Awel y Môr Offshore Wind Farm

Applicant's Further Response to ExQ3.0.7

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AWEL Y MÔR
Offshore Wind Farm

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Contents

1 The Applicant's Further Response to ExQ3.0.7

1 This note is provided by the Applicant in response the Examining Authority's third written questions, question 0.7 (ExQ3.0.7) which reads as follows:

> *"Mona and Morgan Offshore wind Farms*
>
> *Your answer to ExQ2.0.6 notes the text contained within paragraph 5(e) of Schedule 4 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 concerning the requirement to assess cumulative effects with "other existing and/or approved" projects, stating that this means that the legal requirement is limited to projects that are either consented or are built out already. The answer further refers to the Advice Note 17 in the context of other existing development and/or approved development. However, scoping reports have been issued for both Mona and Morgan, meaning that they would fall in Tier 2 of the Advice Note. The ExA also note in your response that "there is significant uncertainty regarding…onshore substation site" but note that the potential substation locations are all in the vicinity of Bodelwyddan and would presumably 'feed into' the same National Grid substation as the proposed development would:*
>
> *a) Provide further evidence, with reference to case law if necessary, that "existing" in the context of paragraph 5(e) of Schedule 4 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017, equates to projects that are consented or are built out; and*
>
> *b) Provide any further justification over your decision not to carry out a cumulative assessment, should you wish to do so."*

2 The Examining Authority (ExA) will be aware of the responses by the Applicant on this issue at Deadlines 1 (REP1-007), 3a (REP3a-004), and 5 (REP5-004). Those responses remain valid and should be read together with the following reply. They are not repeated below.

3 The ExA question places emphasis on Scoping Reports having been issued for the Mona and Morgan Schemes and non-statutory consultation on landfall and substation locations and whether either or both projects would fall into the Tier 2 category of PINS Advice Note 17 relating to assessment of cumulative impacts.

4 Whilst that is factually correct it should be noted that Advice Note 17 does not provide that any specific levels of project information will be available on such other developments simply on account of being within Tier 2. Paragraph 3.1.5 recognises that the tiers represent levels of increasing certainty but paragraph 3.1.4 acknowledges that the availability of information necessary to conduct a cumulative environmental assessment (CEA) will depend on the current status of such other development and also recognises that limitations may exist in relation to availability of data for collection on such other development.

5 In the present case it is practical limitations on the availability of data that continue to prevent any meaningful CEA being undertaken between the Awel y Môr Scheme and the Morgan and Mona Projects.

1.1 The Morgan and Mona Scoping Reports and Subsequent Consultations

6 The Mona Scoping Report is dated May 2022 and was followed in June 2022 by the Morgan Scoping Report, after the application for Awel y Môr was accepted for Examination. A number of non-statutory consultations have also taken place most recently that in autumn 2022 on the Mona project that described three landfall locations, seven substation locations and multiple onshore cable routes.

7 These represent the up-to-date position on project descriptions for both schemes that is in the public domain. Material on both schemes follow similar formats and to a large extent adopt the same text which is unsurprising as they are proposed as linked projects, both being promoted by the same joint venture parties ENBW and BP albeit Morgan will not be connected to onshore grid infrastructure via North Wales.

8 Confirmed information that can be obtained from the current project descriptions is very limited. The geographical extent of the array areas (Mona 449.97km^2, Morgan 322.2km^2), the area of the Mona offshore transmission infrastructure scoping search area (1561km^2), the area of the Mona onshore transmission infrastructure scoping search area (113km^2) and plans that show indicative locations only of landfalls, substations and onshore cable routes.

9 In all other respects every element of offshore and onshore construction is indicative by reference to very broad parameters that allow for no meaningful assessment to be made of the actual development for which development consent is going to be sought. Critically, all material published to date on the Mona and Morgan projects has been seeking comment upon the principle of development generally or by reference to broad locations and no supporting assessment material (at any level of detail) has been published predicting the impact of any of this possible development, nor has any detailed information on the proposed measures (if required) to mitigate any potentially significant effects been provided.

10 In relation to the offshore array for Mona, the Scoping Report identifies in Part 2, Section 2.5 that "*further refinement of the Mona Preferred Bidding Area will be undertaken as additional survey information is collected and project design undertaken*". This suggests that the current offshore array area, which is 449.97 km^2 in area, will be refined further in future. It is usual for offshore wind farms to go through multiple iterative rounds of refinement to their offshore array areas, as has been the case with Awel y Môr, and therefore cannot form the basis of a meaningful CEA.

11 With regard to the transmission assets of Mona, it is noted in the Scoping Report that offshore cable route corridors, a cable landfall, onshore cable route and the onshore substation location are not yet defined. These will all be defined following the outcomes of further route refinement and site selection processes. Part 3, Section 2.5 of the Scoping Report adds that the Preliminary Environmental Information Report (PEIR) (which is not yet published), will be informed by this refinement and site selection, after which feedback from statutory consultation on the PEIR will be taken into account in making further and final decisions on further refinements to routeing and site selection. This suggests that the final proposed cable route and the onshore substation location will not be known until the project submits its application for development consent.

12 Non-statutory consultation materials published for the Mona project in Autumn 2022 included multiple landfalls, cable route and substation location options. The consultation material suggests three potential landfall locations, all in the west of this study area in the Abergele area. There are multiple cable corridor options presented on a schematic map that does not allow the precise location of cable corridors to be determined. It is noted that one option is located near to the AyM OnSS, however, the provided mapping does not show how this route interacts with Bodelwyddan Park or how close it is to the AyM Order Limits. Until a specific cable route is selected and presented at a suitable scale to show the location relative to sensitive receptors, any assessment by the Applicant would need to be based upon speculative assumptions and a meaningful assessment could not be provided.

13 Any assessment prior to further site refinement, and prior to information with a high degree of certainty being made available, could prematurely and inaccurately identify cumulative effects, resulting in a substantial lack of confidence in any conclusions reached. This also has the potential to unfairly prejudice the site selection and refinement processes of those projects before a detailed appraisal is available. In terms of the cumulative effects assessment methodology, it is necessary to understand the locations of other projects assessed in order to establish the distances between those projects and Awel y Môr, and therefore to understand the potential for geographical overlap between the respective Zones of Influence (ZoI) of relevant impacts. Without sufficient certainty in that information, a meaningful CEA is not possible.

14 There is also no certainty over the consenting or construction programmes for these projects. Whilst both projects have received Scoping Opinions, they are yet to undertake statutory consultation or submit their subsequent applications for development consent. The Mona Scoping Report suggested that the PEIR would be published in Q4 2022/Q1 2023 and, at the time of writing (the end of Q1 2023) there is no public indication that the Mona PEIR will be published imminently.

15 The Scoping Reports for Morgan and Mona do not provide information regarding the planned construction programmes for the projects. Given that these projects and Awel y Môr are seeking consents under the same planning regimes, it can be assumed that they would expect to be delivered over similar timeframes, however NSIPs (especially larger-scale NSIPs) often face multiple delays and therefore any assumption cannot be made with a high degree of certainty. Together with the fact that no indicative construction timelines for Morgan or Mona have been provided in the Scoping Reports, it is not possible to establish the potential for temporal interaction of the impacts from those projects additively with those of Awel y Môr. Without such information, a meaningful CEA is not possible.

16 In addition to the lack of any certainty over the precise size and/or location of Morgan and Mona, as well as the timings of their construction, there is also a lack of any assessment undertaken by those projects that could be factored into cumulative assessments for Awel y Môr. Whilst broad design envelopes have been established, there is no information available in terms of quantitative or even qualitative assessment of impacts of the projects on receptors. This is typical of Nationally Significant Infrastructure Projects (NSIPs) seeking consent under the Planning Act 2008, as a primary purpose of a Scoping Report is to define what such assessments will follow in the PEIR and later in the ES.

17 The Morgan and Mona Scoping Reports identify the scope of assessments to come, including quantitative assessments informed by further survey, data collection and (in some instances) technical evaluation of this data via approaches such as numerical modelling, that will be used in assessments in the PEIR. Until such information is available, it is not possible to undertake a meaningful CEA. The Applicant considers the approach it has taken is consistent with that adopted by other offshore wind projects under this planning regime.

18 The Applicant has, within the AyM ES, identified which potential impacts from Morgan and Mona could theoretically act cumulatively with those of Awel y Môr. However, a meaningful quantified assessment of those impacts is not possible without significant speculation on Mona and Morgan project specifics and assessment approaches. A (not exhaustive) list of examples is provided below:

- a) The Morgan and Mona Scoping Reports state that data collected in the 2022 benthic ecology and geophysical survey campaigns (which are not included in the Scoping Reports) will inform the development of physical processes modelling which again has not yet been made available. Until this data is available, and numerical modelling has been undertaken to establish the scale and extent of influence on to the physical environment cumulatively with Awel y Môr, a meaningful CEA is not possible.

- b) The Morgan and Mona Scoping Reports describe that underwater noise modelling is planned to be undertaken to inform the assessment of construction noise, however the exact methodology, scope and specification is yet to be determined and agreed with the regulators and Statutory Nature Conservation Bodies (SNCBs). Until the results of this modelling are available in order for the Applicant to consider the scale and extent of potential interactions with marine mammal and fish receptors considered within the Awel y Môr assessments, a meaningful CEA is not possible.
- c) The Morgan and Mona Scoping Reports identify that Collision Risk Modelling (CRM) and Population Viability Analysis (PVA) on offshore ornithological receptors are yet to be undertaken in order to quantify the level of impacts to seabirds. Until these analyses are available for the Applicant, a meaningful CEA is not possible.
- d) The Morgan and Mona Scoping Reports identify that an analysis of the Zone of Theoretical Visibility (ZTV) to establish the study area in terms of seascape, landscape and visual resources, after the locations of generation and transmission assets has been defined. Once this is determined, representative viewpoints would need to be agreed with the relevant stakeholders in order to inform a detailed assessment in the PEIR (and ES). Until this information is available once further site refinements have been made, it is not possible to consider how the two schemes may appear cumulatively without significant speculation. Therefore, a meaningful CEA of these aspects is not possible.
- e) The Mona Scoping Report does not identify a location for the onshore substation. Even if it were to be located in a similar locality to that of Awel y Môr, there is insufficient information about traffic generation numbers, construction traffic routeing, or confirmation of cable installation techniques in sensitive areas to consider additively with the impacts of Awel y Môr. Therefore, a meaningful CEA is these aspects is not possible.

19 Table 4.5 of the cumulative effects methodology of the ES (APP-042) establishes the screening criteria used to define the potential for cumulative effects arising from other plans, projects and activities, additively with those of Awel y Môr. The explanations provided illustrate that it is not possible to have any certainty over the spatial or temporal effect interactions between the Morgan and Mona projects, and Awel y Môr. It is also clear that in the absence of detailed assessment information from those projects, it is not possible to undertake a quantitative or meaningful qualitative CEA.

20 The only screening criterion that can be established in the absence of this information is the potential for impact-receptor pathway, which is defined as the theoretical interaction by which an impact could have an effect on a receptor. It is not possible from this criterion alone to meaningfully assess the cumulative effects of these projects in EIA terms, and any attempt to do so would be unhelpful and disproportionate from an EIA perspective.

1.2 Case Law

21 The ExA has asked, in addition to further evidence, for the Applicant to reference the case law if necessary on the subject of what comprises "existing" projects that are "consented or built out". The Applicant notes the question and includes within its comments below a wider assessment of how case law informs the ability, or lack thereof, to undertake CEA on the facts as they exist for the Awel y Môr, Mona and Morgan projects.

22 Consideration of case law can be limited to two important relevant judgments in this area:

- a) The February 2021 case of *Pearce v The Secretary of State for Business, Energy and Industrial Strategy and Norfolk Vanguard Limited* [2021] EWHC 326 (Admin) and
- b) The December 2022 case of *R oao Substation Action Save East Suffolk Limited and The Secretary of State for Business, Energy and Industrial Strategy and East Anglia One and Two Limited* [2022] EWHC 3177 (Admin).

23 Beginning with a summary of these two cases, the judgment in *Pearce* resulted in the quashing of the Vanguard Offshore Wind Farm DCO consent because of an unlawful step by the decision maker in failing to consider available information on cumulative impacts with the linked Norfolk Boreas Offshore Wind Farm Scheme. In the following Substation Action case the court dismissed a challenge to the East Anglia One and Two Offshore Wind DCO grants on the basis that there has been no unlawful decision to disregard potential cumulative impacts at the proposed Friston substation from the possible connection there of the Nautilus, Eurolink and Sealink interconnectors.

24 The subject matters (cumulative impact assessment of offshore wind substation development) and the recent dates of both challenges allow the ExA's questions to be most directly answered by comparing the Awel y Môr facts with those in the *Pearce* and Substation Action cases. Indeed doing so very clearly illustrates that Awel y Môr is in the latter class i.e. where it is both reasonable and justifiable to treat the Morgan and Mona Schemes as not being "other existing or approved Projects" for the purposes of Schedule 14 of the 2017 Regulations.

25 The following key decision points from these two cases can be contrasted with the Awel y Môr facts in this way (paragraph numbers refer to the attached judgements):

- a) In *Pearce* the Vanguard and Boreas Schemes were related projects being promoted by the same developer that were proposed to connect to the same substation. Awel y Môr is unrelated to Morgan and Mona (although the latter two are related to each other).
- b) The Scoping Opinion for Vanguard had requested that cumulative impacts with Boreas were assessed and information had been produced to that end (para 43). No such request was made in the Scoping Opinion or on acceptance of the Awel y Môr Project and indeed the ExA's questions now ask for explanation of the approach and not a requirement that this be undertaken.
- c) The cumulative assessment undertaken by Vanguard and submitted to that examination described the status of the cumulative information on Boreas to be "high" (para 46). For Awel y Môr there is no published assessment material on either Morgan or Mona, with a decision still awaited from both projects whether to proceed to Section 42 Consultation and publication of a Preliminary Environmental Impact Report (PEIR). PEIR is the kind of assessment information that is contemplated by PINS Advice Note 17.
- d) In *Pearce* the court concluded that if the ExA had seen genuine difficulty in assessing the cumulative information before it, the ExA could have required further information to be provided (para 137). That situation does not apply at Awel y Môr where there is no further assessment information in relation to Mona or Morgan that the Applicant can report upon.

- e) In *Pearce* the court relied upon judgment in the case of Larkfleet which warns against "salami slicing" of an individual project (para 116). Clearly Awel y Môr is in no way the same project as Mona and Morgan but *Larkfleet* recognises that the assessment of one project can only proceed on the information available to it and if necessary further assessment can be made on the second or subsequent developments under consideration. Hence when making reference to the limit of its ability to undertake cumulative assessment the Applicant has and continues to note the ability for the Morgan and Mona Schemes to consider cumulative impacts with Awel y Môr, in accordance with the authority in *Larkfleet*.
- f) The *Pearce* judgment also refers to the case of Littlewood (para 117) in which the court recognised that in some situations there is simply no ability to assess future development on nearby, adjoining or even remaining parts of a site because of inadequacy of information. That is the situation that presently prevails between Awel y Môr and Mona and Morgan.
- g) In *Pearce* the link between Vanguard and Boreas meant that there was a very real issue in respect of cumulative impacts affecting the decision whether to approve the Vanguard Scheme at all, relating to the justification for a 60-kilometre onshore cable connection (para 132). With no shared infrastructure between Awel y Môr and Mona and Morgan there is no similar question effecting Awel y Môr approval that requires consideration of the impacts of Mona or Morgan.
- h) Finally, in respect of the reasoning in *Pearce* it was acknowledged that it might have been possible for the ExA to have justified its decision not to rely on the information before it but to do so it would have needed to provide far better reasoning than was supplied (para 143). In the Awel y Môr situation full explanation has been given as to the limitations on the information available for cumulative assessment and it is open to the ExA to adopt that reasoning in its decision.

26 The reasoning in the Substation Action case can be more briefly addressed as the court adopted the legal principles outlined in *Pearce* but found very different facts applying:-

- a) In *Substation Action* the court noted the Applicant's evidence that in respect of Advice Note 17 for the Nautilus and EuroLink potential substation extensions it could not gather information ("little to none of the information specified in Advice Note 17 is available") in respect of proposed design and location, programme of construction, operation and decommissioning and (most critically) environmental assessments that set out baseline data and effects arising from these "other existing developments and/or approved developments" (para 191). This situation prevailed up to and including the close of the examination of the East Anglia One and Two DCOs and on that basis the ExA disregarded consideration of cumulative impacts from those Schemes which the conclusion was agreed with by the Secretary of State. On that basis the court concluded the interconnector projects were not "existing and/or approved projects" for the purposes of Schedule 4(5) of the 2017 Regulations.
- b) As the same situation applies between Awel y Môr and Mona and Morgan Projects a similar approach can reasonably be adopted by the ExA in the present case.

27 The Applicant maintains its position set out in previous responses that should this situation change and significant and substantial assessment material be published in respect of either Mona or Morgan projects, it will be open to the Secretary of State to seek submissions on cumulative assessment and to consult upon them before reaching a final decision, if that is justified by the circumstances at the time.

2 Appendix A – Pearce Judgement

Neutral Citation Number: [2021] EWHC 326 (Admin)

Case No: CO/2836/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/02/2021

Before :

THE HON. MR JUSTICE HOLGATE

- -

Between :

RAYMOND STEPHEN PEARCE	**Claimant**
-and -	
SECRETARY OF STATE FOR BUSINESS ENERGY AND INDUSTRIAL STRATEGY	**Defendant**
-and-	**Interested Party**
NORFOLK VANGUARD LIMITED	

- -
- -

Ned Westaway and Michael Brett (instructed by **Thrings LLP**) for the **Claimant**
Richard Moules (instructed by **Government Legal Department**) for the **Defendant**
Hereward Phillpot QC (instructed by **Womble Bond Dickinson (UK) LLP)** for the **Interested Party**

Hearing dates: 19 and 20 January 2021

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Approved Judgment

Mr Justice Holgate

Introduction

1. The Claimant, Mr Raymond Pearce, makes this application for judicial review under s.118 of the Planning Act 2008 ("PA 2008") to challenge the decision of the Defendant, the Secretary of State for Business, Energy and Industrial Strategy, on 1 July 2020 to make the North Vanguard Offshore Wind Farm Order (SI 2020 No. 706) ("the Order"). The Order grants development consent to the Interested Party, Norfolk Vanguard Limited ("NVL") for what is said to be one of the largest offshore wind projects in the world. This development ("Vanguard") is closely related to a second wind farm project Norfolk Boreas ("Boreas"), lying immediately to the north-east of the offshore Vanguard array. Together they would have an export capacity of 3.6 GW.

2. On 8 June 2018 NVL submitted its application for a development consent order ("DCO") under s.37 of PA 2008 in respect of Vanguard. The examination of that application began on 10 December 2018 and ended on 10 June 2019. The Examining Authority submitted its report to the Defendant ("ExAR") on 19 September 2019. The application for development consent in respect of Boreas was made on 11 June 2019. The examination of that second application began on 12 November 2019 and closed on 12 October 2020. The court was informed that a decision by the Defendant on the Boreas application is anticipated to be made in April 2021.

3. NVL proposed that the onshore infrastructure of the two projects be co-located. This involved a cable route carrying high voltage direct current for 60 km from the landfall at Happisburgh to a substation site near the village of Necton. There the power would be converted to alternating current and fed into the National Grid.

4. The Environmental Statement ("ES") prepared by NVL for Vanguard assessed cumulative impacts arising from both projects, including landscape and visual impacts from the infrastructure proposed at Necton.

5. The development proposed at Necton for both the Vanguard and Boreas projects has attracted substantial objections, including objections from the Claimant who lives near the planned cable route. They concern both the impacts of the Necton infrastructure for Vanguard in isolation and also the cumulative impacts which would occur if infrastructure for Boreas were to be added at Necton.

6. In their assessment of landscape and visual impacts for the Vanguard application, both the Examining Authority and the Defendant decided that consideration of cumulative impacts from Vanguard and Boreas should be deferred to any subsequent examination of the Boreas proposal.

7. This challenge raises three issues: -

   (1) Whether the Defendant was obliged to take the cumulative impacts at Necton into account when determining the Vanguard application and acted unlawfully by deferring consideration of that subject to any examination of an application for a DCO in respect of the Boreas project;

(2) Whether the reasons given by the Defendant for not taking those cumulative impacts into account when determining the Vanguard application were legally inadequate;

(3) In the event of the court deciding that the Defendant erred in law in either of those two respects, whether it should refuse to grant relief in the exercise of its discretion.

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

The Statutory Framework

Planning Act 2008

9. The framework laid down by the PA 2008 has been summarised in a number of cases, for example, *R (Friends of the Earth Limited) v Heathrow Airport Limited* [2020] UKSC 52 at [19] to [38]; *R (ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy* [2021] EWCA Civ 43 at [6] to [8] and [104] to [105] and *R (Spurrier) v Secretary of State for Transport* [2020] PTSR 240 at [21] to [39] and [98] to [109]. There is no need for that analysis to be repeated here.

10. In so far as is material, s.104 of the PA 2008 provides:

> "(1) This section applies in relation to an application for an order granting development consent if a national policy statement has effect in relation to development of the description to which the application relates.
> (2) In deciding the application, the Secretary of State must have regard to –
>
> (a) any national policy statement which has effect in relation to development of description to which the application relates (a "relevant national policy statement"),
>
> (aa) ….. ,
>
> (b) any local impact report (within the meaning given by section 60(3)) submitted to the Secretary of State before the deadline specified in a notice under section 60(2),
>
> (c) any matters prescribed in relation to development of the description to which the application relates, and
>
> (d) any other matters which the Secretary of State thinks are both important and relevant to the Secretary of State's decision.
>
> (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.

> (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.
>
> (9) For the avoidance of doubt, the fact that any relevant national policy statement identifies a location as suitable (or potentially suitable) for a particular description of development does not prevent one or more of subsections (4) to (8) from applying."

11. Section 104(2)(d), allows the Secretary of State to exercise a judgment on whether he should take into account any matters which are relevant, but not mandatory, material considerations. This reflects the well-established line of authority which includes *CREEDNZ v Governor General* [1981] NZLR 172, 183; *In Re Findlay* [1985] AC 318, 333-334; *Oxton Farm v Harrogate Borough Council* [2020] EWCA Civ 805 at [8]; and *Friends of the Earth* [2020] UKSC 52 at [116] to [120].

12. When determining an application for development consent, section 114 requires the Secretary of State either to make a DCO or to refuse such consent. Section 116 requires the Secretary of State to prepare and publish a statement of the reasons for his decision.

13. Section 115 enables a DCO to be granted not only for development of the defined categories of nationally significant infrastructure projects ("NSIPs") requiring development consent (Part 3 and s.31 of PA 2008), but also for "associated development" as defined in s.115(2) to (4).

14. A decision to grant a DCO is liable to be challenged by way of judicial review under s.118(1) of PA 2008. The general principles upon which a legal challenge may be brought were summarised by the High Court in *ClientEarth* at [2020] PTSR [98] to [100].

Environmental Impact Assessment

15. The relevant legislation on environmental impact assessment ("EIA") for the determination of the Vanguard application was Directive 2011/92/EU, which, in relation to DCO procedures, was transposed by the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 (SI 2009 No. 2263) as amended ("the 2009 Regulations"). The 2011 Directive was amended by Directive 2014/52/EU, but the latter does not apply to a project for which a screening opinion was sought before 16 May 2017 (article 3(2) of the 2014 Directive). The 2014 Directive was transposed by the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017 No. 572) ("the 2017 Regulations"), regulation 37(2) of which gave effect to the transitional provisions of the 2014 Directive. In the present case NVL sought a scoping opinion on 3 October 2016 and so it is common ground that the 2009 Regulations governed the EIA process in this case.

16. Paragraph 1.5.4 of the ExAR records that NVL decided voluntarily to prepare the ES in accordance with the 2017 Regulations and the statement submitted was examined in accordance with those regulations. The Defendant's decision letter appears to have proceeded on that basis (see e.g. DL 14.1). Nevertheless, no authority has been cited to show that the subsequent regulations can be treated as applying on a consensual basis for the purposes of determining a judicial review under s. 118. This judgment therefore refers to the 2009 Regulations. Fortunately, it is common ground that there are no relevant differences between the 2009 and 2017 Regulations affecting the merits of the grounds of challenge.

17. Regulation 3(2) provides: -

> "Where this regulation applies, the Secretary of State or relevant authority (as the case maybe) must not (in the case of the Secretary of State) make an order granting development consent or (in the case of the relevant authority) grant subsequent consent unless it has first taken the environmental information into consideration, and it must state in its decision that it has done so."

18. "Environmental information" is defined in regulation 2(1) as follows: -

> *"environmental information"* means the environmental statement (or in the case of a subsequent application, the updated environmental statement), including any further information and any other information, any representations made by any body required by these Regulations to be invited to make representations, and any representations duly made by any other person about the environmental effects of the development and of any associated development,"

"Environmental information" therefore covers all information which is obtained through the overall EIA process, which includes the ES and representations in response to the statutory publicity and consultation procedures.

19. "Environmental statement" is defined in regulation 2(1) as follows: -

> *"environmental statement"* means a statement—
>
> (a) that includes such of the information referred to in Part 1 of Schedule 4 as is reasonably required to assess the environmental effects of the development and of any associated development and which the applicant can, having regard in particular to current knowledge and methods of assessment, reasonably be required to compile; but
>
> (b) that includes at least the information referred to in Part 2 of Schedule 4."

20. Schedule 4 defines information for inclusion in the ES. Part 1 includes the following: -

> "17. Description of the development, including in particular—
>
> (a) a description of the physical characteristics of the whole development and the land-use requirements during the construction and operational phases;
>
> (b) a description of the main characteristics of the production processes, for instance, nature and quantity of the materials used;
>
> (c) an estimate, by type and quantity, of expected residues and emissions (water, air and soil pollution, noise, vibration, light, heat, radiation, etc) resulting from the operation of the proposed development.
>
> 18. 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.
>
> 19. A description of the aspects of the environment likely to be significantly affected by the development, including, in particular, population, fauna, flora, soil, water, air, climatic factors, material assets, including the architectural and archaeological heritage, landscape and the inter-relationship between the above factors.
>
> 20. A description of the likely significant effects of the development on the environment, which should cover the direct effects in any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the development, resulting from:
>
> (a) The existence of the development;
>
> (b) The use of natural resources;

> (c) The emission of pollutants, the creation of nuisances and the elimination of waste,
>
> and the description by the application of the forecasting methods used to assess the effects on the environment.
>
> 21. A description of the measures envisaged to prevent, reduce and where possible offset any significant adverse effects on the environment."

21. Part 2 of schedule 4 lists the following information which must be provided: -

> "24. A description of the development comprising information on the site, design and size of the development.
>
> 25. A description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects.
>
> 26. The data required to identify and assess the main effects which the development is likely to have on the environment.
>
> 27. 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.
>
> 28. A non-technical summary of the information provided under paragraphs 1 to 4 of this Part."

22. Under regulation 17(2), where the Examining Authority or the Secretary of State consider that the ES ought to contain further information they must, under regulation 17(1), issue a statement giving clearly and precisely the full reasons for that conclusion and suspend consideration of the application for a DCO until the applicant has provided the further information and the requirements in regulation 17(3) are satisfied. Those requirements include further consultation with the designated consultation bodies and other parties and publicity to enable representations to be made.

23. Alternatively, where the Examining Authority does not consider that additional information ought to be included in the ES, it may request an "interested party" to supply that material under rule 17 of the Infrastructure Planning (Examination Procedure) Rules 2010 (SI 2010 No. 103) ("the 2010 Rules"). By rule 2(1) an "interested party" refers to a person who is an "interested party" for the purposes of Chapter 4 of Part 6 of the PA 2008. By s. 102(1) of that Act an "interested party" includes the applicant for the DCO. Rule 17(2) requires the examining authority to consider whether an opportunity should be given to all interested parties to comment in writing on the further information received.

24. Regulation 23 of the 2009 Regulations sets out a number of requirements for the notification of the decision on the application for a DCO. Regulation 23(2)(d), requires a statement to be made publicly available which sets out (inter alia) the main reasons and considerations on which the decision has been based and a description of the main measures to avoid, reduce and offset, the "major adverse effects" of the development.

National Policy Statements

25. Three National Policy Statements were relevant to the application: NPS EN-1 (Overarching National Policy Statement for Energy), NPS EN-3 (Renewable Electricity Generation) and NPS EN-5 (Electricity Networks Infrastructure). NPS EN-1 applies in combination with the relevant technology-specific NPSs.

26. Part 3 of NPS 1 establishes the need for new energy NSIPs. Applications for energy infrastructure falling within its scope are to be assessed on the basis that "the Government has demonstrated that there is a need for these types of infrastructure and that the scale and urgency of that need is as described for each of them in this part" (Paragraph 3.1.3). Substantial weight should be given to the contribution which a project would make towards satisfying that need (paragraph 3.1.4).

27. There is an established urgent need for new, and particularly low carbon, energy NSIPs to be brought forward as soon as possible (paragraph 3.3.15 of EN-1). Section 3.4 of EN-1 sets out the importance of the large-scale deployment of renewable sources of energy for tackling climate change. Offshore wind projects are expected to make the single largest contribution towards renewable energy generation targets (paragraph 3.4.3). The need for such projects is "urgent" (paragraph 3.4.5).

28. Part 4 of EN-1 sets out certain "Assessment Principles" for DCO applications. Paragraph 4.1.2 refers to a presumption in favour of granting consent "unless any more specific and relevant policies set out in the relevant NPSs clearly indicate that consent should be refused" and subject also to s.104 of the PA 2008 (paragraph 4.1.2).

