1.2.3 The electricity generating station, its post-combustion carbon capture plant and the CO_2 compressor station will be located on part of the South Tees Development Corporation ('STDC') Teesworks area (on part of the former Redcar Steel Works Site). The CO_2 export pipeline will also start in this location before heading offshore. The generating station connections and the CO_2 gathering network will require corridors of land within the administrative areas of both Redcar and Cleveland and Stockton-on-Tees Borough Councils, including crossings beneath the River Tees.

1.3 The Purpose and Structure of this document

1.3.1 The purpose of this document is to provide a Written Summary of the Oral Submission for Issue Specific Hearing 1 ('ISH1'), held at 2pm on 10 May 2022.

1.3.2 The document is structured as follows:

- Section 2 – Written Summary of Oral Submission for ISH1.

2.0 WRITTEN SUMMARY OF ORAL SUBMISSION – FOR ISSUE SPECIFIC HEARING 1

2.1 Written Summary of Oral Submission – ISH1

2.1.1 The Applicant's summary of ISH1 is provided in **Table 2.1** below:

Table 2.1: Summary of Oral Submission ISH1

No.	Agenda	Summary of Oral Submission
1.	**Item 1** **Welcome, Introductions, and arrangements for the Issue Specific Hearing**	N/A
2.	**Item 2** **Purpose of the Hearing**	N/A
3.	**Item 3** **The Need for the Proposed Development** • The ExA will ask the Applicants about the need for the Proposed Development in the context of the Project Need Statement [AS-015]	Hereward Philpott QC ("HPQC"), appearing on behalf of the Applicants, made the following submissions about the approach to the issue of need in this case. It was explained that the need case has two main elements: • the need for the generating station; and • the need for those elements of the application specified in the section 35 Direction. **The generating station** The urgent need for the generating station is set out in current National Policy Statement ("NPS") EN-1, and should not therefore be in issue for the purposes of this examination or the determination of the application.

	and emerging Government policies.	The Examining Authority ("ExA") may disregard representations that relate to the merits of policy set out in a NPS (section 87(3)(b) Planning Act 2008 ("PA 2008")). The ExA may also refuse to allow representations to be made in a hearing that relate to the merits of policy set out in a NPS (section 94(8)(b) PA 2008). Those statutory provisions were considered by the High Court (Holgate J) and the Court of Appeal in the litigation relating to the approval of the Drax Power (Generating Stations) Order 2019 (***R (Client Earth) v The Secretary of State for Business, Energy and Industrial Strategy*** [2020] EWHC 1303 (Admin); [2021] EWCA Civ 43). The Applicant agreed to provide copies of those two judgments to the Examining Authority, which are provided at **Appendix 1 and Appendix 2** respectively. The Court held *inter alia* that: • The question of whether changes of circumstance affect the weight to be attached to a NPS is not an appropriate exercise in determining individual applications. • This is because it constitutes questioning the merits of Government policy, and section 6 of the PA 2008 provides an exclusive means for considering such issues. • 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. In addition, HPQC drew attention to the Energy White Paper at page 55, which confirms that the need set out in the NPSs remains (save for coal), and that while the review of the Energy NPSs is undertaken the existing suite of NPSs will continue to provide a proper basis on which the Planning Inspectorate can examine, and the Secretary of State can make decisions on, applications for development consent.

		In response to questioning by the ExA, Andy Lane for the Applicant ("AL") confirmed that the Applicants were committed to the use of natural gas in the power station. HPQC explained that the combined cycle gas turbine formed part of the description of the development for which development consent is sought. The role of gas-fired power stations was quintessentially a matter of Government policy, the merits of which are not open to debate in the context of individual applications. **The carbon capture and storage infrastructure** The need case for this part of the project is based on statements of published Government policy, supported by analysis and advice by e.g. the Committee on Climate Change. It is set out in the Project Need Statement [AS-015] and the Planning Statement [APP-070]. As noted at the Preliminary Meeting, the policy elements of the need case will be updated at Deadline 1 through the submission of an amended Planning Statement. Since the submission of the application, a number of other important energy policy documents have been published by Government that reinforce the need for Carbon Capture Usage and Storage ("CCUS") and the establishment of low-carbon industrial clusters. • *Publication of draft NPS*, with directly relevant draft policy on the need for CCUS. • *The Net Zero Strategy: Build Back Greener (October 2021)* – this builds on the commitments in the Ten Point Plan and Energy White Paper, proposing to deliver "four carbon capture usage and storage (CCUS) clusters, capturing 20-30 Mt CO2 across the economy, including 6 Mt CO2 of industrial emissions, per year, by 2030". • *British Energy Security Strategy (April 2022)* – this explains how the Government is delivering on the 10 point plan, including (page 8) investing in CCUS with £1 billion in public investment committed to decarbonise industrial clusters and the announcement of the first two clusters in Teesside, the Humber and Merseyside. The section on Oil and Gas (page 15) states that the Government will ensure a new lease of life in the North Sea in low-carbon technologies through delivering CCUS and that the "industrial clusters will be the starting point for a new

		carbon capture industry with a sizeable export potential, helping to create industrial 'SuperPlaces' in the UK". It was submitted that the need is clearly identified in Government policy, and attention was drawn to the fact that no party in its relevant representations has sought to cast doubt on that. Although the specific statutory power to disregard representations that relate to the merits of a NPS does not apply to other statements of Government policy, that does not mean that the merits of such policies are a suitable subject for debate in the examination of an individual application for development consent. The position is comparable to a party to an appeal under section 78 of the Town and Country Planning Act 1990 seeking to use the process to question the merits of policy in the National Planning Policy Framework. There is no equivalent specific statutory provision to prevent such representations being made or taken into account, but there is nevertheless a long-standing recognition that the merits of national policy is not a suitable subject for debate in determining individual applications. The policy support for CCUS identified in the Project Need Statement (as well as the emerging NPSs insofar as they are relevant to need) represent recent and up-to-date statements of Government policy. They have been informed by broad judgments balancing a range of environmental, social and economic factors which are appropriately taken by democratically accountable representatives, and that the merits of those policy judgments are not appropriate for debate in the context of decisions on individual applications. In response to comments by Dr Boswell about a legal challenge having been initiated in respect of the Net Zero Strategy, HPQC made the following submissions:

		• administrative decisions are to be regarded as valid unless and until quashed, and that principle applied to the publication of the Net Zero Strategy; and • in any event, the Applicants' need case as articulated in the Project Need Statement [AS-015] plainly did not depend on the Net Zero Strategy (which postdates that document). The need case would remain whether the challenge succeeds or not. It was also noted that Dr Boswell was not suggesting that the Applicants had misunderstood or misrepresented the effect of up to date Government policy in the Project Need Statement or Planning Statement. Dr Boswell's other submissions were directed to the question of whether current Government policy ought to change, and thus to the merits of that policy rather than how it applied to the application in hand.
4.	**Item 4** **The Proposed Development in the context of the Net Zero Strategy** The ExA will ask the Applicants about: • The relationship of NZT to Zerocarbon Humber and the Northern Endurance Partnership	HPQC confirms that an overview of the BEIS cluster sequencing process (including Tracks and Phases), will be set out in the written note - this is provided immediately below. Post-hearing note: In February 2021, the Department for Business, Energy and Industrial Strategy ("BEIS") launched a consultation on a 'Cluster Sequencing' process to select two 'Track 1' industrial clusters to start up in the mid-2020s, with a further two 'Track 2' clusters to start up by 2030. The Cluster Sequencing process was launched in May 2021, with the 'Cluster Lead' (which is NEP for Teesside and Humber) responsible for preparing a 'Cluster Plan'. This plan includes a detailed technical scope, cost estimate, schedule and commercial framework for the whole cluster, including the transportation and storage system and all emitters across Teesside and Humber. bp, on behalf of NEP, submitted the East Coast Cluster ("ECC") plan in July 2021 and was selected by BEIS as one of the successful clusters in October 2021. The ECC plan aims to deliver 20 million tonnes per annum

		("MTPA") of CCUS capacity by 2030 across multiple emitters in both Teesside and Humber, with further expansion to 27MTPA of CCUS capacity by 2035. A concurrent competitive process for emitters was launched in 4Q 2021, with bids by individual emitter projects within the clusters submitted in January 2022. Net Zero Teesside Power submitted a bid to be part of the first selection of emitter projects to tie into the carbon dioxide transportation and storage network in Teesside. BEIS is currently assessing these bids and will announce the successful emitter projects – it is anticipated this will occur in July 2022. Further information on the Cluster Sequencing process is set out in the Cluster Sequencing for Carbon Capture Usage and Storage Deployment: Phase 1 (May 2021) document provided at **Appendix 3**. In particular, the ExA's attention is drawn to the Introduction and key information (section 1) and within that the Process overview at section 1.4. As noted above, ECC was selected as a successful cluster in October 2021 and has therefore progressed beyond the position set out in that document. Further information is provided in the CCUS Investor Roadmap (April 2022) document provided at **Appendix 4**. This provides BEIS' update on the position in relation to the Cluster Sequencing process, including key activities and milestones (at page 5) as well as contextual information on the Government's policies and activities to ensure that CCUS proposals such as the Proposed Development are able to come forward as quickly as possible. AL, introduced by HPQC and speaking for the Applicant provides a summary explanation of the structure and relationship of the Northern Endurance Partnership ("NEP"), the Low Carbon Humber project and the Applicant, and how those relate to the Cluster sequencing process currently being run by HM Government's Department for Business, Energy and Industrial Strategy ("BEIS"). AL explains that the East Coast Cluster ("ECC"), comprising the Project alongside others was recently selected by BEIS as a Track 1 cluster project. ECC was selected alongside the Hynet scheme, located across the North West of England and North Wales, with the Acorn project in Scotland selected as a reserve cluster.

		AL explains that the Teesside region generates approximately 50% of the industrial Carbon Dioxide emissions in the UK, and that the region also provides a wide range of source emissions. NZT is therefore well located and the Project alongside its Northern Endurance Partnership partner, Zero Carbon Humber, are able to maximise economies of scale in terms of costs. AL confirms that the Project and Zero Carbon Humber are different projects and capable of being progressed separately. AL also explains that HM Government has a funding envelope for UK research and innovation, named the Industrial Strategy Fund ("ISF"). The onshore aspects of NZT, which is the subject of the Application, was awarded funding under the ISF. This funding covered approximately 1/3rd of the development costs during the engineering phase of the Project. The offshore element of NZT was awarded separate funding. In response to questions from the ExA, AL confirms that the Endurance Store, to which the Project will connect offshore, has capacity for approximately 450 million tonnes of storage. The Project is projected to send 10 million tonnes of Carbon Dioxide for storage at the Endurance Store for 40 years. AL explains that the Applicant is working with the North Sea Transition Authority to appraise alternative stores to increase capacity available for storing captured carbon dioxide. Post-hearing note: the North Sea Transition Authority announced on 12 May 2022 that it has issued carbon dioxide storage licences to bp and Equinor in relation to further storage sites, all in the Southern North Sea and in the same area as the Endurance store. The North Sea Transition Authority's announcement identified that, together with Endurance, these storage sites could allow for the storage of up to 23 million tonnes of carbon dioxide per annum.
5.	**Item 5** **Components of the Net Zero Teesside Project**	HPQC explained why the offshore elements of the wider project were not included within the DCO application. There are four main consents that are required to construct and operate the offshore elements. • A CO2 appraisal and storage licence under section 18 of the Energy Act 2008 ("EA 2008").

	• The Applicants will be asked to provide an overview about the offshore elements of the project, their timing and why they are not included in the DCO application • The Applicants will be asked to explain the potential of the project to produce low carbon hydrogen	• A storage permit under regulations 6-8 of the Storage of Carbon Dioxide (Licensing) Regulations 2010 ("the 2010 Regulations"). • An authorisation relating to the construction and use of pipelines under section 14 of the Petroleum Act 1998 ("PA 1998"). • Consent under the Offshore Oil and Gas Exploration, Production, Unloading and Storage (Environmental Impact Assessment) Regulations 2020 ("the 2020 Regulations"). The storage licence has already been granted pursuant to the EA 2008, and so no further application is required. All three of the remaining consents involve the same decision-maker, namely the North Sea Transition Authority ("NSTA"), with consent to be provided pursuant to the 2020 Regulations being dependent on the Offshore Petroleum Regulator for Environment and Decommissioning ("OPRED"), on behalf the Secretary of State, first agreeing to the grant of consent by the NSTA and with OPRED having taken into account the environmental information. More detail on the consenting arrangements is set out in the note at **Appendix 5**. The NSTA is a specialist regulator for this highly technical and specialist area of activity, with considerable internal expertise and accumulated experience in handling such applications. OPRED is similarly expert and experienced. Two of the three remaining consents are not capable of being brought within the scope of the PA 2008, because they are not included in the list of prescribed consent regimes under Schedule 2 to the Infrastructure Planning (Interested Parties and Miscellaneous Prescribed Provisions) Regulations 2015. Those regulations prescribe those consent regimes where pursuant to section 150(1) of the PA 2008 the need to obtain a consent may be removed via a DCO if the relevant consenting authority has agreed to this being done. The two which cannot be included are: • the storage permit under the 2010 Regulations; and

		• consent under the 2020 Regulations. That means that the authorisation for the construction and use of the offshore pipelines under the PA 1998 could as a matter of law have been included, but only if the NSTA consented to this being done. In the circumstances here, however, that would have made little practical sense. If the acceptability of the storage permit and the assessment of environmental impacts of the offshore elements is to be judged and determined by the NSTA (subject to the approval of OPRED in relation to the decision under the 2020 Regulations), there is obvious benefit and good sense in one decision-maker dealing with all of the offshore elements together as a coherent package. Splitting the assessment and decision-making in respect of the offshore elements would offer no obvious public interest benefits (quite the reverse), and it is also not in the Applicants' interests. The NSTA (assisted by OPRED) is the most obviously suitable decision-maker, given its specialist expertise and experience in these matters. Paul Edwards ("PE"), speaking for the Applicants, answers questions from the ExA relating to the offshore elements of NZT. PE confirms that an offshore environmental impact assessment is currently being prepared with the aim of submitting to OPRED in September 2022, subject to some samples being taken and analysed from a borehole that will be drilled in June. The intention is to receive approval from BEIS in April 2023 prior to the taking of a Financial Investment Decision ("FID"). In terms of the storage permit, PE confirmed that the information will be submitted to the NSTA in November 2022. The NSTA have expressed an unwillingness to grant the permit prior to a FID, however the position agreed with the NSTA is that prior to FID they will have achieved a position where the NSTA has no further queries on the permit.

		In terms of the storage lease, which is with the Crown Estate, the relevant information has already been submitted to them. The Crown Estate has committed to provide the agreement for lease (AFL) in Q2 2023, prior to FID. PE explains the offshore consultation that is undergone as part of the offshore consents, licences and permits processes. In response to questions from the ExA on the offshore construction timescales, PE confirms that the offshore execution contractor has not yet been appointed. PE also explains that North Sea weather conditions mean work can only be done during the Q2 and Q3 weather windows each year. The provisional construction timetable, for elements of the works commencing in Q1 2025 and completing in Q3 2026, is summarised. Jack Bottomley ("JB"), speaking for the Applicants, provides information relating to the construction timescales for the onshore permits. JB confirms this is set out in Chapter 5 of the Project Environmental Statement [APP-087] and is subject to contractor schedules, to be determined once the contractor is appointed. Dr Richard Lowe ("RL"), speaking for the Applicants, confirms in response to a question from the ExA that 25 years is the typical design life for a gas fired power station. A 50-year period referred to relates to the store. PE confirms that as part of the storage permit process, the Applicants are agreeing monitoring, management and verification processes with the NSTA. Those processes may give rise to the 50-year aspect. RL confirms that the CO2 gathering network could operate beyond the life of the Project generating station. RL further confirms that the power contracts tend to be of 15 year duration, and whether that term is extended will be subject to a question of need and commercial factors at the relevant time.

		RL provides information relating to the assessment, particularly, the subject of injection rates. RL confirms that they have sought to assess the worst case environmental effects in the Project Environmental Statement. When the power station first comes into effect it will likely be run at a relatively steady rate of injection into the store; however the overall purpose of the generating station is to be flexible and to supplement and complement renewables, based on time and load. In relation to decommissioning, RL confirms that the construction case effects are considered to represent worst case effects compared to decommissioning works. In response to a question from the ExA on the Carbon Capture Readiness Assessment [APP-074], RL explains that the CCR assessment is a requirement of the Carbon Capture Readiness (Electricity Generating Station) Regulations 2013 and is based on the relevant guidance (as set out in the Carbon Capture Readiness Assessment). The worst case scenario (in terms of quantity of CO2) needs to be considered in the CCR assessment, which therefore assumes that the NZT power station will operate as baseload for 25 years. Accordingly, the CCR assessments sets out that there is capacity in the network for 10 million tonnes carbon dioxide export per year; 2 million tonnes will be generated by the generating station, giving an 8 million tonne headroom for other emitters. The network is expected to gather 4 million tonnes per year. In response to a question on hydrogen, AL explains that hydrogen is important but not part of this Application. The Project gathering network and CO2 transport and storage system will enable the decarbonisation of existing grey hydrogen production in the region, and will enable the development of new low carbon hydrogen in the region as well. Post-hearing note: the Applicants' response to Actions 2 (in relation to consideration of the overlap with Hornsea 4) and 4 (options for the SoS on Hornsea 4 DCO application) are respectively at **Appendices 6 and 7**.

6.	**Item 6** **Alternatives** • The ExA will ask the Applicants to provide an overview of the alternative technologies considered with reference to section 6.3 of the Environmental Statement [APP-088]	RL provided an overview of the alternative technologies considered with respect to the Project. RL explains that the original premise of the Project was to deliver Carbon Capture and Storage, to decarbonise industry and provide dispatchable power generation. The nationally significant element of the Project is the generation station itself, which was an approach agreed with BEIS. RL explains that a range of technologies were reviewed and that the most readily available is the post-combustion approach adopted by the Project generating station. RL advises that if the initial appraisal were re-considered the same conclusion would be reached today. RL explains he has worked on the Project since 2016 and gives a summary of the decisions taken regarding site selection, including need for a brownfield site close to the coast ideally located in an industrial area with industrial utilities connections. The ExA ask whether it is necessary to provide a decision matrix. HPQC made the following submissions about the approach to the issue of alternatives, having regard to the Secretary of State's recent decision in respect of the proposed AQUIND Interconnector project. There is a requirement for the purposes of The Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 ("the EIA Regulations") to describe the reasonable alternatives that were studied by the applicant, which are relevant to the proposed development and its specific characteristics, and to indicate the main reasons for the option chosen, taking into account the effects of the development on the environment (Regulation 14(2)(d)). The Applicants consider that they have met this requirement, but would consider the issue further in light of the ExA's question and respond separately in writing on that point. Post Hearing Note: In the context of the Alternatives and Design Evolution chapter [APP-088], as stated in paragraph 6.3.8, "in order to ensure a robust assessment of the likely significant environmental effects of the Proposed Development, the EIA has been undertaken adopting the principles of the 'Rochdale Envelope' approach where appropriate. This involves assessing the

		maximum (or where relevant, minimum) parameters for the elements where flexibility needs to be retained (emission performance, building dimensions or operations modes for example)". The 'Rochdale Envelope' approach was also taken in assessing the environmental effects of alternative design options and through design evolution (paragraph 6.7.4). The criteria for site selection are presented in paragraph 6.4.1, and included minimising environmental / social effects or risks (point 7), particularly by siting the gathering network high pressure compressors on a brownfield site away from residential receptors and as close to the coast as possible, as described in paragraph 6.4.5. In the context of alternative connection routeings and corridors, paragraph 6.6.3 identified that the alternatives proposed were evaluated in terms of their environmental effects, along with consideration of constructability and landowner aspects. Reuse of existing infrastructure has been prioritised where possible. It is clear that decisions made in relation to alternatives considered by the Applicants took into account effects on the environment with, for instance, selection of a brownfield site avoiding a variety of potential impacts on greenfield land, a main site next to the coast reducing or removing certain potential safety impacts, and the use of existing pipeline corridors and racking (where possible) avoiding additional land use change, sterilisation and a number of potential construction phase effects. These and other potential environmental factors informed and were a central part of the process of the Applicants' consideration of alternatives during the pre-application process. A comparison of the environmental effects of the alternatives proposed between the publication of the PEI Report and Application submission are presented in Table 6.1. This comparison has been further updated in Table 6-2 of the Environmental Statement – Addendum [AS-050]. HPQC set out that the requirement in the EIA Regulations is an example of where it is necessary to address alternatives as a matter of law (but only to the limited extent specified). Other examples include the requirement to consider alternatives in certain specific circumstances pursuant to the Conservation of Habitats and Species Regulations 2017. It was noted that there are also certain specific policy requirements to consider alternatives (e.g. flood risk and the sequential test), but beyond that the relevant National Policy Statements ("NPS") do not contain any general

		requirement to consider alternatives or to establish whether the proposed development represents the best option. Outside those specific circumstances, alternatives are only likely to be important and relevant considerations in exceptional circumstances. The guiding principles are helpfully summarised by Holgate J in R (Save Stonehenge World Heritage Site Ltd.) v. SST [2021] EWHC 2161, a copy of which is at **Appendix 8** to this summary. Reference was made in particular to the following points: Land may be developed in any way which is acceptable for planning purposes. The fact that other land exists on which the development proposed would be yet more acceptable for such purposes would not justify the refusal of planning permission for that proposal. In the absence of conflict with planning policy and/or other planning harm, the relative advantages of alternative uses of the application site or of the same use on alternative sites are normally irrelevant. In those exceptional circumstances where alternatives might be relevant, vague or inchoate schemes, or which have no real possibility of coming about, are either irrelevant, or where relevant, should be given little or no weight. That reflects the fact that save for any specific legal or policy obligation to consider alternatives, the question for any proposed development is whether it is acceptable on its own merits, applying relevant policy. If it is, the fact that it is possible to identify another form of development (or location for the same development) that would be even better does not provide a reason for refusal.

		HPQC urged particular caution in respect of the approach taken by the Secretary of State in the recent AQUIND decision, and submitted that it should not be regarded as setting a precedent for a different approach to the consideration of alternatives. The AQUIND decision is subject to legal challenge on the basis (amongst other things) that the approach taken to alternatives by the Secretary of State was unlawful. Whilst the decision itself remains valid unless and until quashed, it is nevertheless important for the ExA to be aware of the grounds on which the decision is argued to be unlawful because they relate to the approach to be taken. A copy of the Secretary of State's decision letter is at **Appendix 9**. It is understood that no decision had yet been made by the Court on whether permission should be granted to bring the judicial review claim, but the Applicants will update the ExA as and when that decision is known. AQUIND is in any event a decision in which the Secretary of State acknowledged in terms that "alternatives are material in exceptional circumstances only" (Decision Letter paragraph 4.20) and where the particular alternative was said "exceptionally" to be relevant "given the combination of adverse impacts" (paragraphs 3.6 and 4.20). In other words, the decision in that case is highly fact-specific and does not provide a precedent for a new and different approach to alternatives to be applied more generally. Where there is a specific legal obligation to consider alternatives, section 4.4 of NPS EN-1 contains a series of important principles to guide decision-making. These are intended to ensure a proportionate approach, and their overall effect is to make it less likely that urgently needed energy infrastructure will be blocked because of arguments about alternatives. Post-hearing note: the Applicants indicated at the hearing that it would seek to provide copies of the claimant's and defendant's pleadings in relation to the judicial review of the Secretary of State's refusal of development consent for the AQUIND project. The Applicants have requested these from AQUIND's solicitors and understand that it is not appropriate to disclose the pleadings. The

		Applicants will update the Examining Authority when judgment is given on the AQUIND judicial review.
7.	**Item 7** **The Extent of the CO_2 Gathering Network** • The Applicants will be asked to provide an overview about the reach of the CO_2 Gathering Network and its potential for expansion	The ExA ask a question regarding the Project initially transporting up to 4 million tonnes CO2 then accommodating future expansion. In response, AL confirms that there will be a staged approach to build up, and is subject to Government decision on selecting emitters. In terms of future expansion of the network, AL explains that the physical gathering network is an above ground pipeline from Billingham, through Seal Sands, crossing the River Tees with a pipeline along the Dabholm Gut, and then on to the PCC Site (where the Compressor Station is located). The gathering proposals made to BEIS was for the development of a backbone system, reaching the majority of emitters. The backbone network has been proposed since 2015 in combination with the Tees Valley Combined Authority. There is space in the pipeline to accommodate more emitters and it can be extended. Any anticipated extensions will be on a case by case basis, as and when emitters' proposals move forward (as part of BEIS' phase 2 emitter process or otherwise). Individual emitters submitted bids to BEIS in January 2022, totalling 25 projects for the East Coast Cluster, 14 of which are in the Teesside area. That shortlist is now being evaluated by HM Government. The Applicants agreed to provide a note covering the detail of this explanation in writing, to be submitted at Deadline 1 – provided above at Item 4. HPQC states in response to a question from the ExA that emitters would obtain permissions required, likely to be under the Town and Country Planning Act regime rather than the Nationally Significant Infrastructure Project regime (due to the nature of the projects and likely length of pipelines).

		In response to a question from the ExA, AL explains there are a range of reasons why an emitter may join into the Gathering Network, for instance, organisations may have corporate environmental targets, reducing carbon footprint, carbon price (a cost which may be avoided if the carbon dioxide is captured and stored), available governmental support for the energy transition, and the energy transition as an attractive business opportunity to produce low carbon products or alternatives that provide a strategic or commercial advantage.
8.	**Review of issues and actions arising**	The Applicant agreed to provide the requested documents at Deadline 1.
9.	**Any other business**	N/A
10.	**Closure of the Hearing**	N/A

APPENDIX 1: R (ON THE APPLICATION OF CLIENTEARTH) V SOS FOR BUSINESS ENERGY AND INDUSTRIAL STRATEGY [2020] EWHC 1303

The Queen on the application of ClientEarth v Secretary of State for Business, Energy and Industrial Strategy v Drax Power Ltd

Positive/Neutral Judicial Consideration

Court
Queen's Bench Division (Administrative Court)

Judgment Date
22 May 2020

Case No: CO/4498/2019

High Court of Justice Queen's Bench Division Planning Court

[2020] EWHC 1303 (Admin), 2020 WL 02630763

Before: The Hon. Mr Justice Holgate

Date: 22/05/2020

Hearing dates: 28th – 30th April 2020

Representation

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.

Approved Judgment

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 CO2 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 NOX 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 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:-

> "CO2 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 CO2 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 CO2 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 CO2 emissions or any Emissions Performance Standard that may apply to plant."

156. Paragraph 2.5.2 of EN-2 states:-

> "CO2 emissions are a significant adverse impact of fossil fuel generating stations. Although an ES on air emissions will include an assessment of CO2 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 CO2 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 CO2 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 CO2—
>
> (a) suitable storage sites are available;
>
> (b) it is technically and economically feasible to retrofit the plant with the equipment necessary to capture that CO2; and
>
> (c) it is technically and economically feasible to transport such captured CO2 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, CO2 transport and the storage of CO2. 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 CO2 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.

Footnotes

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.

APPENDIX 2: R (ON THE APPLICATION OF CLIENTEARTH) V SOS FOR BUSINESS ENERGY AND INDUSTRIAL STRATEGY [2021] EWCA CIV 43

R. (on the application of ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy, Drax Power Limited


No Substantial Judicial Treatment

Court
Court of Appeal (Civil Division)

Judgment Date
21 January 2021

Case No: C1/2020/0998/QBACF

Court of Appeal (Civil Division)

[2021] EWCA Civ 43, 2021 WL 00202679

Before: Lord Justice Lewison Sir Keith Lindblom , Senior President of Tribunals and Lord Justice Lewis

Date: 21/01/2021

On Appeal from the High Court of Justice (Planning Court)

The Honourable Mr Justice Holgate

[2020] EWHC 1303 (Admin)

Hearing dates: 17 and 18 November 2020

Representation

Gregory Jones Q.C. and Merrow Golden (instructed by ClientEarth) for the Appellant.
Andrew Tait Q.C. and Ned Westaway (instructed by the Government Legal Department) for the First Respondent.
James Strachan Q.C. and Mark Westmoreland Smith (instructed by Pinsent Masons LLP) for the Second Respondent.

Approved Judgment

The Senior President of Tribunals:

Introduction

1. This appeal raises questions on 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 designated in July 2011, and their legal effect in the determination of an application for a development consent order to approve a nationally significant infrastructure project ("NSIP"). The NSIP in question is the proposal to construct and operate two gas-fired generating units at the Drax Power Station, near Selby in North Yorkshire.

2. With permission granted by Lewison L.J., the appellant, ClientEarth, appeals against the order of Holgate J., dated 22 May 2020, dismissing its claim for judicial review of the decision of the first respondent, the Secretary of State for Business, Energy and Industrial Strategy, on 4 October 2019, to make the Drax Power (Generating Stations) Order 2019 (S.I. 2019

No.1315) ("the DCO"), approving an application made by the second respondent, Drax Power Ltd. The claim was brought by ClientEarth under section 118 of the Planning Act 2008 ("the Planning Act").

3. The proposed generating units, known as "Unit X" and "Unit Y", would incorporate parts of two coal-fired units currently in operation at the site, which are due to be decommissioned in 2022. They would be fuelled by natural gas. Each would have a capacity of up to 1,800 megawatts, battery storage of up to 100 megawatts and carbon capture and storage reserve space, giving a total capacity of up to 3,800 megawatts, with a designed operational life of up to 25 years. That development is an NSIP.

4. Drax Power made its application for a development consent order under section 37 of the Planning Act , in May 2018. In July 2018 the Secretary of State appointed an examining authority to conduct an examination of the application and report to him with conclusions and a recommendation. The examination began in October 2018 and ended in April 2019. ClientEarth objected to the development, and took part in the examination, submitting written representations. The examining authority's report was produced in July 2019. It recommended that consent be withheld. In her decision letter of 4 October 2019 the Secretary of State disagreed with that recommendation.

The issues in the appeal

5. Lewison L.J. granted permission to appeal on three grounds, which raise these issues: first, whether the Secretary of State misinterpreted EN-1 on the approach to assessing an energy NSIP's contribution to satisfying the need for the type of infrastructure proposed; second, whether the Secretary of State misinterpreted EN-1 on the approach to greenhouse gas emissions; and third, whether the Secretary of State misapplied section 104(7) of the Planning Act .

The Planning Act

6. Section 5 of the Planning Act provides for the designation by the Secretary of State of a national policy statement, which "sets out national policy in relation to one or more specified descriptions of development" (subsection (1)(b)). The policy in a national policy statement "may in particular", among other things, "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" (subsection (5)(a)), "set out the relative weight to be given to specified criteria" (subsection (5)(c)), and "set out circumstances in which it is appropriate for a specified type of action to be taken to mitigate the impact of a specified description of development" (subsection (5)(f)). Section 6(1) requires the Secretary of State to "review each national policy statement whenever [he] thinks it appropriate to do so".

7. Section 104 governs the determination of an application for a development consent order where a relevant national policy statement has effect. In deciding the application, the Secretary of State is required to "have regard" to any "relevant national policy statement" (subsection (2)(a)), and "any other matters which [he] thinks are both important and relevant to [his] decision" (subsection (2)(d)). Section 104(3) states:

> "(3) 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."

Section 104(7) states:

> "(7) This subsection applies if the Secretary of State is satisfied that the adverse impact of the proposed development would outweigh its benefits."

8. Section 106 provides that in deciding an application, the Secretary of State "may disregard representations" if he considers that they "relate to the merits of policy set out in a national policy statement" (subsection (1)(b)).

En-1

9. EN-1 sets out the Government's policy for the delivery of major energy infrastructure. It is to be read together with five technology-specific national policy statements for the energy sector (paragraph 1.4.1). The relevant technology-specific national policy statement is EN-2. Paragraph 1.7.2 says that the energy national policy statements "should speed up the transition to a low carbon economy and thus help to realise UK climate change commitments sooner than continuation under the current planning system", but recognises the difficulty in predicting "the mix of technology that will be delivered by the market against the framework set by the Government".

10. Part 2 contains the Government's policy on energy infrastructure development. Paragraph 2.1.1 refers to three goals – reducing carbon emissions, energy security and affordability.

11. The text in section 2.2, "The road to 2050", assumed the target then in place under the Climate Change Act 2008 ("the Climate Change Act") of reducing greenhouse gas emissions in 2050 by at least 80% compared to 1990 levels. This would require the "electrification" of much of the United Kingdom's heating, industry and transport (paragraph 2.2.1). Delivery of this change would be "a major challenge not least for energy providers …" (paragraph 2.2.2).

12. Paragraph 2.2.4 states:

> "2.2.4 Not all aspects of Government energy and climate change policy will be relevant to [Infrastructure Planning Commission ("IPC")] decisions or planning decisions by local authorities, and 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. … ."

13. The proposed transition to a low carbon economy is described, and the role of the Climate Change Act in driving that transition by delivering reductions in emissions through a series of five-year carbon budgets setting a trajectory to 2050 is

explained (paragraphs 2.2.5 to 2.2.11). It is stated that "[the] EU Emissions Trading System … forms the cornerstone of UK action to reduce greenhouse gas emissions from the power sector" (paragraph 2.2.12). Paragraph 2.2.19 states:

> "2.2.19 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."

14. In the following paragraphs emphasis is placed on the security of energy supplies. That the United Kingdom should continue to have "secure and reliable supplies of electricity" as the transition is made to a low carbon economy is said to be "critical". The need for "diversity" in technologies and fuels is stressed (paragraph 2.2.20). Paragraph 2.2.23 says that the United Kingdom "must … reduce over time its dependence on fossil fuels, particularly unabated combustion", but acknowledges that "some fossil fuels will still be needed during the transition to a low carbon economy".

15. Policy for decision-making is set out in Part 3, "The need for new nationally significant energy infrastructure projects". Paragraphs 3.1.1 to 3.1.4 state:

> "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 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 16."

A footnote to paragraph 3.1.4 – footnote 16 – states:

> "16 In determining the planning policy set out in Section 3.1, the Government has considered a range of projections and models that attempt to assess what the UK's future energy needs may be. Figures referenced relate to different timescales and therefore cannot be directly compared. Models are regularly updated and the outputs will inevitably fluctuate as new information becomes available."

16. Paragraph 3.2.3 states:

> "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, … 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."

17. The means of addressing the objectives of achieving energy security and reducing greenhouse gas emissions are explained. In a passage headed "Meeting energy security and carbon reduction objectives", it is stated that 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" (paragraph 3.3.2). Paragraph 3.3.4 states:

> "3.3.4 There are benefits of having a diverse mix of all types of power generation. It means we are not dependent on any one type of generation or one source of fuel or power and so helps to ensure security of supply. … [The] different types of electricity generation have different characteristics which can complement each other …".

Three types of electricity generation are then mentioned: fossil fuel generation, renewables and nuclear power.

18. Therefore, to meet the 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 [Carbon Capture and Storage ("CCS")])" within the period up to 2025 (paragraph 3.3.5). The conclusion, in paragraph 3.3.6, again recalls the earlier text in paragraph 3.1.2:

> "3.3.6 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 in Section 3.1 when assessing proposals for new energy NSIPs."

19. The need for additional electricity capacity to support the required increase in supply from renewables is recognised. Paragraph 3.3.11 states:

> "3.3.11 An increase in renewable electricity is essential to enable the UK to meet its commitments under the EU Renewable Energy Directive. … 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."

Paragraph 3.3.12 says 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."

20. Under the heading "Future increases in electricity demand", paragraph 3.3.14 states:

> "3.3.14 … As a result of this electrification of demand, total electricity consumption … could double by 2050. … In some outer most circumstances, for example if there was very strong electrification of energy demand and a high level of dependence on intermittent electricity generation, then the capacity of electricity generation could need to triple. The Government therefore anticipates a substantial amount of new generation will be needed."

21. In text headed "The urgency of the need for new electricity capacity", paragraph 3.3.18 states:

> "3.3.18 It is not possible to make an accurate prediction of the size and shape of demand for electricity in 2025, but in order to get a sense of the possible scale of future demand to 2025, one possible starting point is provided by the most recent Updated Energy and Emissions Projections (UEP) which DECC published in June 2010. It is worth noting that models are regularly updated and the outputs will inevitably fluctuate as new information becomes available. … 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."

22. Paragraph 3.3.21 adds that "[whilst] no such projections of the UK's future energy mix can be definitive, they illustrate the scale of the challenge the UK is facing and help the Government to understand how the market may respond". And paragraph 3.3.23 says 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 capacity by 2025".

23. Returning to the theme of the earlier text in paragraph 3.1.2, paragraph 3.3.24 continues:

> "3.3.24 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 … is to review the role of the variety of Government interventions within the electricity market."

24. The important role of renewable electricity generation is described in section 3.4. The United Kingdom's commitment to producing 15% of its total energy from renewable sources by 2020 is confirmed (in paragraph 3.4.1). The role of nuclear power is dealt with in section 3.5. Nuclear power is expected to play an increasingly important role in the move to diversifying and decarbonising sources of electricity (paragraph 3.5.1). It is said to be "Government policy that new nuclear power should be able to contribute as much as possible to the UK's need for new capacity" (paragraph 3.5.2).

25. The role of fossil fuel electricity generation is addressed in section 3.6. Paragraph 3.6.1 says that "[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 … 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". And paragraph 3.6.2 adds this:

> "3.6.2 … 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."

26. Paragraph 3.6.3 says that "[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". It is also noted that "new technology offers the prospect of reducing the carbon dioxide emissions of both fuels [i.e. coal and gas] to a level where, whilst retaining many of their existing advantages, they can also be regarded as low carbon energy sources". Paragraph 3.6.4 emphasises the importance of CCS, which is said to have the potential to reduce carbon emissions from fossil fuel generation by up to 90%.

27. Under the heading "The need for fossil fuel generation", paragraph 3.6.8 states:

> "3.6.8 …. [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 [Carbon Capture Ready ("CCR")] fossil fuel generating stations and the need for the CCS demonstration projects is urgent."

28. In Part 4 of EN-1, "Assessment Principles", paragraph 4.1.2 states a presumption in favour of granting consent to applications for "energy NSIPs":

> "4.1.2 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 …".

29. Paragraph 4.1.3 says that "[in] considering any proposed development, and in particular when weighing its adverse impacts against its benefits, the IPC should take into account" both "its potential benefits including its contribution to meeting the need for energy infrastructure, job creation and any long-term or wider benefits" and "its potential adverse impacts, including any long-term and cumulative adverse impacts, as well as any measures to avoid, reduce or compensate for any adverse impacts".

30. In Part 5, "Generic Impacts", paragraph 5.2.2 states:

> "5.2.2 CO2 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 … and the range of non-planning policies aimed at decarbonising electricity generation such as EU ETS …, Government has determined that CO2 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 CO2 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 CO2 emissions or any Emissions Performance Standard that may apply to plant."

En-2

31. EN-2 stresses 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" (paragraph 1.1.1). It confirms that the Government's policy is to require a substantial proportion of the capacity of all new coal-fired stations to be subject to CCS, that new stations of that kind will be expected to retrofit CCS to their "full capacity", that other fossil fuel generating stations are expected to be "carbon capture ready, and that all such stations will be required to comply with Emissions Performance Standards (paragraph 1.1.2).

32. Paragraph 2.5.2 of EN-2 states:

> "2.5.2 CO2 emissions are a significant adverse impact of fossil fuel generating stations. Although an ES on air emissions will include an assessment of CO2 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 CO2 emissions or any Emissions Performance Standard that may apply to plant."

The examining authority's report

33. On the question of need, the examining authority accepted ClientEarth's contention that, under EN-1, no weight should be given to the need for the proposed development, because, when current projections and other relevant factors were considered, there was no need for it. It concluded that an assessment of need is required for every energy NSIP and although the national policy statements supported a need for additional energy infrastructure in general, Drax Power had not demonstrated that this development would itself meet an identified need for gas generation capacity when assessed against EN-1's "overarching policy objectives of security of supply, affordability and decarbonisation" (paragraphs 5.2.4, 5.2.24, 5.2.26, 5.2.27 to 5.2.74, 5.3.27, 7.2.7 and 11.1.1 of the examining authority's report).

34. On the likely increase in greenhouse gas emissions, the examining authority concluded that "a reasonable baseline" was likely to be somewhere between the figures assessed by Drax Power and by ClientEarth, and therefore that the increase in greenhouse gas emissions was likely to be higher than had been estimated by Drax Power (paragraph 5.3.22).

35. In the examining authority's view, the proposed development would not accord with the energy national policy statements, and that it would undermine the Government's commitment to cut greenhouse gas emissions, made explicit in the Climate Change Act (paragraphs 5.2.4, 5.3.27, 7.2.7, 7.2.10 and 11.1.2). Striking the balance under section 104(7) of the Planning Act , it concluded that the case for development consent had not been made out, and that development consent should therefore be withheld (section 7.3).

The Secretary of State's decision letter

36. In a section of her decision letter headed "The Principle of the Proposed Development and Conformity with National Policy Statements", the Secretary of State referred to the examining authority's conclusions on "need", in particular its conclusion "that the Development would not be in accordance with the relevant National Policy Statements for the purposes of section 104(3) of [the Planning Act] ". She noted that "when considering the planning balance for the purposes of section 104(7) …, the ExA gave no positive weight to the contribution of the Development towards meeting identified need and gave

considerable negative weight in the planning balance to both the adverse effects of the Development's GHG emissions on climate change … and the perceived conflict with the NPSs' overarching decarbonisation objective" (paragraph 4.7). Having referred to paragraphs 3.1.1 and 3.1.3 of EN-1, she quoted the statement in paragraph 3.6.1 that fossil-fuel power stations play a "vital role in providing reliable electricity supplies", and the statement in paragraph 3.6.8 that "there is a need for [carbon capture ready] fossil fuel generating stations" (paragraph 4.10). And she acknowledged that the proposed development – "a gas-fired generating station which would be carbon capture ready (with directly linked battery storage)" – is "a type of infrastructure … covered by EN-1 and [EN-2] and as such the presumption in favour of granting consent … in paragraph 4.1.2 of EN-1 should apply" (paragraph 4.12).

37. She then said (in paragraph 4.13):

> "4.13 The Secretary of State has considered the assessment that [the examining authority] has undertaken to determine whether the Development would meet an identified need for gas generation capacity by reference to the high-level objectives of security of supply, affordability and decarbonisation. However, the Secretary of State is of the view that the NPSs clearly set out the specific planning policies which the Government believes 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. The Secretary of State's view is that these policies, including the presumption in favour of granting consent for energy NSIPs in EN-1 have already taken account of the need to achieve security of supply, affordability and decarbonisation at a strategic level. The NPSs do not, therefore, require decision makers to go beyond the specific and relevant policies they contain to assess individual applications against those high level objectives and there was no need, therefore, for the ExA to make a judgement on those issues when assessing whether this specific application was in accordance with the NPS. The ExA's views on these matters do not, therefore, remove the need to apply the general presumption in favour of Carbon Capture Ready ("CCR") fossil fuel generation which already assumes a positive contribution from such infrastructure."

38. Despite having concluded that "the presumption in favour of fossil fuel generation" applied, she accepted that she "must still consider whether any more specific and relevant policies set out in the relevant [national policy statements] clearly indicate that consent should be refused". The examining authority had "identified that there would be significant adverse effects from the Development in respect of GHG emissions which gave rise to a perceived conflict with the decarbonisation objective of EN-1". She said she had "considered the [examining authority's] arguments on greenhouse gas emissions" (paragraph 4.14).

39. She went on to say (in paragraphs 4.15 to 4.17):

> "4.15 However, in line with paragraph 4.13 above, the Development's impacts on decarbonisation must, in the first instance, be assessed by reference to the specific policies on carbon emissions from energy NSIPs which are contained in the relevant [national policy statements] and which reflect the appropriate role of the planning system in delivering wider climate change objectives and meeting the emissions reduction targets contained in the [Climate Change Act ("CCA")]. In this regard, the Secretary of State has noted that section 2.2 of EN-1 explains how climate change and the UK's GHG emissions reduction targets contained in the CCA have been taken into account in preparing

the suite of Energy [national policy statements]. She has also noted the policy contained in paragraph 5.2.2 of EN-1[, which she then quoted in full].

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 … 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."

40. The Secretary of State's conclusions on need were these (in paragraphs 4.18 to 4.20):

"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, paragraph 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 the 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 … 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 targets 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."

41. Under the heading "The Climate Change Act 2008 (2050 Target Amendment) Order 2019 : "Net Zero"", the Secretary of State concluded that the amendment to the Climate Change Act , which set a new legally binding target of at least a 100% reduction in greenhouse gas emissions against the 1990 benchmark ("Net Zero"), was "a matter which is both important and relevant to the decision on whether to grant consent for the Development and that regard should be had to it when determining the Application" (paragraph 5.7). She noted that the amendment "does not alter the policy set out in the National Policy Statements which still form the basis for decision making under the Act" (paragraph 5.8). And she did "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" (paragraph 5.9).

42. In section 6 of the decision letter, "Conclusions on the Case for Development Consent", the Secretary of State set out the provisions of section 104(3) and (7) , and said that she "therefore … needs to consider the impacts of any proposed development and weigh these against the benefits of any scheme" (paragraph 6.1). On the question of whether the proposed development was in accordance with EN-1 for the purposes of section 104(3) , she referred again – as she had in paragraph 4.4 – to the fact that the examining authority had not applied "the policy presumption in favour of granting consent for energy NSIPs set out in EN-1 when determining whether the Development was in accordance with the relevant NPSs". She considered that "the Development should benefit from the presumption because there are no more specific and more relevant NPS policies which clearly indicate that consent should be refused and therefore the Development accords with the relevant NPSs" (paragraph 6.2).

43. Turning to the question of whether the adverse impacts of the development would outweigh its benefits under section 104(7) , she summarised the relevant conclusions of the examining authority on matters they had given a "neutral weighting" (paragraph 6.3); on those they had given "positive weight" – namely "biodiversity outcomes, socio-economics and the proposed re-use of existing infrastructure at the Drax Power Station" (paragraph 6.4); on those they had given "considerable negative weight", namely "impacts on decarbonisation and climate change"; and on "landscape and visual impacts", which were "negative" but did "not weigh heavily in the overall consideration of planning balance for the Development" (paragraph 6.5).

44. She then returned to the issue of need (in paragraph 6.6):

> "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."

45. On greenhouse gas emissions and the overall balance she said (in paragraph 6.7):

> "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."

46. She accepted the examining authority's "overall weighting" of the visual and landscape impacts. And she found there were "no other negative issues that weigh against the Development" (paragraph 6.8). Her conclusion on section 104(7) was this (in paragraph 6.9):

> "6.9 … [The] ExA identifies positive effects from the Development in respect of biodiversity outcomes, socio-economics and the proposed re-use of existing infrastructure at the Drax Power Station. The Secretary of State's overall conclusion on the planning balance is that there are strong arguments in favour of granting consent for the full, two gas units and two battery storage units, 3.8GW project because of its contribution to meeting the need case set out in the NPSs. On balance therefore [the] Secretary of State considers that the benefits of the Development outweigh its adverse effects."

47. Her overall conclusion was that there was a "compelling case for granting consent for the development". She considered "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, [she did] not believe that its benefits are outweighed by [its] potential adverse impacts, as mitigated by the terms of the Order". She therefore "decided to make the Order granting development consent" (paragraph 7.1).

Did the Secretary of State misinterpret En-1 on the approach to the assessment of need?

48. The essential argument put forward here – as in the court below – is that the policy on need in EN-1 requires an assessment of the particular contribution a project will make to meeting the need for the relevant type of infrastructure. The Secretary of State erred in simply assuming that, because the proposal fell within one of the types of infrastructure for which a need was said to exist, it would necessarily contribute to that need and thus comply with policy in EN-1. She misinterpreted paragraph 3.2.3 of EN-1, asking herself whether there was any reason for not giving substantial weight to the need for the proposed development under the policy in paragraph 3.1.4. A "quantitative" assessment of need was required. None was provided.

49. In Holgate J.'s view, the fact that EN-1 does not seek to define need in "quantitative" terms, except in some limited respects, 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 … 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" (paragraph 73 of the judgment). In paragraphs 3.1.2 and 3.3.15 to 3.3.24 of EN-1 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". This "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" (paragraph 80). Instead, EN-1 "focuses on qualitative need such as functional requirements". Paragraph 3.1.1 states that the United Kingdom needs all types of energy infrastructure covered by EN-1 "in order to achieve energy security while at the same time dramatically reducing GHG", and paragraphs 3.3.2 to 3.3.6 "explain how those twin objectives should be addressed" (paragraph 81).

50. The judge said that, reading EN-1 as a whole, rather than selectively, "[it] is plain that the NPS … does not require need to be assessed in quantitative terms for any individual application" (paragraph 129), that "[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 ([e.g.] consents in the pipeline or projections of capacity) could be related" (paragraph 130); and that "[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" (paragraph 131).

51. After those observations, the judge went on to say that the Secretary of State had "assessed the contribution which the proposed development would make to need in terms of both function and scale" (paragraph 133). The effect of the interpretation of EN-1 advanced by ClientEarth, and accepted by the examining authority, was that "any applicant for a DCO for gas-fuelled power generation would need to demonstrate a quantitative need for the development proposed". This, said the judge, "would run counter to the thinking which lay behind the introduction of [the Planning Act] and the energy NPSs" (paragraph 135). He saw the policy on need in EN-1 as "analogous" to that considered in *R. (on the application of Scarisbrick) v Secretary of State for Communities and Local Government [2017] EWCA Civ 787* , where the Court of Appeal had "rejected the argument … that the NPS [for hazardous waste] required the Secretary of State to assess project-specific need when determining an application for a DCO" (paragraph 138). EN-1 expressly provides, in paragraph 3.1.4 that "substantial weight" is to be given to the contribution a project makes to the identified need (paragraph 139). Paragraph 3.2.3 of EN-1 is "entirely consistent with paragraphs 3.1.3 and 3.1.4". It "does not require an assessment of quantitative need for gas-fired generation" (paragraph 141). So the interpretation of EN-1 contended for by ClientEarth had to be rejected (paragraph 142).

52. Mr Gregory Jones Q.C., for ClientEarth submitted to us that the Secretary of State misinterpreted the policy on need in EN-1. She ought to have understood that EN-1 establishes only a need for particular "types" of energy infrastructure, and not that any particular project will necessarily contribute towards meeting that need, or that the level of need for each type is the same (paragraphs 2.1.1 and 3.1.1 of EN-1). It does not support a "flat-rule" approach to the need for different types of infrastructure (paragraph 3.1.3). It differentiates the "scale and urgency" of the need for each type (paragraphs 3.4.5, 3.5.9 and 3.6.8). The need for fossil-fuel infrastructure is limited (paragraphs 2.2.19, 2.2.23, 3.4.2, 3.4.5, 3.5.2 and 3.6.3). Holgate J. was right to say (in paragraphs 73, 80, 129 and 130 of his judgment) that EN-1 does not set any "quantitative" limits or targets on the need for particular types of energy infrastructure, and (in paragraph 81) that EN-1 concentrates on "qualitative need". But he did not recognise that EN-1 does distinguish between the "scale and urgency" of the need for different types of infrastructure.

53. Mr Jones maintained that EN-1 requires the decision-maker to consider, case by case, the "anticipated … actual contribution" of the individual project to satisfying the need for a "particular type" of infrastructure (paragraphs 3.1.3, 3.1.4, 3.2.3 and 4.1.3). He relied in particular on the statement in the last sentence of paragraph 3.2.3 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". As the examining authority concluded (in paragraphs 5.2.21 and 5.2.23 of its report), paragraph 3.2.3 of EN-1 distinguishes between the need for energy NSIPs and the need for the proposed development. EN-1 is not to be read as simply telling the decision-maker to give "substantial weight" to a need for certain types of energy infrastructure established in the policy (paragraph 3.1.1). That would be to adopt an approach of the kind rejected in *Scarisbrick* (at paragraph 31) – "the bigger the project, the greater is the need for it".

54. Although the "scale and urgency" of the need for particular types of infrastructure may be described as "qualitative" factors, this does not mean – Mr Jones submitted – that the decision-maker's approach to giving "proportionate" weight to considerations of need must be confined to a "qualitative" analysis. "Quantitative" considerations are inherent in the project-specific assessment required under paragraph 3.2.3. The national policy statement considered in *Scarisbrick* was different. It did not refer to the different "scale and urgency" of need for different types of infrastructure, nor did it require a consideration of "proportionate weight".

55. I cannot accept that argument. I agree with the submission made to us by Mr Andrew Tait Q.C. for the Secretary of State, adopted by Mr James Strachan Q.C. for Drax Power, that the Secretary of State did not misinterpret, or fail lawfully to apply, relevant policy in EN-1. On its true interpretation, EN-1 does not compel the approach contended for by Mr Jones.

56. As always, it is necessary to undertake the exercise of policy interpretation by construing the language of the relevant policy objectively, in its context, and having regard to its evident purpose (see the judgment of Lord Reed in *Tesco Stores Ltd. v Dundee City Council [2012] UKSC 13* , at paragraphs 17 to 19, the judgment of Lord Carnwath in *Suffolk Coastal District Council v Hopkins Homes Ltd. [2017] UKSC 37* , at paragraphs 22 to 26). These general principles apply equally to the interpretation of national policy statements as they do to the interpretation of other planning policies (see my judgment in *Scarisbrick* , at paragraph 19).

57. Starting with the most salient passages on need in EN-1, in Part 3, one can see seven things. First, there is a recognised need for "all the types of energy infrastructure" within its scope. Secondly, this is compatible, in principle, not only with the aim to "achieve energy security" but also with that of "dramatically reducing greenhouse gas emissions" (paragraph 3.1.1). Thirdly, in the Government's view it would be inappropriate "to set targets for or limits on" different technologies (paragraph 3.1.2). Fourthly, "all applications" for development consent should be assessed "on the basis that the Government has demonstrated that there is a need for those types of infrastructure" and "the scale and urgency of that need is as described in [Part 3]" (paragraph 3.1.3). Fifthly, when development consent is sought, "substantial weight" should be given to "the contribution which projects would make towards satisfying this need" (paragraph 3.1.4). Sixthly, because "without significant

amounts of new large-scale energy infrastructure, the objectives of [the Government's] energy and climate change policy cannot be fulfilled", it is right that "substantial weight" should be given to "considerations of need" (paragraph 3.2.3). And seventhly, "[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" (paragraph 3.2.3).

58. Those seven points are expanded elsewhere in EN-1. In Part 2 there is a clear emphasis on the "market-based system" (paragraph 2.2.2); on the proposition that "the planning system is only one of a number of vehicles that helps to deliver Government energy and climate change policy" (paragraph 2.2.4); on the place of the EU Emissions Trading Systems as "the cornerstone of UK action to reduce greenhouse gas emissions from the power sector" (paragraph 2.2.12); on the changes being promoted under the Electricity Market Reform project (paragraph 2.2.15); and on the complementary relationship between the Planning Act and the Electricity Market Reform project, which is "consistent with the Government's established view that the development of new energy infrastructure is market-based", it being "a matter for the market to decide where and how to build, as market mechanisms will deliver the required infrastructure most efficiently" (paragraph 2.2.19).

59. Both in Part 2 and in Part 3 the absence of any quantitative definition of relevant need is striking. No attempt is made to describe in quantitative terms either the general need for the types of generating capacity within the scope of EN-1 or a specific need for any particular type. No targets or limits are set. This is deliberate and explicit. It is stressed that the Government has "other mechanisms", including the Electricity Market Reform project, to influence delivery (paragraph 3.3.24).

60. That is the background to the first basic concept in paragraph 3.1.3: that proposals are to be assessed on the basis that need has been demonstrated for the types of infrastructure covered by the energy national policy statements. The second basic concept in paragraph 3.1.3 – that proposals are to be assessed on the basis that the "scale and urgency" of the demonstrated need is "as described in this part" – is also enlarged in the subsequent text. It extends to the fundamental policy in paragraph 3.1.4 that, in decision-making, "substantial weight" is to be given to the contribution that projects make to the satisfaction of need. It embraces the reference in footnote 16 to the "projections and models" considered by the Government when it prepared the policy in section 3.1 being "regularly updated" with "outputs" that "inevitably fluctuate as new information becomes available". It includes the recognition in paragraph 3.3.18 that "it is not possible to make an accurate prediction of the size and shape of demand for electricity in 2025", and that the projections published in June 2010 "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", and in paragraph 3.3.21 that "no such projections … can be definitive". And it carries the caution in paragraph 3.3.24 that the figures mentioned in the preceding paragraphs are not intended by the Government to set "targets or limits on any new generating infrastructure …", that decision-making is not expected to "deliver specific amounts of generating capacity for each technology type", and that there are "other mechanisms to influence the current delivery of a secure, low carbon, affordable electricity mix".

