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# IMMINGHAM EASTERN RO-RO TERMINAL

Written Summary of the Applicant's Oral Case at Issue Specific Hearing 2
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# 1 Executive Summary and Purpose

1.1 Issue Specific Hearing 2 ('ISH2') was held on the afternoon of Thursday 27 July 2023 and gave consideration to the issues specific topic of the **Environmental Statement ('ES')**. Within this, ISH2 specifically considered issues of:

- The Need for the Proposed Development;
- Onshore Highways and Transportation;
- Marine Ecology; and
- Navigation and Shipping.

1.2 In the ISH2 Agenda published 14 July 2023, the Examining Authority ('the ExA') required Associated British Ports as the Applicant ('the Applicant') to prepare brief summaries of its case with regards to each topic area listed above. These summaries are Appended to this document as follows:

- **Appendix 1** – Summary of the Applicant's Case as to the Need for the Proposed Development;
- **Appendix 2** – Summary of the Applicant's Case as to Transport;
- **Appendix 3** – Summary of the Applicant's Case as to Ecology; and
- **Appendix 4** – Summary of the Applicant's Case as to Navigation and Shipping .

1.3 In the Examination Timetable as appended to the Rule 8 Letter, the Applicant is required to prepare written submissions of oral cases made during ISH2. As such, at Table 1 below, this document provides a summary of the submissions and responses made on behalf of the Applicant, during ISH2.

1.4 At Table 2 below, this document then provides a summary of the action points arising from ISH2 and, where these action points fell to the Applicant, how these have been addressed.

# 2 Table 1: Summary of the Issue Specific Hearing 2

| Item | Question / Context for discussion | Applicant's Response |
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| ***Agenda item 1 – Welcome, introductions and arrangements for this hearing*** | | |
| 1. | Welcome, Introductions and arrangements | The following individuals introduced themselves on behalf of ABP (the Applicant):<br><br>• Mr James Strachan KC, and<br><br>• Mr Brian Greenwood, Partner, Clyde & Co<br><br>Mr Strachan explained that he would be supported by other members of the Applicant's team as required, who would be introduced at the appropriate points during the ISH2 session. |
| ***Agenda item 2 – Need for the Proposed Development*** | | |
| 2. | The Applicant was invited to make a short opening statement | ***Opening Statement –*** Mr Strachan KC, on behalf of the Applicant, gave a short opening summary of the Applicant's position on matters relating to the need for the proposed development - attached as **Appendix 1**.<br><br>Mr Strachan KC then introduced Mr Rowell (Director of Adams Hendry Consulting Ltd) a chartered Town Planner with expertise in the promotion of port projects and associated policy matters. |
| 3. | The ExA invited CLdN to make a short opening statement. | **Post Hearing Submission:**<br>Whilst the Applicant was not invited to respond to CLdN's Opening Statement during the ISH2 hearing, it is noted that: |

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| | | 1. CLdN appeared to be suggesting that, (i) the National Policy Statement for Ports (NPSfP) contains 'head room' for interrogating the need case (an argument which appeared to rely in some way upon the reference to 'sustainable development' at paragraph 3.3.1 of the NPSfP) and (ii) need has to be considered as a result of the requirement to produce a harbour improvement statement (IP Applications: Prescribed Forms and procedure) Regulations 2009 – Regulation 6(3)). In short, however, neither of these suggestions require need to be examined in the way CLdN appear to be suggesting.<br><br>2. CLdN suggested that the NPSfP simply establishes the principle of there being a need for port development. This is, however, a fundamentally incorrect interpretation of the role of the NPSfP and the policy contained within it.<br><br>3. CLdN inaccurately referenced aspects of ABP's application documentation – for example, matters relating to capacity and the use of dwell times.<br><br>4. CLdN misunderstood aspects of ABP's position regarding the throughput of the proposed IERRT development that has been identified for environmental assessment purposes.<br><br>5. CLdN were quick to criticise the approach ABP has taken to forecasting future growth and the conclusions reached, but have not yet provided any contrary information to that provided by ABP. In fact, as was made clear in respect of CLdN's responses to specific questions subsequently raised by the ExA it became apparent that CLdN did not - at the time of ISH2 - have information available in this regard. |

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| | | 6. CLdN concentrated on attacking the growth demand aspects of ABP's need considerations, with, notably, no reference to, for example, the competition and resilience elements of the need considerations.<br><br>The Applicant intends to respond to CLdN's case on need in full in due course. |
| 4. | The ExA asked for the submission of relevant vessel movement and freight volume data. | ***Vessel and Freight Data –*** Mr Strachan KC, on behalf of the Applicant, agreed that the Applicant would assist in the submission of the relevant vessel movement data for a representative period. |
| 5. | The ExA asked CLdN why Stena Line would be ceasing its Port of Killingholme operations. | ***Use of Killingholme –*** Mr Strachan KC, on behalf of the Applicant, highlighted that a summary of the reasons why the Killingholme facility was not a long-term option for Stena Line was contained within ES Chapter 4 [**APP-040**]. |
| 6. | The ExA asked CLdN and DFDS for submissions on representative dwell times for unaccompanied freight. | ***Dwell Times –*** Mr Dove-Seymore, on behalf of CLdN, stated that he would expect dwell time to be between one to one and a half days. Mr Byrne, on behalf of DFDS stated that DFDS would expect a dwell time for perishable cargo of a day and a half, whilst non-perishable cargo has a dwell time of nearer three days.<br><br>Mr Strachan KC, on behalf of the Applicant, stated that the Applicant had considered the implications of a range of dwell times on capacity (for example, Appendix 7 of ES Appendix 4.1 [**APP-079**] where a range of dwell times from 1.75 to 3.5 days had been considered). Meanwhile, the figures expressed in the debate by both CLdN and DFDS appeared to be close to the range ABP's information considers. |
| 7. | The ExA asked what progress had been made in the establishment of the Humber Freeport. | ***Humber Freeport –*** Mr Strachan KC introduced Mr Simon Bird, Regional Director, ABP Humber, whose role is to lead the four ABP major ports of Immingham, Grimsby, Hull and Goole. Mr Bird explained that he was also |

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| | | the chair of the Humber Freeport, which is one of eight English Freeports established through policy introduced in 2020. The Humber Freeport was formally launched as a company earlier in July 2023 and three tax sites have been identified across the Humber – although at present only two have been approved, namely at Hull East and to the west of the Port of Immingham.<br><br>The company is in a fledgling state. Whilst it has a chair, a chief executive still needs to be appointed. Whilst there has been some investment in the East Hull site as a result of Freeport status, the Freeport is clearly at a very early stage. |
| 8. | At the end of the agenda item the ExA provided the Applicant with a right of reply to the points raised in the discussion. | ***Applicant's Response to IOT*** – Mr Strachan KC, on behalf of the Applicant, emphasised that Mr Elvin KC, on behalf of IOT, had not objected to the Applicant's need case but had instead stated concerns in respect of the implications of the proposed development on IOT assets – matters to be addressed elsewhere in the examination process.<br><br>***Applicant's Response to CLdN –*** Mr Strachan KC, on behalf of the Applicant, stated that CLdN appear to be attempting to suggest that the need for the IERRT development has not been established through the NPSfP or that the need somehow now needs to be re-established.<br><br>Notwithstanding the position on need set out within the NPSfP which has already been summarised by ABP (see **Appendix 1** to this document) the ExA were reminded by Mr Strachan KC of the ClientEarth case that went to the Court of Appeal and which considered the proper interpretation of the content of relevant National Policy Statements (NPS). In that case one of the grounds of challenge centred on the interpretation of the establishment of need for an energy project within the relevant NPS and the incorrect suggestion by the Claimant that need somehow needed to |

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| | | be re-established or further demonstrated over and above the need as identified in the NPS.<br><br>Mr Strachan KC, on behalf of the Applicant, agreed to provide the Court of Appeal judgement in the ClientEarth case, as well as a note of its relevance to the Examination (see **Appendix 6** to this document).<br><br>it was clear from the NPSfP that there was an established need for, amongst other things, competition and resilience – which in turn require excess port capacity. Notwithstanding the position on need set out within the NPSfP on need matter, ABP had identified a specific need for the IERRT and that this was set out in detail in the application documents.<br><br>Mr Strachan finished by stating that the Applicant awaits further information from CLdN as to its case, because it has not yet provided any detail or evidence to the examination in support of its submissions to date. |
| ***Agenda item 3 (Effects on landside transportation and effects for existing occupiers of the Port of Immingham unconnected with navigation and shipping)*** | | |
| 9. | The ExA asked if the Applicant will be re-surveying/checking data pursuant to the traffic data gathered in the latter part of 2021 which may have been impacted through Covid. | ***Baseline Traffic Data*** – In response to the ExA's question, Mr Strachan introduced Mr Simon Tucker (Director of DTA Transportation Ltd, Transportation Planning Consultants), a Member of the Chartered Institute of Highways and Transportation with over 23 years' experience in the field of Transport Planning.<br><br>Mr Tucker, on behalf of the Applicant, confirmed that the data used in the Traffic Assessment derived from several data sources. This included surveys taken place between September and November 2021 which fell outside of the formal covid restrictions. Further surveys were conducted in April 2022 to identify internal port movement. Trunk Road data was also |

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| | | taken from the National Highways database covering significant periods of time both pre and post pandemic.<br><br>Mr Tucker went on to confirm that current data shows lower numbers than what was used in the Traffic Assessment, demonstrating that the Transport Assessment is robust and that traffic flows are not significantly different now to when they were surveyed.<br><br>To assist the ExA, Mr Tucker confirmed that he would submit this data at Deadline 1. |
| 10. | The ExA asked the Applicant what the implications for the operation of the public highway might be if there was to be less unaccompanied throughput than had been assessed. | ***Unaccompanied vs Accompanied Throughput*** – Mr Tucker, on behalf of the Applicant, referred the ExA to paragraph 5.2.3 of the Transport Assessment [AS-008] which provides a breakdown of how the traffic generation assumptions have been calculated. This included the working assumptions of the proposed terminal operating 364 days a year with a capacity of 1800 units per day, leading to the cap of 660,000 units per annum. Information from the intended operator had then informed the assumptions on the proportion of accompanied (72%) to unaccompanied (28%) units.<br><br>Mr Tucker explained that unaccompanied trailers led to an increased number of traffic movements as tractor units without a trailer would have to come to the port in order to collect a trailer from the dock side. Therefore, the more the number of accompanied trailers, the lower the number of external traffic movements; meaning the impact on the network would reduce. However, in this case the difference in the numbers were marginal, and Mr Tucker stated that the precise numbers in this case were not critical to the outcome of the assessment.<br><br>In response to submissions from the interested parties Mr Tucker, on behalf of the Applicant, stated that the Transport Assessment had included an assessment of the distinctive accompanied peak movement profile |

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| | | against the 'flatter', more spread-out movement profile to be expected with unaccompanied cargo. This could be seen at Table 7of the Transport Assessment **[AS-008]**.<br><br>Mr Tucker also stated that the interested parties which had criticised the 10% tolerance in the accompanied vs unaccompanied calculations as being too low were yet to submit any data in support of their view. |
| 11. | The ExA asked how the Applicant intended to secure traffic distribution in order to ensure that 85% of traffic used the Port's East Gate, as per its assessment. | ***Use of East Gate –*** Mr Tucker, on behalf of the Applicant, stated that securing this would not be necessary due to the location of the proposed facility immediately adjacent to the Port's East Gate. This would mean that a significant proportion of movements from the facility would use the East Gate, as opposed to traversing the length of the port with numerous local junctions and 20mph speed restrictions in order to use the West Gate. From the East Gate, the quickest route to the A180 would be via the Stallingborough interchange. With a total of only three roundabouts before reaching the A180, using East Gate would be by far the most straightforward route; meaning that the majority of traffic would use this gate without any controls being imposed. Meanwhile, should traffic use West Gate, the A160 had significant spare capacity and there would be no adverse traffic impact of that.<br><br>Mr Tucker added that, if there is concern about the capacity of West Gate itself, any delays would serve to influence the choice of route for inbound traffic to avoid that entry point. The overall balance of the network will always lead to East Gate being the more attractive. Further, any delays would only affect inbound movements as there would be no security check on outbound traffic, meaning any HGVs which did not follow the signage to East Gate which is proposed to be provided would leave the port without causing delays. |

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| | | Ms Hattle on behalf of North East Lincolnshire Council as Highways Authority agreed with the Applicant's submissions, whilst also stating that the West Gate falls within a different highways authority area. |
| 12. | The ExA asked the Applicant to consider undertaking sensitivity testing as to the split between the East and West Gates. | ***Sensitivity Testing –*** Mr Tucker, on behalf of the Applicant, stated that sensitivity testing had already been undertaken with the assumption that 100% of traffic would use the East Gate and Laporte Road. Mr Tucker agreed to undertake further sensitivity testing, but pointed to Annex K of the Transport Assessment [AS-008] which contains model outputs showing that there is significant spare capacity on the A160. Any additional sensitivity testing would not change the conclusion of those assessments, but testing could be undertaken for the capacity of West Gate itself. |
| 13. | The ExA asked the Applicant to comment on CLdN's submission that the Applicant proposed to employ storage areas outside of the red line. | ***Red Line Boundary –*** Mr Strachan KC, on behalf of the Applicant, asked CLdN to confirm where the ES referred to the use of land which was outside of the red line boundary.<br><br>**Post Hearing Submission:**<br>The Applicant does not propose to make use of any storage areas outside of the red line boundary. |
| 14. | The ExA asked the Applicant to comment on submissions from Mr East, on behalf of DFDS, that five junctions in the local area would operate over capacity, as well as submissions from Mr Ross, on behalf of CLdN, that the methodology and assumptions which underpinned the Transport Assessment were unclear. | ***Capacity of Local Junctions –*** Ms Hattle on behalf of North East Lincolnshire Council as Highways Authority stated that the Council did not have any concerns regarding the capacity of the junctions which had been identified.<br><br>Mr Strachan KC, on behalf of the Applicant, stated that the adverse impacts on the five junctions identified were merely assertions at this stage, with DFDS making reference to data which had not been provided to the Applicant, the Highways Authority or to the ExA. The Applicant was, therefore, unable to comment further until that data had been submitted. The Applicant was happy to engage with interested parties on this should their data be made available, but it was regrettable that this information was being submitted by way of oral representations only. It was clear from |

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| | | the Applicant's transparent approach to its modelling and Transport Assessment that there are no capacity problems with the junctions that had been identified.<br><br>Mr Strachan KC continued by requesting that, as the work had clearly already been done, the relevant models and data which formed the basis of DFDS's concerns be provided to the Applicant ahead of Deadline 1.<br><br>***Basis of the Transport Assessment –*** Mr Strachan KC, on behalf of the Applicant, stated that the underlying data and assumptions upon which the Transport Assessment was based were set out very clearly in that document, and that the relevant parameters had been agreed through the transport assessment working groups in accordance with established methodologies. The suggestion by CLdN that they were unable to comment on the Transport Assessment for want of that information was, therefore, implausible. Meanwhile, CLdN had raised no concerns as to the capacity of the five junctions which were the subject of DFDS's submissions. |
| 15. | The ExA invited the Applicant to respond to submissions by Mr Ross on behalf of CLdN that the Transport Assessment had averaged the daily movement peaks and troughs and therefore failed to assess the reasonable worst-case scenario. | ***Daily Peak Traffic Flows –*** Mr Tucker, on behalf of the Applicant, stated that the position as set out by CLdN was fundamentally incorrect. The assessment in the Transport Assessment, rather than smoothing out traffic flows, assumed that the facility would be operating at full capacity every day of the year. |
| 16. | The ExA asked the Applicant to confirm its position that the proposed development would not affect the operation of the rail network. | ***Rail Operations –*** Mr Strachan KC, on behalf of the Applicant, confirmed that the proposed development would not affect the operation of any part of the rail network, including rail connections to the port of Killingholme. |
| ***Agenda Item 4 (Any effects for the integrity of the Humber Estuary Special Area of Conservation, Special Protection Area and Ramsar site (the designated sites))*** | | |

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| 17. | The ExA queried if the Applicant had reviewed the response submitted by Natural England which was published the day prior to ISH2 (26 July 2023). | ***Additional Submission of Natural England*** – Mr Strachan KC, on behalf of the Applicant, confirmed that the Applicant had reviewed the additional response submitted by Natural England.<br><br>The ExA flagged slight confusion in the spreadsheet submitted by Natural England and queried why certain boxes remained amber when Natural England had a fewer number of concerns overall.<br><br>Mr Strachan KC, stated that detailed discussions between Natural England and the Applicant were ongoing, and there had been a reduction in the number of outstanding issues since the last iteration of this document.<br><br>**Post Hearing Submission:**<br>The Applicant believes that Natural England's submission has been formatted so as to show areas as green where Natural England are satisfied that particular comments or points are resolved. Where an issue is then also shaded amber, it indicates that there are related points where Natural England wish to receive further information or clarification prior to turning the overarching topic to green. |
| 18. | The ExA queried how the figure of 0.006 hectares arising from the proposed capital dredging and piling had been derived. | ***Intertidal Habitat Loss*** – Mr Strachan KC, on behalf of the Applicant, called Mr Pearson, of ABPmer to respond to the query posed by the ExA.<br><br>Mr Pearson, clarified that the loss of 1.65 hectares referred to by CLdN, was the original predicted loss of intertidal habitat referred to in the PIER documentation prior to the change of the scheme design. To aid the ExA, Mr Pearson provided a breakdown of the current combined loss of 0.022 hectares of intertidal habitat presented in the assessment, which comprises:<br>• Direct loss of 0.006 hectares due to capital dredging; and<br>• Direct loss of 0.006 hectares due to piling. |

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| | | Mr Pearson confirmed that the capital dredging and the marine infrastructure will potentially cause an indirect loss due to the erosion of 0.01 hectares of intertidal mudflat.<br><br>In summarising the combined loss of 0.022 hectares, Mr Pearson clarified that this figure represents a negligible loss in terms of Humber Estuary designated habitats and consists only a very narrow strip of low elevation mudflat on the lower shore around the sublittoral fringe. The ExA requested that this information be provided in writing, alongside a plan identifying the affected habitat in relation to the IERRT proposed development, to which can be found at **Appendix 8** to this document.<br><br>Louise Bridges, an ecologist acting on behalf of CLdN, accepted this as a satisfactory explanation of the difference in habitat loss between the CLdN Relevant Representation and the Applicant's position. |
| 19. | The ExA queried whether piling for the proposed approach jetty and the berths would be undertaken separately or concurrently and the impact that such approach would have on the number of piling rigs deployed at any one time. | ***Underwater Noise and Piling*** – Mr Strachan KC, on behalf of the Applicant, called Dr San Martin of ABPmer to respond to the query posed by the ExA.<br><br>Dr San Martin confirmed that when undertaking the underwater noise modelling, a maximum of four piles per day using four piling rigs was assessed as a worst-case scenario. In conducting the assessment, consideration was made as to where the piling rigs would be located in relation to the estuary, accounting for the further most point into the estuary, to understand the likely distance of the impact. The model also assessed the cumulative noise levels which provided an understanding of the number of pile strikes per day; this took account of four piling rigs being used for up to a total of four piles per day.<br><br>Dr San Martin confirmed that the peak sound pressure level of noise in the underwater noise modelling takes account of two piles being hammered |

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| | | at the same time on the basis that the likelihood of four piles being hammered at the same time is very low and not considered to be a reasonable worst case. This information has been shared with MMO and Cefas as their scientific advisors via a signposting document who have provided an initial indication that they are content with this approach.<br><br>The ExA requested for this signposting note regarding piling to be submitted to the Examination. This can be found at **Appendix 10** to this document. |
| 20. | In relation to the impact protections measures, the ExA asked the Applicant to clarify the sequencing of the works. | ***Sequencing*** – Mr Strachan KC, on behalf of the Applicant, confirmed that the construction of impact protection measures (if required) has been assessed to occur all at once, or to occur as part of a sequenced construction scenario. The assessment accounts for this happening at any time of the year as a worst-case scenario. Notwithstanding this, Dr San Martin confirmed that both take account of the four piling rig restriction.<br><br>The ExA queried if Natural England and MMO were aware of how the works for the impact protection measures would fit in practice.<br><br>Mr Strachan KC confirmed that to the Applicant's knowledge and understanding, this had been made clear to both Natural England and MMO, but the Applicant will re-confirm this position with both organisations. |
| 21. | Following the current timescales and on the basis that the Examination and reporting period of the ExA may run through to 26 April 2024, with the Secretary of State due to make a decision by 26 July 2024, the ExA queried the implications these timescales may have on the construction programme, particularly in regard to the seasonality and timing constraints. | ***Construction Programme*** – Dr Oaten, on behalf of the Applicant, confirmed that the worst-case scenario was assessed as part of the assessment, clarifying that construction could take place during any period of the year, including sensitive periods for the relevant marine ecological receptors which have been assessed.<br><br>In response, the ExA requested that the Applicant Produce indicative construction programmes with start dates in Quarter (Q) 1/Q2/Q3/Q4 for a single phase or a two-phase construction programme, with a |

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| | | commentary on seasonal implications for any likely effects for wildlife, most particularly the qualifying features for the designated sites. This can be found at **Appendix 9** to this document. |
| 22. | The ExA asked the Applicant to respond to representations made by CLdN on the SSSI. | ***SSSI*** – Mr Pearson, on behalf of the Applicant, confirmed that the impacts on the Humber Estuary SSSI were assessed in section 9.8 of Chapter 9 of the Environmental Statement **[APP-045]**. The Applicant also provided further clarification via a signposting document to Natural England on the potential impact of SSSI features to identify where the effects have been assessed for both the Shadow HRA and the Environmental Statement. Mr Pearson also clarified that the features of the SSSI are the same as those of the Humber Estuary SAC. SPA and Ramsar site.<br><br>Mr Strachan KC confirmed that the signposting document provided to Natural England regarding the SSSI would be submitted to the Examination. This can be found at **Appendix 11** to this document. |
| ***Agenda Item 5 (Navigation and Shipping effects)*** | | |
| 23. | The ExA invited the Applicant to make an Opening Statement | ***Opening Statement –*** Mr Strachan KC, on behalf of the Applicant, gave a short opening summary of the Applicant's position on matters relating to navigation and shipping effects, a copy of which can be found at **Appendix 4** to this document. |
| 24. | The ExA asked the Applicant to consider the MCA as stakeholder and an authority providing advice to the MMO and Department for Transport and whether adequate consultation had been undertaken. | ***MCA –*** Mr Hannon, on behalf of the Applicant confirmed that the requirement to consult with the MCA is not in the remit of the SHA within this context. The MCA, under the PMSC, is responsible to the Department of Transport for advising on the technical content of the code and compliance with the code. More generally, Mr Hannon clarified that the MCA had had sight of the NRA and they have provided comments to confirm they are happy with the approach taken and that the |

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| | | responsibilities of the Statutory Harbour Authority and Competent Harbour Authority in reviewing the risk management have been undertaken in an appropriate manner in line with the PMSC.<br><br>Mr Hannon explained that the MCA will advise the MMO accordingly and that they have no further recommendations to make as the navigation and marine authority does not fall within their remit but within the remit of the Statutory Harbour Authority. |
| 25. | The ExA queried whether the MCA will be further consulted on the control of risks or whether the MMO will give a final recommendation. | ***ALARP*** – Mr Hannon clarified that the authority remains with the Statutory Harbour Authority and that the determination of ALARP and setting tolerability falls outside the remit of the MCA or MMO. |
| 26. | The ExA asked the Applicant to confirm why the NRA had referred to MGN 654 and whether a mixed methodology had been used. | ***MGN 654 –*** Mr Hannon, on behalf of the Applicant, confirmed that following a review of the documentation, the IMO guidelines as referred to within the code and the five-step FSA, the Applicant believes there has been no mixing of methodologies. There are, however, similarities on the approach across methodologies in defining how to undertake a risk assessment and determining levels of tolerance. |
| 27. | The ExA queried how the NRA as part of the application fits with the Port's own NRA. | ***Port NRA*** – Mr Hannon, on behalf of the Applicant, confirmed that the NRA, as part of the application, will inform the formal risk assessment in place for ongoing operations within the Port and that this would be used subsequently to inform appropriate amendments and changes to the MSMS (as necessary) as part of the continuous review and improvement cycle<br>Mr Hannon clarified that the methodology used within the application NRA aligns with the methodology used across the SHAs of the Humber. |
| 28. | The ExA sought clarification on where the duties of the Statutory Harbour Authority and the Humber Statutory Harbour Authority | Mr Strachan KC, on behalf of the Applicant, confirmed that guidance would be submitted to the Examination in writing.<br><br>**Post Hearing Submission:** |