29. Section 4.2 of EN-1 deals with the 2009 Regulations. Paragraphs 4.2.5 to 4.2.8 deal with cumulative effects and cases where details of certain aspects of a project have yet to be finalised: -

> "4.2.5 When considering cumulative effects, the ES should provide information on how the effects of the applicant's proposal would combine and interact with the effects of other development (including projects for which consent has been sought or granted, as well as those already in existence). The IPC may also have other evidence before it, for example from appraisals of sustainability of any relevant NPSs or development plans, on such effects and potential interactions. Any such information may assist the IPC in reaching decisions on proposals and on mitigation measures that may be required.
>
> 4.2.6 The IPC should consider how the accumulation of, and interrelationship between, effects might affect the environment, economy and or community as a whole, even though they may be acceptable when considered on an individual basis with mitigation measures in place.
>
> 4.2.7 In some instances it may not be possible at the time of the application for development consent for all aspects of the proposal to have been settled in precise detail. Where this is the case, the applicant should explain in its application which

> elements of the proposal have yet to be finalised, and the reasons why this is the case.
>
> 4.2.8 Where some details are still be to be finalised, the ES should set out, to the best of the applicant's knowledge, what the maximum extent of the proposed development may be in terms of site and plant specifications, and assess on that basis, the effects which the project could have to ensure that the impacts of the project as it may be constructed have been properly assessed."

Following the changes made by the Localism Act 2011, references to the Infrastructure Planning Commission ("IPC") now relate to the Secretary of State.

30. Paragraph 4.2.8 of EN-1 accords with well-known principles set out in *R v Rochdale Metropolitan Borough Council ex parte Milne* [2001] Env. L.R. 406. In the present case NVL's application proposals for the Vanguard infrastructure at Necton were presented as a "Rochdale envelope". That is, because certain design details remained to be determined subsequently, the DCO application defined the parameters within which the buildings would be constructed, and the ES assessed the environmental effects of the proposals by reference to those parameters and any flexibility they involved. The DCO granted by the Defendant authorised the "Works" within those parameters (see [41] below).

31. Section 4.4 of EN-1 deals with alternatives to an applicant's proposal. Paragraph 4.4.3 states that alternatives which are vague or inchoate may be discounted.

32. Part 5 of EN-1 addresses impacts which are common to all types of energy infrastructure, that is "generic impacts", including landscape and visual impacts (section 5.9). Paragraph 5.9.14 states: -

> "Outside nationally designated areas, there are local landscapes that may be highly valued locally and protected by local designation. Where a local development document in England or a local development plan in Wales has policies based on landscape character assessment, these should be paid particular attention. However, local landscape designations should not be used in themselves to refuse consent, as this may unduly restrict acceptable development."

33. On the subject of infrastructure for connections to the National Grid, paragraph 2.6.36 of EN-3 states: -

> "When considering grid connection issues, the IPC should be mindful of the constraints of the regulatory regime for offshore transmission networks. At the time of the application, the applicant may or may not have secured a connection with the network operator into the onshore transmission network and is unlikely to know who will own and manage the offshore transmission assets required for the wind farm."

The Proposals

34. The Vanguard wind array would be located in two areas approximately 47 km from the shore. The export capacity of the generating station would be 1.8 GW providing for up to 1.3m UK households or the equivalent of 2% of the UK's annual energy demand. The initial proposal was for a maximum of 200 turbines, with a maximum hub height of 200m and a maximum blade tip height of 350m. During the course of the examination the number of turbines was reduced to 158.

35. The buried onshore cable would run between the landfall at Happisburgh to Necton, some 60 km away. The Vanguard substation would be located to the east of an existing National Grid Substation (ExAR paragraph 2.1.4).

36. Paragraph 2.1.8 of the ExAR noted that NVL's parent company, Vattenfall Wind Power Limited, was also developing Boreas, which would share with Vanguard a grid connection location as well as much of the offshore and onshore cable corridors. The Vanguard DCO would also include some enabling works for Boreas, including installation of ducts along the entirety of the onshore cable route from Happisburgh to the Necton National Grid connection and overhead line modifications.

37. Chapter 4 of the ES addressed NVL's site selection process. This was summarised in paragraphs 4.4.5 to 4.4.8 of the ExAR. The offshore location was limited to areas within the East Anglia Zone which formed part of the Crown Estate's Round 3 Offshore Wind Farm development process. The developer adopted a strategic approach to Vanguard and Boreas, which included site selection based on the co-location of both projects. An iterative process resulted in the identification of the most suitable locations, having regard to technical constraints and environmental impacts. Following the identification of the offshore areas for Vanguard and Boreas, site selection addressed offshore cable corridor routes and a landfall with the aim of avoiding "high level designations". Three potential landfall sites were identified, from which the one at Happisburgh was selected. Then, National Grid Electricity Transmission plc and NVL worked on the identification of a National Grid connection point. This led to a grid connection offer being made by National Grid plc which NVL accepted in November 2016. Following that exercise, the offshore cable corridor was further refined, and the landfall site was finally selected.

38. The design work on Vanguard and Boreas sought to achieve synergies between the two projects. So, ducts for both projects would be installed along the onshore cable route as part of the Vanguard works, reducing construction times and avoiding the need to reopen land at a later date to install ducts for Boreas.

39. All search areas for a National Grid connection point were identified on the basis that they should be capable of accommodating infrastructure for connections by *both* Vanguard and Boreas (Chapter 4 of the ES paragraphs 4 and 47 and table 4.1). The working width of the cable corridor during construction is up to 45m. A width of 20m is required permanently for the majority of that route. Land acquisition under the Vanguard DCO includes land needed for works to connect Boreas cables to the National Grid (see paragraphs 7.7.6, 7.7.9 and 7.7.37 of NVL's Statement of Reasons for compulsory purchase powers in the DCO).

40. NVL further explained their approach in a document entitled "A strategic approach to selecting a grid connection point for Norfolk Vanguard and Norfolk Boreas" (October 2018). Paragraph 11 stated: -

> "From the outset of development, it was clear to VWPL that it would be more efficient to take a strategic approach to developing the projects. Geographically the projects are close to each other and therefore, the co-location of both projects offers opportunities to explore synergies that might reduce development and operations costs and reduce both regional and local impacts"

Paragraph 18 added that NVL elected to seek common connection points to the National Grid for both Vanguard and Boreas. Paragraph 12 explained that the development programmes for the two projects were only a year apart.

41. Schedule 1 to the DCO defines the works authorised by the Order. They include the two Vanguard substation buildings (Work No. 8A) and the Vanguard extension to the existing National Grid substation at Necton (Work No. 10A). Part 3 of the schedule sets out the "requirements" (which are analogous to conditions imposed on a planning permission) subject to which consent is granted by article 3. Requirement 16 sets out design parameters for onshore works. The area of the fenced compound for Work No. 8A must not exceed 250m by 300m. The total footprint of each of the two buildings in Work 8A must not exceed 110m by 70m and their height must not exceed 19m. The area of the fenced compound for Work No. 10A must not exceed 200m by 150m. The height of the external electrical equipment in Work No 10A may be up to 15m.

42. There was no dispute at the hearing that if Boreas were to be connected to the National Grid at Necton, it would require its own dedicated substation and an extension to the existing National Grid substation, both on a similar scale to the works proposed for Vanguard, along with the associated external electrical equipment. In broad terms the scale of development outside Necton would be doubled. On any view, the development proposed at Necton would be substantial.

Assessment of Cumulative Impacts

43. In November 2016 the Planning Inspectorate issued a Scoping Opinion for the ES that was to be submitted. It stated that, in the assessment of cumulative impacts, other major developments should be identified through consultation with relevant authorities, including projects in the National Infrastructure programme. Boreas was specifically identified in relation to the substation proposals at Necton. Although some cumulative landscape impacts were scoped out of the ES (e.g. offshore infrastructure), those relating to co-located substation development at Necton were not.

44. By the time the ES for the Vanguard project was submitted in June 2018, substantial progress had already been made on Boreas. Grid connection agreements at Necton had been entered into for Vanguard in July 2016 and Boreas in November 2016. The site selection process had already identified preferred substation footprints for both Vanguard and Boreas. The decision had been taken to use HVDC technology for both developments, determining the nature and scale of onshore infrastructure, including substations at Necton. The Boreas team had a pre-application meeting with the Planning Inspectorate on 24 January 2017, a request for a scoping opinion in respect of Boreas was made in May 2017 and the opinion issued in June 2017.

45. Indeed, paragraph 30 of chapter 33 of the Vanguard ES stated that in view of the request for a scoping opinion for Boreas, the "sister project" to Vanguard, Boreas was included in the cumulative impact assessment, adding: -

> "These projects have been considered for CIA only in those chapters where it is considered that the Scoping Reports contain sufficient detail with which to undertake a meaningful assessment."

Accordingly, where the Vanguard ES assessed cumulative impacts for that project together with Boreas, NVL considered that there was sufficient information available for that assessment to be carried out.

46. Table 33.3, dealing with projects included for cumulative impact assessment of onshore elements, stated that the "status" of the project data for Boreas in relation to landscape and visual impacts was "high". Paragraph 158 of chapter 29 of the ES, dealing with landscape and visual impact, stated:-

> "The development most relevant to the CIA for the Norfolk Vanguard onshore project substation and National Grid substation is the Norfolk Boreas onshore project substation and National Grid substation extension. The cumulative scenario considered in the assessment comprises these developments in the context of the existing Necton National Grid substation and Dudgeon substation."

47. Paragraph 23 of schedule 4 of the 2009 Regulations enables a developer to indicate in the ES any difficulties encountered in compiling the required information. Here there was no suggestion in the ES, or elsewhere, that NVL had found any difficulties in providing information on cumulative visual and landscape impacts from the Vanguard and Boreas developments at Necton. That issue was never raised during the examination. NVL's position did not change on this point during the DCO process.

48. Chapter 29 of the ES followed a conventional approach for EIA. The objective was to identify any "significant effects" of the project on "the landscape and visual resource" (paragraph 22). This approach reflects recital (7) and Article 2(1) of Directive 2011/92/EU and regulations 2(1) and 3(2), together with schedule 4, of the 2009 Regulations. Paragraph 32 in chapter 29 of the ES stated that the guiding principle in preparing the cumulative impact assessment had been to focus on the likely significant impacts and, in particular, those likely to influence the outcome of the DCO process.

49. The ES explained that the significance of effects was assessed as a combination of (i) the sensitivity of the landscape or visual receptor and (ii) the magnitude of the change resulting from the project. To count as a "significant" effect, either the sensitivity or magnitude of change had to be assessed as being at least "high" or "medium/high". If both factors were assessed as "medium/low", "low", or "negligible", the effect was not treated as "significant".

50. The assessments of cumulative impacts were presented in table 29.17 of the ES and summarised in paragraph 174 of chapter 29: -

> "Table 29.17 shows the detail of the assessment for each receptor. In summary, the onshore project substation and National Grid substation extension for Norfolk Vanguard in conjunction with the onshore project substation and National Grid substation extension for Norfolk Boreas would have a significant cumulative effect on landscape character in the localised parts of the Settled Tributary Farmland LCT – River Wissey Tributary Farmland LCU and Plateau Farmland LCT – Beeston Plateau LCU and Pickenham Plateau LCU but would not have significant effects on the remaining parts and all other LCUs. In respect of the representative viewpoints, significant cumulative effects would arise from Lodge Lane to the immediate south of the site and a very localised section of Ivy Todd Road to the south-west. These effects would all occur within 1.2 km of the onshore project substation, making them localised."

It is to be noted that the term "localised" was simply used to describe effects occurring within 1.2 km of the substation development.

51. Mr Phillpot QC pointed out that language very similar to that in paragraph 174 was also used in another part of the ES to describe the effects of the Vanguard substation development. In my judgment that point is of little, if any, significance for two reasons. First, the term "significant" covers a range of effects involving varying degrees of harm. Thus, the broad categorisation of an effect as "significant" does not mean that solus and cumulative effects so classified are in fact equivalent. Second, the more detailed comments in the ES on cumulative impacts recognised, for example, the effects of the proposed "concentration of these large-scale energy developments" in a rural area. In any event, it should be noted that several objectors made representations during the examination that the cumulative impacts would be more harmful than had been assessed in the ES.

52. It became common ground during the hearing before me that the ES presented the same type and level of detail on the Vanguard and Boreas projects in order to assess the impacts on landscape and visual receptors, whether considering Vanguard in isolation or in combination with Boreas. In both cases the details provided were consistent with a "Rochdale envelope" approach.

53. The ES presented proposals for strategic landscape mitigation, including "embedded mitigation", for both the Vanguard substation development as a solus project and the Vanguard and Boreas schemes together (see e.g. section 4.5.14 in chapter 4, paragraph 175 and table 29.17 in chapter 29).

The Examination

54. Both the Claimant and other parties in the examination raised objections to the cumulative landscape and visual impacts of the Vanguard and Boreas projects.

55. The local planning authority, Breckland Council, submitted a Local Impact Report under s.60(3) of the PA 2008. When taking his decision, the Defendant was obliged to take this document into account (s.104(2)). Although it appears to have been supportive of

the principle of the Vanguard project, the Council did express substantial concerns about the substation development near Necton: -

> "The predicted change in the form of development is of considerable magnitude and size. It is considered that the proposed extension to the existing National Grid substation in Necton would appear as a disproportionate additional development in the countryside. By more than doubling the size of the floor area to cover 51,000 square metres supporting a built height of up to 15 metres would not usually be allowed by the Local Planning Authority except in very special circumstances. Adding to this the 75,000 square metre new substation for the 19 metre tall HVDC convertor station with higher lightning masts, (potentially together with the Boreas development), then land coverage comparable with the core centre of Necton itself, with structures extending much further into the air, would be the outcome.
>
> It is appreciated that the Applicant has gone to considerable lengths in assessing visibility and the photomontages produced are helpful. However, on the ground it would be extremely difficult to screen a development of this huge scale. This is defined as a national infrastructure project for a reason and it will appear disproportionately dominant against the landscape which is remote from Necton. The new structures would be of such a size that the perceived distance from the A47 would appear relatively short. This would be a prominent and obtrusive feature against the skyline.
>
> The cumulative landscape and visual effects of the development would create negative disbenefits in planning terms. The Secretary of State for Energy must therefore balance the advantages of this major renewable energy project with these negative effects."

Plainly these observations were directed at both solus and cumulative effects on what was described as a "sensitive landscape and visual resource."

56. A number of the parties made representations about the dominant and disproportionate effects of the proposed substation development for Vanguard and, even more so, the cumulative effects of both schemes. They included the Necton Substation Action Group, Necton Parish Council and individual objectors. They took issue with the impact assessment in the ES and they asked that the DCO be rejected because of the unacceptable impact of the substation development. For example, the Parish Council referred to the "huge magnitude" of the change to the area and objected to the development of the "largest substation in Europe" "beside a small village in a rural environment." Some objectors put forward alternatives for a connection to the National Grid away from Necton.

57. In its report the Examining Authority accepted that there is a strong need for the Vanguard project, supported by the NPSs. Vanguard would be one of "the biggest

offshore-wind projects in the world" and together with Boreas could prevent more than 4m tCO_2 from entering the atmosphere (paragraphs 4.2.13 to 4.2.15).

58. The Examining Authority reviewed alternative locations for onshore infrastructure, notably the connection point to the National Grid (ExAR paragraphs 4.4.9 to 4.4.33). It found that NVL had made reasonable decisions on alternatives after following an appropriate process. NVL had narrowed down the choice to three locations, Necton, Norwich Main and Eye. It appears that a connection at Eye was unlikely to be achievable "within the required time-frames". Necton was then preferred because of the greater "environmental and other implications" for Norwich Main.

59. The Examining Authority noted the strongly held view of several participants that in view of the number of offshore wind farm projects coming forward in the region, there should be a strategic approach requiring contributions to an offshore ring main to avoid or reduce onshore environmental impacts. The Authority considered that because that would require co-ordination between projects, it was not an alternative which could be considered within the remit of an examination of a single offshore wind farm project. Although it is not apparent how well that reasoning sits with the requirements of the 2009 Regulations, particularly as the Examining Authority did consider elsewhere cumulative impacts resulting from a project being undertaken by an independent developer, no such argument was raised in the grounds of challenge. That is understandable in view of the way in which the Defendant discounted this particular alternative on the merits in his decision letter (see [71] below).

60. The Examining Authority summarised objections to landscape and visual impacts at Necton (paragraph 4.5.18 to 4.5.23 of the ExAR). It accepted that the Vanguard development could not be completely screened and would result in a material change to the landscape character and visual characteristics of the locality (paragraph 4.5.35). It noted that the substation location is not subject to any national or local landscape designations denoting a special sensitivity (paragraph 4.5.46). The Authority set out its assessments of the effects of the Vanguard substation development as a solus project at paragraphs 4.5.46 to 4.5.60 of the ExAR. It accepted that the impacts would be "localised" in that they would only occur within 1.2 km of the Vanguard substations (paragraphs 4.5.54 and 4.5.60). There would be no significant effects on the views of residents in Necton. The Examining Authority addressed the cumulative impacts of the proposed Vanguard buildings and came to the view that although members of the public "would be conscious of two large-scale energy plants in the locality", those "views would be localised and there would not be other views of the totality of the project" (paragraph 4.5.62 of the ExAR). It is common ground that these findings did not address the cumulative impacts of substation development at Necton for both Vanguard and Boreas.

61. Paragraphs 4.5.97 to 4.5.101 of the ExAR assessed cumulative impacts of Vanguard and another offshore wind farm project, Hornsea Project Three, ("Hornsea") located in the vicinity of the two Vattenfall projects. Hornsea was being brought forward simultaneously with Vanguard but by a different developer. The cable corridor for Hornsea linking to the National Grid at Norwich Main would cross the cable corridor for the Vattenfall projects at Reepham near the Claimant's home. On 1 July 2020 (the day on which the DCO for Vanguard was granted) the Defendant issued a decision letter stating that he was minded to grant a DCO for Hornsea, subject to the resolution of certain matters. The DCO was in in fact granted on 31 December 2020.

62. However, in paragraph 4.5.102 of ExAR the Examining Authority took a different approach to the assessment of the cumulative landscape and visual impacts of Vanguard and Boreas :-

> "Finally, whilst the Norfolk Boreas Offshore wind farm has been included in the Applicant's LVIA cumulative impact assessment, the ExA have not considered it in this part of the assessment due to the limited amount of details available. The ExA considers it would most appropriate for cumulative impacts to be considered in any future examination into Norfolk Boreas." (sic)

63. At paragraph 4.5.114 of the ExAR the Examining Authority said:-

> "The impacts of the development in landscape terms would be generally acceptable save for the localised harm to visual amenity in relation to the substation and associated works. In this respect the proposal would not be in full conformity with Breckland Core Strategy DP11 and DC15. Given the localised nature of the permanent harm the ExA ascribes limited weight to it in the overall planning balance."

This passage related solely to the effects of Vanguard in isolation and not the cumulative effects of Vanguard and Boreas. Nevertheless, it is plain that the solus effects were not regarded as being "acceptable". But purely because of the "localised effect" of the permanent harm that would be caused, the Examining Authority gave limited weight to this factor in the overall planning balance. Plainly, they left unresolved the issue as to how much harm would be caused (including harm within a radius of 1.2km) if both the Vanguard and the Boreas substation developments were to proceed and development on that scale were to take place in the vicinity of Necton.

64. The Examining Authority set out its analysis and conclusions on the Habitats Regulations Assessment under The Conservation of Habitats and Species Regulations 2017 (SI 2017 No. 1012) in chapter 6 of its report. It dealt with cumulative effects with the Boreas project, for example at paragraphs 6.7.167 to 6.7.181 of the ExAR. NVL had agreed with Natural England that these effects had to be considered so as to ensure that mitigation solutions would be compatible for both projects.

65. The Examining Authority set out its overall conclusion on the case for granting development consent in chapter 7 of its report. In relation to landscape and visual impacts the Authority concluded at paragraph 7.3.9: -

> "In terms of landscape effects there would be no significant effects upon landscape character or visual amenity other than for limited localised effects on visual amenity in the vicinity of the substation. Significant localised landscape character effects, as a result of the new substation and substation extension, would reduce to moderate after 10 years. Along the onshore cable route and at landfall any effects would be temporary and localised. Subject to the mitigation measures to be secured through the Requirements, the ExA concludes that proposal would accord

> with the policy requirements of NPS EN-1 and EN-3 and would not cause material harm to key characteristics protected by relevant development plan policies."

66. The Examining Authority struck the overall balance in paragraph 7.3.26:-

> "Many of the principal issues have been resolved to the satisfaction of the ExA or are capable of resolution subject to the recommended changes to the DCO. Excepting the offshore ecology matters, the ExA concludes that, in relation to all other matters, the Proposed Development would be in accordance with NPSs and national policy objectives. When these matters are taken into account the ExA concludes that, in a general planning balance the benefits of the scheme in terms of the large-scale generation of renewable energy and its contribution to sustainable development objectives substantially outweigh the limited harms which have been set out above."

67. In chapter 10 of its report, the Examining Authority summarised its conclusions for the purposes of applying the provisions in s.104 of the PA 2008. They were in line with their conclusions in chapter 7.

The Decision Letter

68. The Defendant's decision letter mainly summarised and accepted the conclusions of the Examining Authority.

69. The Defendant regarded the contribution which would be made to the decarbonisation of the electricity generation sector as a significant benefit (DL 3.5). DL 4.3 referred to the policy in EN-1 that the assessment should begin with a presumption in favour of granting development consent for electricity generating stations in general and offshore wind farms in particular (DL 4.3 and 4.4). The Defendant added: -

> " granting development consent for the Development would be consistent with government policy and will contribute to the delivery of low-carbon and renewable energy, ensuring a secure, diverse and affordable energy supply in line with legal commitments to "net zero" and the need to address climate change. "

70. The Defendant assessed alternatives at DL 4.5 to 4.11. He agreed with the Examining Authority that NVL had undertaken a reasonable process for considering alternatives when finalising its site options (DL 4.10).

71. As to the suggestion that an offshore ring main be considered, the Defendant concluded at DL 4.11: -

> "Whilst discussions are taking place in respect of the future shape of the offshore transmission network, such discussions are at the preliminary stage. The Secretary of State considers that he must assess the Development in line with current policy as set

> out in the National Policy Statements. He does not consider that the decision should be delayed to await the outcome of the discussions on the offshore transmission network given the urgent need for offshore wind development as identified in the National Policy Statements."

72. The Defendant summarised the views of the Examining Authority on landscape and visual impacts at DL 4.12 to 4.49. He noted that the substation location is not within any designated landscape area (DL 4.27). In DL 4.46 the Defendant referred to the Authority's conclusions on cumulative impact in ExAR 4.5.102:-

> "The ExA notes that, while the Applicant's Landscape and Visual Impact Assessment cumulative assessment included the proposed Norfolk Boreas offshore wind farm, it was not considered by the ExA because of the limited information available on that project. The ExA concluded, therefore, that this matter should be considered in the future as part of the examination of the development consent application for the Norfolk Boreas offshore wind farm."

73. In DL 7.4 the Defendant stated: -

> "The Secretary of State notes that there were a range of views about the potential impacts of the Development with strong concerns expressed about the impacts on, among other things, the landscape around the substation, traffic and transport impacts and potential contamination effects at the site of the F-16 plane crash. However, he has had regard to the ExA's consideration of these matters and to the mitigation measures that would be put in place to minimise those impacts wherever possible. The Secretary of State considers that findings in the ExA's Report and the conclusions of the HRA together with the strong endorsement of offshore wind electricity generation in NPS EN-1 and NPS EN-3 mean that, on balance, the benefits of the proposed Development outweigh its adverse impacts. He, therefore, concludes that development consent should be granted in respect of the Development."

74. In DL 8.4 the Defendant dealt with a post-examination representation from a member of the public proposing an alternative location for the Vanguard substations: -

> "A member of the public wrote to suggest that the Secretary of State should seek to move the site of the Necton substations to a new site in the vicinity to lower its visual impact. However, the proposed location would need to be subject to a new application for consent (as it does not form part of the Application submitted by the Applicant) and the ExA considered that the locations of the substations proposed by the Applicant were acceptable (while acknowledging that there would be localised visual impacts). In this situation, the Secretary of State does not believe

> that there is any need to consider an alternative location where an existing proposal is acceptable."

The grounds of challenge: a summary of the parties' submissions

75. I am grateful to all counsel for their clear and helpful written and oral submissions. In this section I simply give a brief summary of those submissions to provide context for the conclusions I reach.

76. Mr Westaway submitted that the Defendant had unlawfully excluded from consideration the cumulative landscape and visual impacts of Vanguard and Boreas in the Necton area. He expressed this initially as a breach of regulation 3(2) of the 2009 Regulations, alternatively a failure to determine the application in accordance with policies in the NPSs (see s.104(3) of the PA 2008), or a failure to take into account an obviously material consideration (see the *CREEDNZ* line of authority). He pointed out that the ES itself had treated Boreas as a relevant project for the purposes of assessing the environmental impact of Vanguard, not least because of co-located and shared infrastructure, notably the 60 km cable corridor from Happisburgh to Necton and the National Grid connection points there. The ES assessed the cumulative landscape and visual impacts on the basis that there was sufficient information available on Boreas to enable that exercise to be carried out. It had arrived at the conclusion that the impacts were significant.

77. Mr Moules submitted for the Defendant (and Mr Phillpot QC adopted his submissions on behalf of NVL) that in this case the Defendant did take into account the material on cumulative impacts, but, because of the limited information available on Boreas, he deferred his decision on how those impacts should be evaluated and weighed to the DCO process on Boreas.

78. The Claimant submits that that decision was irrational. The same type and amount of information was available for Boreas as for Vanguard and yet the solus effects of the latter were assessed by the Defendant in his decision. The lack of information is the sole reason given for the decision to defer, but this was not raised by the Examining Authority during the examination, nor by any participant. So, it is not possible to identify any other explanation from that process. NVL plainly did not consider that the material they had provided on cumulative impacts was inadequate so that those impacts could not be assessed in the decision on the Vanguard DCO. The shared infrastructure and co-location aspects (including combined mitigation) of the two "sister" projects made it necessary for cumulative impacts to be assessed in the decision on the Vanguard DCO. Any deficiencies in the material provided should have been identified by the Examining Authority so that additional information could be requested under regulation 17 of the 2009 Regulations or rule 17 of the 2010 Rules.

79. Mr Westaway reinforces his submission by drawing attention to the effect of the decision to grant the Vanguard DCO on decision-making on the Boreas proposal. By the time the examination of the Boreas application began, the Vanguard DCO had become part of the baseline for the assessment of the environmental impacts of Boreas. Moreover, it would be said in the examination of Boreas, that that proposal should be judged on the basis that Vanguard had already been found to be acceptable. In other words, the decision on Vanguard has a "precedent" effect. He points to a Vattenfall document in the Boreas examination entitled "Implications of the Norfolk Vanguard Decision and

Hornsea Three Letter on Norfolk Boreas," where the promoter relies on the similarities of its two projects and says that the Defendant would need to give very clear reasons for departing from his decision on Vanguard. At paragraph 2.2 the promoter relies upon the "consistency" principle established in the line of authorities beginning with *North Wiltshire District Council v Secretary of State for the Environment* (1993) 65 P & CR 137. The document relies upon "principles" which are common to both Vanguard and Boreas, including the sharing of the same cable corridor and the similarity of the substation development at Necton to achieve a connection to the National Grid. Mr Westaway says that the cumulative effects of both projects upon landscape and visual receptors in the Necton area were not evaluated and weighed by the Defendant before he granted consent for the first project, which decision has a significant "precedent" effect in the determination of the Boreas DCO application.

80. Under ground 2, the Claimant relies essentially upon the same arguments and submits that the reasons given by the Examining Authority and the Defendant on the cumulative impact issue were legally inadequate. Nothing was said as to why the information provided was insufficient, so that any inadequacy could be remedied, whether in the examination of Vanguard or of Boreas. Nothing was said as to why it was thought appropriate to defer the cumulative assessment, other than the unexplained "limited information" on Boreas. This is a case where the inadequacy of the reasoning creates a substantial doubt as to whether the decision-maker has erred in law (*South Bucks District Council v Porter (No. 2)* [2004] 1 WLR 1953 at [36]).

81. Mr Moules submitted that the Defendant has complied with regulation 3(2) of the 2009 Regulations. He did take into account the environmental information on the cumulative impacts, but he decided that it was unnecessary to evaluate that material in reaching a decision on whether the application for the Vanguard DCO should be granted, because only limited information on Boreas was available at that stage and because he judged that such cumulative effects would most appropriately be considered as part of the Boreas examination (paragraphs 46-47 of skeleton). Regulation 3(2) allows a decision-maker to note the existence of certain environmental information but to decide that it need not be an input into the determination of the application. There is no obligation to take into account or weigh every piece of environmental information when reaching that decision.

82. Mr Moules sought to support those submissions by relying upon the context for the decision on the Vanguard DCO. It was important for projects such as Vanguard to be approved without delay, and that decision should not be held up to enable cumulative effects to be assessed, particularly where the solus impacts of the Vanguard proposal did not affect any designated landscape area and were judged to have "limited weight", albeit they had been categorised as "significant effects." Mr Moules submitted that a deferral of the cumulative assessment to the Boreas examination would also enable the overall benefits of the two projects to be properly weighed in the balance against any disbenefits.

83. Mr Phillpot QC submitted that the extent of the "Rochdale envelope" and mitigation for the Boreas application would be matters for the examination of that project. By contrast the material put forward in the Vanguard application on Boreas involved the making of assumptions about that project.

