

WRITTEN REPRESENTATION

THE TREASURY GREEN BOOK

Deadline 7: 10th JULY 2023

Norfolk Parishes Movement for an OTN

Madam Chair, on behalf of the Norfolk Parishes Movement for an Offshore Transmission Network ("The Norfolk Parishes Movement") we now provide further information relevant to the current examination of the SEP and DEP proposals.

We refer to the Deadline 4 submission by The Norfolk Parishes Movement (REP4-054) which set out concerns over the legality of the approach taken by the Applicant, in conjunction with National Grid ESO and National Grid ET, in failing to properly disclose the alternative grid connection points considered for SEP and DEP and the evaluations carried out to determine Norwich Main as the chosen Grid Connection Point.

We now present to you an additional formal opinion by Charles Banner, K.C. which has been prepared on behalf of the East Anglia Pylons Limited in relation to the Great Grid Upgrade Norwich to Tilbury Project (formerly the East Anglia GREEN project) proposed by NG ESO. It refers specifically to the applicability of the Treasury Green Book¹ principles and since the Green Book publication was in force at the time of the submission of the DCO application for SEP and DEP, compliance with them should have been ensured by the Applicant.

We recognise that the ExA will already be familiar with the Green Book principles, but we consider this Opinion is important and directly relevant to the current examination in respect of SEP and DEP for the following reasons:

- The Opinion comments upon the mandatory application of the principles in the Green Book to projects which involve the use of significant new and existing public resources. The SEP and DEP projects have already involved and, if approved, will in future require, the use of significant public resources and entail the provision of objective advice by public servants to decision makers.
- This Opinion raises further concern about the CION process carried out by the Applicant, National Grid ESO and National Grid ET and whether it was conducted correctly.

It is apparent that the choice of the Grid Connection Point is fundamental to the way the SEP and DEP proposals have developed and it must therefore be based on sound costing and selection principles. We are aware from a previous CION report² for an offshore windfarm that National Grid has used flawed Least Worst Regret analysis (see page 13) for determining costs comparisons. We consider it appropriate therefore an assurance is sought from the Applicant, National Grid ESO and National Grid ET that the evaluation of alternatives for the SEP and DEP CION process will be re-done using Treasury Green Book principles.

In making your recommendation to the Secretary of State on the suitability of the SEP and DEP projects we respectfully suggest that the ExA will wish to consider carefully the implications of this formal legal Opinion so that any decision made stands up to legal challenge.

References

¹ The Green Book (2022) – Gov.UK (www.gov.uk) – see attached document.

² East Anglia Offshore Wind Project TWO – CION report, Version 2.0, 9 October 2017.

Please see below Opinion from Charles Banner, K.C. in respect of the Great Grid Upgrade Norwich to Tilbury Project.

IN THE MATTER OF:
GREAT GRID UPGRADE NORWICH TO TILBURY
("THE PROJECT")

OPINION

1. I am instructed by Cerda Planning to provide further advice to East Anglia Pylons Ltd ("EAPL") in relation to the above named Project, which is being promoted by National Grid Electricity Transmission ("NG"). This follows my earlier opinions dated 12th June 2022 and 10th May 2023.
2. My latest instructions relate to the applicability of the Treasury Green Book.¹ I am instructed that the current position of NG in communications with EAPL is that (i) the Green Book applies only to policies, not projects; and (ii) is not relevant to the determination of an application for a development consent order ("DCO") under the Planning Act 2008 ("the 2008 Act"). I am asked to advise on the legal soundness of that approach.
3. In my opinion, NG's approach is legally flawed.
4. The Green Book describes its application in the following terms (the underlining is mine):

"The Green Book is guidance issued by HM Treasury on how to appraise policies, programmes and projects. It also provides guidance on the design and use of monitoring and evaluation before, during and after implementation. Appraisal of alternative policy options is an inseparable part of detailed policy development and design. This guidance concerns the provision of objective advice by public servants to decision makers, which in central government means advice to ministers. In arms-length public organisations the decision makers may be appointed board members, and where local authorities are using the method, elected council members. The guidance is for all public servants concerned with proposals for the use of public resources, not just for analysts. The key specialisms involved in public policy creation and delivery, from policy at a

¹ The Green Book (2022) - GOV.UK (www.gov.uk)

strategic level to analysis, commercial strategy, procurement, finance, and implementation must work together from the outset to deliver best public value. The Treasury's five case model is the means of developing proposals in a holistic way that optimises the social / public value produced by the use of public resources. Similarly, there is a requirement for all organisations across government to work together, to ensure delivery of joined up public services.

...

Green Book Guidance applies to all proposals that concern public spending, taxation, changes to regulations, and changes to the use of existing public assets and resources – see Box 1 below.

Box 1. Scope of Green Book Guidance

Green Book guidance covers:

- policy and programme development
- all proposals concerning public spending
- legislative or regulatory proposals
- sale or use of existing government assets – including financial assets
- appraisal of a portfolio of programmes and projects
- structural changes in government organisations
- taxation and benefit proposals
- significant public procurement proposals
- major projects
- changes to the use of existing public assets and resources

The role of appraisal and evaluation is to provide objective analysis to support decision making. Where the use of significant new and existing public resources is required the proportionate employment of the Green Book and its supplementary business case guidance is mandatory."

5. The interpretation of policy is an objective question of law, to which there is only one correct answer: see the judgment of the Supreme Court in *Tesco Stores Ltd. v . Dundee City Council* [2012] P.T.S.R. 983.
6. In the present context, the only tenable interpretation of the Green Book is that it applies to the consideration of projects, and not just policies. On more than one occasion this is clearly expressed to be the intended scope.

7. The recommendation of an Examining Authority to the Secretary of State in the context of an application for a DCO under the 2008 Act amounts to *“the provision of objective advice by public servants to decision makers”* and as such falls squarely within the expressed scope of the Green Book.
8. To interpret the Green Book any other way would be a misinterpretation of policy amounting to an error of law, in the sense described by the Supreme Court in *Tesco*.
9. It also appears to be uncontroversial that the Project would involve *“the use of significant new and existing public resources”*.
10. It follows that, in the context of the future examination and determination of an application for a DCO for the Project:
 - a. to the extent that any applicable national policy statements to the Project require consideration of matters to which the Green Book relates, the use of Green Book and its supplementary business case guidance is *“mandatory”*;
 - b. in the context of the statutory test under s.104(7) of the 2008 Act, namely that an application for a DCO must be made in accordance with a NPS unless (amongst other things), the Secretary of State *“is satisfied that the adverse impact of the proposed development would outweigh its benefits”*, the Green Book is a material consideration to which regard must be had; and
 - c. a failure by the Examining Authority, and thereafter the Secretary of State, to have regard to the Green Book in either of these contexts would amount to an error of law.

11. I have nothing to add as currently instructed but would be happy to answer any further questions arising out of the advice above, if and when required.



CHARLES BANNER K.C.

**Keating Chambers
15 Essex Street
London WC2R 3AA**

4th July 2023