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| | overlap and differ in terms of governance within the Port. | The ExA are referred to document **10.2.12 - The Port of Immingham and River Humber – Management, Control and Regulation** submitted at Deadline 1. |
| 29. | The ExA requested Run 59 to be shown on screen and for DFDS to provide an explanation of the manoeuvre, as well as the accuracy of the tidal flow data used in the model. | ***Run 59*** – In response to the speculation and assertions advanced by Captain Carson, on behalf of DFDS, in relation to Run 59, Mr Strachan KC, highlighted that Captain Carson had not been present at the simulations. Mr Strachan KC called Mr Parr, the Co-Ordinator of the simulations and builder of the model used for the tide and wind data, to provide an explanation.<br><br>Mr Parr, on behalf of the Applicant, demonstrated that the tidal flows inputted for the simulation are representative of the location in which the Immingham Eastern Ro-Ro Terminal would be situated. Mr Parr clarified that these flows differ from the general flows within the Humber due to the surrounding infrastructure and the bend of the river. The data used to determine the assessment was based on 6-months of AWAC data provided by ABPmer and verified by the flows in the Immingham Eastern Ro-Ro Terminal location. Accordingly, such flows were utilised in the simulation to ensure that a proper assessment was conducted to reflect the reality of the operation which would be taking place, drawing upon the differences in tidal flow between the main part of the river and the Immingham Bellmouth.<br><br>Mr Parr clarified that this specific run represented the Humber pilot's third consecutive run, which was more intensive than would usually happen at the port. The pilot had turned too sharply rather than keeping the vessel broadly parallel to the tide. Due to this mistake, it became obvious that the simulations process was not going to learn anything from the run, so it was aborted.<br><br>**Post-Hearing Submission:** |

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| | | The Applicant can confirm that pilots are trained and provided with guidance on how to make the approaches to berth. Pilots/master mariners making the approach in these conditions (peak flows and 27.5 knots (F7) winds at the berth) would be very experienced and would have made the same approach many times in more straightforward conditions.<br><br>Moreover, in real world operations, pilots have operational time limits and fixed rest periods to minimise fatigue and any associated human error. In the simulation session, pilots necessarily work more intensively, partly because the consequences do not result in real world outcomes, but also as there is not the additional fatigue and physical effort of travelling to and from ships, along with the associated boarding and disembarking procedure. The pilots are also constantly reassessing the environment in a way which doesn't need to happen in reality, as the wind doesn't ordinarily change 180 degrees over the course of 20 minutes. Accordingly, this should be borne in mind when pilot-induced mistakes occur in simulation. |
| 30. | The ExA queried whether the location of the tidal buoy could be submitted to the Examination. | Mr Parr, on behalf of the Applicant, confirmed that this data would be provided at Deadline 1 as to which, see **Appendix 12** to this document. |
| 31. | The ExA queried whether tug masters were involved in the simulations. | ***Tug Masters* –** Mr Parr, on behalf of the Applicant, confirmed that all simulations undertaken were supported by tug masters and highlighted that their opinion was highly important in determining whether the simulations and their outcomes were both realistic and achievable. |
| 32. | The ExA queried what the reality of the manoeuvre would be if the vessel had aborted at the point shown on run 59. | ***'Near Miss'* –** Mr Parr, on behalf of the Applicant, explained the approach a Pilot, or a Master with a Pilot Exempt Certificate, would take in the circumstances shown on run 59. Mr Parr clarified that the manoeuvre undertaken would not classify a near miss as the Pilot or PEC would have realised much earlier that the alignment was sub-optimal and would have taken the executive decision to realign and resettle themselves in the early stages of the manoeuvre before attempting to get onto the berth. |

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| | | As with the equally challenging manoeuvres currently undertaken on the Humber, the pilots and the PECs will require training in order to become familiar with the manoeuvre. HR Wallingford also recommend that tug masters attend continuation training with pilots so that they work together effectively. |
| 33. | The ExA asked the Applicant to respond to the representations made by IOT on the suggested publication of the MSMS. | ***MSMS* –** Mr Strachan KC, on behalf of the Applicant, highlighted an important misunderstanding between the PMSC, the MSMS and the NRA that had arisen in IOT's submissions. While Mr Elvin, on behalf of IOT, submitted that the MSMS for the Port should be published or produced to the ExA, Mr Strachan re-iterated Mr Hannon's earlier comments that the MSMS under the Code for the Port does not incorporate the proposed development because it is not currently part of the Port. Accordingly, the MSMS would be updated to reflect the proposed development if consent was granted.<br><br>Contrary to IOT's representation, publication of the MSMS is not required and this is reflected more widely through other port operations with the majority of MSMS not publishing all documentation. Mr Strachan KC demonstrated that the reasoning behind this is to uphold security within the Port. The MSMS holds a wealth of sensitive data as to the operation of strategic infrastructure which would be contrary to the public interest to make widely available. Additionally, it is not in the commercial interest of the port operators to have confidential and commercially sensitive information publicly shared.<br><br>Notwithstanding the security and commercial reasons for not publishing the MSMS, more fundamentally, the MSMS does not help with the assessment of the proposed development in safety navigation risk and will provide no benefit to the ExA, therefore, it is not entirely clear why this |

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| | | document was requested. Mr Strachan KC confirmed that what has been submitted to the Examination is in accordance with what is conventionally provided to assess navigational risk within port developments.<br><br>Mr Strachan KC clarified that the Applicant has produced an NRA which looks specifically at the navigational risks arising from the proposed development, involving the stakeholders through attendance of simulations and taking on board on their comments. Similarly, Mr Strachan KC emphasised that the Applicant had consulted with all stakeholders on the MSMS, and the stakeholders had provided input as necessary. |
| 34. | The ExA invited the Applicant to respond to the representations made by DFDS on the methodology used for the NRA. | ***Methodology of NRA –*** Mr Strachan KC re-asserted that, representations made by DFDS concerning mixed methodology used as part of the assessment were inaccurate and misleading. In the absence of specific references to the NRA, it is not clear to the Applicant which parts DFDS are referring to and as a general oversight of the NRA, the Applicant is not aware of the proposed mixed methodology which has been suggested.<br><br>In reassuring DFDS and the ExA, Mr Strachan KC confirmed that the NRA precisely followed the requirements and methodology set out under the PMSC and MSMS. |
| 35. | The ExA invited the Applicant to respond to the representations made by the Interested Parties on the accuracy of the simulation exercise and whether additional modelling was required. | ***Objectives of the Simulations –*** Mr Strachan KC, on behalf of the Applicant, clarified a misconception amongst the Interested Parties concerning the reasoning behind the numbers of fails and aborts within the simulation. The fundamental purpose of the simulation exercise was determining the absolute limits of the simulation approach to understand the limits of operations for this particular facility under working conditions to identify what is acceptable, safe and deliverable. Mr Strachan KC confirmed that the model achieves this objective as it demonstrates that this facility can be used safely using the available methodologies with the relevant training. |

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| | | To emphasise the reliability of the assessment used, Mr Strachan KC clarified that pushing the boundaries in order to establish the circumstances where aborts and fails would occur was necessary, as the NRA would be useless without testing what was acceptable and safe.<br><br>***Need for Additional Modelling –*** Mr Strachan KC, on behalf of the Applicant, stated that suggestions that more simulations were necessary could only be because parties considered there to be scenarios which needed to be simulated but which had not been. Simulations were designed to test the operating boundaries, and it is the Applicant's position that those boundaries have already been tested sufficiently. |
| 36. | The ExA requested additional information to determine what had been learnt from the assessment in determining the necessary controls | ***Risk Controls –*** Mr Strachan KC, on behalf of the Applicant, stated that the Applicant would explain in writing where controls had been introduced into the NRA, but reassured the ExA that the NRA had identified acceptable controls and how these should be balanced with the risks that had been identified. |
| 37. | The ExA queried whether the tidal data had an impact on the manoeuvre which took place on run 59 and to comment on the use of windage and sheltering. | ***Run 59 Tidal Impact –*** Mr Parr, on behalf of the Applicant, indicated that in terms of the manoeuvre in discussion, tide did not play a factor in the movement of the vessel. Mr Parr clarified that the wind in this run had the effect of settling the vessel down towards the eastern jetty which, combined with the lateral drift as the vessel came out of the turn, meant the vessel steered towards the eastern jetty. In alignment with the Pilotage Guide, there are specific procedures for approaching the jetty, requiring precise manoeuvring by the pilot. Accordingly, it would be a misunderstanding to concentrate on run 59 as indicative of the manoeuvres towards the IERRT.<br><br>Mr Parr went onto clarify that the simulation utilised a variety of strategies in assessing the conditions to determine how the vessel is best placed to manoeuvre the approach to the Port. Accordingly, out of 150 runs conducted in total as a trial exercise, there are likely to be aborts and fails |

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| | | in order for the simulations to accurately determine the best strategy to adopt.<br><br>***Wind and Sheltering*** – In response to IOT's submissions, Mr Strachan KC, on behalf of the Applicant, confirmed that gusts were modelled in the simulation exercise and windage was considered. To support this, Mr Parr highlighted that lengthy discussions were held with representatives from IOT in determining the use of gusts and sheltering as part of the simulation exercise.<br><br>Mr Parr, on behalf of the Applicant, stated that the data used in the simulation is conservative as this is an exercise based on assumptions, and the outcome which is derived is generally much safer in practice. |
| 38. | The ExA queried why meteorology data had been used from the airport as opposed to the Port and to confirm the area in which the Applicant was confident in the tidal data. | ***Wind Data*** – Mr Parr, on behalf of the Applicant, clarified that the gusts and sheltering wind data used by HR Wallingford to initially assess the direction and the appropriate strengths to test in the simulations derived from the Immingham Dock Tower. This was a collation of 12-months of data provided by HES and analysed by HR Wallingford to establish the general wind directions to form a realistic and representative assessment.<br><br>Mr Parr also confirmed that gathering wind data from the nearest airport for use in simulations is a common methodology, as airports collect comprehensive and accurate data over long periods of time.<br><br>***Tidal Data –*** Mr Parr, on behalf of the Applicant, also confirmed that HR Wallingford were confident in the tidal modelling between the IOT and the Port of Immingham bell mouth, and that the Applicant would provide a diagram of the area for which accurate tidal data had been collected. A comparison between the model and the observed data showed a very high correlation. |

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| 39. | The ExA queried the use of the bow thrusters in the simulation. | ***Bow Thrusters*** – Mr Parr, on behalf of the Applicant, clarified that the use of bow thrusters at high power for extended periods of time was a method utilised to determine the limiting conditions in accordance with the overarching aim of the simulations. Mr Parr highlighted that, following the simulation process, debriefs were held with the pilots and tug masters to determine if the inputs were reasonable to confirm whether the run was to be categorised as a success or as a fail.<br><br>**Post-Hearing Submission**<br>It is standard practice that bow thrusters should be used in accordance with the manufacturer's recommendations. The Simulation Team carefully considered the combined effect of power provided by tugs, main propulsion and bow thrusters during every run and in the overall context of the manoeuvre. |
| 40. | The ExA queried whether there is wind data available from the Port of Immingham. | Wind data for the Port of Immingham can be found at **Appendix 14** to this document. |
| 41. | The ExA invited the Applicant to respond to IOT's representation on the publication of the MSMS. | ***MSMS*** – Mr Hannon, on behalf of the Applicant, to help with the confusion of the IP's, highlighted that the Applicant was referring to the overarching documentation (the Marine Safety Management Manual document) which clearly signposts the makeup of the system whilst not containing the detail of the core components of the MSMS. |
| 42. | IOT and DFDS indicated that they would also be producing their own NRA's utilising differing methodology. | ***Data Inputs*** – Mr Strachan KC, on behalf of the Applicant, welcomed DFDS and IOT to provide data inputs before conducting their own NRA's in order to promote the dialogue between the parties as requested by the ExA. |
| ***Hearing ended 18:22*** | | |

# 3 Table 2: Action Points

| Action | Description | Action by | Deadline | Applicant's Comment/where has the action been answered |
|---|---|---|---|---|
| 1 | Review the recording of ISH2 discussion and provide any comments by D1. | MMO, MCA and NE | D1 | |
| 2 | Provide a note: advising for the duration of the marine element of the Familiarisation Site Inspection how typical, or otherwise, the vessel movements to and from the Port of Immingham were; and confirming what the state of the tide was and the direction(s) and speed(s) for the wind and current. | Applicant | D1 | On 26 July 2023, 37 acts of pilotage and 22 Pilotage Exemption Certificate (PEC) acts were completed at the Port of Immingham, totalling 59 movements. The average in July was 56 and the daily average YTD is 58. Therefore, the marine activity during the Familiarisation Site Inspection (FSI) is considered representative of a typical day. The volume of vessel traffic experienced at the specific time of the FSI is also considered representative of a normal day.<br><br>An extract of the Port of Immingham pilotage log at the tim e of the FSI is provided at **Appendix 5** to this document. Please note that the data has been cropped to remove personal information.<br><br>The vessels alongside within the vicinity of the FSI were:<br><br>Location / Name / LOA / DWT / Beam:<br>Immingham Oil Terminal Berth 3 / Murray Star / 128.60m / 13006 / 20.40m |

<table>
<tr><th>Action</th><th>Description</th><th>Action by</th><th>Deadline</th><th>Applicant’s Comment/where has the action been answered</th></tr>
<tr><td></td><td></td><td></td><td></td><td>
<table>
<tr><td>Immingham Oil Terminal Berth 2</td><td>Gulholmen</td><td>144.00m</td><td>17055</td><td>22.00m</td></tr>
<tr><td>Immingham Oil Terminal Berth 1</td><td>Seasalvia</td><td>183.00m</td><td>50660</td><td>32.20m</td></tr>
<tr><td>Immingham Oil Terminal Berth 8</td><td>Solway Fisher</td><td>85.32m</td><td>5422</td><td>17.00m</td></tr>
<tr><td>Immingham Outer Harbour</td><td>Hollandia Seaways</td><td>232.00m</td><td>17000</td><td>33.01m</td></tr>
<tr><td>Immingham West Jetty Berth 2</td><td>Winter</td><td>128.60m</td><td>13026</td><td>20.40m</td></tr>
</table>
<br>The state of the tide during the visit was a flood tide, with high water at 1157 at Immingham.<br><br>The meteorological station located at the Immingham Dock entrance recorded clear weather conditions, with south-westerly winds, average of 5 m/s and gusting 10 m/s. This is typical of the prevailing wind conditions in Immingham. Tidal flow (current) data is not routinely monitored.</td></tr>
<tr><td>3</td><td>Submit a plan showing the berth numbering at the whole of Immingham Oil Terminal (IOT).</td><td>IOT Operators</td><td>D1</td><td></td></tr>
<tr><td>4</td><td>Provide a note setting out the names, lengths, beams (widths)</td><td>IOT</td><td>D1</td><td></td></tr>
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| Action | Description | Action by | Deadline | Applicant's Comment/where has the action been answered |
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| | and capacities for all of the vessels berthed at the IOT during the landside element of the Familiarisation Site Inspection. | | | |
| 5 | Provide CLdN's expectations for future demand on the Humber for Ro-Ro capacity through to 2050 including the anticipated distribution between accompanied and unaccompanied RoRo freight [a draft by D1 and full version by D2]. | CLdN | D1/D2 | |
| 6 | For the Port of Immingham to provide data on Ro-Ro vessel movements and the distribution between accompanied and unaccompanied freight volume for a representative month. The selection of the representative month to be determined in consultation with the Harbour Master, Stena, DFDS and IoT Operators. | Applicant | D2 | The Applicant has written to the parties identified to progress this Action Point . An update will be provided by the Applicant at Deadline 2. |
| 7 | Provide a plan for the Port of Killingholme identifying its berth numbers. | CLdN | D1 | |
| 8 | Provide for the Port of Killingholme historic data for Ro- | CLdN | D2 | |

| Action | Description | Action by | Deadline | Applicant's Comment/where has the action been answered |
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| | Ro freight volumes for at least the last 10 years with explanatory note. | | | |
| 9 | Submit a copy of the Court of Appeal ClientEarth judgement relating to the consideration of need in the context of the energy National Policy Statements, together with a note explaining any relevance of this judgement to the consideration of the Proposed Development. | Applicant | D1 | A copy of the Court of Appeal ClientEarth judgement and accompanying note are provided at **Appendix 6** to this document. |
| 10 | Submit the further road traffic survey data that has been collected by the Applicant and an explanatory note as supplement to the baseline traffic count data referred to in the application documentation. | Applicant | D1 | The approach to collection of baseline traffic surveys is set out in the **Transport Assessment (Section 3.4) [AS-008]** and included a comprehensive suite of junction turning counts and automatic traffic counts. These were supplemented on the Strategic Road Network (SRN) by long term data from the National Highways (NH) Webtris Database and by review of other planning applications in the area (described as Appendix I of the TA **[AS-008])**.<br><br>Generally data external to the Port was collected during September – November 2021, and data internally to the Port during April 2022.<br><br>At the time of the data collection this was considered by the Transport Assessment Working Group as being appropriate and no specific allowance or amendment required to reflect any implications of fact that the UK was |

| Action | Description | Action by | Deadline | Applicant's Comment/where has the action been answered |
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| | | | | emerging from the COVID pandemic. At the time of the surveys there were no UK restrictions as a result of COVID.<br><br>As explained at ISH2, the Applicant has continued to collect data post-submission of the DCO and updated surveys were undertaken in June 2023 at the same locations as shown on Figure 3 in the Transport Assessment **[page 59 of AS-008]** in order to compare traffic flow levels on the local highway network.<br><br>A summary of the comparison between 2021 flows and the updated flows can be seen in **Tables 1 – 4** below, the full outputs which have been submitted as **document 10.2.18 – Traffic Survey Data – June 2023 submitted at Deadline 1**. Five day averages represent the average across the working week (Monday – Friday) and seven day the average across the week. |

**Table 1** - Comparison of 2021 and 2023 flows on the A1173 (N of Kiln Lane)

| | TA Surveys | | 2023 Update | | Difference | |
|---|---|---|---|---|---|---|
| | Total | HGV | Total | HGV | Total | HGV |
| 07:00-08:00 | 780 | 71 | 602 | 50 | -178 | -21 |
| 16:00-17:00 | 802 | 69 | 593 | 59 | -209 | -10 |
| 24 Hours | 8854 | 1182 | 6972 | 817 | -1882 | -364 |

| Action | Description | Action by | Deadline | Applicant's Comment/where has the action been answered |
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**Table 2** - Comparison of 2021 and 2023 flows on the A1173 (N of Queens Road)

| | TA Surveys | | 2023 Update | | Difference | |
|---|---|---|---|---|---|---|
| | Total | HGV | Total | HGV | Total | HGV |
| 07:00-08:00 | 741 | 47 | 620 | 34 | -121 | -13 |
| 16:00-17:00 | 839 | 45 | 695 | 7967 | -144 | +2 |
| 24 Hours | 9236 | 794 | 613 | 7967 | -1269 | -180 |

**Table 3** - Comparison of 2021 and 2023 flows on the A1173 (Manby Road)

| | TA Surveys | | 2023 Update | | Difference | |
|---|---|---|---|---|---|---|
| | Total | HGV | Total | HGV | Total | HGV |
| 07:00-08:00 | 757 | 100 | 685 | 70 | -72 | -30 |
| 16:00-17:00 | 831 | 96 | 780 | 73 | -51 | -23 |
| 24 Hours | 8931 | 1356 | 8442 | 1017 | -489 | -339 |

**Table 4** - Comparison of 2021 and 2023 flows on the A1173 (Queens Road)

| | TA Surveys | | 2023 Update | | Difference | |
|---|---|---|---|---|---|---|
| | Total | HGV | Total | HGV | Total | HGV |
| 07:00-08:00 | 231 | 31 | 275 | 28 | +45 | -3 |

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<tr><th>Action</th><th>Description</th><th>Action by</th><th>Deadline</th><th>Applicant's Comment/where has the action been answered</th></tr>
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<tr><td>16:00-17:00</td><td>224</td><td>21</td><td>277</td><td>21</td><td>+53</td><td>+1</td></tr>
<tr><td>24 Hours</td><td>4905</td><td>744</td><td>3282</td><td>364</td><td>-1624</td><td>-381</td></tr>
</table><br>The above shows that, generally, 2023 flows are comparable or lower than the 2021 flows recorded and used in the junction capacity assessments. On that basis the assessments presented in the TA are robust as they adopted higher flows than would be the case if the 2023 surveys were adopted.</td></tr>
<tr><td>11</td><td>Submit the road traffic survey data collected by DFDS, together with a commentary, highlighting points of difference from the Applicant's data submitted with the application.</td><td>DFDS</td><td>D1</td><td></td></tr>
<tr><td>12</td><td>Provide an explanation for the contention that a 10% allowance for tractor-only movements on the public highway is insufficient.</td><td>DFDS</td><td>D1</td><td></td></tr>
<tr><td>13</td><td>Comment on 1) the Interested Parties' criticisms of the assumed distribution between accompanied (28%) and unaccompanied (72%) Ro-Ro freight throughput for the Proposed Development and 2)</td><td>Applicant</td><td>D1</td><td>Interested Parties have raised concerns over whether the assessment represents a "realistic worst-case scenario" with regard to the ratio of accompanied to unaccompanied Ro-Ro freight units. The DCO proposes to limit the overall throughput of the IERRT facility and the assessment of traffic related impacts is based on both an end user profile</td></tr>
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| Action | Description | Action by | Deadline | Applicant's Comment/where has the action been answered |
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| | any implications for the operation of the public highway if the throughput for accompanied freight was to be higher than the assumed level of 28%, ie the sensitivity of the public highway to accommodate different levels of accompanied and unaccompanied Ro-Ro throughput. | | | (Table 8 of the TA **[page 231 of AS-008]**) and an overall port profile (Table 9 of the TA **[page 232 of AS-008]**).<br><br>Market research on Ro-Ro and Lo-Lo (Lift-on Lift-off) freight in the UK-Europe shortsea routes in general and their interaction with the Humber Region has been undertaken by Rebel Ports and Logistics (**ES Appendix 4.1 [APP-079]**). For example, Section 3.5 of that ES Appendix considers Humber shortsea unitised traffic and shows, amongst other things, the historic percentage split between unaccompanied Ro-Ro, accompanied Ro-Ro, and Lo-Lo freight in the Humber Estuary.<br><br>This information in ES Appendix 4.1 shows that historically the majority of short sea traffic in the Humber Estuary is unaccompanied Ro-Ro traffic with a smaller proportion of accompanied Ro-Ro traffic. This information supports the position taken on the proportions of unaccompanied / accompanied traffic that has assessed within the TA and shows that it is very unlikely that there would be a high level of accompanied traffic which could skew the peak hours.<br><br>In terms of overall movements across the day if all freight was accompanied traffic the overall daily traffic would be reduced to 1,813 vehicles (against 1,944 vehicles assessed in the TA).<br><br>The profile of traffic across the day would change if the proportion of unaccompanied to accompanied traffic changes. This is because (as set out at Table 7 of the TA |

| Action | Description | Action by | Deadline | Applicant's Comment/where has the action been answered |
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| | | | | **[page 229 of AS-008]**), the arrival and departure rate of an accompanied freight movement is more closely linked to the arrival and departure times of the vessels. For accompanied freight the peak outbound movement is 0900-1000 and inbound movements across the hours of 1800-2000.<br><br>On this basis increasing the proportion of accompanied freight would mean less traffic in the highway peak period periods tested in the TA (defined as the worst-case as set out in Table 10 and Paragraph 5.4.2 – 5.4.4 of the TA [**AS-008]**) of 0700-0800 and 1600-1700.<br><br>Therefore, as a sensitivity test, the assessment provided in Table 8 of the TA has been re-run on the basis that the split of unaccompanied to accompanied freight changes to 38 / 62 (i.e., a shift of 10% towards accompanied traffic). The total movements across the day in comparison with Table 8 of the TA is provided **at Appendix 7** to this document.<br><br>It can be seen from this sensitivity analysis that the impact is marginal. In the highway peak hours, the change is negative (i.e. there is less traffic). The main affected hour is 0900-1000 when flows would increase by 37 vehicles and 1900-2000 when flows would increase by 13 vehicles. These additional vehicles are at times when baseline flows on the network are considerably lower than the highway peak periods and there would, therefore, be no material impact to the assessments or their conclusions provided in the TA. |