61. These are all general statements of policy. They apply to fossil fuel generating capacity as well as other types of infrastructure. But the "vital role" of fossil fuel power stations in providing "reliable electricity supplies" is recognised throughout Part 3: their "important role" in the "energy mix" as the transition is made to a low carbon economy (paragraph 3.6.1); the requirement for "some fossil fuel generating capacity to provide back-up" for intermittent renewable generating capacity (explained in paragraphs 3.3.11 and 3.3.12), and "to help with the transition to low carbon electricity generation", the importance of such fossil fuel generating capacity becoming "low carbon, through development of CCS", and thus "a need for CCR fossil fuel generating stations …" (paragraph 3.6.8).

62. The principles guiding the consideration of applications, in Part 4, flow from the text on decision-making in paragraphs 3.1.1 to 3.1.4. They provide a "presumption in favour of granting consent to applications for energy NSIPs" (paragraph 4.1.2).

They also include as a potential benefit, in the balancing of "adverse impacts" against "benefits", a proposed development's "contribution to meeting the need for energy infrastructure" (paragraph 4.1.3).

63. None of the passages to which I have referred stipulates that a "quantitative" assessment of need must always be carried out in a development consent order process. Nor is that done anywhere else in EN-1. The same may also be said of EN-2.

64. It is necessary to come back now to paragraph 3.2.3, which became a focus of the argument we heard on this issue. That paragraph must be read in the context set by the other relevant passages of EN-1. It confirms that "without significant amounts of new large-scale energy infrastructure" it will be impossible to fulfil the objectives of [the Government's] energy and climate change policy. And it refers to the explanation, in Part 3, of the Government's view that "the need for such infrastructure will often be urgent". No reference is made to the scale or limits of that need, either in general terms or specifically for any particular type of infrastructure.

65. The meaning of the final two sentences of paragraph 3.2.3 was controversial between the parties. But when those two sentences are read as continuing the thrust of the previous three, and in the wider context of the policies on need taken together, their sense is clear. The penultimate sentence looks back to what has just been said, with the connecting word "therefore". It makes plain that the matters referred to in the first three sentences are the reasons why, in decision-making, "substantial weight" should be given to "considerations of need". And this is wholly consistent with what has already been said in paragraphs 3.1.1 to 3.1.4 – in particular, paragraph 3.1.4.

66. It is with this point firmly established – "substantial weight" should be given to "considerations of need" – that one comes to the final sentence of the paragraph, which concerns decision-making "in any given case". From the sentence itself three things are clear. First, while the starting point is that "substantial weight" is to be given to "considerations of need", the weight due to those considerations in a particular case is not immutably fixed. It should be "proportionate to the anticipated extent of [the] project's actual contribution to satisfying the need" for the relevant "type of infrastructure". To this extent, the decision-maker – formerly the IPC and now the Secretary of State – may determine whether there are reasons in the particular case for departing from the fundamental policy that "substantial weight" is accorded to "considerations of need". Secondly, the decision-maker must consider this question by judging what weight would be "proportionate" to the "anticipated extent" of the development's "actual contribution" to satisfying the need for infrastructure of that type. These are matters of planning judgment, which involve looking into the future. Thirdly, beyond the description of the decision-maker's task in those terms, there is no single, prescribed way of performing that task, and there are no specified considerations to be taken into account, or excluded. It is not stated that the issue of what is "proportionate" to the proposal's "actual contribution" must, or should normally, be approached on a "quantitative" rather than a "qualitative" basis.

67. There is, in my view, no justification for reading such a requirement into the policy. The way in which a decision-maker's task is to be carried out in a particular case is for him to resolve. The policy leaves him with an ample discretion to decide how best to go about making the evaluative judgment required. As its language makes clear, the assessment of weight must be grounded in reality. But it demands a predictive assessment: hence the reference to the "anticipated extent" of the development's "actual contribution" to satisfying the relevant need. It should be remembered that paragraph 3.2.3 applies not merely to fossil fuel generating capacity, but to every kind of energy infrastructure to which EN-1 relates, including renewable energy projects. Even without there being in the relevant national policy statements a specific target or limit for a particular type of infrastructure, or a range of the likely requirement for such capacity within a given timescale, it might still be possible to carry out a "quantitative" assessment of need. And there may be circumstances in which, for a particular type of infrastructure, or a particular proposal, it is appropriate to undertake a "quantitative assessment". The important point here, however, is that paragraph 3.2.3 does not compel the decision-maker to do it.

68. Properly understood, paragraph 3.2.3 is not in tension with the other policies. It supports them. Based, as it is, on the fundamental policy that "substantial weight" is to be given to the contribution made by projects towards satisfying the established need for energy infrastructure development of the types covered by EN-1, including CCR fossil fuel generation infrastructure, it ensures that the decision-maker takes a realistic, and not an exaggerated, view of the weight to be given to "considerations of need" in the particular case before him, which should be "proportionate to" the "actual contribution" the project is likely to make to "satisfying the need" for infrastructure of that type. That is its function.

69. One must be careful not to read across unjustifiably from the court's interpretation of a different policy in another national policy statement. But there is, in my view, a parallel between the policies we are considering here and those considered by this court in *Scarisbrick* . Among the policies considered in that case was one indicating that a need for the relevant infrastructure should be taken as demonstrated, and a presumption in favour of consent being granted. From these policies there arose, in this court's view, "a general assumption of need for such facilities", which "applies to every relevant project capable of meeting the identified need, regardless of the scale, capacity and location of the development proposed" (paragraph 24). A difference between that case and this is that the policies there did not indicate the level of weight to be given to need in decision-making. Here they do.

70. Did the Secretary of State proceed on the correct interpretation of the relevant policies on need? In my view she did. She concluded, as she was entitled to do, that the presumption in favour of granting consent, in paragraph 4.1.2 of EN-1, should apply (paragraph 4.12 of the decision letter). She reminded herself that although the "presumption in favour of fossil fuel generation" applied, she "must still consider whether any more specific and relevant policies … in the relevant NPSs clearly indicate that consent should be refused" (paragraph 4.14). She went on to do that, in the light of the examining authority's conclusions. It is not suggested that in doing so she ignored or misunderstood any relevant conclusion of the examining authority, or that her reasons for differing from the examining authority are inadequate or unclear.

71. She considered the issue of need in paragraphs 4.18 to 4.20 of her decision letter. In my view she did so impeccably. She acknowledged "the presumption in favour of the [proposed development]", the assumption of "a general need for CCR fossil fuel generation", and the requirement that the decision-maker "should give substantial weight to the contribution which projects would make towards satisfying this need …". She noted that the examining authority had recommended that no weight be given to the development's contribution to meeting this need. She made it clear that she disagreed with the examining authority's approach. In her view applications for consent for energy NSIPs for which a need had been identified by the national policy statements "should be assessed on the basis that they will contribute towards meeting that need and that this should be given significant weight" (paragraph 4.18). This seems an accurate understanding of what EN-1 says.

72. The issue was not left there. The Secretary of State applied the principle in the final sentence of paragraph 3.2.3 of EN-1. Again, in my view, she did so impeccably. First, she quoted the relevant words. Secondly, she made it clear that her mind was open to the possibility of reducing the weight given to the development's contribution to satisfying the relevant need. She said she had considered whether, in light of the examining authority'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". Thirdly, she pointed to the three considerations relevant to this question: the examining authority's "views on the changes in energy generation since … EN-1 was published in 2011", 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" (paragraph 4.19). It is not suggested that this was an incomplete description of the three main points in the examining authority's assessment.

73. The Secretary of State explained why she was not persuaded by the examining authority's assessment to conclude that less than "substantial weight" should be given to the identified need. There were three points: first, the lack of any "guarantee" that other schemes with consent would "reach completion"; second, as paragraph 3.3.18 of EN-1 says, the updated projections

on which the examining authority had relied did not reflect "a desired or preferred outcome … in relation to … need …"; and third, the principle, in paragraph 3.1.2, that it is the responsibility of "industry" to propose new infrastructure "within the strategic framework set by Government", and "the Government does not consider it appropriate for planning policy to set targets for or limits on different technologies". All three of these points were, in the Secretary of State's view, reinforced by other passages in EN-1. The examining authority's findings did not, in her view, "diminish the weight to be attributed to the [development's] contribution towards meeting the identified need for CCR gas fired generation …". This, she concluded, "should be given substantial weight in accordance with paragraph 3.1.4 of EN-1" (paragraph 4.20).

74. There is, in my view, no legal error there. The Secretary of State's conclusions show that she had interpreted the relevant policies correctly, and proceeded to apply them lawfully.

75. The same may also be said of the Secretary of State's conclusions on need in paragraph 6.6 of her decision letter, where she stated again, that the development's contribution to the "identified need for CCR fossil fuel generation set out in [EN-1]" should, in her view, be given "substantial weight … in the planning balance". Like those in paragraphs 4.18 to 4.20, these conclusions demonstrate a correct interpretation and lawful application of the policies on need in EN-1 and EN-2.

76. I conclude, therefore, that on this issue the appeal should fail.

Did the Secretary of State misinterpret En-1 on the approach to greenhouse gas emissions?

77. ClientEarth's argument on this issue is, essentially, that the Secretary of State misinterpreted EN-1 as requiring the decision-maker to treat the greenhouse gas emissions of the development either as irrelevant or as having no weight.

78. Holgate J. saw no force in that argument. In his view it was "plain … 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 paragraph 4.17 of the decision letter she moved from her conclusions on section 104(3) and (5) to the balance under section 104(7) . She accepted that the examining authority'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 their "evaluation of the benefits of the proposal, including its contribution towards meeting policy need". Once those benefits were "correctly weighed", she found "the impact of GHG emissions should not "carry determinative weight in the overall planning balance"". This, said the judge, "can only mean that the disbenefits did not carry more weight than the benefits"; it was "the other way round". In paragraph 4.17 the Secretary of State was "describing a straight forward balancing exercise … 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 paragraphs 6.3 to 6.9 of the decision letter (paragraph 167 of the judgment).

79. The judge did not see the approach in paragraph 5.2.2 of EN-1 as "legally objectionable". It accorded with section 5(5)(c) of the Planning Act , and was 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. & C.R. 350*])" (paragraph 170). In paragraph 6.7 of the decision letter, when carrying out the exercise required by section 104(7) , the Secretary of State did not suggest that the policy in paragraph 5.2.2 of EN-1 and paragraph 2.5.2 of EN-2 treats greenhouse gas emissions as "an irrelevant consideration in a development consent order application or as a disbenefit to which no weight may be given" (paragraph 172). EN-1 and EN-2 "proceed on the basis that there is no justification in *land use planning terms* for treating GHG emissions as a dis-benefit which in itself is dispositive of an application for a DCO" (paragraph 178). EN-1 does not preclude greenhouse gas emissions being given "greater weight" in the section 104(7) balance, "so long as [they are] not treated as a freestanding reason for refusal" (paragraph 179).

80. Mr Jones submitted that the judge's interpretation of EN-1 was wrong. Neither EN-1 nor EN-2 prevents greenhouse gas emissions being a reason for withholding consent for an energy NSIP, overriding the presumption in paragraph 4.1.2 of EN-1. The statement in paragraph 5.2.2 of EN-1 that CO2 emissions are not "reasons to prohibit the consenting of projects which use these technologies …" is in general terms. It reflects the selection of some of the types of energy infrastructure covered by EN-1, including developments that will emit CO2. It does not dictate how greenhouse gas emissions are to be considered in decision-making on an individual project.

81. This understanding of paragraph 5.2.2, submitted Mr Jones, is confirmed by its reference to the environmental statement for a project, which, it says "on air emissions … will include an assessment of CO2 emissions". Under the Environmental Impact Assessment Directive 2011/92/EU (as amended) ("the EIA Directive") and the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 ("the EIA Regulations"), greenhouse gas emissions would have to be assessed and taken into account within the "environmental information" before the decision-maker when considering whether to grant consent (regulation 21). Under the regime for environmental impact assessment, a significant environmental effect such as CO2 emissions must potentially be capable of providing a reason for refusing consent for a project. EN-1 could not prevent that outcome, because it must be interpreted in accordance with EU law (see *Marleasing SA v La Comercial Internacional de Alimentacion SA (1990) C-106/89*), and otherwise would be overridden by the statutory exceptions under section 104(5) and (6) of the Planning Act . It was not open to the Government, through national policy, to prevent greenhouse gas emissions and their contribution to climate change from being, as Mr Jones put it, a "material consideration" in a decision on an application for a development consent order (see the speech of Lord Hoffmann in *Tesco Stores Ltd. v Secretary of State for the Environment [1995] 1 W.L.R. 759* , at pp.764, 780, 783 and 784; and *R. (on the application of Wright) v Forest of Dean District Council [2019] UKSC 53* , at paragraphs 42, 52 and 53). That there are other means by which the United Kingdom seeks to reduce greenhouse gas emissions from existing infrastructure, including the EU Emissions Trading System, does not bear on this analysis.

82. Mr Jones submitted that the judge was wrong to conclude that greenhouse gas emissions cannot, in themselves, be the basis for a refusal of consent under EN-1 whilst nevertheless accepting that they can be an "adverse impact" to which weight can be given in the balancing exercise under section 104(7) . If greenhouse gas emissions can be given weight in the balance, it must be possible for them to weigh against the grant of consent, whether in combination with other "adverse impacts" or on their own. It is illogical and artificial for greenhouse gas emissions, on their own, to be incapable of founding a reason for refusing consent, but capable of doing so in combination with some other adverse impact, regardless of how powerful that second factor was.

83. Finally, Mr Jones submitted that the Secretary of State did not, in fact, take greenhouse gas emissions into account as a "significant adverse impact". Though she referred to greenhouse gas emissions, it is clear that she gave them no weight – because she misinterpreted relevant policy in EN-1 and EN-2.

84. Those submissions do not, in my view, demonstrate that the Secretary of State's relevant conclusions on this issue were legally flawed. Her conclusions were, I think, entirely lawful.

85. The policy in paragraph 5.2.2 of EN-1 must be read in its entirety, and in its context. It should not be read in a way that puts it into conflict with other provisions in EN-1. The first sentence of the paragraph recognises that CO2 emissions are "a significant adverse impact from some types of energy infrastructure which cannot be totally avoided (even with full deployment of CCS technology)". The second sentence begins with a reference to "the characteristics of these and other technologies, as noted in Part 3 of this NPS" and to "the range of non-planning policies aimed at decarbonising electricity generation such as EU ETS …". It is clear therefore that the policy is seen by the Government as compatible with the policies on need in Part 3. There is no suggestion that it removes or qualifies the general "presumption in favour of granting consent

to applications for energy NSIPs" in paragraph 4.1.2, which is founded on the "level and urgency of need for infrastructure of the types covered by the energy NSIPs set out in Part 3" – including fossil fuel generating capacity.

86. Seen in this context, the policy itself is plain in its meaning. It says that "… CO2 emissions are not reasons to prohibit the consenting of projects which use these technologies …". And it adds that although an assessment of CO2 emissions will be included in an environmental statement for a proposed development, the policies in Part 2 of EN-1 apply to them, and in decision-making it is unnecessary "to assess individual applications in terms of carbon emissions against carbon budgets …". The same policy, but specifically for "fossil fuel generating stations", appears in paragraph 2.5.2 of EN-2, which acknowledges that "CO2 emissions are a significant adverse impact of fossil fuel generating stations".

87. The force of the policy, therefore, is not that CO2 emissions are irrelevant to a development consent decision, or cannot be given due weight in such a decision. It is simply that CO2 emissions are not, of themselves, an automatic and insuperable obstacle to consent being given for any of the infrastructure for which EN-1 identifies a need and establishes a presumption in favour of approval. If they were, the policy need and the policy presumption would effectively be negated for certain forms of infrastructure supported by EN-1, and those essential provisions contradicted. Paragraph 5.2.2 does not diminish the need for relevant energy infrastructure established in national policy or undo the positive presumption. But nor does it prevent greenhouse gas emissions from being taken into account as a consideration attracting weight in a particular case. How much weight is for the decision-maker to resolve. It follows that, in a particular case, such weight could be significant, or even decisive, whether with or without another "adverse impact". This, I accept, differs from the judge's conclusion, in paragraph 179 of his judgment, that greenhouse gas emissions are not capable of being "treated as a freestanding reason for refusal".

88. The Secretary of State's understanding of the policy was, in my view, the correct one. Having concluded that "the presumption in favour of fossil fuel generation" applied, she directed herself to consider "whether any more specific and relevant policies … in the relevant NPSs clearly indicate that consent should be refused", given the examining authority's conclusion that "there would be significant adverse effects from the [development] in respect of GHG emissions which gave rise to a perceived conflict with the decarbonisation objective of EN-1" (paragraph 4.14). She thought not, for three reasons. First, as she reminded herself in the light of section 2.2 of EN-1, "climate change and the UK's GHG emissions reduction targets contained in the [Climate Change Act] have been taken into account in preparing the suite of Energy NPSs" (paragraph 4.15 of the decision letter). Secondly, having in mind the policy in paragraph 5.2.2 of EN-1 and paragraph 2.5.2 of EN-2, she acknowledged "the significant adverse impact of the proposed Development on the amount of greenhouse gases that will be emitted to atmosphere", but recognised that the policy "makes clear that this is not a matter that … should displace the presumption in favour of granting consent" (paragraphs 4.15 and 4.16). And thirdly, she concluded, unequivocally, 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 [Climate Change Act]" (paragraph 4.17).

89. That, however, was not the end of the Secretary of State's consideration of greenhouse gas emissions. As she went on to say, she was aware of 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 Planning Act] applies in this case". She referred to the examining authority's conclusion that the development would have "significant adverse impacts in terms of GHG emissions", which she accepted "may weigh against it in the balance". But she disagreed with the examining authority's finding "that these impacts and the perceived conflict with NPS policy … 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 …" (paragraph 4.17). In saying this, the Secretary of State was accepting that greenhouse gas emissions had a place in the balancing exercise she was going to conduct, though she concluded that they should not have "determinative weight". There is no legal flaw in this conclusion. It is faithful to the policy in paragraph 5.2.2 of EN-1.

90. So too is the Secretary of State's subsequent conclusion, heeding the commitment to "Net Zero" in the amendment to the Climate Change Act , that this did not justify "… attributing the Development's negative GHG emissions any greater weight in the planning balance" (paragraph 5.9).

91. When she came to the balancing exercise under section 104(7) (in paragraphs 6.1 to 6.9 of the decision letter), the Secretary of State expressly considered the examining authority's view that "considerable negative weight" should be attached to "impacts on decarbonisation and climate change" (paragraph 6.5). She referred to "the GHG emissions from the Development" when considering the weight to be given to the need for it under EN-1 (paragraph 6.6). She dealt specifically with the weight given to greenhouse gas emissions as "a significant adverse impact" of fossil fuel generating stations, which EN-2 acknowledges it to be in paragraph 2.5.2. She said, rightly, that EN-1 and EN-2 did not require her "to assess [greenhouse gas emissions] against emissions reduction targets", which matches the similar statement in paragraph 5.2.2 of EN-1 and paragraph 2.5.2 of EN-2. She also said, again rightly, that EN-1 does "[not] state that [greenhouse gas emissions] are a reason to withhold the grant of consent for such projects", which corresponds to the statement in paragraph 5.2.2 that they are "not reasons to prohibit the consenting of projects which use these technologies …". She accepted it was "open" to her to "depart from the NPS policies" and "give greater weight to GHG emissions in the context of the Drax application". But she found "no compelling reason to do so" in this case (paragraph 6.7).

92. Paragraph 6.7 of the decision letter, and especially the reference to her having decided not to give them "greater weight" than is indicated in national policy, shows that the Secretary of State did give weight to greenhouse gas emissions in the balancing exercise as a "significant adverse impact", in accordance with the relevant policies in EN-1 and EN-2. Her acknowledgment that she was free to give this consideration "greater weight", and to "depart from the NPS policies" is, I think, telling. This paragraph of the decision letter betrays no misunderstanding of the relevant policies. It makes it impossible to submit that "greenhouse gas emissions" were excluded from the balance, or given no weight. To suggest that the Secretary of State meant to say, though she did not, that greenhouse gas emissions had no place in the balance is mistaken. Nor can it be said that she was not entitled to assess weight in the way she did. The policy was properly interpreted and lawfully applied.

93. In the striking of the balance, the weight given to greenhouse gas emissions in combination with the weight given to the "negative visual and landscape impacts" (paragraph 6.8), as "adverse effects" of the development, was not as strong as the weight the Secretary of State gave to its "positive effects", including its "contribution to meeting the need case set out in the NPSs" (paragraph 6.9). This was a classic balancing exercise, in which weight was lawfully given to each of the relevant factors.

94. The Secretary of State did not misdirect herself on the meaning and effect of the policy in paragraph 5.2.2 of EN-1 and paragraph 2.5.2 of EN-2, or misapply it. She did not read it as purporting to make CO2 emissions, or greenhouse gas emissions, irrelevant in a decision on an application for a development consent order. She clearly did not regard herself as constrained by EN-1 to treat greenhouse gas emissions as having no bearing on her decision on the Drax project – either because there are other means by which the United Kingdom seeks to reduce greenhouse gas emissions from infrastructure, including the EU Emissions Trading System, or for any other reason.

95. One cannot say that she misunderstood the purpose of environmental impact assessment under the EIA Directive and the EIA Regulations , or the relevance of an assessment of CO2 emissions in an environmental statement for a project within the scope of EN-1 and EN-2. As Mr Tait submitted, the requirement to assess the environmental impacts of a development, under regulation 21 of the EIA Regulations , is not incompatible with a statement of national policy in which the Government explains how impacts of a particular kind are viewed, and how they are being addressed by different means. And there is no basis here for the submission that the Secretary of State thought the policy in paragraph 5.2.2 of EN-1 could, in principle, prevent greenhouse gas emissions, if assessed as a likely significant effect on the environment in an environmental statement, from warranting a refusal of development consent. This was not a conclusion she reached, nor implicit in any she did.

96. The law on "material considerations" in the sphere of decision-making on applications for planning permission under section 70 of the Town and Country Planning Act 1990 does not assist Mr Jones' argument. It does not go to the issue we are concerned with, which is whether the Secretary of State, in making her decision on the Drax proposal, misinterpreted and misapplied policies in national policy statements produced under the self-contained statutory regime for such projects in the Planning Act . The relevant provisions for decision-making in that statute do not refer to "material considerations" – though of course normal public law principles will apply to proceedings challenging a development consent order. But in any event the relevant policies here, in EN-1 and EN-2, exemplify the wide scope of the policy-making power in section 5(5) of the Planning Act , in particular subsections (5)(c) and (5)(f). Their merits as policy are not contested in these proceedings, and could not be. It is enough for us to conclude, as I think we should, that they were neither misinterpreted nor misapplied by the Secretary of State when making her decision on the Drax project.

97. On this issue, therefore, as on the first, I think the appeal should fail.

Did the Secretary of State misinterpret and misapply section 104(7) of the Planning Act?

98. The essence of ClientEarth's argument on this issue is that the Secretary of State failed to discharge her obligation under section 104(7) of the Planning Act to weigh the "adverse impact" of the proposed development against its "benefits", simply repeating her assessment under section 104(3) . Though ClientEarth accepts that policy in a national policy statement is relevant to the exercise under section 104(7) , it contends that the Secretary of State erred by taking the same approach to the issues of need and greenhouse gas emissions, in paragraphs 6.6 and 6.7 of the decision letter, as she had already taken in considering the policies in the national policy statements under section 104(3) . In effect, she fettered her assessment under section 104(7) .

99. Holgate J. saw no difficulty in rejecting this ground of the claim. Citing the decision of this court in *R. (on the application of Thames Blue Green Economy Ltd.) v Secretary of State for Communities and Local Government [2015] EWCA Civ 876* , and at first instance in the same case ([2015] EWHC 727 (Admin)), and also that of the Divisional Court in *R. (on the application of Spurrier) v Secretary of State for Transport [2020] P.T.S.R. 240* , he acknowledged that section 104(7) may not be used to "circumvent the application of ss.87(3) , 104(3) and 106(2)" of the Planning Act (paragraph 176 of the judgment). But the Secretary of State was "legally entitled to … give "substantial weight" to the need case in accordance with the NPS", and "fully entitled to take that assessment into account under s.104(7)" (paragraph 177 of the judgment). In paragraph 6.7 of the decision letter she recognised that in EN-1 greenhouse gas emissions are accepted to be a "significant adverse impact", and then went on to consider whether, in the section 104(7) balance, that factor should be given "greater weight" in the case of the Drax proposal. The proposal also gave rise to landscape and visual impacts, which were "further disbenefits". The suggestion that the Secretary of State looked at the balance under section 104(7) "solely through the lens of, or improperly fettered by, the NPSs" was "untenable" (paragraph 179). She decided not to give "greater weight" to greenhouse gas emissions because she found there to be "no compelling reason in this instance". To criticise this as improperly introducing a "threshold test" was "an overly legalistic approach to the reading of the decision letter". The Secretary of State was "simply expressing a matter of planning judgment", and "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". She went on, in paragraph 6.9, to "weigh all the positive and negative effects of the proposal before concluding that the benefits outweighed the adverse effects of the proposal" (paragraph 180).

100. Mr Jones submitted that the availability of the power to review under section 6 of the Planning Act does not prevent reduced weight being given to policies in a national policy statement that have become out-of-date, or greater weight to other "material considerations" because circumstances have changed since the designation of the national policy statement – such as greenhouse gas emissions in the light of the target of "Net Zero" (see *Spurrier* , at paragraph 109). If that balancing exercise results in "adverse impacts" outweighing "benefits", the obligation under section 104(3) to determine the application

in accordance with the national policy statement is released. The section 104(3) assessment must not be allowed to override the operation of section 104(7) .

101. Yet, Mr Jones submitted, that is what the Secretary of State did in her assessment under section 104(7) . She assumed the project would contribute to the identified need in EN-1 for CCR fossil fuel generation simply because it was a project of that type, but failed to consider the weight to be given to its actual contribution to meeting a national need. And in dealing with greenhouse gas emissions, she merely asked herself whether to give them "greater weight" than was contemplated in the relevant policy in EN-1. This was wrong. Section 104(7) involves a balancing exercise in which any "adverse impact" should be considered, no matter how that kind of impact is addressed in the relevant national policy statement. While an objector in a development consent order examination cannot challenge the need for a type of energy infrastructure included in EN-1 or contend that consent should be refused because the development is of a type that generates greenhouse gas emissions, it can argue under section 104(7) that the greenhouse gas emissions of this proposed development are an "adverse impact" outweighing its "benefits". This does not offend the principle that matters settled by a national policy statement should not be revised or re-opened in a development consent order process (see *Spurrier* , at paragraphs 103 to 105 and 107, and the first instance judgment in *Thames Blue Green Economy Ltd* ., at paragraphs 8 and 9, and 37 to 43).

102. In my view, as Mr Tait and Mr Strachan submitted, this argument is not sound. The Secretary of State did not adopt an unlawful approach to the assessment required under section 104(7) . She did not fetter that assessment. She carried out the balancing exercise required, taking into account the considerations relevant to it and giving them lawful weight. No legal error was made.

103. The reasoning on this issue largely coincides with that on the previous two, which need not be repeated. There are six main points.

104. First, the purpose of the balancing exercise in section 104(7) is to establish whether an exception should be made to the requirement in section 104(3) that an application for development consent must be decided "in accordance with any relevant national policy statement". The exercise involves a straightforward balance, setting "adverse impact" against "benefits". It is not expressed as excluding considerations arising from national policy itself. It does not restrain the Secretary of State from bringing into account, and giving due weight to, the need for a particular type of infrastructure as recognised in a national policy statement, and setting it against any harm the development would cause (see the judgment of Sales L.J. in *Thames Blue Green Economy Ltd* ., at paragraph 16).

105. Secondly, however, as Mr Tait and Mr Strachan submitted, section 104(7) may not be used to circumvent other provisions in the statutory scheme, including section 106(1)(b) , which enables the Secretary of State, when deciding an application for development consent, to "disregard representations" relating to "the merits of policy set out in a national policy statement". It does not provide a means of challenging such policy, or of anticipating a review under section 6 , which is the process for accommodating changes of circumstances after designation (see *Spurrier* , at paragraphs 106 to 110).

106. Thirdly, in this case the Secretary of State identified her task under section 104(7) in paragraph 6.1 of the decision letter. She did so accurately by setting out the provisions of both subsection (3) of section 104 and subsection (7), and directing herself that she would "need to consider the impacts of any proposed development and weigh these against the benefits of any scheme".

107. Fourthly, the Secretary of State concluded in paragraph 6.2, on the basis of her earlier conclusions in paragraphs 4.8 to 4.20, that the proposed development was "in accordance with EN-1", having satisfied herself that it "should benefit from [the

policy presumption in favour of granting consent for energy NSIPs in EN-1] because there are no more specific and more relevant NPS policies which clearly indicate that consent should be refused" and that "therefore the Development accords with relevant NPSs". This was a lawful conclusion.

108. Fifthly, the Secretary of State undertook the balancing exercise under section 104(7) in paragraphs 6.3 to 6.9, concluding in paragraph 6.9 that "[on] balance … the benefits of the Development outweigh its adverse effects". This too was a lawful conclusion. There is nothing illogical or unlawful in recognising the general policy that greenhouse gas emissions are "not reasons to prohibit the consenting of projects", but considering whether to "give greater weight to GHG emissions in the context of the Drax application" and deciding not to do so. In undertaking the section 104(7) balance, this was perfectly appropriate.

109. Sixthly, there is no question of the Secretary of State having fettered herself in striking the section 104(7) balance, either by proceeding as if she had to adhere slavishly to the policies in EN-1 and EN-2, including the policies on need and on greenhouse gas emissions, or in any other way. She took those policies into account. But she did not regard herself as unable to give such weight to the proposal's compliance with them as she thought was right in the circumstances. In weighing the adverse effect of greenhouse gas emissions in paragraph 6.7, she took account of "the Government's policy and legislative framework for delivering a net zero economy by 2050". She acknowledged that she was free to "depart from the NPS policies and give greater weight to GHG emissions" in this case, but decided not to do so. I do not read her reference to there being "no compelling reason" as setting some unduly onerous test. She was merely expressing a lawful planning judgment on the facts of the case – as she also did on the question of need in paragraph 6.9, where she recognised that there were "strong arguments" weighing in favour of granting consent for a development of this capacity, because of its "contribution to meeting the need case set out in the NPSs".

110. In my view, therefore, the appeal should not succeed on this issue.

Conclusion

111. For the reasons I have given, I would dismiss the appeal.

Lord Justice Lewis

112. I agree.

Lord Justice Lewison

113. I also agree.

APPENDIX 3: CCUS CLUSTER SEQUENCING PHASE 1 GUIDANCE FOR SUBMISSIONS

Department for
Business, Energy
& Industrial Strategy

Cluster Sequencing for Carbon Capture Usage and Storage Deployment: Phase-1

Background and guidance for submissions

May 2021

Any enquiries regarding this publication should be sent to us at:
clustersequencing@beis.gov.uk

Contents

Section 1: Introduction and key information

1.1 Background and introduction

In November 2020, the government published the Ten Point Plan for a Green Industrial Revolution[1], with commitments focused on driving innovation, boosting export opportunities, and generating green jobs and growth across the country to level up regions of the UK. In doing so, the government has set its agenda for a clean, resilient and sustainable economic recovery, as the UK builds back from the impacts of COVID-19.

Included in the Ten Point Plan was a commitment to deploy Carbon Capture, Usage and Storage (CCUS) in two industrial clusters by the mid-2020s, and a further two clusters by 2030 with an ambition to capture 10 $MtCO_2$ per year by 2030. In February this year, BEIS published a consultation[2] seeking input on a potential approach to determine a natural sequence for locations to deploy CCUS in order to meet this commitment.

This document sets out the finalised details of the Cluster Sequencing Process, and provides guidance and supporting information for cluster organisations seeking to enter the process by making a submission aligned to their project core concept. Through the process set out in this document, government will look to identify at least two CCUS clusters whose readiness suggests they are most naturally suited to deployment in the mid-2020s, as part of our efforts to identify and support a logical sequence of deployment for CCUS projects in the UK. We refer to these initial clusters as 'Track-1'.

In addition to naming the Track-1 clusters we will also name, if appropriate, a set of 'reserve clusters' alongside Track-1, composed of clusters not sequenced onto Track-1 but which have met the eligibility criteria and performed to a good standard against the evaluation criteria. Government will retain the option to enter negotiations with these reserve clusters in certain circumstances; these may include, for example, if it becomes clear in the course of negotiations that government's affordability envelope could support an additional Track-1 cluster, or if a technical fault is discovered in one of the Track-1 clusters. This process, which we refer to as 'reversing the tracks', is set out in more detail in Section 3.5 of this document.

Alongside the Track-1 result, expected in October, we will also bring forward further details on a process for finalising Track-2; this is discussed further in Section 1.2 below.

Projects within the clusters sequenced onto Track-1 will have the first opportunity to be considered to receive any necessary support under the government's CCUS Programme.

This support includes:

- The £1bn CCS Infrastructure Fund (CIF), which will primarily support capital expenditure on T&S networks and industrial carbon capture projects. Being sequenced onto Track-1 does not guarantee that CIF funding will be awarded, nor do we expect that all early clusters will need to draw from the CIF. Any decision to award CIF funding would be subject to the conditions set out in 1.6 below and government being comfortable that

[1] www.gov.uk/government/publications/the-ten-point-plan-for-a-green-industrial-revolution/title
[2] www.gov.uk/government/consultations/carbon-capture-usage-and-storage-market-engagement-on-cluster-sequencing

CIF funding represents value for money for the consumer and the taxpayer in the context of other government support mechanisms.

- CCUS business models for T&S, power, industrial capture and, potentially, bio-energy with CCS (BECCS), as well as business models for low carbon hydrogen. Further details on the revenue mechanism to bring through private sector investment into industrial carbon capture and hydrogen projects via these business models will be set out later this year.

Further information on these support measures and their respective allocation processes can be found in Section 4 of this document.

By commencing the Cluster Sequencing process, we hope to build on the significant recent steps that government has taken to progress CCUS development, including:

- Confirming Front End Engineering Design (FEED) funding for clusters under the Industrial Decarbonisation Challenge, in March this year[3]
- Publishing an update on the CCUS business models, in December 2020[4]
- Publishing the National Infrastructure Strategy in November 2020[5]
- Publishing the Energy White Paper in December 2020[6]

In addition to launching Phase-1 of the Cluster Sequencing process, we are in parallel publishing a range of updates across the CCUS programme in order to provide maximum visibility to industry regarding relevant policy developments:

- Update on the CCS Infrastructure Fund (CIF)
- Update on Industrial CCUS Business Models
- Update on Power CCUS Business Models
- Update on T&S Business Models
- CCUS Supply Chains: a roadmap to maximise the UK's potential

A consultation on government's preferred business model for hydrogen will follow shortly.

1.2 Future ambitions and Track-2

Through our legally binding commitment to reach net zero emissions by 2050, the UK government has made clear its commitment to decarbonising the economy. We are also clear on the key role that CCUS must play in enabling this transition; the Climate Change Committee (CCC) state that CCUS is a necessity if we are to reach net zero by 2050 and advise that multiple CCUS clusters need to be operational by the mid-2020s to enable this[7]. The Cluster Sequencing process described in this document, and the package of available support outlined above, represent the next step in pursuing this aim.

[redacted]

[4] www.gov.uk/government/publications/carbon-capture-usage-and-storage-ccus-business-models
[5] www.gov.uk/government/publications/national-infrastructure-strategy
[6] www.gov.uk/government/publications/energy-white-paper-powering-our-net-zero-future

[redacted]

However, the delivery of at least two CCUS clusters by the mid-2020s is not the extent of our ambition, we have committed to support four clusters by 2030 at the latest. Government is also clear that in order to reach net zero *all* industrial clusters will need to decarbonise, and CCUS will play a key role in enabling this. After identifying the clusters most suited to deployment in the mid-2020s, government will continue to work with industry to map and support a logical sequence for future CCUS deployment.

This effort will commence with the announcement of further details on a process for identifying 'Track-2' clusters, which we will bring forward when the sequenced Track-1 clusters are announced, expected in October this year. This update will provide further detail in relation to Track-2 timelines, as well as early considerations around Track-2 eligibility and evaluation criteria and future project allocation processes. Accordingly, government will aim to conclude negotiations with projects within the Track-2 clusters in time to enable them to take Final Investment Decisions (FIDs) from 2024 to then be operational from 2027.

This approach will also help to ensure that clusters not sequenced onto Track-1 are able to secure maximum value from any funding they may have been awarded under the Industrial Decarbonisation Challenge (IDC).

We will continue to engage with industry to develop an approach to Track-2 which balances the needs of CCUS developers with strategic government objectives, such as maximising opportunities to carry forward learnings from Track-1. With this in mind, we would further emphasise that Track-1 and Track-2 are both seen as key components of the overall Cluster Sequencing process, and that the Track-1 sequencing decision will not impact upon government's long-term commitment to CCUS deployment in any given cluster.

1.3 Objectives

By identifying and supporting the CCUS clusters best suited to deployment in the mid-2020s, government aims to realise several key benefits of CCUS deployment, including:

- Improving investor confidence and willingness to commit to CCUS projects by successfully demonstrating the operability and viability of the technology, as well as the effectiveness of the commercial frameworks and risk allocation mechanisms which enable their operation at scale.
- Generating key learnings across CCUS applications to improve cost certainty and reduce cost profiles for future deployment.
- Improving certainty across the sector in mapping the UK's pathway towards successful industrial decarbonisation and the net zero transition.
- Demonstrating international leadership in CCUS and decarbonisation more widely, particularly in the context of the UK's role as chair of both the G7 and COP26 in 2021.
- Positioning the UK as a world leader in CCUS technologies, and accessing the economic benefits associated with this position, through both domestic infrastructure deployment and export opportunities.
- Contributing to both near-term and long-term emissions reduction targets under national carbon budgets.

Last month government accepted the CCC's Carbon Budget 6 recommendation; this is a

significant step in the UK's global climate leadership and CCUS and hydrogen will be critical to meeting these important commitments.

1.4 Process overview

The Cluster Sequencing process will be executed across two phases:

- In Phase-1, government will receive submissions from cluster organisations, and provisionally sequence those which are most suited to deployment in the mid-2020s onto Track-1, in accordance with government's stated objectives.
- In Phase-2, government will receive applications from individual projects across capture applications (industry, power, hydrogen) to connect to the Track-1 clusters. Through this process, government will select projects to enter negotiations for the support packages outlined above.

As described in the consultation, we consider it necessary to conduct the Phase-1 assessment at the cluster level to reflect the inherent interdependency of the CCUS chain. Meanwhile, allowing projects not included in the initial cluster submissions to participate in Phase-2 allows for the opportunity to improve on those submissions and achieve potentially improved value for money outcomes.

However, we need to balance an 'open' Phase-2 process with the need to enable clusters to plan with confidence. With this in mind, we would emphasise:

- That there is flexibility built into the Phase-2 timeline. This flexibility could allow government to progress specific projects more swiftly, should government consider that to be the optimal outcome once all the relevant information has been received. Further information on Phase-2 can be found in Section 4 of this document.
- A number of consultation respondents suggested that 'anchor projects' should progress straight through to negotiations, alongside the T&S in Phase-1; our government response explains why we will not take this approach. Nevertheless, we consider it important to highlight that if a project is mature, fully integrated with the T&S and integral to the cluster, that project is likely to be well placed to perform well against Phase-2 project selection criteria. The onus would be on any capture projects entering in Phase-2, and not on the Phase-1 Cluster Plan, to demonstrate that it would offer a better value for money outcome and not have a material impact on cluster timelines.
- If government does decide to alter the Cluster Plan (by removing a project included on the original Cluster Plan and/or adding an additional project to the Cluster Plan), government is committed to working with the Cluster Lead to ensure the implications for the delivery of the wider cluster are understood and considered accordingly.

This document sets out the full details of the Phase-1 process; further details on the Phase-2 processes for each capture application can be found in Section 4 of this document. Government expects to bring forward full details when the Phase-2 process is launched in August this year.

1.5 Phase-1 timeline

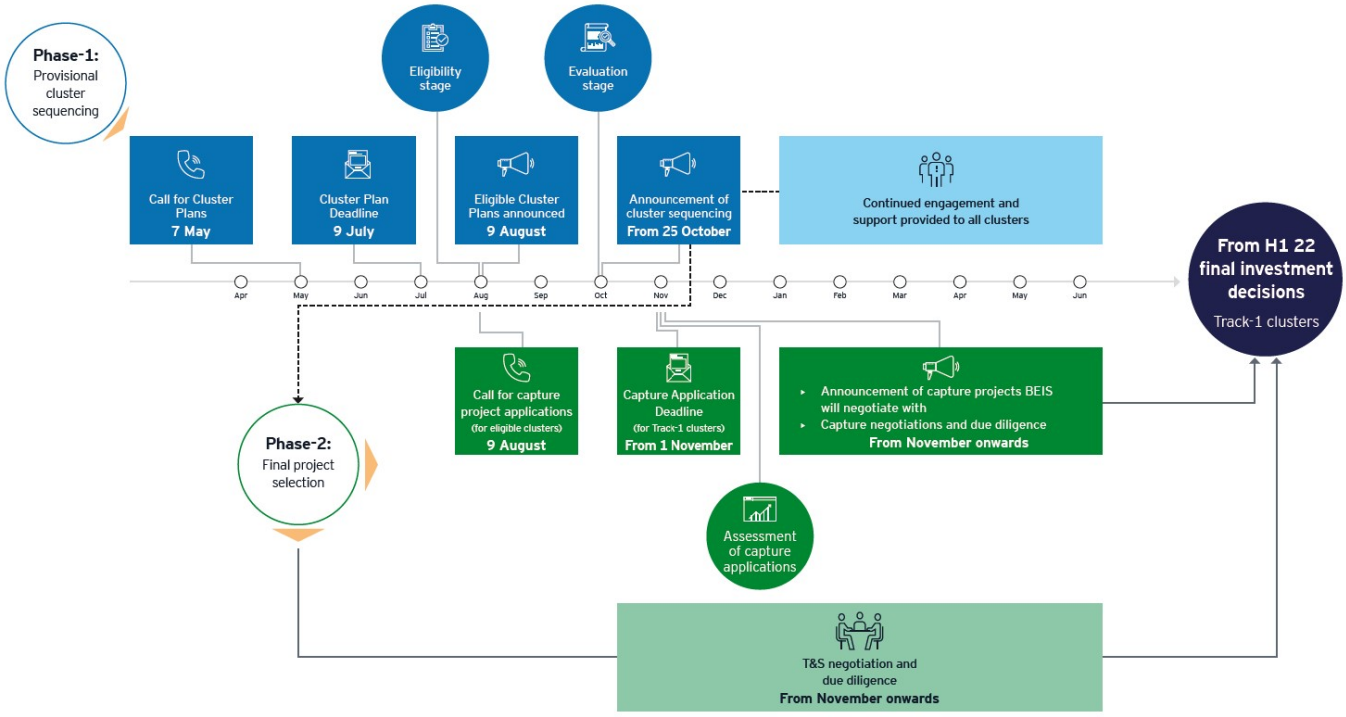
Table 1, below, sets out the timeline on which we intend to execute the Phase-1 provisional sequencing process. Guidance on each of the milestones can be found in later sections of the document. Further information on the timelines for Phase-2 project allocation can be found in Section 4.3 of this document, and these timelines will be confirmed at the launch of the Phase-2 process in August. Please note that these timelines are indicative, and government reserves the right to alter these timelines at any stage in the process.

Table 1: Phase- 1 Cluster Sequencing Timeline

Milestone	Date
Phase-1 Launch	7 May
Phase-1 joint kick-off session	w/c 10 May
Deadline for Phase-1 expressions of interest	21 May
Phase-1 individual submission engagement	w/c 24 May
Deadline for submission of supplementary questions	23 June
Final publication of question responses by BEIS	30 June
Deadline for finalised Phase-1 submissions	9 July
Phase-1 assessment cluster presentations to BEIS	w/c 26 July
Announcement of Phase-1 eligibility assessment	9 August
Phase-1 assessment clarification session	w/c 16 August
Announcement of Phase-1 outcome	From 25 October

This timeline is also reflected in Fig.1, below.

Figure 1: Phase-1 Cluster Sequencing Timeline



1.6 General considerations

Note that being sequenced onto Track-1 does not mean that support will be awarded. Any decision to award support at any stage of this process is only expected to be made subject to government being comfortable with: the application of subsidy control requirements, any balance sheet implications, the status of any relevant statutory consents, and that the project represents value for money for the consumer and the taxpayer.

The Secretary of State reserves the right to cancel, amend or vary the cluster sequencing process, including any envisaged stage and any document issued pursuant to it, at any point with no liability on his part. In particular, the Secretary of State is not liable for any costs (whether incurred by a Cluster Lead, emitter, or an associated entity) resulting from any amendment or cancellation of, or delay to, the process, nor for any costs (whether incurred by a Cluster Lead, emitter, or an associated entity) resulting from an Applicant expressing an interest in the Cluster Sequencing process or discussing or negotiating any proposed support mechanisms.

The proposed terms of any support which may be offered to any cluster following the sequencing process, including the form of the business models, are not final and remain subject to further development by the government, in consultation with relevant regulators and the devolved administrations, as well as the development and Parliamentary approval of any necessary legislative amendments, and completion of necessary contractual documentation. BEIS will separately continue such engagement as it requires in order to refine such submissions, including through engagement with the devolved administrations, to ensure that the proposed policies take account of devolved responsibilities and policies across the UK.

The process will primarily be executed by BEIS and its technical, commercial, and legal advisors. Support and expertise will also be drawn from across Whitehall including HM Treasury, the Infrastructure Project Authority (IPA) and UK Government Investments (UKGI) as well as from its various Partner Organisations including OFGEM, Offshore Petroleum Regulator for Environment and Decommissioning (OPRED) and the Oil and Gas Authority (OGA).

Section 2: Entry and eligibility

2.1 Entry process

The entry process for the Cluster Sequencing process consists of three key stages, as set out in the timeline above:

- Expressions of interest
- Submission engagement
- Final submission

Expressions of Interest and NDAs

To be considered under the Cluster Sequencing Process the Cluster Lead must submit an Expression of Interest (EoI) to BEIS on behalf of their cluster. The EoI template can be found on the main Cluster Sequencing landing page, and the deadline for submitting a completed copy of this template to BEIS is 21 May.

After submitting an EoI, the Cluster Lead, as the entity responsible for information submission, shall be required to enter into a non-disclosure agreement (NDA) with BEIS. This NDA will help to ensure that comprehensive and credible supporting information can be effectively provided throughout the evaluation process, as detailed in Section 3 of this document. The NDA will set parameters for government's use of potentially sensitive information provided as part of the cluster's submission taking into consideration the Secretary of State's statutory obligations (including under the Freedom of Information Act 2000 (FOIA), the Data Protection Act 2018 (DPA), General Data Protection Regulation (GDPR) and the Environmental Information Regulations 2004 (EIR)).

The NDA will also set out criteria that the Cluster Leads will be expected to follow in respect of information-sharing arrangements that they must put in place with capture projects, as further detailed in the section on Anti-Competitive Behaviour, below. In particular, the NDA will require the Cluster Lead to provide prospective Phase 2 applicants wishing to connect to the Cluster Lead's Transport & Storage Network with the information and documentation reasonably required for the purposes of preparing an application at Phase 2.

Submission window engagement

In order to support clusters in preparing submissions that fit the Phase-1 evaluation criteria BEIS intends to carry out engagement sessions, to ensure clusters have a clear understanding of government's criteria and objectives in the Cluster Sequencing process. Invitations for these sessions will be extended to all clusters which submit an EoI, as above; indicative dates for the engagement sessions as follows:

- Week commencing 10 May: kick-off session, to be held jointly with the CCSA. This will be an open session with clusters attending together.
- Week commencing 24 May: clarification session, to confirm clusters' understanding of the process and evaluation criteria. Clusters to attend individual sessions.

In addition to these engagement sessions, clusters may submit clarification questions on the Cluster Sequencing process to clustersequencing@beis.gov.uk, with an explanation of why the question has been raised so the context is clear. BEIS will publish the question and the response provided to ensure transparency and fairness in the sequencing process, except in the circumstance where the question is designated as confidential. This principle is also applicable to any questions raised in the submission engagement sessions which are not specific to the individual cluster concerned.

A cluster may request, at the time of submitting a question, that BEIS treats a clarification question and its response as confidential. BEIS will advise the cluster in advance of providing the answer if it considers that all or any part of the question cannot be treated as confidential, at which time the cluster may either withdraw the question or accept that the question and its response will be treated (in whole or part), as non-confidential.

The deadline for the submission of clarification questions is 23 June, as per the timeline in Section 1.5 of this document. BEIS will be unable to respond to any questions submitted after this date.

Final submission

As per the timeline set out in Section 1.5 of this document, finalised submissions must be submitted to BEIS by 17:00 p.m. on 9 July. Full details and further guidance on the materials which should be included in final submissions are set out in Section 3 of this document.

Each cluster must identify a Cluster Lead which should be the entity primarily responsible for the T&S network and the Cluster Lead should initially identify themselves to BEIS through the EoI, as above. The Cluster Lead should be able to provide evidence of a formal collaboration agreement between cluster organisations, such as a Memorandum of Understanding (MoU) or a consortium/partnership agreement signed off at Board level or equivalent.

Each Cluster Lead should submit only one submission to BEIS and each individual capture project should appear on only one Cluster Plan submission. The Cluster Lead should submit the cluster core concept to BEIS for sequencing – clusters should avoid altering this core concept in an attempt to be sequenced onto Track-1.

Engagement on final submission

BEIS will issue regular clarification questions in relation to the information submitted. Unless specified otherwise, clusters will have three working days to respond to these requests – if an answer is not received within this time limit, then it may not be counted towards the assessment.

BEIS will also host further engagement sessions in the assessment window following the submission of clusters' final submissions, as and when BEIS deems these to be necessary in order to clarify elements of those submissions. The indicative date for this session is as follows:

- Week commencing 26 July: clusters present Cluster Plans to BEIS. Clusters to attend individually.
- Week commencing 16 August: clarification session. Clusters to attend individually.

This date should be treated as indicative at this stage; BEIS will issue invitations to each of the clusters confirming the date once EoIs have been submitted.

Anti-competitive behaviour

The Competition Act 1998 prohibits anti-competitive behaviour such as collusion (including bid-rigging). BEIS is aware that:

- The preparation of submissions may require Cluster Leads to collate confidential information from a range of prospective capture projects, which are not affiliated with one another and may compete with each other for funding at Phase-2 and/or in other markets.
- Some Cluster Leads may also have interests in or relationships with prospective capture projects.
- Breaches of competition law may therefore arise where confidential information is disclosed by prospective capture projects to Cluster Leads.

Clusters are reminded that care must be taken to ensure that any confidential information passing between the Cluster Lead and the prospective capture projects relates solely to the preparation of a Cluster Sequencing submission and any information provided by one party to the other must be provided on a strictly 'need to know' basis.

Information relating to a prospective capture project must only be passed 'up' to a Cluster Lead and not be shared by a Cluster Lead with another prospective capture project. Cluster Leads must ensure that any individuals responsible for collecting information relating to prospective capture projects are not involved in the preparation of any Phase-2 applications.

Particular care will be needed to ensure that representatives of prospective capture projects are not present at submission preparation meetings or meetings with BEIS where they may gain access to confidential information relating to other prospective capture projects.

Cluster Leads will be required to satisfy BEIS at all stages of the Cluster Sequencing process that appropriate arrangements are in place to ensure that there is no risk of actual or potential collusion. If BEIS considers that there has been any co-operation or collusion which actually or potentially undermines or distorts competition, it reserves the right to reject the compromised cluster.

Clusters should seek clarification from BEIS if they are uncertain about their obligations under this paragraph or any other potential competition law requirements.

Process evaluation

BEIS may also contact any organisation named in a cluster submission at a later point to request feedback on their experience of the submission process for evaluation purposes.

2.2 Eligibility criteria

Once finalised submissions have been received, BEIS will assess each submission against the following eligibility criteria, as described in the consultation:

- The cluster must be able to credibly demonstrate that it can be operational by 2030.
- The cluster must be located within the UK.
- The cluster must meet the definition of a CCUS cluster, which we define as a T&S network[8] and an associated first phase of at least two CO_2 capture projects.

Operational by 2030

This criterion has been included to reflect government's commitment to support the deployment of a minimum of two CCUS clusters in the mid-2020s, and four clusters by 2030. Deployment in this decade is considered to be valuable to government for the following key reasons:

- Foundation for net zero: it is estimated that the UK will require 60-180 $MtCO_2$ of capture per year by 2050 in order to meet our net zero commitment. CCUS projects have long lead times, so de-risking, learning and gaining cost certainty through the 2020s will be crucial to meeting these longer-term aims. This is reflected in our ambition to capture 10 $MtCO_2$ per year by 2030.
    - This is also true of other strands of the UK's decarbonisation agenda which are enabled by CCUS, including our ambition to produce 1GW and 5GW of low carbon hydrogen by 2025 and 2030 respectively.
- Near-term carbon budgets: CCUS deployment in the 2020s can potentially make an important contribution to the UK's emissions reduction targets under carbon budgets 4, 5 and 6.
- Maximising comparative advantage: the UK is well-positioned to capture a significant share, worth up to £10bn[9], of the growing global CCUS market. Moving quickly on deployment will allow us to remain competitive with other countries making material progress on CCUS, such as Norway, the Netherlands and the United States.

As described throughout this document and the consultation, we expect Track-1 clusters to be operational by the mid-2020s, and this is reflected in the evaluation criteria set out in Section 3 of this document. However, we have set the cut-off date for the purposes of eligibility at 2030, firstly in order to allow for flexibility in the event that we do not receive two cluster submissions which can credibly be operational by the mid-2020s, and secondly to ensure greater visibility on the readiness of projects that could be operational this decade.

In order to assess whether a cluster submission meets this eligibility criterion, BEIS will refer to the Commercial Operation Date (COD) stated in the cluster's submission.

[8] We in turn define a T&S network as a set of onshore pipelines, offshore pipelines and an associated offshore storage facility. The pipelines must be capable of transporting CO_2 to the storage site (for example a saline aquifer or depleted oil and gas field) that must be able to store this CO_2 safely and permanently.
[9] Pale Blue Dot: Progressing Development of the UK's Strategic Carbon Dioxide Storage Resource (2016).

Located within the UK

As set out in the consultation, this criterion reflects the UK government's commitment to supporting decarbonisation across the UK.

As well as the UK-wide net zero commitment, CCUS deployment can support both Scotland and Wales in meeting their net zero targets of 2045 and 2050 respectively. We will continue to engage with each of the devolved administrations to develop our approach the delivery of CCUS across the UK. In order to facilitate this work, we continue to be open to any CCUS projects across the UK identifying themselves to us.

Meets the definition of a CCUS cluster

We have confirmed our provisional position that meeting the definition of a CCUS cluster will be treated as a requirement for entry into the Phase-1 Cluster Sequencing process. We define a CCUS cluster as a T&S network (incorporating the onshore and offshore network and offshore storage facility) and an associated first phase of carbon capture projects.

This condition restricts entry to those clusters which can demonstrate a coordinated, full-chain submission. This reflects the inherent interdependency of the CCUS chain, as addressed in Section 1.3 of this document. As set out in the consultation, we may look to relax this criterion for future rounds of CCUS deployment, in order to allow for participation by clusters without an integrated CO_2 storage submission.

As per the timeline set out in Section 1.5 of this document, BEIS intends to make an announcement on 9 August confirming which cluster submissions have been assessed as eligible for entry into the Phase-1 Cluster Sequencing process. This eligibility assessment will be made on the basis of finalised cluster submissions, to be received by 9 July.

Section 3: Submission guidance and evaluation

3.1 Submission structure

Clusters must provide completed copies of each of the submission forms found on the Phase-1 landing page, along with supporting evidence where relevant, to be considered under the Phase-1 process. The four forms required are as follows:

- Annex A – Cluster Plan: this document consists of a series of key questions relating to the details of the cluster submission. The Cluster Plan (and associated supporting documentation) will form the primary basis for scoring under the deliverability, emissions reduction and learning and innovation criteria, and will supplement the two templates described below in assessing against the economic benefits and cost criteria. Our intention in designing the Cluster Plan document is to avoid making the process unnecessarily onerous for clusters, and to allow for references to supporting documentation, rather than reproduction of information, wherever possible. This supporting documentation should be referenced within the Cluster Plan and submitted alongside it, via the online submission portal.
- Annex B – Economic benefits template: this document requires clusters to provide a range of key data inputs, which are used to assess a submission's potential for generating direct, indirect and induced economic benefits. This template forms the primary basis of assessment against the economic benefits criterion. The template allows space for the cluster to explain the underlying evidence and assumptions that have been used to generate the estimates.
- Annex C – Cost considerations template: this document requires clusters to input a range of information regarding the lifetime costs of their submissions. Along with information provided in the Cluster Plan, this template is used to calculate a combined Levelised Cost of Abatement (LCOA), which is the primary metric for assessment against the cost considerations criterion.
- Annex D – References matrix: this document enables clusters to cross-reference the additional evidence and documents provided with the questions in the Cluster Plan. This will help to ensure all relevant documents are being considered within the assessment.