84. On the issue of whether the Defendant's judgment to defer consideration of cumulative impacts was irrational, Mr Phillpot QC asked the court to compare how the assessment of those impacts would differ in the separate examinations of the two projects. It is only the subsequent Boreas examination which could result in the authorisation of any cumulative impacts arising from the two projects after having determined their acceptability. If those impacts are unacceptable Boreas would be refused. If, however, they could be made acceptable by additional mitigation, that would be dealt with by imposing a "requirement" in the DCO granted for Boreas. The circumstances of the examination of Vanguard were different. That process could not have authorised cumulative impacts arising from both projects, irrespective of whether they were judged to be acceptable or unacceptable.

85. Mr Phillpot QC laid emphasis on the fact that the Defendant found the Vanguard proposal to be acceptable, leaving only to one side the cumulative impacts on landscape and visual resources at Necton. He submitted that, if instead those cumulative impacts had been taken into account and resulted in the refusal of consent for Vanguard, that would have been nonsensical if subsequently Boreas were to be refused on other grounds. Furthermore, if the solus effects of Vanguard were judged to be acceptable, but cumulative impacts with Boreas found to be unacceptable, that could not justify restricting the "Rochdale envelope" for the Vanguard project when granting development consent.

86. Mr Moules adopted those submissions to explain why it had been considered "most appropriate" to defer consideration of cumulative impact to the Boreas examination. But both he and Mr Phillpot QC accepted that this analysis could not be treated as a set of principles of general application. Instead, the analysis is sensitive to the circumstances of each case. He accepted that no such reasoning had been set out in the ExAR or in the decision letter, but submitted that the court should draw the inference that it had been in the mind of the Examining Authority and also the decision-maker. He relied upon the findings on the national need for Vanguard, the urgency of that need, the express rejection of alternatives and the acceptability of the solus impact of Vanguard.

Discussion

Introduction

87. Many challenges concerned with EIA allege a failure to address a particular subject in the ES. It is well-established that the judgment of the decision-maker on the adequacy of an ES may only be challenged on *Wednesbury* grounds (*Friends of the Earth* [2020] UKSC 52 at [142] to [143]). In the present case there is no such dispute. The ES did deal with the subject at the heart of this challenge. Moreover, NVL did not suggest that they had encountered any difficulties in compiling information on cumulative impacts (paragraph 23 of schedule 4 to the 2009 Regulations). It did not ask for the consideration of cumulative impacts to be deferred to the subsequent examination of the Boreas application, whether that would be the "most appropriate" course of action, or because there was a limited amount of information available on Boreas, or for any other reason. Nor did any other participant in the examination raise any such matters.

88. The court was told that the first time that the view contained in paragraph 4.5.102 of the ExAR was revealed was when that report was published along with the decision letter on 1 July 2020. Up until then, participants in the examination had no reason to think that

cumulative landscape and visual impacts would not be addressed in the ExAR and the decision letter, just as other cumulative impacts were. I am in no doubt that, in terms of the legal obligation on the Secretary of State to give reasons for his decision, the evaluation of cumulative landscape and visual impacts in the Necton area resulting from the Vanguard and Boreas grid connections was one of the important, controversial issues which had to be addressed in the decision on the Vanguard DCO, applying the test in *South Bucks District Council* at [27] and [36].

89. I note that the Claimant has not argued that the process followed was unfair because what emerged as paragraph 4.5.102 of the ExAR had not been raised beforehand. On the other hand, the fact that the points made by the Examining Authority were not raised before their report was published along with the decision letter means that their reasoning cannot be explained by what took place during the examination. Neither the Defendant nor NVL suggested otherwise. The Defendant has not filed any evidence to explain (in so far as might have been admissible) how paragraph 4.5.102 of the ExAR, or indeed DL 4.46, came about.

90. A number of points are common ground between the parties. First, in his decision letter the Defendant relied upon the conclusions of the Examining Authority in paragraph 4.5.102 of the ExAR without having the benefit of any further explanation from that Authority. Second, the Defendant did not find that the cumulative impacts at Necton, which the ES had identified as significant adverse effects, were of no significance and therefore could be set to one side for that reason. This stands in stark contrast, for example, to the combined visual effects of the offshore arrays proposed for Vanguard and Boreas which were screened out of the ES because they were judged not to be significant. Third, the Defendant has accepted that the cumulative effects at Necton do need to be assessed and weighed in a decision on consenting under the PA 2008, but has deferred that evaluation entirely to the decision on the application for the Boreas DCO.

The issues

91. It is convenient to deal with grounds 1 and 2 together. They give rise to three issues which I will address in the following order: -

    (i) Did the Defendant's decision not to evaluate the cumulative impacts at Necton when determining the application for the Vanguard DCO breach the 2009 Regulations?

    (ii) In any event, was the Defendant's decision not to do so irrational?

    (iii) In any event, did the Defendant fail to give legally adequate reasons in relation to this issue?

    Neither the Defendant nor NVL disputed that if the Claimant should succeed on any one of these issues, the Defendant's decision to grant the Vanguard DCO was unlawful. But they submitted that in those circumstances it would be necessary for the court to consider a further issue, namely whether the quashing order sought by the Claimant should be granted or refused.

92. Mr Westaway accepted that his alternative arguments under ground 1, that the Defendant had been obliged to assess the cumulative impacts by virtue of NPS policy and s.104(3)

of the PA 2008, or because they were "obviously material" added nothing to the legal merits of the Claimant's argument. This is because they each depend upon the Claimant establishing that the Defendant's decision on this aspect was irrational.

93. Before going on to address the issues, it is necessary to deal with the difference between the reasoning of the Examining Authority and the Defendant. As Mr Moules said, there were two strands to the reasoning of the Authority. First, they considered the amount of detail available to be limited. Second, they thought it would be "most appropriate" for those impacts to be considered in the Boreas examination. However, they did not give any explanation of either factor to assist the Defendant in coming to a view on whether he should accept their judgment.

94. Ultimately, however, it is the Defendant's reasoning which matters for the purposes of determining this legal challenge. The Defendant only dealt with the deferral point in DL 4.46. The court has nothing else to go on, the topic not having been discussed during the examination. The Defendant has not simply said that he agreed with the Examining Authority. Instead, he has relied upon his own formulation as expressed in DL 4.46. The Defendant merely stated that the cumulative impacts should be considered in the Boreas examination because of the limited information available on that project. The Defendant's use of the word "therefore" makes it plain that the information on Boreas is the only reason he gave as to why the evaluation of the cumulative impacts should be deferred. But like the Authority, he has not given any clue as to why he considered the information available on Boreas to be "limited".

Was there a breach of the 2009 Regulations?

95. I accept the Defendant's submission that the 2009 Regulations did not require him to weigh every single piece of "environmental information" when deciding whether or not to grant development consent. But the material on cumulative impacts at Necton was not just any piece of environmental information. NVL's position was that they amounted to significant adverse environmental impacts falling within schedule 4. The Defendant did not disagree with that view. Furthermore, this information concerned an important controversial issue during the examination which had to be addressed by the Defendant through legally adequate reasoning as part of the reasons for his decision.

96. It is necessary to consider whether a decision to defer an evaluation and weighing of such impacts may in itself amount to a breach of the 2009 Regulations, in particular regulation 3(2).

97. I return to Directive 2011/92/EU. Recital (7) states: -

> "Development consent for public and private projects which are likely to have significant effects on the environment should be granted only after an assessment of the likely significant environmental effects of those projects has been carried out. That assessment should be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the public likely to be concerned by the project in question."

98. Article 1 of the Directive provides: -

> "This directive shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment."

99. Article 2 of the Directive provides (inter alia): -

> "1. Member States shall adopt all measures necessary to ensure that before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. Those projects are defined in Article 4.
>
> 2. The environmental impact assessment may be integrated into the existing procedure for consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of this Directive. "

100. Article 3 requires the EIA to "identify, describe and assess in an appropriate manner in the light of each individual case, and in accordance with Articles 4 to 12, the direct and indirect effects of a project" on a number of features including "the landscape."

101. Article 5(1) sets out requirements linked to Annex IV for the content of an ES to be provided by a developer: -

> "In the case of projects which pursuant to Article 4, are to be made subject to an environmental impact assessment in accordance with this Article and Article 6 to 10, Member States shall adopt the necessary measures to ensure that the developer supplies in an appropriate form the information specified in Annex IV in as much as:
>
> (a) the Member States consider that the information is relevant to a given stage of the consent procedure and to the specific characteristics of a particular project or type of project and of the environmental features likely to be affected;
>
> (b) the Member States consider that a developer may reasonably be required to compile this information having regard, inter alia, to current knowledge and methods of assessment."

102. It will be noted that paragraphs (a) and (b) provide criteria for making a judgment in each individual case as to the extent to which the items listed in Annex IV should be provided in an ES.

103. However, Article 5(3) of the Directive sets out minimum requirements for the content of an ES: -

> "The information to be provided by the developer in accordance with paragraph 1 shall include at least:

(a) a description of the project comprising information on the site, design and size of the project;

(b) a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects;

(c) the data required to identify and assess the main effects which the project is likely to have on the environment;

(d) an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects;

(e) a non-technical summary of the information referred to in points (a) to (d)."

104. That distinction between the obligatory and discretionary contents of an ES has been reflected in the definition of "environmental statement" in regulation 2(1) of the 2009 Regulations (see [19] above) and the two parts of schedule 4 to those regulations (see [20] to [21] above). The judgment as to *whether* a topic falling within part 1 of schedule 4 should be addressed in an ES is a matter for the authority responsible for deciding whether development consent should be granted. The *extent* to which the ES should contain information on any of the topics listed in either part 1 or part 2 of schedule 4 is also a matter for the judgment of that same authority. The authority has the power to require additional information to be provided by the developer (Article 6(2) of the Directive and regulation 17 of the 2009 Regulations).

105. Article 8 of Directive 2011/92/EU requires the information gathered and the results of consultation under articles 5, 6 and 7 to be taken into consideration in the development consent procedure. That is an obligation imposed on the decision-maker. That is how regulation 3(2) of the 2009 Regulations has transposed article 8 (see [17] above).

106. Article 9 of the Directive has been transposed by regulation 23 of the 2009 Regulations (see [24] above). The decision-maker is required to make available to the public a description of (inter alia) the "main measures" to mitigate "the major adverse effects of the development". That requirement cannot be satisfied without the decision-maker evaluating those effects in his decision. This analysis aligns with the developer's obligation in Article 5(3) of the Directive and part 2 of Schedule 4 to the 2009 Regulations to include in the ES "the data required to identify and assess the main effects which the development is likely to have on the environment."

107. The parties agree that in this area of the law, Directive 2014/52/EU is substantially to the same effect as Directive 2011/92/EU. Recital (34) of the 2014 Directive does not indicate any intention to alter the law on decision-making significantly. The 2011 Directive is amended by the insertion of Article 8a. This has been transposed by regulations 21 and 30 of the 2017 Regulations. The decision-maker must (inter alia) reach a "reasoned conclusion" on "the significant effects of the project on the environment", taking into account his examination of the environmental information, and describe any measures to mitigate "likely significant adverse effects" on the environment. Those matters must be published (regulation 31). In my judgment, these parts of the 2017 Regulations simply express more clearly that which was already necessarily implicit in the 2009 Regulations. The drafting alteration from "main effects"

to "significant effects" does not involve any significant alteration of the law. It only confirms that the rules on decision-making are aligned with the requirement that the process of EIA includes an assessment by the decision-maker of the likely significant effects of a project on the environment and the measures to mitigate those effects. In this way the legislation gives effect to the objective set out in recital (7) and the requirements in articles 1, 2 and 8 of Directive 2011/92/EU (see [98] to [100] and [105] above). Sullivan J (as he then was) adopted essentially the same approach in *ex parte Milne* at [104] and [113] when commenting on schedule 3 to SI 1988 No. 1189.

108. Although it is a matter of judgment for the decision-maker as to what are the environmental effects of a proposed project and whether they are significant, EIA legislation proceeds on the basis that he is required to evaluate and weigh those effects he considers to be significant (and any related mitigation) in the decision on whether to grant development consent (see e.g. *Commission v Ireland* [2011] Env. L.R. 478). It follows that if the decision-maker considers that a particular effect is not significant, he is not obliged to weigh that matter in his decision on whether or not development consent should be granted. Whether he need explicitly state that conclusion or give reasons for it will depend on the circumstances. For example, the matter may have been treated in the ES and by the parties as a significant environmental effect and become an important controversial issue in the examination. Subject to complying with any obligation to give reasons that may arise, a decision-maker's conclusion that an effect is not significant may only be challenged in the courts on *Wednesbury* grounds.

109. The next issue is whether consideration of an environmental effect can be deferred to a subsequent consenting process. If, for example, the decision-maker has judged that a particular environmental effect is not significant, but further information and a subsequent approval is required, a decision to defer consideration and control of that matter, for example, under a condition imposed on a planning permission, would not breach EIA legislation (see *R v Rochdale Metropolitan Borough Council ex parte Milne* [2001] Env. L.R. 406).

110. But the real question in the present case is whether the evaluation of an environmental effect can be deferred if the decision-maker treats the effect as being significant, or does not disagree with the "environmental information" before him that it is significant? A range, or spectrum, of situations may arise, which I will not attempt to describe exhaustively.

111. In some cases, the decision-maker may be dealing with the environmental implications of a single project. In *R v Cornwall County Council ex parte Hardy* [2001] Env. L.R. 473 the court held that the local planning authority had not been entitled to grant planning permission subject to a condition which deferred a requirement for surveys to be carried out to identify whether a European species would be adversely affected by the development. The authority could only have decided that it was necessary for the surveys to be carried out and additional data obtained because they had thought that the species might be present and harmed. It was possible that that might turn out to be the case and so, in granting planning permission, the authority could not rationally have concluded that there would be no significant adverse effects in the absence of that data. Consequently, they were not entitled to defer that decision ([61] to [62]).

112. In other cases, it may be necessary to decide whether associated works form part of a single project. Once that decision is made, it may be obvious that consideration of the environmental effects of the associated works cannot be deferred. In *R (Brown) v Carlisle City Council* [2011] Env. L.R. 71 the Court of Appeal held that where the acceptability in planning terms of a proposal for a freight distribution centre was contingent upon the provision of improvements to the runway and terminal at Carlisle Airport (which was reflected in a planning obligation under s. 106 of the Town and Country Planning Act 1990), the airport improvements formed part of the overall project comprising the distribution centre. Consequently, the EIA was required to assess the cumulative environmental effects of that overall project and not just the distribution centre. That was the only rational conclusion ([25]). The fact that the airport improvements were to be dealt with in a separate planning application was nothing to the point. As Lindblom LJ explained in *Preston New Road Action Group v Secretary of State for Communities and Local Government* [2018] Env. L.R. 440, the airport works formed an integral part of the overall project which included the distribution centre. The environmental assessment of the airport works could not be deferred to a subsequent consenting procedure because they were intrinsic to the decision as to whether any part of the project should go ahead.

113. In some cases where the decision-maker is dealing with a single project, the issue of whether the evaluation of significant environmental effects may be deferred has not been so straightforward. For example, a project for the laying out of a residential or business estate may evolve over a number of years in a series of phases, led by changing market demand. At the outset planning permission may be sought in outline. In such cases there is a risk that if outline planning permission is granted for a proposal lacking in detail, significant adverse environmental impacts may only be identified at the reserved matters stage when the authority is powerless to go back on the principle of the development already approved and so cannot prevent it from taking place. A decision to defer the evaluation of a significant adverse effect and any mitigation thereof to a later stage may therefore be unlawful *(R v Rochdale Metropolitan Borough Council ex parte Tew* [2000] Env. L.R. 1, 28-31).

114. In order to comply with the principle identified in *Commission v Ireland*, and illustrated by *Tew* and *Hardy*, consideration of the details of a project defined in an outline consent may be deferred to a subsequent process of approval, provided that (1) the likely significant effects of that project are evaluated at the outset by adequate environmental information encompassing (a) the parameters within which the proposed development would be constructed and operated (a "Rochdale envelope"), and (b) the flexibility to be allowed by that consent and (2) the ambit of the consent granted is defined by those parameters (see *ex parte Milne* at [90] and [93] to [95]). Although in *Milne* the local planning authority had deferred a decision on some matters of detail, it had not deferred a decision on any matter which was likely to have a significant effect (see Sullivan J at [126]), a test upon which the Court of Appeal lay emphasis when refusing permission to appeal (C/2000/2851 on 21 December 2000 at [38]). Those matters which were likely to have such an effect had been adequately evaluated at the outline stage.

115. Sullivan J also held in *ex parte Milne* that EIA legislation plainly envisages that the decision-maker on an application for development consent will consider the adequacy of the environmental information, including the ES. He held that what became regulation

3(2) of the 2009 Regulations imposes an obligation on the decision-maker to have regard to a "particularly material consideration", namely the "environmental information". Accordingly, if the decision-maker considers that the information about significant environmental effects is too uncertain or is inadequate, he can either require more detail or refuse consent ([94] to [95] and [106] to [111]). I would simply add that the issue of whether such information is truly inadequate in a particular case may be affected by the definition of "environmental statement", which has regard to the information which the applicant can "reasonably be required to compile" (regulation 2(1) of the 2009 Regulations - see [19] above).

116. The principle underlying *Tew, Milne* and *Hardy* can also be seen in *R (Larkfleet Limited) v South Kesteven District Council* [2016] Env. L.R. 76 when dealing with significant cumulative impacts. There, the Court of Appeal held that the local planning authority had been entitled to grant planning permission for a link road on the basis that it did not form part of a single project comprising an urban extension development. The court held:-

(i) What is in substance and reality a single project cannot be "salami-sliced" into smaller projects which fall below the relevant threshold so as to avoid EIA scrutiny ([35]);

(ii) But the mere fact that two sets of proposed works may have a cumulative effect on the environment does not make them a single project for the purposes of EIA. They may instead constitute two projects the cumulative effects of which must be assessed ([36]);

(iii) Because the scrutiny of the cumulative effects of two projects may involve less information than if they had been treated as one (e.g. where one project is brought forward before another), a planning authority should be astute to see that the developer has not sliced up a single project in order to make it easier to obtain planning permission for the first project and to get a foot in the door for the second ([37]);

(iv) Where two or more linked sets of works are properly regarded as separate projects, the objective of environmental protection is sufficiently secured by consideration of their cumulative effects in the EIA scrutiny of the first project, so far as that is reasonably possible, combined with subsequent EIA scrutiny of those impacts for the second and any subsequent projects ([38]);

(v) The ES for the first project should contain appropriate data on likely significant cumulative impacts arising from the first and second projects to the level which an applicant could reasonably be required to provide, having regard to current knowledge and methods of assessment ([29]-[30], [34] and [56]).

117. However, in some cases these principles may allow a decision-maker properly to defer the assessment of cumulative impacts arising from the subsequent development of a separate site not forming part of the same project. In *R (Littlewood) v Bassetlaw District Council* [2009] Env. L.R. 407 the court held that it had not been irrational for the local authority to grant consent for a freestanding project, without assessing cumulative impacts arising from future development of the remaining part of the site, where that development was inchoate, no proposals had been formulated and there was

not any, or any adequate, information available on which a cumulative assessment could have been based (pp. 413-5 in particular [32]).

118. I agree with Mr Westaway that the circumstances of the present case are clearly distinguishable from *Littlewood.* Here, the two projects are closely linked, site selection was based on a strategy of co-location and the second project has followed on from the first after a relatively short interval. They share a considerable amount of infrastructure, they have a common location for connection to the National Grid at Necton (the cumulative impacts of which are required to be evaluated) and the DCO for the first project authorises enabling works for the second. In the present case, proposals for the second project have been formulated and the promoter of the first project has put forward what it considered to be sufficient information on the second to enable cumulative impacts to be evaluated in the DCO decision on the first. This information was before the Defendant. I reject the attempt by NVL to draw any analogy with the circumstances in *Littlewood* (at [32]) or with those in *Preston New Road* (at [75]). In any event, the decision-maker in the present case, unsurprisingly, did not rely upon any reasoning of that kind in his decision letter (nor did the Examining Authority in the ExAR).

119. Instead, this case bears many similarities with the circumstances in *Larkfleet.* If anything, the ability to assess cumulative impacts from the two projects in the decision on the first project was much more straightforward here and the legal requirement to make an evaluation of those impacts decidedly stronger. First, the promoter carried out an assessment identifying significant cumulative effects at Necton and it is common ground that, for this purpose, essentially the same information was provided on the two projects (see e.g. [52] to [53] above). Second, there were strong links between the two projects which were directly relevant to this subject (see [118] above).

120. The effect of Directive 2011/92/EU, the 2009 Regulations and the case law is that, as a matter of general principle, a decision-maker may not grant a development consent without, firstly, being satisfied that he has sufficient information to enable him to evaluate and weigh the likely significant environmental effects of the proposal (having regard to any constraints on what an applicant could reasonably be required to provide) and secondly, making that evaluation. These decisions are matters of judgment for the decision-maker, subject to review on *Wednesbury* grounds. Properly understood, the decision in *Littlewood* was no more than an application of this principle.

121. In the Vanguard ES NVL assessed the cumulative landscape and visual impacts as being "significant". Neither the Examining Authority nor the Defendant disagreed with that judgment. Accordingly, this was not a case where deferral of the consideration of those impacts to a subsequent consenting procedure could have been lawful on the basis that the decision-maker considered these impacts to be insignificant (see *ex parte Milne*). The conclusion reached by the Examining Authority and the Defendant on the solus impacts of Vanguard cannot be used to support any such conclusion. Neither Mr. Moules nor Mr. Phillpot QC suggested otherwise. Thus, the court must proceed on the basis that the Defendant considered the cumulative impacts to be significant effects which still need to be evaluated in a decision on whether or not to grant development consent, albeit not in the decision granting the Vanguard DCO.

122. In the circumstances of this case, I am in no doubt that the Defendant did act in breach of the 2009 Regulations by failing to evaluate the information before him on the cumulative impacts of the Vanguard and Boreas substation development, which had

been assessed by NVL as likely to be significant adverse environmental effects. The Defendant unlawfully deferred his evaluation of those effects simply because he considered the information on the development for connecting Boreas to the National Grid was "limited". The Defendant did not go so far as to conclude that an evaluation of cumulative impacts could not be made on the information available, or that it was "inadequate" for that purpose. He did not give any properly reasoned conclusion on that aspect. I would add that because he did not address those matters, the Defendant also failed to consider requiring NVL to provide any details he considered to be lacking, or whether NVL could not reasonably be required to provide them under the 2009 Regulations as part of the ES for Vanguard. It follows the Defendant could not have lawfully decided not to evaluate the cumulative impacts at Necton in the decision he took on the application for the Vanguard DCO. For these reasons, as well as those given previously, the present circumstances are wholly unlike those in *Littlewood.*

123. For the reasons set out above, ground 1 must be upheld.

124. I have referred to the Defendant's submissions on the importance of avoiding delay to an urgently needed project of national importance. For completeness, I should add that the court was not shown any provision which would enable that factor to overcome any requirement under regulation 17 to obtain additional information, where a decision-maker considers that the details in the ES are inadequate for assessing likely significant adverse environmental effects. In any event, the Defendant's decision letter did not purport to approach the matter on that basis.

125. It is also necessary for the court to deal with irrationality and the legal adequacy of the reasoning in the decision letter. All of these issues are closely inter-related.

Rationality

126. If, contrary to my view, a decision-maker may, in the exercise of his judgment, depart from the general principle set out in [120] above, by deferring the evaluation of a significant adverse environment effect to a subsequent consenting procedure, he may only do so on grounds which:-

(i) are rational in the circumstances of the case; and

(ii) satisfy the objectives and requirements of EIA legislation.

127. Irrationality is not confined to decisions which simply defy comprehension, or which are beyond the range of reasonable responses to a given set of information. It also embraces decisions which proceed by flawed logic *(R v North and East Devon Health Authority ex parte Coughlan* [2001] QB 213 at [65]).

128. There is no dispute that Vanguard and Boreas are separate projects. They did not fall to be treated as a single project for the purposes of EIA legislation. This is not a case where, for example, the developer has sought to define the development for which he seeks permission so as to avoid EIA scrutiny. I also accept the submission of the Defendant and NVL that the proposals for Vanguard and Boreas have been made on the basis that the implementation of the Vanguard DCO is not dependent upon the approval or implementation of a DCO for Boreas. Accordingly, the present case should be distinguished from *Brown v Carlisle City Council.* But none of these points address the

true circumstances of this case (see e.g. [118] to [119] above) and so do not assist the Defendant and NVL in resisting this challenge to the DCO.

129. NVL included in the ES an assessment of cumulative landscape and visual impacts at Necton. They considered the information available on the two projects to be adequate for this purpose and they concluded that there were likely to be significant environmental impacts. No complaint has been made about the adequacy of the ES or of the environmental information subsequently gathered. The legal challenge in this case has simply arisen because, first the Examining Authority, and then the Defendant, decided to defer *any* evaluation of those cumulative impacts to the decision on the Boreas project. They did so without the point being discussed publicly during the examination process. They did so on the basis of reasoning which, even on a generous view, could only be described as cursory, despite the importance of the decision being taken and the substantial concerns which had been raised about the selection of Necton for co-located grid connections. A departure from the general principle set out in [120] required proper justification by the Defendant directed to the environmental information and the issues before him, *a fortiori* given the somewhat unusual circumstances of this case as described above.

130. The ES for Boreas was submitted in June 2019. Vattenfall's report on the interrelationship between the two projects explained that the Boreas ES considered two "scenarios" according to whether Vanguard either would or would not receive consent. In the former scenario, Boreas would rely upon the authorisation by the Vanguard DCO of the cable corridor and provisions at Necton (including land acquisition). In the latter scenario, the Boreas DCO was promoted on the basis that it would authorise all the works needed for that project. However, the legality of the decision letter dealing with the Vanguard DCO must be assessed in the context that it authorised shared infrastructure for both projects and, as Mr. Westaway demonstrated (and was not challenged), compulsory acquisition of land at Necton needed solely for the Boreas project. In these circumstances, the general principles in *Larkfleet* for linked projects are applicable. Absent any rational justification, cumulative impacts of both projects had to be evaluated by the decision-maker when considering whether to grant a DCO in each case, even accepting that in some cases less information about the second project may be available when deciding whether to approve the first.

131. It is inescapable that the only reason given by the Defendant for deferring *all* consideration of cumulative landscape and visual impacts to the Boreas examination was that the information available on Boreas was "limited". I am in no doubt that this bare statement was, in the circumstances of this case, illogical or irrational. It was common ground in the hearing before this court that the nature and level of information on the two projects for the purposes of assessing landscape and visual impacts of the substation development at Necton was essentially the same. Plainly, the Defendant must have proceeded on the basis that the information on the solus impacts of the Vanguard project was sufficient for him to be able to evaluate and weigh that matter. No basis has been advanced in these proceedings by either the Defendant or NVL for either (a) treating the adequacy of the environmental information on Boreas differently for an evaluation of the cumulative landscape and visual impacts or (b) not making *any* such evaluation *at all* in the Vanguard decision. The Defendant's decision is flawed by an obvious internal inconsistency. The decision was all the more perverse because, in accordance with *ex parte Milne*, NVL's approach employed a "Rochdale envelope" in order to cater for the

absence of more detailed information, for the evaluation of (a) the Vanguard solus impacts and (b) the cumulative impacts of both projects in the Necton area. The decision was also irrational in other respects.

132. There were a number of features which plainly required the cumulative impacts of the substations for both projects to be assessed as part of the Vanguard decision and not simply left over to the Boreas decision. The two projects had been based on a strategy of co-location. Necton and alternative locations for the essential connection to the National Grid were assessed for their ability to accommodate the substations and infrastructure needed for both Vanguard and Boreas. That was important, if not critical, to the decision to select Necton for the grid connection and to include in the Vanguard DCO authority for the provision of a 60 km cable corridor between Happisburgh and Necton to serve both projects and compulsory acquisition of some land at Necton for Boreas (which would need to satisfy a "compelling public interest" test). Consequently, consistency required the cumulative impacts of the substation development at Necton to be evaluated in the Vanguard decision. In the circumstances of this case, it was irrational for the Defendant to defer that evaluation.

133. If the cumulative impacts in the Necton area had been evaluated when considering the application for the Vanguard DCO, one possible outcome is that they would have been found to be unacceptable. That could have led the Defendant to decide that Necton was not an appropriate location to provide a grid connection for both projects, as intended by the developer, which would also call into question the appropriateness of the co-located cable corridor leading to that connection point. Even assuming that the Defendant would still have decided all the other issues in favour of the Vanguard proposal, it would have been permissible for him to refuse to grant the DCO on the basis that the location of a grid connection at Necton to serve both Vanguard and Boreas (and the related cable corridor) needed to be reconsidered by the developer. Plainly, that ought to be determined before granting consent for the first project. In that way the promoter could reapply or modify or even abandon its strategic co-locational approach before proceeding with either project. Here, the decision to leave that issue over to consideration of the DCO for the second project prevented that course from being taken.

134. Accordingly, there is nothing "nonsensical" in requiring cumulative impacts at Necton to have been evaluated in the Vanguard decision, even if that resulted in the refusal of a DCO for that project (see NVL's submission at [85] above). Any such outcome would simply be the corollary of NVL having chosen to rely upon a co-locational strategy and the common infrastructure involved. Such a choice may have advantages and disadvantages for the promoter, depending upon which of the two projects it decides to promote first and ultimately the Defendant's assessment of their respective merits. Even if DCO consent for a second project were to be refused on other grounds, that would not render absurd the rejection of a co-location strategy advanced in a DCO application for a first project on the grounds of cumulative impact. At the very least, it would remain open to the promoter to submit a further DCO application for that first project. Unlike the situation discussed in [133] above, that outcome would not be prejudiced or pre-empted. Given that NVL itself assessed cumulative impacts in the Vanguard ES, the submission it now makes against those impacts forming a basis for refusal of the Vanguard application which the ES accompanied is, to say the least, surprising.