| Action | Description | Action by | Deadline | Applicant's Comment/where has the action been answered |
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| 14 | Endeavour to agree a ratio for accompanied and unaccompanied Ro-Ro freight throughput for the purposes of assessing the Proposed Development's effect on the operation of the public highway. | Applicant, CLdN and DFDS | D1 | A meeting between the parties was held on 10 August 2023. The Applicant will continue to engage with the identified parties. |
| 15 | Endeavour to agree a methodology for assessing the capacity of the Port of Immingham's West Gate to accommodate vehicular traffic associated with the operation of the Proposed Development. | Applicant, CLdN and DFDS | D1 | A meeting between the parties was held on 10 August 2023. The Applicant will continue to engage with the identified parties. |
| 16 | Provide the results of sensitivity testing for any increased use of the West Gate by inbound or outbound heavy goods vehicle traffic associated with the operation of the Proposed Development, including modelling for and identifying the point at which the West Gate would be operating above its capacity. | Applicant | D1 | The operation of the Port Security "Gates" is set out in the TA at Section 6.4.10 **[AS-008]**.<br><br>The action list from ISH2 includes the need for discussion with CLdN and DFDS on routing assumptions and traffic generation forecasts (Action Points 14 and 15). Therefore, further appraisal of this issue may be necessary following the outcome of those discussions and upon receipt of data from these parties. |
| 17 | Share as soon as possible with Applicant modelling and assessment for the five public highway junctions that DFDS | DFDS | D1 | |

| Action | Description | Action by | Deadline | Applicant's Comment/where has the action been answered |
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| | contends would be operating above capacity by 2032. | | | |
| 18 | Provide a note explaining the concern about the Proposed Development's operation on the movement of rail going freight in and out of the Port of Killingholme. | CLdN | D1 | |
| 19 | Provide: 1) a plan showing the precise locations for the habitat losses due to capital dredging and piling and where any boundaries between different habitat types might be within the areas subject to capital dredging and piling;<br>and 2) an explanation, by the means of a worked calculation or calculations, demonstrating how the areas for any direct habitat losses have been derived. | Applicant | D1 | A plan showing the precise locations of habitat loss associated with the IERRT project is provided at **Appendix 8** to this document.<br><br>The areas of habitat loss were calculated using GIS spatial analysis, bathymetric data, and numerical modelling outputs. An overview of this process is provided below:<br><br>• To calculate the area of **direct habitat loss beneath the piles** (totalling 0.006 ha of intertidal mudflat habitat and 0.027 ha of subtidal mudflat habitat), the location of the piles was mapped and the total amount of overlap with intertidal and subtidal mudflat habitat was measured based on the diameter of the piles.<br><br>• To calculate the area of **direct intertidal mudflat habitat loss from the capital dredge** (totalling 0.006 ha of intertidal habitat), the location of the dredge area was mapped over a bathymetric dataset of the study area which was collected specifically for this project. The extent of intertidal |

| Action | Description | Action by | Deadline | Applicant's Comment/where has the action been answered |
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| | | | | habitat that would be dredged to a level that would cause it to become subtidal (i.e., lowered to an elevation below the mean low water spring (MLWS) tide mark) was then calculated. It should be noted that this loss is located on the side slope of the proposed dredge pocket and the amount of material that needs to be dredged within the berth pocket in this location is minimal. As such, it is anticipated that the existing slope would remain stable and not require further dredging. This would result in no direct habitat loss from the capital dredge; it is included in the assessment as a worst case and on a pre-cautionary basis.<br><br>• The area of **indirect intertidal mudflat habitat loss** (totalling 0.01 ha of intertidal habitat) was calculated by mapping the extent of potential changes in bed elevation, as predicted by the numerical modelling undertaken to inform the assessments of the IERRT scheme **(see Figure 7.19 of the ES [APP-063])** in which negative values indicate areas of either increased erosion or of reduced accretion). The potential for this arises from the small-scale changes in physical processes (specifically flow speeds) resulting from the presence of the IERRT infrastructure. In calculating the potential indirect losses, the vertical change in the bed level (as predicted by the model) was combined with the local bed slope of the existing foreshore to calculate the overall area of |

| Action | Description | Action by | Deadline | Applicant's Comment/where has the action been answered |
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| | | | | change. This calculation represents a worst-case assessment of potential elevation changes and has been considered on a pre-cautionary basis. The level of predicted change is at the limit of the accuracy of the modelled data and, in real terms, is likely to be immeasurable against the context of natural variability (as a result of storm events, for example).<br><br>Intertidal habitat loss totals just 0.022 ha which is approximately 0.00006% of both the Humber Estuary SAC and the Humber Estuary SPA/Ramsar site. The loss of 0.027 ha of subtidal habitat represents approximately 0.000074% of the Humber Estuary SAC. |
| 20 | With respect to the habitat losses identified by the Applicant, clarify the position about the significance of those losses upon the integrity for the designated sites. | CLdN | D1 | |
| 21 | Confirm with Natural England (NE) and Marine Management Organisation (MMO) and submit a note about how works associated with the installation of the proposed impact protect measures subject to Requirement 18 in the draft Development Consent Order, if | Applicant | D1 | If implemented, the proposed impact protection measures could be taken forward under two different scenarios. The first scenario will be to install the measures at the same time as the construction of the other marine and landside infrastructure associated with the IERRT project. Bearing in mind the view of the Applicant that as currently assessed, impact protection measures are not required, the second scenario would be to install the impact |

| Action | Description | Action by | Deadline | Applicant's Comment/where has the action been answered |
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| | implemented, would fit into the construction programme for the Proposed Development. | | | protection measures once the northern finger pier, with two berths, has been constructed and is in operation.<br><br>Both of the above scenarios align with the construction programme described in Chapter 3 of the ES **[APP-039]**, where it is noted that the construction of the IERRT project may be completed in a single stage, or it may be sequenced such that the construction of the southernmost pier takes place at the same time as operation of the northernmost pier.<br><br>In addition, both scenarios have been considered in the assessment of environmental impacts. Furthermore, the assessment has been based on the precautionary worst-case assumption that the works could occur at any time of year (including sensitive periods for qualifying interest feature of the Humber Estuary SAC, SPA, and Ramsar site). In any case, construction of the impact protection measures, if required, will be subject to the proposed mitigation measures set out in the Environmental Statement. |
| 22 | Produce indicative construction programmes with start dates in Quarter (Q) 1/Q2/Q3/Q4 for a single phase or a two-phase construction programme, with a commentary on seasonal implications for any likely effects for wildlife, most particularly the | Applicant | D1 | An indicative construction programme for the marine works is provided at **Appendix 9** to this document.<br><br>The assessment has been based on the precautionary assumption that the works could occur at any time of year as a worst case (including sensitive periods for qualifying interest features of the Humber Estuary SAC, SPA, and Ramsar site). Mitigation has then been proposed to reduce impacts to marine ecological receptors during key sensitive |

| Action | Description | Action by | Deadline | Applicant's Comment/where has the action been answered |
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| | qualifying features for the designated sites. | | | periods – this is accounted for in the indicative construction programme for the marine works provided at **Appendix 9**. Therefore, regardless of whether a single stage or sequenced construction programme is undertaken, and regardless of when construction begins, the effects on wildlife (including the qualifying features of the designated sites) will be managed by the robust package of mitigation measures.<br><br>The relevant quarter start date for marine construction work does, however, affect the overall length of the construction programme. For example, the indicative construction programme provided at **Appendix 9** shows that if works commence in Q4 rather than Q2 or Q3, it adds a further 6-7 months to the overall construction duration.<br><br>This is because of the April and May restriction on all marine piling and Q4 coinciding with the six-month overwintering bird restriction period. This would prevent the majority of the work on the approach jetty and the inner finger pier from proceeding until June of the following year. As stated above, regardless of when construction begins, the effects on wildlife (including the qualifying features of the designated sites) will be managed by the robust package of mitigation measures. |
| 23 | Provide a copy of the note previously sent to MMO regarding piling. | Applicant | D1 | A copy of the signposting document is provided at **Appendix 10** to this document. |

| Action | Description | Action by | Deadline | Applicant's Comment/where has the action been answered |
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| 24 | Provide a copy of signposting note previously sent to NE regarding effects for the Site of Special Scientific Interest. | Applicant | D1 | A copy of the signposting document is provided at **Appendix 11** to this document. |
| 25 | Submit copies of the current editions of the Port Maritime Safety Code (PMSC) together with the Maritime and Coastguard Agency's Guidance to the PMSC plus Marine Guidance Note 654 plus Annex 1 to the latter guidance. | Applicant | D1 | Documents submitted at Deadline 1 as documents:<br>• **10.2.14 - Port Marine Safety Code (PMSC);**<br>• **10.2.15 - Maritime and Coastguard Agency's Guidance to the PMSC**; and<br>• **10.2.16 - Marine Guidance Note 654 and Appendix**. |
| 26 | Submit a plan showing the location of the tidal current measurement buoy. | Applicant | D1 | Two independent current flow monitoring surveys have been conducted in relation to the IERRT project. Firstly, a seabed deployed Acoustic Wave and Current (AWAC) device was installed for a six-month period between 15 November 2019 and 5 June 2020. Over this period current speed and direction (as well as wave climate and water levels) was monitored at 0.5 m depth intervals every 10 minutes. The instrument was located close to the location of the proposed IERRT marine infrastructure (53° 37.81252'N, 00°1 0.52781'W) – see plan provided at **Appendix 12** to this document. Current speed and direction data was initially provided as full depth-averaged data which is the standard output. However, a significant current direction sheer through the water column was identified and, therefore, the data was reprocessed to provide datasets averaged over the upper 5 m, 6 m and 7 m of the water column to represent the expected drafts of vessels using the proposed berths. This data was used |

| Action | Description | Action by | Deadline | Applicant's Comment/where has the action been answered |
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| | | | | to assist the validation of hydrodynamic models used in the design and assessment of the IERRT project (see Appendix 7.2 – Numerical Model Calibration Report **[APP-084]**) and to develop a tidal model for use in the vessel navigation simulations (see Appendix 10.2 – Navigation Simulation Study **[APP-090 and APP-091]** and Appendix 10.3 – Navigation Simulation – Stakeholder Demonstrations **[APP-092]**).<br><br>Secondly, a mobile, vessel based ADCP (Acoustic Doppler Current Profiler) survey was conducted along multiple transects within the vicinity of the proposed IERRT marine infrastructure. This was undertaken to understand the spatial variation of current flows in the area given the undulating bathymetry surrounding the IERRT site. The current monitoring transect surveys were conducted on two occasions: 11-12 October 2022 (spring tide) and 18 October 2022 (neap tide). The three transects were located to provide suitable data for model verification purposes – see plan provided at **Appendix 12** to this document. Two transects (A and B) were located at the location of the proposed IERRT infrastructure, with Transect B crossing the location of the previously deployed seabed AWAC (for comparison purposes). The third transect (C) was located at the approaches to Immingham lock. A further transect (D) was conducted on a peak spring only and passed over an AWAC device that was deployed in 2022 for a direct comparison. Current observations, at 0.5 m intervals through the water column, were conducted along each transect at 30-minute intervals |

| Action | Description | Action by | Deadline | Applicant's Comment/where has the action been answered |
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| | | | | over a full 13-hour tide period. Data was processed both as full depth-averaged and (as above) averaged for the upper 5 m, 6 m and 7 m of the water column. This data corroborated the data collected via the AWAC device. |
| 27 | Provide a graphical explanation for the port area over which the tidal current model is considered to be consistent with the observed data. | Applicant | D1 | To understand the flows and provide data for the navigation simulation work, HR Wallingford produced a TELEMAC-3D flow model to represent the variation in current speed and direction throughout the water column. Measured tidal flow data was used to validate this model (as described in response to Action Point 26 above). This was further verified using additional data provided by a second independent flow survey (also described above).<br><br>It was concluded that the model met the applicable standards for estuarine modelling accuracy and accurately represents the spatial variation in the long-term current measurements.<br><br>On the basis of the above, the area critical to berthing and departures has been correctly modelled for the navigation simulations required for the assessment of the IERRT.<br><br>There is a high level of confidence in the spatial and temporal flow conditions represented in the model for the area verified using the AWAC data collected in 2019-2020 and ADCP data collected in autumn 2022 , as shown by the red area on the plan provided at **Appendix 13** to this document. |

| Action | Description | Action by | Deadline | Applicant's Comment/where has the action been answered |
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| 28 | Give consideration to whether an addendum to the Navigation Risk Assessment (NRA)/ Environmental Statement is necessary as further evidence that the Proposed Development could be safely operated, particularly how the navigation simulations have influenced risk controls in NRA. | Applicant | D3 | The Applicant will provide an update on this Action Point at Deadline 3. |
| 29 | Provide clarification about the sources for and interpretation of wind data used in the navigation simulations. | Applicant | D1 | Existing MetOcean (meteorological and oceanographic) conditions described in Section 3.3 of the NRA **[APP-089]** are informed by available relevant measured and modelled datasets.<br><br>CAA CAP 670 regulatory framework as well as requirements and guidance for Air Traffic Services, Communication, Navigation, Surveillance, Meteorological and Information and Alerting Systems Section MET01: Use of Meteorological Information in ATS Units, sets out the requirements for Surface Winds Data collection and recording.<br><br>There is no requirement for an LPS to have wind recoding capability. Immingham is an LPS, MGN 401 (Amend 3) sets out LPS equipment requirements and does not specify wind sensor or met recording as requirement for sub VTS (LPS) level. |

| Action | Description | Action by | Deadline | Applicant's Comment/where has the action been answered |
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| | | | | For quality and consistency, the best source of data should come from certified, calibrated equipment which is set and measured against a regulated standard which is what has taken place.<br><br>This is common practice. For example, ES and NRA submitted with the Tilbury 2 DCO application used wind data taken from London City Airport – some 14 miles West of the Tilbury 2 development. Further wind data in the subsequent NRA was taken from Gravesend on the South Bank of the River Thames (Port of London Port Control (VTS) Centre) and not from Tilbury Docks.<br><br>For indication and comparison, the wind roses taken for Humberside Airport and Immingham Marine Control Centre (LPS) are provided at **Appendix 14** to this document in Figures 1 and 2 respectively. It should be noted that the recorded wind direction for both locations indicated that the strongest and prevailing winds are South to South Westerly in direction, with a similar strength, factoring in the variations caused by local environment (turbulence) and quality standards used for indication and recording.<br><br>The Humberside wind data provided a more macro indication of wind for use in the ES and NRA, and Immingham Port wind data provided indication of localised wind which is useful to inform simulation |

| Action | Description | Action by | Deadline | Applicant's Comment/where has the action been answered |
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| | | | | modelling. This is the approach and use that was undertaken in the NRA. |
| 30 | Consider what parts of the Marine Safety Management System can be shared with the IOT Operator's request. | Applicant | D1 | The Applicant is giving this request due consideration and will provide a fuller response at Deadline 2. |
| 31 | Provide a note explaining the implications for the operation of the IOT were there to be allisions with the trunkway or vessel to vessel collisions associated with the operation of the Proposed Development. Incidents of varying severity should be commented upon in the note to be submitted. | IOT Operators | D1 | |
| 32 | Submit own NRA, as referred to during ISH2. | DFDS | D2 | |
| 33 | Submit own NRA, as referred to during ISH2. | IOT | D2 | |
| 34 | Provide plan showing the existing stemming (waiting) area(s) for the Port of Immingham, identifying their extent and any overlaps between them and the Proposed Development. | Applicant | D1 | Please see **Appendix 15** to this document. |

| Action | Description | Action by | Deadline | Applicant's Comment/where has the action been answered |
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| 35 | Include note on HASB governance structure and composition in SHA/CHA jurisdiction note to be actioned from ISH1. | Applicant | D1 | Document submitted at Deadline 1 as document **10.2.13 - The Port of Immingham and River Humber – Management, Control and Regulation.** |
| 36 | Submit an Other Person's statement analogous to Written Representation, to cover oversight role and responsibilities on pilotage, safety and conservancy matters; views on the potential for shipping congestion and consequences arising from that; and an opinion on Navigation Simulations and HAZID workshops. | Humber Harbour Master | D2 | |
| 37 | Provide a commentary on any significance the Proposed Development would have for the delivery of the proposed Humber Freeport. | Applicant and CLdN | D2 | The Humber Freeport takes in a 45 kilometre area encompassing the four main ports of the Humber (Hull, Goole, Immingham and Grimsby) and nearby development land opportunities. It is the product of a partnership involving the four local authorities from the Humber sub-region, two local enterprise partnerships, two universities and a collection of major businesses. A new company limited by guarantee has been established to run the Freeport.<br><br>The primary benefits of Freeport status is the creation of tax sites and customs sites. |

| Action | Description | Action by | Deadline | Applicant's Comment/where has the action been answered |
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| | | | | The IERRT facility would be located outside of the key beneficial areas of the Freeport as it would neither be in a tax zone or a customs zone.<br><br>However, being located so close to the Freeport area is likely to have a knock-on beneficial impact for the IERRT development – and the Ro-Ro freight sector in general - as it is likely that new manufacturing and distribution facilities that will locate within the Freeport areas will need access to supplies, raw materials and component parts. The IERRT facility will provide an opportunity to further service such new facilities on the South Bank of the Humber. |

# 4 Glossary

| Abbreviation/ Acronym | Definition |
| --- | --- |
| ABP | Associated British Ports |
| ALARP | As Low As Reasonably Practicable |
| APT | Associated Petroleum Terminals |
| CEMP | Construction Environmental Management Plan |
| CLdN | CLdN Ports (Killingholme) Limited |
| dDCO | Draft Development Consent Order |
| DFDS | DFDS Seaways Plc |
| EA | Environment Agency |
| ExA | Examining Authority |
| HES | Humber Estuary Services |
| HOTT | Humber Oil Terminal Trustees Limited |
| IOT | Immingham Oil Terminal |
| IP | Interested Party |
| ISH2 | Issue Specific Hearing Two |
| MCA | Maritime and Coastguard Agency |
| MGN | Marine Guidance Note |
| MMO | Marine Management Organisation |
| MSMS | Marine Safety Management System |
| NRA | Navigation Risk Assessment |
| PMSC | Port Marine Safety Code |
| SSSI | Site of Special Scientific Interest |

# Appendix 1 – Summary of the Applicant's Case as to the Need for the Proposed Development

**IMMINGHAM EASTERN RO-RO TERMINAL**

**ISH2 – NEED FOR THE PROPOSED DEVELOPMENT**

**SUMMARY STATEMENT**

1. I am privileged to appear today on behalf of the Applicant, ABP, to summarise the Applicant's case on the imperative need for the Proposed Development for the Port of Immingham, the Humber Estuary, the wider region and the UK itself in the public interest. This is only a brief outline of the Applicant's detailed case on the need for this new facility. Much greater detail is set out in the Applicant's Planning Statement [APP-019], Environmental Statement – Vol 1, Ch.4 Need and Alternatives [APP-040] and Vol 2, Ch 4 Figures Need and Alternatives [APP-062] and Vol 3, Appendix 4.1 Market Forecast Study Report [APP-079].

2. ABP, as one of the leading ports group with 21 ports around the coast of Britain, contributes around £7.5 billion to the UK economy supporting over 119,000 jobs. On the Humber Estuary, ABP's ports complex forms the UK's busiest trading gateway. The four ports of Immingham, Grimsby, Goole, and Hull handle more than 58 million tonnes of cargo between them each year – worth approximately £75 billion supporting 35,000 of those jobs. It is, therefore, no exaggeration to say in this case that ABP is uniquely well-placed as a port operator to identify its need for a new facility of this kind for Immingham along with its ability to deliver it in this location.

3. That volume of activity is a feature both of the Humber Estuary's ideal location to provide port facilities for the import and export of freight but also the significant growth and ever increasing demand for facilities and the important competition that it would yield.

4. I will come to the Government's clear policy position in the National Policy Statement for Ports, but ABP's ports on the Humber themselves serve as a good barometer of the situation of a dynamic environment where ABP seeks to provide capacity to match the nation's trading needs through the vital trading gateway to mainland Europe.

5. ABP has identified an imperative need for additional Ro-Ro freight capacity within the Humber Estuary. Both ABP and Stena Line are in no doubt as to the essential need to strengthen the Estuary's contribution to an effective, efficient, competitive and, importantly, resilient UK Ro-Ro freight sector to connect to Europe and the Baltics. The Humber Estuary and more specifically this location at Immingham on the south bank with natural access to deep water and good inland transport connections thereby enabling easy access to major inland conurbations within the UK, makes this the ideal location for the new Ro-Ro freight facility.

6. Before summarising that need, it is important to record at the outset an important principle in terms of established Government policy. Under the National Policy Statement for Ports there is actually no requirement for the Applicant to demonstrate a need for this proposed development (even though

it has) because an urgent need is already established in the NPS approved by Parliament.

7. Chapter 3 of the NPS explains that in detail, but by way of summary only, the Government has identified –

   a. Shipping will continue to provide the only effective way to move the vast majority of freight in and out of the UK, and the provision of sufficient sea port capacity will remain an essential element in ensuring sustainable growth in the UK economy – see NPS paragraph 3.1.4.

   b. The Government seeks to **encourage** sustainable port development to cater for long-term forecast growth in volumes of imports and exports by sea with a competitive and efficient port industry – NPS paragraph 3.3.1, bullet 1.

   c. The Government allows judgments about when and where new developments are proposed to be made on the basis of commercial factors by the port industry or port developers operating within a free market environment (NPS paragraph 3.3.1, bullet 2) This reflects the fact that the ports industry has proved itself capable of responding to demand in that way – NPS paragraph 3.3.2.

   d. Total need depends not only on overall demand for port capacity but also on the need to retain the flexibility that ensures that port capacity is located where it is required and on the need to ensure effective competition and resilience in port operations – NPS paragraph 3.4.1.

   e. The Government's identification of need is partly based upon its own forecasts of demand for port capacity up to 2030. It anticipated that there might be updated forecasts but which it did not expect to result in any change in the policy **that it is for each port to take its own commercial view and its own risks on its particular traffic forecasts** (NPS paragraph 3.4.7). The latest forecasts from 2019 confirm that prescient approach, confirming the need and no revision to the NPS.

   f. The Government emphasises that the capacity needed to provide for competition, innovation, flexibility and resilience can be delivered by the market and is likely to exceed what might be implied by a simple aggregation of demand nationally - NPS paragraph 3.4.9.

   g. The Government also notes that new capacity needs to be provided at a wide range of facilities and locations, to provide the flexibility to match the changing demands of the market, possible with traffic moving from existing ports to new facilities generating surplus capacity - NPS paragraph 3.4.11.

   h. It explains forecasts do not attempt to predict locations where demand would manifest and the Government does not wish to dictate where port development should occur. The Government considers the market is the

best mechanism for getting this right, with developers bringing forward applications for port development where they consider them to be commercially viable - NPS paragraph 3.4.12.

i. It notes that UK ports compete with each other and the Government welcomes and **encourages** such competition which drives efficiency and lowers costs for industry and consumers so contributing to the competitiveness of the UK economy. It notes that real choice for port users and operating at efficient levels is not the same as operating at full capacity. It also specifically notes that total port capacity in any sector will need to exceed forecast overall demand if the ports sector is to remain competitive. Again the Government believes the port industry and port developers are best place to assess their ability to obtain new business and the level of any new capacity that will be commercially viable, subject to developers satisfying decision makers that the likely impacts of any proposed development have been assessed and addressed - NPS paragraph 3.4.13.

j. Spare capacity also helps to assure the resilience of the national infrastructure where port capacity is needed at a variety of locations and covering a range of cargo and handling facilities. The Government believes that resilience is provided most effectively as a by-product of a competitive ports sector - NPS paragraph 3.4.15.

k. Accordingly paragraph 3.4.16 of the NPS makes very clear that there is a compelling need for substantial additional port capacity over the next 20-30 years. Indeed it states that excluding the possibility for additional capacity through new port development would be to accept limits on economic growth and on the price, choice and availability of goods imported into the UK and available to consumers and that it would also limit the local and regional economic benefits that development might bring which would be strongly against the public interest.

l. This leads to the guidance (NPS section 3.5) that when determining an application for a DCO in relation to ports, the decision-maker should <u>accept the need for future capacity</u> to:

   (a) cater for long-term forecast growth indicated by the forecast figures, with demand likely to rise;
   (b) support the development of offshore sources of renewable energy;
   (c) offer a sufficiently wide range of facilities at a variety of locations to match existing and expected trade, ship call and inland distribution patterns and to facilitate and encourage coast shipping;
   (d) ensure effective competition among ports and provide resilience in the national infrastructure; and
   (e) take full account of both the potential contribution port development might make to regional and local economies.

m. Given the level and urgency of need for such infrastructure,the ExA should start with the presumption in favour of granting consent to

applications for ports development which applies unless any more specific and relevant policies set out in the NPS or another NPS clearly indicate that consent should be refused – NPS paragraph 3.5.2.