We would encourage clusters to be aware of the word limits attached to each question in the Cluster Plan. Any information provided above the word limits will be removed before information is provided to assessors and will not count towards the score.

Each of these components must be uploaded by the Cluster Lead through the online submission portal. In addition, the Cluster Lead is required to provide a range of further information directly via the portal, including:

- Corporate information relating to the Cluster Lead and its parent company/companies (if applicable).
- Details for the Cluster Lead's project director.
- Declarations in relation to:

- Compliance of the Cluster project with equalities obligations.
- Applicability of either mandatory or discretionary exclusions to the Cluster Lead organisation.
- The accuracy of any and all information contained within the submission.

Please note that all information requests within the portal should be taken as relating only to the Cluster Lead organisation, unless clearly indicated otherwise. After submitting, clusters will be notified via email to confirm that the submission has been received by BEIS.

Please also note that BEIS reserves to right to use any piece of information provided in any section of the submission to influence any component of the Phase-1 scoring to which it is pertinent.

3.2 General considerations

Credibility and consistency of information

In seeking to identify clusters which are most suited to deployment in the mid-2020s, BEIS will place significant emphasis on the credibility and consistency of information provided. This will also be taken as evidence of the maturity of submissions.

With this in mind, we would advise clusters to ensure that all projections made in their Cluster Plan and wider submission (including deployment dates, capture volumes, and cost profiles) are robust and properly supported by the accompanying documentation that they submit. Across each of the evaluation criteria set out in Section 3.3 of this document, clusters should provide supporting information and evidence which demonstrates the credibility of projections made in their submission. The onus will be on the cluster to demonstrate to BEIS the credibility of information in a way that is considered to be most appropriate; this may be, for example, through evidence of board sign off and/or letters of intent.

Approach to scoring

Section 3.3, below, sets out the evaluation criteria which will be used in assessing the Phase-1 cluster submissions. Clusters will be allocated a score out of 10 against each of the criteria; the methodology for calculating these scores differs between the criteria and is explained in full detail below.

Where the clusters' scores against a particular criterion are determined at least partially via qualitative assessment – that is, for all criteria other than cost considerations – we have provided a set of scoring definitions to indicate how particular levels of performance against those criteria, or sub-criteria, map onto particular scores. In doing so we have defined five scoring categories; this approach reflects the necessary balance between providing as much visibility on the scoring methodology to clusters as possible, and retaining some level of flexibility and discretion, particularly in the event that there is a need to draw a distinction between two or more clusters which have performed similarly against a particular criterion.

3.3 Evaluation criteria

Table 2 below sets out the weightings allocated to each of the Phase-1 evaluation criteria. The headline criteria themselves are unchanged from the consultation:

Table 2: Phase- 1 evaluation criteria

Criterion	Weighting
Deliverability	30%
Emissions Reduction Potential	25%
Economic Benefits	20%
Cost Considerations	15%
Learning and Innovation	10%

Clusters' overall scores will be calculated using their final scores against each criterion, which will then be combined according to their associated weightings, as set out above.

Deliverability (30%)

The deliverability criterion will consider the cluster's capability and capacity to deliver its projects successfully and the timeline on which the cluster and associated capture projects will come online.

The primary tool for assessing against the deliverability criterion will be the cluster's adjusted Commercial Operation Date (COD). We define the COD as the date when ongoing injection of CO_2 emitter volumes into the store begins[10]. In order to determine the adjusted COD, the COD stated in the Cluster Plan will be assessed by our advisors and adjusted according to our level of confidence in this date. In determining the level of adjustment required, assessors will consider the credibility of both the T&S and capture submissions, with the onus on the applicant cluster to provide sufficient supporting information to demonstrate this credibility. In this way, the adjusted COD acts as a combined measure of deliverability and maturity on the one hand, and pace on the other.

By considering the adjusted COD along with a more general assessment of the cluster's deliverability profile, we will assign a deliverability score based on performance against two key factors:

- Government's confidence that the cluster is capable of delivering in the mid-2020s, such that a cluster will score higher the greater the level of confidence in delivery in this period.
- The cluster's pace of delivery within the mid-2020s, such that a cluster with an adjusted COD in, for example, 2024 will score higher than a cluster with an adjusted COD in, for example, 2026.

[10] This should not be taken to represent the definition of the COD that will be used within the T&S business model.

In assessing against this criterion, clusters will be credited for providing clear and credible evidence of the following in particular:

- The capability and the organisational structure of the Cluster Lead and the companies developing the projects within the cluster.
- An integrated project plan with strong schedule logic that incorporates activity durations which are judged to be within reason, for example in comparison to similar activities undertaken on other projects and taking into account any applicable processes, such as acquiring any necessary planning permissions or for procuring suppliers. The critical path and relevant lead times should be clearly identified with floats incorporated as required.
- Progress to date against the stated project plan, with documentation and engineering information provided to demonstrate that the cluster is progressing to plan.
- Progress in applying for and/or securing a CO_2 storage licence and permit; if not yet secured, this should be properly accounted for in the project schedule.
- Accurate identification of the critical planning and consent stages, with these properly accounted for in the project schedule.
- At a project level, financing arrangements for progressing the project and the status of key commercial agreements need to realise the project. A practical organisational structure in place to connect the various entities involved in the cluster, enabling them to operate together effectively. This may include Memoranda of Understanding, collaboration agreements or draft Heads of Terms being in place between emitter projects and the T&S entity– however, we recognise that the level of commitment in place between cluster partners may naturally vary depending on the cluster's stage of development. Off-takers for hydrogen plants will also be considered.
- At a company level, business plans and how the project fits with the company's overall strategic ambition as well as information relating to financial health.
- Detailed registers in place to accurately identify key risks, and with mitigations populated. The cluster should demonstrate where mitigations are already in place and present a clear implementation plan where they are not. This should take account of cyber risks to both the project and the resilience of the infrastructure once commissioned, demonstrating secure by design principles. The cluster should also provide evidence of the steps taken to identify and assess cyber risks and the mitigations that will be put in place to ensure strong cyber resilience.
- Clear adherence to safety regulations, and identification and mitigation of any residual safety risks such that they are as low as reasonably possible across all components of the cluster.
- Ability of cluster organisations to access the proper level of resource and capability necessary to deliver their respective projects. Specifically, the following may be taken as evidence of this:
    - Key contracts in place with core suppliers – or, at a minimum, substantial engagement with prospective suppliers.
    - Evidence of engagement with technology licensors.
    - Demonstration of the Cluster Lead's competence to manage and coordinate a programme of the scale and complexity of a CCUS cluster.

- Assessment of capability and capacity of supply chains to deliver required materials, goods, and skills.

The Cluster Plan includes further prompts as to the specific pieces of supporting evidence which may be beneficial in supporting the cluster to perform well against the deliverability criterion.

In light of the responses and supporting evidence provided, assessors will assign a final score to the cluster by reviewing both the corrected COD and general deliverability assessment in aggregate, considering all information provided by the cluster as well as its credibility. The scoring categories for this criterion are defined as follows:

Table 3: Scoring Categories – Deliverability

Score	Description
Low (1-2)	• Evidence and responses provided in relation to one or more components of the Cluster Plan are missing or incomplete. • Little to no confidence in the ability of the cluster to deploy in the mid-2020s, or in its delivery capability more generally.
Low-Medium (3-4)	• Adequate responses given to all relevant questions, with some level of supporting evidence provided. • Some possibility that the cluster may be capable of deployment in the mid-2020s, but limited confidence or certainty that this is attainable.
Medium (5-6)	• All relevant questions in the Cluster Plan are fully answered, with a reasonable level of supporting evidence provided. • Responses and supporting information give a reasonable level of confidence in the ability of the cluster to deploy in the mid-2020s. • However, there may be reservations regarding the credibility of some supporting information, or the cluster's capability in certain delivery areas.
Medium-High (7-8)	• Comprehensive responses given to all relevant questions in the Cluster Plan, supported by a reasonable level of largely credible supporting evidence. • Responses and supporting information give a strong level of confidence in the ability of the cluster to deliver in the mid-2020s, but potentially less confidence in its ability to deliver at pace within that window.
High (9-10)	• Comprehensive responses given to all relevant questions in the Cluster Plan, with clear and credible evidence provided to demonstrate delivery capability. • Responses and supporting evidence give a high degree of confidence in the ability of the cluster to support a COD in the mid-2020s, and to deliver at pace within that window.

Emissions reduction (25%)

The emissions reduction criterion will assess the potential offered by each cluster to generate reductions in CO_2 emissions. We further divide and sub-weight this into three sub-criteria:

- CO_2 volumes to 2030 (60%)
- Potential for future abatement beyond 2030 (30%)
- CO_2 intensity (10%)

CO_2 volumes to 2030

Clusters are asked to provide quantitative emission capture profiles for their capture plants up to 2030, via a template included in the Cluster Plan. The project with the highest stored volumes before 2030 will be assigned 10 points with the remaining clusters assigned a score pro-rated to this according to their stored volumes. The stored volumes used for this criterion will be the stored volumes from primary emitters; we define primary emitter projects as those scheduled to be operational before 2030 and have at least an MoU in place between themselves and the T&SCo.

This score will then be subject to application of a "credibility factor" which will be used to adjust the original score as a multiplier. This credibility factor will reflect both the relative credibility and the certainty of the cluster's ability to store volumes before 2030. The areas which will be considered to define this credibility factor will be the credibility, associated certainty and relative importance to the cluster of:

- The maturity of primary emitter projects.
- Technical credibility, including flexibility of the project to changes in capture volumes, system conditions or spec, injectivity/short-term capacity of store, T&S availability, emitter capture efficiency, operational risks to T&S capacity and levels of integration.
- The financial credibility of emitters (as well as the financial health of other relevant companies such as any group parent company), the robustness of company business plans relevant to the project & project level financing plans.
- Alternative emitters to those included in the Phase-1 Cluster Plan and diversity of emitter projects included in the Phase-1 Cluster Plan. This includes both diversity between the CCUS applications (industry, power, hydrogen and engineered Greenhouse Gas Removal (GGR) technologies[11]), and within those applications (e.g. diversity of sectors within industrial capture).
- Credibility of off-takers (where applicable). For example, that there is a known off-taker with an MoU in place. We would also be looking for the Cluster to be able to demonstrate the financial health of the off-takers.
- Any other factor that BEIS considers to materially impact the credibility of an individual emitter or the emitter profile.

The credibility factor will be between 0.5 and 1. BEIS will also remove any emitters that are clearly not credible and may also correct the operation date of any individual emitter, altering the volume profile accordingly.

[11] Note that this includes bioenergy carbon capture and storage (BECCS) and Direct Air Capture Capture and Storage (DACCS).

Potential for future abatement beyond 2030

It is important for government to consider the potential future expansion of the clusters and their associated CO_2 storage capacities, as in order to reach the net zero target we will require a significant increase in the level of CCUS as we approach 2050. However, due to the greater uncertainty around longer-term projections for emissions reduction, clusters are asked in the Cluster Plan to present a qualitative account of their plans for additional emissions abatement beyond 2030. This may include the development of additional CO_2 stores/T&S network capacity, additional capture projects, or future CO_2 shipping capability.

Whilst assessment against this component of the emissions criterion will primarily be qualitative, clusters will nevertheless be asked to give a projection of their long-term abatement potential in annual capture volumes.

In order to effectively demonstrate their capacity to deliver additional CO_2 abatement beyond 2030, cluster submissions should reference both specific future emitter projects which are expected to come into operation after 2030 and their longer-term abatement potential more broadly. As with other criteria, BEIS will make an assessment of the credibility of the cluster's projected long-term abatement volumes, which will be factored into the scoring process. The assessment will also consider whether storage sites are suitably sized for the expected CO2 volumes and whether sufficient cost is included for expansion of stores.

The future abatement potential sub-criterion will be assessed qualitatively, with the scoring categories defined below:

Table 4: Scoring Categories – Emissions Reduction – Future Abatement Potential

Score	Description
Low (1-2)	• Responses and evidence provided in relation to one of more relevant components of the Cluster Plan are missing or incomplete. • Little to no effective demonstration of the cluster's future CO_2 abatement potential.
Low-Medium (3-4)	• Some possibility that the cluster may be capable of delivering meaningful additional CO_2 abatement beyond 2030, but limited confidence or certainty that this is attainable. • Limited scope for the cluster to deliver future abatement at the levels necessary to materially contribute to meeting the UK's net zero commitment.
Medium (5-6)	• Responses and supporting information give a reasonable level of confidence in the ability of the cluster to deliver increasing CO_2 abatement beyond 2030. • Some scope for the cluster to deliver CO_2 abatement at volumes considered reasonable in the context of the UK's net zero commitment.

Score	Description
Medium-High (7-8)	• Responses and supporting information give a strong level of confidence in the cluster's plan for scaling up its CO_2 abatement beyond 2030. • Cluster has the potential to deliver additional CO_2 abatement at volumes considered significant in the context of the UK's net zero commitment.
High (9-10)	• Clear and credible evidence provided to demonstrate an ambitious and deliverable approach to increasing CO_2 abatement levels in the cluster over time. • High level of confidence in the cluster's potential to achieve the high abatement levels necessary to make a material contribution to meeting the UK's net zero commitment.

CO_2 intensity

The Carbon Intensity criterion is a measure of how much CO_2 has been emitted during the construction and operational phases of the capture, transportation, and storage infrastructure in addition to the measures, processes and design optimisation performed by the cluster to ensure CO_2 emitted by the cluster is as low as reasonably possible.

The factors influencing carbon intensity that will be considered are:

- Operational Carbon Intensity, defined as g/CO_2 emitted per kg/CO_2 stored, of individual emitters and how these compare with benchmarks and similar emitter designs submitted within the cluster or forming part of other clusters.
- Operational Carbon Intensity of the T&S system and how this compares against different clusters bearing in mind that this is likely to be a function of store location and type.
- Availability of the T&S system and individual emitters.
- The process by which the cluster is reducing embedded and operational emissions to be as low as reasonably possible.

The absolute Carbon Intensity of the cluster will also be considered with lower values viewed favourably, however, this will be balanced with reference to the cluster emitter types.

Table 5: Scoring Categories – Emissions Reduction – CO_2 Intensity

Score	Description
Low (1-2)	• Responses and evidence provided in relation to one of more relevant components of the Cluster Plan are missing or incomplete and/or • The cluster has no, or very limited, insight into the embedded and operational emissions or processes related to emissions reporting or reduction, cannot demonstrate the impact of design decisions on emissions, and has not considered how to incentivise the supply chain to reduce emissions.

Score	Description
Low-Medium (3-4)	• The cluster has some insight into the embedded and operational emissions of processes related to emissions reporting or reduction, and can offer some demonstration of the impact of design decisions on emissions, but has not considered how to incentivise the supply chain to reduce emissions.
Medium (5-6)	• The cluster has good insight into the embedded and operational emissions of processes related to emissions reporting or reduction, and can offer demonstration of the impact of design decisions on emissions, but has not considered how to incentivise the supply chain to reduce emissions.
Medium-High (7-8)	• The cluster has optimised their design based on cost, schedule and carbon emissions and recorded most decisions with reference to their impact on emissions. • The cluster has started to consider processes to reduce the carbon intensity of tier one and tier two contractor procurement and construction/operational activities.
High (9-10)	• The cluster has fully optimised their design based on cost, schedule and carbon emissions and recorded all decisions with reference to their impact on emissions. • The cluster has also defined a process to reduce the carbon intensity of tier one and tier two contractor procurement and construction/operational activities.

As there are multiple sub-criteria within the over-arching emissions reduction criterion, these will be scored separately. Abatement volumes to 2030 will be scored proportionally, with the best-performing cluster scoring 10, and the remaining clusters scored relative to their respective adjusted abatement volumes. Future abatement potential and CO_2 intensity of infrastructure will be scored according to the categories described above.

The overall score for Emissions Reduction will then be calculated according to the sub-weightings set out above.

Economic benefits (20%)

This criterion aims to assess the potential contribution that the cluster can make to the government's objective of supporting clean, resilient and sustainable economic growth as we build back from the impacts of COVID-19. Clusters should look to demonstrate the contribution the cluster can make to the UK economy and government's levelling up agenda.

Assessment against this criterion will be undertaken on the basis of information provided through the Economic Benefits Template (Annex B) and answers provided within the Cluster Plan alongside any associated supporting documentation.

Clusters will be assessed against the economic benefits criterion with reference to three key factors:

- Direct economic benefits, which we define as benefits relating directly to the developer's own activity, and/or the activity of primary contractors.
- Indirect economic benefits, which we define as benefits relating to the remaining supply chain, outside of the developer and its primary contractors.
- Induced economic benefits, which we define as the wider economic benefits that are brought about by the development and operation of the cluster in that local area.

Direct economic benefits

Our approach, as set out in the economic benefits template, will consider direct benefits in terms of job creation: the number of jobs the cluster can create and safeguard, when these jobs will be realised, and the overall wage premium generated by these jobs. The data will be evaluated using standard Green Book appraisal methods. The template will also collect data on the skill level of jobs and evaluate the wage uplift generated via plans for future upskilling and apprenticeships, to the extent that these factors support the delivery of the cluster.

The economic benefits template is structured to allow clusters to provide data for both the direct and indirect jobs they expect to provide through cluster development and operations. The data provided should be separated between T&S and each associated emitter project. As with other criteria, the onus will be on the cluster to provide sufficient supporting information and justification for any assumptions made, and assessors will be instructed to score accordingly.

Indirect economic benefits

Here, as well as the indirect jobs information provided within the Economic Benefits template, clusters should seek to demonstrate how their plans and processes will:

- Develop the regional skills and capabilities to ensure the skills are in the appropriate location to support delivery of the Cluster Plan.
- Ensure all possible suppliers, including SMEs, are aware of planned work and are able to tender for such work.

Induced economic benefits

In line with the commitments made in the Ten Point Plan and the government objective to drive local and regional growth to level up across the UK, clusters should ensure their responses address their contribution to economic growth within the local area, in line with the following key strategic priorities:

- Synergies with other decarbonisation programmes and potential to be a 'SuperPlace': We define a SuperPlace as a low carbon hub of technological development where CCUS, renewables and hydrogen congregate. This could be demonstrated through, for example, the use of blue hydrogen produced in clusters as an energy vector in that local area such as Hydrogen for Heat trials/pilots, or through the mapping of a broader decarbonisation pathway for the region, identifying the economic benefits and opportunities of decarbonisation, as well as the development of skills required to realise these benefits.
- Regeneration and community renewal: clusters should consider how they can contribute to improving and widening the economic benefits associated with their development and operation to local communities. This could include but is not limited to, for example, impacts on air quality, increased attractiveness to other businesses, local transport links

or land value. Clusters should provide evidence of any wider economic benefits that they deem to be relevant. Any engagement with local communities or institutions that has taken place, or will take place, in support of these plans will be seen as beneficial.

- Equality and inclusion: clusters should consider how they can ensure the diversity and inclusivity of their workforce, as well as how to incorporate hiring practices which do not disadvantage those with protected characteristics.

The economic benefits criterion will be scored in aggregate, where all information provided by the clusters across both the Cluster Plan and Economic Benefits template can be considered and contribute to a score out of 10. Scoring categories for this criterion are defined below:

Table 6: Scoring Categories – Economic Benefits

Score	Description
Low (1-2)	• The Cluster submissions demonstrate only minimal levels of economic benefit or no economic benefit at all. • Limited evidence provided which gives little to no confidence in the ability of the Cluster to implement and realise any consequential economic benefits.
Low-Medium (3-4)	• The cluster submission demonstrates limited levels of economic benefit. • Supporting evidence around economic benefits may be limited in places but gives some confidence in the ability of the Cluster to implement and realise the expected plans and economic benefits.
Medium (5-6)	• The Cluster submission demonstrates a reasonable level of economic benefit. • Range of supporting evidence provided, giving confidence in the ability of the Cluster to implement and realise the expected plans and economic benefits.
Medium-High (7-8)	• The Cluster submission demonstrates a good level of economic benefit. • Good level of supporting evidence provided throughout, giving a good degree of confidence in the ability of the Cluster to implement and realise its projected plans and economic benefits.
High (9-10)	• The Cluster submission demonstrates a significant level of economic benefit. • Comprehensive and highly credible supporting evidence gives a high degree of confidence in the ability of the Cluster to realise its plans and economic benefits.

Cost considerations (15%)

Through the cost considerations criterion, BEIS will determine a Levelised Cost of Abatement (LCOA) considering overall lifetime costs of the cluster (emitters and T&S) and the overall carbon abatement in the proposed Cluster Plan.

The calculation will be performed on the basis of the summated costs and carbon abatement of all projects within the Cluster Plan. The calculation considers only the costs; it does not cover financing costs or revenues as these are dependent on the finalisation of the relevant business models and subsidy support mechanisms throughout the cluster chain.

$$\text{LCOA} = \frac{\text{PV(Cluster Lifetime Costs)}}{\text{NPV(Cluster Lifetime } CO_2 \text{ Abatement)}}$$

Lifetime costs shall cover development costs, capital costs, and operational costs including replacement costs on an annual basis across the complete construction and operational period of the cluster.

The NPV of the cluster's lifetime CO_2 abatement will be calculated on the basis of the adjusted volumes determined in assessing against the Emissions Reduction criterion, as described above.

The LCOA model is expressed through the Cost Template (Annex C), which must be filled out by clusters as part of their submission. Further details and instructions are included within the template. Annex C includes references to a 3.5% discount rate; this is a social discount rate that has been used as a modelling assumption. It is not a reflection of the financing cost that we think will be achieved.

The cost considerations criteria will be scored proportionally, with the cluster with the lowest LCOA scoring a 10 and all other clusters scored relative to that based on their respective LCOA values.

Learning and Innovation (10%)

The creation and sharing of knowledge from early CCUS deployment will be a crucial step in de-risking and enabling cost reduction for future CCUS projects. The sharing of information will also promote innovations and collaboration both within and between clusters. Within this criterion government will be looking for a cluster to demonstrate:

- A strong diversity of capture applications (e.g., power, industry, hydrogen, GGRs) and within application (e.g., type, sector, off-takers) as well as the capability to incorporate shipping of CO_2. Note that BEIS will consider the credibility of each particular emitter, in line with the credibility factors set out under emissions reduction above, when making an assessment of the diversity of capture applications.
- That it will deliver replicability benefits, including having plans in place to reduce future costs of all CCUS clusters and projects.
- That it will contribute to the development of innovative technologies, including those with the potential to develop wider markets.
- That it will generate and share knowledge. Here, government will be considering both the Key Knowledge Deliverables (KKDs) that will be generated and shared as well as the plans the Cluster has in place to proactively disseminate this knowledge in a way to benefit future clusters and projects. This may include working with government, research institutions, Universities, Local Enterprise Partnerships, Higher Education Colleges, and businesses to maximise impact.

- The ability to unlock or add to synergies with other decarbonisation initiatives within the region such as the Hydrogen for Heat trials/pilots, green hydrogen projects or green transport hubs in line with the SuperPlaces concept.
- Any contribution it intends to make to government's hydrogen ambition to produce 1 GW and 5 GW of low-carbon hydrogen by 2025 and 2030, respectively.

Government will assess the range of technologies that would be developed under each cluster submission, on the basis that a wider range of technologies will naturally support a broader set of learnings for future rounds of deployment.

Previous government CCUS funding allocations have resulted in important information sharing through KKDs. We would expect a similar level of information sharing as in previous funding allocation rounds[12]. For Phase-1, the onus will be on the cluster to describe what KKDs it will produce and which ones it will be willing to share (either in full or redacted as appropriate). However, specific KKDs may be introduced at a later date, for example, within Phase-2.

We are also not prescribing a specific level of information sharing, but clusters willing to share more information, and proactively work to maximise the benefits of information shared, will be advantaged through the scoring.

Table 7: Scoring Categories – Learning and Innovation

Score	Description
Low (1-2)	• Partial or missing responses to relevant components of the Cluster Plan, with limited supporting evidence. • Submission lacks a clear commitment to information-sharing. • Little to no confidence in the ability of the cluster to support meaningful learnings, or to implement and realise its learning and innovation plans.
Low-Medium (3-4)	• Some confidence in the ability of the cluster to support meaningful learnings and to realise its learning and development plans. • Indication of willingness to share key information.
Medium (5-6)	• Good confidence in the ability of the cluster to support meaningful learnings and cost reductions and to realise its learning and development plans. • Clear indication of willingness to share information.
Medium-High (7-8)	• Full range of supporting information gives good confidence in the ability of the cluster to implement and realise learning and innovation plans for a range of applications, and to support meaningful learnings and cost reductions for future rounds of CCUS deployment in doing so. • Commitment to sharing information.

[12] www.gov.uk/government/collections/carbon-capture-and-storage-knowledge-sharing

Score	Description
High (9-10)	• High degree of confidence in the ability of the cluster to realise learning and innovation plans for a wide range of applications, and to support meaningful learnings and cost reductions for future rounds of CCUS deployment in doing so. • Strong commitment to sharing of information.

3.4 Portfolio considerations

In addition to the core evaluation criteria described above, we have confirmed the position set out in the consultation that in making the Phase-1 provisional sequencing decision, government will consider several factors which relate specifically to how the Track-1 clusters perform in combination, rather than individually. These factors will be considered separately from the individual cluster scoring process described above.

The portfolio factors which will be considered are as follows:

- Presence of multiple stores: we believe it to be important that the clusters sequenced onto Track-1 offer multiple CO_2 storage sites. Having multiple stores operational in the mid-2020s is important in allowing for storage resilience and could allow a cluster the opportunity to transport and store its CO_2 elsewhere, in the unlikely event of a permanent fault, or the more likely event of a temporary outage, at its own store. In addition, having multiple stores operational may allow for the relaxation of the storage requirement for future rounds of CCUS deployment, including Track-2.
- Diversity of storage types: a key objective of deploying the Track-1 clusters is to generate learnings and improve cost certainty for future rounds of CCUS deployment. Different store types – for example saline aquifers and depleted oil and gas fields – can support different learnings. Having a diverse set of CO_2 stores in Track-1 will maximise the proportion of future clusters which are able to benefit from these learnings.
- Diversity of emitter projects: as above, we are keen to ensure that the Track-1 clusters can support a range of different capture applications in order to maximise learnings for future deployment. In assessing the Track-1 cluster combination against this factor we will consider diversity across the main types of application (industry, power, hydrogen, and GGRs), diversity *within* those applications (for example emitters from different industrial sectors), and diversity of hydrogen off-takers, such as establishing credible links to or participation in Hydrogen for Heat trials/pilots where applicable.
- Affordability: to be sequenced onto Track-1 clusters will have to be affordable in terms of their draw on both capital and revenue envelopes. Clusters will need to be affordable against these constraints individually but also in combination with any other cluster(s) sequenced onto this first track. The cluster should submit what it considers to be its core concept to BEIS for evaluation.

It is important to note that these portfolio considerations are not necessarily absolute requirements, but a range of considerations which may be taken into account as part of the sequencing process.

3.5 Decision-making process and announcement

Once clusters have provided their submissions and these have been assessed according to the criteria described above, government will:

- Identify the highest-ranked cluster (Cluster 1) according to the five individual evaluation criteria. This cluster will automatically be sequenced onto Track-1.
- If the second-highest-ranked cluster (Cluster 2) performs well against the portfolio factors in a pairing with Cluster 1, this cluster will also be sequenced onto Track-1.
- However, if Cluster 2 does not perform well against the portfolio factors in a pairing with Cluster 1, but the third-highest-ranked cluster (Cluster 3) does, government will have the option – but not the obligation – to sequence the third-highest-ranked cluster (Cluster 3) onto Track-1 instead.
    - The final decision on whether to sequence Cluster 3 over Cluster 2 would be ministerial and would take into account the clusters' performance against both individual and portfolio factors.

As per the timeline set out in Section 1.5 of this document, government will aim to announce the outcome of the Phase-1 provisional Cluster Sequencing process in October 2021. The announcement is expected to consist of two key components:

- Government expects to name a minimum of two clusters which have been sequenced onto Track-1.
- In parallel, government expects to name a list of reserve clusters consisting of any clusters which have met the eligibility criteria and performed to a good standard against the evaluation criteria, but have not been sequenced onto Track-1.

Reserve clusters

By naming a set of reserve Track-1 clusters, government would retain the flexibility to alter the provisional Track-1 sequencing decision under certain circumstances.

Firstly, government may choose to discontinue engagement with a cluster in Track-1 and in such circumstances reserves the right to engage with one of the reserve clusters instead. Some key circumstances in which this situation might arise are as follows:

- In the event that it becomes clear in the course of engagement with projects within a Track-1 cluster that the cluster is no longer deliverable. Reasons for this conclusion might include discovery of a severe technical or commercial flaw which significantly impedes the deliverability of the cluster.
- In the course of engagement with projects within a Track-1 cluster it becomes clear that the benefits described in that cluster's Phase-1 submission are unattainable – for example if cost projections substantially increase, or if projected CO_2 capture volumes fall.

If it emerges in the course of negotiations with projects in the provisionally sequenced Track-1 clusters that government's capital and revenue affordability envelopes could support an additional cluster(s), government may choose to expand Track-1 by elevating a reserve cluster.

Ultimately, the decision on whether to alter or expand Track-1 will be discretionary, and will sit with ministers. If government does opt to alter or expand Track-1 and more than one reserve cluster is available, the decision on which of the reserve clusters is elevated to Track-1 will be made primarily on the basis of the reserve clusters' individual evaluation scores, as well as how they perform as a portfolio with the remaining Track-1 cluster(s) according to the factors described in Section 3.4 of this document. BEIS ministers will retain discretion on precisely how these factors will be applied, and on the final decision of which cluster to elevate to Track-1.

Section 4: Interaction with Phase-2

4.1 Phase-2 overview

In Phase-2 of the Cluster Sequencing Process, government expects to make specific awards of funding to individual projects within, or that could feasibly connect to, the clusters sequenced onto Track-1 in Phase-1 – in doing so, the provisional Phase-1 sequencing decision will be made final.

We have confirmed the position set out in the consultation and referenced in Section 1.4 of this document, that the Phase-2 application process will be open to all prospective capture projects which could feasibly connect to one of the clusters provisionally sequenced onto Track-1, regardless of whether they featured on the submission submitted by that cluster. The core rationale for taking this approach, as described in the consultation, is as follows:

- In allocating capital and revenue support to emitter projects, government will require a process to ensure that this support is appropriately directed, in relation to government objectives. Having an open Phase-2 recognises the potential for misalignment between the corporate objectives of the Cluster Lead and government's own priorities.
- Having multiple projects seeking support has the potential to drive better value for money outcomes for consumers and taxpayers, especially in an environment with significant cost uncertainties.
- The open approach allows a fair opportunity for all existing projects at the cluster location, and potentially at remote sites, to participate in the process, regardless of their affiliation with the cluster consortium. In addition, by signalling our openness to support unaffiliated projects, we hope to stimulate a potential pipeline of new projects in coming forward.

However, as mentioned in Section 1.4, government is mindful of the potentially negative impact of an open Phase-2 on both certainty for developers and information-sharing between individual emitter projects within clusters. With this in mind, we would emphasise:

- If a project is mature, fully integrated with the T&S and integral to the cluster, that project is likely to be well placed to perform well against Phase-2 project selection criteria.
- In addition, the timeline in Table 8 below states that capture project negotiations will begin from November 2021. As a result, we consider there is already flexibility built into the timeline to progress specific projects soon after the cluster decision, should government consider that to be the optimal outcome once all the relevant information has been received.
- Finally, if government does remove a project included on the original Cluster Plan and/or add an additional project to the Cluster Plan, government is committed to working with the Cluster Lead to ensure the implications for the delivery of the wider cluster are understood and considered accordingly.

We expect that Cluster Leads will support government in identifying the best value solution by co-operating in providing any necessary information on how any emitter which is selected at Phase 2 which is not named in its Cluster Plan could be integrated into its solution, for

example, updating its plans for obtaining relevant planning permissions, permits and other consents if required to support the Phase-2 process.

Next steps

As reflected in the timeline in Section 4.3 below, Phase-2 is expected to commence on 9 August. At this point, government intends to announce the clusters which have been assessed as eligible for consideration in the Phase-1 criteria – at the same time, we intend to issue a call for capture projects capable of connecting to the clusters assessed as eligible.

The application window for Phase-2 capture projects is expected to close one week after government announces its provisional decision on the composition of Track-1. For example, an announcement of the Phase-1 results on 25 October, as per the Phase-1 timetable in Section 1.5, would result in the Phase-2 application window closing on 1 November. Confirmation of this application deadline will be provided in the August Phase-2 Launch Document.

Each individual CCUS application offers a distinct package of government support, and as such will run a distinct Phase-2 allocation process. In this section, we set out the following for each application:

- Details of the support package expected to be available to projects entering into negotiations following the Phase-2 allocation process.
- Finalised eligibility criteria for projects seeking government support
- Early considerations in relation to the evaluation criteria, final details will be set out in the Phase-2 Launch Documents in August.

Note that the General Considerations in Section 1.6 apply equally to this section as they apply to the rest of this document.

Table 8, below, sets out the provisional timeline on which government will look to execute the Phase-2 allocation process.

Table 8: Phase-2 project allocation timeline

Date	Milestone
9 August	Announcement of Phase-1 eligibility assessment; launch of Phase-2 for capture projects
From 25 October	Announcement of provisional Phase-1 sequencing decision
One week after the Phase-1 announcement (from 1 November)	Deadline for Phase-2 submissions
From November onwards	Government will announce the Phase-2 decision on which capture projects will progress to negotiations.

Table 8 states that capture project negotiations will begin *from* November 2021 onwards. This is designed to give government the flexibility to respond to the Phase-1 cluster decision and the Phase-2 capture information received. Specifically, we think it is right that in a scenario in which an early, key project on the Cluster Plan has performed well in the assessment and

there are no other applicants in Phase-2 or any applicants that meet the eligibility criteria, that government should endeavour to progress the original Cluster Plan project through. Whereas in a scenario in which there is either a concern about an early Cluster Plan project and/or greater optionality of projects to choose from, we think it is right that government takes the time to reach an optimal allocation outcome for consumers and taxpayers.

Before any support is provided, in addition to the evaluation criteria, government may consider several factors which relate specifically to how the initial Phase-2 projects perform in combination, rather than individually.

Please note that the timelines described above should be treated as provisional at this stage. Government will retain the right to alter timelines if necessary, at any point during the process.

The considerations set out in this section apply to the final allocation process that would take place within Track-1 clusters. Whilst it can be assumed that some of the same considerations will apply later in the 2020s – for example for allocation to projects within Track-2 clusters – we expect that a greater degree of competition is likely to be feasible by that point. For Track-2 projects, we will consider reviewing the eligibility criteria. This might include, for example, amending the minimum operational start date to support projects that will be deployed later then the mid-2020s. We therefore do not consider it helpful or necessary to cement the Track-2 allocation process now but will provide more information on this topic in the October update.

Projects changing cluster

In line with Section 4 of the February Consultation we have retained the option for capture projects to change cluster in Phase-2. Specifically, whilst a capture project can appear on only one Cluster Plan in Phase-1, if that capture project's original cluster is not named onto Track-1 but the developer considers that it could feasibly connect to a cluster that has been sequenced onto Track-1, the Phase-2 application could be submitted for that Track-1 cluster instead.

4.2 Transport and storage

Allocation

By definition, there would only be one transport and storage submission included within each Cluster Plan. However, a 'Phase-2' would still be required for the Track-1 T&S projects, pursuant to which, government would conduct detailed due diligence and agree the specific amount of financing support required.

It is also important to highlight that BEIS sequencing the cluster onto Track-1 would not be sufficient to get the T&S submission to the point of commercial operation. Any T&S network will necessarily need to be compliant with all relevant laws and standards. Therefore applicants should be cognisant of any domestic and/or international legislative frameworks, that could affect the implementation of the T&S network.

In particular, the T&S project lead will also require:

- A Storage Licence and Storage Permit – obtaining the licence and permit would be the responsibility of the T&S project lead. The T&S project having Storage Licence and Permit, or at least a credible plan to obtain these, would count favourably towards the cluster within the Phase-1 sequencing process.

- The relevant planning and consents for the T&S network - obtaining the relevant planning and consents would be the responsibility of the T&S project lead. Having these in place, or a credible route to doing so, would count favourably towards the cluster within the Phase-1 sequencing process.

Support package

It is expected that the Track-1 clusters' T&S submissions would be eligible to receive the following support:

- An economic licence that grants the licensee a regulated revenue stream (the 'Allowed Revenue') facilitated by the right to charge a regulated fee (the 'T&S fee') to users. This licence would be awarded to the T&S project within the cluster locations sequenced in Phase-1. BEIS is continuing to develop the relevant processes and arrangements which will ensure that T&S projects on Track-1 can be kept on schedule to commence commercial operations by the mid-2020s Further details as to the design of the T&S business model can be found in the update on business models, published alongside this document.
- Access to the CIF, if required. One application of the Fund being considered is to reduce the potential revenue gap for T&SCo. By revenue gap we refer to difference between calculated allowed revenue and the revenue T&SCo can collect from early users for their proportionate use of the network. Further detail on this potential application can be found in the recent update on business models[13]. This would be traded off against other potential uses and be subject to further work on the design of the T&S business model.
- Government Support Package (if required) for specified low probability but high impact risks that the private sector would not be able to bear at an efficient price or indeed any price.

As set out in Section 2, government would continue to engage with reserve Track-1 clusters and other potential Track-2 clusters. This would include engagement with the T&S project of these clusters and would be to understand when further intensified support might best be timed.

We will continue to give consideration of the ownership model of the T&SCo as discussed in our T&S business model updates.

4.3 Industrial

Support package

Government will allocate support to industrial capture projects through the Phase-2 process. Projects that are selected for Track-1 following assessment and negotiations are expected to be supported through:

- An element of capital co-funding through the CCS Infrastructure Fund (CIF).
- An Industrial Carbon Capture Contract which will be funded from the exchequer.

[13] www.gov.uk/government/publications/carbon-capture-usage-and-storage-ccus-business-models

Projects will submit one application for Phase-2 selection and will automatically be considered for capex co-funding from the CIF and business model support through the industrial carbon capture contract. Further details on the business model can be found in the ICC business model update published in parallel[14].

Entering a bilateral negotiation does not mean that any funding or contract will be awarded. Any decision to award support would only be made subject to the successful completion of any negotiation and due diligence. Any negotiation would only conclude successfully once government has satisfied itself of the desirability of the project through a value for money assessment. BEIS reserves the right to interrupt or terminate these negotiations at any time.

Any support, including the awarded strike price and the reference price, will be published if offered. Commercially sensitive information will be redacted.

Funding would not be committed unless: all subsidy control requirements have been met, government is comfortable with any balance sheet implications, all relevant statutory consents have been complete, and government is comfortable that the project represents value for money for the consumer and the taxpayer.

Eligibility

The eligibility criteria set out below have been specifically developed for ICC projects entering Phase-2 of the CCUS Cluster Sequencing process. Only eligible projects will progress to the evaluation and bilateral negotiation stages of Phase-2.

For Phase-2 industrial project selection, projects will be considered eligible if they meet the following criteria:

- The project must be located in the UK.
- The project must meet the definition of an industrial facility.
- The project must have access to a carbon transport solution and storage site.
- The project must have commenced pre-FEED studies or be ready to commence pre-FEED no later than the end of December 2022.
- The project must be operational no later than the end of December 2027.
- The project must meet a range of technical eligibility criteria.

Further detail on each of these criteria is set out below.

Located in the United Kingdom

This criterion has been proposed to reflect UK government's commitment to support decarbonisation across the UK in line with our 2050 net zero target.

Meets the definition of an industrial facility

For the purpose of this criterion, an 'industrial facility' is defined as a:

- facility; or

[14] The ICC business model update can be found at: www.gov.uk/government/publications/carbon-capture-usage-and-storage-ccus-business-models

- part of a facility (including an industrial process or collection of industrial process(es)),

which manufactures products, treats materials and/or provides services for use in or as part of an industrial process or collection of industrial process(es) across one or more eligible sectors (being those sectors which are set out below).

Eligible sectors

In order to provide clarity for stakeholders, we are setting out which sectors we consider to be in and out of scope for the ICC business model for the first ICC Contract allocation round.

The industrial sectors we consider to be in scope include (but are not limited to):

- Midstream and downstream oil and gas (i.e. crude oil processing, natural gas processing, refining), iron and steel, cement, lime, and chemicals (including but not limited to fertilisers, pharmaceuticals, retrofitted CCUS-enabled hydrogen production and basic chemicals, such as ethylene and ethanol).
- Additionally, other sectors that are in scope are food and drink, non-metallic minerals, paper and pulp, nonferrous metals and other industry[15].
- Further details on retrofitted CCUS-enabled hydrogen production, Energy from Waste (EfW), and Combined Heat and Power (CHP) eligibility are set out below.

Sectors that are out of scope comprise:

- New build CCUS-enabled hydrogen production facilities.
- Upstream field operations for oil and gas.

The sectors outlined above that are in scope for the ICC business model fall within the Standard Industry Classification (SIC) codes 5 to 33 and 38. However, we do not propose limiting applications by SIC code and note that there may be cases where a project that is classified under one of these SIC codes is out of scope; this SIC code list is therefore provided for guidance only.

CCUS-Enabled Hydrogen – whilst retrofitting CCUS in existing “grey” hydrogen facilities is considered in scope for the ICC business model, new build CCUS-enabled hydrogen production facilities are out of scope. This is because hydrogen production in existing facilities has already proven to be commercially viable and the ICC business model will cover the extension to a capture component. Therefore, existing hydrogen facilities retrofitting CCUS will only be able to apply to the ICC business model for support and will be ineligible to apply for support under the business models in development for low carbon hydrogen. However, the business models for low carbon hydrogen will cover new build CCUS-enabled hydrogen production plants where commercial viability is less established.

Energy from Waste – our current minded-to position, subject to further work, is to support the application of CCUS at EfW facilities, including waste incineration facilities with readiness and/or plans to implement energy recovery, via the ICC business model. This will include existing EfW facilities where the majority of energy output will be used by an eligible industrial

[15] In this context, ‘other industry’ is defined as the subsectors of industry that are not listed here. Industry is typically defined as the various subsectors relating to manufacturing and refining, which fall under SIC codes 5 and 7 to 33 (excluding 24.46).

facility and/or facilities where the energy output will be sold offsite to heat networks or the electricity grid.

It is intended that support will only be provided to the most energy efficient waste management facilities (i.e. only those facilities with energy recovery included) and to plants that are existing or already fully committed to being established, so that this support does not encourage perverse outcomes such as incentivising the construction of new EfW facilities ahead of more environmentally friendly waste management methods.

Therefore, this position is for initial CCUS projects and is subject to change, and the government will continue to develop its approach over the coming months. We will continue to consider the interactions with wider government priorities, including net zero, waste strategy, air quality, clean transport, and value for money as we develop our approach.

Please refer to the ICC business model update published in parallel for more details on the rationale behind this position and wider considerations for the applicability of the ICC business model to these applications. We will look to provide further detail on the applicability and requirements of a EfW facility seeking support in further updates this year.

Combined Heat and Power – our minded-to position is that the ICC business model will support, in some instances, the application of carbon capture at CHP facilities. Support will only be provided for cases where a majority of energy output (electricity and heat) is to be used primarily for eligible industrial processes. This means that the CHP facility must be (i) embedded or adjacent to and primarily used by eligible industrial process(es), or (ii) embedded whereby flue gases (or capture streams) are combined with those from eligible industrial processes and are to be routed to the same capture facility. This includes cases where the CHP facility is owned by a different entity.

We are minded to apply a similar definition of “majority of energy” output as applied under other government schemes, where 70% or more of the energy output must be used for eligible industrial process(es).

Additionally, support will only be provided to the most efficient CHP facilities, for example, those part of the CHP Quality Assurance (CHPQA) programme. We will look to provide further detail on the applicability and requirements of a CHP facility seeking support in further updates this year.

Please refer to the ICC business model update published in parallel for more detail on the rationale behind this position.

Access to a carbon transport solution and storage site

The Phase-2 process is open to applications located across the UK regardless of geographic location and proximity to a T&S network. However, projects are expected to demonstrate that they have a carbon transport solution and access to a carbon store. Although access to a UK store is not a requirement for eligibility, projects which intend to store CO_2 overseas may be required to demonstrate the need to utilise overseas storage capacity ahead of UK capacity.

To demonstrate access, a project should have a provisional agreement with its preferred carbon store and transportation provider and clear plans for how to integrate with this infrastructure.

Pre-FEED stage or ready to commence pre-FEED no later than the end of December 2022

To ensure that a project is at an appropriate stage of development to align with a 2027 operational date (at the latest), it must at a minimum be at Preliminary-Front End Engineering Design (pre-FEED) stage or be ready to commence pre-FEED no later than the end of December 2022. This should be set out in a project execution plan as part of the application.

Pre-FEED is the stage in which a project would have undergone feasibility studies with further definition around cost estimates and technology specification to prove project feasibility and provide a basis to enter into the FEED stage. A more detailed overview of how pre-FEED is defined for industrial carbon capture projects will be provided in further publications.

Note that we would expect projects with earlier operational dates, such as 'anchor projects', to be further ahead with their FEED studies and for this to be a considered as part of project evaluation.

The project execution plan must also demonstrate that the project is sufficiently advanced in obtaining planning approvals and other permit consents to align with its delivery timeline, along with information on when any challenge period for a relevant consent expires. We reserve the right to delay or prevent entry into a contract where a valid challenge has been brought within the relevant time period.

Operational no later than the end of December 2027

This deadline has been proposed to align with the government's commitment to deploy CCUS in the UK in the 2020s, with at least two clusters to be operational by the mid-2020s. Note that this is intended as a backstop date; having a credible earlier operational date will count favourably towards the project in the evaluation stage. Note, projects with a later operation date than this can still be included within the Phase-1 Cluster Plan but would only be evaluated as part of the Phase-1 assessment.

Technical eligibility considerations

In order to be eligible for an ICC Contract, the industrial facility will need to be:

- Classed as an eligible CCUS technology.
- Able to sufficiently demonstrate the ability to reach high process capture rates of at least 85%.

Eligible CCUS technologies

In the December 2020 update, we noted that existing industrial facilities retrofitting carbon capture and new industrial facilities with carbon capture technology intrinsic to the process will be eligible for the ICC business model. We maintain this position, while recognising that new build CCUS-enabled hydrogen production facilities are an exception and are instead covered by the business models in development for low carbon hydrogen.

Both the full-scale application of CCUS and modular applications of CCUS are in scope and all carbon capture technologies (including pre- and post-combustion, oxyfuel and emerging technologies) are eligible.

In the December 2020 update, we set out the minded-to position that the ICC business model is intended to be applicable to carbon captured for the purpose of usage (CCU) when it results

in the permanent abatement of CO_2 emissions. This is to ensure alignment with government's net zero ambitions. However, we recognise that this brings additional areas of complexity to the ICC Contract and, as such, we are still considering this application of carbon capture and our position is subject to change as the policy in this area develops. There will be further work throughout the year to detail our approach to CCU.

Technologies that we do not currently consider to be in scope for the ICC business model include CCU resulting in temporary abatement due in part to the prioritisation of permanent abatement methods, Direct Air Carbon Capture and Storage (DACCS) and other GGRs A call for evidence on GGRs closed in February 2021. Government will set out further details on the evidence submitted in regard to investment frameworks for GGRs such as DACCS and BECCS in due course.

Process CO_2 capture rate

In the December 2020 update, we noted that we would expect a CO_2 capture rate (defined as the percentage of CO_2 captured from the specific gas stream directed to a carbon capture facility, i.e. the capture efficiency of the technology) of 90% to be achievable. However, further work this year (including through gathering stakeholder feedback) has highlighted that this may not be achievable for all industrial facilities across all sectors. This may be due to various reasons, including how the heterogeneity of industry may result in different expected capture rates in different sectors, varying levels of technological readiness and dilute CO_2 concentrations in the stream directed to the capture plant.

We have therefore revisited our expected CO_2 capture rate and now expect a minimum design capture rate (technology efficiency) of at least 85% for both new build and retrofit facilities, with consequences under the ICC Contract (including in relation to payment) if this threshold is not achieved.

While 85% represents a minimum CO_2 capture rate we would expect to see, higher capture rates will score more highly in the evaluation stage. This is to incentivise industry to optimise plant design to achieve higher capture rates and reduce residual emissions in line with net zero objectives. More stringent rules on capture rates may be applied to future projects following learnings from initial applications of carbon capture and as technologies improvements occur. We will continue to test the design of the business model to ensure that perverse incentives are not introduced and barriers to achieving energy efficiency are minimised.

Please refer to the ICC business model update published in parallel for more details on the rationale and a worked example of process capture rate.

Assessment and allocation

A project will submit one application for Phase-2 selection and will automatically be considered for capital co-funding and support through an industrial carbon capture contract.

First, a project will be assessed against the proposed eligibility criteria, which are set out in the section above. Then, those capture projects that pass the eligibility criteria will be assessed against the evaluation criteria to determine which projects will progress through to bilateral negotiations and full due diligence. At the end of that process, government will allocate and award an industrial carbon capture contract to each successful project and an element of capital co-funding. Some of the types of evaluation criteria and associated metrics government are considering are:

- **Emissions reduction potential** - projected capture rates as defined above (%) and projected volumes of CO_2 captured (Mt/year).
- **Cost** - affordability and levelised cost of abatement (£/tCO_2).
- **Maturity of project** – the stage of development, robustness of project execution plan and likely operation date.
- **Learning and proof of concept** - cost reduction and knowledge transfer strategy.
- **Supporting industrial activity and jobs** - projected contribution to employment and GVA, including supply chain plans.
- **Local community engagement** – level of engagement and level of support from local key stakeholders.

In addition to the possible evaluation criteria described above, a portfolio approach is being considered to help government balance several different factors at the evaluation stage including affordability, the decarbonisation options available to industrial emitters and sectors, industrial benefits, and the value of diversity of emitter projects and sectors.

Further details of the evaluation criteria, portfolio approach and supporting evidence required to assess projects will be published later this year.

4.4 Power

Support package

Projects that are selected following assessment and negotiations are expected to receive a Dispatchable Power Agreement (DPA) which will be funded through consumer subsidies. For further details as to the design of the power CCUS business model please refer to the concurrent business model update.

Entering a negotiation does not mean that a DPA will be awarded. Any decision to award support would only be made subject to the successful completion of any negotiation and due diligence. Any negotiation will only conclude successfully once government has satisfied itself of the desirability of the project through a robust and extensive value for money analysis. BEIS may direct the Low Carbon Contracts Company (LCCC) to enter into one or more power contracts. BEIS shall reserve the right to interrupt or terminate these negotiations at any time.

Contracts are only expected to be awarded in Phase-2 if government is comfortable with: the application of subsidy control requirements, any balance sheet implications, the status of any relevant statutory consents, and that the project represents value for money for the consumer and the taxpayer.

Any DPA, including the agreed payment terms, will be published if offered. Commercially sensitive information will be redacted.

Eligibility

The eligibility criteria set out below have been specifically developed for Phase-2 of CCUS Cluster Sequencing process. Only eligible projects will progress onto the evaluation and negotiations stage.

For Phase-2 project selection, power projects will be considered eligible if they meet the following criteria:

Located in the UK

This criterion has been proposed to reflect UK government's commitment across the UK to support decarbonisation in line with net zero.

Have one of the eligible configurations

The power CCUS plant must be gas-fired thermal generation, it could be new build (both generation and capture) or retrofit (applied to an existing generating station), and must be one of the following technology types:

- Post-combustion
- Pre-combustion (on-site)
- Oxy-fuelled combustion

Have a minimum abated capacity of 100MW

Through the DPA, we are aiming to bring forward Power CCUS plants that are able to make a significant contribution to electricity system decarbonisation. Therefore, projects that are eligible must be 100MW or over.

Have access to a CO_2 transport solution and CO_2 storage site

The Phase-2 process is open to applications across the UK regardless of geographic location and proximity to a T&S network. Projects are expected to demonstrate they have a CO_2 transport solution and access to a CO_2 store. Although access to a UK store is not a requirement for eligibility, projects which intend to store CO2 overseas may be required to demonstrate the need to utilise overseas storage capacity ahead of UK capacity. To demonstrate access, projects should have a provisional agreement with their preferred CO_2 store and CO_2 transportation provider, with clear plans on how they will integrate with a CO_2 store.

Have a minimum projected capture rate of 90%

At full load, of combustion gas for the BM unit (as this term is defined in the Balancing and Settlement Code), including any associated combustion sources required for the provision of energy input to the capture process (where applicable). Following the December 2020 update, we have now worked with technical advisers and experts to reach a conclusion on the necessary projected capture rate at full load. Technical evidence shows that plants can be designed for and can be reasonably expected to achieve at least a 90% capture rate.

Confirmed access to finance

Projects must be able to show information about their financing plan. Evidence required will be confirmed at a later date, for example this could include evidence on the status of discussions with financiers.

Able to undertake pre-FEED or ready to commence pre-FEED no later than December 2022

To assure projects are at an appropriate stage to align with 2027 operational dates, projects must at a minimum be at pre-FEED stage or ready to commence pre-FEED no later than

December 2022. Pre-FEED is the stage in which a project would have undergone feasibility studies with further definition around cost estimates and technology specification to prove project feasibility and provide a basis to enter the FEED stage. A more detailed overview of how pre-FEED is defined for power carbon capture projects will be provided in further publications. Note that we would expect projects with earlier operational dates to be further ahead with their FEED studies and for this to be a considered as part of project evaluation. To evidence how a project meets this criterion it is expected that a project execution plan or equivalent will be submitted. The plan will need to demonstrate a project's readiness and ability to meet key milestones. The project execution plan must demonstrate that the project is at a sufficient stage of progression in acquiring planning approvals and permit consents such that aligns with their delivery timelines. This will include the expiration of any challenge period for the consents. We reserve the right to delay or prevent entry into a contract where a valid challenge has been brought within the relevant time period.

Show that the project will be able to have relevant consents in place no later than 2024

Show that planning consents and applicable agreements have been obtained or demonstrate a proposed process and timetable that allows sufficient time for planning consents and applicable agreements for connecting to gas and electricity networks to be obtained in advance of entry into the DPA. Show that any applicable agreements for connecting to the gas and electricity networks can be executed on or before the target commissioning date for the installation. Timetabling should factor in the expiration of any challenge period for the consents and we reserve the right to delay or prevent entry into a DPA where a valid challenge has been brought within the relevant time period.

Show that the project is able to be operational no later than December 2027

This criterion has been proposed to align with government commitment to deploy CCUS in the UK in the 2020s, with at least two clusters by the mid-2020s. Note that this is intended as a backstop date; having an earlier operational date could count favourably towards the project evaluation stage. Note, projects with a later operational date than this can still be included on the Phase-1 Cluster Plan but would only be evaluated as part of the Phase-1 assessment.

Assessment and allocation

We can confirm the intended use of bilateral negotiations as the mechanism to allocate and award initial power carbon capture contract(s).

For the allocation phase, we are yet to decide on the scope of due diligence and negotiations. We are aiming to release further details on the allocation phase in a subsequent update. Whilst, eventually, we expect Dispatchable Power Agreements (DPA) could be awarded through a wider competitive process, we do not view that an award process such as this would be feasible for the first contract(s). Factors that have influenced this decision include the potential number of appropriately developed power projects, and that government may wish to consider a range of broad strategic factors through the assessment.

We will set out further detail on these additional assessment stages and supporting evidence required to assess projects in forthcoming publications.

Some of the types of criteria and associated metrics government are considering for evaluation are:

- **Emissions reduction potential** – projected capture rates (%).
- **Dispatchability** – capability to provide dispatchable generation capacity.
- **Cost** – affordability and DPA payment rates.
- **Maturity of project** – the stage of development and likely operation date.
- **Learning and proof of concept** – cost reduction and knowledge transfer strategy.
- **Supporting industrial activity and jobs** – projected contribution to employment and GVA, including supply chain plans.
- **Local community engagement** – level of engagement and level of support from local key stakeholders.

4.5 Hydrogen

Support package

Government will allocate revenue support to CCUS-enabled hydrogen plants initially through the Phase-2 process. Projects that are selected following assessment and negotiations are expected to receive revenue support through the hydrogen business model, which will be consulted on shortly. Projects will submit an application for Phase-2 selection to be considered for this support.

The Net Zero Hydrogen Fund (NZHF) was announced in 2020 to provide £240m of support for low-carbon hydrogen production between 2021 and 2025. Projects applying for revenue support through the Hydrogen Business Model may also wish to apply for capital co-funding from the NZHF. We would intend for the allocation process to be supportive of the desire for projects to combine funding in this way, and will confirm in due course with more details on the NZHF and how it interacts with the Hydrogen Business Model.