135. The Defendant has decided that the cumulative impacts at Necton should be assessed solely in the Boreas examination and decision and not also in the Vanguard process, despite (1) the availability of information to enable him to make an evaluation of those impacts and (2) the Court of Appeal's judgment in *Larkfleet.* The Defendant's approach has had the effect, absent consideration of those cumulative effects, of making it easier to obtain consent for Vanguard, and providing a "foot in the door" making it easier to obtain consent for Boreas. Although there is no evidence that NVL sought those outcomes, the Vanguard DCO decision has had a "precedent effect" for decision-making in relation to Boreas upon which, understandably, NVL has relied heavily in the Boreas examination. In view of the familiar *North Wiltshire* line of authority on consistency in decision-making, these were highly likely, if not inevitable, consequences of the Defendant's decision to approve the DCO for Vanguard. These were obviously material considerations which went directly to the rationality of the decision.

136. These considerations underscore the absence of any rational justification in the Vanguard decision letter for refusing to make *any* evaluation of the cumulative impact issue at that stage. The single, perfunctory reason given for deferral, the limited amount of information available on Boreas, could not, in the circumstances of this case, justify by itself leaving the issue entirely to the second examination, particularly where the information was in front of the Defendant, NVL considered it to be adequate and no one suggested the contrary.

137. In any event, the Examining Authority and the Defendant had powers to obtain further information. Indeed, if the Authority had considered the application of regulation 17 of the 2009 Regulations and decided that additional material should have been included in the ES, they would have been obliged to require that information to be provided and suspend the examination in the meantime.

138. Even putting that regulation to one side, and looking at the matter more broadly in the context of rule 17 of the 2010 Rules, the Defendant's decision was unlawful. A bare, unexplained statement that the information on Boreas was "limited", without any attention being given to an obvious solution, namely to ask for more material, or at the very least to consider the pros and cons of taking that step, could not rationally justify departing from the requirement that the significant adverse cumulative impacts at Necton should be evaluated and weighed before deciding whether to grant a DCO for the first of the two linked projects.

139. The submissions by Mr. Moules and Mr. Phillpot QC in [82] to [83] above do not lend any support to their contention that the Defendant's decision to defer the cumulative impact issue was rational. They suffer from a number of flaws. First, there is no evidence that the points advanced by counsel were in the minds of the Examining Authority or of the Defendant, or that any of these matters had been raised during the examination and, therefore might have been taken into account by the decision-maker even tacitly. With respect, these submissions amounted to no more than an *ex post facto* justification of the decision, or, to put it more directly, an impermissible attempt to rewrite the ExAR and the decision letter. Second, even if those matters had been taken into account by the decision-maker, they do not overcome the points set out above as to why the decision to defer in this case was irrational. For example, it is common ground that the information on both projects was of the same nature and level of detail and so it was illogical, in any event, to treat the information on Boreas as inadequate when the decision-maker was content to rely upon that supplied on Vanguard.

140. The analysis by Mr Phillpot QC and Mr Moules of the differences between an assessment of cumulative impacts in the Vanguard examination as opposed to the Boreas examination (see [84] to [86] above) proves too much. The same approach could be applied to the consideration of the cumulative visual impacts of any two projects where the consenting of one is determined before the other. In other words, the analysis would amount to a set of legal principles. However, Mr. Phillpot QC and Mr Moules rightly eschewed that outcome. It would conflict with the 2009 Regulations and established case law (e.g. *Larkfleet*). But, as they accepted, the only way of avoiding that problem is to treat the points they made as depending upon the application of judgment to the circumstances of each case. But, of course, that judgment has to be made by the decision-maker and there is no evidence whatsoever, whether in the decision letter or elsewhere, that the Defendant had any of these considerations in mind, let alone that he decided how much weight to give to any of them. In any event, I am not persuaded that the analysis by counsel overcomes the various aspects of irrationality in the decision to defer as explained above.

141. For these additional reasons, ground 1 must be upheld.

Adequacy of reasons

142. From the discussion of the issues arising under ground 1, it is apparent that the reasons given for the decision to defer evaluation of cumulative impacts to the Boreas examination were legally inadequate. Having regard to the various matters discussed under ground 1 above, there must be, at the very least, a substantial doubt as to whether the decision was tainted by an error of public law, namely a breach of the 2009 Regulations and/or irrationality. For that reason alone, ground 2 must be upheld.

143. Furthermore, even if it be assumed that it was legally permissible to defer the evaluation of the cumulative impacts at Necton to the examination of the Boreas DCO application, any such decision had to be adequately reasoned. The bare statement in this case that the information on Boreas was "limited" did not come anywhere near discharging that requirement, particularly as the Boreas information did not differ materially from that available on Vanguard and no party had raised this suggestion during the examination. There was no explanation as to why an evaluation could not have been made by the Defendant in accordance with regulation 3(2) of the 2009 Regulations.

144. Furthermore, the decision letter gave no indication as to what was meant by "limited information" so that the issue could be addressed properly in the Boreas examination. As Mr. Moules rightly accepted, if the Vanguard application for a DCO had been refused because information for assessing cumulative impacts at Necton was thought to be "limited", without more, NVL would have been entitled to have that decision quashed. There is no reason why that flaw should be treated any differently by the court when the party prejudiced by the lack of reasons is an objector to the proposal (see e.g. *South Bucks District Council* at 30-32). None has been suggested. The objector has no real idea as to why the EIA process has not been completed in accordance with the 2009 Regulations. The Claimant and other objectors, especially those concerned about the cumulative impacts of substation development at Necton, cannot be adequately assured that the decision on deferral was taken on relevant and material grounds (see Lord Bridge in *Save Britain's Heritage v Number 1 Poultry Limited* [1991] 1 WLR 153, 170G).

145. For all these reasons, ground 2 must also be upheld.

Whether relief should be granted or refused

146. The Claimant is entitled to an order quashing the decision to grant the DCO unless there is any proper legal basis for the court to withhold that relief. The Defendant and NVL rely upon s.31(2A) of the Senior Courts Act 1981: -

> "The High Court—
>
> (a) must refuse to grant relief on an application for judicial review, and
>
> (b) may not make an award under subsection (4) on such an application,
>
> if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred."

147. Where a decision is flawed on a point of EU law, the bar for the withholding of relief is set higher than under s.31(2A) (see e.g. *R (Champion) v North Norfolk District Council* [2015] 1 WLR 3710 at [57] to [58]). Two recent cases have raised the issue whether section 31(2A) is overridden or disapplied by the EU legal test where the latter is applicable, without finding it necessary to decide the point *(R (XSWFX) v London Borough of Ealing* [2020] EWHC 1485 (Admin) and *Gathercole v Suffolk Country Council* [2020] EWCA Civ 1179).

148. I am grateful to Mr Moules for producing a very helpful note on these issues and the implications of the European Union (Withdrawal) Act 2018 and the European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 (SI 2020 No. 1525). Counsel for the Claimant and for NVL agreed with the note. In a nutshell, their agreed position is that the High Court is bound by EU retained case law to apply the more exacting EU law test where a challenge succeeds on an EU point of law.

149. Here the Claimant has succeeded in establishing a breach of the 2009 Regulations, as well as a domestic error of public law (irrationality) and a breach of the duty to give reasons (which straddles both EU and domestic law, the 2009 Regulations and the PA 2008).

150. Because I have reached the firm conclusion that, applying the test in s.31(2A) of the Senior Courts Act 1981, there is no justification for withholding the quashing order the Claimant seeks, the same would follow if I were to apply the EU law test.

151. The central issue under s. 31(2A) is whether, if the error identified by the court had not occurred, it is highly likely that the decision on whether or not to grant the DCO would not have been substantially different; in other words, the DCO would still have been granted. The arguments for the Defendant and NVL proceeded on the basis that the court should consider what would be "highly likely" to have happened if, in his

decision on the Vanguard DCO, the Defendant had evaluated cumulative impacts from the Necton infrastructure for both projects.

152. The Court of Appeal has laid down principles for the application of s.31(2A) in a number of cases, including *R (Williams) v Powys County Council* [2018] 1WLR 439; *R (Goring-on-Thames Parish Council) v South Oxfordshire District Council* [2018] 1 WLR 5161; and *Gathercole.* The issue here involves matters of fact and planning judgment, and so the court should be very careful to avoid trespassing into the Defendant's domain as the decision-maker, sometimes referred to as "forbidden territory" (see e.g. *R (Smith) v North Eastern Derbyshire PCT* [2006] 1 WLR 3315 at [10]). Instead, the court must make its own objective assessment of the decision-making process which took place. In this case it was common ground that the Court should consider whether the Defendant's decision would still have been the same by reference to untainted parts of the Defendant's decision (as in *Goodman Logistics Developments (UK) Limited v Secretary of State for Communities and Local Government* [2017] J.P.L. 1115).

153. Although the test in s.31(2A) is less strict than that which applies in the case of statutory reviews (see *Simplex GE (Holdings) Limited v Secretary of State for the Environment* [2017] PTSR 1041), it nevertheless still sets a high threshold. In *R (Plan B Earth) v Secretary of State for Transport* [2020] PTSR 1446 the Court of Appeal held at [273]: -

> "It would not be appropriate to give any exhaustive guidance on how these provisions should be applied. Much will depend on particular facts of the case before the court. Nevertheless, it seems to us that the court should still bear in mind that Parliament has not altered the fundamental relationship between the courts and the executive. In particular, courts should still be cautious about straying, even subconsciously, into the forbidden territory of assessing the merits of a public decision under challenge by way of judicial review. If there has been an error of law, for example in the approach the executive has taken to its decision-making progress, it will often be difficult or impossible for a court to conclude that it is "highly likely" that the outcome would not have been "substantially different" if the executive had gone about the decision-making process in accordance with the law. Courts should also not lose sight of their fundamental function, which is to maintain the rule of law. Furthermore. although there is undoubtedly a difference between the old *Simplex* test and the new statutory test, "the threshold remains a high one" (see the judgment of Sales LJ as he then was, in *R (Public and Commercial Services Union) v Minister for the Cabinet Office* [2018] ICR 269, para 89)."

154. Both the Defendant and NVL submitted that the decision was taken to grant the DCO for Vanguard after taking into account all material considerations, other than cumulative impacts at Necton, and after striking the balance in s.104(7) of the PA 2008. Accordingly, the question is whether if those cumulative impacts had been taken into account, the court is satisfied that it is highly likely that the Defendant would still have granted the DCO.

155. In support of their contention that the answer to that question is yes, the Defendant and NVL emphasised a number of conclusions in the decision letter, including the strength and urgency of the need for the development as set out in the NPSs, the benefits which would flow from the development, the rejection of alternatives, and the assessment that the solus impacts of the Vanguard substations on landscape and visual receptors would be localised (i.e. within a 1.2m radius) and attracted only limited weight.

156. However, the consequence of the legal errors made by the Defendant is that the court does not have any notion as to what the evaluation of cumulative impacts by the Defendant would have been if he had considered the matter. The court does not even have an idea as to how the Examining Authority evaluated the cumulative impacts, because they too decided not to do so. It would be impermissible for the court to make findings on that issue for itself. To do that would involve entering forbidden territory.

157. So instead, the court is being asked to deduce from the Defendant's conclusions on the solus impacts of the Vanguard development at Necton and the way in which the overall balance was struck that it is highly likely that the outcome would have been the same if the cumulative impacts had been evaluated as well.

158. In my judgment, there is a fundamental flaw in the argument relying upon s.31(2A) which cannot be overcome. It flies in the face of the conclusion which the Defendant actually reached, namely that he would not assess cumulative impacts at Necton because the information on Boreas was "limited". This criticism by the Defendant makes it impossible to deduce what his conclusion would have been if he had evaluated those impacts. But even if that point is put to one side, there are other flaws.

159. First, I note that when the Defendant struck the overall balance in DL 7.4, he said that "on balance" the benefits of the Vanguard development outweighed its adverse impacts, looking at the proposal as a whole. No indication was given as to how far those findings tilted the balance in favour of granting the DCO, not even in broad terms.

160. More importantly, the Defendant and NVL are inviting the court effectively to infer that because the ES assessed the cumulative impacts at Necton as falling within a radius of 1.2 km from the proposed substation, that impact would have been treated in the decision as "localised" and would therefore have attracted only "limited weight", just as the Examining Authority and the Defendant had evaluated the solus impacts of the Vanguard substations.

161. However attractively these submissions were presented, they cannot disguise the reality that the court is being asked to take on an inappropriate fact-finding role to supply conclusions which, unlawfully, are missing from the decision letter. This would conflict with the separation of powers between the courts and the executive, the "fundamental relationship" referred to in *Plan B Earth.*

162. This is illustrated by Mr. Westaway's submission, which I endorse, that if more development is concentrated within the 1.2 km radius (which itself is only an assessment tool), it does not follow that any so-called "localised effect" would attract only "limited weight". That argument could be repeated if the additional development within that area was substantially greater than even the doubling of the Vanguard substations which the Boreas project would entail. That would be nonsensical. Instead, the evaluation of the cumulative impacts is a matter for proper fact-finding by the person responsible for

taking the decision on the DCO, and not something capable of being deduced by a judge from the decision letter in this case.

163. The addition of further substation development is to some extent a matter of degree, but it also involves other considerations, such as the effect of the nature and scale of the development on the character of the rural area, including the village of Necton. In part, this comes back to the straightforward points made by Breckland Council in its Local Impact Report (which the Defendant was obliged to take into account under s.104(2) of the PA 2008) that the scale of the Vanguard and Boreas substation developments would be disproportionate in relation to the village of Necton and this rural area. These were important concerns for members of the public objecting to the Vanguard scheme, which they were entitled to have evaluated by the Defendant as the decision-maker responsible, before he decided whether or not to grant the DCO for that project.

Conclusions

164. For the above reasons I uphold grounds 1 and 2 of the challenge. There is no justification for the court to withhold the relief sought by the Claimant and so the Defendant's decision letter dated 1 July 2020 to grant a development consent order for the Norfolk Vanguard Offshore Wind Farm together with SI 2020 No. 706 must be quashed.

165. The court's order is being made at a time when the application for a DCO in respect of Norfolk Boreas remains to be determined. The Defendant will need to give careful consideration as to how the evaluation of cumulative impacts relating to development at Necton for both projects should be approached in each decision and whether, and if so, to what extent, the examination of the Vanguard project needs to be re-opened. The court was not asked during the hearing to express its opinion on those matters.

Addendum: the Court's order

166. The Claimant has submitted that the court's order should contain specific directions on how the implications of this judgment should be handled procedurally in both the Vanguard and Boreas DCO applications. The Defendant and VNL oppose that suggestion. I conclude that the court's order should not include any formal directions of that kind. I will explain my reasons in relation to the submissions which have been made.

167. First, the Boreas application has not yet been determined and is not currently the subject of any proceedings in this court. Second, the Defendant states through counsel that, in accordance with well-established convention, he can be expected to comply with the terms of this judgment without the need for any mandatory order. That is an important consideration. Third, there may be more than one way in which the defendant can properly give effect to the law stated in this judgment, and any other relevant legal principles or requirements, and so it would be inappropriate now for the court to prescribe how such matters should be handled.

168. The Defendant and NVL also rely upon rule 20 of the 2010 Rules which provides:-

> "Where a decision of the Secretary of State in respect of an application is quashed in proceedings before any court, the Secretary of State—

> (a) shall send to all interested parties a written statement of the matters with respect to which further representations in writing are invited for the purposes of the Secretary of State's further consideration of the application;
>
> (b) shall give all interested parties the opportunity of making representations in writing to the Secretary of State in respect of those matters."

169. The Defendant submits that "unusually, and unlike the situation in respect of "ordinary" planning applications, Parliament has addressed its mind to the redetermination of DCO applications and prescribed a procedure". It is submitted that rule 20 provides a complete statement of the steps required for a fair redetermination of the application.

170. In deciding not to grant the additional relief sought by the Claimant, it should be clearly understood that I do not accept these additional submissions.

171. First, it has been well-established for many years that procedural rules such as the 2010 Rules are generally *not* exhaustive of the requirements of procedural fairness or other public law requirements (see e.g. *Lake District Special Planning Board v Secretary of State for the Environment* 1st January 1975 and noted at [1975] JPL 220; *Bank Mellat v HM Treasury (No. 2*) [2014] AC 700 at [35]; *Hopkins Developments v Secretary of State for Communities and Local Government* [2014] PTSR 1145 at [62]; De Smith's Judicial review (8th edition) at paras. 7-012 to 7-016).

172. Rule 20 imposes *minimum* procedural requirements. The language of rule 20 should not be misread as laying down an exclusionary rule in relation to any additional steps that might be required in order to satisfy the duty to act fairly in a particular case. Furthermore, the court has not been shown any statutory provision indicating that Parliament intended the 2010 Rules to be an exhaustive code which excludes, or is incompatible with, additional requirements arising from that duty.

173. Second, the 2010 Rules are not unusual. Rules of this kind have existed for some time. They deal with *some* of the consequences of the quashing of decisions in the planning sphere. For example, the Town and Country Planning (Inquiries Procedure) (England) Rules 2000 (SI 2000 No. 1624) applies to certain planning appeals and called-in planning applications. I note that rule 19 expressly provides for the re-opening of a public inquiry as well as for written representations. However, it cannot be inferred that, simply because the 2010 Rules only mention the making of written representations, the re-opening of an examination is excluded where any quashing order is made under s. 118 of the PA 2008. The requirements of natural justice, which are often fact-sensitive, may require additional procedural steps to be taken beyond those contained in such rules.

174. The procedural consequences of a quashing order will normally depend upon the nature of the legal error or errors which have led to it being made. It is not too difficult to think of a fundamental error affecting the application process from the outset, which would therefore require the matter to be rewound to the beginning, notwithstanding rule 20 of the 2010 Rules.

175. In view of the submissions which have been made it is necessary to refer here to some of the issues arising from this judgment which need to be addressed. There may be others which the parties would wish to raise.

176. First, part of the problem has been the failure of both the Examining Authority and the Defendant to explain in what respects the information on Boreas was thought to be "limited", so that the parties involved in either examination process could address that point. That calls for an explanation from the Defendant, including any implications for the operation of regulation 17 of the 2009 Regulations, before any representations could sensibly be made by interested parties on matters of either procedure or substance.

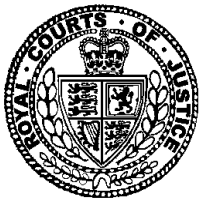
177. Second, there are procedural implications arising from the failure of both the Examining Authority and the Defendant to evaluate the cumulative impacts in the Necton area. Likewise, the obviously material considerations referred to in [132] to [136] above, were not addressed by either the Authority or the Defendant. Consequently, the findings and the recommendation in the report which the Authority was required to make under s. 74 of PA 2008 (and rule 19 of the 2010 Rules), and which the Defendant is required to take into account, have not been based upon those factors.

178. Furthermore, the points in [132] to [136] above, which go to the relationship between the two projects, may have implications for the timing of the decisions on both projects.

179. In these circumstances, it is very doubtful whether the Defendant could properly proceed to re-determine the Vanguard application, or to determine the Boreas application, without at least giving a reasonable opportunity for representations to be made by interested parties on the implications of this judgment for the procedures now to be followed in each application, considering those representations, and then deciding and explaining what course will be followed.

180. Paragraph 11c of NVL's submissions relies upon "the importance in the public interest of determining applications for nationally significant infrastructure projects such as this without undue delay" as a factor influencing the timing of the Defendant's decision. That does indeed reflect one of the purposes of the PA 2008 and the procedural timetables it contains (see also the case law cited in [9] above). But that consideration does not override the need for compliance with EIA legislation and with principles of public law and procedural fairness. It is most unfortunate that there has been a failure to grapple with an important issue in the Vanguard decision (and before the Boreas decision) and that this has resulted in delay to the determination of an important application. But that only serves to underscore the need for care now to be taken to avoid future procedural steps in relation to either project being impugned.

3 Appendix B – Substation Action Judgement



Neutral Citation Number: [2022] EWHC 3177 (Admin)

Case No: CO/1707/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 December 2022

Before :

MRS JUSTICE LANG DBE

- -

Between :

THE KING	**Claimant**
on the application of	
SUBSTATION ACTION SAVE EAST SUFFOLK LIMITED	
- and -	
SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY	**Defendant**
(1) EAST ANGLIA ONE NORTH LIMITED	**Interested Parties**
(2) EAST ANGLIA TWO LIMITED	

- -
- -

Richard Turney and Charles Bishop (instructed by **Richard Buxton Solicitors**) for the **Claimant**
Mark Westmoreland Smith and Jonathan Welch (instructed by the **Government Legal Department**) for the **Defendant**
Hereward Phillpot KC and Hugh Flanagan (instructed by **Shepherd and Wedderburn LLP**) for the **Interested Parties**

Hearing dates: 15 & 16 November 2022

- -

Approved Judgment

This judgment was handed down remotely at 10.30 am on 13 December 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives

Mrs Justice Lang :

1. The Claimant applies for judicial review, pursuant to section 118 of the Planning Act 2008 ("PA 2008"), of the Decisions of the Defendant, dated 31 March 2022, to make two development consent orders ("DCOs") under section 114 PA 2008 for the construction, respectively, of the East Anglia ONE North and East Anglia TWO Offshore Wind Farms with associated onshore and offshore development.

2. The two DCOs are the East Anglia ONE North Offshore Wind Farm Order 2022 (SI 2022/432) ("EA1N") and the East Anglia TWO Offshore Wind Farm Order 2022 (SI 2022/433) ("EA2").

3. Both DCOs authorise two nationally significant infrastructure projects ("NSIPs"): a generating station and associated grid connection and substation, and a National Grid NSIP comprising substation, cable sealing ends and pylon realignment. The project substations, and the National Grid NSIP, are to be located at Friston in Suffolk.

4. The Decisions were preceded by an examination process, held simultaneously in respect of both applications, by the Examining Authorities ("the ExA") which culminated in two separate reports ("ERs"), both recommending the grant of development consent. The Defendant accepted the recommendation of the ExA in two separate decision letters ("DL") which accompanied the Decisions. The reports and the DLs do not differ materially on the issues to which this claim relates. Therefore, to avoid duplication, references to the ER and DL in respect of EA1N stand also as references to the ER and DL for EA2.

5. The Claimant is a company limited by guarantee formed by a number of local residents in East Suffolk to represent communities in the area. There are significant concerns in the local community about the onshore location of the connection of the development to the National Grid. It is this element of the development which is the subject of the claim; the Claimant does not object to the offshore wind farms.

6. The two Interested Parties ("the Applicants") were the respective applicants for the DCOs. They are wholly owned by ScottishPower Renewables, part of the Scottish Power group of companies, which is part of the Spanish utility group Iberdrola.

7. I granted permission to apply for judicial review, on the papers, on 1 July 2022.

Grounds of challenge

8. The Claimant's grounds of challenge may be summarised as follows:

9. **Ground 1: Flood risk (as amended)**. The Defendant erred in his assessment of the adequacy of the Applicants' Flood Risk Assessment ("FRA"), and in his overall assessment of flood risk, in that:

    i) the sequential test, properly applied, requires assessment of all sources of flooding at the stage of site selection;

    ii) the Defendant did not properly apply the sequential test at the stage of site selection, rather than at the stage of design after site selection; and

iii) he otherwise acted irrationally in reaching his conclusions on flood risk.

10. **Ground 2: Heritage assets**. The Defendant's conclusions as to heritage harm were unlawful in that:

i) he substantively adopted the ExA's reasoning which was based on an unlawful interpretation of the Infrastructure Planning (Decisions) Regulations 2010 ("the Decisions Regulations 2010"), which consequently infected the Defendant's analysis of heritage harm; and/or

ii) while the Defendant purported to give heritage harm "considerable importance and weight", such weight was not reflected in the overall planning balance, which followed the ExA's analysis, and which unlawfully attributed only "medium" weight, contrary to the legal requirement.

11. **Ground 3: Noise**. The Defendant erred in his treatment of noise impacts, in that he:

i) failed to take into account that his conclusions on noise necessarily entailed a conflict with paragraph 5.11.9 of National Policy Statement ("NPS") EN-1;

ii) relied on the imposition of a requirement which was in all the circumstances unreasonable in that it had not been shown to be workable; and/or

iii) failed to take into account the impact of noise from switchgear/circuit breakers in the National Grid substation.

12. **Ground 4: Generating capacity**. The Defendant:

i) failed to take into account representations made by the Claimant in respect of the need to secure a minimum generating capacity in the DCO and/or failed to give reasons for rejecting those representations; and/or

ii) took into account an irrelevant consideration, namely the total proposed generating capacity of the Development when this was not secured by a requirement in the DCO.

13. **Ground 5: Cumulative effects**. The Defendant irrationally excluded from consideration the cumulative effects of known plans for extension (outlined in the Applicants' "Extension of National Grid Substation Appraisal"), through the addition of other projects to connect at the same location in Friston, and failed to take into account environmental information relating to those projects, in breach of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 ("the EIA Regulations 2017").

14. **Ground 6: Alternative locations**. The Defendant failed to consider whether there were alternative locations in which to situate the project substations and National Grid NSIP. He was required to do so in the face of the substantial planning objections to the proposals, including in relation to heritage harm and flood risk.

Factual background

15. The applications for development consent comprised an offshore element and an onshore element. The offshore element is for the construction and operation of up to 67 (in the case of EA1N) and 75 (in the case of EA2) wind turbine generators ("WTGs"); together with up to four offshore electrical platforms; an offshore construction, operation and maintenance platform; a meteorological mast; inert-array cables linking the WTGs to each other and to the offshore electrical platforms; platform link cables; and up to two export cables to take the electricity generated by the WTGs from the offshore electrical platforms to landfall. The proposed generating capacity was up to 800MW for EA1N and up to 900MW for EA2.

16. The onshore works in respect of both applications include landfall connection works north of Thorpeness in Suffolk, with underground cables running to a new onshore substation located next to Friston, Suffolk. The onshore works also include the realignment of existing overhead power lines and the construction of a new National Grid substation at Friston. The proposal is therefore that the Friston site will accommodate a substation for each of EA1N and EA2, and a new National Grid NSIP comprising a substation and cable sealing ends connected to the realigned overhead lines. The site at Friston extends to 46.28 hectares.

17. This development is part of a wider series of offshore wind farms known as the East Anglia Zone. The projects in the East Anglia Zone are the East Anglia ONE and East Anglia THREE windfarms (consented in 2014 and 2017 respectively), as well as EA1N and EA2, and future windfarm projects still to be brought forward. When the East Anglia ONE and East Anglia THREE windfarms were consented, the expectation (and requirement) was that their grid connection route (from Bawdsey to an existing National Grid substation at Bramford) would be used for the subsequent projects. Initially, both EA1N and EA2 had grid connection agreements for connection at Bramford and the East Anglia ONE project was required to make provision for future cable ducting to serve other windfarms. However, because of design changes, there was insufficient space within the consented cable corridor for the future connection of EA1N and EA2.

18. The projects in the East Anglia Zone were split between ScottishPower and Vattenfall, with ScottishPower retaining the EA1N, EA2 and East Anglia THREE projects. This resulted in a review by the National Grid of the proposed onshore connection site for EA1N and EA2 in 2017.

19. The Applicants' Environmental Statement ("ES"), Chapter 4, described the process of "Site Selection and Assessment of Alternatives". The National Grid owns the electricity transmission network. The Electricity Act 1989 requires the National Grid to develop and maintain an efficient, co-ordinated and economical system of electricity transmission, whilst having regard to environmental matters. Similar requirements are contained in NPS EN-1 and the National Grid Guidelines. The selection of a site for connection to the National Grid is undertaken through the National Grid Electricity System Operator ("NGESO") Connection and Infrastructure Options Note ("CION") process. The CION process is the mechanism used to evaluate potential options for connecting to the transmission system, having regard to capital and operational cost, and technical, regulatory, environmental, planning and deliverability factors.

20. The CION review considered all realistic possible connection points, namely:

    i) Bramford 400kV substation;

    ii) Sizewell 400kV substation;

    iii) Leiston 400kV substation; and

    iv) Norwich Main 400kV substation.

21. The CION process concluded that a substation in the Leiston area was the most economic and efficient connection, having regard to environmental and programme implications. The reasons for this decision were summarised in the National Grid's "Note on the assessment of options for the connection of ScottishPower Renewables East Anglia ONE North and East Anglia TWO offshore wind farms to the National Grid network".

22. As a result of the CION process, the Applicants considered themselves bound to search for a location for a new substation and related infrastructure in the Leiston area. Chapter 4 of the ES explained, in respect of the "Onshore Substations Site Selection Study Area" that the location of the substations "is driven by the agreement with National Grid for a grid connection in the vicinity of Sizewell and Leiston" (at paragraph 101). On 21 December 2017, the grid connection agreement was made between the Applicants and the National Grid which identified the location of the onshore connection to the National Grid as "in or around Leiston".

23. The site selection process within the Leiston area was described at section 4.9 of Chapter 4 of the ES. Seven potential zones were identified, including Friston. The process comprised (i) scoping; (ii) a Red/Amber/Green ("RAG") assessment; (iii) a Phase 2 consultation; (iv) Site Selection Expert Topic Group; (v) Phase 3 consultation; and (vi) Phase 3.5 consultation. There followed a Preliminary Environmental Information Report ("PEIR") and a FRA.