8. So it is already national Government policy (which no party is entitled to challenge in this examination) that there is an urgent need for this development for all the reasons identified in the NPS – see also R(Clientearth) v SSBEIS [2021] PTSR 1400.

9. Having said all that, the Applicant has produced evidence of its imperative need for this new facility within the Humber Estuary in any event, based on its knowledge of the industry and the requirement to strengthen the estuary's capacity and resilience for the UK Ro-Ro freight sector. The assessment is based on:

    a. The need to ensure the UK has sufficient Ro-Ro capacity. The Applicant has analysed various sources that analyse the predicted growth, including: (i) the UK Port Freight Traffic statistics reflecting average annual growth of 2.5 per year and by 2050 a 130% increase in RoRo tonnage units compared to 2016; (ii) and the Applicant's Forecasts in its HSMS [APP-079] predicting similarly strong growth.

    b. The need to ensure that sufficient Ro-Ro freight capacity is provided in the location where it is required, namely at the Humber Estuary and Immingham in particular for both accompanied and unaccompanied freight. The latter requires more landside storage space. There is also a steady increase in the size of Ro-Ro vessels operating on the North Sea routes and the need to operate from berths that are not constrained by the use of locks or depth of water with reliability of sailing times necessary in a competitive industry.

    c. The features of the Humber Estuary to serve the demand, with its natural deep-water channels and its location on the Eastern seaboard of the UK within an overnight sailing time of key ports on the Western seaboard of Europe critical for journey time reliability and certainty, along with its ability to serve the needs of a very large inland area including the Midlands and the North with its good transport connections.

    d. The natural linkage with the expansion of the Port of Immingham in relation to existing Ro-Ro operations, and the Applicant's assessment of the heavy utilisation of existing capacity already, with very little (if any) spare available capacity of the right type available on the Humber.

10. However, as Government policy makes clear, merely meeting existing capacity is not what Government policy requires. Competitiveness, resilience and growth require provision of extra capacity for all the reasons identified in Government policy.

11. In that context the relevant representations from CLdN that appear to seek to question need are not only contrary to Government policy, but also surprising

and self-defeating. In questioning need in this way in terms of the competition it might bring, CLdN are themselves highlighting one of the very things about the proposed development that Government strongly seeks to encourage, namely competition in the sector. CLdN's representations are nakedly commercial in nature, but ironically, they simply reinforce the case for the development itself in terms of Government policy.

12. The need has been reinforced by recent supply chain events such as Brexit and Covid which have exposed a lack of resilience and the need not to rely to such an extent on the short straits. An increase in capacity, an increase in the ability to handle larger vessels and increased flexibility will all add to resilience, where there is little contingency or resilience in the event that existing Ro-Ro infrastructure were damaged, blocked or otherwise become temporarily unusable for whatever reason.

13. In addition, there is a lack of suitable Ro-Ro facilities to meet Stena Line's requirements. Stena Line currently operates a stop-gap measure from the enclosed port area with limited landside storage space and is not able to continue at Killingholme on acceptable terms in a facility controlled by a competitor, so threatening the essence of competition.

14. So there is a considerable body of evidence from the Applicant that coincides with the Government's established position as to the clear and urgent need for the provision of new facilities here. None of the existing Ro-Ro infrastructure on the Humber Estuary has the necessary suitable capacity or characteristics to meet the needs of Stena Line, but even if it did Government policy is about generating extra capacity anyway.

15. Turning to the specific topics you have asked about in your agenda:

***a) Projections and assumptions for short-sea trade growth, future preferences in shipping and transport and existing capacity at Humber ports***

16. As identified in ES Chapter 4 [APP-040] and ES Appendix 4.1 [APP-079], the analysis demonstrates:

    (i) There will be significant future growth in short sea trades to and from the UK, including in the form of Ro-Ro cargo if further capacity can be provided.

    (ii) The Humber is of central importance as an area from which the market wishes to operate in terms of the handling of short-sea Ro-Ro trade. There is a current dominance of unaccompanied Ro-Ro freight and that is expected to continue.

    (iii) There is a requirement for an increasing size of Ro-Ro vessels that requires the provision of a new facility.

(iv) Extensive use is already made of the existing Ro-Ro capacity on the Humber and there is a lack of remaining suitable capacity to meet the demand and need identified in an efficient, competitive and resilient way.

***b) Consideration of alternatives to satisfy the stated need case.***

17. As a matter of NPS policy, there is no requirement to demonstrate the absence of any alternative locations for a new facility of this kind. Such a requirement can only arise if the law requires. Broadly speaking, in that respect, there is only a requirement to consider alternatives if a proposal causes significant planning harm or causes adverse effects to the integrity of a designated site as part of the process under the Habitats Regulations. Neither situation arises. The duty in respect of the Infrastructure Planning (EIA) Regulations is a more procedural one which is to set out what alternatives have been considered.

18. As it happens, however, the Applicant has considered alternatives in any event, as set out within section 4.3 of ES Chapter 4. In short, there is no alternative location for the identified need than this location given the specific requirements. This has been examined through the staged process of:

- *Stage 1:* The identification and consideration of potential broad options that might be available to meet the identified need.

- *Stage 2:* The identification and consideration of initial potential solutions that fall within the parameters of the identified broad option.

- *Stage 3:* Having identified an initial potential solution to meeting the need the further development of the solution into a detailed proposal to be taken forward for formal consents and approvals.

***c) The meaning and implications of the phrase 'to ensure resilience' in the Need and Alternatives statement [APP-049, para 4.2.53]***

19. That particular phraseology reflects the language in the NPS, see paragraph 3.4.1 where reference is made to the need to ensure effective competition and resilience in port operations. This concept is further explained in the subsequent paragraphs of the NPS.

20. Seeking resilience in respect of Ro-Ro operations means seeking to contribute to sufficient appropriate port capacity – including spare capacity – at a variety of locations to enable the sector to meet short term peaks in demand, the impact of adverse weather conditions, accidents, deliberate disruptive acts and other operation difficulties, without causing economic disruption through impediments to the flow of imports and exports.

21. ABP agrees with the analysis contained within the NPS on this matter, namely that resilience is provided most effectively as a by-product of a competitive ports sector.

***d) A concise summary response to the concerns raised in Relevant Representations regarding the need case.***

22. As far as the Applicant can ascertain, the only 'need' concerns raised in relevant representations are by CLdN – the owner and operator of a competitor Ro-Ro facility on the River Humber at Killingholme.

23. It is difficult to provide much of a summary response to those concerns as things stand as little is provided by way of detail about them. The representation consists of a series of general points and alleged concerns with a lack of evidence in support.

24. That being said, we note at the outset that:

    (1) Any challenge to the established urgent need set out in Government policy is contrary to policy and the Planning Act.

    (2) CLdN appears to question 'overall demand', but the need which ABP, and indeed the Government, has identified is much broader than simply demand (although demand clearly does exist).

    (3) CLdN's representation is not an accurate reflection of the NPS. For example, paragraph 2.1.1 of the CLdN relevant representation is not an accurate summary of what paragraph 3.5.1 of the national policy statement for ports states.

25. ABP will respond in more detail to the CLdN relevant representation and Mr Rowell, the Appellant's planning policy and need expert is available today to answer any questions the Examining Authority may have on need.

## Appendix 2 – Summary of the Applicant's Case as to Transport

## Immingham Eastern Ro-Ro Terminal, Port of Immingham

ISH2 Transport

### 1.0 INTRODUCTION

1.1 The Transport Chapter of the ES and supporting Transport Assessment (AS-008) and Travel Plan (APP109) have been prepared by Simon Tucker of DTA.

1.2 The Transport Assessment was subject to significant pre-application discussions with all three affected highway authorities (North East Lincolnshire Council, North Lincolnshire Council and National Highways). This included regular Transport Assessment working group meetings as the assessment of the project progressed.

1.3 The details of those discussions and the progression and influence they had on the finalisation of the Transport Assessment is set out in the ES Chapter 17 (APP-053 – Section 17.4).

1.4 The methodology adopted in the TA, including inter alia, establishing baseline conditions, forecasting development generated transport movements and the assessment of impacts has been agreed with all the affected highway authorities as being robust, appropriate and reasonable.

1.5 The robust conclusions of that assessment are that the existing highway network is of appropriate design and capacity to accommodate the proposals without the need for any additional mitigation. However, embedded mitigation which will reduce the effects predicted in any event and/or deliver improvements has been included as described at Para 7.4 of the TA in the form of:

a) A Framework Travel Plan.
b) A booking system, if required, to deal with unforeseen or adverse operational impacts (for example, weather).
c) Improvements to the site access from internal port roads and the upgrade to the road network in the vicinity of East Gate which will improve the existing position for existing and future users.

## 2.0 Traffic Surveys and Baseline Information

2.1 The approach to collection of baseline traffic surveys is set out in the Transport Assessment (Section 3.4). It included a comprehensive suite of junction turning counts and automatic traffic counts. These were supplemented on the Strategic Road Network (SRN) by long term data from National Highway's Webtris Database and by review of other planning applications in the area (described as Appendix I of the TA).

2.2 Data external to the port was collected during September – November 2021, and data internally to the port during April 2022.

2.3 The timings of the data collection were considered by the Transport Assessment working group to be appropriate and it was considered that no additional allowances or amendments were required to reflect emergence from the COVID pandemic. At the time of the surveys there were no UK restrictions as a result of COVID.

2.4 Since then, there has been additional collation data from the network by DTA in March/April 2023 which in fact confirms that, in general, flows in the 2021 surveys were higher than those now collected from the period March/April 2023, demonstrating the robustness of the previous work and justifying the collective position of the Transport Assessment working group.

## 3.0 Traffic Generation and Assignment

3.1 The approach to traffic generation from the Proposed Development is fully set out in the TA (Section 5.2). The approach has been to adopt for assessment purposes the maximum capacity of the terminal in terms of annual throughput of 660,000 units and to use an assumption that it will operate at full capacity 364 days per year. This is clearly a robust assumption as it reflects a worst-case assessment that looks at the absolute maximum traffic generation, whereas the reality is that the traffic generation will be lower for most of the time.

3.2 The spread of traffic across each day (i.e per hour) has been assessed based on two scenarios, one which reflects the existing profile of traffic using the Port and the other

based on end-user profile. The former has a flatter profile across the day (Table (9)) whereas the latter has a peak between 9 and 10 am when incoming vessels unload.

3.3 At present around 60% of existing traffic using the Port enters via West Gate with the remainder using East Gate. This is because the majority of vehicle intensive users of the port (including DFDS) are located at the western end of the port.

3.4 By contrast, the proposed facility will be located immediately adjacent to the East Gate and (nearly) all HGV traffic will be routing to the A180 corridor. As assessed in the TA (Section 5.5.7) the quickest route for these vehicles will be via East Gate and A1173 to Stallingborough Interchange.

3.5 It is possible that some vehicles may use West Gate and in order to cater for this, a robust testing that considers a total of 15% using the West Gate has been assessed (even though the percentage is likely to be much less). The impact of that percentage of traffic using the East Gate has been tested and also found to be acceptable.

3.6 That is in addition to the TA (**Annex K Table 2**) testing the implications of 100% of traffic using East Gate which has been found to be acceptable.

## 4.0 Effects of operation on Public Highway

4.1 The effects of the Proposed Development on the wider network are highlighted at Tables 15 and 16 of the TA.

4.2 This confirms that, other than Queens Road and the A1173 towards Stallingborough interchange (considered in a moment), the change in flows on the network will be modest in either absolute or indeed proportional terms. The effect on Queen's Road and the A1173 towards Stallingborough interchange is greater in terms of flows, but again all such effects have been assessed as acceptable.

4.3 The Transport Assessment (as agreed with all three affected highway authorities) tests the impact of the development traffic on 9 affected junctions (Para 6.4.1) identified in the TA and includes consideration of:

1) Base (surveyed traffic flows) – as agreed with highway authorities – (Section 3.4 of TA)
2) Identification of which hours in the day are the highest (peak) hours in terms of flows (Table 10 of TA).
3) Identification and inclusion of known cumulative development traffic and background growth (Sections 6.1 (and Annex I) and Section 6.2 of TA).
4) Preparation of junction operation assessments (Annex K for external (public) junctions, Annex L for A180 slip roads and Annex M for internal port junctions).

4.4 All key junctions in the area have therefore been tested through agreed modelling and including all known committed developments. For the future test year in 2032, all junctions will continue to operate within capacity. No mitigation is therefore required or indeed justified.

4.5 In respect of the A180, this dual carriageway road is operating well within capacity and assessment of the slip roads (Appendix L of the TA) confirm this.

## 5.0 Operational effects for existing occupiers of the port other than shipping and navigation

5.1 From a review of the Relevant Representations, the only two issues that appear to have been raised by existing occupiers relate to capacity (and existing congestion) at the Port Security Gates and internal junction operation.

5.2 The assessment on the operation of the Port Security "Gates" is set out in the TA at Section 6.4.10. This confirms that the existing East Gate capacity will be significantly enhanced by the proposed provision of a second inbound security lane, which will effectively double capacity for the East Gate so resulting in an improved situation. A more detailed assessment that explains this will be included in the Applicant's response to concerns raised in the Relevant Representations. It confirms that the proposals will improve transit times at East Gate for all users.

5.3 The effects on delay for users of the West Gate will be minimal and not material. Across the port and separate from these proposals, the Applicant is also implementing

an ANPR system for staff cars which will reduce queuing time by enabling those cars to pass more quickly through the Port Security gates.

5.4 Internal to the port, assessments have been undertaken of all key junctions, and this is reported at Annex M of the TA. There is significant spare capacity within those internal junctions to accommodate the Development Proposal. There will be no discernible impact on other existing occupiers of the port in terms of land side transportation.

## Appendix 3 – Summary of the Applicant’s Case as to Ecology

**Immingham Eastern Ro-Ro Terminal**
**ISH2 – ECOLOGY SAC/SPA/RAMSAR Summary Statement**

**ISH2 Agenda Question 4 - Any effects for the integrity of the Humber Estuary Special Area of Conservation, Special Protection Area and Ramsar site (the designated sites)**

## 1 Introduction

1.1 In line with the National Policy Statement for Ports and the legal framework that affects designated sites, you will have seen from the Applicant's submitted documentation that any potential effects (including any cumulative and in-combination effects) arising from the Proposed Development (both in terms of its construction and its subsequent operation) on the integrity of the Humber Estuary Special Area of Conservation (SAC), Special Protection Area (SPA) and Ramsar site (known together as the Humber Estuary European Marine Site (EMS)) have been fully assessed by a team of specialist experts, as set out in the submitted Habitats Regulations Assessment (HRA) [APP-115] and the relevant parts of the Environmental Statement (ES) including in particular Volume 1, Ch.9 [APP-045], Vol 1, Ch. 20 [APP-056], Volume 2, Ch.9 [APP-065], Volume 2, Ch.20 [APP-074] and the relevant Appendices of Vol 3.

1.2 Those assessments have been based on a robust evidence base, supported by extensive baseline surveys covering the last two decades. The EIA Project team that has led that assessment work are ABPmer, an extremely experienced company with a wealth of expertise from individual specialists in each of the respective disciplines whose individual expertise and qualifications are set out in the EIA Competency Statement (submitted in accordance with Regulation 14(4) of the IP(EIA) Regulations 2017 – see ES, Volume 3 Appendix 6.3 [APP-083]). ABPmer with its respective specialists have worked on the assessment of multiple projects on the Humber Estuary and have acquired a detailed understanding of the local baseline environment and potential impacts associated with port development in this environment and the Applicant will enable the relevant experts to provide you with further evidence in relation to any matters that you wish to examine further to the extent that proves necessary.

1.3 However, by way of summary of what that comprehensive expert assessment process has demonstrated, the Applicant's case can be summarised briefly and I shall do it by reference to the relevant aspects of the designated sites in question.

1.4 ***First in terms of Benthic habitats and species (and supporting bird habitat),*** full consideration has been given to the **intertidal** area. The intertidal mudflat habitat of the designated sites is located along the frontage of the Port of Immingham. It is designated as a feature of the SAC, as well as a supporting habitat for the qualifying coastal waterbird features of the SPA and Ramsar site that feed on it.

1.5 Benthic habitats and species have the potential to be affected through direct and indirect losses of intertidal habitat that can arise from piling activity and by capital dredging. However, in this case the very limited extent of any such activity for this Proposed Development has been considered in detail and the simple position is that the affected habitat is very small indeed and assessed by the relevant experts to be negligible. Indeed, the area affected by the Proposed Development totals only 0.022 ha which represents approximately 0.00006% of both the SAC and SPA/Ramsar site.

1.6 Such *de minimis* loss in mudflat extent will not change either the overall structure or the functioning of the mudflats within the Port of Immingham area or more widely in the Humber Estuary SAC.

1.7 Moreover, the spatial extent of these losses and any effects from the Proposed Development represents a barely measurable, and in any event inconsequential, reduction in available feeding habitat for coastal waterbird features that utilise this area.

1.8 ***Turning to the Subtidal*** area, the results of the assessment demonstrate a very similar picture. The piling will result in only a very small direct loss of 0.027 ha of subtidal seabed habitat. Again, the relevant experts have concluded that any such loss is simply negligible in the context of the extent of the overall amount of similar marine habitats found locally. Moreover, such piling will not adversely affect the overall functioning of subtidal habitats within this section of the Humber Estuary SAC.

1.9 As already noted, potential effects can arise from capital dredging and maintenance dredging, albeit no loss of area of seabed, as a result of the removal of sediment and sediment deposition. However, as you will have already appreciated, maintenance dredging activity is an almost daily occurrence at the Port of Immingham. The assessment demonstrates that the nature of the benthic community will re-establish between maintenance dredge campaigns – as is currently the case elsewhere - and all of the characterising species are considered tolerant to the predicted millimetric changes in deposition.

1.10 Turning to the question of air quality and effects that might arise in that respect, the assessment recognises that intertidal habitats can be sensitive to air pollutants where the impact of a pollutant has the ability to affect vegetation if it is present in that intertidal habitat, such as rooted macrophytes, lichens and/or bryophytes. However, the mudflat habitat in this case in relation to the Proposed Development that might be affected by air quality changes is not sensitive to any deposition of airborne pollutants even if such deposition were to occur as it is not vegetated and, in addition, it is washed and scoured by the sediment-loaded tide twice a day, along with any build-up of macroalgae.

1.11 The nearest vegetated habitat that would be considered potentially sensitive to changes in air quality is the saltmarsh habitat but that is located approximately 3 km north-west of the site and the levels of dust and nitrogen deposition predicted to arise from the construction and operation of the

Proposed Development is simply not of a magnitude or in a location that could adversely affect such features of the SAC.

2 **As to Coastal waterbirds**

2.1 ABPmer and its expert team have a wealth of information and experience upon which to base their assessment. Monitoring surveys spanning the last 20 years have been used to understand the usage of the Immingham intertidal frontage by birds in light of all existing activity that is already associated with this working port. This data, together with a detailed evidence-based review of the scientific literature on the effects of potential disturbance to birds has been used to formulate precautionary and robust mitigation measures proposed to ensure that there will be no unacceptable disturbance effects during the construction phase to coastal waterbirds.

2.2 These highly precautionary measures include a restriction on construction activity from 1 October to 31 March for works within 200 m of exposed intertidal mudflat when such coastal waterbirds in their use of that habitat are considered to be more sensitive. This will limit the potential for any disturbance over the colder winter months when birds are in their highest numbers and are considered more vulnerable to the effects of disturbance, albeit there is well-established evidence as to the continued use of these areas by coastal waterbirds in close proximity to the existing activities of the Port. This measure, along with the use of a noise suppression system, acoustic barriers/screens, soft start procedures and a freezing weather restriction, will minimise any potential disturbance effects.

2.3 As a general comment based on the expertise of those involved, it is clear that coastal waterbirds are tolerant to existing day-to-day port operational activities on jetties. It is expected that birds will become habituated to such activities relatively quickly once the Project is operational. On a purely precautionary basis, however, temporary screening is proposed along the jetty to minimise any disturbance effects and to facilitate that habituation.

2.4 The approach jetty of the Proposed Development itself will be an open piled structure with large gaps between each of the piles and between the jetty deck and the mudflat. Any avoidance of marine infrastructure by birds is expected to be limited, highly localised and not to change the overall distribution of waterbird assemblages on the foreshore.

3 **Any effects on Fish and marine mammals have been fully assessed and no adverse effects on the integrity on the designated sites is predicted with what is proposed.**

3.1 The mitigation measures inherent in the construction approach will minimise any potential underwater noise effects that could arise through piling and any consequential effects on lamprey and grey seals (features of the SAC). Again, these include soft start procedures, timing restrictions to avoid potentially sensitive periods for migratory fish and the use of marine mammal observers.

## 4 The cumulative and in-combination effects of the Proposed Development have been fully assessed

4.1 A detailed cumulative and in-combination effects assessment is set out in the HRA and ES. None of the ongoing activities, plans and projects are predicted to result in cumulative or in-combination effects of a scale that would change the existing condition status of the interest features recognised within the Humber Estuary EMS or to affect the conclusions as to the absence of any adverse effect on the integrity of the designated sites.

4.2 Throughout the relevant processes, the Applicant, along with its technical expert consultants, has consulted and been in discussion with Natural England and the Marine Management Organisation (MMO), including Cefas, the MMO's technical advisors, in relation to their assessment of potential adverse effects on the Humber Estuary EMS. This has taken place through the pre-application stage of the Project – and those discussions have continued following submission of the DCO application.

4.3 More specifically, following receipt of Natural England's and the MMO's relevant representations, a number of meetings have taken place to discuss issues raised in those relevant representations (including the arrangement of a Natural England site visit to the Port). As many of the questions raised relate to information which is available within the assessment material, a series of 'signposting documents' have been produced for each organisation with the aim of identifying where the relevant information or assessment work can be found and to clarify and address the sorts of issues that were raised. That has already been a very productive process (as illustrated, for example, by Natural England's recent production of an updated version of its table moving matters from "amber" to "green" and the Applicant is seeking to address draft Statements of Common Ground (SoCGs). Discussions on these matters are ongoing and continue to be constructive and the Applicant remains very keen for its respective experts to meet and discuss any further issues (if there are any), but the Examining Authority will have noted that the MMO itself has already explained that it considers that any of the questions it has raised can be resolved and the Applicant considers that the same is true in respect of Natural England. That reflects the detail into which the Applicant has gone in its assessments and the nature of the Proposed Development which has been fully assessed in this process.

## 5 Summary

5.1 In summary, therefore, having fully considered the designated sites' conservation objectives and the nature of the Proposed Development both in terms of construction and operation, the Applicant's case is straightforward. Its construction and consequent operation will create no adverse effects on the integrity of any designated sites.

## Appendix 4 – Summary of the Applicant's Case as to Navigation and Shipping

**IMMINGHAM EASTERN RO-RO TERMINAL**

**ISH2 – NAVIGATION SUMMARY STATEMENT**

**Navigation and Shipping Effects – (with reference to the Proposed Development having regard to Chapter 10 of the ES [APP-046], the Navigation Risk Assessment (NRA) [APP-089] and associated Navigation Simulation documents [APP-090 to APP-092]**

**Introduction**

1. A Navigational Risk Assessment (NRA) is a process designed to consider and assess the consequences and impacts of a given marine development project, in this case the Immingham Eastern Ro-Ro Terminal, on navigation, both during construction and operation to enable the relevant port authority to be satisfied as to the ability to deliver and operate the Proposed Development acceptably and safely in accordance with its responsibilities as a Duty Holder for port marine safety.

2. NRA is not something that is specifically required as a matter of policy for proposed development in ports under the NPS for Ports. This undoubtedly reflects the well-established principle that the DCO process is not intended to duplicate or require assessment of the effectiveness of other regulatory controls that will continue to apply to the Port under other legislation and statutory framework and application of the Port Marine Safety Code.

3. Under that other regime, the very simple and short point is that the relevant authorities, including the Port Authority for the River Humber, the Harbour Master for the area (with responsibility for the pilots) and the Dock Master will undoubtedly ensure, and be required to ensure, that the Port continues to operate safely with the Proposed Development under construction and operation.