Further opportunities for allocation of revenue support to hydrogen plants outside of Phase-2 of the Track-1 Cluster Sequencing process will be considered in due course.

Eligibility

The eligibility criteria set out below have been specifically developed for hydrogen projects applying for Phase-2 of the CCUS Cluster Sequencing process. The eligibility criteria for future allocation of support via the Hydrogen Business Model and NZHF, including for other production types such as electrolytic hydrogen, will be considered in due course.

Following the Business Model consultation there may be further requirements that projects applying through the Phase-2 selection process will need to meet ahead of negotiations and final allocation of Business Model support.

For Phase-2 industrial project selection, hydrogen projects will be considered eligible if they meet the following criteria:

Located in the UK

This criterion has been proposed to reflect the UK government's commitment to supporting decarbonisation across the UK.

Be a new CCUS-enabled hydrogen production plant

For this allocation process, only new CCUS-enabled hydrogen production plants will be eligible to apply for revenue support via the Hydrogen Business Model. For existing hydrogen producers looking to retrofit using CCS technology, they are eligible to apply for the Industrial Carbon Capture (ICC) Business Model for revenue support. This is because the ICC Business Model has been developed with the aim of making it commercially viable for existing industrial facilities to decarbonise, including existing production of 'grey' hydrogen. The Hydrogen Business Model aims to make the production of new low carbon hydrogen viable so that it can compete against the high carbon alternative – either fuel or feedstock.

Further information on options being considered for a UK low carbon hydrogen standard, and how it may apply to projects seeking BEIS support, will be set out in the forthcoming consultation on Low Carbon Hydrogen Standards. The consultation has been informed by extensive industry engagement and, depending on the outcome, we intend this to support the assessment process of Phase-2 applications.

Has access to a CO_2 transport solution and a CO_2 storage solution

To support the government's ambition to establish the UK as a hub for hydrogen, the Phase-2 process is open to applications from CCUS-enabled hydrogen projects across the UK regardless of geographic location and proximity to a T&S network. Projects are expected to demonstrate they have a CO_2 transport solution and access to a CO_2 store. Although access to a UK store is not a requirement for eligibility, projects which intend to store CO_2 overseas may be required to demonstrate the need to utilise overseas storage capacity ahead of UK capacity.

To demonstrate access, projects should have a provisional agreement with their preferred CO_2 store and CO_2 transportation provider, with clear plans on how they will integrate with a CO_2 store.

Be at pre-FEED stage or ready to commence pre-FEED no later than the end of December 2022

To assure projects are at an appropriate stage to align with, at the latest, 2027 operational dates, projects must at a minimum be at Pre-FEED stage or ready to commence pre-FEED no later than the end of December 2022. This should be set out in a project execution plan as part of the application.

Pre-FEED is the stage in which a project would have undergone feasibility studies with further definition around cost estimates and technology specification to prove project feasibility and provide a basis to enter into the FEED stage. A more detailed overview of how pre-FEED is defined for hydrogen projects will be provided in further publications.

Note that we would expect projects with earlier operational dates, such as 'anchor projects', to be further ahead with their FEED studies and for this to be a considered as part of project evaluation.

The project execution plan must demonstrate that the project is at a sufficient stage of progression in acquiring planning approvals and permit consents such that aligns with their delivery timelines. This will include the expiration of any challenge period for the consents. We reserve the right to delay or prevent entry into a contract where a valid challenge has been brought within the relevant time-period.

Expected to be operational by no later than the end of December 2027

This criterion has been proposed to align with government's commitment to deploy CCUS in the UK in the 2020s, with at least two cluster by the mid-2020s. Note that this is intended as a backstop date; having an earlier operational date will count favourably towards the project at evaluation stage. Note, projects with a later operational date than this can still be included on the Cluster Plan submitted in Phase-1 but would only be evaluated as part of the Phase-1 assessment.

Has identified an off-taker or multiple off-takers

Hydrogen producers looking to apply for support will need to have identified off-takers for their hydrogen. This is to give assurance that the project is sufficiently developed in concept and viable if it were to receive funding. To demonstrate this, projects will be expected to have either a letter of intent or MOU between the producer and its off-taker(s), as well details in the project execution plan. At the evaluation phase further checks will be done on the robustness of the off-taker and any off-taker agreements. For this Phase-2 process, all uses of hydrogen that lead to a reduction in carbon emissions will be counted as a valid off-taker.

It is noted that under current health and safety regulations (the Gas Safety (Management) Regulations 1996 (GSMR)), the amount of hydrogen allowed in the existing gas network is no greater than 0.1% by volume. For a greater amount, say, up to 20% by volume for blending of hydrogen, this would require HSE to grant an exemption to the existing hydrogen limit. Such an exemption would only be granted if it was shown the health and safety of people likely to be affected by the exemption would not be prejudiced in consequence of it. HSE is currently considering how a review of GSMR can be taken forward which would allow the existing hydrogen limit to be amended to allow for, say 20% hydrogen blend.

Any such change would, of course, have to be safe, with the safety evidence being presented to HSE for assessment before any change could be made to the regulations (earliest 2023) and be accompanied by a completed BEIS value for money case, followed by necessary legal and regulatory change. Hydrogen producers planning to blend hydrogen into the existing gas network are still able to apply for support through this Phase-2 process. However, any financial support allocated through this process would be subject to the necessary policy decisions and regulatory changes required for the proposed hydrogen and natural gas blend into the existing gas network. An expected decision on whether to blend into the existing gas network or not is expected to take place earliest by Q4 2023. However, this decision may extend beyond this date.

Assessment and allocation

Work on the hydrogen business model is progressing at pace but the model is currently less developed than the equivalent carbon capture business models for power and industry. We will be consulting on the government's preferred hydrogen business models shortly. Therefore, allocation method and criteria have not been decided yet, but the process will be open to those hydrogen projects included within the Cluster Plan and any potential new hydrogen projects within, or that could feasibly connect to, the successful Track-1 clusters as part of the Phase-2 process. We will also consider hydrogen projects that could feasibly access other CO_2 storage solution by the 2027 operational date.

Hydrogen Business Model update

The Hydrogen Business Model is being developed to provide a form of revenue support to overcome the existing cost challenge of producing and buying low carbon hydrogen against cheaper high carbon counterfactual fuels, such as natural gas. After exploring a number of producer and end user support mechanisms, we believe that a producer side subsidy combined with demand side incentives would be the most efficient way to stimulate hydrogen production and provide reasonable surety of returns for investors.

Our current view for the producer subsidy is that a contractual framework would be more appropriate than a regulatory framework, recognising the asset life of hydrogen production assets, the likely investor profile, and our long-term aim of a subsidy-free market for low carbon hydrogen. As such, the business model will provide revenue support over an agreed contract term, incorporating a proportion of operational costs (taking into account a CO_2 T&S fee) and an appropriate rate of return on capital invested. The Business Model will also set out the proposed risk allocation framework between government and the private sector.

For demand side incentives, we continue to work with existing government policy areas to explore what adaptions to policies and regulations are required, and any additional mechanisms to support different end use sectors.

Further details on the revenue mechanism to fund the Hydrogen Business Models and provide the certainty investor needs will be set out in 2021.

4.6 BECCS

BECCS business models are at an earlier stage than Power, Industry, Hydrogen and T&S.

Our long-term approach to BECCS, and GGRs more widely, is to have a technology-neutral market driven, competitive framework. However, we also recognise that there are near term opportunities for BECCS that, if deemed sufficiently valuable, could require support ahead of that framework being in place.

For example, recognising that the Dispatchable Power Agreement is not designed to value the negative emissions of BECCS projects in the power sector, in January 2021 we established an independent investigation into potential commercial frameworks that could meet this need. The investigation is ongoing, and we will publish a final report later this year. The report will provide specific advice on how to structure a commercial framework that meets typical criteria, such as ensuring that ‘value for money’ is achieved, as well as:

- Incentivising operators to continually reduce supply chain carbon intensity.
- Only rewarding verified negative emissions, rather than simply stored carbon.
- To be feasible to implement in the 2020s, using existing frameworks where possible.

As this work has not completed we will provide an update on our approach to BECCS later this year. Any decision to award support would only be made subject to the successful completion of any negotiation and due diligence, taking into account a value for money assessment.

Whilst DACCS projects are not at the same stage of development as BECCS projects in the UK, we recognise that engineered GGRs feeding into CO_2 T&S networks may need to be considered as part of the CCUS Cluster Sequencing process in the future.

This publication is available from: www.gov.uk/government/publications/cluster-sequencing-for-carbon-capture-usage-and-storage-ccus-deployment-phase-1-expressions-of-interest

If you need a version of this document in a more accessible format, please email enquiries@beis.gov.uk. Please tell us what format you need. It will help us if you say what assistive technology you use.

APPENDIX 4: CCUS INVESTOR ROADMAP (APRIL 2022)

CCUS Investor Roadmap

Capturing Carbon and a Global Opportunity

April 2022

The UK is leading the charge towards a net zero future

"The UK is ideally positioned to lead the global development and deployment of Carbon Capture, Usage and Storage, with the world class industrial experience and world leading capital investment landscape to enable innovation, development, and growth, alongside the government's commitment to capturing 20-30MtCO2 per year to help achieve our ambitious target of net zero by 2050."

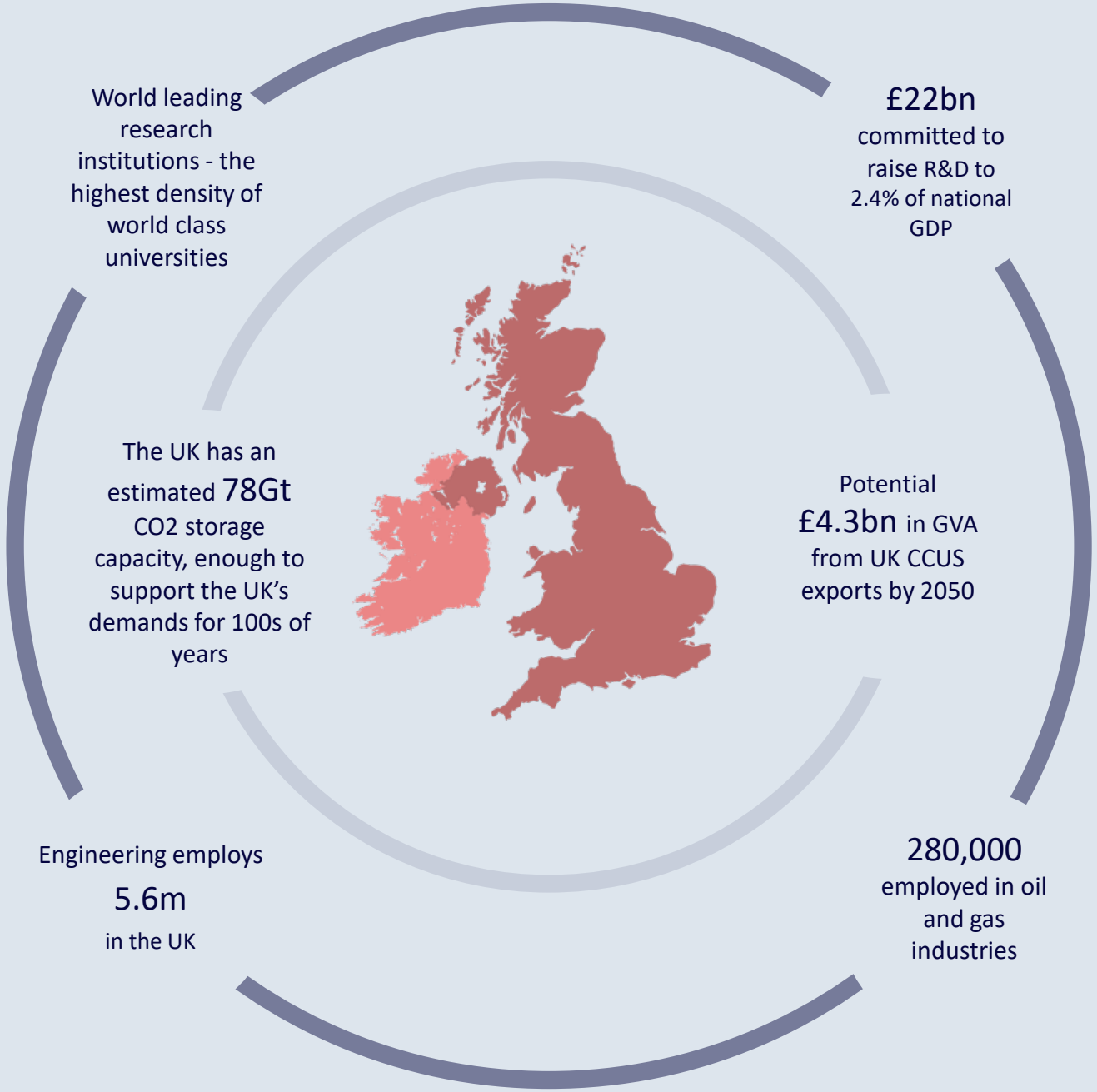
Kwasi Kwarteng MP
Secretary of State for Business, Energy & Industrial Strategy

Carbon capture and storage is "a necessity, not an option" for the UK's ambition to transition to net zero by 2050

The UK is well placed to lead in CCUS globally with:

- A worldwide reputation as an international centre of engineering excellence
- Extensive experience from the oil, gas and petrochemicals sector
- Substantial CO2 storage potential and industrial infrastructure e.g. gas network

The UK is a first mover; we will support the establishment of at least two low carbon CCUS clusters by the mid-2020s and a further two by 2030 through which we aim to capture 20-30MtCO2 per year



The UK has one of the world's most attractive business environments

- Most active and deepest capital markets in Europe
- Stable regulatory market
- 2nd in G20 for ease of doing business
- 0% dividend withholding tax rate, as part of wider competitive tax regime
- The UK-EU Trade Cooperation Agreement post EU exit allows zero tariff market access with the EU
- Further UK Free Trade Agreements enable exports to the rest of the world (currently 70 plus EU)
- Super-Deduction - A new 130% first-year capital allowance for qualifying plant and machinery assets

Why invest in UK CCUS

UK aims to capture **20-30 $MtCO_2$** per year by 2030

£8.3bn
In potential total UK captured turnover from CCUS by 2050

£1bn
To support the capital costs of CCUS infrastructure through the CIF

£170m
Industrial Decarbonisation Challenge Fund

Up to **£100m**
In new R&D spending to develop DACCS and other GGR technologies in the UK

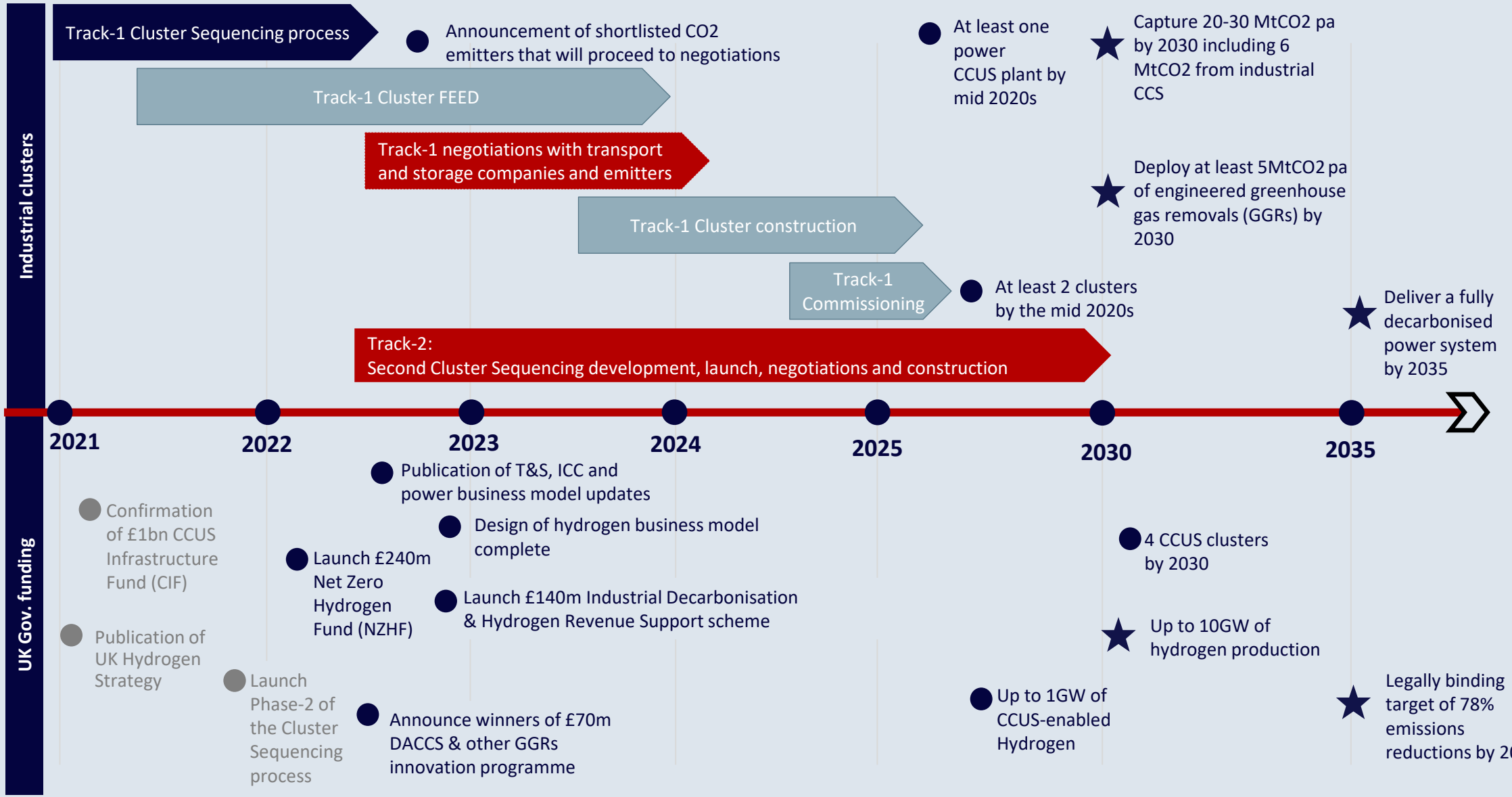
£140m
to set up the Industrial Decarbonisation Hydrogen Revenue Support scheme

Opportunities in an advanced & growing sector:

- **Global player:** UK is in the top 5 countries globally for CCUS readiness. The UK has one of the largest potential CO2 storage capacities in Europe
- **Project pipeline:** Funding for industrial carbon capture and hydrogen production projects will be announced later this year and allocated through the Cluster Sequencing process and hydrogen funding schemes
- **Regulatory environment:** Bespoke business models
- **Boost jobs:** CCUS-enabled clusters could support up to 50,000 jobs in the UK by 2030

Our 2035 Delivery Plan

Critical activities and milestones on a path to developing the UK CCUS sector



CCUS is crucial to decarbonisation in the UK

The role of CCUS in the UK's transition to net zero

The North Sea Transition Deal will commit to deliver investment of up to £14-16bn by 2030 in new energy technologies, of which £2-3bn is allocated to CCUS, £2-3bn to electrification and up to £10bn to hydrogen

We will ensure a second lease of life for the North Sea in low-carbon technologies by: Delivering on our £1bn commitment to 4 CCUS clusters by 2030, with the first two sites selected in the North East and North West currently proceeding through Track-1

By 2050, emissions associated with industry could need to fall by around 90% compared to 2018. Industrial CCUS will be fundamental to this

Power CCUS can provide non-weather dependent, dispatchable low carbon generation. This will be vital alongside system flexibility and energy storage to support a fully decarbonised electricity system by 2035

The North Sea Transition Authority (NSTA) are the regulator for the storage of CO2 on the UK Continental Shelf. When it receives an application for a storage permit, the NSTA is required by law to ensure (amongst other requirements) that the storage complex and surrounding area have been sufficiently characterised and assessed to ensure there is no significant risk of leakage

Sources: See Appendix. OPITO unpublished People and Skills Plan.

The UK's world class skills and infrastructure are gearing up to the transition

Energy, oil, and gas

280,000
employed in the oil & gas industries

£27bn
oil & gas turnover, c.40% through exports

90%
of oil and gas jobs have high or medium transferability

Chemicals

153,000
employed in the chemical industry

£19.2bn
Gross Value Added in 2018

£57.6bn
of chemicals exports in 2019

Engineering

5.6m
employed in the UK

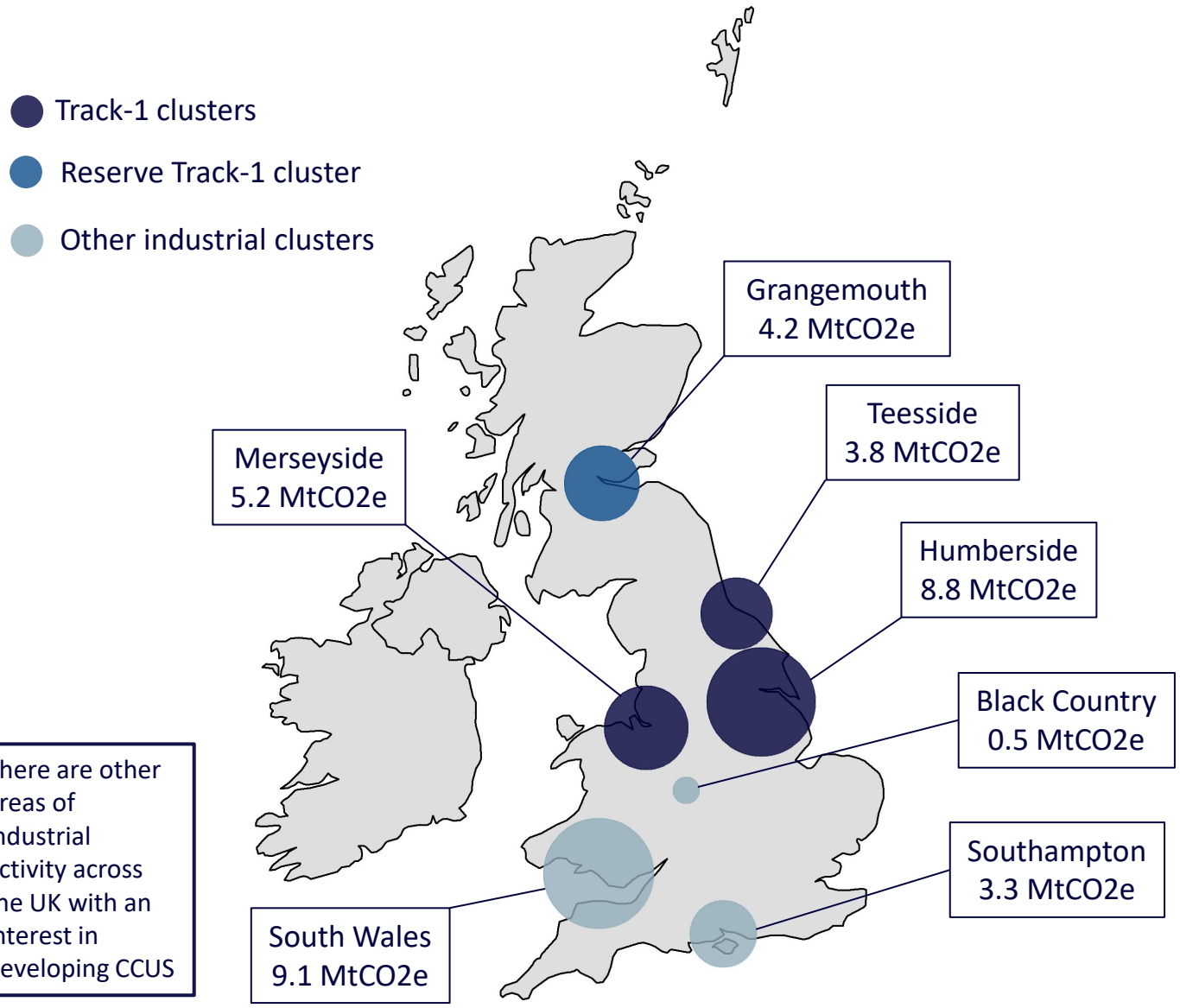
£1.2tn
of total UK turnover, 21.4% UK total

5.1%
increase in employment over last 5 years

There are strong transferable capabilities from existing UK industries into CCUS:

- ✓ Worldwide reputation as an international centre of engineering excellence and world leading in the oil, gas, and petrochemicals sector
- ✓ Extensive experience in implementing large offshore infrastructure projects and investing in shared offshore infrastructure solutions
- ✓ Deep knowledge of subsurface technologies, geoscience and reservoir management
- ✓ Around half of the business opportunity for UK CCUS is associated with engineering, procurement and construction management (EPCm) services, a key strength for the UK

Building the market - Deploying CCUS in industrial clusters



Map of major UK industrial cluster emissions from large point sources (2019).
Source: NAEI 2019 data. Does not capture non-ETS emissions in a cluster.

- Industry is responsible for around 16% of the UK's emissions with the seven industrial clusters accounting for around 50% of all industrial emissions
- Decarbonising the clusters is essential and we will work with industry to achieve at least **two clusters by the mid-2020s and four low carbon industrial clusters by 2030 at the latest, and at least one net zero industrial cluster by 2040**
- The Cluster Sequencing process maps a logical sequence for CCUS deployment in the UK. Clusters sequenced for the mid-2020s are 'Track-1' and those by 2030 are 'Track-2'
- HyNet (Merseyside) and the East Coast Cluster (Teesside and Humberside) have been confirmed as Track-1 clusters for the mid-2020s. Acorn has been announced as a reserve cluster
- The industrial clusters will be the starting point for a new **carbon capture industry** with a **sizeable export potential**, helping to create industrial 'SuperPlaces' in areas such as the North East, the Humber, North West, Southern England, Scotland and Wales

Government and industry working together

Collaborating to deliver CCUS in the UK

	What we have done	What we expect from industry
Establishing a long term CCUS market	■ Set ambitious capture targets to support our long term ambition to get to net zero by 2050 ■ Set up the Cluster Sequencing process to establish CCUS deployment in the UK to decarbonise industrial clusters ■ Launched funding streams to support CCUS deployment	■ Establish two operational industrial clusters by the mid-2020s ■ The sector will invest £2-3bn to build the Transport & Storage infrastructure to help capture 20-30MtCO2 per year of carbon by 2030
A stable, regulated market	■ Incentivising scale up and promoting reliability through developing investable business models to provide long term revenue certainty and addressing 'cross chain' risk, and creating a regulated asset base ■ Initial drafting of CCUS Network Code, guided by government and driven by industry, enabling the development of network codes and standards	■ Support the development of the CCUS Network Code ■ Support the government to develop business models
Skills and capability	■ Developing our green jobs and skills offer and reforming the skills system to ensure the development of key capabilities	■ Identify and support the rapid growth of competitive new capabilities to meet future energy needs ■ Create skilled, long-term jobs and a diverse workforce, demonstrating how they will fill any skills gaps
Supply chains	■ Published supply chain roadmap setting out how government and industry can work together to harness the power of a strong, industrialised supply chain ■ Working through the Energy Supply Chains Taskforce and CCUS Council to identify UK supply chain strengths	■ Build up robust transparent supply chains, with emphasis on local skills and capacity development ■ Share information on supply chain development

Sources: See Appendix

Establishing a long term CCUS market

Deploying CCUS in the UK through industrial clusters

Establishing a long term CCUS market

What we have done

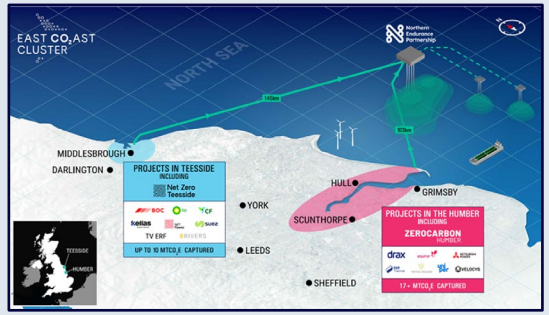
- Launched the Cluster Sequencing process. Confirmed HyNet and the East Coast Cluster as Track-1 clusters with Acorn as a reserve cluster
- Announced Cluster Sequencing Phase-2: eligible projects (power CCUS, hydrogen and ICC)

What we are doing

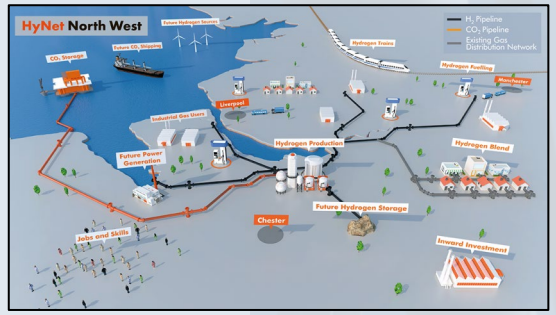
- Selecting the projects that will make up Track-1 clusters
- Engaging with industry on the development of a Track-2 process

What we have committed to

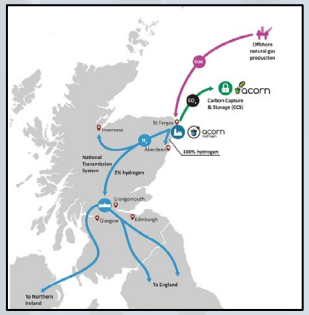
- Work with industry to achieve four low carbon industrial clusters by 2030 and at least one net zero industrial cluster by 2040
- Support Track-1 clusters to be operational in the mid-2020s



East Coast Cluster



HyNet

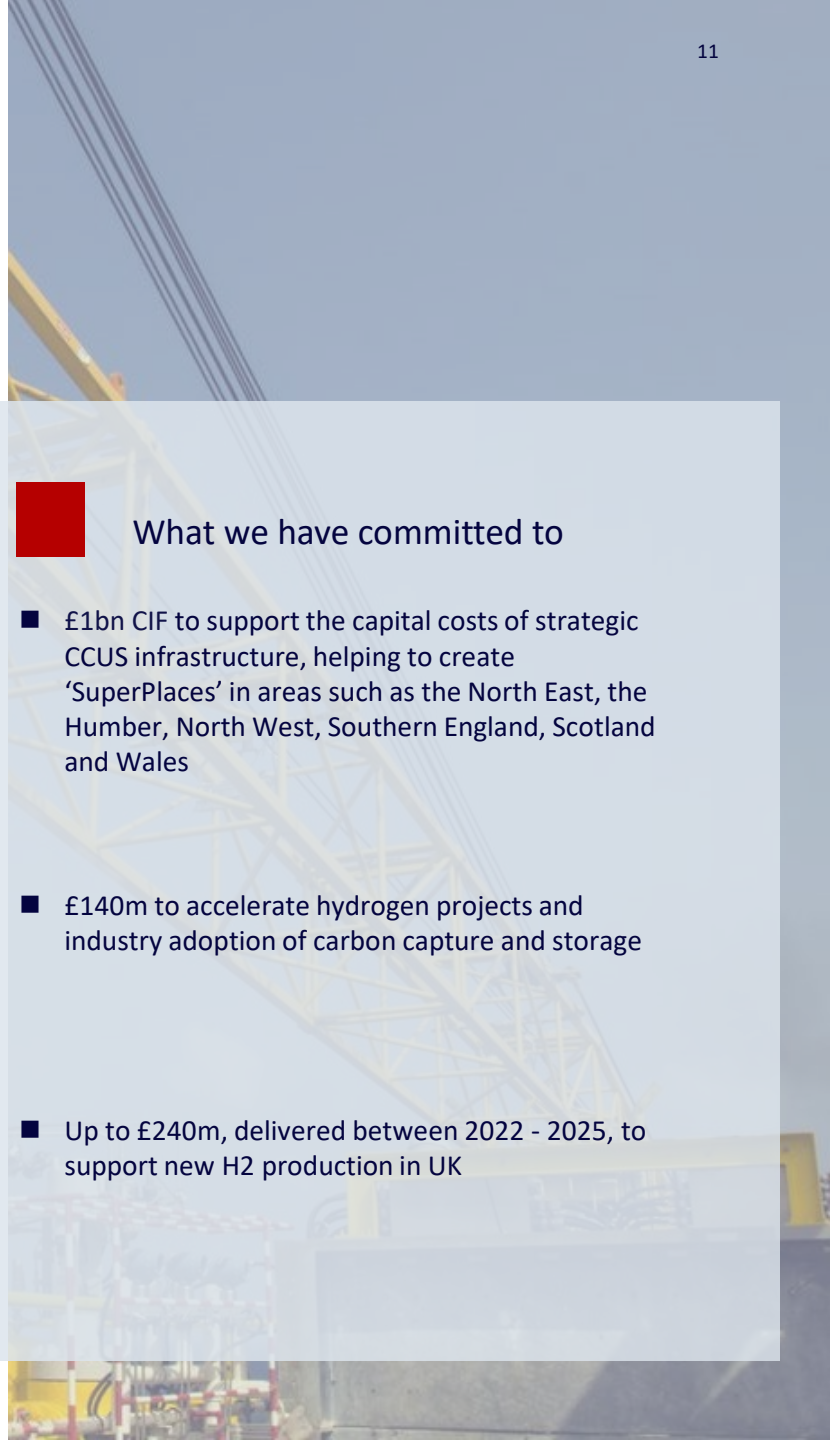


Acorn

Sources: See Appendix

Establishing a long term CCUS market

Providing capital and revenue funding to support CCUS deployment



	What we have done	What we are doing	What we have committed to
CCUS Infrastructure Fund (CIF)	■ Announced £1bn CIF to support the capital costs of strategic CCUS infrastructure ■ Committed up to £40m of the CIF to support design work for offshore storage and onshore infrastructure through Industrial Decarbonisation Challenge, which is providing up to £171m across nine projects	■ The final design of the CIF will develop alongside the Cluster Sequencing process, the design of the business models and the finalisation of related funding streams	■ £1bn CIF to support the capital costs of strategic CCUS infrastructure, helping to create 'SuperPlaces' in areas such as the North East, the Humber, North West, Southern England, Scotland and Wales
Industrial Decarbonisation and Hydrogen Revenue Support (IDHRS)	■ Set up the £140m IDHRS scheme to fund our new hydrogen and industrial carbon capture business models	■ We will announce a funding envelope in 2022 that will enable us to award the first contracts to CCUS-enabled hydrogen and industrial carbon capture facilities from 2023	■ £140m to accelerate hydrogen projects and industry adoption of carbon capture and storage
Net Zero Hydrogen Fund (NZHF)	■ Consulted on the design of the NZHF and split the funding in 4 strands	■ We are aiming to open the first funding window for Strands 1 and 2 in Spring 2022, with a potential of a further funding window in 2023/24. We intend to open strand 3 in summer 2022	■ Up to £240m, delivered between 2022 - 2025, to support new H2 production in UK

Sources: See Appendix

Creating a stable regulated market

UK Government is incentivising scale up and promoting reliability through developing investable business models and creating a stable regulatory base

	What we have done	What we are doing	What we have committed to
Power CCUS - the "Dispatchable Power Agreement"(DPA)	■ Developed the DPA which builds on the UK's expertise in Contracts for Difference for renewable energy. The DPA aims to provide long term revenue certainty and a stable investment environment for developers of power CCUS plants	■ Publishing DPA full contract in Spring 2022 and consulting to further understand industry perspectives. Engaging industry later in 2022 with a call for evidence for future policy development for Power CCUS. Developing Decarbonisation Readiness	■ A competitive allocation process in the 2020s for the next phase of Power CCUS deployment. Support at least one Power CCUS project for delivery by mid-2020s. Deliver a fully decarbonised power system by 2035
Transport and Storage (T&S) - the T&S Regulatory Investment (TRI) Model	■ Developed the TRI business model which supports stable investment by providing investors with a clear sight of the long-term revenue model for T&S. The model is designed to accommodate different potential network designs and growth profiles	■ Working towards confirming a regulator and establishing a licensing regime. Developing economic licences, T&S codes and code documents with industry. Developing the TRI Model further to mitigate remote, specified risks and revenue risk; and establish a return commensurate with risk taken by T&S Companies	■ To enable the transportation and storage of 20-30Mt of CO2 per year by 2030
Hydrogen Business Model	■ Publication of government response on business model design, alongside indicative Heads of Terms of the business model contract	■ Developing detailed model design to provide producers with revenue support and help overcome operating cost gap between hydrogen and fossil fuels and an ROI	■ Finalise the business model in 2022 ■ Announce funding envelope in 2022 to support delivery of up to 1GW of CCUS-enabled hydrogen by mid-2020s

Sources: See Appendix

Creating a stable regulated market

UK Government is incentivising scale up and promoting reliability through developing investable business models and creating a stable regulatory base

	What we have done	What we are doing	What we have committed to
Industrial Carbon Capture (ICC)	■ The ICC contract provides a model to unlock investment by providing long-term revenue certainty for industrial users to achieve deep decarbonisation and is being adapted to support waste CCUS projects	■ Publishing next business model update and full ICC contract in Spring 2022 and consulting to further understand industry perspectives ■ Developing business models to enable waste CCUS projects to obtain access to funding	■ Ambition to capture 20-30 MtCO2, including 6MtCO2 of industrial emissions, per year by 2030 and 9MtCO2 per year by 2035
Bioenergy with carbon capture and storage (BECCS) and Direct Air Carbon Capture and Storage (DACCS)	■ An Expression of Interest for Greenhouse Gas Removal (GGR) projects, including DACCS and Power BECCS, closed in early 2022 which will provide visibility on market readiness ■ Reports published on monitoring, reporting and verifying and commercial frameworks for power BECCS ■ Response to GGR incentive framework consultation published as well as the biomass policy statement	■ Developing first of a kind Power BECCS business model ■ Running a £70m innovation competition for DACCS and other GGRs to bring down costs and support newly emerging efficiency improvements ■ Developing robust sustainability criteria for BECCS to ensure delivery of genuine negative emissions ■ Consulting on preferred GGR business models in spring 2022	■ Ambition to deploy at least 5MtCO2 per year from ‘engineered’ GGRs by 2030 to support the trajectory to Net Zero

Sources: See Appendix

Strengthening supply chains

We are committed to the development of a CCUS supply chain including through realising export opportunities

	What we have done	What we are doing	What we have committed to
Strengthening and promoting UK supply chain	■ Published the CCUS Supply Chain Roadmap to maximise the UK's potential ■ Launched the UK Energy Supply Chain Taskforce - a joint enterprise working to maximise opportunities and mitigate challenges in the development of energy supply chains ■ UK Export Finance, the UK's export credit agency, has enhanced its support to attract investment into CCUS supply chains and export capability	■ Working with industry to map the capabilities of the UK CCUS supply chain to identify specific equipment, technologies and services where UK can become a global leader. Engaging with key stakeholders to facilitate new opportunities overseas for the UK's net zero supply chains ■ Developing a 'Fit for CCUS' programme to ensure UK-based companies are in the best position to compete for and win new CCUS contracts across the globe. Offering a suite of products to support the innovation to export pathway for CCUS supply chains	■ Working with industry to harness the power of a strong, industrialised UK CCUS supply chain, whilst ensuring that the CCUS sector remains investible, cost effective and focused on delivery ■ UK Export Finance is increasing its International Export Finance Executive network from 15 to 30 Country Heads to build a pipeline of opportunities for supply chains and secure investment for the UK ■ Deploying a targeted UK offer utilising the full suite of Government finance and support to secure a 'first mover' export advantage
Existing infrastructure	■ Identified existing infrastructure that could be transitioned to support CCUS deployment, e.g. oil and gas transportation	■ Working with stakeholders to understand the requirements needed to transition and repurpose existing infrastructure and capabilities where appropriate	■ Protecting existing legacy infrastructure and utilising the transferable capabilities developed in related sectors over the past five decades

Sources: See Appendix

Building our skills and research and innovation

Developing key capabilities and supporting the strong transferable skills the UK already has

	What we have done	What we are doing	What we have committed to
Skills	■ Launched Green Jobs Taskforce, which published an independent report with recommendations that informed the Net Zero Strategy	■ Reforming the skills system through Local Skills Improvement Plans. We are working with industry to support the deployment of CCUS that could help create 50,000 UK jobs by 2030 ■ Working with delivery partners to assess the skills requirements for CCUS	■ Green Jobs Delivery Group will be a central forum through which government, industry and other key stakeholders support the development and delivery of green jobs and skills ■ The North Sea Transition Deal has a commitment to deliver an integrated People and Skills Plan to ensure the highly transferable workforce is being tapped into throughout the energy transition.
Research and innovation	■ Between 2004-2019 we provided over £330m public funding for CCUS Research and Innovation ■ The Industrial Decarbonisation Challenge Fund provides up to £170m, matched by £261m from industry, supports low-carbon technology development ■ Established the Industrial Decarbonisation Research and Innovation Centre	■ In addition to the £70m DACCS and GGR competition, we are providing up to £25m of research and development funding to help develop and pilot next generation carbon capture technologies in the UK	■ GGR technologies and Next Generation Carbon Capture are two of the top ten priorities of the £1bn Net Zero Innovation Portfolio

Sources: See Appendix

Appendix: Sources

The UK - A reliable, stable place for business, leading the world for capital investments

- Oil and Gas Authority (2021) Carbon Capture and Storage.
- BEIS (2019) Energy Innovation Needs Assessment – Carbon Capture, Usage and Storage. To note, GVA considers market value estimates.

CCUS is crucial to decarbonisation in the UK and Why invest in UK CCUS

- BEIS (2022) British energy security strategy
- Industrial Clusters Mission Infographic (2019)
- BEIS (2018) CCUS deployment pathway action plan.
- GCCSI (2018) The Carbon Capture and Storage Readiness Index
- Oil and Gas Authority (2021) Carbon Capture and Storage.

Additional information

- Cluster Sequencing Phase-2: eligible projects (power CCUS, hydrogen and ICC)
- Business models

The UK's world class transferable skills and infrastructure

- BEIS (2019) Energy Innovation Needs Assessment – Carbon Capture, Usage and Storage. To note, GVA considers market value estimates.
- UK Oil and Gas Authority (2020). UKCS integration.
- Engineering UK (2019) Key Facts & Figures
- UK Government (2020) UK Energy in Brief 2020
- H2FC SUPERGEN (2020) Opportunities For Hydrogen And Fuel Cell Technologies To Contribute To Clean Growth In The UK
- Statista (2020) Chemical Industry in the UK
- Oil and Gas UK (2021) Workforce Insight Report

Department for International Trade

The UK's Department for International Trade (DIT) has overall responsibility for promoting UK trade across the world and attracting foreign investment to our economy. We are a specialised government body with responsibility for negotiating international trade policy, supporting business, as well as delivering an outward-looking trade diplomacy strategy.

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Published April 2022

APPENDIX 5: NZT OFFSHORE CONSENTS - NOTE FOR DEADLINE 1 - MAY 2022

NET ZERO TEESSIDE – DCO Application

Pinsent Masons

CONSENTS REQUIRED FOR OFFSHORE CO_2 TRANSPORT AND STORAGE

1. **INTRODUCTION**

1.1 The Applicants have submitted the Application for development consent for the construction, operation and maintenance of the Net Zero Teesside Project ('**NZT**'), including associated development (together, the '**Proposed Development**') on land at and in the vicinity of the former Redcar Steel Works site, Redcar, and in Stockton-on-Tees, on Teesside.

1.2 The Proposed Development that is the subject of the Application comprises the onshore elements (other than crossings of the Tees and water discharge outfalls). The offshore elements (comprising those lying below Mean Low Water Springs (MLWS), relating to CO_2 transport and storage) also require to be consented. Grant of the offshore consents is being pursued via separate applications.

1.3 This note provides information on the offshore consents and whether they could be included in a DCO application.

2. **MAIN OFFSHORE CONSENTS AND THE PLANNING ACT 2008**

2.1 The main consents required for the offshore aspects of NZT are as follows (the "**Offshore Consents**"):

2.1.1 A CO2 appraisal and storage licence under section 18 of the Energy Act 2008 (a "**storage licence**" under the "**EA 2008**");

2.1.2 A storage permit under regulations 6-8 of the Storage of Carbon Dioxide (Licensing) Regulations 2010 (the "**2010 Regulations**");

2.1.3 An authorisation relating to the construction and use of pipelines under section 14 of the Petroleum Act 1998 (the "**PA 1998**"); and

2.1.4 Consent under the Offshore Oil and Gas Exploration, Production, Unloading and Storage (Environmental Impact Assessment) Regulations 2020 (the "**2020 Regulations**").

Section 150 Planning Act 2008

2.2 Under section 150 PA 2008, an order granting development consent may remove the requirement to obtain prescribed consents or authorisations, but only if the consenting authority under the prescribed regime has consented.

2.3 The Infrastructure Planning (Interested Parties and Miscellaneous Prescribed Provisions) Regulations 2015/462 was brought into force pursuant to section 150 PA 2008. Schedule 2 of the 2015 Regulations prescribes the consent regimes relevant to section 150 and therefore in relation to which the need to obtain consent may be removed via a development consent order.

2.4 A storage licence under section 18 EA 2008 and authorisation under section 14 PA 1998 are included in the list of prescribed consents pursuant to section 150 PA 2008. Accordingly, if the consent of the relevant body is obtained, the need to obtain consent for the EA 2008 storage licence and PA 1998 authorisation can be excluded via a development consent order. In this instance, the relevant body for both the EA 2008 and PA 1998 is the North Sea Transition Authority (the "**NSTA**", previously known as the Oil and Gas Authority).

2.5 The storage licence has already been granted and is currently held by BP, National Grid and Equinor with BP named as operator.

2.6 The 2010 Regulations and the 2020 Regulations are not included in the list of prescribed consent regimes under Schedule 2 to the 2015 Regulations. Therefore, in respect of the grant of the storage permit under the 2010 Regulations, and consent under the 2020 Regulations, neither can be brought within the development consent regime and the permit and consent would always need to be obtained separately.

Permit under 2010 Regulations and Consent under 2020 Regulations

2.7 The storage permit requirements under the 2010 Regulations are provided in regulations 6 - 8. In summary, the NSTA must be satisfied that a number of conditions have been (or will be) met before granting the storage permit and the storage permit must contain a number of provisions as detailed in the 2010 Regulations.

2.8 The consent requirement under the 2020 Regulations is provided in regulation 4. In summary, the consent of the NSTA must be obtained, and the Secretary of State (via the Offshore Petroleum Regulator for Environment and Decommissioning, OPRED, which is part of BEIS) must agree to the grant of that consent. The Secretary of State must not agree to the grant of consent unless an environmental impact assessment has been carried out, or an environmental impact assessment is not required.

Pinsent Masons, May 2022

APPENDIX 6: APPLICANTS' RESPONSE TO ACTION 2 (IN RELATION TO CONSIDERATION OF THE OVERLAP WITH HORNSEA 4)

ISH 1 ACTION 2 - NOTE ON REQUIREMENT TO ASSESS HORNSEA 4

1. INTRODUCTION

1.1 The Applicants have submitted the Application for development consent for the construction, operation and maintenance of the Net Zero Teesside Project ('**NZT'**), including associated development (together, the '**Proposed Development**') on land at and in the vicinity of the former Redcar Steel Works site, Redcar, and in Stockton-on-Tees, on Teesside.

1.2 The Proposed Development that is the subject of the Application comprises the onshore elements (other than crossings of the Tees and water discharge outfalls). The offshore elements (comprising those lying below Mean Low Water Springs ("**MLWS**"), promoted by the Northern Endurance Partnership ('**NEP**') and relating to CO_2 transport and storage) also require to be consented. Grant of the offshore consents is being pursued via separate applications to be supported by an environmental and social impact assessment ('**ESIA**').

1.3 The Examination by the Examining Authority of the Proposed Development commenced on 10 May 2022 and will run until 10 November 2022.

1.4 Overlapping and neighbouring part of the offshore CO_2 storage element of NEP is the proposed Hornsea 4 Offshore Wind Farm, which is being promoted by Ørsted Hornsea Project Four Limited ("**Hornsea 4**"). Examination of the DCO application for Hornsea 4 Offshore Wind Farm commenced on 22 February 2022.

1.5 Part of the offshore element of NEP and part of the offshore array for Hornsea 4 Offshore Wind Farm overlap, meaning that the two projects propose development within the same area of the North Sea (the "**Overlap Area**"). Each project has submitted representations to the respective examinations of the other project in respect of this overlap.

1.6 bp has made representations to the Hornsea 4 examination (in summary) that the two projects cannot co-exist, and that the relevant parts of the Hornsea 4 development within the Overlap Area should not be granted consent. Those representations have been made during the Hornsea 4 examination.

1.7 At Issue Specific Hearing 1 for the Proposed Development, held on 10 May 2022 ("**ISH1**"), Hornsea 4 made oral representations in respect of their concerns with regard to the Overlap Area. The Examining Authority asked the Applicants to "consider whether the geographical overlap with Ørsted Hornsea Project Four should be further considered in the NZT [Proposed Development] EIA". That forms Action 2 of the post-ISH1 action items list. This note sets out legal analysis relating to Action 2 – whether the geographical overlap with Ørsted Hornsea Project Four ought to be considered as part of the Proposed Development's Environmental Impact Assessment ("**EIA**").

1.8 Other actions within the post-ISH1 action items list relating to Hornsea 4 Offshore Wind Farm are considered and addressed separately.

2. SCOPE OF EIA

2.1 The statutory obligations that control preparation of the Environmental Statement ("**ES**") are set out in the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (the "**EIA Regulations**"). Relevant parts of the EIA Regulations are set out and considered below.

Regulation 4 EIA Regulations

2.2 The starting point with regards EIA is in Regulation 4, which states that for 'EIA development' (such as the Proposed Development) the Secretary of State must not make an order granting development consent unless an EIA has been carried out in respect of the application.

Regulation 5 EIA Regulations

2.3 Regulation 5 sets out the EIA process, one stage of which includes the preparation of the ES (with other stages including the carrying out of consultation, publication and notification as well as consideration of whether development consent should be granted by the Secretary of State).

2.4 Regulation 5(2) states that the EIA must: "identify, describe and assess in an appropriate manner, in light of each individual case, the direct and indirect significant effects of the proposed development on the following factors - (a) population and human health; (b) biodiversity, with particular attention to species and habitats protected under any law that implemented [the Habitats Directive and the Birds Directive]; (c) land, soil, water, air and climate; (d) material assets, cultural heritage and the landscape; (e) the interaction between the factors referred to in sub-paragraphs (a) to (d)".

Regulation 14 EIA Regulations

2.5 Regulation 14 requires an application for development consent to be accompanied by an ES. Regulation 14 also prescribes the contents of the ES as follows, and gives effect to Schedule 4 (discussed below):

2.5.1 14(2) An environmental statement is a statement which includes at least-

(a) a description of the proposed development comprising information on the site, design, size and other relevant features of the development;

(b) a description of the likely significant effects of the proposed development on the environment;

(c) a description of any features of the proposed development, or measures envisaged in order to avoid, prevent or reduce and, if possible, offset likely significant adverse effects on the environment;

(d) a description of the reasonable alternatives studied by the applicant, which are relevant to the proposed development and its specific characteristics, and an indication of the main reasons for the option chosen, taking into account the effects of the development on the environment;

(e) a non-technical summary of the information referred to in sub-paragraphs (a) to (d); and

(f) any additional information specified in Schedule 4 relevant to the specific characteristics of the particular development or type of development and to the environmental features likely to be significantly affected.

2.6 The Applicants are responsible for providing the ES, which is contained in Volume 6 of the Application documents (APP-081 to APP-347). This was supplemented by an ES Addendum (relating to various changes to the Application accepted on 6 May 2022) which is contained in documents AS-049 to AS-132.

2.7 There is nothing in Regulation 14 which specifically requires consideration of the impact of the Proposed Development on other proposed developments (such as Hornsea 4 Offshore Wind Farm).

2.8 Regulation 14(3)(a) states that where a scoping opinion has been adopted, the ES must be based on the most recently adopted scoping opinion (so far as the proposed development remains materially the same as the proposed development which was the subject of that opinion).

2.9 A scoping opinion was adopted prior to the preparation of the ES for the Proposed Development[1] (the "**Scoping Opinion**", APP-241 to APP-243). The Scoping Opinion provides the Secretary of State's view of, inter alia, the extent of potential effects that are to be assessed, including the geographical extent of potential effects.

2.10 The Scoping Opinion did not identify any requirement to assess the effects of NEP on Hornsea 4 Offshore Wind Farm within the Overlap Area.

2.11 In respect of the Scoping Opinion, the cumulative effects section:

2.11.1 sets out that the "ES should identify other developments with the potential to impact on sensitive receptors (including, where appropriate, the offshore works of the Teesside Cluster Carbon Capture & Usage Project) together with the Proposed Development. Any likely significant cumulative effects should be assessed"; and

2.11.2 acknowledged the Applicant's proposal to assess cumulative effects based on a "realistic geographical scope" and advised that this should be "based on a zone of influence of potential impacts from the Proposed Development and the other activities or projects under consideration, as advocated in the Inspectorate's Advice Note Seventeen: Cumulative Effects Assessment".

2.12 It is clear that this requires the ES to consider other developments (including the offshore transport and storage project) which have the potential to impact on sensitive receptors together with the Proposed Development. This was done, as is explained in ES Volume 1 Chapter 24 (Cumulative and Combined Effects, APP-106), including undertaking the cumulative assessment in accordance with a zone of influence as advised in Advice Note Seventeen. The methodology is explained in Section 24.3 of that Chapter.

2.13 Accordingly there is no obligation under EIA Regulation 14(2) to assess the Proposed Development's effects on a wider geographical scope than the zone of influence, nor specifically to address impacts on Hornsea 4 Offshore Wind Farm from the Proposed Development or NEP.

Schedule 4 Paragraph 4 EIA Regulations

2.14 Schedule 4 of the EIA Regulations provides the information to be included in the ES.

2.15 Paragraph 4 of schedule 4 states the ES should cover:

2.15.1 "A description of the factors specified in regulation 5(2) likely to be significantly affected by the development: population, human health, biodiversity (for example fauna and flora), land (for example land take), soil (for example organic matter, erosion, compaction, sealing), water (for example hydromorphological changes, quantity and quality), air, climate (for example greenhouse gas emissions, impacts relevant to adaptation), material assets, cultural heritage, including architectural and archaeological aspects, and landscape."

2.16 It is clear that paragraph 4 requires a description of the factors likely to be significantly affected by the development, and that the ES submitted by the Applicants achieves this. Chapter 1 of Volume 1 (Document Ref. APP-083) sets out the structure of the ES, Chapter 2 of Volume 1 (Document Ref. APP-084) sets out the assessment methodology used to identify and then consider the relevant factors, and that is supplemented where relevant with further consideration of factors within individual topic chapters within Volume 1 (Chapters 8 to 22, Document Refs. APP-090 to APP-104). Chapter 3 is also relevant, providing the Description of the Existing Environment (Document Ref. APP-085).

Schedule 4 Paragraph 5 EIA Regulations

[1] Scoping Opinion adopted by the Planning Inspectorate (on behalf of the Secretary of State pursuant to Regulation 10 of the EIA Regulations) in respect of case reference EN010103 dated April 2019

2.17 Paragraph 5 of schedule 4 states the ES should also cover:

2.17.1 *"*A description of the likely significant effects of the development on the environment resulting from, inter alia-…

(e) The cumulation of effects with other existing and/or approved projects, taking into account any existing environmental problems relating to areas of particular environmental importance likely to be affected or the use of natural resources;"

2.18 It is clear that paragraph 5 of schedule 4 requires an assessment of effects of the proposed development on the environment resulting from cumulative effects with other projects, i.e. effects caused by the proposed development together with other projects, not effects "to" or "on" any other projects.

2.19 It is also noted that Hornsea 4 Offshore Wind Farm is not "existing and/or approved".

2.20 There is therefore no statutory obligation under paragraph 5 of schedule 4 to the EIA Regulations to assess the Proposed Development's effects on an application stage development, such as Hornsea 4.

Schedule 4 Paragraph 3 EIA Regulations

2.21 The 'future baseline' for the Proposed Development is also potentially relevant. The statutory requirements for the future baseline to be assessed by an environmental statement are set out in schedule 4 paragraph 3 of the EIA Regulations:

2.21.1 *"*A description of the relevant aspects of the current state of the environment (baseline scenario) and an outline of the likely evolution thereof without implementation of the development as far as natural changes from the baseline scenario can be assessed with reasonable effort on the basis of the availability of environmental information and scientific knowledge."

2.22 In respect of schedule 4 paragraph 3, Hornsea 4 Offshore Wind Farm is not a "natural change" to the ES's current baseline scenario.

2.23 Secondly and as noted above, the test under the EIA Regulations remains to assess a proposed development with and not on another project. Paragraph 3 of schedule 4 to the EIA Regulations does not alter that position.