24. The Applicants selected Zone 7, Friston, as the onshore site. The ER summarised the reasons for the selection of Friston as follows:

> "25.3.13 In summary terms, the Friston location was viewed by the Applicant as the preferred substation location. Its main benefits were seen as its location outside the Suffolk Coast and Heaths AONB, the availability of a substantial body of land in which all substation infrastructure could be co-located, taking significant screening benefits from established woodland and the avoidance of possible conflicts with construction, operation or decommissioning in relation to Sizewell nuclear power stations. The disbenefit of the location was the need for a significant additional extent of onshore cable corridor to connect it to the landfall location."

25. The applications for development consent were submitted on 25 October 2019. They were accepted for examination under section 55 PA 2008 on 22 November 2019, and the ExA was appointed on 13 December 2019. The simultaneous examination of EA1N

and EA2 took place from October 2020 to July 2021. The ExA reported to the Defendant on 6 October 2021.

26. The ExA's overall conclusions were as follows:

> "**28.4 OVERALL CONCLUSION ON THE CASE FOR DEVELOPMENT**
>
> 28.4.1. Because the Proposed Development meets specific relevant Government policy set out in NPS EN-1, NPS EN-3, and NPS EN-5, as a matter of law, a decision on the application in accordance with any relevant NPS (PA 2008 S104(2)(a) and S104(3)) also indicates that development consent should be granted unless a relevant consideration arising from the following subsections of the Act (PA 2008 S104 (4) to (8)) applies.
>
> 28.4.2. The Proposed Development is also broadly compliant with the MPS. Regard has been had to the Marine Plans in force and again, the Proposed Developments broadly comply (PA 2008 s104(2) (aa)).
>
> 28.4.3. Regard has been had to the LIR (PA2008 s104(2)(b), to prescribed matters (PA 2008 s104(2)(c)) and to all other important and relevant policy (including but not limited to the Development Plan) and to other important and relevant matters identified in this Report (PA 2008 s104(2)(d).
>
> 28.4.4. In the ExA's judgement, the benefits of the Proposed Development at the national scale, providing highly significant additional renewable energy generation capacity in scalar terms and in a timely manner to meet need, are sufficient to outweigh the negative impacts that that have been identified in relation to the construction and operation of the Proposed Development at the local scale. The local harm that the ExA has identified is substantial and should not be under-estimated in effect. Its mitigation has in certain key respects been found to be only just sufficient on balance. However, the benefits of the Proposed Development principally in terms of addressing the need for renewable energy development identified in NPS EN-1 outweigh those effects. In terms of PA 2008 s104(7) the ExA specifically finds that the benefits of the Proposed Development do on balance outweigh its adverse impacts.
>
> 28.4.5. In reaching this conclusion, the ExA has had regard to the effect of the Proposed Development cumulatively with the other East Anglia development and with such other relevant policies and proposals as might affect its development, operation or decommissioning and in respect of which there is information in the public domain. In that regard, the ExA observes that effects of the cumulative delivery of the Proposed Development

> with the other East Anglia development on the transmission connection site near Friston are so substantially adverse that utmost care will be required in the consideration of any amendments or additions to those elements of the Proposed Development in this location. This ExA does not seek to fetter the discretion of future decision-makers about additional development proposals at this location. However, it can and does set out a strong view that the most substantial and innovative attention to siting, scale, appearance and the mitigation of adverse effects within design processes would be required if anything but immaterial additional development were to be proposed in this location.
>
> 28.4.6. In relation to this conclusion, the ExA observes that particular regard needs to be had at this location to flood and drainage effects (where additional impermeable surfaces within the existing development site have the potential to affect the proposed flood management solution), to landscape and visual impacts and to impacts on the historic built environment, should these arise from additional development proposals in the future.
>
> 28.4.7. The ExA concludes overall that, for the reasons set out in the preceding chapters and summarised above, the SoS should decide to grant development consent.
>
> 28.4.8. The ExA acknowledges that this is a conclusion that may well meet with considerable dismay amongst many local residents and businesses who became IPs and contributed positively and passionately to the Examination across a broad range of matters and issues. To them the ExA observes that their concerns are real and that the planning system provided a table to which they could be brought. However, highly weighty global and national considerations about the need for large and timely additional renewable energy generating capacity to meet need and to materially assist in the mitigation of adverse climate effects due to carbon emissions have to be accorded their due place in the planning balance. In the judgment of the ExA, these matters must tip a finely balanced equation in favour of the decision to grant development consent for the Proposed Development."

27. The Defendant undertook further consultation following receipt of the ERs. The DL, dated 31 March 2022, set out the Defendant's conclusions as follows:

> "**27 The Secretary of State's Consideration of the Planning Balance**
>
> 27.1 The ExA considered all the merits and disbenefits of the Proposed Development and concluded that in the planning balance, the case for development consent has been made and that the benefits of the Proposed Development would outweigh

its adverse effects [ER 28.4.4]. The ExA judged that the benefits of the Proposed Development at the national scale, providing highly significant additional renewable energy generation capacity in scalar terms and in a timely manner to meet the need for such development (as identified in NPS EN-1), are sufficient to outweigh the negative impacts that have been identified in relation to the construction and operation of the Proposed Development at the local scale. In reaching this conclusion, the ExA had regard to the effect of the Proposed Development cumulatively with the East Anglia TWO development and with such other relevant policies and proposals as might affect its development, operation or decommissioning and in respect of which there is information in the public domain. The Secretary of State agrees with the ExA's overall conclusion on the case for development.

27.2 Because of the existence of three relevant NPSs, NPS EN-1, NPS EN-3, and NPS EN-5, the Secretary of State is required to determine this application against section 104 of the Planning Act 2008. Section 104(2) requires the Secretary of State to have regard to:

- any local impact report (within the meaning given by section 60(3)),

- any matters prescribed in relation to development of the description to which the application relates, and

- any other matters which the Secretary of State thinks are both important and relevant to the decision.

27.3 The Secretary of State acknowledges and adopts the substantial weight the ExA gives to the contribution to meeting the need for electricity generation demonstrated by NPS EN-1 and its significant contribution towards satisfying the need for offshore wind [ER 28.4.4]. He further notes that the ExA has identified that the Proposed Development would be consistent with the Climate Change Act 2008 (2050 Target Amendment) Order 2019 which amended the Climate Change Act 2008 to set a legally binding target of 100% below the 1990 baseline. The Secretary of State notes that the designated energy NPSs continue to form the basis for decision-making under the Planning Act 2008. The Secretary of State considers, therefore, that the ongoing need for the Proposed Development is established as it is in line with the national need for offshore wind as part of the transition to a low carbon economy, and that granting the Order would be compatible with the amendment to the Climate Change Act 2008.

27.4 After reviewing the ExA Report, the Secretary of State has reached the following conclusions on the weight of other

individual topics to be taken forward into the planning balance: flooding & drainage - high negative weighting; landscapes & visual amenity - medium negative weighting; onshore historic environment - medium negative weighting; seascapes - neutral weighting; onshore ecology - low negative weighting; coastal processes – neutral weighting; onshore water quality & resources; noise and vibration - medium negative weighting; air quality, light pollution, and impacts on human health - low negative weighting; transport & traffic - medium negative weighting; socio economic effects onshore – medium positive weighting; land use effects - medium negative weighting; offshore ornithology - medium negative weighting; marine mammals - low negative weighting; other offshore biodiversity - low negative weighting; marine physical effects & water quality - low negative weighting; offshore historic environment - low negative weighting; offshore socio-economic & other effects - neutral weighting; good design - low negative weighting; other overarching matters – neutral weighting.

27.5 Following his consideration of the various submissions relating to the potential for the OTNR to provide an alternative onshore grid connection for the Proposed Development (see paragraphs 3.13 to 3.19 above), the Secretary of State has decided to accord limited weight to the OTNR against granting the Proposed Development.

27.6 The Secretary of State has considered all the merits and disbenefits of the Proposed Development and concluded that, on balance, the benefits of the Proposed Development outweigh its negative impacts.

27.7 For the reasons given in this letter, the Secretary of State considers that there is a strong case for granting development consent for the East Anglia ONE North Offshore Wind Farm. Given the national need for the development, as set out in the relevant NPSs, the Secretary of State does not believe that this is outweighed by the Proposed Development's potential adverse impacts, as mitigated by the proposed terms of the Order.

27.8 The Secretary of State has also considered the proposal supported by multiple interested parties that there should be a split decision or partial consent in respect to proposed onshore and offshore development, but after careful consideration agrees with the ExA's position that the East Anglia ONE North and East Anglia TWO developments are entitled to be evaluated under the policy framework that is in place rather than the prospect of a new one, and that the great weight to be accorded to delivering substantial and timely carbon and climate benefits also weighs in favour of not taking split decisions driven by other elements of further possible policy changes.

> 27.9 The Secretary of State has therefore decided to accept the ExA's recommendation to make the Order granting development consent [ER 28.4.7] to include modifications set out below in section 29 below. In reaching this decision, the Secretary of State confirms regard has been given to the ExA's Report, the joint LIR submitted by East Suffolk Council and Suffolk County Council, the NPSs, and to all other matters which are considered important and relevant to the Secretary of State's decision as required by section 104 of the Planning Act 2008. The Secretary of State confirms for the purposes of regulation 3(2) of the ExA Planning (Environmental Impact Assessment) Regulations 2017 that the environmental information as defined in regulation 2(1) of those Regulations has been taken into consideration."

28. Thus, the Defendant reached the same conclusion as the ExA, though not always for the same reasons. Overall, whereas the ExA found the competing factors to be "finely balanced" the Defendant concluded there was "a strong case" for a development consent order to be made.

Statutory and policy framework

Planning Act 2008

29. A detailed account of the PA 2008 was provided by the Supreme Court in *R (Friends of the Earth Ltd) v Heathrow Airport Ltd* [2020] UKSC 52, at [19] – [38].

30. By section 31 PA 2008, development consent is required for development "to the extent that the development is or forms part of a nationally significant infrastructure project".

31. Sections 41 to 50 PA 2008 apply before an application for a DCO is made, and impose duties to consult on an applicant.

32. Section 104 PA 2008 applies when the Secretary of State is determining an application for a DCO in relation to which an NPS has effect:

> "**104 Decisions in cases where national policy statement has effect**
>
> (1) This section applies in relation to an application for an order granting development consent if a national policy statement has effect in relation to development of the description to which the application relates.
>
> (2) In deciding the application the Secretary of State must have regard to—
>
> (a) any national policy statement which has effect in relation to development of the description to which the application relates (a "relevant national policy statement"),

> (aa) the appropriate marine policy documents (if any), determined in accordance with section 59 of the Marine and Coastal Access Act 2009,
>
> (b) any local impact report (within the meaning given by section 60(3)) submitted to the Secretary of State before the deadline specified in a notice under section 60(2),
>
> (c) any matters prescribed in relation to development of the description to which the application relates, and
>
> (d) any other matters which the Secretary of State thinks are both important and relevant to the Secretary of State's decision.
>
> (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.
>
> (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.
>
> (9) For the avoidance of doubt, the fact that any relevant national policy statement identifies a location as suitable (or potentially suitable) for a particular description of development does not prevent one or more of subsections (4) to (8) from applying."

33. Section 104(2)(d) PA 2008 allows the Secretary of State to exercise a judgment on whether he should take into account any matters which are relevant, but not mandatory,

material considerations in line with the established case law on relevant considerations: *Pearce v Secretary of State for Business, Energy and Industrial Strategy* [2022] Env LR 4, per Holgate J. at [11].

34. Section 104(3) PA 2008 "requires an application for a DCO to be decided in accordance with any relevant NPS judged as a whole, recognising that the statement's policies (or their application) may pull in different directions and that, for example, a breach of a single policy does not carry the consequence that the proposal fails to accord with the NPS": *R (Spurrier) v Secretary of State for Transport* [2020] PTSR 240 (Divisional Court) at [329] (undisturbed on appeal).

National Policy Statements

35. NPSs are made by the Secretary of State under section 5 PA 2008.

36. The NPS Overarching NPS for Energy (EN-1) was made in July 2011. It sets out the wider national policy for energy and applies in combination with the other technology-specific NPSs. Part 3 of EN-1 establishes the need for new energy NSIPs. Part 4 of EN-1 sets out principles applicable to assessing DCO applications. Paragraph 4.1.2 sets a presumption in favour of granting consent to applications for energy NSIPs, unless any more specific and relevant policies set out in the relevant NPSs clearly indicate that consent should be refused, and subject to the provisions of the PA 2008.

37. The NPS Renewable Energy Infrastructure (EN-3) was made in July 2011. It provides further policies on assessment and technology-specific information on offshore wind.

38. The NPS Electricity Networks Infrastructure (EN-5) was made in July 2011. It provides further policies on a variety of impacts, including assessment of noise.

39. The Department for Business, Energy and Industrial Strategy ran a consultation on revised NPSs that support decisions on major energy infrastructure from 6 September to 29 November 2021. This included a draft revised EN-1, EN-3 and EN-5. Draft revised EN-1 was taken into account as an emerging policy on the heritage issues.

40. The principles applicable to the interpretation of national planning policy in the context of the PA 2008 were summarised by Lindblom LJ in *R (Scarisbrick) v Secretary of State for Communities and Local Government* [2017] EWCA Civ 787 at [19]:

> "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 (Asda Stores Ltd intervening)* [2012] UKSC 13; [2012] PTSR 983, in particular the judgment of Lord Reed JSC at paras 17–19). 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; [2017] 1 WLR 1865 at [22]–[26]). Statements of policy are to be interpreted objectively in accordance with the language used, read in its proper context

> (see para 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 para 18 of Lord Reed's judgment in *Tesco Stores 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 paras 24–26 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."

National Planning Policy Framework and Planning Practice Guidance

41. At the time the applications were submitted, the relevant version of the National Planning Policy Framework ("the Framework") was dated 19 February 2019. A revised version of the Framework was published on 20 July 2021, after the examination had closed (on 6 July 2021) but before the ExA completed its report.

42. The Planning Practice Guidance ("PPG") is relevant to Ground 1 (Flood risk). The Claimant referred to authorities on the status of the PPG which confirm that it is merely practice guidance, not policy.

Ground 1: Flood risk (as amended)

Claimant's submissions

43. The Claimant submitted that the Defendant erred in his assessment of the adequacy of the Applicants' FRA, and in his overall assessment of flood risk. The sequential test, properly applied, required assessment of all sources of flooding at the stage of site selection. Here it was applied at the stage of design after site selection. Therefore the Defendant was wrong to conclude that the sequential test was met, and his conclusions on flood risk were irrational.

44. The Claimant pleaded in its Reply to the Summary Grounds of Resistance (paragraph 2) that "for the purposes of the claim the Court can simply proceed on the basis that all parties are agreed that to find compliance with the Sequential Test, it was necessary to find that the IP's had demonstrated that there were no sites available for the substation with lower pluvial flood risk".

45. The Claimant accepted that the Applicants applied the sequential test to the risk of fluvial flooding, but complained that it had not been applied to the risk of surface water

flooding, which the ExA found to be a high risk (ER 6.5.5). The ExA wrongly concluded that the Applicants had complied with the requirements of NPS EN-1. The ExA also erred in finding that the revised Framework, issued in July 2021, had introduced a policy change by requiring that the sequential approach should be applied to all sources of flood risk, including surface water. This was not a change in policy; NPS EN-1, Planning Policy Statement 25 ("PPS 25") and the earlier editions of the Framework all required assessment of surface water flood risks, using the sequential test.

46. The Claimant submitted that the Defendant should have clearly stated in the DL that the ExA's view that there had been a policy change was mistaken. He did not do so.

47. Further, the Defendant erred in accepting the Applicants' case that the FRA was appropriate and applied the sequential test as part of its site selection, in the absence of any updated guidance on how the sequential test should be applied to all sources of flooding, including surface water. The sequential test had to be applied to the risk of surface water flooding at site selection stage, which the Applicants failed to do. The reliance upon the PPG was misplaced as it is merely practice guidance, supplemental to the Framework, and does not have the force of policy.

Defendant and Applicants' submissions

48. The Defendant and Applicants submitted that the Claimant's submissions proceeded on the twin misapprehensions that the Defendant thought the sequential test did not require consideration of surface water flood risks and that the Applicants did not assess surface water flood risks. Both were incorrect. The Defendant did not adopt the ExA's view that the Framework (July 2021 edition) introduced a change in policy; he accepted the view of the Applicants that it was a clarification of existing policy.

49. The Defendant did not misinterpret national policy and guidance on the sequential test. It was relevant that the guidance in the PPG had not been updated. The policy and guidance is not prescriptive as to how surface water flooding risk is to be taken into account in applying the sequential test. It leaves a significant element of judgment to the decision-maker, as emphasised in PPG paragraph 7-034. That judgment can only be challenged on public law grounds, such as irrationality.

50. The Claimant's assertion in paragraph 2 of the Reply to the Summary Grounds (set out at paragraph 44 above) was incorrect; that was not what the policy or guidance stated.

51. Contrary to the Claimant's submissions, the Applicants' FRA did take account of the surface water flood risk, as well as fluvial flood risk. On the basis of the evidence, the Defendant was entitled to conclude, as a matter of planning judgment, that the Applicants had complied with current policy and guidance on the sequential test as part of site selection, and therefore the FRA was appropriate for the application (DL 4.28). This conclusion could not be characterised as irrational.

Conclusions

Policies and guidance

52. The policies on flood risk in force at the date of the ExA's report were NPS EN-1 and the Framework (February 2019 edition). The PPG contained practice guidance on the application of the Framework. The only difference by the time of the Defendant's decision was that the July 2021 edition of the Framework had been issued.

53. NPS EN-1 provides, at paragraph 5.7.3, that the aims of planning policy on development and flood risk are to ensure that flood risk from all sources of flooding is taken into account at all stages in the planning process to avoid inappropriate development in areas at risk of flooding.

54. Paragraph 5.7.4 refers to sources of flooding, other than rivers and the sea, for example, surface water.

55. Paragraph 5.7.5 sets out the minimum requirements for FRAs. Paragraph 5.7.6 of EN-1 states that further guidance on what will be expected from FRAs is found in the Practice Guide accompanying PPS 25 or successor documents (thus, now, the Framework and PPG).

56. Under the heading "decision making", EN-1 provides:

> "5.7.9 In determining an application for development consent, the IPC should be satisfied that where relevant:
>
> • the application is supported by an appropriate FRA;
>
> • the Sequential Test has been applied as part of site selection;
>
> • a sequential approach has been applied at the site level to minimise risk by directing the most vulnerable uses to areas of lowest flood risk;
>
> • the proposal is in line with any relevant national and local flood risk management strategy [Footnote 114: As provided for in section 9(1) of the Flood and Water Management Act 2010.];
>
> • priority has been given to the use of sustainable drainage systems (SuDs) (as required in the next paragraph on National Standards); and
>
> • in flood risk areas the project is appropriately flood resilient and resistant, including safe access and escape routes where required, and that any residual risk can be safely managed over the lifetime of the development.
>
> ……

> 5.7.12 The IPC should not consent development in Flood Zone 2 in England ….unless it is satisfied that the sequential test requirements have been met. It should not consent development in Flood Zone 3 or Zone C unless it is satisfied that the Sequential and Exception Test requirements have been met…..”

57. The policy then goes on to set out the sequential test:

> “**The Sequential Test**
>
> 5.7.13 Preference should be given to locating projects in Flood Zone 1 in England ….If there is no reasonably available site in Flood Zone 1 ….. then projects can be located in Flood Zone 2 ….. If there is no reasonably available site in Flood Zones 1 or 2 then nationally significant energy infrastructure projects can be located in Flood Zone 3 or Zone C subject to the Exception Test. Consideration of alternative sites should take account of the policy on alternatives set out in Section 4.4 above.”

58. I agree with the submission made by the Defendant and the Applicants that, whilst NPS EN-1 refers to all sources of flooding, the specific guidance on the application of the sequential test only refers to the location of projects in different flood zones. Whilst flood zones are plainly relevant, they are designated on the basis of the risk of fluvial flooding, not surface water or other sources of flooding, and so they are not a sufficient means of assessing surface water flood risks. Therefore, it is a matter of judgment for an applicant, and ultimately the decision-maker, as to how to apply the sequential test to flood risks from other sources, such as surface water.

59. The policy on assessment of flood risks in the Framework (July 2021) provides:

> “**Planning and flood risk**
>
> 159. Inappropriate development in areas at risk of flooding should be avoided by directing development away from areas at highest risk (whether existing or future). Where development is necessary in such areas, the development should be made safe for its lifetime without increasing flood risk elsewhere.
>
> 160. Strategic policies should be informed by a strategic flood risk assessment, and should manage flood risk from all sources. They should consider cumulative impacts in, or affecting, local areas susceptible to flooding, and take account of advice from the Environment Agency and other relevant flood risk management authorities, such as lead local flood authorities and internal drainage boards.
>
> 161. All plans should apply a sequential, risk-based approach to the location of development - taking into account all sources of flood risk and the current and future impacts of climate change - so as to avoid, where possible, flood risk to people and property. They should do this, and manage any residual risk, by:

> a) applying the sequential test and then, if necessary, the exception test as set out below;
>
> b) safeguarding land from development that is required, or likely to be required, for current or future flood management;
>
> c) using opportunities provided by new development and improvements in green and other infrastructure to reduce the causes and impacts of flooding, (making as much use as possible of natural flood management techniques as part of an integrated approach to flood risk management); and
>
> d) where climate change is expected to increase flood risk so that some existing development may not be sustainable in the long-term, seeking opportunities to relocate development, including housing, to more sustainable locations.

162. The aim of the sequential test is to steer new development to areas with the lowest risk of flooding from any source. Development should not be allocated or permitted if there are reasonably available sites appropriate for the proposed development in areas with a lower risk of flooding. The strategic flood risk assessment will provide the basis for applying this test. The sequential approach should be used in areas known to be at risk now or in the future from any form of flooding.

163. If it is not possible for development to be located in areas with a lower risk of flooding (taking into account wider sustainable development objectives), the exception test may have to be applied. The need for the exception test will depend on the potential vulnerability of the site and of the development proposed, in line with the Flood Risk Vulnerability Classification set out in Annex 3.

164. The application of the exception test should be informed by a strategic or site-specific flood risk assessment, depending on whether it is being applied during plan production or at the application stage. To pass the exception test it should be demonstrated that:

> a) the development would provide wider sustainability benefits to the community that outweigh the flood risk; and
>
> b) the development will be safe for its lifetime taking account of the vulnerability of its users, without increasing flood risk elsewhere, and, where possible, will reduce flood risk overall.

165. Both elements of the exception test should be satisfied for development to be allocated or permitted.

166. Where planning applications come forward on sites allocated in the development plan through the sequential test, applicants need not apply the sequential test again. However, the exception test may need to be reapplied if relevant aspects of the proposal had not been considered when the test was applied at the plan-making stage, or if more recent information about existing or potential flood risk should be taken into account.

167. When determining any planning applications, local planning authorities should ensure that flood risk is not increased elsewhere. Where appropriate, applications should be supported by a site-specific flood-risk assessment [Footnote 55: A site-specific flood risk assessment should be provided for all development in Flood Zones 2 and 3. In Flood Zone 1, an assessment should accompany all proposals involving: sites of 1 hectare or more; land which has been identified by the Environment Agency as having critical drainage problems; land identified in a strategic flood risk assessment as being at increased flood risk in future; or land that may be subject to other sources of flooding, where its development would introduce a more vulnerable use.]. Development should only be allowed in areas at risk of flooding where, in the light of this assessment (and the sequential and exception tests, as applicable) it can be demonstrated that:

a) within the site, the most vulnerable development is located in areas of lowest flood risk, unless there are overriding reasons to prefer a different location;

b) the development is appropriately flood resistant and resilient such that, in the event of a flood, it could be quickly brought back into use without significant refurbishment;

c) it incorporates sustainable drainage systems, unless there is clear evidence that this would be inappropriate;

d) any residual risk can be safely managed; and

e) safe access and escape routes are included where appropriate, as part of an agreed emergency plan.

168. Applications for some minor development and changes of use [Footnote 56: This includes householder development, small non-residential extensions (with a footprint of less than $250m^2$) and changes of use; except for changes of use to a caravan, camping or chalet site, or to a mobile home or park home site, where the sequential and exception tests should be applied as appropriate.] should not be subject to the sequential or exception

> tests but should still meet the requirements for site-specific flood risk assessments set out in footnote 55.
>
> 169. Major developments should incorporate sustainable drainage systems unless there is clear evidence that this would be inappropriate. The systems used should:
>
> a) take account of advice from the lead local flood authority;
>
> b) have appropriate proposed minimum operational standards;
>
> c) have maintenance arrangements in place to ensure an acceptable standard of operation for the lifetime of the development; and
>
> d) where possible, provide multifunctional benefits."

60. Paragraphs 160 to 165 apply to plan-making and site allocation by local planning authorities. Paragraphs 166 to 169 apply to applications for planning permission or development consent. The reference to "taking into account all sources of flood risk" in paragraph 161 (emphasis added) is the clarification that was not in the previous edition of the Framework.

61. The PPG, at paragraph 7.019, provides:

> "**The aim of the Sequential Test**
>
> **What is the aim of the Sequential Test for the location of development?**
>
> The Sequential Test ensures that a sequential approach is followed to steer new development to areas with the lowest probability of flooding. The flood zones as refined in the Strategic Flood Risk Assessment for the area provide the basis for applying the Test. The aim is to steer new development to Flood Zone 1 (areas with a low probability of river or sea flooding). Where there are no reasonably available sites in Flood Zone 1, local planning authorities in their decision making should take into account the flood risk vulnerability of land uses and consider reasonably available sites in Flood Zone 2 (areas with a medium probability of river or sea flooding), applying the Exception Test if required. Only where there are no reasonably available sites in Flood Zones 1 or 2 should the suitability of sites in Flood Zone 3 (areas with a high probability of river or sea flooding) be considered, taking into account the flood risk vulnerability of land uses and applying the Exception Test if required.
>
> ….

> Within each flood zone, surface water and other sources of flooding also need to be taken into account in applying the sequential approach to the location of development.
>
> Paragraph: 019 Reference ID: 7-019-20140306
>
> Revision date: 06 03 2014"

62. Paragraph 7.033 of the PPG provides:

> "**Applying the Sequential Test to individual planning applications**
>
> **How should the Sequential Test be applied to planning applications?**
>
> See advice on the sequential approach to development and the aim of the sequential test.
>
> The Sequential Test does not need to be applied for individual developments on sites which have been allocated in development plans through the Sequential Test, or for applications for minor development or change of use (except for a change of use to a caravan, camping or chalet site, or to a mobile home or park home site).
>
> Nor should it normally be necessary to apply the Sequential Test to development proposals in Flood Zone 1 (land with a low probability of flooding from rivers or the sea), unless the Strategic Flood Risk Assessment for the area, or other more recent information, indicates there may be flooding issues now or in the future (for example, through the impact of climate change).
>
> For individual planning applications where there has been no sequential testing of the allocations in the development plan, or where the use of the site being proposed is not in accordance with the development plan, the area to apply the Sequential Test across will be defined by local circumstances relating to the catchment area for the type of development proposed. For some developments this may be clear, for example, the catchment area for a school. In other cases it may be identified from other Local Plan policies, such as the need for affordable housing within a town centre, or a specific area identified for regeneration. For example, where there are large areas in Flood Zones 2 and 3 (medium to high probability of flooding) and development is needed in those areas to sustain the existing community, sites outside them are unlikely to provide reasonable alternatives.
>
> When applying the Sequential Test, a pragmatic approach on the availability of alternatives should be taken. For example, in

> considering planning applications for extensions to existing business premises it might be impractical to suggest that there are more suitable alternative locations for that development elsewhere. For nationally or regionally important infrastructure the area of search to which the Sequential Test could be applied will be wider than the local planning authority boundary.
>
> Any development proposal should take into account the likelihood of flooding from other sources, as well as from rivers and the sea. The sequential approach to locating development in areas at lower flood risk should be applied to all sources of flooding, including development in an area which has critical drainage problems, as notified to the local planning authority by the Environment Agency, and where the proposed location of the development would increase flood risk elsewhere.
>
> See also advice on who is responsible for deciding whether an application passes the Sequential Test and further advice on the Sequential Test process available from the Environment Agency (flood risk standing advice).
>
> Paragraph: 033 Reference ID: 7-033-20140306
>
> Revision date: 06 03 2014"

63. Paragraph 7.034 of the PPG provides:

> "**Who is responsible for deciding whether an application passes the Sequential Test?**
>
> It is for local planning authorities, taking advice from the Environment Agency as appropriate, to consider the extent to which Sequential Test considerations have been satisfied, taking into account the particular circumstances in any given case. The developer should justify with evidence to the local planning authority what area of search has been used when making the application. Ultimately the local planning authority needs to be satisfied in all cases that the proposed development would be safe and not lead to increased flood risk elsewhere.
>
> Paragraph: 034 Reference ID: 7-034-20140306
>
> Revision date: 06 03 2014"

64. It is apparent that the Framework and the PPG require surface water flooding to be taken into account when considering location of development, as part of the sequential approach, but, beyond that, there is no further direction as to exactly how surface water flooding is to be factored into the sequential approach. Policy and guidance is not prescriptive in this regard. Therefore it will be a matter of judgment for the applicant and the decision-maker (as envisaged in paragraph 7.034 of the PPG) as to how to give effect to the policy appropriately, in the particular circumstances of the case.

65. I accept the submission of the Defendant and Applicants that neither the policies nor the guidance support the Claimant's submission that the application of the sequential test means that, where there is some surface water flood risk, it must be positively demonstrated that there are no sites reasonably available for the development with lower surface water flood risk.