4. However, the NRA process is included as part of the EIA process which shows what assessment has been undertaken in terms of any likely significant effects. The NRA process that has been undergone demonstrates that the relevant authorities have already satisfied themselves in principle as to the ability to address navigation without any likely significant effects with the normal raft of controls that are available to them to manage shipping in the Humber, around Immingham and to enable ships to move in and out of berths and the Port using well-established techniques and expertise one would expect that takes full account of the conditions on the day.

5. It is perhaps inevitable that commercial rival operators will use this opportunity to pursue objections to a development that presents competition, or to seek to obtain improvements or changes to their own facilities which are not justified. Much time could be spent debating such objections, but ultimately such objections do not impinge upon the basic allocation of responsibilities for assessments of risk and management of that risk by the relevant authorities

who will ensure the safe construction and subsequent operation of the Proposed Development using well-established methods that take place on a day-to-day basis.

6. Moreover, the scope of the NRA undertaken for this project has been extremely thorough and comprehensive and involved full involvement of stakeholders. It has been produced by qualified specialist experts in relation to navigation matters (as you will have seen from their qualifications) with involvement of navigation stakeholders.

7. In summary, it has included the appraisal of existing vessel activity and new activity arising as a result of the construction of the new marine infrastructure, including the required capital and maintenance dredge required to accommodate Ro-Ro vessels at the three new berths at all stages of the tide.

8. It then appraises the effect of the proposed development on future marine traffic is then assessed with regards to any potentially additional identified hazards and embedded controls that are in place, along with potential future control/mitigation measures. Any identified risks can then be appraised and the Port Authority is able to assess and identify what controls will be used to ensure that the risks are both ALARP (as low as reasonably practicable) and acceptable. That process has been fully undertaken.

9. Turning to your more specific questions raised in the agenda: –

***How the Navigation Risk Assessment (NRA) for the Proposed Development complies with Maritime and Coastguard Agency (MCA) published guidance, in regard to the Port Marine Safety Code and the MGN654 Annex 1 'Methodology for Assessing Marine Navigational Safety etc.'***

10. The UK national standard for the safe *and* efficient running of ports is the ***Department for Transport's 'Port Marine Safety Code' (DfT, 2016)*** and its accompanying guidance document '***A Guide to Good Practice on Port Marine Operations' (DfT,2018)*** on which the NRA methodology is based.

11. The Port Marine Safety Code (PMSC) references the use of formal risk assessment (FRA) to manage the risks associated with marine operations, the need for assessment, and the means of controlling risk. It states that the aim of the process is to eliminate the risk or, failing that, to reduce risks to as low as reasonably practicable (ALARP). Formal risk assessments should be used to: *'identify hazards and analyse risks; assessing those risks against an appropriate standard of acceptability; and where appropriate consider a cost-benefit assessment of risk-reduction measures'.* That is the process that the Applicant has followed already.

12. It should be noted, however, that no formal prescriptive guidance and/or methodology for navigational risk assessment is specified in the PMSC. The risk assessment process that the Appellant has used therefore fully complies

with the requirements of the PMSC and involves the use of experts apply conventional methodologies in the way described in the NRA.

13. ***The Guide to Good Practice on Port Marine Operations (GtGP)*** Section 4 provides risk assessment guidance in the context of supporting the port's ***Marine Safety Management System (MSMS)***.

14. The GtGP suggests the use of staged risk assessment and provides an example of a five-stage risk assessment, similar to, but not completely the same as, the five-step process outlined in ***International Maritime Organization (IMO) Revised Guidelines for Formal Safety Assessment (FSA)***.

15. The GtGP states - '*Risk assessment techniques are fundamentally the same for large and small ports, but the execution and detail will differ considerably*' and *'A risk assessment will typically involve five stages'.*

16. The GtGP does not, however, prescribe or mention a fixed methodology to be used for undertaking an NRA. Again the risk assessment process that the Applicant has used therefore is consistent with the GtGP.

17. Indeed, the experts have used suggested formal risk assessment example in the GtGP in the NRA for this project as it would also be followed by the Statutory Harbour Authority as part of the requirement for the Marine Safety Management System.

18. There is no prescribed process nor method guidance in either the PMSC nor GtGP. The experts that produced the NRA have taken account of guidance from IMO in the form of the five-step FSA and the MCA Guidance for assessing risk in a different context as contained within MGN654. This document has Hazard Identification categories and these categories are used in the NRA as they reflect a categorisation used both internationally and for UK Marine Authority procedural guidance. As explained in the NRA on any wider use of the guidance in MGN654 and the IMO - "*It should be noted that the documents listed below cover a wide range of guidance advice for marine activities, not all of which are applicable to the IERRT proposals*".

19. Indeed, MGN654 Annex 1 'Methodology for Assessing Marine Navigational Safety etc', or to give it the full title - MGN 654 (M+F) Safety of Navigation: Offshore Renewable Energy Installations (OREIs) - Guidance on UK Navigational Practice, Safety and Emergency Response. Annex 1: Methodology for Assessing the Marine Navigational Safety & Emergency Response Risks of Offshore Renewable Energy Installations reflects that point. It is a methodology that specifically applies to the different circumstances for assessing the impact on navigational safety and emergency response (search and rescue, salvage and towing, and counter pollution) caused by offshore renewable energy installation developments (wind, wave and tidal). It applies

to proposals in United Kingdom internal waters, Territorial Sea and Exclusive Economic Zone.

20. It does not apply to port related risk assessments relating to navigation or marine operations, nor does it apply to areas within a port or harbour under an SHA acting as the authority for the safe provision of navigation.

21. Accordingly, so far as MGN654 Annex 1 is concerned in respect of the NRA, the only element used from this MGN is in respect of using standardised categorisation of Hazard Identification.

22. The structure and contents of the NRA fulfil the requirements of the PMSC and GtGP. Indeed, the submitted NRA goes beyond that which is required from an NRA used as part of any environmental assessment because the five-step FSA process addresses the addition of a cost benefit analysis (CBA) that aligns with the SHA and meets the PMSC's requirement for assessing risk and maintaining the MSMS.

23. The Applicant's MSMS is internally audited on an annual basis, and an external assurance audit is undertaken every three years against the requirements of the PMSC and GtGP.

24. The Applicant has identified compliance with the PMSC to the UK Government and are listed on the .gov Port Marine Safety Code compliant ports webpage as a port submitting compliance, which is a requirement of the PMSC.

***The berthing simulation exercises conducted to support the NRA.***

25. HR Wallingford undertook an initial feasibility study in December 2021 to consider the design of the IERRT berths and the requirements for safe operations at the IERRT, using real-time navigation simulation.

26. A further one day duration simulation was undertaken in April 2022. The purpose was to consider the effect of rotating the IERRT by 1° towards the IOT. ABP took the opportunity to invite stakeholders from APT, the operators of IOT to attend this simulation.

27. In July 2022, HR Wallingford carried out a further real-time navigation simulation study that considered the feasibility of operating large 237m long Ro-Ro ferries.

28. Based on some questions about the original tidal data collection and the subsequent flow model developed by HR Wallingford, ABP commissioned a further flow survey using an Acoustic Doppler Current Profiler to model the tidal effects in more detail.

29. In December 2022, ABP commissioned a programme of stakeholder demonstrations, supported by the real-time navigation simulation. The

programme was devised by ABP and the Competent Harbour Authority and facilitated by HR Wallingford. It was attended, amongst others, by representatives for IOT and DFDS.

30. The final simulation runs confirmed previous findings. With the correct training and appropriate use of risk controls such as tugs, and procedures factoring tide and wind conditions, manoeuvring to and from the new infrastructure is acceptable.

***The governance approach taken to judgements concerning the acceptable level of 'tolerability' in the NRA; and the additional risk controls that it proposes to implement.***

31. Port Authority Duty Holders have a responsibility to set the levels of 'tolerability' for their organisations based on how they consider what is acceptable for their organisation. The PMSC does not mention tolerability nor define the process nor does it provide guidance on or prescribe to duty holders tolerability levels or thresholds. The only reference within the GtGP concerning tolerability is contained in the section explaining the ALARP process where it also mentions intolerable risk and states that measures must be taken to eliminate these risks so far as is practicable. It does not prescribe the method either.

32. The ABP Harbour Authority and Safety Board (HASB), chaired by the CEO, meets separately from the main ABP Board and has its own remit. The HASB has the same membership as the main ABP Board but also has some additional regular standing attendees who act as expert advisors to the HASB. ABP's appointed 'Designated Person' and Marine Advisor, as required under the PMSC, both attend HASB meetings. An external health and safety legal advisor also attends.

33. The HASB met on Monday 12 December 2022 for the propose of discussing the "IERRT Navigation Risk Assessment – Project Sugar" and to consider the process and approach which had been undertaken in relation to the navigational risk assessment for the project. In particular, the Board was asked to consider its approval to the conclusion that the risks identified as part of the process were as low as reasonably practicable (ALARP) and tolerable and it did so.

**The Applicant's understanding of obligations regarding assessment of 'Tolerability of Societal Concerns' under the guidance of paragraph 6.2 of the MGN 654 Annex Methodology.**

34. The Applicant as a port operator and Statutory Harbour Authority does not have any duties nor any obligations under the guidance contained in paragraph 6.2 Annex 1 of MGN654 as this applies for assessing the impact on navigational safety and emergency response (search and rescue, salvage and towing, and counter pollution) caused by offshore renewable energy installation developments (wind, wave and tidal). It applies to proposals in United Kingdom internal waters, Territorial Sea and Exclusive Economic Zone.

35. The use of the guidance in MGN654 is clear in that context, as it is intended to fulfil the requirements of the UK Government within the Energy Act 2004 (as amended) which establishes a regulatory regime for OREIs beyond the Territorial Sea, in the UK's Exclusive Economic Zone (EEZ), and supplements the regime which applies in the UK's internal and Territorial Sea. Sections 99 and 100 of the Act deal specifically with navigation and introduces section, 36B with the title "Duties in relation to navigation" into section 36 of the Electricity Act 1989 (as amended). By contrast, Port and Harbour Authorities, follow guidance and standards provided by DfT and as laid out in the PMSC and GtGP and for the purposes of this type of development project will set their own levels of acceptable tolerance.

***When and how the Applicant intends to determine whether or not the impact protection measures for the Immingham Oil Terminal would be installed and how the timing of the construction of those measures have been taken into account in assessment of cumulative and in-combination effects in the ES and HRA.***

36. Following a review of the NRA and consideration by the HAS Board, impact protection measures are not considered to be required. Following the commencement of operations, however, the Competent Harbour Authority (CHA) will keep this under continuous review as required by the MSMS, formal risk assessment as laid out in the PMSC together with duties to facilitate safe navigation. This will take form based on reports provided by the pilots. If it subsequently transpires that impact protection measures should be provided on the grounds of navigational safety, then ABP as the owner and operator of the port will be able to determine the steps that should be taken to achieve this.

37. In terms of how this has been taken into account in the cumulative and in-combination effects assessment in the ES and HRA, the impact protection measures have been assessed as part of the IERRT project (as described in Chapter 2 of the ES (APP-038)). The assessment has been based on the precautionary assumption that the works for installation could occur at any time of year as a worst case.

**Its [the Applicant] intentions regarding the provision of shore-to-ship power for the Proposed Development and the power technology for future marine tugs.**

38. The provision of shore-to-ship power will be incorporated in the jetty approach, linkspan, pontoons, and finger pier; this will not involve development of additional marine infrastructure.

39. Svitzer are currently working closely with Caterpillar on transition of tugs fuel to methanol, to meet IMO and UK Government requirements for marine decarbonisation.

40. In January 2019, the government published Maritime 2050, a strategic vision for the future of the maritime sector building on the earlier 2015 Maritime

Growth Study outlining ambitious recommendations to take the UK maritime industry into the second half of the 21st century.

41. In February 2023 ABP released their Sustainability Strategy 'Ready for Tomorrow' stating their commitment to improving its environmental impact across its 21 ports through, for example, reducing its greenhouse gas emissions and encouraging biodiversity. The use of Shore Power for vessels is included in this policy as a key initiative.

## Appendix 5 – Familiarisation Site Inspection Pilotage Log

Date From

Date To 31/07/2023

Find

All | Arrivals & Transits | Movements & Departures

| Ship Name | Draft | LOA | Beam | DWT | ETA/ETD | State | Anc. | Required At | Side | Disembark | BO | Berth Available | Pilotage | Pilot Name | Allocation |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| LIANNE | 4.30 | 80.20 | 12.50 | 3027 | 26/07/2023 07:50 (B) | B | DWA L | Spurn Lt Float | X | GROVE LM1 | O | 26/07/2023 13:20 (B) | | | 26/07/2023 05:20 (B) |
| LIANNE | 4.30 | 80.20 | 12.50 | 3027 | 26/07/2023 07:50 (B) | B | DWA L | Spurn Lt Float | X | GROVE LM1 | O | 26/07/2023 13:20 (B) | | | 26/07/2023 05:20 (B) |
| HAV SNAPPER | 3.40 | 88.16 | 12.50 | 2950 | 26/07/2023 07:50 (B) | O | | Spurn Lt Float | X | GLE Nth East Corner | O | 26/07/2023 12:20 (B) | POB | | 26/07/2023 05:20 (B) |
| HAV SNAPPER | 3.40 | 88.16 | 12.50 | 2950 | 26/07/2023 07:50 (B) | O | | Spurn Lt Float | X | GLE Nth East Corner | O | 26/07/2023 12:20 (B) | POB | | 26/07/2023 05:20 (B) |
| ALFA FINLANDIA | 13.70 | 237.00 | 44.00 | 109089 | 26/07/2023 09:50 (B) | B | 5'N | Humber Light Float | X | Tetney Mono Buoy | O | 26/07/2023 12:20 (B) | | | 26/07/2023 06:20 (B) |
| ALFA FINLANDIA | 13.70 | 237.00 | 44.00 | 109089 | 26/07/2023 09:50 (B) | B | 5'N | Humber Light Float | X | Tetney Mono Buoy | O | 26/07/2023 12:20 (B) | | | 26/07/2023 06:20 (B) |
| GULHOLMEN | 6.20 | 144.00 | 22.00 | 17055 | 26/07/2023 10:45 (B) | O | DW H | Spurn Lt Float | P | IOT 2 | O | 26/07/2023 12:15 (B) | POB | | 26/07/2023 08:15 (B) |
| DORNBUSCH | 5.40 | 101.10 | 18.20 | 5220 | 26/07/2023 11:00 (B) | O | | IMM DK 8 Qy | S | Spurn Lt Float | | | | | 26/07/2023 09:00 (B) |
| SAMSKIP INNOVATOR | 7.50 | 140.64 | 21.80 | 9350 | 26/07/2023 12:00 (B) | O | | Spurn Lt Float | X | KGD QE 9 Qy East | O | 26/07/2023 14:00 (B) | POB | | 26/07/2023 09:30 (B) |
| HELENE G | 3.35 | 82.51 | 12.40 | 3156 | 26/07/2023 11:50 (B) | O | | N HOLL Dock North | X | Spurn Lt Float | | | POB | | 26/07/2023 09:50 (B) |
| HELENE G | 3.35 | 82.51 | 12.40 | 3156 | 26/07/2023 11:50 (B) | O | | N HOLL Dock North | X | Spurn Lt Float | | | POB | | 26/07/2023 09:50 (B) |
| BALTICA HAV | 2.60 | 82.44 | 11.38 | 1769 | 26/07/2023 17:00 (B) | P | | IMM DK 10 Qy(300') | X | Spurn Lt Float | | | A | | 26/07/2023 15:00 (B) |
| LADY MATHILDE | 5.00 | 115.23 | 16.50 | 5635 | 26/07/2023 17:30 (B) | P | | Spurn Lt Float | X | KGD QE 16 Shed | O | 26/07/2023 20:00 (B) | A | | 26/07/2023 15:00 (B) |
| MURRAY STAR | 8.75 | 128.60 | 20.40 | 13006 | 26/07/2023 18:00 (B) | P | | IOT 3 | P | Spurn Lt Float | | | A | | 26/07/2023 16:00 (B) |
| WINTER | 7.60 | 128.60 | 20.40 | 13026 | 26/07/2023 18:00 (B) | P | | IMM W/J 2 | P | Spurn Lt Float | | | A | | 26/07/2023 16:00 (B) |
| ANTARES | 5.20 | 79.90 | 11.50 | 2408 | 26/07/2023 18:30 (B) | I | DW L | Spurn Lt Float | S | IOT 6 | O | 26/07/2023 20:00 (B) | A | | 26/07/2023 16:00 (B) |
| JSP CARLA | 5.50 | 139.88 | 19.45 | 9238 | 26/07/2023 18:45 (B) | P | | IMM DK Henderson'... | X | Spurn Lt Float | | | A | | 26/07/2023 16:45 (B) |
| SOLWAY FISHER | 5.30 | 85.32 | 17.00 | 5422 | 26/07/2023 19:45 (B) | P | | IOT 8 | P | Spurn Lt Float | | | A | | 26/07/2023 17:45 (B) |
| SOLWAY FISHER | 5.30 | 85.32 | 17.00 | 5422 | 26/07/2023 19:45 (B) | P | | IOT 8 | P | Spurn Lt Float | | | A | | 26/07/2023 17:45 (B) |
| PACIFIC AWARD | 8.90 | 199.90 | 32.24 | 61411 | 26/07/2023 21:39 (B) | I | 5'N | Humber Lt Float | P | IMM HIT 1 | O | 27/07/2023 01:09 (B) | A | | 26/07/2023 18:09 (B) |
| PACIFIC AWARD | 8.90 | 199.90 | 32.24 | 61411 | 26/07/2023 21:39 (B) | I | 5'N | Humber Lt Float | P | IMM HIT 1 | O | 27/07/2023 01:09 (B) | A | | 26/07/2023 18:09 (B) |
| PACIFIC AWARD | 8.90 | 199.90 | 32.24 | 61411 | 26/07/2023 21:39 (B) | I | 5'N | Humber Light Float | P | IMM HIT 1 | O | 27/07/2023 01:09 (B) | A | | 26/07/2023 18:09 (B) |
| NABUCCO | 6.70 | 104.27 | 17.24 | 6551 | 26/07/2023 21:30 (B) | P | | SEJ 1 | X | Spurn Lt Float | | | A | | 26/07/2023 19:30 (B) |

*Snapshot of vessel movements on 26/7/23 (Pilot names removed for GDPR purposes)*

## Appendix 6 – ClientEarth judgments and accompanying note

## Accompanying Note for the ClientEarth Judgements

***Introduction***

1. At ISH2 dealing with the topic of need, the Applicant identified that although the Applicant has provided detailed evidence about the need for the Proposed Development, as a matter of principle there is no requirement on the Applicant to demonstrate such a need in light of the National Policy Statement for Ports (2012) ("the NPS") and relevant provisions of the Planning Act 2008 ("PA 2008").

2. The Applicant referred the Panel to decisions of the High Court and Court of Appeal in *R(ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy & Another [*2020] EWHC 1303 (Admin), [2020] PTSR 1709 (**Appendix 1**) – for the High Court and [2021] EWCA Civ 43, [2021] PTSR 1400 for the Court of Appeal (**Appendix 2**) on this topic.

3. The Panel requested copies of both decisions and a note from the Applicant on them. This Note responds to that request. The decisions are attached.

**The *ClientEarth* Case**

4. The *ClientEarth* case was a claim for judicial review of a decision of the Secretary of State for Business, Energy and Industrial Strategy ("SSBEIS") to grant an application for a development consent order ("DCO") made by Drax Power Ltd ("Drax") for two gas-fired generating units at an existing power station near Selby in North Yorkshire.

*The High Court Decision*

5. As identified in paragraph 3 of the judgment of Holgate J in the High Court **("HCJ3")**, in dismissing the claim indicated that, the challenge raised an important issue on the correct legal interpretation of the Overarching National Policy Statement for Energy ("EN-1") and the National Policy Statement for Fossil Fuel Electricity Generating Infrastructure ("EN-2") for the purposes of

determining the DCO application. Both EN1 and NE2 had been designated as National Policy Statements in July 2011.

6. The examining authority (“the Panel”) in that case had recommended that consent for the DCO be withheld, but the SSBEIS disagreed with that recommendation and made the DCO.

7. The Claimant for the judicial review claim, ClientEarth, had participated in the examination. It had objected to the development on a number of grounds, including its contention that there was no need for the proposed development and that it would have significant adverse environmental impacts, including those arising from GHG emissions and the effect on climate change.

8. As recorded by Holgate J at HCJ11, the position of the applicant, Drax, was that the need for the development was already established by Part 3 of NPS EN-1 and that substantial weight should be attributed to the contribution the development would make to meeting the needs for additional energy capacity.

9. As recorded at HCJ17-18, the Panel had concluded that whilst the NPSs supported a need for additional energy infrastructure in general, Drax had not demonstrated that the development met an identified need for gas generation capacity when assessed against EN-1's overarching policy objectives of security of supply, affordability and decarbonisation. The Panel found that the development would not accord with the Energy NPSs and that it would undermine the Government's commitment to cut GHG emissions, as set out in the Climate Change Act 2008 **("CCA 2008")**. Applying the balancing exercise in s. 104(7) of the PA 2008, the Panel concluded that the adverse impacts of the development outweighed the benefits, the case for development consent had not been made out and so consent should be withheld.

10. As recorded HCJ19, the SSBEIS disagreed with the Panel's recommendation. She decided that the Order should be made, concluding at Decision Letter 7.1 that "there is a compelling case for granting consent for the development" and that:-

"…The Secretary of State considers that the Development would be in accordance with the relevant NPSs and, given the national need for such development as set out in the relevant NPSs, the Secretary of State does not believe that its benefits are outweighed by the Development's potential adverse impacts, as mitigated by the proposed terms of the Order. As such, the Secretary of State has decided to make the Order granting development consent …..."

11. The SSBEIS disagreed with the Panel on need. In summary, she decided that EN-1 assumed a general need for fossil fuel generation and did not draw any distinction between that general need and the need for any particular proposed development. She also stated that substantial weight should be given to a project contributing to that need. She concluded that "there are strong arguments in favour of granting consent for the full, two gas units and two battery storage units, 3.8 GW project because of its contribution to meeting the need case set out in the NPSs". She considered that the benefits of the proposal outweighed its adverse effects for the purposes of s. 104(7) of the PA 2008.

12. Under Ground 1 of the legal challenge to the SSBEIS's decision, the Claimant argued that the SSBEIS had misinterpreted NPS EN-1 on the assessment of the "need" for the development; and under Ground 2 it argued that the Defendant had failed to give adequate reasons for her assessment of the "need" for the development.

13. In upholding the SSBEIS's decision, Holgate J analysed relevant provisions of the PA 2008 and its purpose, before then interpreting the relevant NPSs on need.

14. As to the PA2008, the Judge began by identifying the reasons why the PA2008 had been enacted by reference to the *White Paper: Planning for a Sustainable Future* (see HCJ26-27 onwards). The Judge noted that from the White Paper:

"… a key problem which the legislation was designed to tackle was the lack of clear statements of national policy, particularly on the national need for infrastructure. This had caused, for example, significant delays at the public inquiry stage because national policy had to be clarified and need had to be established through the inquiry process for each individual application. Sometimes the evidence at individual inquiries might not have given a sufficiently full picture. Furthermore, there was no prior consultation process by which the public and interested parties could participate in the formulation of national policy, which might only emerge through ad hoc decisions by ministers on individual planning appeals.

Paragraph 3.2 of the White Paper pointed out that the absence of a clear national policy framework can make it more difficult for developers to make investment decisions which by their nature are often long term in nature and "therefore depend on government policy and objectives being clear and reasonably stable."

15. At HCJ30 the Judge referred to paragraph 3.11 of the White Paper which stated:-

"There should therefore be no need for inquiries on individual applications for development consent to cover issues such as whether there is a case for infrastructure development, what that case is, or the sorts of development most likely to meet the need for additional capacity, since this will already have been addressed in the national policy statement. It would of course be open to anyone to draw the Government's attention to what they believe is new evidence which would affect the current validity of a national policy statement. Were that to happen, the relevant Secretary of State would then decide whether the evidence was both new and so significant that it warranted revisions to national policy. The proposer of the new evidence would be informed of the Secretary of State's decision. This would ensure that inquiries can focus on the specific and local impacts of individual applications, against the background of a clear assessment of what is in the national interest.

This, in turn, should result in more focused and efficient inquiry processes."