Summary in relation to EIA Regulations

2.24 The EIA Regulations do not therefore require the ES in respect of the Proposed Development to assess any impact that may arise from the incompatibility that bp consider arises between Hornsea 4 Offshore Wind Farm and the geological storage of CO_2 as part of NEP, within the Overlap Area.

3. NATIONAL POLICY STATEMENT - NPS-EN1

3.1 When determining a DCO application pursuant to section 104 of the Planning Act 2008 ("**PA2008**"), the Secretary of State must have regard to any national policy statement which has effect and, subject to the exceptions set out, must determine the application in accordance with any relevant national policy statement. When determining a DCO application pursuant to section 105 PA2008 the Secretary of State must have regard to any other matters which the Secretary of State thinks are both important and relevant.

3.2 The application of s 104 and/or 105 to the Application is not the subject of this note (see the Applicants' revised Planning Statement (Document Ref. 5.3) also submitted at Deadline 1). However,

the Applicants' position is that the energy National Policy Statements are considered to be important and relevant to the Application whether it is decided pursuant to Section 104 or Section 105.

3.3 NPS EN-1 requires that "*when considering cumulative effects assessment, the ES should provide information on how the effects of the applicant's proposal would combine and interact with the effects of other developments"* (paragraph 4.2.5). This requirement of NPS EN-1 is similar to the EIA Regulations, in that it requires an assessment of how the proposed development would combine with the effects of other developments, not how it would affect those other developments.

3.4 In relation to Land use, NPS EN-1 states:

3.4.1 "An energy infrastructure project will have direct effects on the existing use of the proposed site and may have indirect effects on the use, or planned use, of land in the vicinity for other types of development" (paragraph 5.10.1); and

3.4.2 "The ES (see Section 4.2) should identify existing and proposed land uses near the project, any effects of replacing an existing development or use of the site with the proposed project or preventing a development or use on a neighbouring site from continuing" (paragraph 5.10.5).

3.5 Whilst for the reasons set out above there is no legal obligation to consider any impact on the Hornsea 4 Offshore Wind Farm in the Overlap Area pursuant to the EIA Regulations, bp considers that providing such an assessment is likely to assist the Examining Authority's consideration of the application by reference to these elements of NPS EN-1. The Applicants therefore intend to provide an assessment of the impacts of the offshore elements of the Project on Hornsea 4 Offshore Wind Farm to the Examining Authority by Deadline 4.

APPENDIX 7: APPLICANTS' RESPONSE TO ACTION 4 (OPTIONS FOR THE SOS FOR BEIS ON HORNSEA 4 DCO APPLICATION)

Applicant's Response

At Issue Specific Hearing 1, preliminary discussion was held regarding the Proposed Development's interaction with Hornsea Project Four Offshore Wind Farm ("**Hornsea Project 4**"). The Examining Authority was particularly interested in the overlapping area of seabed within which both Hornsea Project 4 and the proposed offshore carbon and storage facility which is being consented separately from the Proposed Development ("**Endurance Store**") are proposed (the "**Overlap Zone**").

The Applicant explained that the Hornsea Project 4 DCO (Planning Inspectorate reference EN010098) is currently in examination (having commenced on 22 February 2022) and that that examination is considering in detail the competing legal and competing technical arguments as to whether co-existence of the Endurance Store and Hornsea Project 4 is possible within the Overlap Zone. That examination is also considering the nature of the provisions which should be included in the Hornsea Project 4 DCO in order to address issues in relation to the overlap.

The Applicant further explained that re-litigating these issues during the examination for this Application would not be sensible, as the Recommendation to be made by the relevant Examining Authority in the Hornsea Project 4 DCO will ultimately be provided to the same decision maker (the Secretary of State for Business Energy and Industrial Strategy, '**SoS**') prior to that decision maker receiving a Recommendation in respect of this Application.

The Applicant explained that the Proposed Development does not extend to the Overlap Zone. It has, therefore, no direct physical conflict with the Hornsea 4 Project. In contrast, the Hornsea Project 4 DCO application does seek authorisation of development in the Overlap Zone. There is therefore a direct relationship between the authorisation being sought in the Hornsea Project 4 DCO and the effect on the storage of CO2 in a significant part of the Endurance Store, which does not arise in respect of this Application[1].

Nevertheless, the Applicants are to seek the inclusion of an Article in the NZT DCO, to address liabilities which could in certain circumstances otherwise arise under the 'Interface Agreement'[2]. The additional Article and explanation for its inclusion are set out at Appendix 1 to this document – the Article will be included in the Applicant's draft DCO to be submitted at Deadline 2.

In this context, the Applicant offered at ISH1 to clarify for the Examining Authority what options are available to the SoS when determining the Hornsea Project 4 DCO and how such decisions may impact on the acceptability and deliverability of the Proposed Development. The Applicant considers such options to be, principally:

- **Scenario 1 - Refuse the Hornsea Project 4 DCO**. In this case the bp protective provisions would not exist. As explained in Appendix 1 to this document, this is the primary reason for the proposed inclusion of the additional Article in the NZT DCO. Without this Article, in circumstances where the Hornsea Project 4 DCO is refused,

1 The elements of the offshore storage works and their relevant consenting processes are explained at paragraph 4.8 of the Chapter 4 to the Environmental Statement [APP-086], Other Consents and Licences [APP-077], and as supplemented by information in the Written Summary of Oral Submission for ISH1 [Document Ref. 9.2].

2 An agreement between bp, Orsted and the Crown Estate which purports to regulate the development of the Hornsea 4 Project and the Endurance Store in the Overlap Zone. See the Explanatory Memorandum for more details.

the Interface Agreement would remain extant and so continue to present a very real risk to the viability of the Endurance Store to deliver the ECC plan. It is accepted there may be other primary reasons why the SoS may elect to refuse the Hornsea Project 4 DCO, distinct from its interface issues with the Endurance Store; however, it may be that the SoS is nevertheless still satisfied with the arguments proposed by bp in relation to the need to disapply the Interface Agreement and so the proposed Article of the NZT DCO enables the SoS to ensure its disapplication through the NZT DCO.

In this Scenario 1, where the NZT DCO is consented with the additional Article included, the Applicant does not consider there to be any impediment to the deliverability of the Proposed Development or for the refusal of Hornsea Project 4 to have any relevance to the Proposed Development's acceptability. Similarly, in the counter-factual scenario where the NZT DCO is consented without the additional Article included, whilst this would then present the abovementioned risk/viability challenges to the ability of the Endurance Store to deliver the ECC plan, the Proposed Development would nevertheless still remain viable and acceptable, even if it were limited to capturing and transporting the carbon to only the residual part of the Endurance Store outside of the Overlap Zone which is not subject to the terms of the Interface Agreement.

- **Scenario 2 – Hornsea Project 4 is consented, with bp's full protective provisions included (including the disapplication of the Interface Agreement)**. In such circumstances, the SoS would have accepted the submissions put forward by bp and particularly the need to safeguard the deliverability of the Endurance Store through inclusion of the bp protective provisions. It follows that he would have been satisfied with the need to disapply the Interface Agreement and so it would be similarly appropriate to include the additional Article in the NZT DCO (where consented) to ensure bp, as operator of carbon storage licence CS001, retained a degree of control and certainty, which may otherwise be absent were the provision to be limited to the Hornsea Project 4 DCO. As explained at Appendix 1, otherwise in such circumstances, Orsted could potentially not implement the DCO before it lapses, with the result that the Interface Agreement survives and this threatens the viability of the Endurance Store to deliver the ECC plan.

  Again, in this scenario, assuming the NZT DCO is consented with the additional Article included, the Applicant does not consider there to be any impediment to the deliverability of the Proposed Development, or for the granting of the Hornsea Project 4 DCO to have any relevance to the Proposed Development's acceptability.

- **Scenario 3 – Hornsea Project 4 is consented, with bp's protective provisions included, save for the disapplication of the Interface Agreement.** In such circumstances, the SoS would have accepted the need to prevent co-location between Hornsea Project 4 and the Endurance Store within the Overlap Zone but not agreed with bp's submissions as to why it is appropriate to disapply the Interface Agreement. In this circumstance, it would follow that the SoS would likely not be persuaded by the need to include the corresponding additional Article in the NZT DCO.

  The Applicant does not consider there to be any other relevance to the acceptability of the NZT DCO. Further, whilst bp considers that the failure to include a provision disapplying the Interface Agreement would have adverse consequences for the

viability of the Endurance Store to deliver the ECC plan, the Applicant does not consider that this would impact on the deliverability of the NZT DCO (for the reasons advocated in relation to Scenario 4 below).

- **Scenario 4 – Hornsea Project 4 is consented, with Orsted's alternative protective provisions included**. bp has made extensive submissions into the Hornsea Project 4 DCO examination as to why Orsted's protective provisions are insufficient to adequately safeguard the Endurance Store, and the very real risk presented to the viability of the Endurance Store to deliver the ECC plan if the Hornsea 4 DCO is granted with Orsted's version of the protective provisions. In all likelihood, this scenario would prevent the delivery of the ECC plan.

  Further, by reducing the available storage capacity by approximately 70% due to the location of the wind turbine infrastructure, it would significantly compromise the long-term use of the Endurance aquifer for carbon capture and storage.

  However, the Proposed Development would nevertheless remain viable in this scenario. The Proposed Development's carbon would be captured and transported to the residual part of the Endurance Store. As such, the Applicant considers the Proposed Development remains acceptable and deliverable in this scenario, notwithstanding the wider detrimental effects to the Endurance Store.

As can be seen from the above, whilst there are a number of different options available to the SoS when determining the Hornsea Project 4 DCO, the Applicant considers the acceptability and deliverability of the Proposed Development to be constant throughout each (particularly in Scenarios 1 and 2, where it would be expected that the additional Article would be included in the NZT DCO where granted). The Applicant would be happy to further clarify any of the above as is necessary to give the ExA confidence in agreeing to allow the scrutiny of this matter to be limited to the Hornsea Project 4 examination.

APPENDIX 1 – ADDITIONAL ARTICLE AND EXPLANATORY NOTE

The Applicant will include the following article in the Draft DCO to be submitted at Deadline 2 of the NZT examination:

> **Disapplication of Interface Agreement**
>
> *From the date of this Order, the Interface Agreement shall no longer have effect, and no claim may be made, nor award granted, for any damages as a result of any alleged antecedent breach of the Interface Agreement prior to the date of this Order.*

This will require the insertion of the following additional definitions into Article 2:

> "BP Exploration Operating Company Limited" means BP Exploration Operating Company Limited, with Company Registration Number 00305943, whose registered office is at Chertsey Road, Sunbury On Thames, Middlesex TW16 7BP;
>
> "Carbon Sentinel Limited" means Carbon Sentinel Limited, with Company Registration Number 08116471, whose registered office is at 1-3 Strand, London WC2N 5EH;
>
> "Interface Agreement" means the agreement dated 14 February 2013 between (1) The Crown Estate Commissioners (2) Carbon Sentinel Limited and (3) Smart Wind Limited, as varied and adhered to by an agreement dated 12 September 2016 between (1) The Crown Estate Commissioners (2) Smart Wind Limited (3) Carbon Sentinel Limited and (4) Orsted Hornsea Project Four Limited and a Deed of Covenant and Adherence dated 10 February 2021 between (1) The Crown Estate Commissioners (2) Orsted Hornsea Project Four Limited (3) Smart Wind Limited (4) Carbon Sentinel Limited and (5) BP Exploration Operating Company Limited, or such other agreement as may be entered into by the parties in substitution for those agreements;
>
> "Orsted Hornsea Project Four Limited" means Orsted Hornsea Project Four Limited, with Company Registration Number 08584182, whose registered office is at 5 Howick Place, London, England SW1P 1WG;
>
> "Smart Wind Limited" means Smart Wind Limited, with Company Registration Number 07107382, whose registered office is at 5 Howick Place, London, England SW1P 1WG

The Applicant's explanation in relation to this additional Article is as follows:

The Article provides for the disapplication of the Interface Agreement entered into between the listed parties from the date of the Order, as well as confirming that no claim for any damages pursuant to its terms can be made as a result of any alleged antecedent breach of the Interface Agreement prior to the date of this Order.

This article replicates a protective provision proposed by BP Exploration Operating Company Limited ("bp") in its representations to the Hornsea Project Four DCO (currently in examination) (as per Annex 3 of bp's response to Deadline 2).

By way of high-level overview, the Interface Agreement purports to regulate and co-ordinate Orsted's Hornsea Project Four Offshore Wind Farm and the offshore carbon storage

elements of NEP within an overlapping area of the seabed (defined in the Interface Agreement as the "Overlap Zone") with a view to managing potential and resolving actual conflicts in relation to those respective projects' activities. The agreement was entered into in 2013 during the pre-feasibility stage of both developments, when it was considered that co-existence in the Overlap Zone would be possible. This is no longer the case and bp have made extensive submissions into the Hornsea Four DCO examination as to why it is necessary to disapply the Interface Agreement.

As both the Hornsea Four DCO and the NZT DCO will both be ultimately determined by the same Secretary of State and with the Hornsea Four DCO currently due to be determined ahead of the NZT DCO, the Applicant would respectfully request that the scrutiny of/advocacy for its disapplication is limited to the Hornsea Four DCO examination, so limiting duplication of time/resource in the NZT DCO. The ExA which has been appointed to report to the Secretary of State in respect of the Hornsea Four application will need to consider the merits of including bp's proposed protective provisions in the DCO, and include a recommendation in its report that reflects the conclusions it reaches on that matter in light of the evidence and submissions made by the parties. That would be necessary even if the ExA recommended that the DCO should not be granted, because it would need to cater for the possibility that the Secretary of State might reach a different conclusion. It does not seem helpful or necessary to repeat the advocacy in the NZT DCO examination before a separate ExA, when the recommendations will both fall before the same decision-maker in any case. The exception to this being the need to justify for the provision's duplication in the NZT DCO, which the Applicant can confirm is simply to safeguard the NZT project, particularly in contemplation of circumstances where the Hornsea Four DCO were to be refused and so bp's proposed protective provisions not given legal effect, meaning the Interface Agreement remained extant. In such circumstances, this would continue to compromise the potential deliverability/introduce significant potential liability for the carbon storage element of NEP. It would also give bp a degree of control/certainty, which may otherwise be absent were the provision to be limited to the Hornsea Project Four DCO as in such circumstances, Orsted could potentially not implement the DCO before it lapses with the result that the Interface Agreement survives).

APPENDIX 8: R (ON THE APPLICATION OF SAVE STONEHENGE WORLD HERITAGE SITE LTD) V SOS FOR TRANSPORT [2021] EWHC 2161 (ADMIN)

Department for Business, Energy & Industrial Strategy

Department for Business, Energy & Industrial Strategy

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[redacted]
W www.gov.uk

Louise Rich
Technical Director Planning
WSP UK Limited
Aldermary House
10-15 Queen Street
London
EC4N 1TX

Our Ref: EN020022

20 January 2022

Dear Ms Rich,

PLANNING ACT 2008

APPLICATION FOR THE AQUIND INTERCONNECTOR ORDER

1. Introduction

1.1. I am directed by the Secretary of State for Business, Energy and Industrial Strategy ("the Secretary of State") to advise you that consideration has been given to the report dated 8 June 2021 of the Examining Authority ("the ExA"), comprising three examining Inspectors, Andrew Mahon, Stephen Roscoe, and David Wallis, who conducted an examination into the application ("the Application") submitted on 14 November 2019 by AQUIND Limited ("the Applicant") for a Development Consent Order ("the Order") under section 37 of the Planning Act 2008 for the AQUIND Interconnector project. The AQUIND Interconnector project as a whole, is a bi-directional subsea electrical power transmission link (an interconnector) between the UK and France. The proposed development for which development consent is sought lies wholly within England, waters adjacent to England out to the seaward limits of the territorial sea, and the UK Exclusive Economic Zone ("EEZ").

1.2. The Application was accepted for examination on 12 December 2019. The examination began on 8 September 2020 and concluded on 8 March 2021. The Secretary of State received the report containing the ExA's conclusions and recommendation on 8 June 2021.

1.3. A total of 199 Relevant Representations (as defined in the Planning Act 2008) were received from statutory and non-statutory authorities, local councils, local MPs, local organisations and local residents. In addition, the Secretary of State notes that following Deadline 1, a further 779 letters were exceptionally accepted by the ExA to enable their views to be heard during the examination.

1.4. The Secretary of State notes that the examination has been conducted by the ExA in the challenging times of the COVID-19 pandemic when the Government introduced public health measures including a ban on large public meetings and a direction for people to stay at home as much as possible. He notes that the Planning Inspectorate and the ExA made best endeavours to ensure that no person or party was disadvantaged in participating in the examination process that was held virtually through videoconferencing and teleconferencing, and that the ExA's case team had run support and familiarisation sessions to ensure participation would be manageable, useful, fair and inclusive for all participants.

1.5. The principal matters considered by the ExA, as set out in its Report are:

- the principle of and need for the proposed development (including the fibre-optic cables);
- consideration of alternatives;
- traffic, highways, and onshore transport;
- air quality;
- noise, vibration, and electromagnetic fields ("EMF");
- the local community and socio-economic matters;
- the marine environment;
- shipping and navigation;
- onshore biodiversity and nature conservation;
- design;
- landscape and views (including tranquillity);
- trees;
- cultural heritage and the historic environment;
- the onshore water environment;
- soils and land use;
- ground conditions and contamination; and
- findings and conclusions in relation to Habitats Regulations Assessment

1.6. Following receipt of the ExA's Report, the Secretary of State requested further information from the Applicant on 13 July 2021 in respect of: mitigation and financial contribution proposals for sports grounds, playing pitches and recreational facilities in Portsmouth and the Victorious Festival, the commercial use of the surplus capacity in the fibre optic cable, micro-siting of the converter station at Lovedean and protective provisions. A response was requested by 27 July 2021 and was subsequently published on the Planning Inspectorate website on 28 July 2021. Interested Parties were invited to provide their comments on the responses received by 12 August 2021. The Secretary of State decided to issue a second request to the Applicant for further information on 2 September 2021 which requested clarification and justification for the

compulsory purchase powers sought for the plots of land associated with the proposed optical regeneration site and land associated with the commercial telecommunications buildings should those elements of the Application related to commercial telecommunications use be excluded from the Order. A response was requested by 16 September 2021. The response was subsequently published on the Planning Inspectorate website on 17 September 2021 and Interested Parties were invited to provide their comments on the responses received by 1 October 2021. In light of this second request for further information, the Secretary of State made the decision to extend the statutory deadline for taking the decision by six weeks, from 8 September 2021 to 21 October 2021. A statement confirming the new deadline for a decision was made to the House of Commons and House of Lords on 14 September 2021 in accordance with section 107(7) of the Planning Act 2008.

1.7. The decision deadline was further extended from 21 October 2021 to 21 January 2022 to ensure that the Secretary of State had sufficient time to consider all information relevant to the Application, and to allow time for a further request for information. The third request for information was issued on 4 November 2021 which sought information on the Applicant's consideration of alternatives, with reference to the substation at Mannington. The request also sought information related to the North Portsea Island Coastal Defence Scheme, the updates to the National Planning Policy Framework related to flood risk, and the location of the converter station at Lovedean. The Applicant provided its response on 18 November 2021 and the Secretary of State invited comments on 1 December 2021 from Interested Parties on this response and on certain topics from Portsmouth City Council, Coastal Partners, and National Grid Electricity Transmission with a deadline for response of 15 December 2021.

1.8. The Order as applied for, would grant development consent for the construction, operation, maintenance and decommissioning of a linear 2,000 megawatt ("MW") bi-directional subsea interconnector from the boundary of the EEZ in the English Channel to Lovedean in Hampshire, via a landfall at Eastney on Portsea Island, Portsmouth, together with a connection to an existing substation and associated infrastructure ("the proposed development"). The onshore route passes through the administrative areas of Portsmouth City Council, Havant Borough Council, East Hampshire District Council and Winchester City Council. The northern end of the route and the proposed converter station are adjacent to, but outside, the southern administrative boundary of the South Downs National Park Authority. From the UK EEZ boundary to Normandy, France, the remainder of the proposed development is subject to equivalent French planning consents. At the acceptance stage of the Planning Act process, the proposed development was a 'project of common interest' under the European Union TEN-E Regulation. After the UK exited the European Union the project lost its project of common interest status and would therefore no longer need to be assessed against the TEN-E Regulation.

1.9. As applied for, the AQUIND Interconnector would comprise:

- high voltage direct current ("HVDC") marine cables from the boundary of the UK EEZ to a landfall in the UK at Eastney in Portsmouth;
- jointing of the HVDC marine cables and HVDC onshore cables at the landfall;
- HVDC onshore cables from the landfall to Lovedean;
- a converter station at Lovedean, with a new access road of up to 1.2km;
- an extension to the existing substation at Lovedean;
- high voltage alternating current ("HVAC") onshore cables and associated infrastructure connecting the Converter Station to the UK grid at the Lovedean Substation;
- fibre-optic cables installed with the HVDC and HVAC cables;
- two optical regeneration stations for signal amplification at the landfall and two telecommunications buildings at the proposed converter station site;
- various landscape and temporary construction and access works.

1.10. Powers of compulsory acquisition over land and new rights over land, are also sought by the Applicant to support the delivery of the proposed development. Subsequent to the Application being made, the Applicant made three changes to the proposed development relating to the inclusion of additional land within the Order limits and further compulsory acquisition matters. Two changes were treated by the ExA as 'material' and the third as 'non-material'. In addition, other changes were made to respond to matters as they emerged during the examination, however the ExA was satisfied that the proposed changes to the Application would not be materially different from the proposed development that was applied for.

1.11. Published alongside this letter on the Planning Inspectorate's National Infrastructure website is a copy of the ExA's Report of Findings, Conclusions and Recommendation to the Secretary of State ("the ExA Report"). The main features of the development proposals, as applied for, and site are set out in section 2 of the ExA's Report. The ExA's findings are set out in sections 5 - 8 of the ExA Report, and the case for development consent and the ExA's conclusions on the terms of the Order are set out at sections 9 and 11 respectively.

2. Summary of the ExA Report and Recommendation

2.1. The ExA's recommendation in section 12.3 (page 367 of the ExA Report) is as follows:

> "*12.3.1 For all of the above reasons and in light of its conclusions on all important and relevant matters set out in this Report, the ExA recommends that the Secretary of State should make the Order in the form attached at Appendix C to this Report, subject to the recommendations in section 10.10 and modified in accordance with the recommended changes at section 11.9 of this Report*."

3. Summary of the Secretary of State's Decision

3.1. Section 104(3) of the Planning Act 2008 requires the Secretary of State to decide the Application in accordance with any relevant National Policy Statement ("NPS"). **The Secretary of State has carefully considered the ExA's Report and all other material considerations, including further representations received after the close of the ExA's examination ("the post-examination representations"), and has decided, in accordance with Section 104(3), to refuse development consent.** All numbered references, unless otherwise stated, are to paragraphs of the ExA's Report ["ER *.*.*"].

3.2. This letter is the statement of reasons for the Secretary of State's decision for the purposes of section 116(1)(b) of the Planning Act 2008 and the decision notice for the purposes of regulation 30 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 ("the 2017 EIA Regulations").

3.3. Section 104(2) requires the Secretary of State, in deciding an application, to have regard to the any relevant NPS. Subsection (3) requires that the Secretary of State must decide the application in accordance with the relevant NPS except to the extent that one or more of subsections (4) to (8) applies.

3.4. In relation to the Application, the Secretary of State has had regard to the Overarching National Policy Statement for Energy ("NPS EN-1"). The Secretary of State has made his decision on the basis that making the Order would not be in accordance with his obligations under the Planning Act 2008.

3.5. The Secretary of State notes that the ExA also considered at length the question of the planning balance under section 104(7) of the Planning Act 2008 i.e. whether the need for the proposed Development outweighed the planning harms inherent in the scheme and concluded that this was the case. The Secretary of State notes that the ExA identified planning harms associated with the scheme, which include less than substantial harm to the Fort Cumberland Scheduled Monument and the Grade II listed cottage known as Scotland, as well as impacts on tourism receptors, sports pitches, and the Victorious Festival. The compulsory purchase powers sought by the Applicant would also result in private losses and could cause delay to the North Portsea Island Coastal Defence Scheme due to the overlapping of construction compound areas between this scheme and the proposed Development. The proposed development also has other potential adverse effects which are summarised in the ExA's report in the consideration of the planning balance [ER 9.3]. The Secretary of State agrees these adverse effects weigh against the proposed development.

3.6. The Secretary of State has had regard to the case law in relation to the consideration of alternatives and is of the view that the alternatives, and in particular the Mannington substation initially considered by the Applicant, is an important and relevant consideration under s104(2)(d) of the Planning Act

2008. Given the adverse effects arising from the project and which have been noted above, and in particular the combination of impacts that result from the proposed landfall in an urban location, the Secretary of State considers that in the circumstances of this particular application it is exceptionally necessary to consider whether sufficient consideration has been given to whether there are more appropriate alternatives to the proposed route. In particular, consideration needs to be given to the alternative substations initially identified by the Applicant (and therefore alternative onshore routes avoiding the above harms) and whether these were adequately considered to determine whether the potential harms caused by the development from the selected route could have been avoided or reduced. In this regard the Secretary of State disagrees with the ExA's conclusion in relation to the consideration of alternatives and, as set out below, considers that there was a failure to adequately consider the original alternatives identified by the Applicant, such that it is not possible to conclude that the need for and benefits of the proposed Development would outweigh its impacts.

4. The Secretary of State's Consideration of the Application

4.1. The Secretary of State has considered the ExA's Report and relevant representations received after the Examination in response to his consultation. The Secretary of State disagrees with the conclusions and recommendations of the ExA's report regarding the consideration of alternatives, and the reasons for the Secretary of State's decision are set out below.

Consideration of Alternatives

4.2. The policy relating to the consideration of alternatives is set out in section 4.4 of EN-1. Paragraph 4.4.3 states that the Secretary of State '*should be guided in considering alternative proposals by whether there is a realistic prospect of the alternative delivering the same infrastructure capacity (including energy security and climate change benefits) in the same timescale as the proposed development.'* Paragraph 4.4.3 goes on to state that '*it is intended that potential alternatives to a proposed development should, wherever possible, be identified before an application is made to the [Secretary of State] in respect of it (so as to allow appropriate consultation and the development of a suitable evidence base in relation to any alternatives which are particularly relevant).'*

4.3. The ExA notes that several matters arose during the examination relating to pre-application alternatives for locating the converter station, the choice of landfall and the cable routing between these two points. There also remained at the close of the examination, two alternatives for the micro-siting of the converter station. The ExA also notes that [ER 5.4.6] the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 require the Environmental Statement to include a description of the reasonable alternatives studied by an applicant.

4.4. The Applicant considered the question of alternatives in Chapter 2 of the Environmental Statement that was submitted to the Planning Inspectorate as

part of its application (the "Environmental Statement"). With regard to the substation, the Applicant's position was that ten substations were initially identified on the 400kV transmission network as possible sites but seven discounted because of limited thermal capacity, technical capability to extend them or difficulties with onshore and offshore cable routing. Of the three remaining options that were considered further, the Lovedean Substation was selected on the basis that it was the most efficient, coordinated and economical. The Applicant considered that the converter station for the interconnector should also be close to the substation. The ExA notes [ER 5.4.10] that, at the close of examination, two options for the micro-siting of the converter station remained. In terms of the location for the landfall site, twenty-nine potential sites were identified and six within 35km of the Lovedean substation were considered in greater detail. The Applicant's view was that the beach at Eastney was the most appropriate, but that East Wittering and Hayling Island remained feasible options. In terms of the cable route, the Applicant decided to underground the onshore cable at an early stage, and consequently East Wittering and Hayling Island were discounted due to technical difficulties and environmental effects. Of the routes to Eastney following studies and feedback from Portsmouth City Council, route '3D' was deemed feasible, and was the shortest and most economical, although it was recognised that the potential environmental constraints required careful consideration.

4.5. The ExA notes [ER 5.4.15] that several Relevant Representations were received from statutory consultees and members of the public, raising the Applicant's assessment of alternatives. In response to those Relevant Representations, the Applicant provided a supplementary alternatives chapter to its Environmental Statement, in which it set out the further detail regarding reasoning on the technical, physical and environmental constraints that informed the selection of the grid connection point and the onshore cable corridor route, as well as the discounting of a Hayling Island option [ER 5.4.16]. With regard to the location of the substation at Lovedean, the Secretary of State notes that National Grid Electricity System Operator's ("NG ESO") submitted a representation to the examination confirming the reasons behind discounting the other substations [ER 5.4.24].

4.6. The Local Impact Reports submitted by the relevant local authorities were also considered by the ExA [ER 5.4.17 et seq]. Havant Borough Council, Hampshire County Council, and Winchester Council expressed similar concerns regarding the availability of a countryside route rather than one along the public highway, and the potential impact on local features, developments and planned road improvement schemes. Portsmouth City Council also suggested that alternative routes had been given inadequate consideration. However, the ExA was satisfied that [ER 5.4.29], in the context of the requirement for the consideration of alternatives set out in NPS EN-1, that the Applicant has demonstrated a considered approach to the location of the converter station, onshore cable corridor and landfall and provided sufficient detail as to routing options.

4.7. The ExA concluded [ER 5.4.33] that the Applicant's consideration of alternatives had provided adequate information to describe and explain its

assessment of alternatives in relation to the social and environmental effects, technical feasibility and costs, and that the Applicant's consideration of alternatives was sound, with adequate information provided on a range of alternative routes and locations, and that the requirements of NPS EN-1 and the Environmental Impact Assessment ("EIA") Regulations had been met. It also indicated that there are no policy or legal requirements that led the ExA to recommend that consent be refused for the proposed development in favour of another alternative.

4.8. The Secretary of State disagrees with the ExA's conclusion on this matter and considers that in this instance insufficient consideration was given by the Applicant to the alternative connection point at the Mannington substation. The Secretary of State notes that the document *Environmental Statement Addendum – Appendix 3 – Supplementary Alternatives Chapter*[1] states that ten existing substations were evaluated as part of a feasibility study carried out by National Grid Electricity Transmission ("NGET"). The Secretary of State understands that the Applicant submitted a request to NGET for a Feasibility Study in December 2014, and that the final version of the Feasibility Study was issued in January 2016. The Mannington Substation was assessed as part of this Feasibility Study. The Feasibility Study notes that the substation was not considered to be suitable for the proposed connection because, at the time, there was already a connection agreement in place for the proposed Navitus Bay offshore wind farm. The Addendum notes that the Navitus Bay offshore wind farm project was subsequently abandoned but the grid connection agreement remained in place "for some time following the feasibility study" during which "significant progress" was made on the AQUIND interconnector project meaning that it was not reasonable, having regard to costs and delay, for the Applicant to re-consider the potential for a connection at Mannington at that later stage.

4.9. The decision to refuse development consent for the Navitus Bay development was taken by the Department of Energy and Climate Change on 11 September 2015. The Secretary of State requested information from the Applicant on 4 November 2021 in respect of how long the connection agreement for the Navitus Bay development remained in place following that refusal, what enquiries the Applicant made in respect of the potential use of the Mannington substation following the refusal of the Navitus Bay project, and at what stage the development of the proposed AQUIND Interconnector project was when the connection agreement ended.

4.10. The Applicant submitted their response to this request on 18 November 2021. At paragraph 2.6 of this response, the Applicant noted that the letter submitted by NG ESO on 25 January 2021 stated that "Options to the West of Lovedean required all or nearly all the same network reinforcements as a connection at Lovedean plus additional reinforcements to either get the power to Lovedean or reinforcements to the west to Exeter substation and as far northwards as

[1] https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN020022/EN020022-001488-7.8.1.3%20ES%20Addendum%20-%20Appendix%203%20Supplementary%20Alternatives%20Chapter.pdf

Minety", and that "these sites would likely have resulted in more overall reinforcements, which would therefore lead to more environmental impact, and increased costs to the GB consumer". At paragraph 2.7 of its response, the Applicant noted that in addition to these reasons from NG ESO as to why Mannington Substation was not taken forward for systems analysis, the shared connection point with the 970MW Navitus Bay offshore windfarm raised technical concerns around the suitability of Mannington Substation as well.

4.11. The Applicant advises that the connection agreement for the Navitus Bay offshore windfarm at Mannington Substation remained for some time after the Feasibility Study request in December 2014. The Applicant goes on to state at paragraph 2.14 of their response that, following the refusal of development consent for the Navitus Bay offshore wind farm, the Applicant made enquiries with NGET on 14 October 2015 regarding the impact of that refusal on the Feasibility Study which was being undertaken and known to be near completion. However, the Applicant has not been able to locate a response to this enquiry, though the Applicant notes that it was understood that the refusal would have been subject to the six-week legal challenge period provided for by section 118 of the Planning Act 2008 and as such the connection agreement for Navitus Bay offshore wind farm would have remained in place. The Applicant was aware by January 2016 that the connection agreement was no longer in place (paragraph 2.15 of their response). The Application was submitted on 19 November 2019.

4.12. On 1 December 2021, the Secretary of State invited Interested Parties to comment on the Applicant's response to his request for information of 4 November 2021. Various Interested Parties commented on the Applicant's response regarding Navitus Bay offshore wind farm and the consideration of alternatives. Portsmouth City Council noted that the Applicant's response did not answer the Secretary of State's question as to how long the connection agreement for the Navitus Bay offshore wind farm development remained in place following the refusal for development consent. Portsmouth City Council indicated they were surprised that a single, unresolved enquiry in October 2015 by the Applicant is considered by them to be an adequate investigation of this matter. Portsmouth City Council's view is that reasonable approaches to NGET and/or the promoters of the Navitus Bay offshore wind farm application could have yielded responses in a timely manner which could have then been considered in the Feasibility Study report. Portsmouth City Council do not consider that the Applicant's response explains its failure to deal with this matter and concludes that the matter was either deliberately overlooked, or that the Applicant had closed its mind. Portsmouth City Council also note that the Applicant does not make any assessment of the private loss to be suffered in consequence of the different options in either the Consideration of Alternatives Chapter 2 of the Environmental Statement, or in the Supplementary Alternatives Chapter. Portsmouth City Council state that as a result, the Secretary of State will not be in a position to properly determine either that the route option(s) selected represents the most equitable balance of public benefit versus private loss.

4.13. Winchester City Council also commented on this matter. They note that when the Navitus Bay offshore wind farm scheme was refused, the Applicant did not re-consider the availability of the connection point at Mannington Substation, and that the Applicant has not provided clear detail beyond the statement that the re-introduction of Mannington Substation into the connection review process would have resulted in lost time and expenditure. Winchester City Council suggest that the developer has to accept that when initiating a project with a long lead in time, it carries the inherent risk that some aspect that feeds into site selection or another part of the process might change over time, and that this may require a developer to go back and repeat or reshape the terms of reference before any work is undertaken. Winchester City Council also disagree with the Applicant's view that a connection at Mannington Substation would have resulted in an impact on the Jurassic coastline, as the Navitus Bay offshore wind farm project was not making landfall on the relevant section of coastline, but rather east of Christchurch, and Winchester City Council consider that the proposed AQUIND Interconnector project would have made landfall in the same area had Mannington Substation been an option. Winchester City Council also suggested that it would be appropriate to seek views from NGET to provide a clear picture of how the process was undertaken, including any benchmarks the process contains. Winchester City Council consider that the views of NGET are particularly relevant, as they are likely to have been more aware of the situation and timeline when Navitus Bay offshore wind farm was refused. Winchester City Council therefore suggested that the Secretary of State ask NGET for an outline of the key stages and the timeline that the joint exercise would have followed together with an explanation for the lack of a reply to the correspondence the Applicant says they tried to initiate on this matter. The Secretary of State considers that the Applicant has access to any relevant information relating to discussions between the Applicant and NGET, and therefore considers that the Applicant would have submitted all available and relevant information on this matter and that there is therefore no requirement to seek views from NGET. The Applicant has had the opportunity to address the issue of this alternative and could have sought any information it required from NGET. It is the Secretary of State's view that it is not appropriate in the circumstances to further delay the decision for this purpose.

4.14. Hampshire County Council submitted a late response to the invitation for comments on 16 December 2021. Hampshire County Council's response also refuted the Applicant's claim that a connection at Mannington Substation would have resulted in impacts on the Jurassic coastline for the same reasons as Winchester County Council. Hampshire County Council's view is that limited weight can be given to the Applicant's argument that a connection at Mannington Substation was not preferable to Lovedean without further clarification from the Applicant as to whether such reinforcement was needed with consent for Navitus Bay offshore wind farm being refused.

4.15. The Secretary of State agrees with the views of Interested Parties that the Applicant should have undertaken further work to assess the feasibility of the Mannington Substation as the grid connection point once it became aware of the consent refusal for the Navitus Bay offshore wind farm project. Further

consideration of the connection at Mannington Substation could provide an alternative to avoid the material harms caused by the Application route.

4.16. The Secretary of State considers that at the point in the timeline (i.e. 11 September 2015) when consent for the Navitus Bay offshore wind farm was refused), that the Mannington Substation option should have been adequately explored. The Applicant states that it raised its enquiries with NGET around the impact of the refusal for Navitus Bay offshore wind farm on the Feasibility Study on 14 October 2015. At this point in time, the Feasibility Study had not yet been completed, and the six-week legal challenge period for Navitus Bay offshore wind farm was nine days away from expiry on 23 October 2015. The Secretary of State also notes that the Applicant's inability to provide a response to the enquiries it raised with NGET on 14 October 2015 regarding the impact on the Feasibility Study, means that the Secretary of State is unable to review in full the discussions that took place regarding this matter at the time.

4.17. The Secretary of State notes the Applicant's view that it was not reasonable or necessary to further consider Mannington Substation as the grid connection point for the proposed development following the completion of the Feasibility Study. However, the Secretary of State considers that the Applicant should have pursued further the option to include Mannington Substation in the Feasibility Study given that the Applicant was aware that consent had been refused for the Navitus Bay offshore wind farm. The Secretary of State notes that the Applicant understood the potential importance of the refusal of consent for Navitus Bay offshore wind farm at the time, as it raised queries with NGET regarding the impact of this on the Feasibility Study. The Secretary of State considers that the Applicant has provided insufficient detail as to why further investigation into Mannington Substation was not undertaken. Whilst the Secretary of State understands that this could have resulted in further work for the Applicant, and the Applicant may not have been able to progress with regulatory and other submissions until that process was complete, the Secretary of State considers that the potential adverse effects of the proposed development (as identified by the ExA) necessitate the adequate consideration of those alternatives that the Applicant had identified. The Secretary of State also notes that the refusal of Navitus Bay was in September 2015 and the Application would not be made until over four years later.

4.18. As noted above, NPS EN-1 states that potential alternatives should be identified wherever possible before an application is made to the Secretary of State so as to allow appropriate consultation and the development of a suitable evidence base in relation to any alternatives which are particularly relevant. However, the Secretary of State disagrees with the ExA's conclusion on this matter and considers that the failure to adequately consider the alternative of the Mannington Substation as a connection point is a material consideration. The Secretary of State considers that this weighs significantly against the proposed Development as he is unable to conclude that the proposed route is justified.

4.19. The Secretary of State also acknowledges the implications of the Applicant's consideration of alternatives and the compulsory acquisition powers it seeks as part of the Application. Blake Morgan LLP submitted comments to the Secretary

of State on behalf of landowners the Carpenters on 15 December 2021 which raised the concerns around the possibility of an alternative connection point at Mannington Substation and the implications this has for the compulsory acquisition of the Carpenters' land. In their comments of 15 December 2021, Portsmouth City Council noted its concerns that the Applicant had not made any assessment of the private loss to be suffered in consequence of the different options available and had not weighed that loss against the public benefits of the proposed development.

4.20. The Secretary of State acknowledges that alternatives are material in exceptional circumstances only. The Secretary of State considers that this test is met given the combination of adverse impacts from the proposed route through a very densely populated urban area. He considers that the change in circumstances relating to the Mannington Substation was known by the Applicant at a sufficiently early stage of the Feasibility Study, and that the change was of sufficient importance and scale. Therefore, further investigation should have been undertaken to ensure that sufficient evidence was available in its application documents to support the preferred choice of route taken forward by the Applicant.

4.21. The Secretary of State acknowledges that if the Applicant had investigated a connection at Mannington Substation further, it may have concluded that it was not a feasible option. However, in the absence of sufficient evidence on this matter, the Secretary of State cannot grant consent for the AQUIND Interconnector project taking into account the adverse effects identified by the ExA and the possibility that a connection point at Mannington Substation might potentially have resulted in less adverse impact.

5. Submissions to the Secretary of State after Receipt of the ExA's Report

5.1 The Secretary of State received late representations from a significant number of individuals following the close of the examination period. The Secretary of State has considered these representations and has taken the view that these late representations do not materially add to the information that was already available to him through the ExA's examination and report.

5.2 Penny Mordaunt MP wrote to the Secretary of State on 5 May 2021 expressing concerns about the AQUIND Interconnector project's impact on the City of Portsmouth, including on the traffic and road network, and the local environment. Penny Mordaunt's letter also raised concerns regarding the UK's energy resilience and reliance on France for energy. Penny Mordaunt MP delivered a petition to the Secretary of State on 10 June 2021 in objection to the proposed development, and also wrote to the Secretary of State on 12 August 2021, in response to the Secretary of State's invitation for comments on the Applicant's response to the first request for further information.

5.3 Stephen Morgan MP submitted a letter on 22 June 2021 objecting to the proposed development. On 6 July 2021, Stephen Morgan MP asked an Oral Parliamentary Question regarding the project, in which he requested that the Secretary of State reject the proposals. Stephen Morgan MP also secured a

Westminster Hall Debate on the AQUIND Interconnector project on 13 July 2021. Stephen Morgan MP submitted a further letter to the Secretary of State regarding the AQUIND Interconnector project on 14 July 2021, in which he requested that all correspondence with AQUIND Limited be published immediately, and also requested an independent review of the proposed development. On 14 September 2021, Stephen Morgan MP presented a petition with over 6,200 signatures to the House of Commons objecting to the proposed development. On 17 September 2021, Stephen Morgan MP wrote to the Secretary of State noting the local opposition to the proposed development and the number of signatures on the petition and stated that the project should be stopped.

5.4 The Secretary of State has considered the representations made by Penny Mordaunt MP and Stephen Morgan MP and the petitions which they presented. So far as these relate to planning matters, the issues raised were covered by the examination and the Secretary of State has therefore taken them into account during his consideration of the ExA's report.

5.5 Catherine West MP submitted a letter to the Secretary of State on 6 July 2021 that, amongst other concerns, raised a question regarding the number of green jobs provided by the proposed project. In taking his decision on the proposed development, the Secretary of State has considered the socio-economic effects of the proposed development, including job creation, along with all other matters relevant to planning.

5.6 On 28 July 2021, Flick Drummond MP submitted a representation to the Secretary of State that set out concerns regarding the route of the cable, the siting and construction of the converter building, and the disruption associated with the proposed development including the environmental impact. The Secretary of State notes that Flick Drummond MP submitted comments to the Planning Inspectorate whilst the Application was being examined. The Secretary of State considers that the matters raised by Flick Drummond MP were covered by the examination, and the Secretary of State has given them consideration in taking his decision on the proposed development.

6. Findings and Conclusions in Relation to Habitats Regulations Assessment

6.1 The Conservation of Habitats and Species Regulations 2017 ("the Habitats Regulations") and the Conservation of Offshore Marine Habitats and Species Regulations 2017 ("the Offshore Habitats Regulations") require the Secretary of State to consider whether the proposed Development would be likely, either alone or in combination with other plans and projects, to have an adverse effect on the integrity of any site(s) forming part of the UK's national site network as defined in the Habitats Regulations and the Offshore Habitats Regulations (collectively referred to in this document as a "protected site"). If likely significant effects cannot be ruled out, then an Appropriate Assessment must be undertaken by the Secretary of State pursuant to regulation 63(1) of the Habitats Regulations and regulation 28(1) of the Offshore Habitats Regulations

to address potential adverse effects on site integrity. The Secretary of State may only agree to the project if he has ascertained that it will not adversely affect the integrity of a protected site. This process is collectively known as a Habitats Regulations Assessment.

6.2 The preparation of the Habitats Regulations Assessment ("HRA") that is published alongside this decision letter was prepared by environmental specialists in BEIS. The HRA concludes that a likely significant effect cannot be ruled out in respect of 13 protected sites when considered alone or in-combination with other plans and projects [ER 8.4.7]. It was, then, necessary to consider whether the proposed development, either alone or in-combination, would have an adverse effect on the integrity of those sites. An Appropriate Assessment was, therefore, undertaken by the Secretary of State to determine whether an adverse effect on the protected sites could be ruled out in light of the sites' conservation objectives.

6.3 The Applicant's conclusion that adverse effects on integrity ("AEoI") could be excluded from all protected sites was disputed by Natural England in relation to the dark-bellied brent goose feature of the Chichester and Langstone Harbours Special Protected Area ("SPA") and Ramsar site, and Portsmouth Harbour SPA and Ramsar site. To avoid an AEoI on the sites, the Applicant proposed implementation of winter working principles and screening around the perimeter of horizonal direct drilling ("HDD") compounds as described in the Onshore Outline Construction Environment Management Plan. Natural England then confirmed their agreement that there would be no AEoI on the protected sites.

6.4 The overall conclusion of the assessment is that there would be no AEoI of any protected sites, either alone or in-combination with other plans and projects. This conclusion of no AEoI of the protected sites is based on the implementation of the proposed mitigation measures, including but not limited to standard best practice in relation to waste management and spill response, winter working principles during construction, the use of HDD under Langstone Harbour and part of Milton Common, and the development of a Marine Pollution Contingency Plan [ER 8.4.10]. The proposed mitigation measures related to the onshore environment are secured in requirement 15 of the Order in relation to the Construction Environmental Management Plan, and the marine provisions are secured in the Deemed Marine Licence. The Secretary of State does not, therefore, consider that there would be any breach of his duty under the Habitats Regulations and the Offshore Habitats Regulations in the event he was to grant development consent for AQUIND Interconnector.

6.5 The Secretary of State notes that the ExA also concluded that the proposed development, subject to the inclusion of controls set out in the Recommended Order and the final agreement as provided from Natural England and the Joint Nature Conservation Committee, would not have any AEoI on any protected sites. The Secretary of State finds no reason to disagree with the ExA's conclusions on this matter.

7. The Secretary of State's Consideration of the Planning Balance

7.1 Section 104 of the Planning Act 2008 set out the procedures to be followed by the Secretary of State in determining applications for development consent where National Policy Statements have effect. The Secretary of State has to have regard to a range of policy considerations including the relevant National Policy Statements and development plans and local impact reports prepared by local planning authorities in reaching a decision. For applications determined under section 104, the primary consideration is the policy set out in the National Policy Statements.

7.2 The ExA has identified [ER 9.3.4 et seq] that adverse impacts arising from the proposed development include significant though temporary effects on highways conditions and onshore transport during the construction phase, temporary noise and vibration affecting some residents, and a loss of access to formal sports facilities along the cable route. There would also be short and long-term adverse landscape and visual effects, including some harm to the South Downs National Park, as well as harm to the significance of the Grade II listed Cottage known as Scotland, and the Fort Cumberland scheduled monument. However, the ExA is satisfied [ER 9.3.10] that the adverse effects would be mitigated as far as reasonably practicable in respect of the Application route. The Secretary of State does not disagree but a significant number of adverse effects remain. These remaining impacts, in the view of the Secretary of State, make the consideration of alternatives exceptionally relevant to the Secretary of State's decision in this case.

7.3 In addition to these impacts identified by the ExA, the Secretary of State considers that the Applicant's failure to adequately assess the feasibility of Mannington Substation as an alternative connection point, means that the planning balance weighs against the Order being made, given the proposed development's obvious impacts on the City of Portsmouth and the possibility that a connection at Mannington Substation might have resulted in less adverse impact.

7.4 Although the ExA found that the benefits of the proposed development would outweigh its adverse effects, the Secretary of State disagrees with this conclusion, as the alternative of a connection to the Mannington Substation has not been properly assessed and therefore he cannot conclude that the proposed route has been justified and determine that the need for and benefits of the proposed Development would outweigh its impacts.

8. Other Matters

Section 35 Direction and Associated Development

8.1 The ExA considered the principle of and need for the proposed commercial telecommunications development in its report. The ExA took the view that although the section 35 direction had proposed that surplus capacity in the fibre optic cable should be used for commercial telecommunications purpose as

associated development, the section 35 direction itself had overridden this by including use of the surplus capacity as part of the development and that this included buildings associated to this use as part of the development for which development consent is required [ER 5.3.45]. As a result, this part of the proposed development was not associated development within the meaning of section 115(2) of the Planning Act 2008 and submissions by various parties that they failed to meet the tests to be considered as associated development were not considered as relevant by the ExA.

8.2 The Secretary of State has considered carefully the views of the ExA and the representations put forward by the Applicant. Section 35 provides a limited power to the Secretary of State to direct development to be treated as development for which development consent is required where it meets certain conditions, including: that the development is in the field of energy; the Secretary of State thinks the development proposed is nationally significant; and it is in England or waters adjacent to England. The Secretary of State is of the view that nothing in section 35 permits a direction to constrain, determine or oust the question of whether something is associated development or not. At the section 35 direction stage, the precise parameters of every aspect of the proposed project were not known, and it was therefore not possible for the Secretary of State to take a decision as to whether aspects of the proposed development fell to be considered as part of the 'main' development or associated development under sections 115(1)(a) or 115(1)(b) respectively. In addition, the Secretary of State is of the view that a section 35 direction cannot be construed to direct that development which does not meet the necessary section 35 criteria itself (the telecommunications equipment does not fall within the included 'fields' of development) be treated as development for which development consent is required. This does not mean, however, that such development cannot be associated development and thus be consented through a development consent order.

8.3 The Secretary of State therefore disagrees with the ExA's view that all elements of the proposed development described in the section 35 direction request, including those which are described as associated development, are part of the development for which development consent is required [ER 5.3.43]. The elements of the proposed development which therefore relate to commercial telecommunications activity were not made development for which development consent is required under section 115(1)(a) of the Planning Act 2008.

Human Rights Act 1998

8.4 The ExA and the Secretary of State has had regard to the potential infringement of human rights by the proposed Development, in relation to the European Convention on Human Rights as given effect by the Human Rights Act 1998 in the event that the application is granted. The Secretary of State does not consider that refusing development consent would be incompatible with any Convention Right.

Equality Act 2010

8.5 The Equality Act 2010 includes a public sector equality duty ("PSED"). This requires a public authority, in the exercise of its functions, to have due regard to the need to (a) eliminate discrimination, harassment and victimisation and any other conduct prohibited by or under the Act; (b) advance equality of opportunity between persons who share a relevant protected characteristic (e.g. age; gender; gender reassignment; disability; marriage and civil partnerships[2]; pregnancy and maternity; religion and belief; and race.) and persons who do not share it; and (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

8.6 In considering this matter, the Secretary of State (as decision-maker) must pay due regard to the aims of the PSED. This must include consideration of all potential equality impacts highlighted during the examination. There can be detriment to affected parties but, if there is, it must be acknowledged and the impacts on equality must be considered. The Secretary of State does not consider that his decision to refuse consent would have significant differential impacts on any of the protected characteristics.

Natural Environment and Rural Communities Act 2006

8.7 The Secretary of State has considered the Secretary of State's duty in accordance with section 40(1) of the Natural Environment and Rural Communities Act 2006, where he is required to have regard to the purpose of conserving biodiversity, and in particular to the United Nations Environmental Programme Convention on Biological Diversity of 1992, when granting development consent.

8.8 The Secretary of State is of the view that the ExA Report, together with the environmental impact analysis, considers biodiversity sufficiently to inform his decision in this respect.

9. Challenge to decision

9.1 The circumstances in which the Secretary of State's decision may be challenged are set out in the Annex to this letter.

10. Publicity for decision

10.1 The Secretary of State's decision on this Application is being publicised as required by section 116 of the Planning Act 2008 and regulation 31 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017.

[2] In respect of the first statutory objective (eliminating unlawful discrimination etc.) only.

Yours sincerely

[redacted]

Gareth Leigh
Head of Energy Infrastructure Planning

ANNEX

LEGAL CHALLENGES RELATING TO APPLICATIONS FOR DEVELOPMENT CONSENT ORDERS

Under section 118 of the Planning Act 2008, an Order granting development consent, refusal of development consent, or anything done, or omitted to be done, by the Secretary of State in relation to an application for such an Order, can be challenged only by means of a claim for judicial review. A claim for judicial review must be made to the Planning Court during the period of 6 weeks beginning with the day after the day on which the Secretary of State's reasons (the decision letter) is published. The decision documents are being published on the date of this letter on the Planning Inspectorate website at the following address:

https://infrastructure.planninginspectorate.gov.uk/projects/south-east/aquind-interconnector/

These notes are provided for guidance only. A person who thinks they may have grounds for challenging the decision to make the Order referred to in this letter is advised to seek legal advice before taking any action. If you require advice on the process for making any challenge you should contact the Administrative Court Office at the Royal Courts of Justice, Strand, London, WC2A 2LL (0207 947 6655).

APPENDIX 9: AQUIND INTERCONNECTOR ORDER – SOS DECISION LETTER

The Queen on the application of Save Stonehenge World Heritage Site Limited v Secretary of State for Transport v Highways England, Historic Buildings and Monuments Commission for England ("Historic England")

Court
Queen's Bench Division (Administrative Court)

Judgment Date
30 July 2021

Case No: C0/4844/2020

High Court of Justice Queen's Bench Division Planning Court

[2021] EWHC 2161 (Admin), 2021 WL 03276048

Before: The Hon. Mr Justice Holgate

Date: 30/07/2021

Hearing dates: 23rd, 24th and 25th June 2021

Representation

David Wolfe QC and Victoria Hutton (instructed by Leigh Day) for the Claimant.
James Strachan QC and Rose Grogan (instructed by The Government Legal Department) for the Defendant.
Reuben Taylor QC (instructed by Pinsent Masons) for the First Interested Party.
Richard Harwood QC and Christiaan Zwart (instructed by Shoosmiths) for the Second Interested Party.

Approved Judgment

Mr Justice Holgate:

Introduction

1. The claimant, Save Stonehenge World Heritage Site Limited, seeks to challenge by judicial review the decision dated 12 November 2020 of the defendant, the Secretary of State for Transport ("SST"), to grant a development consent order ("DCO") under s.114 of the Planning Act 2008 ("the PA 2008") for the construction of a new route 13 km long for the A303 between Amesbury and Berwick Down which would replace the existing surface route. The new road would have a dual instead of a single carriageway and would run in a tunnel 3.3 km long through the Stonehenge part of the Stonehenge, Avebury and Associated Sites World Heritage Site ("WHS").

2. The application for the order was made by the first interested party, Highways England ("IP1"), a strategic highways company established under the Infrastructure Act 2015 (" IA 2015 ").

3. The second interested party, Historic England ("IP2"), was a statutory consultee in relation to the application and is the government's statutory advisor on the historic environment. IP2 has long been involved in the management of Stonehenge and since 2014 with the current road proposals.

4. The claimant is a company formed by the supporters of the Stonehenge Alliance, which is an unincorporated, umbrella campaign group, which co-ordinated the objections of many of its supporters before the statutory examination into the application.

5. On 16 November 1972 the General Conference of UNESCO adopted the Convention Concerning the Protection of the World Cultural and Natural Heritage ("the World Heritage Convention" or " the Convention "). The UK ratified the Convention on 29 May 1984. In 1986 the World Heritage Committee ("WHC") inscribed Stonehenge and Avebury as a WHS having "Outstanding Universal Value" ("OUV") under article 11(2).

6. In June 2013 the WHC adopted a statement of the OUV for the WHS which included the following:-

> "The World Heritage property comprises two areas of chalkland in Southern Britain within which complexes of Neolithic and Bronze Age ceremonial and funerary monuments and associated sites were built. Each area contains a focal stone circle and henge and many other major monuments. At Stonehenge these include the Avenue, the Cursuses, Durrington Walls, Woodhenge, and the densest concentration of burial mounds in Britain. At Avebury, they include Windmill Hill, the West Kennet Long Barrow, the Sanctuary, Silbury Hill, the West Kennet and Beckhampton Avenues, the West Kennet Palisade Enclosures, and important barrows."

The WHS is said to be of OUV for qualities which include the following:-

> • Stonehenge is one of the most impressive prehistoric megalithic monuments in the world on account of the sheer size of its megaliths, the sophistication of its concentric plan and architectural design, the shaping of the stones, uniquely using both Wiltshire Sarsen sandstone and Pembroke Bluestone, and the precision with which it was built.
>
> • There is an exceptional survival of prehistoric monuments and sites within the World Heritage property including settlements, burial grounds, and large constructions of earth and stone. Today, together with their settings, they form landscapes without parallel. These complexes would have been of major significance to those who created them, as is apparent by the huge investment of time and effort they represent. They provide an insight into the mortuary and ceremonial practices of the period, and are evidence of prehistoric technology, architecture, and astronomy. The careful siting of monuments in relation to the landscape helps us to further understand the Neolithic and Bronze Age."