66. I was not assisted by the Claimant's references to cases on other policies in other contexts (e.g. *Hale Bank Parish Council v Halton Borough Council* [2019] EWHC 2677 (Admin)).

The decisions

67. The Defendant conducted a post-examination consultation on the updates to the Framework, as recommended by the ExA. It was summarised at DL 4.27, as follows:

> "*Updates to the National Planning Policy Framework: Post Examination Consultation*
>
> 4.27 The Secretary of State consulted on the issue of updates to the NPPF on 2 November 2021 and 20 December 2021, the key responses are summarised below:
>
> • SCC (the Lead Local Flood Authority) – the changes to the NPPF would require the Applicant to undertake a Sequential Test, and if necessary, an Exception Test. However, SCC acknowledge that as the PPG has not been updated, it is not clear how the Sequential and Exception Tests would be applied.
>
> • ESC – states that the reference in the updated NPPF has the potential to have important implications for the East Anglia ONE North and East Anglia TWO projects. However, they also acknowledge that as the PPG has not been updated, it is not clear how the Sequential and Exception Tests would be applied.
>
> • SASES – consider that it is clear from the Applicant's submissions that surface water and ground water were not taken into account during the site selection process and, consequently, the Sequential test was not properly applied. Additionally, SASES consider that the updates to the NPPF do not impose any new policy requirement but rather reinforce the existing requirements. SASES also reiterated that they considered the infiltration testing conducted by the Applicant was insufficient and had concerns about the Applicant's approach to applying the Sequential Test. Overall, SASES considered that because of the defects of the Applicant's approach, that policy requirements had not been met.
>
> • The Applicant – acknowledges that the updated NPPF is more explicit in the use of the term 'any source' of flooding but note that the criteria for the assessment and application of the

> Sequential Test remains unchanged, and that the PPG does not provide any criteria for the assessment of suitability of a location to determine whether a development is appropriate or not. The Applicant also highlighted:
>
> (i) they have considered all sources of flooding in the design of the Proposed Development;
>
> (ii) the substation site and National Grid infrastructure have been located in an area at low risk of surface water flooding;
>
> (iii) appropriate mitigation measures have been adopted to address any remaining surface water flood risk concerns;
>
> (iv) SCC had already given surface water flooding equal weighting when reviewing the Proposed Development's assessment of flood risk throughout the examination;
>
> (v) that the emphasis in the updated NPPF to move away from hard engineered flood solutions is not considered by the Applicant to be a fundamental change that would alter their proposed drainage strategy or adoption of SuDS measures;
>
> (vi) that the extensive landscape planting proposed would reduce the speed of surface water runoff compared to that currently experienced, as well as soil erosion and silt levels in runoff;
>
> (vii) modelling undertaken for the Friston Surface Water Flood Study15 confirms that surface water flooding within Friston primarily results from surface water flow from a number of locations unrelated to the substation site; and
>
> (viii) by attenuating surface water and ensuring a controlled discharge rate from the site there is no increase in flood risk to the surrounding area, specifically Friston."

68. The Defendant then set out his conclusions on this issue at DL 4.28:

> "4.28 The Secretary of State notes that all sources of flooding have been considered by the Applicant in the design of the Proposed Development, he also notes the surface water mitigation measures which the Applicant has proposed to address flood risk concerns. Furthermore, the Secretary of State has considered all the consultation responses relevant to the NPPF updates and, noting that the guidance on how the Sequential Test should be applied in respect of all sources of flooding has not been updated, is satisfied that the Applicant has (as it is currently defined) applied the Sequential Test as part of site selection. As such, the Secretary of State considers that the FRA is appropriate for the Application."

69. In my view, the Defendant did not adopt the ExA's view, expressed at ER 6.5.7, that the July 2021 edition of the Framework introduced a policy change. The Defendant aptly described the change in wording as a clarification (DL 4.25). As the Applicants submitted in their consultation response, "the updated NPPF is more explicit in the use of the term 'any source' of flooding" (DL 4.27).

70. I consider that the Defendant was correct to note, at DL 4.28, that the guidance on applying the sequential test (within the PPG) had not been updated to reflect the clarification in the Framework. That was a relevant observation to make in circumstances where he had to consider how the sequential test should be applied to surface water flood risks, which was not provided for in the policy. Therefore, I reject the Claimant's criticism of the Defendant's approach as one which unduly elevated the status of the PPG.

71. There was ample evidence of the Applicants' assessment of surface water flood risk before the Defendant. Although the RAG assessment did not consider surface water flood risks, the FRA, provided as part of the PEIR (Appendix 20.1), noted that within each flood zone, surface water and other sources of flooding also need to be considered when applying the sequential approach to the location of each project (paragraph 125) and went on to consider surface water flood risk and conclude that there were no unacceptable impacts (paragraphs 171-172).

72. Chapter 4 of the ES on Site Selection and Assessment referred to the PEIR and its FRA. The FRA that was submitted as part of the ES also considered surface water flood risk (paragraphs 142, 191 to 196).

73. Further information was submitted during the examination by the Applicants including the Outline Operational Drainage Management Plan (5 July 2021), which further considered flood risk in Friston (see paragraphs 59-76) and a strategy to address any surface water issues (section 9).

74. On 25 March 2021, the Applicants submitted a "Flood Risk and Drainage Clarification Note" and on 6 May 2021, the Applicants submitted comments on the Claimant's Deadline 9 Submissions.

75. In response to the Secretary of State's consultation of 2 November 2021, the Applicants submitted an explanation on 30 November 2021 of how surface water flood risk had been taken into account in site selection. It summarised the policy and guidance and stated:

> "23. While the Applicants have considered all sources of flooding, in the absence of any criteria as to how this should be implemented, they have sought to address the potential risk from surface water flooding by locating the onshore substations and National Grid infrastructure in an area at low risk of surface water flooding, and by adopting appropriate mitigation measures within the design to address any remaining surface water flood risk concerns.
>
> 24. In considering the revised wording it is also noted that SCC (as the LLFA) had already given surface water flooding equal

> weighting when reviewing the Projects' assessment of flood risk throughout the DCO examinations and prior to the publication of the updated NPPF.
>
> 25. All development sites have an element of potential surface water flood risk and any development that changes the surface of a site so that it is more impermeable will need to address this matter through the application of appropriate mitigation measures. There is greater emphasis in the updated NPPF on "…making as much use as possible of natural flood management techniques as part of an integrated approach to flood risk management…", which is part of the shift in focus away from hard engineering solutions. However, this is not considered to be a fundamental change that would alter the Projects' Drainage Strategy or the adoption of the proposed SuDS measures. It should also be noted that the extensive landscape planting being proposed as part of the Projects' landscape mitigation strategy would reduce the speed of surface water runoff compared to that currently experienced, as well as soil erosion and silt levels in runoff. On this basis, the landscape mitigation strategy will afford opportunities for further flood mitigation over and above that already included within the concept drainage design.
>
> 26. Regarding surface water flooding, the onshore substation and National Grid infrastructure locations were reviewed against the Environment Agency's surface water flood risk mapping and identified as being predominantly located in an area at very low risk of surface water flooding. Furthermore, the National Grid substation location was selected in full cognisance of the presence of a shallow surface water flow route (comprising approximately 4cm of water depth during a 1 in 100 year storm event), noting that such features can be diverted, and their continued conveyance ensured using well established and proven techniques. A commitment to this is made within the OODMP (REP13-020), along with a commitment to offset any reduction in volume relating to other existing surface water features in the vicinity of the substation locations.
>
> 27. Additionally, a review of the modelling undertaken for the Friston Surface Water Flood Study (BMT, 2020) further confirmed that the surface water conveyance routes onsite do not constitute a significant risk to the onshore substations or National Grid infrastructure, and that the risk falls well below the lowest hazard."

76. The application of the relevant policy and guidance was a matter of planning judgment for the Defendant. I do not consider that the Defendant's approach discloses any error of law.

77. At DL 4.1 to 4.5, the Defendant summarised the relevant policies, clearly recording that all sources of flood risk were to be taken into account at all stages, and that development

was directed away from areas at highest risk of flooding by the application of the sequential test.

78. The Defendant then set out a summary of the Applicants' case at DL 4.6 to 4.12. All above ground structures, including the substations, would be located in Flood Zone 1. Some subterranean development (cabling) would be located in Flood Zones 2 and 3 where it is required to pass under existing watercourses on its route to the sea. The sequential test had been applied in accordance with the Framework and the PPG, and the development would be sequentially located in Flood Zone 1, in accordance with the current guidance on the sequential test in the PPG that "The aim is to steer new development to Flood Zone 1" (paragraph 7.019).

79. At DL 4.27, the Defendant noted the Applicants' position that all sources of flooding had been assessed with regard to the onshore substations, and that the wider area, including the village of Friston, would not be adversely affected. The substation and infrastructure were located in an area at low risk of surface water flooding, and appropriate mitigation measures had been adopted to address any remaining surface water flood risk concerns, by attenuating surface water and ensuring a controlled discharge rate from the site. There was no increase in flood risk to the surrounding area, specifically Friston.

80. The Claimant relied upon the ExA's finding that "Friston should be considered an area at high risk of surface water flooding" (ER 6.5.5). However, this finding related to the village of Friston (see ER 6.5.7, 6.5.20 and 6.5.27), not the site of the proposed development which lies outside the village, and is at low risk of surface water flooding. Modelling undertaken for the Friston Surface Water Flood Study confirmed that surface water flooding within Friston primarily resulted from surface water flow from a number of locations unrelated to the substation site.

81. At DL 4.28, the Defendant accepted that all sources of flooding had been considered, and he was satisfied that the Applicants had applied the sequential test as part of site selection. He concluded that the FRA was appropriate for the application, in all the circumstances. In my judgment, this was a lawful exercise of planning judgment, in which the Defendant recognised that the relevant policies and guidance required surface water flood risks to be taken into account when considering the location of development, as part of the sequential approach, but left it to the decision-maker to determine when and how that should be done. The Defendant's conclusion cannot be properly characterised as irrational.

82. Therefore, for the reasons set out above, Ground 1 does not succeed.

Ground 2: Heritage assets

Claimant's submissions

83. The Claimant submitted that the Defendant's conclusions as to heritage harm were unlawful in that:

i) he substantively adopted the ExA's reasoning which was based on an unlawful interpretation of the Decisions Regulations 2010, which consequently infected the Defendant's analysis of heritage harm; and/or

ii) while the Defendant purports to give heritage harm "considerable importance and weight", such weight was not reflected in the overall planning balance, which follows the ExA's analysis, and which unlawfully attributed only "medium" weight, contrary to the legal requirement.

84. The Claimant contended that regulation 3 of the Decisions Regulations 2010 should be interpreted and applied in a similar way to the statutory regime under the Planning (Listed Buildings and Conservation Areas) Act 1990 ("LBCA 1990") and the Town and Country Planning Act 1990 ("TCPA 1990"). This was the approach taken by Holgate J. in *R (Save Stonehenge World Heritage Site Ltd) v Secretary of State for Transport* [2021] EWHC 2161 (Admin), [2022] PTSR 74.

85. The Defendant's position was inconsistent with paragraph 5.9.21 of draft emerging NPS EN-1 and the Defendant's own position in the decision on the Thurrock Flexible Generation Plant Development and the Norfolk Vanguard Offshore Wind Farm Order 2022 in which he accorded identified heritage harm considerable importance and weight.

86. Although the Defendant said, at DL 6.30, that he gave "considerable importance and weight" to heritage harm, he did not refer to this when undertaking the planning balance, and only gave the heritage harm a "medium" weighting, whereas it should have been given a "high" weighting as a matter of law.

Defendant's and Applicants' submissions

87. The Defendant and Applicants submitted that there was a clear distinction between the statutory duty in regulation 3 of the Decisions Regulations 2010 and the statutory regime under the LBCA 1990 and the TCPA 1990. Therefore the case law and policy that has developed under the LBCA 1990 could not simply be read across into cases under the PA 2008.

88. In *Howell v Secretary of State for Communities and Local Government* [2014] EWHC 3627 (Admin), the court held, per Cranston J. at [45]-[46], that the duty to "have special regard" in the LBCA 1990 was not to be equated with the duty to "have regard" in other statutes concerning planning and environmental matters.

89. This point did not arise nor was it decided by Holgate J. in the case of *Save Stonehenge*. Furthermore, Holgate J. made no finding that the LBCA 1990 learning and case law could simply be read across to the PA 2008.

90. The proper interpretation of the legislation could not be altered by a draft policy document, or by the other DCO decisions referred to by the Claimant.

91. The Defendant plainly did have regard to the desirability of preserving any affected building, its setting, or any features of special or architectural or historic interest it possesses: see ER 8.6.2 and DL 6.1 and 6.30.

92. The weight to be attached to the heritage harm was a matter of planning judgment, not mandated by statute.

93. Alternatively, if there was a legal duty to give the heritage harm considerable importance and weight, that was what the Defendant did at DL 6.30. In the light of this statement, the medium weighting given to the heritage harm in the planning balance has to be read as meaning "considerable" or "significant". The weight given to other factors cannot affect the weight given to heritage harm.

Conclusions

The tests to be applied

94. The legal test to be applied by the Defendant on application for a DCO is set out in regulation 3(1) of the Decisions Regulations 2010 which 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."

95. The policy to be applied by the Defendant in NPS EN-1, which provides:

> "5.8.13 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 they can make to sustainable communities and economic vitality …
>
> 5.8.14 There should be a presumption in favour of the conservation of designated heritage assets and the more significant the designated heritage asset, the greater the presumption in favour of its conservation should be…"

96. I refused the Claimant permission to refer to the speech of the Under-Secretary of State when introducing the Decisions Regulations 2010 in the House of Lords as, in my judgment, the test in *Pepper v Hart* [1993] AC 593, at 640B-C, was not met. The wording of regulation 3 is not ambiguous, nor does it lead to an absurdity.

97. There is a separate statutory regime, applicable to applications for planning permissions under the TCPA 1990, which is set out in the LBCA 1990, at section 66(1):

> "66. General duty as respects listed buildings in exercise of planning functions
>
> (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.
>
> (2) Without prejudice to section 72, in the exercise of the powers of appropriation, disposal and development (including redevelopment) conferred by the provisions of section 232, 233 and 235(1) of the principal Act, a local authority shall have regard to the desirability of preserving features of special architectural or historic interest, and in particular, listed buildings."

98. The duty under section 66(1) LBCA 1990 was considered by the Court of Appeal in *Barnwell Manor Wind Energy Limited v East Northamptonshire District Council & Ors* [2014] EWCA Civ 137. Sullivan LJ held that there was an overarching statutory duty to treat a finding of harm to a listed building as a consideration to which the decision-maker must give "considerable importance and weight" when carrying out the balancing exercise. It was not open to the decision-maker merely to give the harm such weight as he thought fit, in the exercise of his planning judgment. In *Barnwell*, the Inspector erred in not giving the harm to the listed building "considerable importance and weight" in the planning balance, and instead treating the less than substantial harm to the setting of the listed buildings as a less than substantial objection to the grant of planning permission (at [29]).

99. This analysis was derived from the case law on earlier legislation expressed in similar terms. In *South Lakeland District Council v Secretary of State for the Environment & Anor* [1992] 2 AC 141 the House of Lords held that the intention of the equivalent provision in the Town and Country Planning Act 1971 was to "give a high priority" to the statutory objective (per Lord Bridge at 146F-G).

100. In *Bath Society v Secretary of State for the Environment* [1991] 1 WLR 1303, Glidewell LJ held that the desirability of preserving or enhancing the conservation area was, in formal terms, a material consideration but added at 1319A; "[s]ince … it is a consideration to which special attention is to be paid as a matter of statutory duty, it must be regarded as having considerable importance and weight".

101. The principle set out in the case law above is reflected in the Framework at paragraph 199 which states:

> "199. When considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation (and the more

> important the asset, the greater the weight should be). This is irrespective of whether any potential harm amounts to substantial harm, total loss or less than substantial harm to its significance."

102. The distinction between the duty to have "special regard" in section 66(1) LBCA 1990, and a duty "to have regard" which is found in other planning legislation, was considered in *Howell v Secretary of State for Communities and Local Government* [2014] EWHC 3627 (Admin), per Cranston J., at [42], [45], [46].

> "42. This first ground of challenge is that the Inspector made an error of law in misinterpreting his duty with respect to the Broads. Under section 17A of the 1988 Act, in exercising or performing any functions in relation to, or so as to affect, land in the Broads, the Secretary of State (and hence the Inspector)
>
> "shall have regard to the purposes of—
>
> (a) conserving and enhancing the natural beauty, wildlife and cultural heritage of the Broads;
>
> (b) promoting opportunities for the understanding and enjoyment of the special qualities of the Broads by the public; and
>
> (c) protecting the interests of navigation."
>
> …
>
> 45. Mr Harwood submitted that the Inspector had fallen into the same trap as had occurred in *East Northamptonshire DC v Secretary of State for Communities and Local Government* [2014] EWCA Civ 137; [2014] 1 P & CR 22. That was a case involving a listed building. Section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 provides for the general duty as respects granting planning permission for development which affects a listed building or its setting: the planning authority must "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." In that case it was common ground between the parties that "preserving" meant doing no harm: [16]. That did not mean that no harm could be done: however, there was a presumption against the grant of planning permission and considerable importance and weight had to be given to the desirability of preserving the setting of heritage assets when balancing the proposal against other material considerations: [27]-[28]. The planning inspector in that case had not done that.
>
> 46. In my judgment the East Northamptonshire DC case is not directly applicable in this case since the 1988 Act requires the

> planning authority not to have "special regard" to the matter as does section 66(1), but simply to have regard to it. In this respect the 1988 Act follows other planning legislation, for example, the Town and Country Planning Act 1990, s. 70(2); the National Parks and Access to the Countryside Act 1949, s. 11A(2); and the National Environment and Rural Communities Act 2006, s. 40(1). To have regard to a matter means simply that that matter must be specifically considered, not that it must be given greater weight than other matters, certainly not that it is some sort of trump card. It does not impose a presumption in favour of particular result or a duty to achieve that result. In the circumstances of the case other matters may outweigh it in the balance of decision-making. On careful consideration the matter may be given little, if any, weight."

103. The Defendant in this case drew my attention to the fact that section 66(2) LBCA 1990 also imposes the lesser duty "to have regard", suggesting that Parliament attached significance to the distinction between "special regard" and "to have regard".

104. In my judgment, applying the principles in *Howell*, the correct interpretation of the duty "to have regard", in regulation 3 of the Decisions Regulations 2010 is that it requires the decision-maker to take into account the "desirability of preserving the listed building or its setting or any features of special architectural or historic interest which it possesses". It does not include the higher duty found in section 66(1) LBCA 1990 to treat a finding of harm to a listed building as a consideration to which the decision-maker must give "considerable importance and weight" when assessing the planning balance.

105. The relevant policy in NPS EN-1 (5.8.13 – 5.8.14) does not equate to the Framework policy on heritage assets (paragraph 199). Of course, the Secretary of State has power to vary the policy tests to be applied, and to specify the nature of the duty to have regard in more detail. He has done so in other contexts (see ER 8.5.9) and it appears that he intends to do so in future in EN-1. Paragraph 5.9.21 of the draft emerging EN-1 requires:

> "5.9.21 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. This is irrespective of whether any potential harm amounts to substantial harm, total loss, or less than substantial harm to its significance."

106. If and when this change to the policy takes effect, then decision-makers will be required to give "great weight" to an asset's conservation in the planning balance. The decision-maker will continue to make his own judgment as to the extent of the potential harm to the asset, but the weight to be given to that assessed harm in the planning balance will be prescribed by policy as "great weight".

107. I agree with the Defendant and Applicants that this point did not arise nor was it decided by Holgate J. in the case of *Save Stonehenge*. Furthermore, Holgate J. made no finding that the LBCA 1990 case law should be applied to the PA 2008.

Decision

108. On the issue of the correct approach to the weighing of heritage harm under the Decisions Regulations 2010 and NPS EN-1, the ExA reached the following conclusions:

> "8.5.9. In particular, the phrase 'great weight' which appears within the NPPF does not appear in NPS EN-1. This is at odds with later NPSs for different sectors, such as for instance, the Airports NPS (2018) or the Geological Disposal Infrastructure NPS (2019). Such wording complies with the findings of the Barnwell Manor judgement in 2014 (referred to by SASES [REP1-366]) which states that any harm to a heritage asset must be given 'considerable importance and weight'.
>
> 8.5.10. The Applicant notes in its response to ExQ1.8.1 that the NPPF does not contain specific policies for NSIPs, and that these are determined in accordance with the Planning Act 2008. It notes that the policy of 'great weight' set out in the NPPF is not reflected in NPS EN-1 and that the test of having 'special regard' [to the desirability of preserving a listed building or its setting or any features of special architectural or historic interest which it possesses] as set out in section 66 of the Planning (Listed Buildings and Conservation areas) Act 1990 is reduced to having 'regard' through regulation 3 of the Infrastructure Planning (Decisions) Regulations 2010.
>
> 8.5.11. The ExA agree with the Applicant's reasoning and interpretation of the law. However, it also considers that the 'direction of travel' of policy including the later wording of the NPPF and the policy of 'great weight' to be important and relevant, noting the Barnwell decision and the text of later NPSs in this regard."

109. The ExA summarised its conclusions on heritage at ER 8.6.2:

> "• The ExA has had regard to the desirability of preserving the settings of the identified Listed Buildings and any features of special architectural or historic interest which they possess. Harmful impacts on the significance of various designated heritage assets have been identified, as well as to a non-designated heritage asset. NPS EN-1 requires such harm to be weighed against the public benefits of development – this assessment is carried out in Chapter 28, the Planning Balance.

> • Harm caused to the onshore historic environment has a medium negative weighting to be carried forward in the planning balance.
>
> • Cumulative effects with the other East Anglia application increase this harm.
>
> • Medium levels of harm are found as opposed to high due to the fact that harm to heritage assets has been found to be less than substantial. However, for several heritage assets the harm within this scale is at the higher end (including to a Grade II* listed building) and there would be substantial harm to a non-designated heritage asset. The ExA consider therefore that harm within the medium level of harm is at the top end of the scale.
>
> ……."

110. The Defendant agreed with the ExA's assessment and concluded:

> "6.30 Overall, the ExA concluded that harm caused to the onshore historic environment had a medium negative weighting to be carried forward in the planning balance. The Secretary of State is aware that where there is an identified harm to a heritage asset he must give that harm considerable importance and weight and he does so in this case. Overall, the Secretary of State agrees with the ExA's conclusions on Onshore Historic Environment and in light of the public benefit of the Proposed Development is of the view that onshore historical environment matters do not provide a justification not to make the Order."

111. The Defendant's counsel explained to me at the hearing that the Defendant applied "considerable importance and weight" to the heritage harm in anticipation of the policy change to be introduced by the draft emerging EN-1. I would have expected to see an express reference to the requirement to apply "considerable importance and weight" to the heritage harm when the Defendant undertook the planning balance in DL 27. DL 27.4 merely listed "onshore historic environment – medium negative weighting" along with the other assessed weightings. In the light of the clear statement in DL 6.30, I consider that this is more likely to be a drafting oversight than an error in the reasoning. But in any event, since the weight to be accorded to the heritage harm was not prescribed by statute, and the draft emerging EN-1 was not in force at the time, I do not consider that the Defendant was required by law to apply "considerable importance and weight" to the heritage harm in the planning balance.

112. Therefore Ground 2 does not succeed.

Ground 3: Noise

Claimant's submissions

113. The Claimant submitted that the Defendant erred in his treatment of noise impacts, in that he:

i) failed to take into account that his conclusions on noise necessarily entailed a conflict with paragraph 5.11.9 of NPS EN-1;

ii) relied on the imposition of a requirement which was in all the circumstances unreasonable in that it had not been shown to be workable; and/or

iii) failed to take into account the impact of noise from switchgear/circuit breakers in the National Grid substation.

Sub-paragraph (i)

114. The Claimant submitted that the ExA found that the Applicants had not provided sufficient information to demonstrate that negative noise effects could be avoided in respect of tonality, constructive interference, operational and construction noise (ER 13.2.114-13.2.116). Accordingly, the Defendant could not be satisfied that significant adverse effects could be avoided and so paragraph 5.11.9 of NPS EN-1 applied, and the Defendant should not have granted development consent. Any departure from policy had to be explained and justified.

Sub-paragraph (ii)

115. Paragraph 4.1.7 of NPS EN-1 sets the test for requirements to be imposed on DCOs under section 120 PA 2008, in particular that requirements must be "reasonable". This aligns with the legal and policy tests for the imposition of planning conditions.

116. The PPG on "Use of planning conditions" and the now-cancelled Circular 11/95 "Use of conditions in planning permission" make clear that if it cannot be demonstrated that a condition will be met, it will not satisfy the requirements of reasonableness.

117. It is well-established in the context of Environmental Impact Assessment ("EIA") screening decisions that a conclusion that an impact is not significant based on proposed mitigation measures can only lawfully be reached if those measures are "established" and the likelihood of their success can be predicted with confidence. In cases of doubt, the precautionary principle applies (see the summary of the law in *R (Swire) v Secretary of State for Housing, Communities and Local Government* [2020] EWHC 1298 (Admin), [2020] Env LR 29, per Lang J. at [62] – [89]).

118. Given the ExA accepted that there was no evidence the noise impacts could be avoided, there was no evidence to demonstrate that these noise limits could actually be met. Consequently, the requirement was unreasonable.

119. If the requirement cannot be met, the most likely outcome was an application in future for the requirement to be changed under Schedule 6 to PA 2008 or closure of the wind farm. These possibilities were not taken into account.

120. In the circumstances, a rational decision-maker would have refused consent.

Sub-paragraph (iii)

121. During the examination, the Claimant expressed concern about the impacts of the impulsive noise created during the operational phase of switchgear (circuit breakers and isolators), particularly at night, on the National Grid substation. However the Applicants, the ExA and the Defendant failed to address this issue. This was an obviously material consideration which should have been taken into account.

Defendant and Applicants' submissions

Sub-paragraph (i)

122. The Defendant and Applicants submitted that the ExA and the Defendant plainly concluded that there was compliance with NPS EN-1 paragraph 5.11.9; that all noise impacts could be satisfactorily mitigated; and the noise requirements could be met.

Sub-paragraph (ii)

123. The imposition of a planning requirement is a matter of planning judgment for the decision-maker which can only be challenged if it discloses a public law error.

124. The ExA gave detailed consideration to the evidence, including expert evidence, on these issues. Both the ExA and the Defendant were satisfied, on the evidence, that the requirements would be met, and that the noise impacts would be satisfactorily mitigated.

125. The Defendant was not required to address the possibility that, at some future date, the windfarm might have to cease operation, or that the operator might apply to vary the requirements.

Sub-paragraph (iii)

126. The Applicants addressed the issue of switchgear noise at the examination, and it was considered by the ExA. The Defendant agreed with the ExA's conclusions. In any event, this issue was not an obviously material consideration.

Conclusions

Sub-paragraph (i)

127. Paragraphs 5.11.9 and 5.11.10 of NPS EN-1 provide:

> "5.11.9 The IPC should not grant development consent unless it is satisfied that the proposals will meet the following aims:
>
> • avoid significant adverse impacts on health and quality of life from noise;

> • mitigate and minimise other adverse impacts on health and quality of life from noise; and
>
> • where possible, contribute to improvements to health and quality of life through the effective management and control of noise.
>
> 5.11.10 When preparing the development consent order, the IPC should consider including measurable requirements or specifying the mitigation measures to be put in place to ensure that noise levels do not exceed any limits specified in the development consent."

128. Thus, paragraph 5.11.9 requires that significant adverse impacts are avoided, but it contemplates that lesser adverse impacts may remain and, provided that they have been mitigated and minimised, there can be policy compliance.

129. Paragraph 5.11.9 reflects the noise policy aims set out in the Noise Policy Statement for England (March 2010). The Noise Policy Statement (at paragraphs 2.19 to 2.24) identifies three levels of noise impacts: "NOEL - No Observed Effect Level"; "LOAEL – Lowest Observed Adverse Effect Level" and "SOAEL – Significant Observed Adverse Effect Level". The policy advises that an impact at the level of SOAEL should be avoided. Where the impact lies somewhere between LOAEL and SOAEL, the policy "requires that all reasonable steps should be taken to mitigate and minimise adverse effects on health and quality of life …This does not mean that such adverse effects cannot occur".

130. The ExA set out the relevant policies on noise in NPS EN-1, at the beginning of Chapter 13, and it expressly had regard to them.

131. The ExA gave lengthy and thorough consideration to the noise issues at the Examination and in the ER.

i) In respect of operational noise, it concluded:

> "the Applicant's commitment to adopt Best Practicable Means (BPM) and the reduced operational noise limits now specified in Requirement 27 in the dDCO are consistent with national policy" (ER 13.2.116)
>
> "… notwithstanding the differences of opinion, the ExA is satisfied that the Requirements in the dDCO must nevertheless be met, and consequently the ExA concludes that operational noise impacts can be satisfactorily mitigated." (ER 13.2.118)

ii) In respect of construction noise it concluded:

> "there are no significant outstanding issues in respect of construction noise which are not capable of satisfactory mitigation through Requirement 22 in the final version of the dDCO" (ER 13.2.117).

132. I agree with the submission made by the Defendant and the Applicants that the ExA concluded that all noise impacts could be satisfactorily mitigated. Read in the context of NPS EN-1 paragraph 5.11.9 which the ExA had set out, and reinforced by the ExA's reference to consistency with national policy at ER 13.2.116, the ExA was plainly concluding that there was compliance with paragraph 5.11.9. The ExA's conclusion that all mitigation was "satisfactory" necessarily meant that the ExA concluded that it was effective to "avoid significant adverse impacts on health and quality of life" and to "mitigate and minimise other adverse impacts on health and quality of life" within the meaning of paragraph 5.11.9.