16. As the Judge identified at HCJ31:

"So the object was for policies on matters such as the need for infrastructure to be formulated and tested through the process leading up to the decision to adopt a national policy statement and to that extent they would not be open to challenge through subsequent consenting procedures. New evidence, such as a change in circumstance since the policy was adopted, would be addressed by the Secretary of State making a revision to the policy, in so far as he or she judged that to be appropriate. In essence, the 2008 Act gave effect to these principles."

17. The Judge then turned to consider the relevant provisions of the statutory framework which achieved this from HCJ32 onwards. The Judge identified (amongst other things) that:

(1) Section 5(1) of the 2008 Act enables the Secretary of State to designate a NPS setting out national policy on one or more descriptions of development. Before doing so the Secretary of State must carry out an appraisal of the sustainability of the policy (s.5(3)). In addition, the Secretary of State will normally be required to carry out a strategic environmental assessment ("SEA") in compliance with the Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004 No 1633). The SEA process itself involves consultation with the public and relevant authorities.

(2) The Secretary of State must also comply with the publicity and consultation requirements laid down by s.7 and the proposed NPS must undergo Parliamentary scrutiny under s.9.

(3) Section 5(5)(a) provides that a NPS may "set out, in relation to a specified description of development, the amount, type or size of development of that description which is appropriate nationally or for a specified area." Thus, policy in a NPS may determine the need for a particular infrastructure

project, or development of a particular type (Spurrier [2020] PTSR 240 at [99]). It may describe that need in quantitative or qualitative terms, or a mixture of the two.

(4) Section 5(5)(c) enables policy in a NPS to determine "the relative weight to be given to specific criteria." So, for example, a NPS may determine that the need for a development should be given "substantial weight" in the decision on an application for a DCO.

(5) Section 5(7) requires a NPS to "give reasons for the policy set out in the statement." As the Divisional Court explained in Spurrier, that obligation deals with the supporting rationale for the policies in the NPS which the Secretary of State decides to include ([118] to [120]). In that context, section 5(8) requires those reasons to include "an explanation of how the policy set out in the statement takes account of Government policy relating to the mitigation of, and adaptation to, climate change."

(6) Section 6(1) obliges the Secretary of State to review a NPS whenever he thinks it appropriate to do so. Under section 6(3):-

> "In deciding when to review a national policy statement the Secretary of State must consider whether—
>
> > (a) since the time when the statement was first published or (if later) last reviewed, there has been a significant change in any circumstances on the basis of which any of the policy set out in the statement was decided,
> >
> > (b) the change was not anticipated at that time, and
> >
> > (c) if the change had been anticipated at that time, any of the policy set out in the statement would have been materially different."

Section 6(4) employs the same three criteria for reviews of part of a NPS.

(7) Section 10(2) requires the Secretary of State to exercise his functions under ss.5 or 6 "with the objective of contributing to the achievement of sustainable

development." By s.10(3) the Secretary of State must (in particular) have regard to the desirability of *inter alia* "mitigating, and adapting to, climate change." In Spurrier the Divisional Court held that the PA 2008 and the CCA 2008 should be read together. They were passed on the same day and the language which is common to ss.5(8) and 10(3) of the PA 2008 refers to the very objective of the CCA 2008. As Hansard shows that is confirmed by the way in which these provisions were introduced into the legislation (see Spurrier at [644] to [647]).

(8) Thus, EN-1 and EN-2 had to satisfy all these statutory requirements, including the obligation to promote the objective of CCA 2008, before they could finally be designated. Even then, they could have been the subject of legal challenge by way of judicial review under s.13 of PA 2008.

(9) Once a NPS has been designated, sections 87(3), 94(8) and 106(1) enable the examining authority during the examination of an application for a DCO, and the Secretary of State when determining an application for a DCO, to disregard *inter alia* representations, including evidence, which are considered to "relate to the merits of policy set out in a national policy statement."

(10) The Judge then referred to other decisions dealing with the principle that the policy laid down in an NPS, for example on the need for particular infrastructure, is to be treated as settled for the purposes of examining and determining an application for a DCO, and thus not open to challenge in that process: see *R (Thames Blue Green Economy Limited) v Secretary of State for Communities and Local Government* [2015] EWHC 727 (Admin); [2015] EWCA Civ 876; [2016] J.P.L. 157; *R (Scarisbrick) v Secretary of State for Communities and Local Government* [2017] EWCA Civ 787; and *Spurrier* at [99] to [111].

(11) The scheme in the PA 2008 for the making of national policy accords with well-established constitutional principles. As the Divisional Court said in Spurrier [2020] PTSR 240 at [153]:-

"Under our constitution policy-making at the national level is the responsibility of democratically-elected governments and ministers accountable to Parliament. As Lord Hoffmann said in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, paras 69 and 74: "It does not involve deciding between the rights or interests of particular persons. It is the exercise of a power delegated by the people as a whole to decide what the public interest requires."

(12) Under the PA 2008 responsibility for the content and merits of policy in a NPS, or for the merits of revising any such policy, lies with the relevant Secretary of State who is accountable to Parliament. For example, it is open to Parliament to raise questions with a Minister as to whether a NPS needs to be reviewed because of a change in circumstances.

(13) Section 104 applies to the determination of an application for a DCO where a NPS is applicable. Section 104(2) requires the Secretary of State to have regard to (inter alia) a relevant NPS. Section 104(3) goes further:-

"The Secretary of State must decide the application in accordance with any relevant national policy statement, except to the extent that one or more of subsections (4) to (8) applies."

It is important to note the words in s.104(3) "except to the extent that", recognising that an exception in subsections (4) to (8) may only have the effect of disapplying the obligation in s.104(3) as regards part of a NPS, or perhaps part of a project.

(14) Where an application is made for a DCO for development to which a NPS applies, and the Secretary of State considers that the NPS should be reviewed under s.6 of PA 2008 before the application is determined, he may suspend the examination of that application until the review is completed (s.108).

18. The Judge then embarked upon a detailed analysis of the relevant NPSs EN-1 and EN-2 for that case, concluding that EN-1 did not seek to define need in

quantitative terms (save in the limited respects he mentioned. His conclusion was consistent with (a) the broad indications of the potential need to double or treble generating capacity by 2050 previously given in Part 2 of the NPS (see paragraph 60 above) and (b) the unequivocal statement in paragraph 3.1.2 that it is inappropriate for planning policy to set targets for, or limits on, different types of technology. He referred to those parts of the NPS which addressed the weight to be given to the contribution which a project makes to the need for a particular type of infrastructure. In the "Assessment Principles" in Part 4, paragraph 4.1.2 he identified that it set out a presumption in favour of granting consent to applications for energy NSIPs (which is similar to that to be found in the NPS for Ports) :-

> "Given the level and urgency of need for infrastructure of the types covered by the energy NPSs set out in Part 3 of this NPS, the IPC should start with a presumption in favour of granting consent to applications for energy NSIPs. That presumption applies unless any more specific and relevant policies set out in the relevant NPSs clearly indicate that consent should be refused. The presumption is also subject to the provisions of the Planning Act 2008 referred to at paragraph 1.1.2 of this NPS.

19. The Judge then set out general legal principles including the following:

(1) Statements of policy are to be interpreted objectively in accordance with the language used, read in its proper context. The author of a planning policy is not free to interpret the policy so as to give it whatever meaning he might choose in a particular case. The interpretation of planning policy is, in the end, a matter for the court (see paragraph 18 of Lord Reed's judgment in *Tesco v Dundee City Council*). 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.

(2) The merits of policy set out in a NPS are not open to challenge in the examination process or in the determination of an application for a DCO. That is the object of ss.87(3), 94(8) and 106(1).

(3) Furthermore, section 104(7) cannot be used to circumvent s.104(3), so, for example, where a particular NPS stated that there was a need for a particular project and ruled out alternatives, it was not permissible for that subject to be considered under s.104(7), even where a change of circumstance has occurred or material has come into existence after the designation of the NPS (see Thames Blue Green Economy Limited [2015] EWHC 727 (Admin) at [8] to [9] and [37] to [43] and [2016] JPL 157 at [11] to [16]; Spurrier at [103] to [105] and [107]).

(4) This inability to use s. 104(7) to challenge the merits of policy in a NPS also precludes an argument that there has been a change in circumstance since the policy was designated so that reduced, or even no, weight should be given to it. Although that is a conventional planning argument in development control under the TCPA 1990, it "relates to the merits of policy" for the purposes of the PA and therefore is to be disregarded. The appropriate procedure for dealing with a contention that a policy, or the basis for a policy, has been overtaken by events, or has become out of date, is the review mechanism in s.6 PA 2008 (Spurrier at [107] to [108]).

(5) The preclusive or presumptive effect of a NPS is dependent upon the wording of the policy and its proper interpretation, applying the principles set out above.

20. The Judge then went on to apply these principles in rejecting the claim made under Ground 1 and 2.

21. The essential issue under Ground 1 was whether the SSBEIS had misinterpreted EN-1 when she rejected the Panel's view that the NPS draws a distinction between the need for energy NSIPs in general and the need for any particular proposed development (DL 4.18). She added that applications for a DCO for energy NSIPs for which a need has been identified in EN-1 should be assessed on the basis that they will contribute towards meeting that need and that contribution should be given significant weight. Nonetheless, the Secretary

of State went on to consider whether the Panel's findings provided any reason for not giving that weight to the proposal (DL 4.19 to 4.20). It was common ground that this was an objective question of law for the court as to the correct interpretation of the NPS, reading it as a whole rather than selectively.

22. The Judge concluded it was plain that the NPS (as summarised in HCJ 53 to 97) did not require need to be assessed in quantitative terms for any individual application. He concluded that there was no justification for the Panel to have regard to the 2017 UEP projections in order to assess the contribution of the Drax proposal to meeting the qualitative need identified in the NPS. Likewise, an analysis of the consents for gas-fuelled power stations was irrelevant for that purpose. Moreover, the Panel's assessment was benchmarked against the 2017 UEP projections, which self-evidently did not form the basis for the policy contained in EN-1. He concluded that the case advanced by ClientEarth was a barely disguised challenge to the merits of the policy and it flew in the face of EN-1 which stated that there was a qualitative need for such development. Consequently, whereas EN-1 specifically gave substantial weight to the qualitative need it established, the logic of the Panel's reasoning led them to give effectively no weight to that need.

23. Whatever might be the merits of ClientEarth's arguments which found favour with the Panel, the Judge concluded they were not matters which should have been taken into account in the examination (s.87(3) of PA 2008). Instead, these arguments about the current or continuing merits of the policy on need could be relevant to any decision the Secretary of State might be asked to make on whether or not to exercise the power to review the NPS under s.6 PA 2008. No such decision has been taken and the claim has not been brought as a challenge to an alleged failure to act under s.6 PA 2008. The Judge noted that it may well be that the Panel thought that they had moved on to the *application* of policy in EN-1. But the problem with the Panel's approach was that it begs the prior question whether they had understood EN-1 correctly. Here, EN-1 contained no language to indicate that the "requirements" or "needs" for each type of energy NSIP set out in EN-1 should be reassessed from time to time, in the consideration of individual applications for a DCO, or were dependent upon quantitative need being shown. That approach would

amount to a revision of the policy and belongs to the process of review under s.6 PA 2008. He concluded that the policy on need in EN-1 was analogous to that considered by the Court of Appeal in *Scarisbrick.* The interpretation of EN-1 for which ClientEarth had contended, and which the Panel accepted, and upon which ground 1 was dependent, was rejected. The Secretary of State was entirely correct to dismiss that approach at DL 4.13 and 4.18 of her decision.

***The Court of Appeal Decision***

24. The Court of Appeal dismissed ClientEarth's appeal against the High Court decision.

25. As stated in paragraph 1 of the judgment (CAJ1) from the Senior President of Tribunals (with which the other members of the Court agreed), the appeal raised question on the interpretation of EN-1 and EN2.

26. As identified at CAJ55, the Court of Appeal rejected ClientEarth's interpretation of the NPSs for the reasons set out in detail in the judgment. The Court of Appeal concluded (see CAJ 70 onwards) that the SSBEIS had been entitled to apply the presumption in favour of granting consent based on paragraph 4.1.2 of EN-1 and she went on to consider whether any more specific and relevant policies in the relevant NPS clearly indicated that consent should be refused. She had considered the issue of need in DL4.18-20 acknowledging the presumption in favour of the development, the assumption of a general need for CCR fossil fuel generation and the requirement that the decision maker should give substantial weight to the contribution which projects would make towards satisfying that need and disagreeing with the Panel's view that no weight should be given to the development's contribution to meeting that need and she accurately interpreted EN-1 on the basis that projects of this type would contribute towards meeting the identified need and this should be given signficiant weight. She then went on to apply to paragraph 3.2.3 of EN1 with an open to mind to see if there was any reason why she should not attribute substantial weight to the project's contribution to meeting that need and explained why she was not persuaded by the Panel's assessment in this respect. She then went on lawfully to apply section 104(7) of the PA 2008 to her assessment. In so doing, the CA agreed that section 104(7) may not be

used to circumvent other provisions in the statutory scheme including section 106(1)(b) enabling the Secretary of State to disregard representations relating to the merits of policy set out in a NPS.

***Relevance to Current Application***

27. In light of *ClientEarth*, it is clear that the question of whether or not need is established for the Proposed Development by the NPS for Ports is a matter of interpretation of the NPS for Ports itself as a matter of law. The *ClientEarth* decisions are not relied upon for their analysis of EN-1 and EN-2 (which applied to the development in issue in that case), but for the legal principles to be adopted to such interpretation and the consequence where, on the correct interpretation, a national policy statement does establish a need as a matter of national policy.

28. For the reasons set out already in the Applicant's supporting representations and briefly summarised at ISH2, the Applicant submits it is clear as a matter of law that the specific terms of the NPS for Ports do indeed set out an established need for the Proposed Development as a matter of principle.

29. Indeed, the Applicant submits that the NPS for Ports is unambiguous in setting out Government policy that such a need exists, and in emphasising that it is for port operators and developers to bring forward development in light of that established need.

30. In light of the terms of the NPS for Ports, there is a clear presumption in favour of the Proposed Development under the NPS

31. On this basis, as a matter of the correct interpretation of the NPS, there is no requirement for the Applicant to establish a need for the Proposed Development. The presumption in favour of the development applies as a result of the established need set out in the NPS.

32. Moreover, it is equally clear that attempts to call into question that need of the type that have been advanced by CLdN are impermissible and contrary to the statutory scheme (as analysed in *ClientEarth* by reference to the terms of the PA 2008*).* Such representations are impermissibly directed towards the merits of the designated NPS which remains extant, and which has not been challenged or subject to review by the Secretary of State.

33. Without prejudice to these important legal points, the Applicant has in fact provided further cogent evidence of the need for the Proposed Development in any event, albeit there is no policy requirement to do so and the presumption in favour of the development applies regardless of such evidence.

**James Strachan KC**
**August 2023**

## Appendix 1 – R (ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy [2020] EWHC 1303 (Admin)

A

Queen's Bench Division

# Regina (ClientEarth) *v* Secretary of State for Business, Energy and Industrial Strategy

B

## [2020] EWHC 1303 (Admin)

2020 April 28–30; May 22 Holgate J

C

*Planning — Development — National policy statement — Secretary of State granting development consent order for gas-fired energy generating units — Whether wrongly deciding "need" for such development established by applicable national policy statements so that assessment of need not required in individual case — Whether erring in approach to greenhouse gas and carbon emissions — Climate Change Act 2008 (c 27), s 1 (as amended by Climate Change Act 2008 (2050 Target Amendment) Order 2019 (SI 2019/1056), art 2(2)) — Planning Act 2008 (c 29) (as amended by Localism Act 2011 (c 20), s 128, Sch 13, para 49), ss 5(1), 104 — Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/572), reg 21 — Drax Power (Generating Stations) Order 2019 (SI 2019/1315)*

D

The interested party applied to the Secretary of State for a development consent order for a nationally significant infrastructure project ("NSIP") comprising the construction and operation of two gas-fired generating units situated at an existing power station. Both the Overarching National Policy Statement for Energy ("EN-1") and the National Policy Statement for Fossil Fuel Electricity Generating Infrastructure ("EN-2"), made by the Secretary of State pursuant to section 5 of the Planning Act 2008[1] ("the Planning Act"), applied to the development. The Secretary of State accepted the application and a panel was appointed as the examining authority. At the examination the claimant, an environmental law charity, objected to the development on the ground that its adverse impacts outweighed its benefits, both as assessed under the two national policy statements and through the application of the balancing exercise required by section 104(7) of the Planning Act, since there was no need for the proposed development and it would have significant adverse environmental impacts. On the issue of need, the panel considered that, while the national policy statements supported a need for additional energy infrastructure in general, the interested party had not demonstrated that the development itself met an identified need for gas generation capacity when assessed against EN-1's overarching policy objectives of security of supply, affordability and decarbonisation. It found that the development would not accord with the national policy statements and would undermine the Government's commitment to cut greenhouse gas emissions, as set out in the Climate Change Act 2008[2] ("the Climate Change Act"), and that the adverse

E

F

G

H

[1] Planning Act 2008, s 5(1): "The Secretary of State may designate a statement as a national policy statement for the purposes of this Act if the statement— (a) is issued by the Secretary of State, and (b) sets out national policy in relation to one or more specified descriptions of development."
S 104, as amended: see post, paras 48–50.

[2] Climate Change Act 2008, s 1, as amended: "(1) It is the duty of the Secretary of State to ensure that the net UK carbon account for the year 2050 is at least 100% lower than the 1990 baseline. (2) 'The 1990 baseline' means the aggregate amount of— (a) net UK

impacts of the development therefore outweighed the benefits, and it recommended that consent be withheld. The Secretary of State disagreed with that recommendation and decided to make the order sought with minor modifications, taking the view, inter alia, that the need for the development, being a type of generating station identified in Part 3 of EN-1, was thereby established and did not have to be demonstrated, and that once the project's contribution to policy need, and thus its overall benefits, were correctly evaluated, the adverse carbon and greenhouse gas impacts were not determinative. The claimant sought judicial review of that decision on grounds which largely related to the lawfulness of the Secretary of State's approach to the issue of need and her consideration of greenhouse gas and carbon emissions, including the alleged failure to comply with the requirements of regulation 21 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017[3] regarding measures for the monitoring of greenhouse gas emissions and errors in consideration of the "net zero target" for carbon emissions set out in section 1 of the Climate Change Act, as amended. The claimant also alleged procedural unfairness arising from a letter sent by the interested party's solicitor, which had addressed the implications of the net zero target for EN-1, but which the other parties had not seen or been given an opportunity to comment on, and arising from the Secretary of State's consideration of that issue generally.

On the claim—

*Held*, dismissing the claim, (1) that reading national policy statement EN-1 as a whole, rather than selectively, it plainly did not require need to be assessed in quantitative terms for any individual application; that it did not set out a general requirement for a quantitative assessment of need in the determination of individual applications for development consent orders and, apart from an estimate of a minimum need requirement for new build capacity by the "interim milestone" of 2025, to which neither the claimant nor the panel had sought to relate the proposals in the present case, there were no benchmarks against which a quantitative analysis could be related; that the merits of policy set out in a national planning statement were not open to challenge in the examination process or in the determination of an application for a development consent order, it being established that the appropriate procedure for dealing with a contention that a policy, or the basis for a policy, had been overtaken by events, or had become out of date, was the review mechanism in section 6 of the Planning Act 2008; that, further, the proper interpretation of a national policy statement was an objective question of law and could not depend on the evidence which happened to be presented in one particular examination; that the panel had therefore erred in considering that, while the principle of need for energy NSIPs in general was not for debate, it was appropriate to consider the specific need for the development proposed because of the evidence presented in the examination; that, since EN-1 contained no language to indicate that the "requirements" or "needs" for each type of energy NSIP set out therein should be reassessed from time to time in the consideration of individual applications for a development consent order, or were dependent upon quantitative need being shown, the panel's approach amounted to a revision of the policy and belonged to the process of review under section 6, and the Secretary of State had therefore been correct to dismiss that approach; that her decision to disagree with the panel's conclusions in those circumstances gave rise to no heightened obligation to give fuller reasons addressing the panel's reasoning which arose from the panel's misinterpretation of

emissions of carbon dioxide for that year, and (b) net UK emissions of each of the other targeted greenhouse gases for the year that is the base year for that gas."

[3] Infrastructure Planning (Environmental Impact Assessment) Regulations 2017, reg 21: see post, paras 199, 200.

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A EN-1 and involved questioning the merits of national policy statement policy; and that she had given legally adequate reasoning on the issue of need (post, paras 106–108, 129, 130, 134–137, 142, 146, 147, 152).

*R (Scarisbrick) v Secretary of State for Communities and Local Government* [2017] EWCA Civ 787, CA and *R (Spurrier) v Secretary of State for Transport* [2020] PTSR 240, DC applied.

(2) That the Secretary of State's conclusion that the adverse carbon and B greenhouse gas impacts were not determinative, once the project's contribution to policy need was correctly evaluated, amounted to a conclusion that the weight to be given to those disbenefits was outweighed by the benefits of the proposal; that the Secretary of State had not treated greenhouse gas emissions as irrelevant, or as something to which no weight should be given, but had disagreed with the panel's evaluation of the benefits of the proposal, including its contribution towards meeting policy need, and had concluded that once those benefits were correctly C weighed the impact of greenhouse gas emissions ought not to carry determinative weight in the overall planning balance; that that was a straightforward balancing exercise, involving no misinterpretation of the national policy statements; and that the Secretary of State had been entitled as a matter of planning judgment to give substantial weight to the need case, to decide not to give greenhouse gas emissions greater weight and, having weighed all the positive and negative effects of the D proposal, to conclude that the benefits outweighed the adverse effects (post, paras 163, 167, 171–173, 177, 180, 181).

(3) That where the development consent order itself imposed a number of monitoring measures covering various matters, which were addressed where appropriate both in the panel's report and the Secretary of State's decision letter, it was apparent that the Secretary of State had had well in mind the requirement in regulation 21 of the Infrastructure Planning (Environmental Impact Assessment) E Regulations 2017 to consider whether it was appropriate to impose monitoring measures; that there was no requirement for the Secretary of State to give reasons for a decision not to impose a particular monitoring measure; and that, in all the circumstances, there had been no breach of regulation 21 since its requirements and objectives had been met and no substantial prejudice had occurred (post, paras 205–207, 217, 218).

(4) That, in so far as the claimant alleged procedural unfairness arising from the F letter from the interested party's solicitor, since the Secretary of State had herself been unaware of the letter and its contents and it had not influenced or tainted the advice given to her by her officials, there had been no requirement, in order to discharge the duty to act fairly, to refer that letter to the claimant and other parties for comment before the Secretary of State reached her decision; that, moreover, in so far as the claimant sought to contend that key policies in EN-1 and EN-2 were out of date by virtue of the net zero target enshrined in the Climate Change Act, that fell outside the G scope of the process created by Parliament by which an application for a development consent order was examined and determined and was instead a matter which could only be addressed through a decision to carry out a review under section 6 of the Planning Act; that there having been no such decision, and no claim for judicial review relating to any allegation of failure to institute such a review, the way in which the Secretary of State's officials had handled the letter had not caused the claimant to H lose an opportunity to advance a case which would have been admissible under the Planning Act or which could have affected the determination of the interested party's application for a development consent order; that, for similar reasons, it had not been unfair for the Secretary of State to have regard to the issue whether the substitution of the net zero target in section 1 of the Climate Change Act had implications for the determination of the application without giving the parties an opportunity to make

submissions, since any additional arguments that the claimant would have wished to advance fell outside the legitimate ambit of the development consent order process; that, accordingly, the Secretary of State's consideration of the implications of the amendment to the Climate Change Act had given rise to no procedural unfairness on the facts of the case; and that the Secretary of State had been entitled rationally to conclude that the proposed development was not incompatible with the net zero target (post, paras 235, 240, 243, 244, 249, 250, 254, 256, 258).

*R (National Association of Health Stores) v Secretary of State for Health* The Times, 9 March 2005, CA applied.

*Bushell v Secretary of State for the Environment* [1981] AC 75, HL(E) and *Broadway Energy Developments Ltd v Secretary of State for Communities and Local Government* [2016] JPL 1207, CA distinguished.