The phrase "landscapes without parallel" has featured prominently in the material before the court.

7. The Stonehenge part of the WHS occupies about 25 sq. km and contains over 700 known archaeological features of which 415 are protected as parts of 175 scheduled ancient monuments under the Ancient Monuments and Archaeological Areas Act 1979 (see para. 6.11.1 of the Environmental Statement ("ES") for the project). For the assessment of impacts on heritage assets, either directly or upon their setting, the ES relied upon a primary study area up to 500m from the boundary of the proposed development. To address impacts on the setting of other high value assets a secondary study area was used extending to 2 km from that boundary. There are 255 scheduled monuments within the 2 km area, of which 167 fall entirely or partly within the WHS. Within that area there are also:-

6 Grade I listed buildings

14 Grade II* listed buildings

209 Grade II listed buildings

8 conservation areas.

8. There are 1142 known, non-designated heritage assets within the 500m study area, of which 11 would be directly impacted by the scheme. These 11 are relevant to ground 1(i) of the challenge.

9. Paragraphs 11.1.14 to 11.1.17 of the World Heritage Site Management Plan adopted on 18 May 2015 describe the background to the problem concerning the existing A303. Paragraph 11.1.14 states:-

> "….. the A303 continues to have a major impact on the integrity of the wider WHS, the setting of its monuments and the ability of visitors to explore the southern part of the Site. The A303 divides the Stonehenge part of the WHS landscape into northern and southern sections diminishing its integrity and severing links between monuments in the two parts. It has significant impacts on the setting of Stonehenge and its Avenue as well as many other monuments that are attributes of OUV including a number of barrow cemeteries. The road and traffic represent visual and aural intrusion and have a major impact on the tranquillity of the WHS. Access to the southern part of the WHS is made both difficult and potentially dangerous by the road. In addition to its impacts on the WHS, reports indicate that the heavy congestion at certain times has a negative impact on the economy in the South West and locally and on the amenity of local residents."

10. Proposals to improve the A303 date back to the 1990s when the process of identifying alternative routes began. In 2002 the then Highways Agency proposed a dual carriageway scheme with a tunnel 2.1 km long running past Stonehenge. A public inquiry was held in 2004 (para. 11.1.15). The Inspector's report in 2005 recommended in favour of the scheme proceeding. But in view of increased tunnelling costs, the government decided to review whether the scheme still represented the best option for improving the A303 and the setting of Stonehenge, as well as value for money. The government concluded that, because of significant environmental constraints across the whole of the WHS, there were no acceptable alternatives to the 2.1 km tunnel, but the scheme costs could not be justified at that time. The need to find a solution for the negative impacts of the A303 remained a key challenge (para. 11.1.16). In 2014 the SST adopted a Road Investment Strategy ("RIS") for the

purposes of the IA 2015 which identified the A303 corridor for improvements (para. 11.1.17). This included the scheme which became the subject of the application for the DCO.

11. In summary, IP1's scheme comprises the following components, running from west to east:-

- A northern bypass of Winterbourne Stoke
- A new grade-separated junction with twin roundabouts between the A303 and A360 to the west of, and outside, the WHS replacing the existing Longbarrow roundabout
- "The western cutting" – a new dual carriageway within the WHS in a cutting 1 km long connecting with the western portals of the tunnel
- A tunnel 3.3 km long running past Stonehenge
- A new dual carriageway from the eastern tunnel portals to join the existing A303 at a new grade-separated junction (with a flyover) between the A303 and A345 at the Countess roundabout, of which 1 km would be in cutting ("the eastern cutting").

The scheme includes a number of "green bridges." One bridge (150 m in width) over the western cutting would be located 150 m inside the western boundary of the WHS (which follows the line of the A360).

12. The proposals for the western cutting, western tunnel portals and the Longbarrow junction have attracted much opposition. In the current design, the cutting is about 1 km long, 7-11m deep, about 35m wide between retaining walls and 60m wide between the edges of sloping grass embankments (PR 2.2.14 and 5.7.221).

13. In 2017 the WHC expressed concerns that the proposed tunnel (then 2.9 km long) and cuttings would adversely affect the OUV and asked the UK to consider a non-tunnel bypass to the south of the WHS ("route F10") or a longer tunnel (approximately 5 km in length) which would remove the need for cuttings within the WHS. In 2019 the WHC commended the increase in the length of the tunnel to 3.3 km and the green bridge over the western cutting. However, it still expressed concerns about the exposed dual carriageways within the WHS, particularly the western cutting. The WHC urged the UK to pursue a longer tunnel "so that the western portal is located outside" the WHS. But it no longer asked the UK to pursue the F10 option.

14. The application for a DCO was the subject of a statutory examination before a panel of five inspectors between 2 April and 2 October 2019. The report of the Panel was submitted to the Department ("DfT") on 2 January 2020.

15. During the Examination the option of a longer tunnel of 4.5 km was considered. This would omit the western cutting.

16. In its report the Panel made the following observation about the western cutting at PR 5.7.225, in contrast to the removal of a surface road such as the existing A303:-

> "On the other hand, the current proposal for a cutting would introduce a greater physical change to the Stonehenge landscape than has occurred in its 6,000 years as a place of widely acknowledged human significance. Moreover, the change would be permanent and irreversible."

17. The Panel recommended that the DCO should not be granted (PR 7.5.25). In its final conclusions the Panel said that the scheme would have a "significantly adverse effect" on the OUV of the WHS, including its integrity and authenticity. Taking this together with it impact upon the "significance of heritage assets through development within their settings", the scheme would result in "substantial harm" (PR 7.5.11). The Panel considered that the benefits of the scheme would not be substantial and, in any event, would not outweigh the harm to the WHS (PR 7.5.21). In addition, the totality of the adverse impacts of the proposed scheme would strongly outweigh its overall benefits (PR 7.5.22). Those impacts included "considerable harm to both landscape character and visual amenity" (PR 7.5.12). Nonetheless, in PR 7.5.26 the Panel said this:-

> "….. the ExA recognises that its conclusions in relation to cultural heritage, landscape and visual impact issues and the other harms identified, are ultimately matters of planning judgment on which there have been differing and informed opinions and evidence submitted to the Examination." ("ExA" referring to the Examining Authority or Panel)

The Panel acknowledged that the SST might reach a different conclusion on adverse impacts, or the weight to be attached to planning benefits, and consequently on the overall planning balance, which might result in a DCO being granted.

18. In his decision letter the SST preferred the views of IP2 on the level of harm to the spatial, visual relations and settings of designated assets, namely that the harm would be "less than substantial" rather than "substantial" (DL 34). In DL 43 the SST specifically noted the concerns raised by interested parties and the Panel about the adverse impacts from the western cutting and portals, the Longbarrow junction and, to a lesser extent, the eastern approach. However, on balance, and taking into account the views of IP2 and Wiltshire Council, the SST concluded that any harm caused to the WHS as a whole would be less than substantial. In DL 80 the SST accepted advice from IP2 that the harm to "heritage assets, including the OUV," would be less than substantial. In DL 81 the SST disagreed with the Panel's views that the level of harm to the landscape would conflict with the National Policy Statement for National Networks ("NPSNN") and concluded that that harm would be outweighed by beneficial impacts throughout most of the scheme, so that landscape and visual impacts had a neutral effect rather than "considerable" negative weight, as the Panel had found. Ultimately, after weighing all the other considerations, the SST decided that the need for the scheme, together with its other benefits outweighed any harm (DL 87).

19. Plainly, this is a scheme about which strongly divergent opinions are held. It is therefore necessary to refer to what was said by the Divisional Court in *R (Rights: Community: Action) v Secretary of State for Housing, Communities and Local Government [2021] PTSR 553 at [6]* :-

> "It is important to emphasise at the outset what this case is and is not about. Judicial review is the means of ensuring that public bodies act within the limits of their legal powers and in accordance with the relevant procedures and legal principles governing the exercise of their decision-making functions. The role of the court in judicial review is concerned with resolving questions of law. The court is not responsible for making political, social, or economic choices. Those decisions, and those choices, are ones that Parliament has entrusted to ministers and other public bodies. The choices may be matters of legitimate public debate, but they are not matters for the court to determine. The Court is only concerned with the legal issues raised by the claimant as to whether the defendant has acted unlawfully."

20. The present judgment can only decide whether the decision to grant the DCO was lawful or unlawful. It would therefore be wrong for the outcome of this judgment to be treated as either approving or disapproving the project. That is not the court's function.

21. I would like to express my gratitude to counsel for their helpful written and oral submissions and to the legal teams for the assistance they have given. In particular, the parties are to be commended for having produced a very helpful and comprehensive statement of common ground ("SOCG").

22. The claimant raises 5 grounds of challenge which it has summarised in paragraph 7 of its skeleton:-

> **Ground 1** : By considering the impact on the 'historic environment' as a whole, rather than assessing the impact on individual assets (as the applicable policies required), the Secretary of State has unlawfully failed to comply with and apply the NPSNN and the applicable local development plan policies. The Secretary of State has, in any event, unlawfully failed to give adequate and intelligible reasons as to (1) the significance of each of the affected heritage assets (2) the impact upon each asset and (3) the weight to be given to that impact.
>
> **Ground 2:** The Secretary of State disagreed with the assessment of his Expert Panel, without - unlawfully - there being any proper evidential basis for so doing. That happened in part because the Secretary of State misconstrued the advice of Historic England. In any event, the Secretary of State's reasons for disagreeing with the advice of his Expert Panel were unlawfully inadequate and unintelligible.
>
> **Ground 3:** The Secretary of State adopted an unlawful approach to the consideration of heritage harm under paragraphs 5.131-5.134 of the NPSNN.
>
> **Ground 4:** The Secretary of State's approach to the World Heritage Convention was unlawful.
>
> **Ground 5:** The Secretary of State failed to consider mandatory material considerations, namely: (i) the breach of various local policies, (ii) the impact of his finding of heritage harm which undermined the business case for the proposal and (iii) the existence of at least one alternative.

23. On 16 February 2021 I ordered that the application for permission to apply for judicial review be adjourned to a "rolled up" hearing at which both the question of permission and substantive legal issues would be considered. A case management hearing took place on 23 February 2021 at which the parties successfully co-operated in putting forward directions to enable the court to handle the issues, and the potentially large amount of material, fairly and efficiently.

24. On 7 April 2020 the claimant made an application for permission to amend the Statement of Facts and Grounds to add ground 6, which alleged that the decision to grant the DCO had been vitiated by actual or apparent pre-determination and for an order for disclosure in relation to that ground. The application was opposed and on 18 May 2021 Waksman J refused it on the papers. The claimant renewed its application to an oral hearing and the matter came before me on 10 June 2021. Like Waksman J, I found the proposed new ground to be wholly unarguable and so dismissed the application. The judgment is at *[2021] EWHC 1642 (Admin)* .

25. The remainder of this judgment is set out under the following headings:-

Planning legislation for nationally significant infrastructure projects

26. The proposed development is a nationally significant infrastructure project for the purposes of the PA 2008 . Accordingly, development consent is required under that legislation (s.31). The requirements to obtain other approvals such as planning permission and scheduled ancient monument consent are disapplied by s.33.

27. The statutory framework for the designation of national policy statements and for obtaining a DCO has been summarised in a number of recent cases and need not be repeated here (see e.g. *R (Scarisbrick) v Secretary of State for Communities and Local Government [2017] EWCA Civ 787 at [5]-[8]* ; *R (Spurrier) v Secretary of State for Transport* at [21]-[40] and [91]-[112]; *R (Client Earth) v Secretary of State for Business, Energy and Industrial Strategy [2020] PTSR 1709 at [26]-[52]* and [105]- [116]; *[2021] EWCA Civ 43 at [67-68] and [104 - 105]*); *R (Friends of the Earth Limited) v Secretary of State for Transport [2021] PTSR 190 at [19]-[38]*). None of the analysis in those passages was in dispute here.

28. Section 66(1) and 72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 do not apply to the determination of applications for a DCO. But instead regulation 3 of the Infrastructure Planning (Decision) Regulations 2010 (SI 2010 No. 305) ("the 2010 Regulations") provides:-

> "(1) When deciding an application which affects a listed building or its setting, the Secretary of State must have regard to the desirability of preserving the listed building or its setting or any features of special architectural or historic interest which it possesses.
>
> (2) When deciding an application relating to a conservation area, the Secretary of State must have regard to the desirability of preserving or enhancing the character or appearance of that area.
>
> (3) When deciding an application for development consent which affects or is likely to affect a scheduled monument or its setting, the Secretary of State must have regard to the desirability of preserving the scheduled monument or its setting."

29. The project constituted EIA development to which the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017 No. 572) ("the EIA Regulations 2017 ") applied.

30. Regulation 4(2) prohibits the granting of a DCO "unless an EIA has been carried out in respect of that application." Regulation 5(1) defines EIA as a process consisting of (a) the preparation of an ES, (b) compliance with publicity, notification and consultation requirements in the EIA Regulations 2017 on the application and the ES, and (c) compliance in this case with regulation 21.

31. Regulation 21(1) imposed the following obligations on the Secretary of State:-

> "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."

"Environmental information" is defined by regulation 3(1) as including the ES, any further information added to the ES, and representations made by consultees or other persons about the effects of the development on the environment.

32. The EIA "must identify, describe and assess in an appropriate manner" "the direct and indirect significant effects of the proposed development" on *inter alia* "cultural heritage" (regulation 5(2)).

33. Regulation 14 defines what must be contained in an ES, including "the likely significant effect of the proposed development on the environment" (regulations 14(2)(b) and also:-

> "a description of the reasonable alternatives studied by the applicant, which are relevant to the proposed development and its specific characteristics, and an indication of the main reasons for the option chosen, taking into account the effects of the development on the environment" (regulation 14(2)(d))

This is repeated in paragraph 2 of schedule 4 (linked to regulation 14(2)(f)). Paragraph 3 of schedule 4 requires the ES to contain a description of the relevant aspects of the current state of the environment, the "baseline scenario." As we shall see,

the effects of the current A303 on the environment, including heritage assets, formed an important part of the assessment of the changes in environmental impact resulting from the proposed scheme.

34. Regulation 5(5) provides

> "The Secretary of State or relevant authority, as the case may be, must ensure that they have, or have access as necessary to, sufficient expertise to examine the environmental statement or updated environmental statement, as appropriate."

This provision acknowledges that a Minister or relevant authority may not themselves have "sufficient expertise" to examine the ES, particularly as such a document may cover a wide range of specialist topics. It is sufficient that the decision-maker has "access" to sufficient expertise for that purpose. That expertise will include the officials within the Minister's department and also the Panel of Inspectors reporting on its assessment of the environmental information and of the statutory examination of the application for a DCO.

35. Because in this case an NPS had taken effect, s.104 of the PA 2008 was applicable. Accordingly, by s.104(2) the SST was required to have regard to *inter alia* the NPSNN. Section 104(3) required the SST to "decide the application in accordance with" the NPSNN "except to the extent that one or more of subsections (4) to (8) applies." Section 104(4) to (8) provides:-

> "(4) 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 United Kingdom being in breach of any of its international obligations.
>
> (5) 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.
>
> (6) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would be unlawful by virtue of any enactment.
>
> (7) This subsection applies if the Secretary of State is satisfied that the adverse impact of the proposed development would outweigh its benefits.
>
> (8) This subsection applies if the Secretary of State is satisfied that any condition prescribed for deciding an application otherwise than in accordance with a national policy statement is met."

The legal issues in this case are particularly concerned with s.104(3), (4) and (7) . It is common ground that the World Heritage Convention was an "international obligation" falling within s.104(4) .

36. Section 116 of the PA 2008 imposes a duty on the SST to give reasons for a decision to grant or refuse a DCO.

National Policy Statement for National Networks

37. The NPSNN was published on 17 December 2014 and formally designated under s.5 of the PA 2008 on 14 January 2015 following consideration by Parliament in accordance with ss.5(4) and 9 .

38. Paragraph 4.2 of the NPSNN sets out a presumption in favour of granting a DCO in these terms:-

> "Subject to the detailed policies and protections in this NPS, and the legal constraints set out in the Planning Act , there is a presumption in favour of granting development consent for national networks NSIPs that fall within the need for infrastructure established in this NPS. The statutory framework for deciding NSIP applications where there is a relevant designated NPS is set out in Section 104 of the Planning Act ."

39. Paragraph 4.3 provides:-

> "4.3 In considering any proposed development, and in particular, when weighing its adverse impacts against its benefits, the Examining Authority and the Secretary of State should take into account:
>
> • its potential benefits, including the facilitation of economic development, including job creation, housing and environmental improvement, and any long-term or wider benefits;
>
> • its potential adverse impacts, including any longer-term and cumulative adverse impacts, as well as any measures to avoid, reduce or compensate for any adverse impacts."

40. Paragraph 4.5 lays down a requirement for a business case:-

> "Applications for road and rail projects (with the exception of those for SRFIs, for which the position is covered in paragraph 4.8 below) will normally be supported by a business case prepared in accordance with Treasury Green Book principles. This business case provides the basis for investment decisions on road and rail projects. The business case will normally be developed based on the Department's Transport Business Case guidance and WebTAG guidance. The economic case prepared for a transport business case will assess the economic, environmental and social impacts of a development. The information provided will be proportionate to the development. This

> information will be important for the Examining Authority and the Secretary of State's consideration of the adverse impacts and benefits of a proposed development…."

This paragraph is relevant to ground 5(ii).

41. Paragraphs 4.26 and 4.27 deal with alternatives to a proposal:-

> "4.26 Applicants should comply with all legal requirements and any policy requirements set out in this NPS on the assessment of alternatives. In particular:
>
> • The EIA Directive requires projects with significant environmental effects to include an outline of the main alternatives studied by the applicant and an indication of the main reasons for the applicant's choice, taking into account the environmental effects.
>
> • There may also be other specific legal requirements for the consideration of alternatives, for example, under the Habitats and Water Framework Directives.
>
> • There may also be policy requirements in this NPS, for example the flood risk sequential test and the assessment of alternatives for developments in National Parks, the Broads and Areas of Outstanding Natural Beauty (AONB).
>
> 4.27 All projects should be subject to an options appraisal. The appraisal should consider viable modal alternatives and may also consider other options (in light of the paragraphs 3.23 to 3.27 of this NPS). Where projects have been subject to full options appraisal in achieving their status within Road or Rail Investment Strategies or other appropriate policies or investment plans, option testing need not be considered by the examining authority or the decision maker. For national road and rail schemes, proportionate option consideration of alternatives will have been undertaken as part of the investment decision making process. It is not necessary for the Examining Authority and the decision maker to reconsider this process, but they should be satisfied that this assessment has been undertaken."

42. Paragraphs 5.120 to 5.142 deal with the historic environment. Paragraph 5.122 explains the concepts of "heritage asset" and "significance":-

> "Those elements of the historic environment that hold value to this and future generations because of their historic, archaeological, architectural or artistic interest are called 'heritage assets'. Heritage assets may be buildings, monuments, sites, places, areas or landscapes. The sum of the heritage

> interests that a heritage asset holds is referred to as its significance. Significance derives not only from a heritage asset's physical presence, but also from its setting."

43. The categories of designated heritage assets include not only listed buildings and conservation areas but also world heritage sites and scheduled ancient monuments (para. 5.123). But paragraph 5.124 provides that certain non-designated assets of archaeological interest should be subject to the policies applied to designated assets:-

> "Non-designated heritage assets of archaeological interest that are demonstrably of equivalent significance to Scheduled Monuments, should be considered subject to the policies for designated heritage assets. The absence of designation for such heritage assets does not indicate lower significance."

This paragraph is relevant to ground 1(i).

44. Paragraphs 5.128 and 5.129 state that the Secretary of State should seek to identify and assess the significance of any heritage asset which, or the setting of which, may be affected by a proposed development, including the nature of that significance and the value of the asset. Paragraph 5.129 says:-

> "In considering the impact of a proposed development on any heritage assets, the Secretary of State should take into account the particular nature of the significance of the heritage asset and the value that they hold for this and future generations. This understanding should be used to avoid or minimise conflict between their conservation and any aspect of the proposal"

45. Para.5.130 states:-

> "The Secretary of State should take into account the desirability of sustaining and, where appropriate, enhancing the significance of heritage assets, the contribution of their settings and the positive contribution that their conservation can make to sustainable communities – including their economic vitality….."

46. Paragraphs 5.131 and 5.132 set out the following general principles:-

> "5.131 When considering the impact of a proposed development on the significance of a designated heritage asset, the Secretary of State should give great weight to the asset's conservation. The more important the asset, the greater the weight should be. Once lost, heritage assets cannot be replaced and their loss has a cultural, environmental, economic and social impact. Significance can be harmed or lost through alteration or destruction of the heritage asset or development within its setting. Given that heritage assets are irreplaceable, harm or loss affecting any designated heritage asset should require clear and convincing justification. Substantial harm to or loss of a grade II Listed Building or a grade II Registered Park or Garden should be exceptional. Substantial harm to or loss of designated assets of the highest significance, including World Heritage Sites, Scheduled Monuments, grade I and II* Listed Buildings, Registered Battlefields, and grade I and II* Registered Parks and Gardens should be wholly exceptional.
>
> 5.132 Any harmful impact on the significance of a designated heritage asset should be weighed against the public benefit of development, recognising that the greater the harm to the significance of the heritage asset, the greater the justification that will be needed for any loss."

47. Paragraphs 5.133 and 5.134 lie at the heart of much of the claimant's case under grounds 1 to 3. They set out what was described in argument as a "fork in the road" in the decision-making process. The policy test to be applied is more strict where a proposal would cause "substantial harm" to, or total loss of, the significance of a designated heritage asset, as opposed to "less than substantial harm." In the former case,

> "substantial public benefits" are required to outweigh the heritage loss or harm, which must also be shown to be necessary in order to deliver those benefits. In the latter case, the policy simply requires the heritage harm to be weighed against "public benefits":-
>
> > "5.133 Where the proposed development will lead to substantial harm to or total loss of significance of a designated heritage asset, the Secretary of State should refuse consent unless it can be demonstrated that the substantial harm or loss of significance is necessary in order to deliver substantial public benefits that outweigh that loss or harm, …
> >
> > 5.134 Where the proposed development will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal, including securing its optimum viable use."

48. It is common ground for the purposes of this claim that there is no material difference between paragraphs 5.133 and 5.134 of the NPSNN and their counterparts in paragraphs 195 and 196 of the National Planning Policy Framework ("NPPF") (SOCG at paras. 63-4).

Development plan and other policies

Wiltshire Core Strategy

49. Wiltshire Council adopted the Wiltshire Core Strategy in January 2015 as part of the statutory development plan.

50. Core Policy 6 states:-

> **"Stonehenge**
>
> The World Heritage Site and its setting will be protected so as to sustain its Outstanding Universal Value in accordance with Core Policy 59. "

51. Core Policy 58 states:-

> " **Ensuring the conservation of the historic environment** Development should protect, conserve and where possible enhance the historic environment. Designated heritage assets and their settings will be conserved, and where appropriate enhanced in a manner appropriate to their significance, including:
>
> i. nationally significant archaeological remains
>
> ii. World Heritage Sites within and adjacent to Wiltshire
>
> iii. buildings and structures of special architectural or historic interest
>
> iv. the special character or appearance of conservation areas
>
> v. historic parks and gardens
>
> vi. important landscapes, including registered battlefields and townscapes.
>
> Distinctive elements of Wiltshire's historic environment, including non-designated heritage assets, which contribute to a sense of local character and identity will be conserved, and where possible enhanced. The potential contribution of these heritage assets towards wider social, cultural, economic and environmental benefits will also be utilised where this can be delivered in a sensitive and appropriate manner in accordance with Core Policy 57 (Ensuring High Quality Design and Place Shaping) "

52. Core Policy 59 states:-

> **"The Stonehenge, Avebury and associated sites World Heritage Site**
>
> The Outstanding Universal Value (OUV) of the World Heritage Site will be sustained by:
>
> > i. giving precedence to the protection of the World Heritage Site and its setting
> >
> > ii. development not adversely affecting the World Heritage Site and its attributes of OUV. This includes the physical fabric, character, appearance, setting or views into or out of the World Heritage Site
> >
> > iii. seeking opportunities to support and maintain the positive management of the World Heritage Site through development that delivers improved conservation, presentation and interpretation and reduces the negative impacts of roads, traffic and visitor pressure
> >
> > iv. requiring developments to demonstrate that full account has been taken of their impact upon the World Heritage Site and its setting. Proposals will need to demonstrate that the development will have no individual, cumulative or consequential adverse effect upon the site and its OUV. Consideration of opportunities for enhancing the World Heritage Site and sustaining its OUV should also be demonstrated. This will include proposals for climate change mitigation and renewable energy schemes."

The Stonehenge World Heritage Site Management Plan

53. This document contains a number of detailed policies. Policy 1d states:- "Development which would impact adversely on the WHS, its setting and its attributes of OUV should not be permitted"

54. Policy 3c states:-

> "Maintain and enhance the setting of monuments and sites in the landscape and their interrelationships and astronomical alignments with particular attention given to achieving an appropriate landscape setting for the monuments and the WHS itself."

55. Policy 6a states:-

> "Identify and implement measures to reduce the negative impacts of roads, traffic and parking on the WHS and to improve road safety and the ease and confidence with which residents and visitors can explore the WHS."

The World Heritage Convention

56. Article 1 defines "cultural heritage" in terms of monuments (including elements or structures of an archaeological nature), groups of buildings and sites which are of "outstanding universal value."

57. Article 3 provides that it is for each State Party to the Convention to identify properties within its territory falling within *inter alia* Article 1. Each State Party must submit to the WHC an inventory of all such properties (article 11(1)). From that inventory the WHC compiles and publishes a list of those properties which "it considers as having outstanding universal value" (article 11(2)).

58. Articles 4 and 5 lie at the heart of the claimant's ground 4. They state:-

> **"Article 4**
>
> Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, belongs primarily to that State. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.
>
> **Article 5**
>
> To ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory, each State Party to this
>
> Convention shall endeavour, in so far as possible, and as appropriate for each country:
>
> (a) to adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes;
>
> (b) to set up within its territories, where such services do not exist, one or more services for the protection, conservation and presentation of the cultural and natural heritage with an appropriate staff and possessing the means to discharge their functions;
>
> (c) to develop scientific and technical studies and research and to work out such operating methods as will make the State capable of counteracting the dangers that threaten its cultural or natural heritage;

> (d) to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage; and
>
> (e) to foster the establishment or development of national or regional centres for training in the protection, conservation and presentation of the cultural and natural heritage and to encourage scientific research in this field."

59. The WHC has issued "Operational Guidelines for the Implementation of the World Heritage Convention" (July 2019). Paragraphs 77 – 78 set out criteria for identifying whether an asset has OUV to merit inscription as a WHS. Paragraph 78 states that a property "must also meet the conditions of *integrity* and *authenticity* and must have an adequate protection and management system to ensure its safeguarding". The concepts of authenticity and integrity are explained respectively in paragraphs 79 to 86 and 87 to 95. Authenticity is concerned with the ability to understand the value attributable to a heritage asset (para. 80). Properties meet the conditions of authenticity if "their cultural values …. are truthfully and credibly expressed through a variety of attributes …." which include location and setting (para. 82). Integrity is "a measure of the wholeness and intactness of the natural and/or cultural heritage and its attributes" (para. 88). Paragraph 96 states that "Protection and management of World Heritage properties should ensure that their Outstanding Universal Value, including the conditions of integrity and/or authenticity at the time of inscription, are sustained or enhanced over time." The Panel summarised the concepts of integrity and authenticity in its report at PR 5.7.314 and 5.7.317-8.

Legal principles

60. The parties have helpfully agreed in the SOCG a number of legal principles which it is appropriate to record in Appendix 1 to this judgment.

61. With regard to paragraph 1e of the Appendix and the law on "obviously material considerations", *ClientEarth [2020] PTSR 1709 at [99]* has been approved by the Court of Appeal in *R (Oxton Farm) v Harrogate Borough Council [2020] EWCA Civ 805 at [8]* . The principles have been set out more fully by the Supreme Court in *R (Friends of the Earth Limited) v Secretary of State for Transport [2021] PTSR 190 at [116-121]* .

62. On the issue of whether as a matter of fact a Minister did take into account a particular factor, it is well-established that a Minister only has regard to matters of which he knows or which are drawn to his attention, for example in briefing material or by a precis (see *R (National Association of Health Stores) v Department of Health [2005] EWCA Civ 154 at [26-38]* and *Revenue and Customs Commissioners v Tooth* [2021] 1WLR 2811 at [70]).

63. However, the mere fact that a Minister did not know about, or have his attention drawn to, a relevant consideration is insufficient by itself to vitiate his decision. A claimant needs to go further and demonstrate that relevant legislation mandated, expressly or by implication, that the consideration be taken into account. Otherwise, he must show that the consideration was so "obviously material" that a failure to take it into account would be irrational; it would not accord with the intention of the legislation. This is the familiar irrationality test in *Wednesbury* (see *National Association of Health Stores* at [62-3] and [73-5]; *Oxton Farm* at [8]; *Friends of the Earth* at [116-9]).

64. In *National Association of Health Stores* the Court of Appeal approved the following passages from the decision of the High Court of Australia in *Minister for Aboriginal Affairs v Peko-Wallsend* [1986] HCA 40; *(1986) 162 CLR 24*):- Gibbs CJ held at [3]:-

> "Of course the Minister cannot be expected to read for himself all the relevant papers that relate to the matter. It would not be unreasonable for him to rely on a summary of the relevant facts furnished by the officers of his Department. No complaint could be made if the departmental officers, in their summary, omitted to mention a fact which was insignificant or insubstantial. But if the Minister relies entirely on a departmental summary which fails to bring to his attention a material fact which he is bound to consider, and which cannot be dismissed as insignificant or insubstantial, the consequence will be that he will have failed to take that material fact into account and will not have formed his satisfaction in accordance with law. "

Brennan J held at [18]:-

> "A decision-maker who is bound to have regard to a particular matter is not bound to bring to mind all the minutiae within his knowledge relating to the matter. The facts to be brought to mind are the salient facts which give shape and substance to the matter: the facts of such importance that, if they are not considered, it could not be said that the matter has been properly considered.

and at [27]:-

> The Department does not have to draw the Minister's attention to every communication it receives and to every fact its officers know. Part of a Department's function is to undertake an analysis, evaluation and precis of material to which the Minister is bound to have regard or to which the Minister may wish to have regard in making decisions. The press of ministerial business necessitates efficient performance of that departmental function. The consequence of supplying a departmental analysis, evaluation and precis is, of course, that the Minister's appreciation of a case depends to a great extent upon the appreciation made by his Department. Reliance on the departmental appreciation is not tantamount to an impermissible delegation of ministerial function. A Minister may retain his power to make a decision while relying on his Department to draw his attention to the salient facts. But if his Department fails to do so, and the validity of the Minister's decision depends upon his having had regard to the salient facts, his ignorance of the facts does not protect the decision. The Parliament can be taken to intend that the Minister will retain control of the process of decision-making while being assisted to make the decision by departmental analysis, evaluation and precis of the material relevant to that decision."

65. It is plain from these authorities that in considering the legal adequacy of the briefing provided to a Minister, it is necessary to have regard to the nature, scope and purpose of the legislation in question, including any matters expressly required to be taken into account, and the nature and extent of any matter which has not been addressed. It is also lawful for a ministerial decision to be reached following evaluation and analysis by experienced officials in the department and a briefing which provides a precis of material which the Minister is "bound to have regard to." To some extent, the preparation of a ministerial

briefing involves judgment on the part of officials about the material to be included. In this respect, there is a broad analogy to be drawn with the approach taken by the courts to challenges to an officer's report prepared to brief the members of a local authority's committee on a planning application (see e.g. *R (Luton Borough Council) v Central Bedfordshire Council [2014] EWHC 4325 (Admin) at [91]-[94]*).

66. Regulation 5(5) of the EIA Regulations 2017 does not impinge upon the legal principles above on the extent of the matters which a Minister may be taken to have known about when he reaches a decision. The adequacy of the expertise of Inspectors or officials is not to be confused with the legal adequacy of the briefing materials made available to a Minister to inform him of all the matters which he is legally obliged to take into account.

67. In the present case it is common ground that the relevant briefing materials before the SST comprised the Panel's report and the draft decision letter prepared by officials, as well as the briefing notes they submitted from time to time. Mr Strachan QC said on instructions that there was no material difference between the draft decision letter which accompanied the final briefing note and the formal decision issued on 12 November 2020 following final Ministerial approval on 5 November. The claimant did not ask the court to require the draft to be produced and did not take issue with that position. In effect, the parties have been content to proceed on the basis that Mr Strachan's statement is correct.

The Environmental Statement

68. As the Panel reported (PR 5.7.18.) chapter 6 of the ES with its appendices, assessed the effect of the proposed development on the significance of designated and non- designated heritage assets (including the WHS) within the two study areas, either through physical impact or by affecting their setting. A separate Heritage Impact Assessment ("HIA") was provided to deal with the impact of the scheme on the OUV of the WHS. It addressed both designated and non-designated assets, both within and without the WHS, relevant to its OUV, together with impacts on the character of the setting of the WHS (PR 5.7.22) in accordance with Guidance issued by the International Council on Monuments and Sites ("ICOMOS") (see ES paras. 6.3.1 to 6.3.2).

69. Chapter 3 of the ES dealt with IP1's assessment of alternative options to the proposed scheme.

70. The ES described in a conventional manner the significance of the scheme's effects on assets, using criteria to assess the significance or value of the asset, the "setting contribution" and the magnitude of the impact, whether adverse or beneficial (PR 5.7.20).

71. Paragraph 6.6.59 of the ES explains that for the assessment in the ES and HIA of both the baseline scenario (with the existing A303) and the impacts of the proposed scheme, the analysis identified some 39 "asset groupings" to reflect the disposition and significance of some of the monuments within the WHS and wider landscape. This was said to be an established approach endorsed in a joint mission report by the WHS and ICOMOS in 2015. IP2 agreed with this approach in the present case. "The consideration of related assets as part of groups allows for the potential of different levels and types of impact on individual components of individual asset groups extending over large areas to be assessed" (paras. 6.10.6 to 6.10.8 of IP2's representations to the Panel in May 2019). In addition, the ES and HIA made assessments of the impacts on certain individual assets and their settings.

72. The ES arrived at a range of impacts on different assets from different parts of the scheme, some adverse, some neutral and some beneficial. In particular, this was not a proposal for an entirely new road. The scheme would *remove* the existing A303 which, it is generally accepted, has its own detrimental impacts on heritage assets. Accordingly, it was unavoidable

that in assessing the impacts of the proposal on any particular asset or grouping of assets, the judgments expressed in the ES and HIA had to compare the effects of the existing A303 as part of the baseline. To do otherwise would have been unrealistic. That approach was not criticised during the hearing. In some instances the ES state that the proposed scheme would improve the existing position by reducing the level of net harm or producing a net benefit, in others the end result is assessed as harmful *per se* .

73. IP1's overall assessment was that the proposed development would not cause substantial harm to any designated heritage asset, and for many the effects would be beneficial. It was then said that the substantial benefits of the scheme would outweigh the less than substantial harm caused to the significance of some heritage assets (PR 5.7.21).

74. The HIA assessed the proposed scheme in relation to the 7 attributes of the OUV of the WHS:-

> "(1) Stonehenge itself as a globally famous and iconic monument.
>
> (2) The physical remains of the Neolithic and Bronze Age funerary and ceremonial sites and monuments in relation to the landscape.
>
> (3) The siting of Neolithic and Bronze Age funerary and ceremonial sites and monuments in relation to the landscape.
>
> (4) The design of Neolithic and Bronze Age funerary and ceremonial sites and monuments in relation to the skies and astronomy.
>
> (5) The siting of Neolithic and Bronze Age funerary and ceremonial sites and monuments in relation to each other.
>
> (6) The disposition, physical remains and settings of the key Neolithic and Bronze Age funerary, ceremonial and other monuments and sites of the period, which together form a landscape without parallel.
>
> (7) The influence of the remains of the Neolithic and Bronze Age funerary and ceremonial monuments and their landscape setting on architects, artists, historians, archaeologists and others."

The HIA also assessed the effect of the development on the "authenticity" and the "integrity" of the WHS.

75. IP1 concluded that the scheme would have a slightly adverse effect on two OUV attributes but a beneficial effect on the remaining five. They also judged that the proposal would have a slightly beneficial effect on the authenticity and integrity of the WHS and thus, viewed overall, a slightly beneficial effect on all three criteria, OUV attributes, authenticity and integrity (PR 5.7.25).

76. Many of the impacts of the proposed development do not involve direct loss of assets. They are the subject of mitigation measures in the Outline Environmental Management Plan ("OEMP") and the Detailed Archaeological Mitigation Strategy ("DAMS"). The former effectively provides a code of construction practice and the latter a detailed framework for the preparation, approval and implementation of plans for site-specific investigation and archaeological method statements

(PR 5.7.33). The OEMP and DAMS are themselves important documents which gave rise to significant issues during the Examination (see the Panel's "second main issue" at PR 5.7.151-5.7.205).

77. The Panel summarised IP1's case on the *overall* heritage benefits of the scheme at PR 5.7.29:-

"• The removal of the A303 and its traffic will greatly improve the setting of the stone circle and numerous monuments and monument groups across the central part of the WHS. Visitors will be able to appreciate the stone circle and interrelationships with numerous monuments and monument groups without the sight and sound of traffic intruding on their experience. This will help to conserve and enhance the WHS and sustain its OUV.
• The Scheme will also remove the intrusion of vehicles and vehicle lights upon the mid-winter sunset solstitial alignment and restore the relationship between the stone circle and the Sun Barrow. It will also allow the removal of the lit junction at Longbarrow Roundabout, which currently results in night-time light spill and light pollution on the western edge of the WHS, contributing to improvements in the experience of dark skies.
• The removal of the A303 will reconnect the Avenue where it is currently severed by the existing road.
• The existing road as it passes through the WHS will be altered for use by NMUs allowing safer exploration of the WHS east to west.
• The Scheme would afford safer NMU connections using north- south Public Rights of Way, currently severed by the existing surface A303.
• Removal of Longbarrow Roundabout and the conversion of the A303 and part of the A360 to NMU routes, immediately adjacent to the Winterbourne Stoke Crossroads complex of burial mounds, will allow improvements to the immediate landscape context and setting of this important barrow group.
• The construction of the Scheme will improve visitor's enjoyment and experience of the WHS landscape as a whole and provide opportunities for improved interpretation and presentation of the WHS.
• The construction of the Scheme will require advanced archaeological works to record archaeological remains in advance of Proposed Development construction. This will present educational and community outreach opportunities working sensitively and in close collaboration with key heritage stakeholders."

Views of parties at the Examination

78. A number of parties strongly opposed the proposal. The claimant comprised a group of five NGOs, which included the British Archaeological Trust. They criticised the ES and HIA and supported the objections of the Consortium of Archaeologists ("COA") and the Council for British Archaeology ("CBA") (see e.g. PR at 5.7.105-5.7.128). The concerns and objections of the WHC and ICOMOS were summarised at, for example, PR 5.7.73-5.7.79 and 5.7.84-5.7.98.

79. Wiltshire Council, as the local planning authority, provided a local impact report under s.60 of the PA 2008 , addressing the impact of the scheme on the authority's area. The Council considered that the removal of the existing A303 would be beneficial to the setting of Stonehenge and many groups of monuments contributing to its OUV. The removal of the existing Longbarrow roundabout would also bring benefits to the Winterbourne Stoke group of barrows.

80. The Council considered that the most significant negative impact would be from the dual carriageway, cutting and portals in the western part of the WHS. There would be harmful visual effects, impacts on the settings of key monument groups expressing attributes of the OUV and spatial severance, which would be difficult to avoid with the length of tunnel proposed. The Council accepted that the principles and commitments in the OEMP would enable the detailed design to accord with the aims and objectives of the WHS Management Plan and sustain the OUV. But the Council remained concerned about the visual impact on monuments and their settings at the western end of the scheme. Although harm could be mitigated to some extent by the use of green infrastructure and other design solutions, the failure to reduce the impact by providing additional cover to the western cutting was a missed opportunity (PR 5.7.55-5.7.61).

81. A statement of common ground agreed between the Council and IP1 noted that there was general agreement as to the likely extent of the impacts of the scheme and that the Council agreed that there are no aspects which are likely to reach the level of "substantial harm" (DL 43). The Council considered the proposal to be "in accordance with the large majority of policies" in the development plan, subject to appropriate mitigation being carried out by IP1 of potential harmful effects identified in the ES. By the end of the Examination, the Council and IP1 agreed that there were no outstanding policy issues (PR 4.5.6 and 4.5.8).

82. The National Trust owns and manages 850 hectares of the Stonehenge landscape within the WHS. It welcomed the government's intention to invest in a bored tunnel to remove a large part of the existing A303. If well designed and delivered with the utmost care for archaeology and the landscape, it could provide an overall benefit to the WHS. The Trust was satisfied that design and delivery controls had been developed through the DAMS and OEMP to provide necessary reassurance and that other concerns had been overcome (PR 5.7.70-5.7.71).

83. The English Heritage Trust manages over 400 historic buildings, monuments and sites across the country, including the Stonehenge monument itself. In a statement of common ground agreed with IP1, the Trust said that it was supportive of the project, because it has the potential to transform the Stonehenge area of the WHS and make significant improvements to the setting of the Stonehenge monument (see SOCG in these proceedings at paras. 34-35).

84. The position of IP2 at the Examination has been summarised in paragraphs 24 to 27 of the SOCG agreed between the parties and by the Panel at PR 5.7.62 to 5.7.69.

85. In addition, I note that in its representations in May 2019, IP2 stated that it was supportive of the objectives of the scheme. It had been instrumental in securing the government's commitment to invest in a bored tunnel at least 2.9 km long. But a number of matters needed to be addressed to ensure the delivery of those objectives and potential benefits for the OUV of the WHS (paras 1.16 to 1.17, 4.9.2, 6.10.12 *et seq* and 8.11). IP2 focused primarily on the WHS and on those scheduled monuments affected by the scheme, whether contributing to the OUV or not, and whether inside or outside the WHS (para.3.9). But it had considered all parts of the ES relevant to cultural heritage as well as the HIA (paras. 3.10 and 6.3). In November 2017 IP2 had specifically identified the need for the ES to address non-designated heritage assets (para 4.10.4). IP2's representations to the Examination identified those specific areas where it had concerns or further information was needed.

86. In PR 5.7.329 the Panel pinpointed the key difference between its overall assessment on the effect of the scheme on cultural-heritage and that of IP2, namely it considered the harm to be substantial whereas the latter considered it to be less than substantial. The Panel's explanation for this was the weight it placed on the effects of the western cutting and the Longbarrow junction (see PR 5.7.330).

The Panel's report

87. The Panel's report is over 500 pages long covering many topics and issues. However, the court was asked to focus primarily on sections dealing with heritage impact and the overall balance. Even so, the section dealing with heritage impact alone runs to over 50 pages. The Panel's conclusions on heritage matters occupy some 30 pages, running from PR 5.7.129 to 5.7.333. But it is only necessary for this judgment to focus on certain of the issues which affect the claimant's grounds of challenge.

88. At the outset of its assessment the Panel identified five "main issues":-

(1) Whether the analysis and assessment methodology is appropriate;
(2) Whether the mitigation strategy, and its effectiveness in the protection of WHS archaeology, is appropriate;
(3) The effects of the proposed development on spatial relations, visual relations, and settings;
(4) Cumulative and in-combination effects;
(5) Effects on WHS OUV and the historic environment as a whole.

89. It is primarily the Panel's conclusions on the third and fifth main issues which are relevant to grounds 1 to 3 of this challenge. However, it is convenient to summarise the Panel's conclusions on the other main issues first.

90. On the first main issue the Panel concluded at PR 5.7.150:-

> "The ExA considers the analysis and assessment methodology appropriate subject to the points of criticism set out. It does not necessarily agree with the Applicant's assessments. Particular points will be examined in the remainder of this section of the Report."

Although the second sentence in that paragraph is ambiguous, the defendant and IP1 say that the third sentence shows that the Panel accepted the analysis in the ES and HIA, save for where the contrary is expressly stated. The position taken in those documents was that the scheme would not cause "substantial harm" to any designated asset (see e.g. PR 5.7.21).

91. Under the first main issue, the Panel considered that, subject to a number of concerns identified in its report, the HIA was generally comprehensive and provided a sufficient level of detail (para 5.7.138). But the Panel said that the HIA should have given more consideration to the effect of the Longbarrow junction on the setting of the WHS as a whole (para.5.7.139). Furthermore, the assessment of impact on settings had largely been concerned with "static views" rather than "the less tangible aspects of setting that relate to the WHS as a whole", including the overall significance of the site and "the succession of impressions which lead cumulatively to an overall sensory and intellectual construct of the site" which is important (paras.5.7.143 to 5.7.145). This last point was linked to a paper by D Roberts *et al* (2018) on the distribution of long barrows within the Stonehenge landscape (PR 5.7.144). The Panel substantially relied upon the thinking in this paper when it came to express its conclusions on the third main issue (see below).

92. In relation to the second main issue, the Panel judged the proposed mitigation strategy to be adequate, provided that issues relating to the sampling strategy for the investigation of archaeological features together with other identified concerns were resolved. Such matters were addressed in post-examination consultation carried out by the SST as the Panel had envisaged at PR 5.7.328. There is no legal challenge that the SST failed to address those matters properly.

93. On the fourth main issue, and leaving to one side its criticisms under the third and fifth main issues, the Panel agreed with the ES's overall conclusions on cumulative and in- combination effects (para.5.7.305).

94. On the third main issue, part of the Panel's analysis was concerned with the effect of the proposal on listed buildings and conservation areas. The Panel concluded that the effects of the proposed development on the settings of assets lying beyond "three main elements" would be acceptable (PR 5.7.296). Those matters are not relevant, therefore, to the difference

between the Panel and the SST as to whether the proposal would cause "substantial" or "less than substantial harm" to the heritage assets.

95. The "three main elements" were identified in PR 5.7.207 as:-

(1) the western approach, cutting and portals;
(2) the proposed Longbarrow junction;
(3) "and to a lesser extent, the eastern approach and portal."

It will be recalled that it was the first two elements upon which the Panel relied when expressing its disagreement with IP2 that the harm would be "less than substantial" (PR 5.7.329-5.7.330).

96. In relation to each of these three elements the Panel set out its conclusions on its effects on the OUV of the WHS and on the settings of heritage assets. But before embarking upon that exercise, the Panel returned in PR 5.7.212 to 5.7.215 to the paper by D Roberts *et al* . The landscape setting of long barrows is important to such matters as their alignment, intervisibility, relationship with other Early Neolithic monuments and evidence of routes for movement. The Panel subsequently referred to this very specific landscape concept as "the landscape settings of monuments" (similarly the reference to "an unparalleled historic landscape"), which should not be confused with the typical assessment of landscape and visual impact as part of a general planning appraisal.

97. Dealing with the western cutting and portals, the Panel concluded that, in particular, attributes (3), (5), and (6) of the OUV of the WHS would be greatly harmed or would suffer major harm (PR 5.7.226-5.7.230). In relation to settings, the Panel emphasised the need to consider not only visual aspects, but also contextual relationships, including the presence of archaeological features in the landscape; these aspects being similar to those considered when assessing the effect on the OUV of the WHS. Having regard to its earlier findings, the Panel considered that the western cutting and portals would cause "substantial harm" to the settings of designated assets (PR 5.7.233 to 5.7.236). Much of the Panel's reasoning concerned the visual effects of this part of the scheme and the impact on the landscape in which the archaeological features are set (see e.g. PR 5.7.219 to 5.7.224, 5.7.227, 5.7.229 and 5.7.232 to 5.7.234).

98. The Panel described the second element, the new Longbarrow junction, as being of motorway scale, albeit sunk into the ground with substantial earthworks. The pattern of the junction's landform would be at odds with the surrounding smaller scale morphology of small rectilinear fields and small groupings of traditional buildings. The junction, together with the western cutting and portals, would represent a single, very large, and continuous civil engineering work spanning the western boundary of the WHS. The effects of the junction on the OUV of the WHS would be similar to those of the western cutting and portal (PR 5.7.242 to 5.7.245). As with that first element, a good deal of the Panel's reasoning concerned the visual impacts of the junction and the impact on the landscape in which the archaeological features are set (see e.g. PR 5.7.243 to 5.7.245 and 5.7.247). At PR 5.7.247 the Panel concluded:-

> "….. Also, the harm to the overall assembly of monuments, sites, and landscape through major excavations and civil engineering works, of a scale not seen before at Stonehenge. Whilst the existing roads could be removed at any time, should a satisfactory scheme be put forward, leaving little permanent effect on the cultural heritage of the Stonehenge landscape, the effects of the proposed junction would be irreversible."

They also found that the proposal would cause substantial harm as regards the OUV and settings (PR 5.7.248).

99. The Panel considered that the effect of the eastern cutting would be very much less severe than the western cutting (PR 5.7.254 to 5.7.255). The Panel found that there would be harm to the landscape values of the OUV, but neutral or slightly positive effects for attribute (3) and for attribute (6) (PR 5.7.256 to 5.7.257). At PR 5.7.258 to 5.7.279 the Panel assessed harm caused to a number of heritage assets, ranging from negligible, slight or small to moderate in one instance (PR 5.7.259) and great harm from the flyover at the Countess Road junction (PR 5.7.274). The overall conclusion for the eastern approaches, including the Countess Road junction, was given at PR 5.7.280:-

> "The effects of this element of the Proposed Development on OUV would be neutral or slightly positive. The effects on settings, taken as a whole, would be moderately adverse. Overall, a small degree of harm would arise."

100. It is therefore plain that the Panel's conclusion under the third main issue that "substantial harm" would be caused related solely to the western cutting and portals and to the Longbarrow junction. This is borne out by the Panel's overall conclusion at PR 5.7.297 read in context:-

> "The ExA concludes overall on this issue that substantial harm would arise with regard to the effects of the Proposed Development on spatial relations, visual relations and settings. This is despite the assessment of more moderate effects with regard to the eastern approaches and settings of assets beyond the main three elements considered."

101. The Panel addressed the fifth main issue at PR 5.7.306 to 5.7.326. First, it found that the proposal would harm attributes (1) to (3) and (5) to (7) of the OUV (PR 5.7.306 to PR 5.7.313). Under the third main issue the Panel had found that the western cutting and Longbarrow junction would only harm attributes (3), (5) and (6) (see [97-98] above). So it is plain that the judgment here was based upon the Panel's assessment of the scheme as a whole, and was not driven simply by the effects of the works in the western section. For example, PR 5.7.308 referred to the tunnel and the potentially serious loss of assets through excavation works and PR 5.7.313 referred to the profound and irreversible aesthetic and spiritual damage that would be caused, even after allowing for the removal of the existing A303. By contrast, IP1's HIA had claimed a large or very large beneficial effect for attributes (1) and (4), slight beneficial effects for attributes (5), (6) and (7) and only slight adverse effects for attributes (2) and (3).

102. The Panel then concluded that the scheme would substantially and permanently harm the integrity of the WHS, pointing to the impacts of the Longbarrow junction and the western cutting (PR 5.7.315 to PR 5.7.316). The Panel reached the view that the development would seriously harm the authenticity of the WHS (PR 5.7.317 to PR 5.7.320).

103. The Panel's overall conclusion on the fifth main issue was that the benefits *to the OUV* resulting from the scheme were outweighed by the harm caused and so "the overall effect on the WHS OUV would be significantly adverse" (PR 5.7.321). Because of this impact, the proposal did not accord with Core Policies 58 and 59 of the Wiltshire Core Strategy nor with Policy 1d of the WHS Management Plan (PR 5.7.324 to PR 5.7.325). It is important to note the Panel's overall conclusion at PR 5.7.326:-

> "The ExA concludes that the effects of the Proposed Development on WHS OUV and the historic environment as a whole would be significantly adverse. *Irreversible harm would occur, affecting the criteria for which the Stonehenge, Avebury and Associated World Heritage Site was inscribed on the World Heritage List* ." (emphasis added)

As IP2 has explained (paragraph 42 of skeleton), the assessment in an HIA of impact on a WHS is not expressed using NPSNN terminology of "substantial" or "less than substantial harm".

104. At PR 5.7.327 to PR 5.7.332 the Panel summarised its conclusions on the five main heritage issues. It said that it regarded the views of ICOMOS and the WHC as important, but not of such weight as to be determinative in themselves (PR 5.7.331). The Panel then summarised its view, in terms of paragraph 5.133 of the NPSNN, that the effect of the scheme on the OUV of the WHS and on "the significance of heritage assets through development within their settings," taken as whole, would lead to "substantial harm" for the purposes of the "fork in the road" decision (PR 5.7.333 and see also PR 7.2.33). However, the Panel left the application of that policy test to its overall conclusions later on in the report.

105. In the light of a submission in relation to ground 2 made by Mr James Strachan QC (who together with Ms Rose Grogan appeared on behalf of the defendant), it is necessary to summarise how the Panel dealt separately with landscape and visual impacts in section 5.12 of its report. They did so from a general planning perspective. Paragraph 5.12.1 explains:

> "The integrity of the cultural heritage landscape was examined in a previous section of the Report. This section covers the potential impacts of the Proposed Development on existing landscape features and landscape and townscape character, together with potential impacts on visual receptors, including residents, visitors, and users of [public rights of way]"

As is common for a general assessment of this kind, the method used by IP1 was based on the Guidelines for Landscape and Visual Impact Assessment (3rd Edition) published by the Landscape Institute and the Institute of Environmental Management and Assessment (PR 5.12.14).

106. The Panel dealt with the landscape and visual impacts of the western cutting and Longbarrow junction once completed at PR 5.12.112 to 5.12.119. The assessment in this part of the report focused on the effects of the proposal on landscape character and visual amenity, and not on cultural heritage which had already been dealt with in section 5.7 of the report. The overall impact of this part of the scheme was described as being "significantly harmful". These paragraphs formed but a small part of the assessment made by the Panel of each part of the scheme in paragraphs 5.12.79 to 5.12.147. The assessment took into account broader planning considerations including effects on tranquillity, connectivity, light pollution and the night sky.

107. The Panel set out its overall conclusions on the impact of the whole scheme on landscape and visual amenity at PR 5.12.148 to 5.12.152. They concluded that it "would cause considerable harm in the ways identified, and therefore it conflicts with the aims of the NPSNN".

108. At PR 5.17.121 to 5.17.128 the Panel set out its overall conclusions on traffic and transport which, in summary were:-

(i) Public transport would be incapable of delivering a decisive shift from private car transport for the majority of trips in the corridor;
(ii) The development would contribute to meeting the government's objective of a high quality route between the southeast and the southwest, meeting also the future needs of traffic;
(iii) Journey times would be reduced, with the benefits being greater in the summer months and other times of high demand;
(iv) The road would be safer helping to reduce collisions and casualties;
(v) There would be a significant reduction in traffic through rural settlements helping to relieve traffic and related environmental issues;
(vi) Transportation costs for users and businesses would be reduced;
(vii) The scheme would help to enable growth in jobs and housing.

109. In section 7.2 of its report the Panel summarised its findings on the matters for and against the proposal which would be taken into account in the overall balance. As part of its conclusions on cultural heritage issues the Panel said at paragraphs 7.2.32 to 7.2.33:-

> "7.2.32. The ExA recognises that the Proposed Development would benefit the OUV in certain valuable respects. However, it considers that the effects of the Proposed Development would substantially and permanently harm the integrity of the WHS. In addition, it would seriously harm the authenticity of the WHS. The ExA finds that permanent, irreversible harm, critical to the OUV would occur, affecting not only our own, but future generations. The fundamental nature of that harm would be such that it would not be offset by the benefits to the OUV. The overall effect on the WHS OUV would be significantly adverse. The Proposed Development would not therefore accord with Core Policies 58 and 59 of the Wiltshire Core Strategy or Policy 1d of the WHS Management Plan.
>
> 7.2.33. Assessed in accordance with the NPSNN, the effect of the Proposed Development on the OUV of the WHS, and the significance of heritage assets through development within their settings, taken as a whole, would lead to substantial harm. This harmful impact on the significance of the WHS designated heritage asset shall be weighed against the public benefits in the ExA's overall conclusions."

110. It is important to note the careful distinction drawn by the Panel between these two paragraphs. PR 7.2.33 expressly made the "fork in the road" decision applying paragraph 5.133 of the NPSNN. PR 7.2.32 dealt separately with the Panel's conclusion about the effect on the OUV of the WHS. In that paragraph the Panel reiterated that the integrity of the WHS would be permanently and substantially harmed and its authenticity would be seriously harmed and that the benefits of the proposal to the OUV would not outweigh the harm caused. The Panel weighed the benefits of the proposal to the OUV for the specific purpose of deciding what the net heritage effect would be on the WHS as a designated asset itself, just as they had previously done in PR 5.7.321 (see [103] above). This should not be confused with the separate exercise carried out under paragraph 5.133 or paragraph 5.134 of the NPSNN.