133. The Defendant, at DL 11.10 – 11.11 recorded and agreed with the ExA's conclusions, which he was entitled to do, on the evidence and findings before him. There was no error of law in the approach taken to noise impacts.

Sub-paragraph (ii)

134. By section 120 PA 2008, the Defendant has a power to include requirements in an order granting development consent.

135. NPS EN-1 paragraph 4.1.7 sets out policy on the exercise of the power:

> "The IPC should only impose requirements in relation to development consent that are necessary, relevant to planning, relevant to the development to be consented, enforceable, precise, and reasonable in all other respects. The IPC should take into account the guidance in Circular 11/95, as revised, on "The Use of Conditions in Planning Permissions" or any successor to it."

136. Circular 11/95 has been cancelled and replaced by the PPG on use of planning conditions. The PPG outlines circumstances where conditions should not be used, which include "Conditions which unreasonably impact on the deliverability of a development" (paragraph 21a-005). A further circumstance where the PPG suggests that a condition may fail the test of reasonableness concerns conditions requiring action on land outside the control of the applicant. The PPG states (paragraph 21a-009): "Such conditions should not be used where there are no prospects at all of the action in question being performed within the time-limit imposed by the permission."

137. These provisions on the imposition of requirements are separate from the EIA framework referred to by the Claimant.

138. Whether to impose a requirement is a matter of planning judgment for the decision-maker which can only be challenged on the basis of irrationality or some other public law error.

139. The applications originally proposed an operational noise limit of 34dB LAeq at the nearest sensitive receptors, as recorded at ER 13.2.31. The limit was assessed as achievable in the ES, Chapter 25 Noise and Vibration, at paragraphs 185-193. Subsequently, the Applicants were able to commit to reduced operational noise limits of 31dB LAeq and 32dB LAeq, as recorded at ER 13.2.52. These limits have been

incorporated into requirement 27. This was only 1dB or 2dB higher than the noise limit of 30dB LAeq which the Claimant considered acceptable. The reduction was possible due to design refinements and identification of additional mitigation, and the new limits were again assessed as achievable (see "Clarification Note - Noise Modelling" at paragraphs 49-53 and 90-93).

140. The Claimant submitted that it identified at Examination that there were risks of non-compliance arising from tonal characteristics of the noise, and from constructive interference. However, both those matters were the subject of specific evidence from the Applicants explaining why these matters would not prevent compliance with the noise limits. This was part of a wider evidence base showing requirement 27 to be achievable.

141. The Applicants submitted an expert report on noise dated 4 March 2021 by Colin Cobbing BSc (Hons) CEnvH FCIEH MIOA, an acoustics consultant. The report addressed the achievability of requirement 27, including the two contentions now particularly relied upon by the Claimant, stating (page 12):

> "SASES then go on to make the claim that the EA1 substation is not directly comparable with those proposed for EA1N or EA2 and infer that the noise monitoring report is of little or no relevance. Again, this position lacks balance. Of course, there are differences but there are also similarities between EA1 and the proposed substations. The findings of the noise monitoring report for EA1 provides a useful indication of the likelihood of the presence of tones associated with substations incorporating modern technology.
>
> In my opinion, the Examining Authority can be confident that the Projects can be designed to avoid any highly perceptible or clearly perceptible tones and it is likely that any tones can be avoided altogether.
>
> If any tones are perceptible at the receiver locations, it would attract a correction in accordance with the BS4142 method and this would be accounted for in the proposed noise limit. This will drive the designers to minimise tonal features or eliminate them altogether. As explained earlier, this is a perfectly normal and acceptable way of controlling noise from commercial and industrial noise. Standing waves and interference patterns are also raised as a potential issue. These points, no doubt, are intended to cast doubt on the confidence that the Examining Authority can have in relation to these types of features. I agree in as much that this effect cannot be dismissed as a possibility, but it is highly improbable in my view. This is a matter that can be adequately addressed during the detailed design of the substations. …"

142. The ExA recorded this evidence at ER 13.2.68-13.2.69. Accordingly, the ExA had regard to expert evidence explaining why there could be confidence that the design of the projects enabled the limits to be achieved, notwithstanding the points raised by the

Claimant. Even where an impact cannot be ruled out, consent can be granted, subject to a requirement that prevents operation of the development beyond an acceptable noise level.

143. The ExA reached conclusions on tonal correction and constructive interference at ER13.2.114 and 13.2.115. It referred to the Applicants' reliance on mitigation. The ExA did not disagree with the Applicants' position recorded in those bullet points that the effects are "capable of satisfactory mitigation at detailed design stage". In its "Conclusions on noise matters" (ER 13.2.118), the ExA expressly concluded that operational noise impacts "can be satisfactorily mitigated". The second bullet point at ER 13.2.116, when read with the subsequent bullet points in ER 13.2.116 reflects the position set out in ER 13.2.114 and 13.2.115 that, to the extent that it is necessary, mitigation can be adequately addressed at detailed design stage. This was also East Suffolk Council's position (ER 13.2.85, 13.2.87, 13.2.95). As stated in the final bullet point of ER 13.2.116, the combination of adopting Best Practicable Means and operational noise limits met the national policy objectives in paragraph 5.11.9 of EN-1.

144. In addition, as noted at ER 13.2.60, the Applicants submitted the Onshore Substation Operational Noise Assessment which had been undertaken by the Applicants to measure the sound levels from the already operational East Anglia ONE substation. As Mr Cobbing observed in the passage quoted above, this provided useful further evidence of the likely operational noise effects from the substation components of the proposed developments.

145. I accept the Applicants' submission that noise impacts from a proposed development will necessarily be predictions, particularly in cases such as the present where the DCO provides an outline framework for development, with detailed design left to a subsequent stage. However, the existence of an element of uncertainty cannot in itself be a reason to refuse consent. The predictions were based on noise emission levels from actual and operating plant, as well as engagement with the supply chain, with reasonable steps taken to minimise uncertainty, and conservative assumptions adopted as explained by Mr Cobbing in his expert report at 4.4. The availability of the assessment from the operational East Anglia ONE substation, which the ExA could plainly treat as at least similar to the proposed developments, provided additional specific support for finding that it was appropriate to impose requirement 27. This evidence was expressly referred to by the ExA when concluding that operational noise impacts could be satisfactorily mitigated (Conclusions on noise matters at ER 13.2.118).

146. The achievability of the limit in requirement 27 was also confirmed and explained repeatedly in other submissions from the Applicants to the examination: the Applicants' Position Statement on Noise, at paragraphs 41-51; the Applicants' comments on the Claimant's Deadline 8 submissions, at ID4 page 16; the Applicants' comments on the Claimant's Deadline 9 submissions at ID15-16 pages 8 to 9; the Applicants' comments on the Claimant's Deadline 11 submissions at ID2 pages 26 to 33; and the Applicants' final position statement for each application, at paragraphs 65-66.

147. Requirement 12 requires the local planning authority's agreement to be obtained to the design of the substations, including any noise mitigation, prior to commencement of relevant work. In particular, the Applicants are required by the Substations Design

Principles Statement to submit an Operational Noise Design Report for approval in accordance with requirement 12(2) which must include information on avoiding tonal penalties. That mechanism further enabled the ExA to be satisfied that the limits would be achieved.

148. On the basis of the ExA's conclusions, there was no need to address the scenario presented by the Claimant on the basis that the requirements were not met at some point in the future. The consented development must operate in accordance with the requirements imposed, and it will be for the undertaker to ensure that it is able to do so. If there was an application to vary requirement 27 at a later date, a separate statutory process would apply, and the application would be judged on its merits.

149. In the light of the evidence, and the findings of the ExA, the Defendant was entitled to conclude that the requirements were achievable and reasonable, and his decision does not disclose any error of law.

Sub-paragraph (iii)

150. Switchgear noise relates only to operational noise at the National Grid substation, not the EA1N and EA2 substations. The ExA expressly dealt with switchgear noise at ER 13.2.24:

> "Operational impacts were assessed using BS4142. The dominant operational noise sources are substation transformers, shunt reactors and rotating plant such as transformer coolers. The National Grid infrastructure does not contain any of these, so operational noise would come from switchgear and control systems, with noise levels imperceptible at the nearest NSR [noise sensitive receptor]. …"

151. That reflected the position set out in the Applicants' ES, paragraph 30. The position was further confirmed in the Clarification Note submitted by the Applicants on 13 January 2021. The note explained that the switchgear equipment is only activated under an emergency or for occasional testing. An example was given of an existing substation where there were 26 activations of switchgear over a period of 18 months. Noise levels were modelled and the following conclusion was reached:

> "37. As the predicted noise level generated by the switchgear is below both the prevailing background and the maximum noise levels currently experienced at the agreed noise sensitive locations above, and due to the low occurrence of this item of equipment being operated, this item of National Grid Infrastructure has not been included or assessed further in the updated noise model."

152. The Applicants responded to the Claimant's comments on this issue, including orally at Issue Specific Hearing 12, and in writing in its comments on the Claimant's Deadline 8 submissions.

153. In the light of this evidence, I do not consider that either the ExA or the Defendant failed to take account of switchgear noise.

154. Therefore, for the reasons set out above, Ground 3 does not succeed.

Ground 4: Generating capacity

Claimant's submissions

155. The Claimant submitted that the Defendant failed to take into account representations made by the Claimant that a requirement should be imposed to ensure that the Applicants did not downsize the output from the estimated total generating capacity of 800MW for EA1N, and 900MW for EA2, once consent was granted. The minimum capacity was specified in the DCOs as more than 100 MW, in order to qualify as a NSIP under section 15(3)(b) PA 2008. The "finely balanced" case for granting the DCOs was contingent on the benefit of high renewable energy generation capacity. Further the Defendant failed to give reasons for rejecting the Claimant's representations.

156. The Claimant also submitted that the Defendant took into account an irrelevant consideration when making his decision, namely, the total proposed generating capacity of the development when this was not secured by a requirement in the DCO.

Defendant and Applicants' submissions

157. The Defendant and the Applicants submitted that the ExA considered the Claimant's representations, but accepted the Applicants' view that the requirement proposed by the Claimant was neither necessary nor appropriate. Therefore the Claimant was aware of the reasons why its proposal was not accepted. The Defendant adopted the same approach as the ExA.

158. The Defendant was not obliged by law to include such a requirement. Furthermore, the Defendant was entitled to take into account the benefits of the proposed electricity generation without those benefits formally secured as a requirement. These were matters of planning judgment for the Defendant to determine.

Conclusions

159. Schedule 1 to the DCO describes the development authorised by work number 1(a) as:

> "an offshore wind turbine generating station with a gross electrical output capacity of over 100MW comprising up to 67 wind turbine generators … situated within the area shown on the works plans."

160. Thus the DCO only authorises the construction and operation of an offshore generating station above the 100MW threshold for NSIPs of that type identified in section 15(3) PA 2008. The purpose of securing that minimum level of capacity is to ensure that the generating station to be constructed and operated is a NSIP as defined by PA 2008.

161. Aside from the requirements of section 15(3) PA 2008, there is no legal or policy requirement for the generating capacity to be formally secured. Furthermore, as a general principle, there is no legal requirement that all benefits which are given weight in a planning balance must be formally secured, in order to be treated as material considerations. In this case, the decision to give weight in the planning balance to the generating capacity was a matter of judgment for the Defendant.

162. During the Examination, the Claimant submitted that the development described in the DCO should be amended so as only to allow the proposed generating station to be developed at the power proposed in the application, subject to a small margin, to prevent future downsizing.

163. The ExA addressed this submission in its commentary on the draft DCO. It summarised the Claimant's arguments, and sought the Applicants' response. In particular, the ExA asked the Applicants whether securing a higher minimum level "may form a relevant component of greater public benefits" and whether or not there was a threshold for minimum capacity "that might be necessary to be secured in these proposed developments to ensure that a positive balance of benefit could be retained" (pages 23-24).

164. During the course of the examination (both in response to the ExA's commentary and the Claimant's submissions, and in subsequent written submissions to the Defendant), the Applicants argued that such an amendment was both unnecessary and inappropriate on the facts of this case. In support of that argument, evidence was given and submissions were made, to the following effect:

    i) The Applicants' intention was "to build out both projects to their maximum capacity" and they "have engaged extensively with the turbine and grid supply chains on this basis" (Applicants' Comments on the Claimant's Deadline 11 Submissions).

    ii) It was important to retain some element of flexibility as to the ultimate generating capacity to be built, having regard to the way in which offshore windfarms are financed through the Contract for Difference ("CfD") Auction process, and an example was given of how the market mechanism can operate so as to require individual projects to make use of the flexibility within DCOs as to how much generating capacity to build out at any one time (Applicants' Comments on the ExA's Commentary on the draft DCO dated 24 February 2021).

    iii) The market mechanism nevertheless operates so as to drive delivery towards the higher end of the transmission capacity created in order to achieve the price reductions reported in the Energy White Paper (the Applicants explained the economic factors that lie behind that effect) (Applicants' Comments on the ExA's Commentary on the draft DCO dated 24 February 2021).

    iv) The factors that lay behind previous significant reductions in capacity were explained as being the "considerable uncertainty regarding both turbine and grid technologies" which had existed at that earlier stage, but this "is no longer the case" (Applicants' Comments on the Claimant's Deadline 11 Submissions).

v) The increased Government targets for the deployment of offshore generating capacity to 40GW by 2030 was a clear signal to the market that there would be an acceleration of opportunity and that the future CfD Auction rounds were likely to increase in capacity (Applicants' Comments on the ExA's Commentary on the draft DCO dated 24 February 2021).

vi) A significant reduction in capacity below that planned would make the proposed development unviable, essentially because the income generated by the station would not be sufficient to justify the costs incurred in developing and operating the assets (Post-examination submissions to the Defendant dated 31 January 2022).

165. Having regard to those matters, the Applicants' position was that it was likely that the capacity ultimately developed would be at the upper end of what was proposed, without any further provision being added to the DCO to mandate that result, and the planning balance should therefore be struck by reference to the likely scale of electrical output in light of the evidence that had been adduced (Applicants' Comments on the Claimant's Deadline 8 Submissions).

166. The ExA conclusions on this issue were as follows:

> "5.2.10 In this context, the Proposed Development provides a substantial volume of renewable electricity generating capacity meeting a materially significant volume of projected national need and targets. In scalar terms, ES Chapter 2 [APP-050] indicatively calculates that, if developed, East Anglia ONE North would deliver some 2.5TWh/ year of effectively zero carbon renewable electricity. The Applicant's calculations (section 2.2.2 of [APP-050] indicate that the Proposed Development has the potential to meet approximately 3.5% of the UK cumulative deployment target for 2030, although the ExA does not adopt a precise percentage figure for a number of reasons…."
>
> …..
>
> 5.2.13 It is also important to note that whilst the ES describes the effects on the receiving environment offshore of proposed generating station, it does not commit to a maximum renewable electricity yield for the Proposed Development. The Application Form [APP-002] identifies that the Proposed Development is expected to have a generating capacity of over 100MW (essential if the development is to be considered an NSIP under PA2008) but reserves adaptability around precise selection of turbine blades and generators, with a view to maximising the installed generating capacity and yield within the expected market framework of a Contract for Difference (CfD) auction."

167. The ExA therefore recognised that the actual volume to be delivered was not fixed but was flexible. The ExA explained why they did not "adopt a precise percentage figure". The weighing of this benefit therefore rested on the potential generating capacity, rather

than any specific and fixed minimum scale of generation being delivered above the 100MW threshold.

168. The Defendant agreed with the ExA's conclusions as to the benefits of the proposed development in this respect, and the weight to be attached to the contribution to meeting the need identified in the NPS EN-1 (DL 27.1 and 27.3). In endorsing those conclusions the Defendant did not assume that any specific minimum capacity above 100MW was certain to be delivered. Instead, he (like the ExA) carried out the planning balance on the broader basis that what was consented would constitute "highly significant additional renewable energy generation capacity in scalar terms" (DL 27.1). That was a conclusion reasonably open to him on the evidence. It was plainly a material planning consideration and the weight that was attached to it was entirely a matter for the Defendant's planning judgment. Nothing further was required to enable the Defendant to lawfully conclude that the associated public benefits were "sufficient to outweigh the negative impacts that have been identified" (DL 27.1).

169. In my judgment, the reasons given by the Defendant were adequate and intelligible and met the required standard. The ERs and DL were addressed to parties who were well aware of the arguments and evidence involved.

170. Therefore, for the reasons set out above, Ground 4 does not succeed.

Ground 5: Cumulative effects

Claimant's submissions

171. The Claimant submitted that the Defendant irrationally excluded from consideration the cumulative effects of known plans for extension of the site, by the addition of other projects to connect at the same location in Friston, and failed to take into account environmental information relating to those projects, in breach of the EIA Regulations 2017.

172. The proposed National Grid Substation at Friston may form the connection location for other projects, in particular, for two interconnectors, Nautilus and Eurolink, promoted by National Grid Ventures, and a further interconnector, Sealink, promoted by National Grid Electricity Transmission ("NGET"). There is also the potential for other windfarms to connect to the grid at the same location.

173. The Claimant expressed concerns about the cumulative effects of the other projects during the Examination. At the request of the ExA, the Applicants produced the "Extension of National Grid Substation Appraisal" ("the Extension Appraisal") which gave information about the likely environmental effects of extending the proposed National Grid substation at Friston to accommodate the Nautilus and Eurolink projects.

174. Neither the ExA nor the Defendant considered the Extension Appraisal in reaching their conclusions. This was an error of law, for three reasons:

i) The Defendant was required to consider the likely significant cumulative effects of the proposed development together with other projects. The Extension Appraisal contained information in respect of those effects which had been

expressly required to be provided. Failing to take that information into account was a breach of the EIA Regulations, and irrational: see *Pearce v Secretary of State for Business, Energy and Industrial Strategy* [2022] Env LR 4.

ii) The ExA's reasoning for not considering that information was irrational. The ExA said that the information was "environmental information" and for that reason did not need to be taken into account. However, environmental information must be taken into account in deciding whether to grant development consent.

iii) The reasons given were inadequate. It appears that the information was disregarded simply because the Applicants did not wish to describe the document as a "Cumulative Impact Assessment". However, the information could only be disregarded if it was not relevant, and accordingly these reasons were plainly inadequate.

175. The ExA cautioned that the scale of the impacts at Friston would mean that "utmost care" would be required if further development were to be proposed. As the decision was finely balanced, if the further likely significant effects of future development had been taken into account, the balance may have tipped against granting development consent.

176. The ExA and the Defendant also failed to consider the effects of extension on a range of matters including flooding and transport, which were omitted from the Extension Appraisal. The ExA noted that it considered that "satisfactory assumptions" could "have been made by the Applicant about the likely levels of traffic which would be generated by the proposed NGV interconnector projects to enable them to be included in the Applicant's cumulative impact assessment" at ER 12.14. Yet at DL 12.17 – 12.19, the Defendant found that there was a lack of information about the Nautilus and Eurolink projects which justified failing to assess them. Thus there was a further failure to take into account the cumulative effects of the interconnector projects.

Defendant and Applicants' submissions

177. There was no breach of the Defendant's obligations under the EIA Regulations 2017. There was insufficient reliable information on the projects to carry out a cumulative impact assessment. The information specified in Advice Note 17 was not available.

178. The projects were some considerable way from being "existing or approved projects" in respect of which a cumulative assessment would be required by reference to paragraph 5 of Schedule 4 to the EIA Regulations 2017.

179. The Extension Appraisal was considered and taken into account by the ExA and the Defendant as "environmental information" submitted by the Applicants during the Examination, but it did not have the status of "further information" which was "directly relevant to reaching a reasoned conclusion on the significant effects of the development on the environment" and which it is necessary to include in an environmental statement.

180. The Defendant's conclusions were a legitimate exercise of his planning judgment and clearly rational.

181. The reasons in the DL were sufficient and intelligible.

Conclusions

The EIA Regulations 2017 and case law

182. Regulation 21 of the EIA Regulations 2017 provides:

> "21.— Consideration of whether development consent should be granted
>
> (1) 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.…"

183. Regulation 3 - Interpretation defines the following relevant terms:

> ""environmental information" means the environmental statement (or in the case of a subsequent application, the updated environmental statement), including any further information and any other information, any representations made by any body required by these Regulations to be invited to make representations and any representations duly made by any other person about the environmental effects of the development and of any associated development;
>
> "environmental statement" has the meaning given by regulation 14;
>
> …
>
> "further information" means additional information which, in the view of the Examining authority, the Secretary of State or the relevant authority, is directly relevant to reaching a reasoned conclusion on the significant effects of the development on the environment and which it is necessary to include in an

environmental statement or updated environmental statement in order for it to satisfy the requirements of regulation 14(2);

…

"any other information" means any other substantive information provided by the applicant in relation to the environmental statement or updated environmental statement;".

184. Regulation 14 provides:

"14.— Environmental statements

(1) An application for an order granting development consent for EIA development must be accompanied by an environmental statement.

(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.

(3) The environmental statement referred to in paragraph (1) must—

(a) where a scoping opinion has been adopted, be based on the most recent scoping opinion adopted (so far as the proposed

> development remains materially the same as the proposed development which was subject to that opinion);
>
> (b) include the information reasonably required for reaching a reasoned conclusion on the significant effects of the development on the environment, taking into account current knowledge and methods of assessment; and
>
> (c) be prepared, taking into account the results of any relevant UK environmental assessment, which is reasonably available to the applicant with a view to avoiding duplication of assessment.
>
> ……..”

185. Schedule 4 sets out information for inclusion in environmental statements. Paragraph 5 requires a “description of the likely significant effects of the development on the environment resulting from, inter alia… 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”. It continues that the description of likely significant effects should cover “cumulative” effects of the development.

186. In *Pearce*, Holgate J. quashed a DCO where the Secretary of State deferred his evaluation of the cumulative impacts of a substation development on the basis that the information on the development was “limited”, without giving a properly reasoned conclusion as to whether an evaluation could be made.

187. Holgate J. summarised the relevant case law at [95] to [117], which I have cited in part below:

> “108 Although it is a matter of judgment for the decision-maker as to what are the environmental effects of a proposed project and whether they are significant, EIA legislation proceeds on the basis that he is required to evaluate and weigh those effects he considers to be significant (and any related mitigation) in the decision on whether to grant development consent (see e.g. *Commission v Ireland* [2011] Env. L.R. 25)……”
>
> 109 The next issue is whether consideration of an environmental effect can be deferred to a subsequent consenting process. If, for example, the decision-maker has judged that a particular environmental effect is not significant, but further information and a subsequent approval is required, a decision to defer consideration and control of that matter, for example, under a condition imposed on a planning permission, would not breach EIA legislation (see *R. v Rochdale MBC Ex p. Milne* [2000] Env. L.R. 1).
>
> 110 But the real question in the present case is whether the evaluation of an environmental effect can be deferred if the decision-maker treats the effect as being significant, or does not

disagree with the "environmental information" before him that it is significant? A range, or spectrum, of situations may arise, which I will not attempt to describe exhaustively.

…..

114 In order to comply with the principle identified in *Commission v Ireland*, and illustrated by *Tew* and *Hardy*, consideration of the details of a project defined in an outline consent may be deferred to a subsequent process of approval, provided that: (1) the likely significant effects of that project are evaluated at the outset by adequate environmental information encompassing: (a) the parameters within which the proposed development would be constructed and operated (a "Rochdale envelope"); and (b) the flexibility to be allowed by that consent; and (2) the ambit of the consent granted is defined by those parameters (see *ex parte Milne* at [90] and[93]–[95]). Although in *Milne* the local planning authority had deferred a decision on some matters of detail, it had not deferred a decision on any matter which was likely to have a significant effect (see Sullivan J at [126]), a test upon which the Court of Appeal lay emphasis when refusing permission to appeal (C/2000/2851 on 21 December 2000 at [38]). Those matters which were likely to have such an effect had been adequately evaluated at the outline stage.

115 Sullivan J also held in *ex parte Milne* that EIA legislation plainly envisages that the decision-maker on an application for development consent will consider the adequacy of the environmental information, including the ES. He held that what became reg.3(2) of the 2009 Regulations imposes an obligation on the decision-maker to have regard to a "particularly material consideration", namely the "environmental information". Accordingly, if the decision-maker considers that the information about significant environmental effects is too uncertain or is inadequate, he can either require more detail or refuse consent ([94]–[95] and[106]–[111]). I would simply add that the issue of whether such information is truly inadequate in a particular case may be affected by the definition of "environmental statement", which has regard to the information which the applicant can "reasonably be required to compile" (reg.2(1) of the 2009 Regulations—see [19] above).

116 The principle underlying *Tew*, *Milne* and *Hardy* can also be seen in *R. (Larkfleet Ltd) v South Kesteven DC* [2016] Env. L.R. 76 when dealing with significant cumulative impacts. There, the Court of Appeal held that the local planning authority had been entitled to grant planning permission for a link road on the basis that it did not form part of a single project comprising an urban extension development. The court held:

(i) What is in substance and reality a single project cannot be "salami-sliced" into smaller projects which fall below the relevant threshold so as to avoid EIA scrutiny ([35]).

(ii) But the mere fact that two sets of proposed works may have a cumulative effect on the environment does not make them a single project for the purposes of EIA. They may instead constitute two projects the cumulative effects of which must be assessed ([36]).

(iii) Because the scrutiny of the cumulative effects of two projects may involve less information than if they had been treated as one (e.g. where one project is brought forward before another), a planning authority should be astute to see that the developer has not sliced up a single project in order to make it easier to obtain planning permission for the first project and to get a foot in the door for the second ([37]).

(iv) Where two or more linked sets of works are properly regarded as separate projects, the objective of environmental protection is sufficiently secured by consideration of their cumulative effects in the EIA scrutiny of the first project, so far as that is reasonably possible, combined with subsequent EIA scrutiny of those impacts for the second and any subsequent projects ([38]).

(v) The ES for the first project should contain appropriate data on likely significant cumulative impacts arising from the first and second projects to the level which an applicant could reasonably be required to provide, having regard to current knowledge and methods of assessment ([29]–[30], [34] and [56]).

117 However, in some cases these principles may allow a decision-maker properly to defer the assessment of cumulative impacts arising from the subsequent development of a separate site not forming part of the same project. In *R.(Littlewood) v Bassetlaw DC* [2009] Env. L.R. 407 the court held that it had not been irrational for the local authority to grant consent for a freestanding project, without assessing cumulative impacts arising from future development of the remaining part of the site, where that development was inchoate, no proposals had been formulated and there was not any, or any adequate, information available on which a cumulative assessment could have been based (pp.413–415 in particular [32]).

118 I agree with Mr Westaway that the circumstances of the present case are clearly distinguishable from *Littlewood*. Here, the two projects are closely linked, site selection was based on a strategy of co-location and the second project has followed on from the first after a relatively short interval. They share a

> considerable amount of infrastructure, they have a common location for connection to the National Grid at Necton (the cumulative impacts of which are required to be evaluated) and the DCO for the first project authorises enabling works for the second. In the present case, proposals for the second project have been formulated and the promoter of the first project has put forward what it considered to be sufficient information onthe second to enable cumulative impacts to be evaluated in the DCO decision on the first. This information was before the defendant. I reject the attempt by NVL to draw any analogy with the circumstances in *Littlewood* (at [32]) or with those in *Preston New Road* (at [75]). In any event, the decision-maker in the present case, unsurprisingly, did not rely upon any reasoning of that kind in his decision letter (nor did the Examining Authority in the ExAR).
>
> 119 Instead, this case bears many similarities with the circumstances in *Larkfleet*. If anything, the ability to assess cumulative impacts from the two projects in the decision on the first project was much more straightforward here and the legal requirement to make an evaluation of those impacts decidedly stronger. First, the promoter carried out an assessment identifying significant cumulative effects at Necton and it is common ground that, for this purpose, essentially the same information was provided on the two projects (see e.g. [52]–[53] above). Secondly, there were strong links between the two projects which were directly relevant to this subject (see [118] above).
>
> 120 The effect of Directive 2011/92, the 2009 Regulations and the case law is that, as a matter of general principle, a decision-maker may not grant a development consent without, firstly, being satisfied that he has sufficient information to enable him to evaluate and weigh the likely significant environmental effects of the proposal (having regard to any constraints on what an applicant could reasonably be required to provide) and secondly, making that evaluation. These decisions are matters of judgment for the decision-maker, subject to review on *Wednesbury* grounds. Properly understood, the decision in Littlewood was no more than an application of this principle.
>
> ……"

188. Holgate J.'s conclusion on the facts of the case before him were summarised at [122]:

> "In the circumstances of this case, I am in no doubt that the defendant did act in breach of the 2009 Regulations by failing to evaluate the information before him on the cumulative impacts of the Vanguard and Boreas substation development, which had been assessed by NVL as likely to be significant adverse environmental effects. The defendant unlawfully deferred his

> evaluation of those effects simply because he considered the information on the development for connecting Boreas to the National Grid was "limited". The defendant did not go so far as to conclude that an evaluation of cumulative impacts could not be made on the information available, or that it was "inadequate" for that purpose. He did not give any properly reasoned conclusion on that aspect. I would add that because he did not address those matters, the defendant also failed to consider requiring NVL to provide any details he considered to be lacking, or whether NVL could not reasonably be required to provide them under the 2009 Regulations as part of the ES for Vanguard. It follows the defendant could not have lawfully decided not to evaluate the cumulative impacts at Necton in the decision he took on the application for the Vanguard DCO. For these reasons, as well as those given previously, the present circumstances are wholly unlike those in *Littlewood*."