The following cases are referred to in the judgment:

*Allen v Secretary of State for Communities and Local Government* [2016] EWCA Civ 767, CA
*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223; [1947] 2 All ER 680, CA
*Barker Mill Estates (Trustees of the) v Test Valley Borough Council* [2016] EWHC 3028 (Admin); [2017] PTSR 408
*Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin); [2017] PTSR 1283
*Bolton Metropolitan Borough Council v Secretary of State for the Environment* [2017] PTSR 1063; (1990) 61 P & CR 343, CA
*Broadview Energy Developments Ltd v Secretary of State for Communities and Local Government* [2016] EWCA Civ 562; [2016] JPL 1207, CA
*Bushell v Secretary of State for the Environment* [1981] AC 75; [1980] 3 WLR 22; [1980] 2 All ER 608; 78 LGR 269, HL(E)
*Canterbury City Council v Secretary of State for Communities and Local Government* [2018] EWHC 1611 (Admin); [2019] PTSR 81
*CREEDNZ Inc v Governor General* [1981] 1 NZLR 172
*Derbyshire Dales District Council v Secretary of State for Communities and Local Government* [2009] EWHC 1729 (Admin); [2010] 1 P & CR 19
*East Staffordshire Borough Council v Secretary of State for Communities and Local Government* [2017] EWCA Civ 893; [2018] PTSR 88, CA
*Errington v Minister of Health* [1935] 1 KB 249, CA
*Gateshead Metropolitan Borough Council v Secretary of State for the Environment* (1994) 71 P & CR 350
*George v Secretary of State for the Environment* (1979) 77 LGR 689, CA
*Hopkins Developments Ltd v Secretary of State for Communities and Local Government* [2014] EWCA Civ 470; [2014] PTSR 1145, CA
*Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] UKSC 37; [2017] PTSR 623; [2017] 1 WLR 1865; [2017] 4 All ER 938, SC(E)
*Horada v Secretary of State for Communities and Local Government* [2016] EWCA Civ 169; [2016] PTSR 1271; [2017] 2 All ER 86, CA
*Malloch v Aberdeen Corpn* [1971] 1 WLR 1578; [1971] 2 All ER 1278, HL(Sc)
*Monkhill Ltd v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 1993 (Admin); [2020] PTSR 416
*Mordue v Secretary of State for Communities and Local Government* [2015] EWCA Civ 1243; [2016] 1 WLR 2682, CA
*Newsmith Stainless Ltd v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 74; [2017] PTSR 1126
*R v Secretary of State for Education, Ex p S* [1995] ELR 71, CA

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A *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2003] 2 AC 295; [2001] 2 WLR 1389; [2001] 2 All ER 929, HL(E)
*R (Champion) v North Norfolk District Council* [2015] UKSC 52; [2015] 1 WLR 3710, SC(E)
*R (Khatun) v Newham London Borough Council* [2004] EWCA Civ 55; [2005] QB 37; [2004] 3 WLR 417; [2004] LGR 696, CA
B *R (Mansell) v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314; [2019] PTSR 1452, CA
*R (Midcounties Co-operative Ltd) v Wyre Forest District Council* [2009] EWHC 964 (Admin)
*R (Mott) v Environment Agency* [2016] EWCA Civ 564; [2016] 1 WLR 4338, CA
*R (National Association of Health Stores) v Secretary of State for Health* [2005] EWCA Civ 154; The Times, 9 March 2005, CA
C *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] UKSC 3; [2020] PTSR 221; [2020] 3 All ER 527, SC(E)
*R (Scarisbrick) v Secretary of State for Communities and Local Government* [2017] EWCA Civ 787, CA
*R (Spurrier) v Secretary of State for Transport* [2019] EWHC 1070 (Admin); [2020] PTSR 240, DC; sub nom *R (Plan B Earth) v Secretary of State for Transport (WWF-UK intervening)* [2020] EWCA Civ 214; [2020] PTSR 1446, CA
D *R (Thames Blue Green Economy Ltd) v Secretary of State for Communities and Local Government* [2015] EWHC 727 (Admin); [2015] EWCA Civ 876; [2016] JPL 157, CA
*St Modwen Developments Ltd v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643; [2018] PTSR 746, CA
*Save Britain's Heritage v Number 1 Poultry Ltd* [1991] 1 WLR 153; [1991] 2 All ER 10; 89 LGR 809, HL(E)
*Seddon Properties Ltd v Secretary of State for the Environment* (1978) 42 P & CR 26
E *South Bucks District Council v Porter (No 2)* [2004] UKHL 33; [2004] 1 WLR 1953; [2004] 4 All ER 775, HL(E)
*Tesco Stores Ltd v Dundee City Council (Asda Stores Ltd intervening)* [2012] UKSC 13; [2012] PTSR 983, SC(Sc)
*Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759; [1995] 2 All ER 636; 93 LGR 403, HL(E)

F The following additional cases were cited in argument or referred to in the skeleton arguments:

*Berkeley v Secretary of State for the Environment* [2001] 2 AC 603; [2000] 3 WLR 420; [2000] 3 All ER 897, HL(E)
*Commission of the European Communities v Federal Republic of Germany* (Case C-431/92) EU:C:1995:260; [1995] ECR I-2189, ECJ
G *R v Chelsea College of Art and Design, Ex p Nash* [2000] ELR 686
*R v Parliamentary Comr for Administration, Ex p Balchin* [1998] 1 PLR 1
*R (An Taisce (The National Trust for Ireland)) v Secretary of State for Energy and Climate Change* [2013] EWHC 4161 (Admin)
*R (Halite Energy Group Ltd) v Secretary of State for Energy and Climate Change* [2014] EWHC 17 (Admin)
*R (Kides) v South Cambridgeshire District Council* [2002] EWCA Civ 1370; [2003] 1 P & CR 19, CA
H *R (Mars Jones) v Secretary of State for Business, Energy and Industrial Strategy* [2017] EWHC 1111 (Admin)
*Ruiz-Mateos v Spain* CE:ECHR:1993:0623JUD001295287; 16 EHRR 505
*Safeway Properties Ltd v Secretary of State for the Environment* [1991] JPL 966, CA

**CLAIM** for judicial review

A

By a claim form the claimant, ClientEarth, an environmental law charity, applied under section 118 of the Planning Act 2008 for judicial review of the decision of the defendant, the Secretary of State for Business, Energy and Industrial Strategy, on 4 October 2019 granting a development consent order, the Drax Power (Generating Stations) Order 2019, to the interested party, Drax Power Ltd, for a nationally significant infrastructure project comprising the construction and operation of two gas-fired generating units situated at the existing Drax Power Station near Selby in North Yorkshire, contrary to the recommendation of the examining authority in its prior report dated 4 July 2019. The grounds of challenge are set out, post, para 23.

B

The facts are stated in the judgment, post, paras 1–22.

C

*Gregory Jones QC* and *Merrow Golden* (instructed by *ClientEarth*) for the claimant.

*Andrew Tait QC* and *Ned Westaway* (instructed by *Treasury Solicitor*) for the Secretary of State.

*James Strachan QC* and *Mark Westmoreland Smith* (instructed by *Pinsent Masons llp*) for the interested party.

D

The court took time for consideration.

22 May 2020. **HOLGATE J** handed down the following judgment.

*Introduction*

E

**1** The claimant, ClientEarth, applies under section 118 of the Planning Act 2008 ("PA 2008") for judicial review of the decision by the defendant, the Secretary of State for Business, Energy and Industrial Strategy, on 4 October 2019 to grant the application made by Drax Power Ltd ("Drax") for a development consent order ("DCO") for a "nationally significant infrastructure project" ("NSIP"): the construction and operation of two gas-fired generating units situated at the existing Drax Power Station near Selby in North Yorkshire ("the development"). The order made by the Secretary of State is the Drax Power (Generating Stations) Order 2019 ("the Order").

F

**2** The claimant is an environmental law charity. Its charitable objects include the enhancement, restoration, conservation and protection of the environment, including the protection of human health, for the public benefit.

G

**3** This challenge raises important issues on (a) the interpretation of the Overarching National Policy Statement for Energy ("EN-1") and the National Policy Statement for Fossil Fuel Electricity Generating Infrastructure ("EN-2"), both of which applied to the proposal, and (b) their legal effect in the determination of the application for a DCO, particularly as regards the need for the development and greenhouse gas emissions ("GHG"). These national policy statements ("NPSs") were designated in July 2011.

H

**4** The proposal by Drax gave rise to a number of controversial issues which were considered during the examination of the application. Some of those issues are raised in grounds of challenge in these proceedings. It is important to emphasise at the outset that it is not for the court to consider

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A the merits of the proposed development or of the objections made to it. It is only concerned with whether an error of law was made in the decision or in the process leading up to it.

**5** On 29 May 2018 Drax made its application under section 37 of the PA 2008 for the Order. On 26 June 2018 the Secretary of State accepted the application under section 55. On 16 July 2018 a panel comprising two members was appointed to be the examining authority (the "ExA" B or "Panel"). Their responsibility was to conduct the examination of the application and to report on it to the Secretary of State with conclusions and a recommendation as to how it should be determined (under Chapters 2 and 4 of Part 6 of the PA 2008). The examination began on 4 October 2018 and was completed on 4 April 2019.

**6** The Panel produced their report dated 4 July 2019. They recommended C that consent for the development be withheld. The Secretary of State disagreed with that recommendation and on 4 October 2019 decided to make the Order (with minor modifications). The decision was taken by the Minister of State acting on behalf of the defendant.

*The development*

D **7** The development involves the construction of two gas-fired units (units X and Y) utilising some of the existing infrastructure of two coal-fired units currently in operation at the site (units 5 and 6 with a total output of 1320 megawatts, which are due to be decommissioned in 2022. Each unit would comprise combined cycle gas turbine ("CCGT") and open cycle gas turbine ("OCGT") technology, with a capacity of up to 1,800 megawatts. Each E unit would also have battery storage of up to 100 megawatts, giving the development an overall capacity of up to 3,800 megawatts.

**8** The development also includes switchgear buildings, a natural gas reception facility, an above-ground gas installation, an underground gas pipeline, underground electrical connections, temporary construction areas, a reserve space for carbon capture storage ("CCS"), landscaping and biodiversity measures, demolition and construction of sludge lagoons, F removal of an existing 132 kilovolt overhead line, pylons and further associated development. The development would also involve a three-kilometre gas pipeline connecting to the National Grid Feeder lying to the east of the site.

**9** The construction of Unit X was expected to begin in 2019/2020 and be completed by 2022/2023. If Unit Y were to be built, the construction was G expected to start in 2024 and be completed by 2027. The development is designed to operate for up to 25 years, after which Drax has stated that it would review the development's continued operation. The Order does not contain any condition restricting the period for which the facility may be operated.

H *Need for the development*

**10** The claimant participated in the examination, by attending hearings and submitting a number of written representations. The claimant objected to the development on the grounds that its adverse impacts outweighed its benefits, both as assessed under the NPSs and through the application of the balancing exercise required by section 104(7) of the PA 2008 (see

below). The claimant's position was that there was no need for the proposed development and that it would have significant adverse environmental impacts, particularly in respect of likely GHG emissions, the risk of "carbon lock-in" and impact on climate change.

**11** Drax's position throughout the examination was that the need for the development, being a type of generating station identified in Part 3 of NPS EN-1, was established through that NPS and that substantial weight should be attributed to the contribution the development would make to meeting the needs for additional energy capacity (both security of supply and to assist in the transition to a low carbon economy). Drax contended that the substantial weight attributable to the development's actual contribution to meeting needs identified in EN-1 was not outweighed by the adverse impacts of the development.

*Climate change and GHG emissions*

**12** The environmental statement ("ES") submitted with the application contained an assessment of the likely significant effects of the development upon climate change. It estimated that the development would cause GHG emissions to increase from 188,323,000 tonnes of carbon dioxide equivalent ("$tCO_2e$") to 287,568,000 $tCO_2e$ over the period 2020 to 2050 against the baseline position, a 90% net increase. But at the same time, there would be an increase in the maximum generating capacity from 1,320 megawatts to 3,600 megawatts for the development (excluding the battery storage capability), representing an increase of 173% in the maximum electricity generating capacity.

**13** Relating the emissions produced to the generating capacity, the ES assessed that the GHG emissions *intensity* for the existing coal fired units would be 840 grams of carbon dioxide equivalent per kilowatt-hour ("$gCO_2e/kWh$") in the period 2020 to 2025 and fall to 450 $gCO_2e/kWh$ in the period 2026 to 2050 in the baseline scenario. For the development, the figure would be 380 $gCO_2e/kWh$, representing a 55% reduction in GHG intensity for the period 2023 to 2025 and a 16% reduction in the period 2026 to 2050.

**14** According to the claimant's assessment, the development would result in a 443% increase in emissions intensity (using an average baseline emissions intensity of 70 $gCO_2e/kWh$) and a 488% increase in total GHG emissions.

**15** There was no disagreement as to the possible extent of future emissions from the proposed development; the disagreement was over the baseline against which they should be assessed and thus the likely net effect of the development. It was common ground between the parties during the examination that an increase in total GHG emissions of 90% represented a significant adverse effect.

*An overview of the conclusions of the Panel and the Secretary of State*

**16** The Panel concluded that "a reasonable baseline was likely to be somewhere in between" the figures assessed by Drax and by the claimant and so the increase in GHG emissions was likely to be higher than had been estimated by Drax (paras 5.3.22 and 5.3.27–5.3.28).

**17** The Panel concluded that whilst the NPSs supported a need for additional energy infrastructure in general, Drax had not demonstrated that

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A the development itself met an identified need for gas generation capacity when assessed against EN-1's overarching policy objectives of security of supply, affordability and decarbonisation. It found that the development would not accord with the Energy NPSs and that it would undermine the Government's commitment to cut GHG emissions, as set out in the Climate Change Act 2008 ("CCA 2008") (paras 5.2.4, 5.3.27, 7.2.7, 7.2.10, and 11.1.2)

B **18** Applying the balancing exercise in section 104(7) of the PA 2008, the Panel concluded that the adverse impacts of the development outweighed the benefits, the case for development consent had not been made out and so consent should be withheld (section 7.3).

**19** The Secretary of State disagreed with the Panel's recommendation and decided that the Order should be made, concluding at para 7.1 of the decision C letter ("DL") that "there is a compelling case for granting consent for the development" and:

> "The Secretary of State considers that the development would be in accordance with the relevant NPSs and, given the national need for such development as set out in the relevant NPSs, the Secretary of State does not believe that its benefits are outweighed by the development's D potential adverse impacts, as mitigated by the proposed terms of the Order. As such, the Secretary of State has decided to make the Order granting development consent …"

**20** The Secretary of State disagreed with the Panel on need. In summary, she decided that EN-1 assumed a general need for fossil fuel generation and did not draw any distinction between that general need and the need for E any particular proposed development. She also stated that substantial weight should be given to a project contributing to that need.

**21** The Secretary of State noted the significant adverse impact that the development would have, through the amount of GHGs that would be emitted to the atmosphere, but at DL 4.15–4.16 she relied upon para 5.2.2 of EN-1 and para 2.5.2 of EN-2 to conclude that those emissions did not F afford a reason for refusal of consent or to displace the presumption in the policy in favour of granting consent (see also DL 6.7).

**22** In DL 6.8 and 6.9 the Secretary of State referred to negative visual and landscape impacts and to the positive effects of the development regarding biodiversity and socioeconomic matters and the proposed re-use of existing infrastructure at the power station. She concluded that "there are strong G arguments in favour of granting consent for the full, two gas units and two battery storage units, 3·8 gigawatts project because of its contribution to meeting the need case set out in the NPSs". She therefore considered that the benefits of the proposal outweighed its adverse effects for the purposes of section 104(7) of the PA 2008.

**23** Originally the claimant advanced nine grounds of challenge to the Secretary of State's decision. In summary it raised the following issues:

H *Ground 1*: The defendant misinterpreted the NPS EN-1 on the assessment of the "need" for the development.

*Ground 2*: The defendant failed to give adequate reasons for her assessment of the "need" for the development.

*Ground 3*: The defendant misinterpreted NPS EN-1 on the assessment of GHG emissions.

*Ground 4*: The defendant misinterpreted and misapplied section 104(7) of the Planning Act 2008. A

*Ground 5*: The defendant failed to assess the carbon-capture readiness of the development correctly in accordance with EN-1.

*Ground 6*: The defendant failed to comply with the requirements of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017.

*Ground 7*: The defendant's consideration of the net zero target was procedurally unfair and, or in the alternative, the defendant failed to give adequate reasons for her consideration of the net zero target. B

*Ground 8*: The defendant failed to fully consider the net zero target, including whether to impose a time limiting condition on the development.

*Ground 9*: The decision was irrational.

**24** This judgment is structured as follows (with paragraph numbers): C

| | |
|---|---|
| The Planning Act 2008 | 26–52 |
| The national policy statements on energy infrastructure | 53–97 |
| General legal principles | 98–166 |
| Grounds 1 and 2 | 117–153 |
| Ground 3 | 154–173 |
| Ground 4 | 14–181 |
| Ground 5 | 182–197 |
| Ground 6 | 198–221 |
| Ground 7 | 222-–252 |
| Ground 8 | 253–260 |
| Ground 9 | 261 |
| Conclusion | 262 |

D E

**25** Before going any further, I would like to express my gratitude for the way in which this case was presented and argued by counsel and solicitors on all sides and for the help which the court received. There was a good deal of co-operation in the production of electronic bundles to ensure that these complied with the various protocols and guidance on remote hearings and were relatively easy to use despite the amount of material which needed to be included. F

*The Planning Act 2008*

*The White Paper: Planning for a Sustainable Future* G

**26** The statutory framework of the Planning Act 2008 was summarised by the Divisional Court in *R (Spurrier) v Secretary of State for Transport* [2020] PTSR 240, paras 20–40. This bespoke form of development control for NSIPs had its origins in the White Paper published in May 2007, "Planning for a Sustainable Future" (Cm 7120). A key problem which the legislation was designed to tackle was the lack of clear statements of national policy, particularly on the national need for infrastructure. This had caused, for example, significant delays at the public inquiry stage because national policy had to be clarified and need had to be established through the inquiry process for each individual application. Sometimes the evidence at individual inquiries might not have given a sufficiently full picture. Furthermore, there H

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A was no prior consultation process by which the public and interested parties could participate in the formulation of national policy, which might only emerge through ad hoc decisions by ministers on individual planning appeals.

**27** Para 3.2 of the White Paper pointed out that the absence of a clear national policy framework can make it more difficult for developers to make investment decisions which by their nature are often long term in nature and "therefore depend on government policy and objectives being clear and B reasonably stable".

**28** Para 3.4 stated that NPSs "would integrate the Government's objectives for infrastructure capacity and development with its wider economic, environmental and social policy objectives, including climate change goals and targets, in order to deliver sustainable development".

**29** Para 3.8 explained that NPSs would need to reflect differences between C infrastructure sectors, so that in contrast to projects dependent on public funding where Government has a large influence on what goes ahead "where government policy is primarily providing a framework for private sector investment determined by the market, policy statements are likely to be less prescriptive". Likewise, para 3.9 recognised that in the energy sector "the precise energy mix, and therefore the nature of infrastructure needed to meet D demand, is determined to a large extent by the market".

**30** Para 3.11 stated:

> "There should therefore be no need for inquiries on individual applications for development consent to cover issues such as whether there is a case for infrastructure development, what that case is, or the sorts of development most likely to meet the need for additional E capacity, since this will already have been addressed in the national policy statement. It would of course be open to anyone to draw the Government's attention to what they believe is new evidence which would affect the current validity of a national policy statement. Were that to happen, the relevant Secretary of State would then decide whether the evidence was both new and so significant that it warranted F revisions to national policy. The proposer of the new evidence would be informed of the Secretary of State's decision. This would ensure that inquiries can focus on the specific and local impacts of individual applications, against the background of a clear assessment of what is in the national interest. This, in turn, should result in more focused and efficient inquiry processes."

G **31** So the object was for policies on matters such as the need for infrastructure to be formulated and tested through the process leading up to the decision to adopt a national policy statement and to that extent they would not be open to challenge through subsequent consenting procedures. New evidence, such as a change in circumstance since the policy was adopted, would be addressed by the Secretary of State making a revision to the policy, in so far as he or she judged that to be appropriate. In essence, the 2008 Act H gave effect to these principles.

*Statutory framework*

**32** Section 5(1) of the 2008 Act enables the Secretary of State to designate a NPS setting out national policy on one or more descriptions

of development. Before doing so the Secretary of State must carry out an appraisal of the sustainability of the policy (section 5(3)). In addition, the Secretary of State will normally be required to carry out a strategic environmental assessment ("SEA") in compliance with the Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004/1633). The SEA process itself involves consultation with the public and relevant authorities.

**33** The Secretary of State must also comply with the publicity and consultation requirements laid down by section 7 and the proposed NPS must undergo parliamentary scrutiny under section 9.

**34** Section 5(5)(a) provides that a NPS may "set out, in relation to a specified description of development, the amount, type or size of development of that description which is appropriate nationally or for a specified area". Thus, policy in a NPS may determine the need for a particular infrastructure project, or development of a particular type (*Spurrier* [2020] PTSR 240, para 99). It may describe that need in quantitative or qualitative terms, or a mixture of the two.

**35** Section 5(5)(c) enables policy in a NPS to determine "the relative weight to be given to specific criteria". So, for example, a NPS may determine that the need for a development should be given "substantial weight" in the decision on an application for a DCO.

**36** Section 5(7) requires a NPS to "give reasons for the policy set out in the statement". As the Divisional Court explained in *Spurrier*, that obligation deals with the supporting rationale for the policies in the NPS which the Secretary of State decides to include (paras 118–120). In that context, section 5(8) requires those reasons to include "an explanation of how the policy set out in the statement takes account of Government policy relating to the mitigation of, and adaptation to, climate change".

**37** Section 6(1) obliges the Secretary of State to review a NPS whenever he thinks it appropriate to do so. Under section 6(3):

> "In deciding when to review a national policy statement the Secretary of State must consider whether— (a) since the time when the statement was first published or (if later) last reviewed, there has been a significant change in any circumstances on the basis of which any of the policy set out in the statement was decided, (b) the change was not anticipated at that time, and (c) if the change had been anticipated at that time, any of the policy set out in the statement would have been materially different."

Section 6(4) employs the same three criteria for reviews of part of a NPS.

**38** So the Secretary of State must consider not only whether there has been a significant change in circumstance on the basis of which policy in the NPS was decided, and which was not anticipated when the NPS was first published, but also whether if that change had been so anticipated, the policy would have been materially different. If not, then the power to review is not engaged and the NPS continues in force unamended. But if a review is carried out, any revised policy is also subject to sustainability appraisal, SEA, publicity, consultation and parliamentary scrutiny. Thus, the 2008 Act proceeds on the legal principle that significant changes in circumstances affecting the basis for, or content of, a policy may only be taken into account through the statutory process of review under section 6 (*Spurrier*, at para 108).

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A **39** Section 10(2) requires the Secretary of State to exercise his functions under sections 5 or 6 "with the objective of contributing to the achievement of sustainable development". By section 10(3) the Secretary of State must (in particular) have regard to the desirability of inter alia "mitigating, and adapting to, climate change". In *Spurrier* the Divisional Court held that the PA 2008 and the CCA 2008 should be read together. They were passed on the same day and the language which is common to sections 5(8) and 10(3) of
B the PA 2008 refers to the very objective of the CCA 2008. As Hansard shows that is confirmed by the way in which these provisions were introduced into the legislation (see *Spurrier*, at paras 644–647).

**40** Thus, EN-1 and EN-2 had to satisfy all these statutory requirements, including the obligation to promote the objective of the CCA 2008, before they could finally be designated. Even then, they could have been the subject
C of legal challenge by way of judicial review under section 13 of the PA 2008.

**41** Once a NPS has been designated, sections 87(3), 94(8) and 106(1) enable the examining authority during the examination of an application for a DCO, and the Secretary of State when determining an application for a DCO, to disregard inter alia representations, including evidence, which are considered to "relate to the merits of policy set out in a national policy
D statement".

**42** Mr Andrew Tait QC for the Secretary of State and Mr James Strachan QC for Drax submitted that these provisions give effect to the principle that the policy laid down in an NPS, for example on the need for particular infrastructure, is to be treated as settled for the purposes of examining and determining an application for a DCO, and thus not open to challenge in that process. That principle has been considered by the courts in *R (Thames*
E *Blue Green Economy Ltd) v Secretary of State for Communities and Local Government* [2015] EWHC 727 (Admin); [2016] JPL 157 (Court of Appeal); *R (Scarisbrick) v Secretary of State for Communities and Local Government* [2017] EWCA Civ 787; and *Spurrier* [2020] PTSR 240, paras 99–111, to which I return below.