111. The Panel considered landscape and visual impacts from a general planning perspective separately at PR 7.2.53 to 7.2.55.

112. At PR 7.3.1 to 7.3.43 of its report the Panel considered whether the proposed scheme would result in a breach of the Convention and thus engage s.104(4) of PA 2008 , so as to displace the requirement in s.104(3) to decide the application for the DCO in accordance with the NPSNN. The argument during the Examination centred on articles 4 and 5 and is the subject of ground 4 in this challenge. Certain parties contended at the Examination that "any harm" to a WHS could breach those provisions. Others, including IP1 and IP2, argued that if a scheme complies with the policy tests in paras.5.132 to 5.134 of the NPSNN there would be no breach of the Convention . The Panel followed the latter approach (PR 7.3.40 to 7.3.43).

113. At PR 7.3.65 the Panel concluded that the ES was fully compliant with the EIA Regulations 2017 . The SST accepted that conclusion at DL 67. There is no challenge to that part of the decision. But, by definition, it was impossible for the Panel to deal with the separate issue of whether the SST subsequently complied with regulation 21(1) of the EIA Regulations 2017 at the decision-making stage.

114. The Panel struck the overall balance in section 7.5 of its report. The Panel first set out its views on the benefits of the proposal (PR 7.5.5 to PR 7.5.9). It then did the same for the scheme's adverse impacts (PR 7.5.10 to 7.5.17).

115. The Panel regarded a number of factors as having limited or very limited weight, that is agriculture, the loss of a view of the Stones for people passing on the A303 (moderate weight), impact on users of byways open to all traffic, and impacts on businesses and individuals (PR 7.5.13 to 7.5.17).

116. The Panel gave substantial or considerable weight to only two sets of adverse impact (PR 7.5.11 to 7.5.12):-

(1) Substantial weight for the effects of the proposal on the WHS OUV and on the significance of heritage assets through development within their settings (drawn from section 5.7 of the report); and
(2) Considerable weight to the considerable harm to both landscape character and visual amenity (drawn from section 5.12 of the report).

117. On impact to the cultural heritage the Panel said at PR 7.5.11:-

> "The ExA considers that the effects of the Proposed Development would substantially and permanently harm the *integrity* of the WHS, now and in the future. In addition, it would seriously harm the *authenticity* of the WHS. The overall effect on the WHS OUV would be *significantly adverse.* The effect of the Proposed Development on the OUV of the WHS, and the significance of heritage assets through development within their settings, taken as a whole, would lead to *substantial harm* . The Proposed Development would not therefore be in accordance with Core Policies 58 and 59 of the Wiltshire Core Strategy or Policy 1d of the WHS Management Plan. This is a factor to which substantial weight can be attributed." (emphasis added)

This reflects the approach taken by the Panel in its conclusions in 7.2.32 to 7.2.33 (see [109-110] above).

118. On impact to landscape and visual impact the Panel said at PR7.5.12:-

> "In addition, there would be considerable harm to both landscape character and visual amenity, notwithstanding the mitigation proposed. There would therefore be conflict with the Wiltshire Core Strategy, Core Policy 51. The harms to landscape character and visual amenity are factors to which considerable weight can be attributed."

119. The Panel's striking of the overall planning balance was set out in PR 7.5.19 to 7.5.22:-

> "7.5.19. Since the ExA has identified that there would be substantial harm to the WHS, paragraph 5.131 of the NPSNN applies to the determination of the application. This requires the SoS to give great weight to the conservation of a designated heritage asset. Furthermore, substantial harm to or loss of designated assets of the highest significance, including World Heritage Sites, should be wholly exceptional.
>
> 7.5.20. In addition, paragraph 5.133 of the NPSNN provides that where the proposed development would lead to substantial harm to the significance of a designated heritage asset, the SoS should refuse consent unless it can be demonstrated that the substantial harm or loss of significance is necessary in order to deliver substantial public benefits that outweigh that loss or harm.
>
> 7.5.21. The ExA disagrees with the Applicant as to the extent of the public benefits that would be delivered. In totality, it does not consider that substantial public benefit would result from the Proposed Development. In reaching that view, the ExA has had regard to all potential benefits including any long-term or wider benefits. In any event, those public benefits which have been identified, even if they could be regarded as substantial, would not outweigh the substantial harm to the designated heritage asset. In the light of NPSNN, paragraph 5.133, the substantial harm that would result to the WHS cannot therefore be justified.
>
> 7.5.22. In applying the NPSNN, paragraph 4.3, the ExA concludes that the totality of the adverse impacts of the Proposed Development would strongly outweigh its overall benefits. S104(7) PA 2008 applies and the NPSNN presumption in favour of the grant of development consent cannot therefore be sustained."

120. Thus, in PR 7.5.19 to 7.5.21 the Panel concluded that the proposal failed to meet the test in paragraph 5.133 of the NPSNN simply on the basis that the benefits of the scheme, even if assumed to be substantial, did not outweigh its harm. They did not go any further and apply the necessity test. It is to be noted that in striking the balance required by paragraph 5.133 of the NPSNN the Panel did not, of course, put into the disbenefits side of the balance any harm other than harm to cultural heritage. For example, harm to landscape and visual amenity was rightly not taken into account until the separate *overall* balance was struck in PR 7.5.22.

121. In Section 10 of its report the Panel summarised its overall findings and conclusions. In PR 10.2.6 the Panel summarised its separate conclusions on impacts to cultural heritage and to landscape and visual amenity. In PR 10.2.10 to 10.2.12 it repeated the separate balancing exercises carried out under paragraph 5.133 of the NPSNN and under paragraph 4.3 of the NPSNN and s.104 of the PA 2008 . The Panel recommended that the SST should not make an order granting development

consent for the application. On the other hand if the SST were to disagree and to grant a DCO, the Panel recommended that he should seek clarification on a number of additional points, mainly relating to the OEMP and DAMS as set out in Appendix E to the report.

The Secretary of State's decision letter

The process leading to the decision letter

122. The process has been described by Mr David Buttery, the senior official responsible for the handling of the application in the department.

123. On 27 March 2020 officials submitted a briefing note to the SST and the relevant Minister responsible for determining the application for a DCO. Officials said that there were two options. First, the SST could accept the Panel's recommendation and refuse the application for a DCO. Second, officials could explore whether there was evidence to support the case for rejecting the recommendation and granting a DCO, on the basis, for example, that the development would result in less than substantial harm to the heritage assets. Officials drew attention to the Panel's statement that its views on cultural heritage, landscape and visual impacts were matters of judgment and were not shared by all consultees. Consequently, it might be possible to take a different view on the weight to be attached to the benefits and disbenefits of the scheme if there was sufficient justification to do so. Officials said that at that stage they had not yet identified sufficient evidence to justify an approval. In that context, they said that they would assess in detail the evidence provided by bodies such as IP2 to see whether it contained sufficient evidence to conclude that less than substantial harm would be caused. They also advised that if this second option were to be chosen, a consultation letter should be sent on the points raised in Appendix E to the Panel's report (see [119] above).

124. The SST and the Minister chose the second option. The consultation letter was sent on 4 May 2020.

125. On 6 July 2020 officials submitted a further memorandum to the Ministers recommending that a further consultation be carried out on a recent archaeological find at the WHS. Ministers agreed and a consultation letter was sent on 16 July 2020. A third and final consultation letter dated 20 August 2020 was sent allowing representations on the responses which had been received by the DfT.

126. On 28 October 2020 officials provided a further briefing note to the SST and the Minister advising that they considered that there was sufficient evidence to justify a decision that a DCO be granted and attaching a draft decision letter to that effect.

127. On 5 November 2020 the Ministers responded that they approved the grant of a DCO. The decision letter was issued on 12 November 2020.

128. I note that at paragraph 78 of its skeleton the claimant said that none of the consultation responses provided any material which could have supported the defendant's decision to reject the Panel's recommendation and to grant the DCO. This is one of several points that were not pursued, but for the record I note that it is not strictly correct. The responses to the consultation letter dated 4 May 2020 provided clarification on the issues set out in Appendix E to the Panel's report, which arose from its second main heritage issue, to do with the mitigation strategy, and were relied upon by the SST. He accepted the views of IP2 on the important subject of "artefact sampling" and concluded that the updated OEMP and DAMS submitted on 18 May 2020 "would help minimise harm to the WHS" (DL 39, 48, 50 and 80).

The decision letter

129. DL 10 explained the approach taken in the decision letter to the Panel's report:-

> "Where not otherwise stated, the Secretary of State can be taken to agree with the ExA's findings, conclusions and recommendations as set out in the ExA's Report and the reasons given for the Secretary of State's decision are those given by the ExA in support of the conclusions and recommendations."

130. At DL 12 to DL 22 the SST addressed the need for the scheme and the benefits it would bring, either in isolation or in conjunction with other improvements to the A303 corridor. The SST said that he was satisfied that there was a clear need case for the proposed development and that the benefits weighed significantly in its favour.

131. Turning to the adverse impacts of the scheme, the SST agreed with the Panel's views on issues relating to agriculture, views from the existing A303, public rights of way and harm to businesses and individuals (DL 23-24 and 57-60). He also agreed with the Panel that climate change was not a matter weighing in the balance against the proposal (DL 61) and that the matters listed in DL 63 were of neutral weight. He agreed with the Panel's assessment that granting consent by applying the heritage policies in the NPSNN would not involve a breach of the World Heritage Convention and would not engage s.104(4) (see DL 64-66).

132. The two issues on which the SST disagreed with the Panel were (a) landscape and visual impact and (b) cultural heritage impact (DL 25 to 56).

133. In relation to landscape and visual effects the SST noted the identification of various benefits and disbenefits by the Panel (DL 53) and adverse impacts by some interested parties (DL 54). He noted the views of Wiltshire Council on the permanent beneficial effects of the scheme for landscape and visual amenity and that overall it would deliver "beneficial effects through the reconnection of the landscape within the WHS and avoiding the severance of communities" (DL 54.) He then referred to the positive effects of the proposal identified by IP2 (significant reduction in sight and sound of traffic benefiting the experience of the Stonehenge monument and wider access to the landscape), English Heritage Trust and National Trust (DL 55). Drawing on that material, the SST considered that the design of the scheme accorded with principles in the NPSNN and that "the beneficial impacts throughout most of the WHS outweigh the harm caused at specific locations." Disagreeing with the Panel's judgment, the SST considered the landscape and visual impacts to be of neutral weight in the overall planning balance (DL 56). It is plain that the SST's treatment of this subject, like that of the Panel, did not address the landscape setting of monuments, or the historic landscape, which had so influenced the Panel when dealing with the impact on cultural heritage.

134. DL 25 to DL 43 and DL 50 dealing with heritage issues are annexed to this judgment in Appendix 2.

135. The SST began his consideration of heritage issues by referring to the Panel's assessment together with the differing views of a number of different parties at the Examination (DL 25).

136. At DL 26 the SST recognised the importance of the Panel's conclusion that the proposal would cause "substantial harm" to the OUV of WHS, how that would lead to the application of the test in paragraph 5.133 of the NPSNN and that substantial harm to a WHS should be "wholly exceptional."

137. The structure of the relevant part of the SST's reasoning is as follows:-

(i) In DL 28 the SST summarised the views of the Panel on its fifth main issue, namely the effects of the scheme on the OUV of the WHS. There would be "permanent irreversible harm, critical to the OUV" affecting not only present but future generations. The benefits of the scheme to the OUV would be incapable of offsetting this harm and the overall effect would be "significantly adverse";
(ii) In DL 29 the Secretary of State summarised the views of the Panel on the first and second main issues;
(iii) The SST then referred at DL 30 to the third main issue, effects on spatial relations, visual relations and settings. He took into account the Panel's judgment that the proposal would cause substantial harm, and their recognition that that view differed from IP2 (PR 5.7.329). He identified the great weight placed by the Panel on the effects of the spatial division of the western cutting in combination with the Longbarrow junction, on the physical connectivity between monuments and the significance they derive from their settings (PR 5.7.330);
(iv) At DL 32 the SST summarised the Panel's conclusion on the fourth main issue;
(v) At DL 33 the SST summarised the Panel's overall conclusion (in PR 5.7.333) applying the NSPNN, that is the effects of the scheme on the OUV of the WHS *and* on "the significance of heritage assets through development within their settings". The Panel's judgment, drawing on what they had already concluded under the third main issue (see DL 30), was that taken as a whole there would be "substantial harm";
(vi) The SST then relied in DL 33 upon the Panel's acceptance that this was a matter of judgment upon which differing and informed opinions and evidence had been given to the Examination;

(vii) Still in DL 33, the SST drew upon the views of IP1, IP2, Wiltshire Council, the National Trust, English Heritage Trust and DCMS placing greater weight on the benefits of the scheme to the WHS from the removal of the existing A303 compared to any harmful effects of the scheme elsewhere in the WHS. Those bodies did not agree that the level of harm would be substantial. Some said that there would or could be scope for a net benefit overall to the WHS (see e.g. the cross-references to PR 5.7.70, 5.7.72 and 5.7.83);
(viii) In DL 34 the SST referred to the third main issue again. He preferred the view of IP2 on the effect of the scheme on spatial and visual relations and settings, judging that it would be less than substantial rather than substantial;
(ix) The SST then drew upon the views of a number of parties at the Examination who, to varying degrees, were supportive of the proposal: IP2, National Trust, English Heritage Trust and Wiltshire Council (DL 35 to DL 42);
(x) In DL 43 the SST said that he had carefully considered the Panel's concerns and those of other interested parties, including ICOMOS-UK, the claimant, the COA and the CBA in relation to both the effects of the proposal on the OUV of the WHS and also the cultural heritage and the historic environment of the wider area. He took into account, in particular, the concerns expressed by some interested parties and the Panel regarding the adverse impact from the western cutting and portal, the Longbarrow junction and, to a lesser extent, the eastern approach and portal. He accepted that there would be adverse impacts from those parts of the development. But the SST concluded on balance, taking into account the views of IP2 and Wiltshire Council, that any harm to the WHS as a whole would be less than substantial.

138. The judgments expressed at DL 34 and DL 43 involved the SST taking the "fork in the road" decision with the consequence that paragraph 5.134 of the NPSNN applied, rather than, as the Panel had concluded, paragraph 5.133.

139. In DL 50 the SST stated that he had placed great importance on the views of IP2. He agreed with IP2 that the harm caused would not be substantial and accepted its view that the proposed approach to artefact sampling was acceptable, disagreeing with the judgment of the Panel on those matters. It is plain from DL 34, DL *43, DL 50* and DL 80 that the SST understood IP2 to have said that there would be "less than substantial" harm and he agreed with that view. It follows that the SST did not agree with those interested parties who had gone further by suggesting that the scheme would result in a net *benefit* to the OUV of the WHS. Accordingly, the SST did not depart from the Panel's view that the benefits of the scheme to the OUV of the WHS did not outweigh the harm that would be caused to OUV attributes, the integrity and the authenticity of the WHS (see [101 to 103] above).

140. In DL 80-87 the SST summarised his overall conclusions on the application for a DCO. He dealt with heritage issues and visual and landscape impacts at DL 80-81:-

> "80. For the reasons above, the Secretary of State is satisfied that there is a clear need for the Development and considers that there are a number of benefits that weigh significantly in favour of the Development (paragraphs 12-22). He considers that the harm that would arise to agriculture should be given limited weight in the overall planning balance (paragraphs 23-24). In respect of cultural heritage and the historic environment, the Secretary of State recognises that, in accordance with the NPSNN, he must give great weight to the conservation of a designated heritage asset in considering the planning balance and that substantial harm to or loss of designated assets of the highest importance, including WHSs, should be wholly exceptional. He accepts there will be harm as a result of the Development in relation to cultural heritage and the historic environment and that this should carry great weight. Whilst also recognising the counter arguments put forward by some Interested Parties both during and since the examination on this important matter, on balance the Secretary of State accepts the advice from his statutory advisor, Historic England, and is satisfied that the harm to heritage assets, including the OUV, is less than substantial and that the mitigation measures in the DCO, OEMP and DAMS will minimise the harm to the WHS (paragraphs 25-51).
>
> 81. The Secretary of State accepts there will be adverse and beneficial visual and landscape impacts resulting from the Development and recognises that the extent of landscape and visual effects is also a matter of planning judgment. He is satisfied the Development has been designed to accord with the NPSNN and that reasonable mitigation has been included to minimise harm to the landscape. He disagrees that the level of harm on landscape impacts conflicts with the aims of the NPSNN. Whilst he recognises the adverse harm caused, he considers that the beneficial impacts throughout most of the WHS outweigh the harm caused at specific locations and therefore considers that there

> is no conflict with the aims of the NPSNN. For these reasons, he considers landscape and visual effects to be of neutral weight in the overall planning balance (paragraphs 52-56)."

141. In DL 87 the SST concluded that the need case for the development together with the other identified benefits outweighed any harm.

142. One potential issue was whether the SST's disagreement with the Panel that there would be substantial harm to heritage assets meant that he was also disagreeing with its specific findings on the impacts of the scheme upon which that conclusion had been based. Mr Strachan QC put it neatly in his oral submissions: the SST did not disagree with the Panel's findings on specific impacts on heritage assets but he did disagree with the Panel's categorisation of those impacts as involving substantial harm. I accept that submission.

143. In my judgment there is nothing in the decision letter to indicate that the SST dissented from any of the Panel's specific findings on impact. The Panel's view that there would be substantial harm to designated assets related only to the effects of the western cutting and portals together with the Longbarrow junction. The SST's decision letter simply decided that that level of harm would be lower without expressing any disagreement or doubts about the more detailed assessments made by the Panel (see eg. PR 5.7.229 to 5.7.330 and DL 34, 43 and 50). It has to be borne in mind that the SST did not have the ES or HIA and he did not have any detailed briefing from officials about impacts on individual assets or groupings of assets. The Panel's report of IP2's views did not provide that information because IP2 had stated that they were not setting out for the Examination an assessment of that nature, albeit that they disagreed with IP1's appraisal of some impacts (which were not identified). Indeed, if it had been submitted by the defendant, IP1 or IP2 that the decision letter should be read as if the SST had disagreed with the Panel's specific findings, and that submission had been arguable, I would have decided that the reasons given in the letter on such an important matter were legally inadequate and quashed the decision on that ground.

144. For similar reasons, I do not consider that the SST disagreed with the Panel on its conclusions that the proposal would harm attributes (1) to (3) and (5) to (7) of the OUV, as well as the integrity and authenticity of the WHS, or the specific findings on impact from which the Panel drew those conclusions. Similarly, he did not disagree with its view that benefits to the OUV of the WHS would not outweigh harm to OUV attributes, authenticity and integrity of the WHS. There is simply no reasoning in the decision letter to indicate that the SST took that course. On an issue of such importance, both nationally and internationally, the SST would have been legally obliged to state clearly that those were his conclusions. As in paragraph [143] above, if it had been submitted that the decision letter should be read as if the SST had rejected those specific findings, and that submission had been arguable, I would have decided that the reasoning was legally inadequate. The SST simply dealt with the question posed by the NPSNN of "substantial" or "less than substantial" harm which, as both he and the Panel made clear, was a judgment bringing together the overall effect of the proposal on designated assets as well as the WHS (see e.g. PR 5.7.333, PR 7.2.33 and DL 33 to 34 and 50).

Ground 1

145. The claimant raises 4 issues under ground 1 which it is convenient to take in the following order:-

(i) The SST failed to apply paragraph 5.124 of the NPSNN (see [43] above) to 11 non-designated heritage assets;
(ii) The SST failed to consider the effect of the proposal on 14 scheduled ancient monuments (i.e. designated heritage assets);
(iii) The SST failed to consider the effect of the proposal on the setting of the heritage assets, as opposed to its effect on the OUV of the WHS as a whole;
(iv) The SST's judgment that the proposal would cause less than substantial harm improperly involved the application of a "blanket discount" to the harm caused to individual heritage assets.

146. Underlying much of the claimant's case under ground 1 was the proposition that a decision-maker is obliged to consider in respect of *each* heritage asset its significance, the impact of the proposal and the weight to be given to that impact (see e.g. paras. 93 to 121 of the claimant's skeleton). The claimant relies upon regulation 3 of the 2010 Regulations (see [27] above), paragraphs 5.128 to 5.133 of the NPSNN (see [41] to [43] above) and the decision of the Court of Appeal in *City and Country Bramshill Limited v Secretary of State for Housing, Communities and Local Government [2021] EWCA Civ 320* , in particular the passage in the judgment of Lindblom LJ where he stated at [79] that in the overall balancing exercise:-

> "….. every element of harm and benefit must be given due weight by the decision-maker as material considerations…."

147. However, the court also added that the decision-maker has to adopt "a sensible approach" ([80]). The legislation on heritage assets does not prescribe any single, correct approach to the balancing of harm to those assets against any likely benefits of a proposal or other material considerations weighing in favour of the grant of consent ([72]). The same applies to policies in the NPSNN subject, of course, to applying any specific policy test which is relevant. Requirements in the NPSNN that "great weight" be given to the conservation of an asset and "the more important the asset, the greater the weight should be" are matters left to the planning judgment of the decision-maker to resolve ([73]). The same applies to the application of the tests in paragraphs 195-6 of the NPPF and paragraphs 5.133-5.134 of the NPSNN. The policies do not direct the decision-maker to adopt any specific approach as to *how* harm should be assessed or what should be taken into account or excluded in that exercise. "There is no one approach." (see ([74]).

148. In the present case, the ES upon which the planning assessments by the Panel and ultimately the SST were based, had to address a large number of heritage assets over a substantial area. The assessment for some individual assets was expressed separately for each one. But in addition a number of assets were collected together in groupings, an approach endorsed by the WHC, ICOMOS and IP2 (see [71] above). The Panel made no criticism of that approach in its report. Indeed, it adopted it at various points in its reasoning, and the same is true of the decision letter. The presentation of an assessment by the use of groupings does not mean that assets have not been individually assessed. Instead, the technique enables such assessments to be collected together and expressed in relation to an appropriate grouping. Mr. David Wolfe QC, who together with Ms. Victoria Hutton appeared on behalf of the claimant, confirmed that the claimant makes no criticism of this approach.

(i) The 11 non-designated heritage assets

149. The claimant accepts that an assessment was made of the 11 non-designated heritage assets in the western section of the scheme. They are listed in table 6.11 of chapter 6 of the ES. They are not located in the WHS. Some of the assets would be lost because of the scheme. But others would not. For example, it was said that one asset might suffer damage from compression by overlaying of material. Another could not be found when a survey was carried out, or had ceased to exist because of plough-damage.

150. The point taken by the claimant is that the Panel and the SST failed to apply paragraph 5.124 of the NPSNN by considering whether these 11 assets should be treated as having equivalent significance to scheduled ancient monuments, so that policies such as paragraphs 5.133 to 5.134 of the NPSNN might be applied.

151. With respect, there is nothing in this point. Mr. James Strachan QC, supported by Mr. Reuben Taylor QC for IP1 and Mr. Richard Harwood QC for IP2, pointed to the test which has to be satisfied for paragraph 5.124 to apply. A non-designated asset must be "demonstrably of equivalent significance to Scheduled Monuments." Accordingly, such a monument must be considered to be of national importance (s. 1(3) of the Ancient Monuments and Archaeological Areas Act 1979). Decisions on national importance are guided by Principles of Selection laid down by the Secretary of State for Digital, Culture, Media and Sport. IP2 has published a number of scheduling selection guides on eligibility under s.1(3) .

152. Table 6.1 of the ES stated that paragraph 5.124 of the NPSNN had been applied in the work carried out and cross-referred to table 6.2. The latter set out the criteria applied in the ES for determining the value of a heritage asset. A non-designated asset contributing to *regional* research objectives was assessed as having a "medium" value. A non- designated asset of comparable quality to a scheduled monument, that is one of *national* importance, was assessed as having a "high" value. None of the non-designated assets in Table 6.11 were given a high value. All were treated as having a medium value. They were therefore treated by IP1 as not falling within para. 5.124 of the NPSNN. Appendix 6.3 to the ES gave detailed references to the source material, including surveys, relied upon for this evaluation. I therefore accept the defendant's submission that this exercise was carried out transparently and in such a way that any interested party who wished to disagree, by demonstrating that any asset should be treated as equivalent to a scheduled monument, could do so.

153. The short point is that no objecting party attempted to carry out any such exercise. Accordingly, this was not an issue in the Examination, let alone a "principal important controversial issue", which the Panel was required to address in its report to

the SST, or which had to be addressed in the decision letter (*South Bucks District Council v Secretary of State [2004] 1 WLR 1953 at [36]*). I should also add that the Panel's report refers to paragraph 5.124 of the NPSNN and shows that it was applied to other assets, where judged appropriate (see PR 5.7.28 and 5.7.49). The Panel approved of the approach taken in the ES, save for where it explicitly identified any disagreement (see [90] above). It did not criticise the handling of this part of the NPSNN.

154. The claimant relied upon some very brief passages in representations made to the Examination about non-designated heritage assets. These passages were of a generalised nature. They did not pick out any item from Table 6.11 of the ES to attempt to demonstrate that such a feature is of national importance, applying relevant criteria and drawing upon any source material.

155. The criticism made under ground 1(i) must be rejected.

(ii) Failure to consider 14 scheduled ancient monuments

156. Originally the claimant suggested in its "First Reply" that the impact on 15 scheduled monuments had not been assessed by the Panel in its report and likewise had not been assessed by the SST in his decision letter. During oral argument the number of assets was said to be 14. It was submitted that the effect of the proposal on the *setting* of these assets had not been addressed. The HIA had simply considered the effect on the OUV of the WHS. Ms. Hutton told the court that these assets are located in the vicinity of the proposed Longbarrow Junction.

157. However, as Mr. Strachan QC pointed out, the 14 designated assets were also dealt with in the "Setting Assessment", Appendix 6.9 to the ES. There the effect on the settings of each of the assets was addressed. The defendant provided a detailed schedule showing where each asset was considered in the documentation. This has not been disputed by the claimant. The ES assessed the effects of the scheme on the settings as ranging from neutral, through slight beneficial to moderate beneficial. In no case did the ES identify any substantial harm.

158. Here again, the claimant has relied upon a few brief passages from representations made in the Examination. These passages do not contain anything like the level of detail or referencing contained in the ES or HIA, although it would appear that the document would have been prepared by expert archaeologists. The claimant has not shown that they gave rise to a principal important controversial issue which has not been addressed by the Panel in its report, for example, in its criticisms of the Longbarrow junction and its continuation of the western cutting.

159. Under its third main issue the Panel expressed its concern about the adverse impact of the western cutting and portals on the Wilsford/Normanton dry valley and the relationship between monuments on either side (see PR 5.7.227 and 5.7.229) which formed part of its finding of "substantial harm". In relation to the proposed Longbarrow junction, the Panel noted its effect on *inter alia* the Winterbourne Stoke Downs barrows, two individual scheduled monuments on Winterbourne Stoke Down and the Diamond Group (PR 5.7.239). The SST agreed with the Panel's report on these matters (see DL 10).

160. Accordingly, the criticisms made under ground 1(ii) must be rejected.

(iii) Failure to consider effect on the settings of heritage assets

161. It is plain from the review carried out above that the ES and HIA considered the effects of the scheme on both the OUV of the WHS and on the settings of heritage assets. It is also plain from its report that the Panel addressed under its third and fifth main issues the effect of the proposal on spatial relations, visual relations and settings in relation to the WHS and also heritage assets ([88] and [96-100] above). It then went on to consider effects on the OUV of the WHS and the historic environment as a whole.

162. However, the claimant submits that in his decision letter the SST failed to consider the effect of the proposal on the settings of heritage assets as well as on the WHS overall. It is said that he only considered the latter issue.

163. This criticism is untenable. It comes from a misreading of the decision letter and to some extent the Panel's report. The third and fifth main issues were not treated by the Panel as being in hermetically sealed compartments. Conclusions drawn under the third main issue on the project's effects upon the settings of assets, and upon the landscape containing these assets, also influenced the Panel's reasoning on the fifth main issue. This is plain not only from the Panel's report but also the decision letter (see [137] above). Mr. Wolfe QC is incorrect to suggest that DL 34 did not refer to the third main issue and only considered the effect on the OUV as a whole. The language of DL 34 cannot be read in that way, particularly when it is considered in the context of the preceding parts of the decision letter and the Panel's report to which it responds.

164. There is equally no merit in the submission that IP2 had only addressed the impact of the proposal on the OUV of the WHS and, therefore, because DL 34 relied upon the opinion of IP2 that paragraph must be read as addressing only the WHS and not heritage assets. DL 30 had already referred to PR 5.7.329 to 5.7.330. From those paragraphs it was clear to the SST that the Panel understood IP2 to disagree with its view on substantial harm, in the context of the third main issue, which dealt with the effect of the development on spatial and visual relations and settings of *heritage assets* .

165. The decision letter was prepared by officials for consideration by the SST following their review of the representations which had been made in the Examination by IP2 and others. DL 33 reflects that exercise. IP2's representations in May 2019 (paras. 3.9 to 3.10 and 6.3) made it plain that it had addressed scheduled monuments (and other assets), whether contributing to the OUV or not, and whether inside the WHS or not, and had considered all parts of the ES relating to cultural heritage issues as well as the HIA (see [85] above).

166. Accordingly, the criticisms made under ground 1(iii) must be rejected.

(iv) Whether the Secretary of State took into account the impacts on all heritage assets

167. This is a challenge to the SST's judgment that the harm identified by the Panel as substantial should be treated as less than substantial. It has been put in more than one way.

168. First, it is said that that reduction in the level of harm was an improper "blanket discount" because the judgment is said to have been applied to a "significant number of designated and undesignated heritage assets" and yet the impact of the scheme was not the same for all the assets affected. Mr. Wolfe QC also described the error of law here as a "composite approach," whereas, in accordance with *Bramshill* [79] and the NPSNN (paragraph 5.129), a separate assessment of the impact on each individual heritage asset was required.

169. To some extent, the argument has moved on since the claimant's pleadings and skeleton were prepared. The claimant accepts that the requirement for individual assessment can properly be addressed by an approach based on groupings (see [129] above).

170. But what appears clearly from paragraph 76 of the Statement of Common Ground, is that, by whatever means he employs, the decision-maker must ensure that he has taken into account (a) the significance of each designated heritage asset affected by the proposed development and (b) the impact of the proposal on that significance.

171. Mr Strachan QC submitted, supported by IP1 and IP2, that the SST complied with the principle in [170] above. This is because, first, the ES addressed all relevant heritage assets. Second, the Panel identified in its report those impacts where it disagreed with the assessment in IP1's ES and must be taken as having agreed with the remainder (PR 5.7.150). Third, the SST stated in DL 10 that he is to be taken as having agreed with the findings and conclusions in the Panel's report save for where the contrary is stated. It is submitted that the SST must therefore be treated as having agreed with those parts of the ES and HIA with which the Panel did not expressly disagree.

172. The defendant's argument essentially relies upon the starting point that all relevant assets were assessed in the ES (and HIA). So the question arises whether the defendant's analysis is correct, given that neither the ES nor the HIA were before the SST at any stage. In this context, regulation 21(1) of the EIA Regulations 2017 is relevant (see [31] above). The SST was obliged to take into account the environmental information for the proposal, which included the ES and DL11 states that he did this.

173. The ES concluded that no part of the scheme would result in substantial harm to any designated heritage asset. The Panel disagreed with that view in relation to the effects of the western cutting and portals and the Longbarrow junction. Nonetheless, the Panel recognised that that was a matter of judgment on which the SST might differ and that there had been differing opinions submitted to the Examination, not least that of IP 2 (PR 7.5.26).

174. As I have said in [137] above, the SST disagreed with the Panel's judgment that "substantial harm" would be caused by those parts of the scheme. It follows that he disagreed with the conclusions in PR 5.7.236, 5.7.248, 5.7.297, 5.7.329, 5.7.333, 7.5.11, 7.5.19, 7.5.21 and 10.2.10 that that level of harm would be substantial. However, the SST did not disagree with the more specific findings of the Panel upon which its "substantial harm" conclusion was based. The effect of DL 10 is that he agreed with those findings (see [142 to 144] above).

175. The agreed principle in [170] above does not lay down a rubric as to how an assessment should be made or how reasoning should be expressed. It does not indicate that something akin to the analysis in an environmental statement is required. It is open to a decision-maker to accept the findings of an Inspector or Panel about the specific impacts that would be caused by a proposed development, or a part thereof, and then to say as a matter of judgment that those effects should be treated as less than substantial harm rather than substantial harm, particularly where that view is supported by the evidence and opinion of a specialist adviser such as IP2 in this case. It was not suggested that the judgment in the present case should be treated as irrational. That is hardly surprising given what the Panel had said at PR 5.7.26. So that part of ground 1(iv) which seeks to attack what is described as a "blanket discount" does not assist the claimant.

176. But the real issue remains whether the principle in [170] above has been satisfied in the decision letter in the light of the explanation of the decision-making process given in [171].

177. Notwithstanding regulation 21(1) of the EIA Regulations 2017 and the contents of DL11, the defendant's legal team informed the court that the ES and HIA were not before Ministers when they were considering the Panel's report and the determination of the application for development consent. It is said that "the ES and HIA were considered by officials in providing their advice and the ES and HIA formed part of the examination library accessible from the examination website". However, as is clear from the case law cited in [62] to [65] above, what was within the knowledge of officials is not to be treated on that account as having been within the Minister's knowledge, unless it was drawn to his attention in a briefing or precis.

178. That same case law suggests that in the real world a Minister cannot be expected to read every line of an environmental statement and all the environmental information generated during an examination or inquiry process. But nevertheless, an adequate precis and briefing is required. Depending on the circumstances, that requirement may be met, wholly or in part, by the report of a Panel or an Inspector (for example, where the Secretary of State agrees with the relevant parts of that report). It may also be provided in the draft decision letter which is submitted to the decision-maker for his consideration or in any additional briefing. That would be necessary in a typical case where only one or a small number of heritage assets are impacted. The requirement *to take into account* the impact on the significance of each relevant asset still applies in an atypical case, such as the present one, where a very large number of heritage assets is involved. It will be noted, however, that although regulation 21(1) requires the decision- maker to take into account the environmental information in a case, it does not require him to give his own separate assessment in relation to each effect or asset.

179. Here, the SST did receive a precis of the ES and HIA in so far as the Panel addressed those documents in its report. But the SST did not receive a precis of, or any briefing on, the parts of those documents relating to impacts on heritage assets which the Panel accepted but did not summarise in its reports. This gap is not filled by relying upon the views of IP2 in the Examination because, understandably, they did not see it as being necessary for them to provide a precis of the work on heritage impacts in the ES and in the HIA. Mr Wolfe QC is therefore right to say that the SST did not take into account the appraisal in the ES and HIA of those additional assets, and therefore did not form any conclusion upon the impacts upon their significance, whether in agreement or disagreement.

180. In my judgment this involved a material error of law. The precise number of assets involved has not been given, but it is undoubtedly large. Mr Wolfe QC pointed to some significant matters. To take one example, IP1 assessed some of the impacts on assets and asset groupings not mentioned by the Panel as slight adverse and others as neutral or beneficial. We have no evidence as to what officials thought about those assessments. More pertinently, the decision letter drafted by officials (which was not materially different from the final document – see [67] above) was completely silent about those assessments. The draft decision letter did not say that they had been considered and were accepted, or otherwise. The court was not shown anything in the decision letter, or the briefing, which could be said to summarise such matters. In these circumstances, the SST was not given legally sufficient material to be able lawfully to carry out the "heritage" balancing exercise required by paragraph 5.134 of the NPSNN and the overall balancing exercise required by s.104 of the PA 2008 . In those balancing exercises the SST was obliged to take into account the impacts on the significance of all designated heritage assets affected so that they were weighed, without, of course, having to give reasons which went through all of them one by one.

181. Accordingly, I uphold ground 1(iv) of the challenge.

Conclusion

182. For these reasons, I uphold ground 1(iv) of the challenge and reject grounds 1(i), (ii) and (iii).

Ground 2 – lack of evidence to support disagreement with the Panel

183. The claimant submits that the SST disagreed with the Panel on the substantial harm issue without there being any proper evidential basis for doing so. Mr. Wolfe QC advances this ground by reference to the SST's acceptance of the views of IP2 in DL 34, 43, 50 and 80. He submitted that IP2's representations did not provide the SST with evidence to support his disagreement with the Panel on "substantial harm" in two respects. First, he said that HE only addressed the spatial aspect of the third main issue and did not address harm to individual assets or groups of assets. Second, he submitted that SST had misunderstood IP2's position: it had never said that the harm would be less than substantial.

184. It should be noted that although the claimant had raised other more detailed criticisms, Mr. Wolfe QC did not pursue them in oral submissions or invite the court to deal with them. No doubt he considered that ground 2 should stand or fall on the points that he chose to advance as set out above.

185. The short answer is to be found in PR 5.7.329 to 5.7.330. The Panel understood that IP2 took the view that no substantial harm would be caused to any asset and that the reasons for the difference of view between the Panel and IP2 were concerned with the effects of the western cutting and portals and the new Longbarrow junction. Those passages would have reflected what took place during the hearings in which IP2 took part, as well as its written representations. IP2 has confirmed that the Panel's report at PR 5.7.329 to 5.7.330 accurately set out its position in the Examination (para. 28 of Detailed Grounds of Defence). There is no proper basis for the court to go behind what was said by the Panel in its report on this subject. The SST was plainly entitled to rely upon that part of the report.

186. It is also apparent from PR 5.7.329 to 5.7.330 that the Panel was dealing with its overall finding of substantial harm under the third main issue. The claimant's attempt to confine the effect of those passages to effects on "spatial relations, visual relations and settings" overlooks the fact that PR 5.7.329 simply repeated the heading given for the third main issue when it was introduced in PR 5.7.129. It is plain from the section of the report devoted to the third main issue that the Panel considered both the spatial aspect and the harm to heritage assets and their setting. There is no reason to think that the shorthand they used in PR 5.7.329 was meant to suggest that IP2 had only considered the spatial aspect. This is a forensic, excessively legalistic argument of the kind which should not be advanced in the Planning Court.

187. In any event, on a fair reading of IP2's representations, it is plain that it did consider those parts of the ES and HIA which assessed impacts on individual heritage assets or groups of assets.

188. For these reasons, ground 2 must be rejected.

189. For completeness, I would add that I do not accept the submission of Mr Strachan QC that the SST's disagreement on the level of harm resulting from the western section of the scheme was supported by his conclusions in DL 52 to 56 on landscape and visual amenity impacts from a general planning perspective. Both the Panel and the SST treated those issues separately from the historic landscape matters which arose under the cultural heritage sections of their respective assessments. However, Mr Strachan's submission is not necessary for the court to reject ground 2.

Ground 3 – double-counting of heritage benefits

190. The claimant submits that the SST not only took into account the heritage benefits of the scheme as part of the overall balancing exercise required by para. 5.134 of the NPSNN, but also took those matters into account as tempering the level of heritage disbenefit. It is said that this was impermissible double-counting because those heritage benefits were placed in both scales of the same balance.

191. But the claimant also made a further submission which is rather different. It was said that the SST relied upon heritage benefits in DL 34 and DL 43 as reducing the level of heritage harm when deciding whether less than substantial harm would be caused (ie. whether paragraph 5.133 or 5.134 of the NPSNN should be applied), and then also took those heritage benefits into account when deciding whether the balance pointed in favour or against the scheme.

192. It is necessary to be clear about how the policies in the NPSNN operate, the process which was followed in the ES and HIA, and the chain of reasoning in the decision letter.

193. Paragraphs 5.133 and 5.134 of the NPSNN lay down the criteria which determine which of the policy tests is to be applied for dealing with harm to heritage assets (the "fork in the road decision" - see [47] above). In the light of *Bramshill* at

[71] it is common ground that in reaching this judgment, the decision-maker *may* take into account benefits to the heritage asset itself (referred to as an "internal balance") but he is not obliged to do so (and see [74]).

194. In *Bramshill* at [78] Lindblom LJ stated:-

> "Cases will vary. There might, for example, be benefits to the heritage asset itself exceeding any adverse effects to it, so that there would be no "harm" of the kind envisaged in paragraph 196 [of the NPPF]. There might be benefits to other heritage assets that would not prevent "harm" being sustained by the heritage asset in question but are enough to outweigh that "harm" when the balance is struck. And there might be planning benefits of a quite different kind, which have no implications for any heritage asset but are weighty enough to outbalance the harm to the heritage asset the decision-maker is dealing with."

For the purposes of the present case, two points may be drawn from that passage.

195. First, when assessing the impact of a project on a heritage asset it is permissible to combine both the beneficial and the adverse effects *on that asset* . That is not so much a balancing exercise as a realistic appraisal of what would be the net impact of the project on the asset, viewed as a whole and not partially. That approach was followed in the ES in this case. It was necessary to take into account the A303 as part of the existing baseline and to take into account the beneficial impact on an individual asset of removing that road as well as any harmful impact on that asset from the new scheme. The net outcome might be positive, neutral or negative.

196. Second, if a scheme would cause harm to one asset and benefit to another, that does not alter the judgment that the first asset will be harmed. Instead, the benefit to the other is a matter to be weighed in whichever balance falls to be applied under the NPSNN, or indeed paragraphs 195 or 196 of the NPPF. Here again we see the distinction between deciding which of the two policy tests in those paragraphs is to be applied and the carrying out of the balancing exercise itself.

197. There is a tendency to use the term "double-counting" imprecisely as if to say that it is necessarily objectionable whenever a particular factor is taken into account in a decision on a planning application more than once. That is too sweeping a proposition. Well-known planning policies contain examples where legitimately the same factor may have to be taken into account more than once. For example, in Green Belt policy some types of development are regarded as inappropriate if they would harm the openness of the Green Belt and/or conflict with the purposes of including land within it (paras. 145 and 146 of the NPPF). In those circumstances, the application of the "very special circumstances test" will also require that harm to the Green Belt to be included in the overall planning balance. There is no improper double-counting. The same factor is being assessed twice for two different and permissible purposes.

198. Paragraph 11(d) of the NPPF provides another example. If, for example the presumption in favour of granting permission is engaged (e.g. because the supply of housing land is less than 5 years) the "tilted balance" in sub-paragraph (ii) may be applicable. If so, the extent to which the proposal complies with or breaches development plan policies may be taken into account in the balance required to be struck under paragraph 11(d)(ii). But it is also necessary to take into account those polices when striking the balance required by s.38(6) of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004") . Those two balances may either be struck separately or taken together. Either way, there is no impermissible double-counting. Taking into account the same factor more than once is simply the consequence of having to apply more than one test (see *Gladman Developments Limited v Secretary of State for Housing, Communities and Local Government [2021] EWCA Civ 104 at [62]-[67]* and *[2020] PTSR 993 at [110]*). The same considerations may apply where paragraph 11(d)(i) falls to be applied.

199. The policies in paragraphs 5.133 to 5.134 of the NPSNN are similar in nature to the first of those examples. These paragraphs determine which of the two tests for decision- making on heritage policy are to be applied, before arriving at the overall planning balance. A beneficial impact on a heritage asset may appropriately be taken into account in determining the net level of harm which that asset would sustain and therefore which policy test is engaged, and then again in the balancing exercise required by that test when *all* public benefits are weighed against all harm to heritage assets. The same factor is taken into account at two different stages for different and permissible purposes. There is no question of improper double-counting. Ultimately, in his reply Mr. Wolfe QC accepted this analysis.

200. Accordingly, the real issue under ground 3 has come down to whether the SST, when striking the balance, put the same benefits in both scales, for and against the proposal (see [190] above).

201. The ES and HIA assessed the impacts of the proposal on individual assets and groups of assets and arrived at the conclusion that no asset would be substantially harmed. On that basis the test in paragraph 5.134 would fall to be applied. I accept the submission of the defendant and IP1 that that series of separate judgments did not involve any off- setting of net benefit to one asset against net harm to another. The claimant did not identify any material to the contrary.

202. The Panel disagreed with that assessment in relation to the impacts of two elements of the scheme, the western cutting and portals and the Longbarrow junction. They judged that there would be substantial harm to assets or groups of assets and to the OUV of the WHS in certain locations (see e.g. PR 5.7.219, 5.7.224, 5.7.228 to 5.7.229, 5.7.231 to 5.7.232, 5.7.239, 5.7.241, 5.7.245 and 5.7.247). The Panel's judgment was based upon its assessment of the scale and design of the civil engineering works together with the mitigation proposed, and their effect upon the setting of assets and the landscape in which they feature. In reaching its judgments the Panel appropriately took into account the removal of the A303 because that in itself affects the impact on relevant assets, as well as the mitigation proposed for those elements of the scheme (see e.g. PR 5.7.236 and 5.7.248). There is no evidence that when it made its judgment on the "fork in the road" between paragraphs 5.133 and 5.134 of the NSPSNN, the Panel introduced off- setting between different assets or had regard to the broader (or generic) heritage benefits of the entire scheme (e.g. as set out in PR 5.7.29 – see [70] above). The Panel performed the overall balancing exercise separately in section 7.5 .

203. In DL 34 and DL 43 the SST set out his conclusion on which of the policy tests in paragraph 5.133 or paragraph 5.134 of the NPSNN should be applied. Having decided in favour of paragraph 5.134, the SST then applied that test in DL 51. There, the SST simply weighed benefits from the overall scheme ("the public benefits") against the harm he had already identified. They included the overall or generic scheme benefits for cultural heritage identified at PR 5.7.29. The benefits in PR 5.7.29 were put into the correct scale. There is no indication that the SST put the positive effects on each *individual* asset or asset grouping attributable to the western section of the proposed scheme in both sides of the balance.

204. In DL 80 the SST drew upon his earlier conclusions in DL 34 and DL 43 that the proposal would cause less than substantial harm, but there is no suggestion in DL 80 that that judgment was tainted by improperly taking into account heritage benefits from the scheme overall rather than the way in which the contentious elements of the western section of the scheme affected relevant assets. That judgment had previously been reached in DL 34 and DL 43.

205. Ultimately, ground 3 came down to an attack on the way in which the SST reached his conclusions on less than substantial harm in DL 34 and DL 43. In my judgment, they contain no indication that the SST took into account *overall* benefits of the scheme rather than effects of the scheme on *individual* relevant assets, so that this resulted in improper double-counting either in DL 51 or in DL 80 to DL 87.

206. The claimant's submission was also advanced on the basis that the SST had relied upon the views of IP2 and that the latter had taken that broader approach. I reject that submission. In PR 5.7.229 to 5.7.330 the Panel stated that IP2 had taken the view that less than substantial harm would be caused to assets affected by the western cutting and Longbarrow junction. The Panel gave no indication that that involved a different and broader approach to the assessment of that harm, one which took into account overall or generic scheme benefits, as compared with its own approach. Instead, the Panel said that it was simply a difference of professional judgment on the evidence. The claimant's submission on this point is not supported by any of the documents shown to the court

207. The claimant sought to criticise the relationship between DL 33 and DL 34 in order to suggest that impermissible double-counting was introduced into DL 34. I disagree. Part of DL 33 addressed the Panel's conclusion on the effect of the overall scheme on the WHS. It was in that context that the SST referred to the views of IP2 and others that greater weight should be given to the beneficial effects of removing the existing A303 from the WHS rather than the harmful effects of part of the new scheme on part of the WHS. Indeed, some contended that there would be a net benefit overall. This approach was entirely proper because, it was necessary to consider the WHS as a whole and, correctly, it involved treating the WHS as a designated heritage asset in itself. Thus the benefits relevant to that asset would necessarily relate to the scheme as a whole. That approach is entirely consistent with the second and third sentences of [78] in *Bramshill* (see [194 to 196] above).

208. But in DL 34 the SST also brought in the third main issue and did so in the context of what he had already said in DL 30. The difference between IP2 and the Panel related to the effect of the western cutting and the Longbarrow junction on heritage assets and also the OUV of the WHS. Here, there is no reason to think that the SST, relying upon the views of IP2,

took into account a wider range of heritage benefits than was permissible for the purposes of deciding whether paragraph 5.133 or 5.134 of the NPSNN applied (see [206] above).

209. For these reasons, ground 3 must be rejected.

Ground 4 – whether the proposal breached the World Heritage Convention

210. The claimant contends that the SST's acceptance that the scheme would cause harm, that is less than substantial harm, to the WHS involved a breach of articles 4 and 5 of the Convention and therefore the SST erred in law in concluding that s.104(4) of PA 2008 was not engaged. It was engaged and so, it is submitted, the presumption in s.104(3) should not have been applied in the decision letter.

211. The claimant's case as set out in its skeleton (see e.g. para. 242) appeared to be that any harm, or at least any significant harm, to the WHS would, if allowed, involve a breach of articles 4 and 5 of the Convention , irrespective of whether the benefits of the scheme were judged to have greater weight. That appears to have been the case presented in the Examination and which IP1 successfully persuaded the Panel to reject. In his oral submissions Mr. Wolfe QC shifted the case significantly. He accepted that the Convention allows for a balance to be struck between harm to the WHS and benefits, but contended that only heritage benefits, in particular benefits to the WHS, its OUV and attributes, could be taken into account in that balance. Thus, he submitted, the balance required to be struck by either paragraph 5.133 or paragraph 5.134 of the NPSNN conflicts with the Convention .

212. The first issue is whether the Convention has been incorporated into UK law, or the law applicable in England and Wales, so that its construction is a matter of law directly for this court. Although the Convention had been ratified by the UK, it is common ground that it has not been incorporated into our domestic law by legislation. Instead, Mr. Wolfe QC submitted that an international treaty may be treated by the court "as for all practical purposes as incorporated into domestic law," citing Lord Steyn in *R (European Roma Rights) v Prague Immigration Officer [2005] 2 AC 1 at [40]* et seq. However, that decision does not assist the claimant. Lord Steyn was not prepared to treat a provision in the Immigration Rules not requiring any action to be taken contrary to the Refugee Convention as incorporating that Convention into English law. The Rules were insufficient for that purpose. But because the same principle was later enacted in primary legislation, it was that measure which was held to have been sufficient to achieve incorporation (see [41] to [42]).

213. In the present case the claimant merely points to s.104(4) of the PA 2008 . But that refers to international obligations generally and not specifically to the World Heritage Convention. As Mr. Taylor QC pointed out, on the claimant's argument s.104(4) would have the effect of incorporating *any* international obligation into our domestic law, but *only* for the purposes of determining an application for a DCO. There is nothing in the language used by Parliament to indicate that it intended to achieve such a strange result.

214. Instead, all that s.104(4) does is to make a breach of an international obligation one of the grounds for not applying s.104(3) . But as Mr. Wolfe QC accepted, where s.104(4) is met, that does not automatically result in the refusal of an application for a DCO. Accordingly, Mr. Wolfe QC accepted that the highest that he could put the incorporation argument is that s.104(4) treats the issue of whether a proposal would comply with the Convention as a mandatory material consideration, and not that Parliament requires a proposal to comply with the Convention as a matter of law.

215. I am not persuaded that Mr Wolfe's revised analysis provides a sufficient justification for concluding that an international obligation has been incorporated into domestic law. Mr. Wolfe QC has not shown the court any authority where that has been accepted. Indeed, if the Convention is simply being treated as a material consideration, rather than as an instrument with which a proposal must comply, the issue of whether a proposal is in conflict with the Convention is essentially a matter of judgment for the decision- maker, subject to review on the grounds of irrationality. That is especially so given the very broad, open-textured nature of the language used in articles 4 and 5. The position would not be materially different from the second authority cited by Mr. Wolfe QC, *R v Secretary of State for the Home Department ex parte Launder* [1997] 1WLR 839, where the Secretary of State took the ECHR into account and the grounds of challenge were dealt with under the law on irrationality (see pp.867E to 869B).

216. On the basis that the Convention has not been incorporated into domestic law, the relevant principles on the interpretation of that instrument were set out by Lord Brown in *R (Corner House Research) v Director of the Serious Fraud Office [2009] 1 AC 756 at [67] to [68]* . The court should allow the executive a margin of appreciation on the meaning of the Convention and only interfere if the view taken is not "tenable" or is "unreasonable." This approach allows for the possibility that, so far

as the domestic courts are concerned, more than one interpretation, indeed a range, may be treated as "tenable." The issue is simply whether the decision-maker has adopted an interpretation falling within that range.

217. I have no hesitation in concluding that the SST was entitled to decide that the policy approach in paragraphs 5.133 and 5.134 of the NPSNN (read together with the surrounding paragraphs) is compliant with the Convention . That is a tenable view. If I had to decide the point of construction for myself, I would still conclude that those policies are compliant with the Convention .

218. Although Articles 4 and 5 refer to matters of great importance, they are expressed in very broad terms. By article 4 each State Party has recognised that the duty of protecting and conserving a WHS belongs primarily to that State, which "will do all it can to this end, to the utmost of its own resources." Resources are, of course, finite and they are the subject of competing social, economic and environmental needs. The Convention does not further explain the meaning and scope of the language used in article 4. This must be a matter left to individual Party States.

219. In any event, article 4 has to be read in conjunction with the slightly more specific provisions in Article 5, and not in isolation. There the obligation on each State is to endeavour "as far as possible", and "as appropriate" for that country, to comply with paragraphs (a) to (e). They include the taking of the "appropriate" legal measures necessary to protect and conserve the heritage referred to in articles 1 and 2.

220. The broad language of these Articles is compatible with a State adopting a regime whereby a balance may be drawn between the protection against harm of a WHS or its assets and other objectives and benefits and, if judged appropriate, to give preference to the latter. The Convention does not prescribe an absolute requirement of protection which can never be outweighed by other factors in a particular case. Nor does the Convention use language which would limit such other factors to heritage benefits or benefits for the WHS in question. I also note that in its Guidance on Heritage Impact Assessments for Cultural World Heritage Properties, ICOMOS accepts that a balance may be drawn between the "public benefit" of a proposed change and adverse impacts on a WHS (para. 2-1-5).

221. The Australian authorities cited (*Commonwealth of Australia v State of Tasmania* (1983) 46 ALR 625; *Australian* Convention Foundation Incorporated v Minister for the Environment [2016] FCA 1042) need to be read carefully. Those cases were concerned with circumstances in which the Convention had been incorporated into Australian law by legislation and any observations on interpretation should be understood in the context to which the decisions were addressed. Having said that, I do not see my conclusion as conflicting with any of the observations in those decisions. They do not lend any support for the interpretation which Mr. Wolfe QC said must be given to the Convention . Indeed, the observations in the High Court of Australia in the Tasmanian Dam case upon which Mr Wolfe QC principally relied, emphasise the discretion left to individual State Parties as to the steps each will take and the resources it will commit (see e.g. Brennan J at p.776).

222. For these reasons, ground 4 must be rejected.

223. Although it is not necessary for my decision on ground 4, I would add one further point. As I have noted, it is common ground that there is no material difference between paragraphs 5.133 to 5.134 of the NPSNN and paragraphs 195 to 196 of the NPPF. The antecedent policy in Planning Policy Statement 5 (PPS5) was to the same effect and contained a statement that the government considered the policies it contained to be consistent with the UK's obligations under the Convention . No legal challenge has been brought to the policies in question, for example, on the basis that they adopted an interpretation of the Convention which is incorrect *on any tenable view* . A legal challenge to the NPSNN would now be precluded by s.13(1) of the PA 2008 . Under s.106(1) a representation relating to the merits of a policy set out in a NPS may be disregarded by the SST (see also *Spurrier* and *ClientEarth*).

Ground 5

224. The claimant raises three contentions under ground 5:-

(i) The SST failed to take into account any conflict with Core Policies 58 and 59 of the Wiltshire Plan and with policy 1d of the WHS Management Plan;
(ii) The SST failed to take into account the effect of his conclusion that the proposal would cause less than substantial harm to heritage assets on the business case advanced for the scheme;
(iii) The SST failed to consider alternative schemes in accordance with the World Heritage Convention and common law.

(i) Failure to take into account local policies

225. It is plain from, for example, DL11 and DL27 that the SST had regard to the Wiltshire Core Strategy and the WHS Management Plan.

226. In PR 5.7.322 to 5.7.325 of its report the Panel stated in a section devoted to its fifth main issue that in view of its conclusions on the impact of the scheme on the OUV of the WHS, the proposal would not accord with Core Policies 58 and 59 of the Core Strategy, nor with policy 1d of the WHS Management Plan. The Panel clearly thought that the language used in PR 5.7.324 was apt to cover impact upon the settings of designated heritage assets, the subject of Core Policy 58. The Panel carried that conclusion regarding conflict with those three policies through to its summary of the adverse impacts of the scheme within section 7.2 dealing with the planning balance. At PR 7.2.32 the Panel restated the conflict they perceived with the three local policies in terms of harm to the WHS and its OUV. There is no reason to think that in that paragraph the Panel excluded the broader consideration addressed in PR 7.2.33. In any event, at PR 7.5.11 the Panel restated its conclusion on breach of the three policies in terms of both harm to the OUV of the WHS and harm to "the significance of heritage assets through development within their settings." Plainly the Panel did not think these differences in wording were important for a true understanding of their reasoning on local policies.