189. Holgate J. went on to find, in the alternative, that it was not rational to conclude that the information as to cumulative effects was too limited to be taken into account; and further that there had been a failure to give any adequate reasons for not considering the cumulative effects.

Decision

190. In my view, the facts and circumstances of this case were clearly distinguishable from those in *Pearce* for the reasons given by the Defendant at DL 12.16 – DL 12.19.

191. The potential effects of a substation extension for the Nautilus and Eurolink projects were appraised by the Applicants, to a limited extent only, in the Extension Appraisal. The Applicants stated that it was not possible to undertake a cumulative impact assessment due to the lack of detailed publicly available information on them. It stated:

> "6. The Overarching National Policy Statement for Energy (EN-1) paragraph 4.2.5 states that "When considering cumulative effects, the ES should provide information on how the effects of the applicant's proposal would combine and interact with the effects of other development (including projects for which consent has been sought or granted, as well as those already in existence)".
>
> 7. **Advice note seventeen: Cumulative effects assessment relevant to nationally significant infrastructure projects** (AN17) sets out a cumulative assessment process with the stages of longlisting and shortlisting projects, information gathering and assessment.
>
> 8. Information gathering "requires the applicant to gather information on each of the 'other existing development and/or approved development' shortlisted at Stage 2. As part of the Stage 3 process the applicant is expected to compile detailed

> information, to inform the Stage 4 assessment. The information captured should include but not be limited to:
>
> • Proposed design and location information;
>
> • Proposed programme of construction, operation and decommissioning; and
>
> • Environmental assessments that set out baseline data and effects arising from the 'other existing development and/or approved development".
>
> 9. The Applicants maintain that for the remaining projects being considered for potential connection in the vicinity of Leiston (Nautilus and Eurolink) little to none of the information specified in Advice Note seventeen is available."

192. The ExA addressed the Extension Appraisal document and considered what potential impacts that extension might have, in addition to those proposed by the EA1N and EA2 DCOs. This included adverse impacts on landscape and visual matters (ER 7.5.58-60, 7.6.1**)** and heritage (ER 8.5.69- 8.5.73).

193. On both issues, the ExA decided that these potential impacts were not to be factored in to "the reasoned conclusion on the significant effects of the development on the environment", for the purposes of regulation 21(1)(b) of the EIA Regulations 2017: see ER 7.6.2 and ER 8.6.2. The reason given was that the Applicants had stated that the Extension Appraisal was not a "cumulative impact assessment". Therefore it only had the status of "environmental information", as defined in regulation 3 of the EIA Regulations 2017.

194. The Defendant addressed this issue in the context of "Landscapes and Visual Amenity" as follows:

> "5.12 In response to significant concerns from a number of parties (including the Councils') about future projects, the Applicant submitted an Extension of National Grid Substation Appraisal [ExA Ref: REP8-074]. This Appraisal assessed the potential effects of extending the National Grid substation to accommodate future projects, including: Nautilus interconnector, EuroLink interconnector, North Falls and Five Estuaries offshore wind farms. However, the Appraisal states "it has been confirmed by both the proposed North Falls [ExA Ref: REP7-066] and Five Estuaries projects that they will not connect near Leiston."
>
> 5.13 The Secretary of State notes that the future projects considered are in the following stages of development:
>
> • Nautilus interconnector – National Grid Ventures requested a section 35 direction under the Planning Act 2008 on 4 March 2019, the Secretary of State received further information from

National Grid Ventures on 4 April 2019 and a direction was made by the Secretary of State on 29 April 2019. The application is expected to be submitted to the Planning Inspectorate Q2 2023.

• EuroLink interconnector - is a proposal by National Grid Ventures to build a HVDC transmission cable between the UK and the Netherlands. The capacity of the link will be 1.4 GW and the project is still in the very early stages of development. No information on this project has currently been submitted to the Planning Inspectorate or the Secretary of State.

5.14 Currently, the only documentation available on the Planning Inspectorate's website for the Nautilus interconnector project is the Section 35 Direction made by the Secretary of State for the proposed development to be treated as development for which development consent is required under the 2008 Act. The Eurolink interconnector project is earlier in the development consent process than Nautilus, and no documentation has been submitted to the Planning Inspectorate. Consequently, there is very limited environmental information available which would allow the Applicant to conduct a cumulative assessment. The Applicant's decision not to include these proposed projects in its cumulative effects assessment is also supported by the Planning Inspectorate's Advice Note Seventeen: Cumulative effects assessment relevant to nationally significant infrastructure projects. Paragraph 3.3.1 of the Advice Note lists the information required to conduct stage 4 of a cumulative effects assessment:

• proposed design and location information;

• proposed programme of construction, operation and decommissioning; and

• environmental assessments that set out baseline data and effects arising from the 'other existing development and/or approved development'.

5.15 As none of the above information was available prior to the close of the East Anglia ONE North and East Anglia TWO examination period for either the Nautilus or Eurolink projects, the Secretary of State is content that it was not necessary for the Applicant to include these proposed projects in its cumulative effects assessment. Further details of the Secretary of State's position on the inclusion of these projects in the Applicant's cumulative assessment can be found in paragraph 12.14 of this document.

5.16 The ExA [ER 7.6.1] concludes that:

> "The extension of National Grid Substation Appraisal [ExA Ref: REP8-074] demonstrates a significant worsening of potential adverse effects for relevant VPs [Viewpoints] and for landscape character. The extension of the NG substation would intensify and worsen the effects of the Proposed Development on both the local landscape and on visual receptors. Such an effect would be added to in an unknown way by the provision of required surface water drainage."
>
> ……
>
> 5.22 In reaching the above conclusions the ExA has not considered the Extension of National Grid Substation Appraisal, noting that the Applicant acknowledges that the Appraisal is 'environmental information' and is not intended to comprise a Cumulative Impact Assessment.
>
> 5.23 The Secretary of State agrees with the ExA's conclusions on Landscape and Visual Amenity."

195. In his conclusions on the "Onshore Historic Environment", the Defendant stated:

> "*Cumulative Impacts with the Potential National Grid Extension*
>
> 6.26 The Applicant submitted a National Grid Substation Appraisal during the examination which indicated the potential effects which would result from extending the National Grid substation to accommodate future projects. The Appraisal indicated that this would result in an increase in the overall length of the National Grid Substation [ER 8.5.69]. The ExA considered that an extension to the National Grid substation would increase the magnitude of harm to Little Moor Farm (Grade II), the Church of St Mary (Grade II*), Friston House (Grade II), Woodside Farm House (Grade II) and High House Farm (Grade II). However, the increase in magnitude would not result in an increase to the overall levels of less than substantial harm it had assigned, as such, the levels would remain the same as detailed in paragraph 6.17. The ExA considered that the overall level of less than substantial harm for the Friston War Memorial would potentially increase to a medium level of less than substantial harm [ER 8.5.72; 8.6.1].
>
> 6.27 The ExA stated [ER 8.6.1] that it had not considered the National Grid Substation Appraisal in reaching its overall conclusion on Onshore Historic Environment—noting that the Applicant acknowledged that the Appraisal is "environmental information" and is not intended to comprise a Cumulative Impact Assessment."

196. In his conclusions on "Transport and Traffic", the Defendant stated:

"12.14 With regards to the inclusion of the Nautilus and Eurolink interconnector projects in the cumulative effects assessment, the Secretary of State notes that Friston is a potential connection point for the National Grid Ventures interconnector projects [ER 14.5.15]. However, the Secretary of State disagrees with the ExA's statement [ER 14.5.17] that satisfactory assumptions could have been made to allow the Nautilus and Eurolink interconnector projects to be included in the Applicant's cumulative impact assessment.

12.15 Predicting the future traffic effects of projects for which very few details are available would not be helpful in determining the cumulative effects of the East Anglia ONE North and East Anglia TWO developments, as the elements of the future projects which would contribute to adverse traffic effects are likely to change significantly before their applications are submitted to the Planning Inspectorate. Attempting to predict the traffic movements at this early stage in the projects' lifecycle would rely on ambiguous assumptions and would not result in predictions which accurately represent the cumulative effects of the projects in question, or in mitigation which would adequately reduce the effects. In contrast, when the applications for the Nautilus and Eurolink interconnector projects are further progressed, accurate up-to-date construction programme and traffic and transport information will be available for the East Anglia ONE North, East Anglia TWO and Sizewell C projects which would allow effective mitigation measures to be implemented by the respective developers.

12.16 The Secretary of State refers to paragraph 44 of the recent ruling from Mr Justice Holgate on the Norfolk Vanguard offshore windfarm in relation to cumulative effects which states:

> "By the time the ES for the Vanguard project was submitted in June 2018, substantial progress had already been made on Boreas. Grid connection agreements at Necton had been entered into for Vanguard in July 2016 and Boreas in November 2016. The site selection process had already identified preferred substation footprints for both Vanguard and Boreas. The decision had been taken to use HVDC technology for both developments, determining the nature and scale of onshore infrastructure, including substations at Necton. The Boreas team had a pre-application meeting with the Planning Inspectorate on 24 January 2017, a request for a scoping opinion in respect of Boreas was made in May 2017 and the opinion issued in June 2017."

12.17 Unlike the Norfolk Boreas Offshore Wind Farm project, no scoping opinion request has been submitted to the Planning Inspectorate for the Nautilus interconnector project, and it is currently in the early stages of the pre-application phase of the

> development consent process. So far, the only documentation available on the Planning Inspectorate's website for the Nautilus project is the Section 35 Direction. The Eurolink interconnector project is earlier in the development consent process than Nautilus, and no documentation has yet been submitted to the Planning Inspectorate.
>
> 12.18 The Secretary of State also notes that the Applicant's decision not to include these proposed projects in its cumulative effects assessment is supported by the Planning Inspectorate's Advice Note Seventeen: Cumulative effects assessment relevant to nationally significant infrastructure projects. Paragraph 3.3.1 of the Advice Note lists the information required to conduct stage 4 of a cumulative effects assessment:
>
> • proposed design and location information;
>
> • proposed programme of construction, operation and decommissioning; and
>
> • environmental assessments that set out baseline data and effects arising from the 'other existing development and/or approved development'.
>
> 12.19 As none of the above information was available prior to the close of the East Anglia ONE North and East Anglia TWO examination period for either the Nautilus or Eurolink interconnector projects, the Secretary of State is content that it was not necessary for the Applicant to include these projects in its cumulative effects assessment."

197. I accept the submissions made by the Defendant and the Applicants that the approach taken by the Defendant did not constitute a breach of the EIA Regulations 2017. The developments in question were not "existing and/or approved projects" in respect of which a cumulative assessment would be required by reference to paragraph 5 of Schedule 4 to the EIA Regulations 2017.

198. The Extension Appraisal did not constitute a cumulative impact assessment for the reasons set out in that document at 1.1. The two projects were at such an early stage that there was not sufficient reliable information to undertake a satisfactory cumulative assessment. That approach was in accordance with the guidance in Advice Note Seventeen.

199. The ExA and the Defendant were entitled to regard the Extension Appraisal as "environmental information" but not "further information", as defined in regulation 3 of the EIA Regulations 2017, as it was not "additional information which, in the view of the Examining authority, the Secretary of State or the relevant authority, is directly relevant to reaching a reasoned conclusion on the significant effects of the development on the environment and which it is necessary to include in an environmental statement … in order for it to satisfy the requirements of regulation 14(2)".

200. Like all other representations made by the Applicants about the environmental effects of the development (i.e. "environmental information" as defined in regulation 3), the Extension Appraisal was carefully examined by the ExA, and fully taken into account by the Defendant when making his decision. The issues of flooding and transport were considered in the screening assessment with the Extension Appraisal, but were not taken forward for further assessment.

201. The Defendant was entitled, as the decision-maker, to disagree with the ExA's statement that satisfactory assumptions could have been made to allow the future projects to be included in the cumulative impact assessment, for the reasons he gave at DL 12.14 – 12.19. Furthermore, although the Claimant relied upon the ExA's description of the decision as "finely balanced", the Defendant took a different view and concluded that the Applicants had a strong case (DL 27.7).

202. In my judgment, the Defendant's approach cannot be characterised as irrational. He was entitled to agree, in the exercise of his judgment, with the Applicants' case that the uncertainties about the future projects were such that it was not possible to undertake a reliable assessment of cumulative effects for the purposes of regulation 21(1)(b) of the EIA Regulations 2017.

203. Finally, I consider that the reasons given for the decision were clear and sufficient, and met the legal standard.

Ground 6: Alternative sites

Claimant's submissions

204. In the light of the findings of substantial adverse effects at Friston, and the Applicants' reliance upon the benefits of the proposed development, the ExA and the Defendant erred in failing to consider alternative sites, and fell into the same error as the Secretary of State for Transport in *Stonehenge*.

205. The ExA and the Defendant ignored the possibility of seeking a review of the National Grid's connection offers made in the CION process.

206. The ExA and the Defendant erred in law in dismissing alternative sites proposed by others on the basis that they had not been considered and assessed by the Applicants. In fact, the Applicants had failed to address alternative sites, including Bramford, as originally intended.

Defendant and Applicants' submissions

207. The Defendant and Applicants submitted that the Claimant misstated the relevant legal principles on alternative sites, as applied in *Stonehenge* and the preceding case law. Furthermore, *Stonehenge* was clearly distinguishable on the facts of the case, and the findings of the Court.

208. In this case, alternative sites were adequately considered by the ExA and the Defendant, including Bramford. Some further alternative sites, which had not been appraised, were

not progressed beyond inspection stage by the ExA, in the exercise of its planning judgment, as they were not considered to be "important and relevant" to the Secretary of State's decision under section 104(2)(d) PA 2008 and NPS EN-1. That was a lawful exercise of planning judgment.

Conclusions

Law and policy

209. The authorities were helpfully reviewed by Holgate J. in *Stonehenge,* at [268] – [276]:

> "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 Hotels Ltd v Secretary of State for the Environment* (1986) 53 P & CR 293,299–300 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 whether 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 Ltd) v Westminster City Council* [2017] PTSR 1166, at para 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] 2 P LR 59, paras 22–30. At para 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 LJ 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 (paras 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 (paras 16–28).

273 In *R (Langley Park School for Girls) v Bromley London Borough Council* [2010] 1 P & CR 10 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 (paras 45–46). He added that no "exceptional circumstances" had to be shown in such a case (para 40).

274 At paras 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 in *First Secretary of State v Sainsbury's Supermarkets Ltd* [2008] JPL 973 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 (paras 30 and 32). Accordingly, that was not a case, like the present one, 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 para 272 above).

> 276 The wider issue which the Court of Appeal went on to address at paras 33–38 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 para 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?"

210. Holgate J.'s conclusions in the *Stonehenge* case were as follows:

> "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. 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" (paragraph 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 paras 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 para 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 para 269 above).

283 The submission of Mr Strachan 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 paragraph 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 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 paras 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 para 273 above), the second principle in *Trusthouse Forte* applies with equal, if not greater force.
>
> 287 Eighth, it is no answer for the SST 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 SST to say that in DL 85 the SST found that the proposed scheme was in accordance with the NPSNN and so section 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 section 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."

211. In my judgment, Holgate J. was here applying the principles in the case law which he had previously set out to the circumstances of this "wholly exceptional" and "overwhelming" case. He was not establishing as a principle of law that, in any case where a proposed development would cause adverse effects, but these are held to be outweighed by its beneficial effects, the existence of alternative sites inevitably

becomes a mandatory material consideration. That is an over-simplification of the *Stonehenge* decision, and the preceding body of case law. In *R (Jones) v North Warwickshire Borough Council* [2001] 2 PLR 59, at [30], Laws J. made it clear that neither he nor Simon Brown J. in the *Trusthouse Forte* case were laying down a "fixed rule".

212. In *Derbyshire Dales District Council v Secretary of State for Communities and Local Government* [2010] 1 P & CR 19, Carnwath LJ held that an error of law could not arise unless there was a statutory 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] – [28]. This analytical approach has been widely applied.

213. In *R (Langley Park School for Girls Governing Body) v Bromley LBC* [2009] EWCA Civ 734, Sullivan LJ at [52]- [53], considered the varying circumstances in which a decision-maker may be required to take alternative sites into account, and emphasised that the assessment was highly fact-sensitive and a matter within the planning judgment of the decision-maker.

214. Furthermore, in my judgment, the Defendant and Applicants were correct to submit that the case law does indicate that consideration of alternative sites will only be relevant to a planning application in exceptional circumstances (see *Mount Cook*, cited at [270] in *Stonehenge*; *Jones* cited at [271] in *Stonehenge*; *Langley Park*, cited at [273] in *Stonehenge*, and see also in the law report at [2010] 1 P & CR 10, at [37], [40]). This principle was applied by Holgate J. in the *Stonehenge* case, at [277], when he found that the circumstances were "wholly exceptional".

215. The PA 2008 does not include any express requirement to consider alternative sites, but such a requirement may arise from the terms of any national policy statement (section 104(2)(a) PA 2008) or if they are "other matters which the Secretary of State thinks are both important and relevant to the Secretary of State's decision" (section 104(2)(d) PA 2008). This is a matter of judgment for the Secretary of State.

216. The policy guidance on alternatives in NPS EN-1 provides as follows:

> "**4.4 Alternatives**
>
> 4.4.1 As in any planning case, the relevance or otherwise to the decision-making process of the existence (or alleged existence) of alternatives to the proposed development is in the first instance a matter of law, detailed guidance on which falls outside the scope of this NPS. From a policy perspective this NPS does not contain any general requirement to consider alternatives or to establish whether the proposed project represents the best option.
>
> 4.4.2 However:
>
> • applicants are obliged to include in their ES, as a matter of fact, information about the main alternatives they have studied. This should include an indication of the main reasons for the

applicant's choice, taking into account the environmental, social and economic effects and including, where relevant, technical and commercial feasibility;

• in some circumstances there are specific legislative requirements, notably under the Habitats Directive, for the IPC to consider alternatives. These should also be identified in the ES by the applicant; and

• in some circumstances, the relevant energy NPSs may impose a policy requirement to consider alternatives (as this NPS does in Sections 5.3 [biodiversity], 5.7 [flood risk] and 5.9 [landscape and visual]).

4.4.3 Where there is a policy or legal requirement to consider alternatives the applicant should describe the alternatives considered in compliance with these requirements. Given the level and urgency of need for new energy infrastructure, the IPC should, subject to any relevant legal requirements (e.g. under the Habitats Directive) which indicate otherwise, be guided by the following principles when deciding what weight should be given to alternatives:

• the consideration of alternatives in order to comply with policy requirements should be carried out in a proportionate manner;

• the IPC 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;

• where (as in the case of renewables) legislation imposes a specific quantitative target for particular technologies or (as in the case of nuclear) there is reason to suppose that the number of sites suitable for deployment of a technology on the scale and within the period of time envisaged by the relevant NPSs is constrained, the IPC should not reject an application for development on one site simply because fewer adverse impacts would result from developing similar infrastructure on another suitable site, and it should have regard as appropriate to the possibility that all suitable sites for energy infrastructure of the type proposed may be needed for future proposals;

• alternatives not among the main alternatives studied by the applicant (as reflected in the ES) should only be considered to the extent that the IPC thinks they are both important and relevant to its decision;

• as the IPC must decide an application in accordance with the relevant NPS (subject to the exceptions set out in the Planning

> Act 2008), if the IPC concludes that a decision to grant consent to a hypothetical alternative proposal would not be in accordance with the policies set out in the relevant NPS, the existence of that alternative is unlikely to be important and relevant to the IPC's decision;
>
> • alternative proposals which mean the necessary development could not proceed, for example because the alternative proposals are not commercially viable or alternative proposals for sites would not be physically suitable, can be excluded on the grounds that they are not important and relevant to the IPC's decision;
>
> • alternative proposals which are vague or inchoate can be excluded on the grounds that they are not important and relevant to the IPC's decision; and
>
> • it is intended that potential alternatives to a proposed development should, wherever possible, be identified before an application is made to the IPC 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). Therefore where an alternative is first put forward by a third party after an application has been made, the IPC may place the onus on the person proposing the alternative to provide the evidence for its suitability as such and the IPC should not necessarily expect the applicant to have assessed it."

217. As NPS EN-1 indicates, there is a general requirement to address alternatives in the EIA process, in regulation 14(2)(d) of the EIA Regulations 2017, which states that the ES should include "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". It was not part of the Claimant's case that there had been a failure to comply with this requirement.

Decision

218. I refer to paragraphs 15 to 24 above for the factual background, including site selection. At paragraph 21, I referred to the National Grid "Note", dated June 2018, which assessed the options as follows:

> "6.2 Connecting in the Bacton, Bradwell and Lowestoft areas on the coast, would require the extension of the National Grid transmission network out to the coast in addition to the construction of a new National Grid substation. A new double circuit overhead line, at minimum, from the existing 400kV network out to the coast across Norfolk, Essex or Suffolk - this would carry significant consenting and environmental challenges. Identifying route options, consulting about those, obtaining consent for them and then building new transmission

lines would be environmentally challenging and would not be deliverable within the timescales the wind farms are looking to connect. For these reasons, connecting in the Bacton, Bradwell or Lowestoft areas was discounted.

6.3 Options to connect to the transmission network in North Norfolk, near Brandon, Shipdham, Dereham, Necton, Little Dunham, Kings Lynn or Walpole, were parked in the assessment, as other options compared more favourably in environmental and cost terms. [Footnote 4: 'Parked' means that the option is not subject to further analysis as there are better alternative options which have a similar system impact. It can still be reconsidered if the alternative(s) were later discounted due to reasons that are not affecting the parked options]. Each of these parked options would require much longer OFTO connecting cables in addition to new National Grid substations, with resultant greater environmental impacts and costs, as they are further from the offshore wind farms compared to other options.

6.4 Options to connect at Eye/Diss in Norfolk were similarly parked because of the longer distance. Those locations are further inland giving rise to greater environmental impact and cost associated with running OFTO cables from the wind farms to that location.

6.5 A connection at Norwich Main would require the extension of the existing substation and a new overhead transmission line from Pelham on the Hertfordshire/Essex border to Necton in Norfolk. The OFTO cables would also need to either navigate through the Norfolk Broads or north around the Norwich conurbation, to reach Norwich Main, with high consenting risks and a longer route than other connection options. There are also multiple offshore conservation zones between the wind farm and land falls towards Norwich.

6.6 Bramford was originally selected as the grid connection point for the East Anglia ONE offshore windfarm and two future East Anglia offshore projects. The onshore cable corridor for these projects was consented under the East Anglia ONE DCO consent. Following a design review of the East Anglia offshore projects (including the cable technology to be used to make the East Anglia ONE grid connection), it is only possible to accommodate the grid connections for East Anglia ONE and East Anglia THREE within the consented cable corridor. Any further connection at Bramford would require new cable routes to be developed and constructed.

6.7 The assessment initially indicated that connecting at Sizewell is the preferred option. This would have required the extension of the existing substation. However the substation is within the

> nuclear security perimeter zone, requiring the option to be under the rules of Civil Nuclear Constabulary. In addition to that, the potential site is highly constrained both physically and environmentally. Connecting there is therefore unlikely to be achievable.
>
> 6.8 A connection in the Leiston area is close to Sizewell and the coast, avoiding a longer cable route penetrating further inland through Suffolk to Bramford or elsewhere on the transmission network. A short cable route means the interaction between the project and other parties, such as crossings, protected areas and settlements, can be minimised.
>
> 6.9 For these reasons, when considering connections efficiency, coordination, economic and environmental impacts, the Leiston area compares more favourably than other connection options and forms the basis of the connection offers for the East Anglia ONE North and East Anglia TWO projects."

219. Site selection was considered in detail by the ExA in ER Chapter 25. It considered the issues and evidence, in particular, whether the site at Bramford or Broom Covert, near Sizewell, offered viable connection alternatives. For example, at ER 25.4.1, the ExA recorded the information that National Grid had decided not to offer the Bramford substation as an option for grid connection and referred to site selection work within discrete topic areas such as onshore historic environment and biodiversity. At ER 25.3.12 - 25.3.14, it explained why the Broom Covert option had not been pursued further. In the ExA's view, the Applicants' site selection process was "compliant with policy and has led to a broadly deliverable Proposed Development" (ER 25.2.6).

220. At ER 25.5.8, the ExA recognised that it was not its role to second-guess the judgment of the Applicants or the NGET in the siting of transmission infrastructure and that equally, their choices were at their own risk. It went on to say, at ER 25.5.9:

> "It is clear that the ExA is not 'at large' in the territory of alternatives. The ExA must consider the merits of the application before it, including the consideration of alternatives with respect to the matters where they were relevant. It is sufficient in this respect to consider whether alternatives have as a matter of fact been appraised (and they have been)….."

221. At ER 25.5.11, the ExA acknowledged the extent of "community concern and disquiet about the general adequacy of the site selection process that led to the selection of the Friston …. location" but correctly observed that "that disquiet alone does not provide a basis under which the ExA may move at large and interrogate the adequacy of site selection processes and decisions about alternatives, other than provided for in law and policy… The adequacy of the selected site becomes a matter of the application of relevant legal and policy tests and then for the planning balance in due course".

222. At ER 25.5.12, the ExA found that the legal and policy framework for the considerations of alternatives and site selection had been met.

223. At ER 25.2.5 – 25.2.6, the ExA had regard to the policy guidance in NPS EN-1, paragraph 4.4.3, to the effect that alternatives that were not main alternatives studied by the Applicants, should only be considered to the extent that they were "important and relevant" (section 104(2)(d) PA 2008) and that proposals that were vague or inchoate could be excluded on the grounds that they were not important and relevant. It undertook site examinations of further alternative sites which were suggested by interested parties at the Examination but which had not been submitted to the Applicants for appraisal, and notice had not been given to persons who would be affected if additional land was required. It concluded that those alternative sites were not "important and relevant" for the purposes of section 104(2)(d) PA 2008 and NPS EN-1. In my view, this was a lawful exercise of planning judgment.

224. The Defendant considered the evidence relating to the alternative sites which had been appraised, at DL 26.10 – 26.11:

> "26.10 The ExA asked the Applicant about possible alternative sites raised in representations. The Applicant considered Bramford was unsuitable due to constraints of overhead lines, other undertakers' apparatus, areas required for planting for the East Anglia ONE and East Anglia THREE projects, the need for compulsory acquisition, pinch points along the route passing through three designated sites and the cost of the longer route using AC technology, and that the solution proposed by SASES would not work as the limit (1320MW) was insufficient for both projects; Bradwell would require extension of an overhead line with consequent environmental, timetabling and consenting challenges; Old Leiston airfield and Harrow Lane, Theberton have problems associated with the proximity of nearby residential property, caravan park, Leiston Abbey and Theberton village, the openness of the landscape and views and the absence of screening [ER 29.6.65]. The ExA was satisfied that these were not viable alternative sites [ER 29.5.146].
>
> 26.11 The ExA investigated the possibility of an alternative grid connection at Broom Covert which was initially suggested by NNB Generation (SZC) Company Limited, but which subsequently stated the land is being used for translocation of reptiles from the construction of the Sizewell C power station and was unavailable [ER 29.5.66 et seq]. Following queries from the ExA at Compulsory Acquisition Hearing 3 the Applicant explained that in July 2017 EDF Energy had advised that this land, or any land associated with the development of Sizewell C, was not available as it was allocated for ecological compensation and mitigation for reptiles, and the Applicant was satisfied that as EDF was a statutory undertaker, coupled with the importance of the land to Sizewell C and EDF's need to protect the safety and security of Sizewell B power station meant the land was not available; it had also considered the matter following requests from ESC and SCC and concluded that the policy and consenting challenges outweighed the increased cost of further cabling to

> Grove Wood. The ExA was satisfied with the Applicant's response and concluded that compulsory acquisition of the land to the west was necessary and proportionate [ER 29.5.69 et seq.]. The ExA concluded Broom Covert was not a viable alternative [ER 29.5.146]."

225. Finally, the Defendant agreed with the ExA's analysis and conclusions on alternative sites and site selection (DL 23.30).

226. In my judgment, the conclusions of the ExA and the Defendant were a legitimate exercise of planning judgment which do not disclose any public law errors. In the light of their findings, there was no proper basis to refer the matter back for reconsideration by the National Grid.

227. The facts and circumstances of this case are clearly distinguishable from those in *Stonehenge*. *Stonehenge* was not a case about alternative sites. It concerned a failure to take into account the relative merits of alternative tunnelling options at the site, which the Court found were obviously material considerations, such that it was irrational not to take them into account. In this case, following the site selection process undertaken by the National Grid, and then the Applicants, the ExA and the Defendant have considered alternative sites in detail and reached rational conclusions upon the evidence before them. It is not possible to conclude that, on the evidence, the ExA and the Defendant have acted irrationally by failing to take into account any obviously material consideration. By concluding (at ER 25.2.6) that further alternative sites were not "important and relevant" under section 104(2)(d) PA 2008 and NPS EN-1, the ExA was, in effect, deciding that those sites were not obviously material considerations. This conclusion was not unlawful in the circumstances of this case.

228. Holgate J. found that the relevant circumstances in *Stonehenge* were "wholly exceptional". Those circumstances included significantly adverse effects on heritage assets at a World Heritage Site that has "outstanding universal value" for the cultural heritage of the world. The circumstances at this site cannot be characterised as "wholly exceptional". The ExA's final summary of the total adverse impacts was "local harm [which] is substantial and should not be under-estimated in effect" (ER 28.4.4). It was outweighed by the national benefits of providing highly significant renewable energy generation capacity.

229. Therefore, for the reasons set out above, Ground 6 does not succeed.

Final conclusion

230. The claim for judicial review is dismissed, on all grounds.

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