227. In DL28 the SST stated:-

> "The ExA concludes the Development would benefit the OUV in certain valuable respects, especially relevant to the present generation. However, permanent irreversible harm, critical to the OUV would also occur, affecting not only present, but future generations. It considers the benefits to the OUV would not be capable of offsetting this harm and that the overall effect on the WHS OUV would be significantly adverse [ER 5.7.321]. The ExA considers the Development's impact on OUV does not accord with the Wiltshire Core Strategy Core Policies 59 and 58, which aim to sustain the OUV of the WHS and ensure the conservation of the historic environment [ER 5.7.322 – 5.7.324], and that the Development is also not consistent with Policy 1d of the WHS Management Plan [ER 5.7.325]. It considers this is a factor to which substantial weight can be attributed [ER 7.5.11]."

228. The claimant complains that this failed to address the breach of Core Policy 58 as a result of harm caused to the settings of a number of designated assets (para. 262 of skeleton). But the SST's summary in DL28 accurately and fairly reflects the language used by the Panel themselves to cover the issues raised by both Core Policies 58 and 59. The criticism is wholly untenable.

229. The second complaint is that the SST disagreed with the Panel on the level of harm that would be caused to heritage assets (i.e. from the western cutting and from the Longbarrow junction) and so cannot be taken to have accepted, in accordance with DL 10, that that lesser degree of harm still involved conflict with the three local policies. But the language used in those policies does not indicate that "less than substantial" harm could not involve any conflict therewith and the SST said nothing to the contrary. The only rational inference is that the SST accepted that there remained a conflict with those policies. The second criticism is no better than the first.

230. There is nothing in the decision letter to indicate that the conflict with local policies was disregarded by the SST. In any event, and as Mr. Strachan QC submitted, the local policies do not refer to any balancing of harm against the benefits of a proposal, as required by the NPSNN. The NPSNN was the primary policy document to be applied under the PA 2008 according to s.104(3) , which may be contrasted with s.38(6) of PCPA 2004 Act (see also para. 91 of the defendant's skeleton and *Bramshill* at [87]).

231. For these reasons ground 5(i) must be rejected.

(ii) The alleged error regarding the business case for the scheme

232. This complaint arises from paragraph 4.5 of the NPSNN (see [40] above). An application is normally to be supported by a business case prepared in accordance with Treasury Green Book principles. It provides the basis for investment decisions

and will also be important for the consideration by the Examining Authority or by the Secretary of State of the adverse impacts and benefits of a proposal. However, the NPSNN does not suggest that such a business case should put a monetary value on every factor which goes into a planning balance or a balance carried out under paragraphs 5.133 or 5.134 of the NPSNN.

233. Nonetheless, the claimant submits that the SST's decision was flawed because he did not take into account his conclusion that two elements in the western section of the scheme would result in less than substantial harm to heritage assets.

234. The point is said to arise in this way. The cost benefit analysis for the scheme placed a monetary value of £955m on the benefit of removing the existing A303 from the WHS. This was by far the greatest monetary benefit ascribed to the scheme, being approximately ¾ of its overall benefits. The costs of the scheme were said to be between £1.15bn and £1.2bn (Table 5-6 of IP1's "Case for the scheme and NPS accordance"). So without the sum attributed to the removal of the A303 the analysis would be heavily negative. That is hardly surprising. The construction of a 3.3 km tunnel, the cuttings and the junctions are expensive works.

235. The figure of £955m was arrived at by a public attitude survey which asked people to put a monetary value on their willingness to pay for the perceived benefit of removing the existing A303 and its traffic from the immediate vicinity of Stonehenge; or to put a monetary value on their willingness to accept a payment as compensation for the loss of amenity to travellers on the existing A303 through no longer being able to see Stonehenge while travelling. The survey was targeted at three groups: visitors to Stonehenge, road users and the general population (PR 5.17.94).

236. A number of criticisms were made of this approach during the Examination (see e.g. PR 5.17.96 to 5.17.99). IP1 accepted that it was unusual for cultural heritage assets to be given a monetary value in the appraisal of a transport scheme, but here the enhancement of the cultural heritage was so significant that it formed an integral part of the objectives of the scheme and it was therefore considered appropriate to make an attempt at quantification of that factor (PR 5.17.100). However, it is plain that the exercise did not attempt to monetise all positive or negative impacts upon cultural heritage or all factors going into the planning balance. IP1 submitted at the Examination that the two should not be confused (PR 5.17.112). The cost benefit analysis formed part of a value for money exercise. It was relevant, for example, that funding was in place, given that compulsory purchase powers needed to be granted as part of the DCO.

237. The National Audit Office pointed out that although IP1 had used approved methodologies to arrive at the figure of £955m, calculating benefits in that way was inherently uncertain and decision-makers were advised to treat them cautiously (PR 5.17.108).

238. The Panel took a realistic attitude to this debate (PR 5.17.117):-

> "The ExA makes no specific criticism of the manner in which the study has been undertaken, or the methodology adopted. It appears to the ExA a genuine attempt undertaken to put a value on heritage benefits as described in the survey material. However, the ExA recognises that this is hedged with uncertainty and endorses the cautious approach advocated by the NAO and the DfT itself. The ExA notes the concerns of SA and others that the visual information provided to survey participants did not fully represent the impact of the Proposed Development on the WHS and recognises that participants could not be expected to have the detailed knowledge of impacts that the Examination process has allowed. The ExA also understands that participants might, if presented with choices about what their taxes would be spent on, adjust the priority given to otherwise desirable heritage outcomes."

239. The whole of the Panel's report was before the SST. The Panel accepted that respondents to the survey could not be expected to have detailed knowledge about impacts on cultural heritage that had been discussed in the Examination. It did not suggest that this component of the economic or investment analysis should be adjusted, in some way, whether quantitatively or otherwise, according to the judgments reached on heritage impacts, for example, from the western section of the scheme.

240. The SST did not disagree with the Panel's approach. Given the nature and purpose of the cost benefit analysis, the view taken on the level of heritage benefits or disbenefits attributable to parts of the scheme was not an "obviously material consideration" which the SST was obliged to take into account as altering the business case.

241. Accordingly, ground 5(ii) must be rejected.

(iii) Alternatives to the proposed western cutting and portals

242. The focus of the claimant's oral submissions was that the defendant failed to consider the relative merits of two alternative schemes for addressing the harm resulting from the western cutting and portal, firstly, to cover approximately 800m of the cutting and secondly, to extend the bored tunnel so that the two portals are located outside the western boundary of the WHS.

243. The Panel dealt with the issue of alternatives in section 5.4 of its report, before it came to deal with impacts on the cultural heritage in section 5.7. On a fair reading of the report as a whole, there is no indication that the substantial harm it identified in section 5.7 influenced the approach it had previously taken to alternatives. The same is true of section 7.2 of the report which brought together in the planning balance the various factors which had previously been considered. Paragraph 7.2.25 summarised the Panel's overall conclusion on the treatment of alternatives in section 7.4. After dealing with biodiversity and climate change the Panel summarised its conclusions on cultural heritage issues at paragraphs 7.2.31 to 7.2.33. The reason for this would appear to be the way in which the Panel applied the NSPNN.

244. It is important to see how the Panel approached the issue of alternatives in section 5.4. They directed themselves at the outset by reference to paragraphs 4.26 and 4.27 of the NPSNN (see [41] above) (see PR 5.4 to 5.4.2). Those policies framed the Panel's conclusions at PR 5.4.56 to 5.4.75.

245. IP1's case, applying paragraph 4.26 to 4.27 of the NPSNN, was that the only consideration of alternatives relevant to the Examination were:

(i) "to be satisfied that an options appraisal has taken place,"
(ii) compliance with the EIA Regulations 2017 in relation to the main alternatives studied by the applicant and the main reasons for the applicant's decision to choose the scheme, and
(iii) alternatives to the compulsory acquisition of land (PR 5.4.3 and 5.4.60).

246. At PR 5.4.56 the Panel stated that IP1 had correctly identified all legal and policy requirements relating to the assessment of alternatives. It accepted that alternatives did not have to be assessed under The Conservation of Habitats and Species Regulations 2017 (SI 2017 No 1012) ("the Habitats Regulations 2017 ") or the Water Framework Directive (PR 5.4.57 to 5.4.58). In relation to policy requirements, the Panel accepted that IP1 had satisfied the sequential and exception tests for flood risk and that no part of the scheme fell within a National Park or an Area of Outstanding Natural Beauty (PR 5.4.59). However the Panel did not consider any policy requirements relating to cultural heritage impacts which might make it appropriate or even necessary to reach a conclusion on the relative merits of IP1's scheme and alternatives to it. That is all the more surprising given that a significant part of the Panel's report was devoted to the representations of interested parties about alternatives to avoid or reduce the harm to the WHS and heritage assets that would result from IP1's scheme (see PR 5.4.35 to 5.4.55).

247. The Panel summarised IP1's case on options for a longer tunnel at PR 5.4.16 to 5.4.27 and the representations of interested parties on that issue at PR 5.4.45 to 5.4.49. As a result of the concerns expressed by the WHC about the western section of the project, IP1 had studied two longer tunnel options: first, the provision of a cut and cover section to the west of the proposed bored tunnel and second, an extension of that bored tunnel to the west so that its portals would be located outside the WHS. The former would increase project costs by £264m and the latter by £578m (PR 5.4.18 to 5.4.19). In the HIA IP1 stated that the options involving 4.5km tunnels were assessed as having "significantly higher estimated scheme costs that were considered to be unaffordable and were not considered further in the assessment" (para. 7.3.12) However, in the Examination IP1 said, in addition, that it had rejected both of these options not purely on the grounds of cost but also because they would provide "minimal benefit in heritage terms" (PR 5.4.20).

248. It is important to see IP1's case in context. First, it did not consider that any of the elements of the western section of its proposal would cause substantial harm to designated heritage assets ([73] above). Second, it considered that there would be a beneficial effect on five attributes of the OUV, only a slightly adverse effect on two attributes and a slightly beneficial effect looking at the OUV, authenticity and integrity of the WHS overall ([75] above).

249. The Panel recorded the position of IP2 as having been satisfied that IP1 had undertaken "an options appraisal in relation to the alternatives to the route of a highway in place of the A303…." (PR 5.4.55). Once again "options appraisal" referred to the term used in paragraph 4.27 of the NPSNN. IP1 also asks the court to note PR 5.4.54 and 5.4.63 where the Panel recorded that IP2 had said that they were satisfied that the EIA had addressed alternatives, relying also upon the HIA, including the text quoted in [247] above from paragraph 7.3.12. However, it was not suggested that IP2 addressed the issue whether the relative merits of alternatives needed to be considered by the SST in order to meet common law or policy requirements under the NPSNN for the protection of heritage assets and their settings. Nor has the court been shown any assessment by IP2, which was before the Panel or SST, agreeing with IP1's additional contention that the extended tunnel options would bring only minimal benefits in heritage terms.

250. In its conclusions the Panel said that it was satisfied that IP1 had carried out a "full options appraisal" for the project in achieving its selection for inclusion in the RIS [1] as referred to in paragraph 4.27 of the NPSNN. The Panel also relied upon IP2's view that "the EIA has addressed alternatives" and that IP1 had carried out an options appraisal on alternatives for the route of a highway to replace the A303 as it passes through the WHS (PR 5.4.63). The Panel stated that the criticisms made by interested parties of the appraisal process and public consultation did not alter its view that a full options appraisal had been carried out by IP1 (PR 5.4.67). Importantly, the Panel referred expressly to IP1's case that because the scheme retained its status in the RIS, "further option testing need not be considered by the [Panel] or by the [SST]" (PR 5.4.68). The Panel also referred to the "full response" which IP1 had given on the alternatives referred to by interested parties, noting that IP1 had "explained" its reasons for their rejection and the selection of the scheme route. The Panel said that it found "no reason to question the method and approach of the appraisal process that led to that outcome" (PR 5.4.69).

251. After noting the views of the WHC (PR 5.4.70), the Panel then reached this highly important conclusion at PR 5.4.71:-

> "However, insofar as the options appraisal is concerned, the ExA is content that the Applicant's approach to the consideration of alternatives is in accordance with the NPSNN. It is satisfied that the Applicant has undertaken a proportionate consideration of alternatives as part of the investment decision making process. *Since that exercise has been carried out, it is not necessary for this process to be reconsidered by the ExA or the decision maker* ." (emphasis added)

This simply restated paragraph 4.27 of the NPSNN.

252. The Panel addressed the EIA requirement for assessment of alternatives in PR 5.4.72 to 5.4.73. Its conclusions focused on the adequacy of the description in the ES of IP1's study of alternatives. Consistent with what it had just said in PR 5.4.71, the Panel did not make its own appraisal of the relative merits of the proposed scheme and alternatives, in particular the longer tunnel option, despite the fact that subsequently in section 5.7 of its report, the Panel went on to make a number of strong criticisms of the proposed western section which subsequently drove its recommendation that the application for development consent be refused.

253. In PR 5.4.74 the Panel addressed alternatives in the context of compulsory acquisition. But it is not suggested that that addressed alternatives to, for example, the western cutting. Instead, the Panel referred to land required for the deposit of tunnel arisings.

254. The Panel's overall conclusions at PR 5.4.75 was:-

> "The ExA concludes that there are no policy or legal requirements that would lead it to recommend that development consent be refused for the Proposed Development in favour of another alternative."

255. Similarly at PR 7.2.28 the Panel concluded:-

> "The ExA is satisfied that the Applicant has carried out a proportionate option consideration of alternatives as part of the investment decision making process which led to the inclusion of the scheme within RIS1. It concludes that the Applicant has complied with the NPSNN, paragraphs 4.26 and 4.27. There are no policy, or legal requirements that would lead the ExA to recommend that consent be refused for the Proposed Development in favour of another alternative."

256. In his decision letter the SST merely stated that the impacts of a number of factors, including alternatives, were neutral (DL 63). In relation to alternatives, the SST relied upon section 5.4 of the Panel's report and PR 7.2.28. He said that he saw "no reason to disagree with the [Panel's] reasoning and conclusions on these matters."

257. Accordingly, both the Panel and the SST considered alternatives on the same basis as IP1, in that it was necessary to consider alternatives, but only in relation to whether an options appraisal had been carried out, whether the ES produced by IP1 had complied with the EIA Regulations 2017 and whether compulsory acquisition of land was justified. Although regulation 21(1) of the EIA Regulations 2017 required the SST to take into account the "environmental information", which included the representations made on the ES (see [31] above), the Panel and the SST did not go beyond assessing the adequacy of the assessment of alternatives in the ES for the purposes of compliance with that legislation. Neither the Panel nor the SST expressed any conclusions about whether the provision of a longer tunnel would achieve only "minimal benefits" as claimed by IP1 in its evidence to the Examination (PR 5.4.20), taking into account not only the costs of the alternatives but also the level of harm to heritage assets which would result from the proposed scheme.

258. Accordingly, the approach taken by the Panel and by the SST under the EIA Regulations 2017 did not go beyond that set out in PR 5.4.71. Yet these were vitally important issues raised in relation to a heritage asset of international importance by WHC, ICOMOS and many interested parties, including archaeological experts. It is also necessary to keep in mind the nature of the western section of the proposal which had given rise to so much controversy. The Panel pithily described it as the greatest physical change to the Stonehenge landscape in 6000 years and a change which would be permanent and irreversible, unlike a road constructed on the surface of the land (PR 5.7.224 to 5.7.225 and 5.7.247). Does the approach taken by the Panel and adopted by the SST disclose an error of law?

259. It is necessary to return to the NPSNN. Paragraph 4.26 begins by stating a general principle, that an applicant should comply with "all legal requirements" and "any policy requirements set out in this NPS" on the assessment of alternatives. The NPSNN goes on to set out requirements which should be considered "in particular," namely the EIA Directive and the Water Framework Directive and "policy requirements in the NPS for the consideration of alternatives." But those instances are not exhaustive. "Legal requirements" include any arising from judicial principles set out in case law as well as the Habitats Regulations 2017 . Similarly, the references in paragraph 4.26 to developments in National Parks, the Norfolk Broads and AONBs and flood risk assessment are given only as examples of policy requirements for the assessment of alternatives.

260. But the Panel, and by the same token, the SST, applied paragraph 4.27 of the NPSNN, which states that where a project has been subject to full options testing for the purposes of inclusion in a RIS under the IA 2015 it is *not necessary* for the Panel or the decision- maker to reconsider this process; instead, they should be satisfied that the assessment has been carried out. On a proper interpretation of the NPSNN, I do not consider that where paragraph 4.27 is satisfied (i.e. there has been full options testing for the purposes of a RIS) the applicant does not need to meet any requirements arising from paragraph 4.26. As the NPSNN states, a RIS is an "investment decision-making process". For example, page 91 of the current RIS, "Road Investment Strategy 2: 2020-2025", explains that the document makes an investment commitment to the projects listed on the assumption that they can "secure the necessary planning consents." "Nothing in the RIS interferes with the normal planning consent process." [2]

261. A few examples suffice to illustrate why paragraph 4.27 of the NPSNN cannot be treated as overriding paragraph 4.26. First, a scheme may require appropriate assessment under the Habitats Regulations 2017 and the consideration of alternatives by the competent authority, following any necessary consultations (regulations 63 and 64). Those obligations on the competent authority (which are addressed in para. 4.24 of the NPSNN) cannot be circumvented by reliance upon paragraph 4.27 of the NPSNN.

262. Second, even if a full options appraisal has been carried out for the purposes of including a project in a RIS, that may not have involved all the considerations which are required to be taken into account under the development consent process, or there may have been a change in circumstance since that exercise was carried out. In the present case page 3-3 of chapter 3 of the ES stated that the options involving a 4.5 km tunnel (i.e. a western extension) all involved costs significantly in excess of the available budget and so had not been considered further. During the Examination IP1 stated in a response to questions from the Panel that it also considered that extending the tunnel to the west would provide only "minimal benefit" in heritage terms (PR 5.4.20). That was an additional and controversial issue in the Examination which fell to be considered by the Panel.

263. Third, the options testing for a RIS may rely upon a judgment by IP1 with which the Panel disagrees and which therefore undermines reliance upon that exercise and paragraph 4.27 of the NPSNN. In the present case IP1's assessment that the extended tunnel options would bring minimal benefit in heritage terms cannot be divorced from its judgments that (i) no part of its proposed scheme would cause substantial harm to any designated heritage asset ([71] above) and (ii) there would be a beneficial effect on five attributes of the OUV, only a slightly adverse effect on two attributes and a slightly beneficial effect looking at the OUV, authenticity and integrity of the WHS overall ([75] above). By contrast, the Panel explained why it considered that (i) the western section of the proposal would cause substantial harm to the settings of assets ([97-98] above) and (ii) there would be harm to six attributes of the OUV (including great or major harm to three attributes), the integrity and authenticity of the WHS would be substantially and permanently harmed, and its authenticity seriously harmed ([101 to 103] above). In such circumstances, it was irrational for the Panel to treat the options testing carried out by IP1 as making it unnecessary to assess the relative merits of the tunnel alternatives for themselves, *a fortiori* if there was a policy or legal requirement for that matter to be considered by the decision-maker.

264. The Panel's finding that substantial harm would be caused to a WHS, an asset of the "highest significance" meant that paragraph 5.131 of the NPSNN was engaged (see [46] above). On that basis it would have been "wholly exceptional" to treat that level of harm as acceptable.

265. Furthermore, on the Panel's view paragraph 5.133 of the NPSNN was engaged. It would follow that the application for consent was to be refused unless it was demonstrated that the substantial harm was "necessary" in order to deliver substantial public benefits outweighing that harm. It is relevant to note that this policy also applies to the complete loss of a heritage asset. In such circumstances, it is obviously material for the decision-maker (and any reporting Inspector or Panel) to consider whether it was unnecessary for that loss or harm to occur in order to deliver those benefits. The test is not merely a balancing exercise between harm and benefit. Accordingly, relevant alternatives for achieving those benefits are an obviously material consideration. However, although in the present case the Panel made its vitally important finding of substantial harm, it simply carried out a balancing exercise without also applying the necessity test. In the Panel's judgment the proposal failed simply on the balance of benefits and harm, even without considering whether any alternatives would be preferable (see [120]). Because the Panel approached the matter in that way, the SST did not have the benefit of the Panel's views on the relative merits of the extended tunnel options compared to the proposed scheme.

266. The SST differed from the Panel in that he considered the western section of the scheme would cause less than substantial harm. Consequently, paragraph 5.134 of the NPSNN was engaged. That only required the balancing of heritage harm against the public benefits of the proposal without also imposing a necessity test. However, when it came to striking the overall planning balance, the SST relied upon the need for the scheme and the benefits it would bring (see [130] and [140-141] above).

267. Furthermore, the SST did not differ from the Panel in relation to the effect of the western section on attributes of the OUV and the integrity and authenticity of the WHS. He also accepted the Panel's view that the beneficial effects of the scheme on the OUV did not outweigh the harm caused (see [139] and [142 to 144] above).

268. The principles on whether alternative sites or options may permissibly be taken into account or whether, going further, they are an "obviously material consideration" which must be taken into account, are well-established and need only be summarised here.

269. The analysis by Simon Brown J (as he then was) in *Trusthouse Forte v Secretary of State for the Environment (1987) 53 P & CR 293 at 299-300* has subsequently been endorsed in several authorities. First, land may be developed in any way which is acceptable for planning purposes. The fact that other land exists upon which the development proposed would be yet more acceptable for such purposes would not justify the refusal of planning permission for that proposal. But, secondly, where there are clear planning objections to development upon a particular site then "it may well be relevant and indeed necessary" to consider where there is a more appropriate site elsewhere. "This is particularly so where the development is bound to have significant adverse effects and where the major argument advanced in support of the application is that the need

for the development outweighs the planning disadvantages inherent in it." Examples of this second situation may include infrastructure projects of national importance. The judge added that even in some cases which have these characteristics, it may not be necessary to consider alternatives if the environmental impact is relatively slight and the objections not especially strong.

270. The Court of Appeal approved a similar set of principles in *R (Mount Cook Land Limited) v Westminster City Council [2017] PTSR 116 at [30]* . Thus, in the absence of conflict with planning policy and/or other planning harm, the relative advantages of alternative uses on the application site or of the same use on alternative sites are normally irrelevant. In those "exceptional circumstances" where alternatives might be relevant, vague or inchoate schemes, or which have no real possibility of coming about, are either irrelevant, or where relevant, should be given little or no weight.

271. Essentially the same approach was set out by the Court of Appeal in *R (Jones) v North Warwickshire Borough Council [2001] PLCR 31 at [22] to [30]* . At [30] Laws LJ stated:-

> "…. it seems to me that all these materials broadly point to a general proposition, which is that consideration of alternative sites would only be relevant to a planning application in exceptional circumstances. Generally speaking—and I lay down no fixed rule, any more than did Oliver L.J. or Simon Brown J.— such circumstances will particularly arise where the proposed development, though desirable in itself, involves on the site proposed such conspicuous adverse effects that the possibility of an alternative site lacking such drawbacks necessarily itself becomes, in the mind of a reasonable local authority, a relevant planning consideration upon the application in question."

272. In *Derbyshire Dales District Council v Secretary of State for Communities and Local Government [2010] 1 P&CR 19* Carnwath LJ emphasised the need to draw a distinction between two categories of legal error: first, where it is said that the decision-maker erred by taking alternatives into account and second, where it is said that he had erred by failing to take them into account ([17] and [35]). In the second category an error of law cannot arise unless there was a legal or policy requirement to take alternatives into account, or such alternatives were an "obviously material" consideration in the case so that it was irrational not to take them into account ([16] to [28]).

273. In *R (Langley Park School for Girls Governing Body) v Bromley London Borough Council [2009] EWCA Civ 734* the Court of Appeal was concerned with alternative options within the same area of land as the application site, rather than alternative sites for the same development. In that case it was necessary for the decision-maker to consider whether the openness and visual amenity of Metropolitan Open Land ("MOL") would be harmed by a proposal to erect new school buildings. MOL policy is very similar to that applied within a Green Belt. The local planning authority did not take into account the claimant's contention that the proposed buildings could be located in a less open part of the application site resulting in less harm to the MOL. Sullivan LJ referred to the second principle in *Trusthouse Forte* and said that it must apply with equal, if not greater, force where the alternative suggested relates to different siting within the same application site rather than a different site altogether ([45 to 46]). He added that no "exceptional circumstances" had to be shown in such a case ([40]).

274. At [52-53] Sullivan LJ stated:-

> "52. It does not follow that in every case the "mere" possibility that an alternative scheme might do less harm must be given no weight. In the Trusthouse Forte case the Secretary of State was entitled to conclude that the normal forces of supply and demand would operate to meet the need for hotel accommodation on another site in the Bristol area even though no specific alternative site had been identified. There is no "one size fits all" rule. The starting point must be the extent of the harm in planning terms (conflict with policy etc.) that would be caused by the application. If little or no harm would be caused by granting permission there would be no need to consider whether the harm (or the lack of it) might be avoided. The less the harm the more likely it would be (all other things being equal) that the local planning authority would need to be thoroughly persuaded of the merits of avoiding or reducing it by adopting an alternative scheme. At the other end of the spectrum, if

> a local planning authority considered that a proposed development would do really serious harm it would be entitled to refuse planning permission if it had not been persuaded by the applicant that there was no possibility, whether by adopting an alternative scheme, or otherwise, of avoiding or reducing that harm.
>
> 53. Where any particular application falls within this spectrum; whether there is a need to consider the possibility of avoiding or reducing the planning harm that would be caused by a particular proposal; and if so, how far evidence in support of that possibility, or the lack of it, should have been worked up in detail by the objectors or the applicant for permission; are all matters of planning judgment for the local planning authority. In the present case the members were not asked to make that judgment. They were effectively told at the onset that they could ignore Point (b), and did so simply because the application for planning permission did not include the alternative siting for which the objectors were contending, and the members were considering the merits of that application."

275. The decision cited by Mr Taylor QC in *First Secretary of State v Sainsbury's Supermarkets Limited [2007] EWCA Civ 1083* is entirely consistent with the principles set out above. In that case, the Secretary of State did in fact take the alternative scheme promoted by Sainsbury's into account. He did not treat it as irrelevant. He decided that it should be given little weight, which was a matter of judgment and not irrational ([30 and 32]). Accordingly, that was not a case, like the present one [3] , where the error of law under consideration fell within the second of the two categories identified by Carnwath LJ in *Derbyshire Dales District Council* (see [272] above).

276. The wider issue which the Court of Appeal went on to address at [33] to [38] of the *Sainsbury's* case does not arise in our case, namely must *planning permission be refused* for a proposal which is judged to be "acceptable" because there is an alternative scheme which is considered to be more acceptable. True enough, the decision on acceptability in that case was a balanced judgment which had regard to harm to heritage assets, but that was undoubtedly an example of the first principle stated in *Trusthouse Forte* (see [269] above). The court did not have to consider the second principle, which is concerned with whether a decision-maker may be obliged to take an alternative *into account.* Indeed, in the present case, there is no issue about whether alternatives for the western cutting should have been taken into account. As I have said, the issue here is narrower and case-specific. Was the SST entitled to go no further, in substance, than the approach set out in paragraph 4.27 of the NPSNN and PR 5.4.71?

277. In my judgment the clear and firm answer to that question is no. The relevant circumstances of the present case are wholly exceptional. In this case the relative merits of the alternative tunnel options compared to the western cutting and portals were an obviously material consideration which the SST was required to assess. It was irrational not to do so. This was not merely a relevant consideration which the SST could choose whether or not to take into account [4] . I reach this conclusion for a number of reasons, the cumulative effect of which I judge to be overwhelming.

278. First, the designation of the WHS is a declaration that the asset has "outstanding universal value" for the cultural heritage of the world as well as the UK. There is a duty to protect and conserve the asset (article 4 of the Convention) and there is the objective *inter alia* to take effective and active measures for its "protection, conservation, presentation and rehabilitation" (article 5). The NPSNN treats a World Heritage Site as an asset of "the highest significance" (para. 5.131).

279. Second, the SST accepted the specific findings of the Panel on the harm to the settings of designated heritage assets (e.g. scheduled ancient monuments) that would be caused by the western cutting in the proposed scheme. He also accepted the Panel's specific findings that OUV attributes, integrity and authenticity of the WHS would be harmed by that proposal. The Panel concluded that that overall impact would be "significantly adverse", the SST repeated that (DL 28) and did not disagree (see [137], [139] and [144] above).

280. Third, the western cutting involves large scale civil engineering works, as described by the Panel. The harm described by the Panel would be permanent and irreversible.

281. Fourth, the western cutting has attracted strong criticism from the WHC and interested parties at the Examination, as well as in findings by the Panel which the SST has accepted. These criticisms are reinforced by the protection given to the

WHS by the objectives of Articles 4 and 5 of the Convention , the more specific heritage policies contained in the NPSNN and by regulation 3 of the 2010 Regulations.

282. Fifth, this is not a case where no harm would be caused to heritage assets (see *Bramshill* at [78]). The SST proceeded on the basis that the heritage benefits of the scheme, in particular the benefits to the OUV of the WHS, did not outweigh the harm that would be caused to heritage assets. The scheme would not produce an overall net benefit for the WHS. In that sense, it is not acceptable *per se* . The acceptability of the scheme depended upon the SST deciding that the heritage harm (and in the overall balancing exercise *all* disbenefits) were outweighed by the need for the new road and *all* its other benefits. This case fell fairly and squarely within the exceptional category of cases identified in, for example, *Trusthouse Forte* , where an assessment of relevant alternatives to the western cutting was required (see [269] above).

283. The submission of Mr. Strachan QC that the SST has decided that the proposed scheme is "acceptable" so that the general principle applies that alternatives are irrelevant is untenable. The case law makes it clear that that principle does not apply where the scheme proposed would cause significant planning harm, as here, and the grant of consent *depends* upon its adverse impacts being outweighed by need and other benefits (as in para. 5.134 of the NPSNN).

284. I reach that conclusion without having to rely upon the points on which the claimant has succeeded under ground 1(iv). But the additional effect of that legal error is that the planning balance was not struck lawfully and so, for that separate reason, the basis upon which Mr. Strachan QC says that the SST found the scheme to be acceptable collapses.

285. Sixth, it has been accepted in this case that alternatives should be considered in accordance with paragraphs 4.26 and 4.27 of the NPSNN. But the Panel and the SST misdirected themselves in concluding that the carrying out of the options appraisal for the purposes of the RIS made it unnecessary for them to consider the merits of alternatives for themselves. IP1's view that the tunnel alternatives would provide only "minimal benefit" in heritage terms was predicated on its assessments that no substantial harm would be caused to any designated heritage asset and that the scheme would have slightly *beneficial* (not adverse) effects on the OUV attributes, integrity and authenticity of the WHS. The fact that the SST accepted that there would be net harm to the OUV attributes, integrity and authenticity of the WHS (see [139] and [144] above) made it irrational or logically impossible for him to treat IP1's options appraisal as making it unnecessary for him to consider the relative merits of the tunnel alternatives. The options testing by IP1 dealt with those heritage impacts on a basis which is inconsistent with that adopted by the SST.

286. Seventh, there is no dispute that the tunnel alternatives are located within the application site for the DCO. They involve the use of essentially the same route and certainly not a completely different site or route. Accordingly, as Sullivan LJ pointed out in *Langley Park* (see [246] above), the second principle in *Trusthouse Forte* applies with equal, if not greater force.

287. Eighth, it is no answer for the defendant to say that DL 11 records that the SST has had regard to the "environmental information" as defined in regulation 3(1) of the EIA Regulations 2017 . Compliance with a requirement to take information into account does not address the specific obligation in the circumstances of this case to compare the relative merits of the alternative tunnel options.

288. Ninth, it is no answer for the defendant to say that in DL 85 the SST found that the proposed scheme was in accordance with the NPSNN and so s.104(7) of the PA 2008 may not be used as a "back door" for challenging the policy in paragraph 4.27 of the NPSNN. I have previously explained why paragraph 4.27 does not override paragraph 4.26 of the NPSNN, and does not disapply the common law principles on when alternatives are an obviously material consideration. But in addition the SST's finding that the proposal accords with the NPSNN for the purposes of s.104(3) of the PA 2008 is vitiated (a) by the legal error upheld under ground 1(iv) and, in any event, (b) by the legal impossibility of the SST deciding the application in accordance with paragraph 4.27 of the NPSNN.

289. I should add for completeness that neither the Panel nor the SST suggested that the extended tunnel options need not be considered because they were too vague or inchoate. That suggestion has not been raised in submissions.

290. For all these reasons, I uphold ground 5(iii) of this challenge.

Conclusions

291. The court upholds two freestanding grounds of challenge, 1(iv) and 5(iii). Permission is granted to the claimant to apply for judicial review in relation to those grounds.

292. Permission is refused to apply for judicial review in respect of all other grounds on the basis that each of them is unarguable.

293. There is no basis for the court to hold that relief should be withheld under s.31(2A) of the Senior Courts Act 1981 . It is self-evident from the nature of each of the grounds I have upheld that it cannot be said that it is highly likely that the application for development consent would still have been granted if neither error had been made.

294. The claim for judicial review succeeds to the extent I have indicated. The claimant is entitled to an order quashing the SST's decision to grant development consent and the DCO itself.

Appendix 1 – Legal principles agreed between the parties

1. The general legal principles applicable to a judicial review of this kind are well-established. Amongst other things:

a. There is a clear and basic distinction between questions of interpretation of policy and the application of policy and matters of planning judgment. The Court will not interfere with matters of planning judgment other than on legitimate public law grounds: see for example *Client Earth* at [101] and [103] [4/9/203- 204], applying *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council [2020] PTSR 221* and *St Modwen Developments v Secretary of State for Communities and Local Government [2017] EWCA Civ 1643* ; *[2017] PTSR 476 at [7]* .

b. Decision Letters should be read (1) fairly and in good faith, and as a whole; (2) in a straightforward and down-to-earth manner, without excessive legalism or criticism; and (3) as if by a well-informed reader who understands the principal controversial issues in the case: see *St Modwen* above and the principles *in Save Britain's Heritage v Number 1 Poultry Ltd [1991] 1 WLR 153* , 164E-G).

c. Reasons given for a decision must be intelligible, adequate and enable the reader to understand why the matter was decided as it was: see for example *South Bucks DC v Porter (No 2) [2004] 1 WLR 1953* . The question is whether the reasons given leave room for genuine, as opposed to forensic, doubt as to what was decided and why (*R (CPRE Kent) v Dover District Council [2017] UKSC 79 at [42]*). Reasons can be briefly stated and there is no requirement to address each and every point made, provided that the reasons explain the decision maker's conclusions on the principal important controversial issues. In circumstances where the Secretary of State disagrees with a recommendation from a planning inspector, there is no different standard of reasons: see *Client Earth* High Court judgment at [146] and *Secretary of State for Communities and Local Government v Allen [2016] EWCA Civ 767 at [19]* . However, 'if disagreeing with an inspector's recommendation the Secretary of State is…required to explain why he rejects the inspector's view' see *Horada v SSCLG [2016] EWCA Civ 169, at [40]* . Similarly, in the heritage context, the need to give considerable importance and weight to listed building preservation does not change the standard of legally adequate reasons for granting planning permission: see *Mordue v Secretary of State for Communities and Local Government* [2015] EWCA Civ 29434 1243 at [24]-[26]. Reasons do not need to be given for the way in which every material consideration has been dealt with (*HJ Banks & Co Ltd v Secretary of State for Housing, Communities and Local Government [2019] PTSR 668*).

d. The judgment of Lewis J. in *R (Mars Jones) v Secretary of State for Business, Energy and Industrial Strategy [2017] EWHC 1111 (Admin)* has applied the South Bucks standard of reasons to development consent decisions (at [47]).

e. 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 has failed to take into account a material 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: see *Client Earth* at [99] applying *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council [2020] PTSR 221*

f. The interpretation of planning policy is a matter for the court. In *R (Scarisbrick v Secretary of State for Communities and Local Government [2017] EWCA Civ 787* , the Court of Appeal considered the interpretation of national policy statement for nationally significant hazardous waste infrastructure under the Planning Act 2008 . See paragraphs 5-8. Lindblom LJ (with whom the other Lord Justices agreed) held:

> "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."

Heritage Assessment - the Statutory Duty

2. Regulation 3 of the 2010 Regulations states:

> (1) When deciding an application which affects a listed building or its setting, the Secretary of State must have regard to the desirability of preserving the listed building or its setting or any features of special architectural or historic interest which it possesses.
> (2) When deciding an application relating to a conservation area, the Secretary of State must have regard to the desirability of preserving or enhancing the character or appearance of that area.
> (3) When deciding an application for development consent which affects or is likely to affect a scheduled monument or its setting, the Secretary of State must have regard to the desirability of preserving the scheduled monument or its setting.

3. The 2010 Regulations do not address World Heritage Sites, although they do address individual scheduled monuments, listed buildings etc. within a World Heritage Site.

4. The equivalent sections applying to listed buildings and conservation areas in relation to planning decisions are in s66(1) and s72(1) Planning (Listed Buildings and Conservation Areas) Act 1990 ('the Listed Buildings Act'). These state:

> (1) In considering whether to grant planning permission…for development which affects a listed building or its setting, the local planning authority or, as the case may be, the Secretary of State shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses."

> (1) In the exercise, with respect to any buildings or other land in a conservation area, of any functions under or by virtue of any of the provisions mentioned in subsection (2), special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area."

5. The case law concerning the wording of the statutory duties in the Listed Buildings Act refers to the decision maker being required to give 'considerable importance and weight' to the desirability of: (a) preserving listed buildings or their settings, (b) preserving or enhancing the character or appearance of a conservation area, (c) preserving scheduled monuments or their settings (see *East Northamptonshire District Council v SSCLG [2015] 1 WLR 45* the Court of Appeal (following *South Lakeland District Council v Secretary of State for the Environment [1992] 2 AC 141* and *The Bath Society v SSE* [1991] 1 W.L.R.1303)).

6. In *Forge Field v Sevenoaks DC [2014] EWHC 1895* Lindblom J (as he then was) stated in respect of duties in the Listed Buildings Act that:

> "There is a statutory presumption, and a strong one, against granting planning permission for any development which would fail to preserve the setting of a listed building or the character or appearance of a conservation area" (at [45]).

The Judge went on [49]:

> "…an authority can only properly strike the balance between harm to a heritage asset on the one hand and planning benefits on the other if it is conscious of the statutory presumption in favour of preservation and if it demonstrably applies that presumption to the proposal it is considering."

7. The case of *South Lakeland* (above) confirmed that the concept of 'preserving' under the Listed Buildings Act means 'doing no harm' (per Lord Bridge of Harwich at pp 149- 50).

8. Lindblom LJ provided further guidance in relation to the duty in relation to the settings of listed buildings under the Listed Buildings Act in *Catesby Estates v Steer [2018] EWCA Civ 1697* . He highlighted that:

a. 'the s. 66(1) duty, where it relates to the effect of a proposed development on the setting of a listed building, makes it necessary for the decision-maker to understand what that setting is—even if its extent is difficult or impossible to delineate exactly—and whether the site of the proposed development will be within it or in some way related to it. Otherwise, the decision- maker may find it hard to assess whether and how the proposed development "affects" the setting of the listed building, and to perform the statutory obligation to "have special regard to the desirability of preserving … its setting …"' [28]
b. '…though this is never a purely subjective exercise, none of the relevant policy guidance and advice prescribes for all cases a single approach to identifying the extent of a listed building's setting. Nor could it. In every case where that has to be done, the decision-maker must apply planning judgment to the particular facts and circumstances, having regard to relevant policy, guidance and advice. The facts and circumstances will change from one case to the next.' [29]
c. 'the effect of a particular development on the setting of a listed building— where, when and how that effect is likely to be perceived, whether or not it will preserve the setting of the listed building, whether, under government policy in the NPPF, it will harm the "significance" of the listed building as a heritage asset, and how it bears on the planning balance —are all matters for the planning decision-maker, subject, of course, to the principle emphasized by this court in *East Northamptonshire District Council v Secretary of State for Communities and Local Government [2015] 1 W.L.R. 45 (at [26] to [29])* , *Jones v Mordue [2016] 1 W.L.R. 2682 (at [21] to [23])* , and Palmer (at [5]), that "considerable importance and weight" must be given to the desirability of preserving the setting of a heritage asset. Unless there has been some

clear error of law in the decision- maker's approach, the court should not intervene (see Williams, at [72]). For decisions on planning appeals, this kind of case is a good test of the principle stated by Lord Carnwath in Hopkins Homes Ltd. v Secretary of State for Communities and Local Government *[2017] 1 W.L.R. 1865 (at [25])* - that "the courts should respect the expertise of the specialist planning inspectors, and start at least from the presumption that they will have understood the policy framework correctly".' [30].

9. The most recent judgment of the Court of Appeal addressing paragraph 196 NPPF is *City and Country Bramshill Ltd v Secretary of State for Housing, Communities and Local Government [2021] EWCA Civ 320* . In that case the Court confirmed that neither 29838 paragraph 196 NPPF nor s66(1) Listed Buildings Act 1990 require an internal heritage balance to be conducted in order to arrive at the level of harm to an asset before weighing that harm against public benefits. The key passages of the judgment are at [71]-[81].

Appendix 2 – Paragraphs 25 to 43 and 50 of the decision letter

25. The Secretary of State notes the ExA's consideration of cultural heritage and the historic environment in Chapter 5.7 of the Report and the differing positions on this matter among others of: Wiltshire Council [ER 5.7.55 – 5.7.61]; the Historic Buildings and Monuments Commission for England ("Historic England") [ER 5.7.62 – 5.7.69]; the National Trust [ER 5.7.70 – 5.7.71]; English Heritage Trust [ER 5.7.72]; International Council on 7 Monuments and Sites ("ICOMOS") Missions [ER 7.7.73 – 5.7.80]; Department for Digital, Culture, Media and Sport ("DCMS") [ER 5.7.81 – 5.7.83]; International Council on Monuments and Sites, UK ("ICOMOS-UK") [ER 5.7.84 – ER 5.7.98]; Stonehenge and Avebury World Heritage Site Coordination Unit ("WHSCU") [ER 5.7.99 – ER 5.7.104]; the Stonehenge Alliance (comprising: Ancient Sacred Landscape Network, Campaign for Better Transport, Campaign to Protect Rural England, Friends of the Earth, and Rescue: The British Archaeological Trust) [ER 5.7.105 – 5.7.108]; the Consortium of Archaeologists and the Blick Mead Project Team ("COA") [ER 5.7.109 – 5.7.120]; and the Council for British Archaeology ("CBA") and CBA Wessex [ER 5.7.121 – 5.7.128].

26. Central to the Secretary of State's consideration of cultural heritage and historic environment is the question of the Development's conformity with the NPSNN and whether substantial or less than substantial harm is caused to the Outstanding Universal Value ("OUV") of the WHS. The NPSNN (paragraphs 5.131-5.134) states that substantial harm to or loss of designated assets of the highest significance, including World Heritage Sites, should be wholly exceptional and that any harmful impact on the significance of a designated heritage asset should be weighed against the public benefit of the development, recognising that the greater the harm to the significance of the heritage site, the greater the justification that will be needed for any loss. Where the Development would lead to substantial harm to or total loss of significance of a designated heritage asset, the Secretary of State should refuse consent unless it can be demonstrated that the substantial harm or loss of significance is necessary in order to deliver substantial public benefits that outweigh that loss or harm. Where the Development will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal.

27. The Secretary of State notes that the concept of OUV has evolved and been incorporated in the UNESCO document 'The Operational Guidelines ("OG") for the Implementation of the World Heritage Convention'3, which have been regularly revised since 1977 (the latest update being in 2019). It is noted that the term OUV is defined in paragraph 49 of the OG as meaning: 'Outstanding Universal Value means cultural and/or national significance which is so exceptional as to transcend national boundaries and to be of common importance for present and future generations of all humanity'. The Secretary of State notes the UNESCO definitions of criteria for inscription of the WHS on the World Heritage List [ER 2.2.2] and the description of the attributes of OUV4 [ER 2.2.6] has been set out by the ExA. The WHS Management Plan that was adopted for the WHS in 2015 sets out the vision and management priorities for the WHS to sustain its OUV [ER 3.13.1 - 3.13.2]. The ExA has also considered the local Development Plan, National Planning Policy Framework ("NPPF"), and the Statement of Outstanding Universal Value that exists for the WHS as important and relevant matters [ER 5.7.13 - 5.7.17].

28. The ExA concludes the Development would benefit the OUV in certain valuable respects, especially relevant to the present generation. However, permanent irreversible harm, critical to the OUV would also occur, affecting not only present, but future generations. It considers the benefits to the OUV would not be capable of offsetting this harm and that the overall effect on the WHS OUV would be significantly adverse [ER 5.7.321]. The ExA considers the Development's impact on OUV

does not accord with the Wiltshire Core Strategy Core Policies 59 and 58, which aim to sustain the OUV of the WHS and ensure the conservation of the historic environment [ER 5.7.322 – 5.7.324], and that the Development is also not consistent with Policy 1d of the WHS Management Plan [ER 5.7.325]. It considers this is a factor to which substantial weight can be attributed [ER 7.5.11].

29. In the ExA's overall heritage assessment [ER 5.7.327 – 5.7.333] the ExA considers the cultural heritage analysis and assessment methodology adopted by the Applicant appropriate, subject to certain points of criticism. These include poor consideration of the influence of the proposed Longbarrow Junction on OUV; inadequate attention paid to the less tangible and dynamic aspects of setting, as well as the absence of consideration of certain settings; and concerns regarding the consideration given to the interaction and overall summation of effects. The ExA took these points into account in its assessment [ER 5.7.327]. The ExA is also content overall with the mitigation strategy, apart from the proposed approach to artefact sampling and various other points identified. As set out in Appendix E to its Report the ExA recommends the Secretary of State considers resolving these matters if the decision differs from the recommendation [ER 5.7.328].

30. On the effects of the Development on spatial relations, visual relations and settings, the ExA concludes that substantial harm would arise. This conclusion does not accord with that of Historic England, but is based on the ExA's professional judgments, having regard to the entirety of evidence on cultural heritage [ER 5.7.329]. In particular, the ExA places great weight on the effects of the spatial division of the cutting, in combination with the presence of the Longbarrow Junction on the physical connectivity between the monuments and the significance that they derive from their settings. This includes the physical form of the valleys, with their historic significance for past cultures, and the presence of archaeological remains [ER 5.7.330].

31. The ICOMOS mission reports and the WH Committee decisions, alongside the submissions of DCMS, in the context of the remainder of the evidence examined have been noted by the ExA and it regards the reports and decisions as both relevant and important, but not of such weight as to be determinative in themselves [ER 5.7.331].

32. The Secretary of State notes the ExA's approach has been to integrate cumulative and in- combination effects into its assessment, where relevant and that the ExA agrees with the outcome of the Applicant's exercise that cumulative effects arising from the future baseline would not be significant, and that adequate mitigation has been arranged in respect of in-combination effects during construction and operation [ER 5.7.332].

33. It is the ExA's opinion that when assessed in accordance with NPSNN, the Development's effects on the OUV of the WHS, and the significance of heritage assets through development within their settings taken as a whole would lead to substantial harm [ER 5.7.333]. However, the Secretary of State notes the ExA also accepts that its conclusions in relation to cultural heritage, landscape and visual impact issues and the other harms identified, are ultimately matters of planning judgment on which there have been differing and informed opinions and evidence submitted to the examination [ER 7.5.26]. The Secretary of State notes the ExA's view on the level of harm being substantial is not supported by the positions of the Applicant, Wiltshire Council, the National Trust, the English Heritage Trust, DCMS and Historic England. These stakeholders place greater weight on the benefits to the WHS from the removal of the existing A303 road compared to any consequential harmful effects elsewhere in the WHS. Indeed, the indications are that they 9 consider there would or could be scope for a net benefit overall to the WHS [ER 5.7.54, ER 5.7.55, ER 5.7.62, ER 5.7.70, ER 5.7.72 and ER 5.7.83].

34. The Secretary of State notes the differing positions of the ExA and Historic England, who has a duty under the provisions of the National Heritage Act 1983 (as amended) to secure the preservation and enhancement of the historic environment. He agrees with the ExA that there will be harm on spatial, visual relations and settings that weighs against the Development. However, he notes that there is no suggestion from Historic England that the level of harm would be substantial. Ultimately, the Secretary of State prefers Historic England's view on this matter for the reasons given [ER 5.7.62 – 5.7.69] and considers

it is appropriate to give weight to its judgment as the Government's statutory advisor on the historic environment, including world heritage. The Secretary of State is satisfied therefore that the harm on spatial, visual relations and settings is less than substantial and should be weighed against the public benefits of the Development in the planning balance.

35. Whilst also acknowledging the adverse impacts of the Development, the Secretary of State notes that Historic England's concluding submission [Examination Library document AS-111] states that it has supported the aspirations of the Development from the outset and that putting much of the existing A303 surface road into a tunnel would allow archaeological features within the WHS, currently separated by the A303 road, to be appreciated as part of a reunited landscape, and would facilitate enhanced public access to this internationally important site [ER 5.7.62] and that overall it broadly concurs with the Applicant's Heritage Impact Assessment [ER 5.7.66]. Furthermore, it is also noted from Historic England's concluding submission that it considers the Development proposes a significant reduction in the sight and sound of traffic in the part of the WHS where it will most improve the experience of the Stonehenge monument itself, and enhancements to the experience of the solstitial alignments [ER 5.12.32]. It considers that, alongside enhanced public access, these are all significant benefits for the historic environment.

36. The Secretary of State also notes from Historic England's concluding submission made during the examination [Examination library document AS-111] that its objective through the course of the examination was to ensure that the historic environment is fully and properly taken into account in the determination of the application and, if consented, that appropriate safeguards be built into the Development across the dDCO, OEMP and the Detailed Archaeological Mitigation Strategy ("DAMS") [ER 5.7.63]. Whilst it is also noted that Historic England identified during the examination a number of concerns where further information, detail, clarity or amendments were needed, particularly around how the impacts of the Development would be mitigated, their concluding submission states that its concerns have been broadly addressed. Historic England believe that the dDCO, OEMP and DAMS set out a process to ensure that heritage advice and considerations can play an appropriate and important role in the construction, operation and maintenance of the Development. As a consequence of the incorporation of the Design Vision, Commitments and Principles in the OEMP, together with arrangements for consultation and engagement with Historic England, it considers sufficient safeguards have been built in for the detailed design stage and there are now sufficient provisions for the protection of the historic environment in the dDCO. It is Historic England's view that the DAMS is underpinned by a series of scheme specific research questions which will ensure that an understanding of the OUV of the WHS and the significance of the historic environment overall will guide decision making and maximise opportunities to further understand this exceptional landscape. It considers the DAMS will also ensure that the archaeological mitigation under the Site Specific Written Schemes of Investigation ("SSWSIs") will be supported by the use of innovative methods 10 and technologies and the implementation of an iterative and intelligent strategy, which will enable it to make a unique contribution to international research agendas.

37. Given the amendments and assurances requested and received during the course of the examination and the safeguards that are now built into the DCO overall, Historic England states in the concluding submission that it is confident of the Development's potential to deliver benefits for the historic environment.

38. The Secretary of State also notes that Historic England would continue to advise the Applicant on the detail of the design and delivery of the Development through its statutory role and its roles as a member of Heritage Monitoring and Advisory Group and of the Stakeholder Design Consultation Group. The ExA agrees with Historic England's view that this would also help minimise impact on the OUV, and delivery of the potential benefits for the historic environment [ER 5.7.69].

39. Historic England's response to the Secretary of State's further consultation on 4 May 2020 also indicates that its advice has addressed the need to avoid any risk of confusion which might impede the successful operation of the processes, procedures and consultation mechanisms set out in the revised DAMS and OEMP designed to minimise the harm to the Stones and surrounding environment of the WHS.

40. Similarly, the Secretary of State also notes the National Trust's support for the Development and view that, if well designed and delivered with the utmost care for the surrounding archaeology and chalk grassland landscape, the Development could provide an overall benefit to the WHS. It also considers the Development could help to reunite the landscape providing improvements to monument setting, tranquillity and access for both people and wildlife. Following initial concerns about the lack of detail in relation to both design and delivery, it is now satisfied that sufficient control measures have been developed through the DAMS and OEMP and also in the dDCO [ER 5.7.70 – 5.7.71]. English Heritage Trust support the scope for linking Stonehenge back to its wider landscape and making it possible for people to explore more of the WHS and welcomes the reconnection of the line of the Avenue [ER 5.7.72]. DCMS also expressed the view that the Development represents a unique opportunity to improve the ability to experience the WHS and its overall impact would be of benefit to the OUV of the WHS, primarily through the removal of the existing harmful road bisecting the site [ER 5.7.81 – 5.7.83].

41. The Secretary of State notes that whilst Wiltshire Council acknowledge that the most significant negative impact of the Development would be that of the new carriageway, cutting and portal on the western part of the WHS, the Council considers the removal of the existing A303 road would benefit the setting of Stonehenge and many groups of monuments that contribute to its OUV and the removal of the severance at the centre of the WHS caused by the road would improve access and visual connectivity between the monuments and allow the reconnection of the Avenue linear monument. It considers the removal of the existing Longbarrow Roundabout and the realignment of the A360 would also benefit the setting of the Winterbourne Stoke Barrow Group and its visual relationship to other groupings of monuments in the western part of the WHS and the absence of road lighting within the WHS and at the replacement Longbarrow Junction would help reduce light pollution. The rearranged road and byway layout to the east would remove traffic from the vicinity of the scheduled Ratfin Barrows [ER 5.7.55 – 5.7.57].

42. The Secretary of State also notes from the Statement of Common Ground agreed between Wiltshire Council and the Applicant [Examination library document AS-147] that Wiltshire Council's regulatory responsibility include managing impacts on Wiltshire's heritage assets and landscape, in relation to its statutory undertakings. These responsibilities include having regard to the favourable conservation status of the WHS. The document notes that the Development affects several built heritage assets, both designated and undesignated. However, all sites of interest along the route had been visited by the relevant Council officer with the built heritage consultant, and general agreement exists regarding the likely extent of the Development's impacts. Wiltshire Council agreed that there are no aspects that are considered likely to reach a level of 'substantial harm'.

43. The Secretary of State has also carefully considered the ExA's concerns and the respective counter arguments and positions of other Interested Parties, including ICOMOS-UK, WHSCU, the Stonehenge Alliance, the COA and the CBA in relation to the effects of elements of the Development on the OUV of the WHS and on the cultural heritage and the historic environment of the wider area raised during the examination. The Secretary of State notes in particular the concerns raised by some Interested Parties and the ExA in respect of the adverse impact arising from western tunnel approach cutting and portal, the proposed Longbarrow Junction and, to a lesser extent, the eastern approach and portal [ER 5.7.207]. He accepts there will be adverse impacts from those parts of the Development. However, on balance and when considering the views of Historic England and also Wiltshire Council, he is satisfied that any harm caused to the WHS when considered as a whole would be less than substantial and therefore the adverse impacts of the Development should be balanced against its public benefits.

50. In conclusion on cultural heritage and the historic environment, the Secretary of State places great importance in particular on the views of his statutory advisor, Historic England and also sees no reason to doubt the expertise of those from Historic England or other statutory consultees that have advised on this matter (or indeed on other matters relating to the application). As indicated above, whilst he accepts there will be harm, there is no suggestion from Historic England that the harm will be substantial. The Secretary of State agrees with Historic England on this matter and is also encouraged by the continued role Historic England would have in the detailed design and delivery of the Development should consent be granted. Whilst also acknowledging some Scientific Committee experts are not content with the mitigation proposed and also that the ExA was

not content with the proposed approach to artefact sampling, the Secretary of State accepts Historic England's views on this matter and is satisfied that the mitigation measures included in the updated OEMP and DAMS as submitted by the Applicant on 18 May 2020 and secured by requirements 4 and 5 in the DCO are acceptable and will help minimise harm to the WHS.

Footnotes

1 For a discussion of the statutory regime under which Road Investment Strategies are set see *R (Transport Action Network v Secretary of State for Transport [2021] EWHC 2095 (Admin)*

2 See *R (Transport Action Network v Secretary of State for Transport [2021] EWHC 2095 (Admin) at [28]-[37] and [96* (vii)].

3 Which is to do with a failure to assess the relative merits of identified alternatives.

4 It should be recorded that neither the Panel nor the SST considered exercising any discretion to consider the relative merits of alternative options for extending the proposed tunnel to the west, given PR 5.4.71 and their reliance upon para. 4.27 of the NPSNN.