**43** The claimant in this case seeks to protect environmental and health
F interests of great public importance which it says argue strongly against any development of the kind proposed taking place. But those matters are not freestanding. There are also other public interest issues which operate in favour of such development, such as its contribution to security and diversity of energy supply and the provision of support for the transition to a low carbon economy. Policy-making in this area involves the striking of a balance in which these and a great many other issues are assessed and weighed. This
G is carried on at a high strategic level and involves political judgment as to what is in the public interest.

**44** The scheme in the PA 2008 for the making of national policy accords with well-established constitutional principles. As the Divisional Court said in *Spurrier* [2020] PTSR 240, para 153:

H "Under our constitution policy-making at the national level is the responsibility of democratically-elected governments and ministers accountable to Parliament. As Lord Hoffmann said in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, paras 69 and 74: 'It does not involve deciding between the rights or interests of particular persons. It is the

exercise of a power delegated by the people as a whole to decide what the public interest requires.'" A

**45** Also in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295 Lord Clyde stated at para 140:

B

"Planning and the development of land are matters which concern the community as a whole, not only the locality where the particular case arises. They involve wider social and economic interests, considerations which are properly to be subject to a central supervision. By means of a central authority some degree of coherence and consistency in the development of land can be secured."

C

And at para 141:

"Once it is recognised that there should be a national planning policy under a central supervision, it is consistent with democratic principle that the responsibility for that work should lie on the shoulders of a minister answerable to Parliament."

D

**46** Under the PA 2008 responsibility for the content and merits of policy in a NPS, or for the merits of revising any such policy, lies with the relevant Secretary of State who is accountable to Parliament. For example, it is open to Parliament to raise questions with a minister as to whether a NPS needs to be reviewed because of a change in circumstances. The court's role is limited to the application of principles of public law in proceedings for judicial review brought in accordance with the terms of the Act. E

**47** Part 3 of the PA 2008 defines those developments which qualify as NSIPs to which the DCO code and the relevant NPS apply. By section 15 a generating station with a capacity in excess of 50 megawatts if located onshore, or 100 megawatts if located offshore, is treated as a NSIP. Smaller scale generating projects are excluded from this statutory scheme and fall within the normal development control regime under the Town and Country Planning Act 1990 ("TCPA 1990"). F

**48** Section 104, as amended, applies to the determination of an application for a DCO where a NPS is applicable. Section 104(2) requires the Secretary of State to have regard to (inter alia) a relevant NPS. Section 104(3) goes further: "The Secretary of State must decide the application in accordance with any relevant national policy statement, except to the extent that one or more of subsections (4) to (8) applies." It is important to note the words in section 104(3) "except to the extent that", recognising that an exception in subsections (4) to (8) may only have the effect of disapplying the obligation in section 104(3) as regards part of a NPS, or perhaps part of a project. G

**49** Section 104(5) provides: H

"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."

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A **50** Section 104(7) provides: "This subsection applies if the Secretary of State is satisfied that the adverse impact of the proposed development would outweigh its benefits."

**51** Where an application is made for a DCO for development to which a NPS applies, and the Secretary of State considers that the NPS should be reviewed under section 6 before the application is determined, he may suspend the examination of that application until the review is completed (section 108). B

**52** Section 116 imposes on the Secretary of State an obligation to give reasons for the decision under section 114 whether to grant or refuse development consent.

*The national policy statements on energy infrastructure*

C

*EN-1*

**53** EN-1 sets out the overarching policy for delivery of major energy infrastructure. It is to be read alongside five technology-specific NPSs for the energy sector (para 1.7). In the present case EN-2 is relevant.

**54** EN-1 falls into five parts. Following an introductory section, Part 2 sets D out government policy on "energy and energy infrastructure development", including section 2.2 "The road to 2050". Part 3 is devoted to the Government's policy on the need for new NSIPs in the energy sector. Part 4 contains assessment principles for matters not falling within Parts 3 or 5. Part 5 addresses "generic impacts", in the sense of impacts arising from any type of energy infrastructure covered by the NPSs, or impacts arising in similar ways in relation to at least two energy NPSs. Technology-specific impacts are E generally covered in the relevant NPS (para 5.1.1).

**55** Section 1.7 refers to the appraisal of sustainability ("AoS") carried out for all the energy NPSs, incorporating material required for SEA. The primary function of the AoSs was to inform consultation on the draft NPSs by providing an analysis of the environmental, social and economic impacts of granting DCOs for large-scale energy infrastructure projects in accordance F with those policies (para 1.7.1).

**56** Para 1.7.2 states that the energy NPSs should speed up transition to a low carbon economy and thus help to realise United Kingdom climate change commitments; but it recognised uncertainty because of difficulty in predicting "the mix of technology that will be delivered by the market against the framework set by the Government".

G **57** In accordance with the requirements of the 2004 Regulations for SEA, the AoS assessed "reasonable alternatives" to the policies set out in EN-1 at a strategic level (para 1.7.5). Alternative A3 placed more emphasis on reducing $CO_2$ emissions which would be beneficial for climate change (para 1.7.8). It was concluded that it would not be possible to give practical effect to that alternative *through the planning system* in the next ten years or so without adverse risks to the security of supply. Alternative A3 was not preferred to H the policies in EN-1, but the Government said that it would consider other ways in which to encourage industry to accelerate progress towards a low carbon economy, particularly through the Electricity Market Reform project addressed in section 2.2 of the NPS (para 1.7.9). Para 1.7.12 explained that because all the alternatives were "assessed as performing less well than EN-1 against one or more of the criteria for climate change or security of

energy supply that are fundamental objectives of the plan" the Government's preferred option was to proceed with EN-1 to EN-6.

**58** The Government's policy on energy infrastructure development in Part 2 of EN-1 is critical to understanding the policies on need, on which key parts of this challenge have focused.

**59** Para 2.1.1 states that there are three key goals, namely reducing carbon emissions, energy security and affordability. Large scale infrastructure plays a "vital role" in ensuring security of supply (para 2.1.2).

**60** Section 2.2 of EN-1 is entitled "The road to 2050". It was based upon the target then enshrined in the CCA 2008 of reducing GHG in 2050 by at least 80% compared to 1990 levels. Analysis of "pathways" produced to 2050 shows that this requires not only cleaner power generation but also the electrification of much of the UK's heating, industry and transport (para 2.2.1). That "electrification" could itself double the demand for electricity over the period to 2050 (para 2.2.22). In the same vein, para 3.3.14 states that in order to be robust in all weather conditions the total capacity of electricity generation may need to more than double. If there were to be, for example, "very strong electrification of market demand and a high level of dependence on intermittent electricity generation" (eg renewables), then the capacity of electricity generation might need to triple.

**61** Delivery of this "transformation" is to take place "within a market based system" and so the Government's focus is "on developing a clear, long term policy framework which facilitates investment in the necessary new infrastructure (by the private sector)" (para 2.2.2).

**62** Para 2.2.4 states:

> "the planning system is only one of a number of vehicles that helps to deliver Government energy and climate change policy. The role of the planning system is to provide a framework which permits the construction of whatever Government—and players in the market responding to rules, incentives or signals from Government—have identified as the types of infrastructure we need in the places where it is acceptable in planning terms."

**63** The transition to a low carbon economy is dealt with at paras 2.2.5–2.2.11. The UK needs to wean itself off a high carbon energy mix, to reduce GHG emissions, and to improve the security, availability and affordability of energy through diversification. Under some of the "illustrative" 2050 pathways electricity generation would need to become virtually emission-free (para 2.2.6).

**64** The CCA 2008 has been put in place in order to drive the transition needed, by delivering emission reductions through a series of five-year carbon budgets setting a trajectory to 2050 (para 2.2.8).

**65** Paras 2.2.12–2.2.15 explain how the EU Emissions Trading System ("EU ETS") "forms the cornerstone of UK action to reduce greenhouse gas emissions from the power sector". The system sets a cap on emissions for different sectors of industry, including electricity generation. The cap translates to a finite number of allowances to emit GHG, which can be traded between operators, creating a carbon price, which in turn makes the production of electricity from carbon intensive power stations less attractive and creates an incentive for investment in cleaner electricity generation. The Government proposed to increase the emissions reduction target from

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A 20% to 30% by 2020 and intended to go further than EU ETS to ensure developers invest in low carbon generation "to decarbonise the way in which we produce electricity and reinforce our security of supply" through its "Electricity Market Reform project" described in paras 2.2.16–2.2.19. Para 2.2.17 of EN-1 described a package of reforms which included an emissions performance standard.

B **66** Para 2.2.19 makes this important statement:

> "The Planning Act and any market reforms associated with the Electricity Market Reform project will complement each other and are consistent with the Government's established view that the development of new energy infrastructure is market-based. While the Government may choose to influence developers in one way or another to propose C to build particular types of infrastructure, it remains a matter for the market to decide where and how to build, as market mechanisms will deliver the required infrastructure most efficiently. Against this background of possibly changing market structures, developers will still need development consent for each proposal. Whatever incentives, rules or other signals developers are responding to, the Government D believes that the NPSs set out planning policies which both respect the principles of sustainable development and are capable of facilitating, for the foreseeable future, the consenting of energy infrastructure on the scale and of the kinds necessary to help us maintain safe, secure, affordable and increasingly low carbon supplies of energy."

**67** It is fundamental to a proper understanding of the policies in E Part 3 on need that they be seen within the overall policy context in EN-1. Thus, planning operates in a market-based system and is only one of a number of vehicles for the delivery of energy and climate change policy. Planning provides a framework which allows the construction of whatever Government, or "players in the market" responding to rules, incentives or signals from Government, identify as the types of infrastructure F needed in locations acceptable in planning terms. The "incentives" and "signals" (further explained in para 2.2.24) may be given through the EU ETS and Electricity Market Reforms.

**68** Paras 2.2.20–2.2.26 address security of energy supplies. It is said to be "critical" for the UK to continue to have secure and reliable supplies of electricity as it makes the transition to a low carbon economy. To manage the risks to supply, the country must have sufficient capacity to meet variations G in demand at all times, both simultaneously and continuously, given that electricity cannot be stored. This requires a safety margin of spare capacity to meet unforeseen fluctuations in supply or demand. There is a need for diversity in terms of technologies and fuels.

**69** Para 2.2.23 states that:

H

> "The UK must therefore reduce over time its dependence on fossil fuels, particularly unabated combustion. The Government plans to do this by improving energy efficiency and pursuing its objectives for renewables, nuclear power and carbon capture and storage. However some fossil fuels will still be needed during the transition to a low carbon economy."

**70** According to para 2.2.25 the two main challenges to security of supply during that transition are: A

> "• increasing reliance on imports of oil and gas as North Sea reserves decline in a world where energy demand is rising and oil and gas production and supply is increasingly politicised; and
>
> • the requirement for substantial and timely private sector investment over the next two decades in power stations, electricity networks and gas infrastructure." B

**71** Part 3 begins with the following policies for decision-making:

> "3.1.1 The UK needs all the types of energy infrastructure covered by this NPS in order to achieve energy security at the same time as dramatically reducing greenhouse gas emissions. C
>
> "3.1.2 It is for industry to propose new energy infrastructure projects within the strategic framework set by Government. The Government does not consider it appropriate for planning policy to set targets for or limits on different technologies.
>
> "3.1.3 The IPC should therefore assess all applications for development consent for the types of infrastructure covered by the energy NPSs on the basis that the Government has demonstrated that there is a need for those types of infrastructure and that the scale and urgency of that need is as described for each of them in this Part. D
>
> "3.1.4 The IPC should give substantial weight to the contribution which projects would make towards satisfying this need when considering applications for development consent under the Planning Act 2008." E

The functions of the "IPC" (the Infrastructure Planning Commission) for determining applications for DCOs were transferred to the Secretary of State by the Localism Act 2011.

**72** Mr Gregory Jones QC for the claimant laid much emphasis on the reference in para 3.1.4 to the contribution made by a project to satisfying need, which also appears towards the end of para 3.2.3: F

> "This Part of the NPS explains why the Government considers that, without significant amounts of new large-scale energy infrastructure, the objectives of its energy and climate change policy cannot be fulfilled. However, as noted in section 1.7, it will not be possible to develop the necessary amounts of such infrastructure without some significant residual adverse impacts. This Part also shows why the Government considers that the need for such infrastructure will often be urgent. The IPC should therefore give substantial weight to considerations of need. The weight which is attributed to considerations of need in any given case should be proportionate to the anticipated extent of a project's actual contribution to satisfying the need for a particular type of infrastructure." G H

**73** However, Mr Jones accepted that although para 3.1.3 states that the "scale" and "urgency" of need is described for each type of infrastructure, EN-1 does not seek to define need in quantitative terms (save in the limited respects mentioned below). In my judgment, this is consistent with (a) the broad indications of the potential need to double or treble generating

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A capacity by 2050 previously given in Part 2 of the NPS (see para 60 above) and (b) the unequivocal statement in para 3.1.2 that it is inappropriate for planning policy to set targets for, or limits on, different types of technology.

**74** One aspect of quantitative need concerns the requirement to replace power stations which have to be closed (paras 3.3.7–3.3.9). Within the UK at least 22 gigawatts of existing generating capacity will need to be replaced, B particularly during the period to 2020, as the result of stricter environmental standards and ageing power stations. The closure of about 12 gigawatts capacity relates to coal and oil power stations and results from controls under the Large Combustion Plant Directive (Parliament and Council Directive 2001/80/EC on the limitation of emissions of certain pollutants into the air from large combustion plants (OJ 2001 L309, p 1)) on emissions of sulphur and nitrogen dioxide. In addition, approximately 10 gigawatts of nuclear C generating capacity is expected to close by about 2031. The imposition of even stricter limits on emissions of sulphur and nitrogen oxides (“$NO_X$”) is likely to result in additional closures of power stations. It will be recalled that the present proposal is for the construction of two gas-fired units in place of two coal-fired units which are to be decommissioned in 2022.

**75** The second element of need which has been quantified is that required D by a “planning horizon of 2025” for energy NPSs in general and nuclear power in particular. It is within the context of that “interim milestone” that the following passage in para 3.3.16 appears, upon which Mr Jones placed some reliance:

> “A failure to decarbonise and diversify our energy sources now could result in the UK becoming locked into a system of high carbon E generation, which would make it very difficult and expensive to meet our 2050 carbon reduction target. We cannot afford for this to happen.”

**76** Para 3.3.18 warned that it was not possible to make an accurate prediction of the size and shape of demand for electricity in 2025, but used “Updated Energy and Emissions” projections (“UEP”) published by the former Department of Energy and Climate Change (“DECC”) as a “starting F point” to get “a sense of the possible scale of future demand to 2025”. It is also essential to note the further warning that: “The projections do not reflect a desired or preferred outcome for the Government in relation to the need for additional electricity generating capacity or the types of electricity generation required.” Para 3.3.21 added that the projections helped to illustrate the scale of the challenge faced by the UK and the Government to understand *how* G *the market might respond.*

**77** Based on one of the scenarios studied, para 3.3.22 indicated that by 2025 the UK would need at least 113 gigawatts of total electricity generating capacity, compared to 85 gigawatts in 2011, of which 59 gigawatts would be new build. Around 33 gigawatts of new capacity by 2025 would need to come from renewable sources, and it would be for industry to determine the exact mix of the remaining 26 gigawatts within the strategic framework H set by Government. After allowing for projects already under construction, the NPS suggested that 18 gigawatts remained to be provided as new non-renewable capacity by 2025. The Government stated that it would like a significant proportion of that balance of 18 gigawatts to be provided by new low-carbon generation and, in principle, nuclear power should be free to contribute as much as possible towards this need up to the interim milestone

of 2025. Footnote 36 expressed the judgment that it would not be prudent when determining national policy to take into account consents for other energy projects where construction had yet to begin. A

**78** Para 3.3.23 stated: "To minimise risks to energy security and resilience, the Government therefore believes it is prudent to plan for a *minimum* need of 59 gigawatts of new electricity capability by 2025." (Emphasis added.)

**79** To avoid any misunderstanding of the exercise carried out in paras 3.3.15–3.3.23 of EN-1, para 3.3.24 repeated the approach which had already been clearly laid down in Part 2 and in para 3.1.2: B

> "It is not the Government's intention in presenting the above figures to set targets or limits on any new generating infrastructure to be consented in accordance with the energy NPSs. It is not the IPC's role to deliver specific amounts of generating capacity for each technology type. The Government has other mechanisms to influence the current delivery of a secure, low carbon, affordable electricity mix. Indeed, the aim of the Electricity Market Reform project (see Part 2 of this NPS for further details) is to review the role of the variety of Government interventions within the electricity market." C

**80** Thus, it is plain that, apart from indicating need for a *minimum* amount of new capacity by 2025, the references to need in EN-1 were not expressed in quantitative terms. That is said to be consistent with the market-based system under which electricity generation is provided and the other non-planning mechanisms by which Government seeks to influence the operation of the market. D

**81** Instead, EN-1 focuses on qualitative need such as functional requirements. Thus, para 3.1.1 states that the UK needs all types of energy infrastructure covered by the NPS in order to achieve energy security while at the same time dramatically reducing GHG. Paras 3.3.2–3.3.6 explain how those twin objectives should be addressed. E

**82** Paras 3.3.2–3.3.3 state:

> "3.3.2 The Government needs to ensure sufficient electricity generating capacity is available to meet maximum peak demand, *with a safety margin or spare capacity to accommodate unexpectedly high demand and to mitigate risks such as unexpected plant closures and extreme weather events. This is why there is currently around 85 gigawatts of total generation capacity in the UK, whilst the average demand across a year is only for around half of this.* F
>
> "3.3.3 The larger the difference between available capacity and demand (ie the larger the safety margin), the more resilient the system will be in dealing with unexpected events, and consequently the lower the risk of a supply interruption. This helps to protect businesses and consumers, including vulnerable households, from rising and volatile prices and, eventually, from physical interruptions to supplies that might impact on essential services." (Emphasis added.) G

H

**83** Para 3.3.4 explains the need for a diverse mix of all types of power generation, so as to avoid dependency on any one type of generation or source of fuel or power and to help ensure security of supply. The different types of electricity generation have different characteristics complementing each other:

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A "• fossil fuel generation can be brought on line quickly when there is high demand and shut down when demand is low, thus complementing generation from nuclear and the intermittent generation from renewables. However, until such time as fossil fuel generation can effectively operate with Carbon Capture and Storage ('CCS'), such power stations will not be low carbon (see section 3.6).

B • renewables offer a low carbon and proven (for example, onshore and offshore wind) fuel source, but many renewable technologies provide intermittent generation (see section 3.4); and

• nuclear power is a proven technology that is able to provide continuous low carbon generation, which will help to reduce the UK's dependence on imports of fossil fuels (see section 3.5). Whilst capable of responding to peaks and troughs in demand or supply, it is not as C cost efficient to use nuclear power stations in this way when compared to fossil fuel generation."

**84** Accordingly, in order to meet the twin challenges of energy security and climate change the Government "would like industry to bring forward many new low carbon developments, renewables, nuclear and fossil fuel generation with CCS" within the period up to 2025 (para 3.3.5). This section D then concludes in para 3.3.6 by bringing the reader back to the policy contained in section 3.1.2:

"Within the strategic framework established by the Government it is for industry to propose the specific types of developments that they assess to be viable. This is the nature of a market-based energy system. E The IPC should therefore act in accordance with the policy set out at in section 3.1 when assessing proposals for new energy NSIPs."

**85** Paras 3.3.10–3.3.12 address an important subject, namely the need for additional electricity capacity *to support* the required increase in supply from renewables. Para 3.3.11 explains:

F "An increase in renewable electricity is essential to enable the UK to meet its commitments under the EU Renewable Energy Directive. It will also help improve our energy security by reducing our dependence on imported fossil fuels, decrease greenhouse gas emissions and provide economic opportunities. However, some renewable sources (such as wind, solar and tidal) are intermittent and cannot be adjusted to meet G demand. As a result, the more renewable generating capacity we have the more generation capacity we will require overall, to provide back-up at times when the availability of intermittent renewable sources is low. If fossil fuel plant remains the most cost-effective means of providing such back-up, particularly at short notice, it is possible that even when the UK's electricity supply is almost entirely decarbonised we may still need fossil fuel power stations for short periods when renewable output H is too low to meet demand, for example when there is little wind."

This paragraph draws an important distinction between the capacity of a power station and the periods for which it is operational.

**86** Para 3.3.12 then makes a statement which was directly relevant to the present case: "It is therefore likely that increasing reliance on renewables will

mean that we need more total electricity capacity than we have now, with a larger proportion being built only or mainly to perform back-up functions."

**87** It will be recalled that para 3.1.3 of EN-1 says that the "scale" and "urgency" of the need for each type of infrastructure is indicated in the following sections of Part 3. Section 3.4 describes the important role of renewable electricity generation. Para 3.4.1 refers to the UK's commitment to producing 15% of its total energy from renewable sources by 2020. Para 3.4.5 states: "To hit this target, and to largely decarbonise the power sector by 2030, it is necessary to bring forward new renewable electricity generating projects as soon as possible. The need for new renewable electricity generation projects is therefore urgent."

**88** Section 3.5 addresses the role of nuclear power. It is a low-carbon, proven technology, which is anticipated to play an increasingly important role in the move to diversifying and decarbonising sources of electricity (para 3.5.1). According to para 3.5.2, "it is Government policy that new nuclear power should be able to contribute as much as possible to the UK's need for new capacity", before going on to acknowledge that it is not possible to predict whether or not there will be a reactor (or more than one reactor) at each of the eight sites identified in EN-6.

**89** Para 3.5.6 states that new nuclear power forms one of the three key elements of the strategy for moving towards a decarbonised, diverse electricity sector by 2050 comprising (i) renewables, (ii) fossil fuels with CCS and (iii) new nuclear capacity. With regard to "urgency of need", para 3.5.9 says that it is important that new nuclear power stations are constructed and start to generate electricity "as soon as possible and significantly earlier than 2025". In 2011 it was thought to be realistic for new nuclear power to begin to be operational from 2018.

**90** Section 3.6 of EN-1 deals with the role of fossil fuel electricity generation. Para 3.6.1 states:

> "Fossil fuel power stations play a vital role in providing reliable electricity supplies: they can be operated flexibly in response to changes in supply and demand, and provide diversity in our energy mix. They will continue to play an important role in our energy mix as the UK makes the transition to a low carbon economy, and Government policy is that they must be constructed, and operate, in line with increasingly demanding climate change goals."

**91** Para 3.6.2 states:

> "Fossil fuel generating stations contribute to security of energy supply by using fuel from a variety of suppliers and operating flexibly. Gas will continue to play an important role in the electricity sector—providing vital flexibility to support an increasing amount of low-carbon generation and to maintain security of supply."

**92** Para 3.6.3 states:

> "Some of the new conventional generating capacity needed is likely to come from new fossil fuel generating capacity in order to maintain security of supply, and to provide flexible back-up for intermittent renewable energy from wind. The use of fossil fuels to generate electricity produces atmospheric emissions of carbon dioxide. The

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A amount of carbon dioxide produced depends, amongst other things, on the type of fuel and the design and age of the power station. At present coal typically produces about twice as much carbon dioxide as gas, per unit of electricity generated. However, as explained further below, new technology offers the prospect of reducing the carbon dioxide emissions of both fuels to a level where, whilst retaining many of their existing advantages, they also can be regarded as low carbon energy sources."

B

This passage needs to be read together with paras 3.3.12 (see para 86 above) and 3.3.14 (see para 60 above).

**93** Para 3.6.4 explains the importance of carbon capture and storage ("CCS") which has the potential to reduce carbon emissions from fossil fuel generation by up to 90%. Whilst there is a high level of confidence C that CCS technology will be effective, there is uncertainty about its impact on the economics of power station operation and hence its development. CCS needs to be demonstrated on a commercial scale. Consequently, the Government was providing support for four commercial scale demonstration projects on coal-fired stations (paras 3.6.5 and 4.7.4). Para 3.6.6 requires all commercial fossil fuel power stations with a capacity over 300 megawatts to be constructed carbon capture ready ("CCR"). This requirement is explained D in more detail in paras 4.7.10–4.7.17 of EN-1.

**94** The need for fossil fuel electricity generation was addressed in para 3.6.8:

> "As set out in para 3.3.8 above, a number of fossil fuel generating stations will have to close by the end of 2015. Although this capacity may be replaced by new nuclear and renewable generating capacity in E due course, it is clear that there must be some fossil fuel generating capacity to provide back-up for when generation from intermittent renewable generating capacity is low and to help with the transition to low carbon electricity generation. It is important that such fossil fuel generating capacity should become low carbon, through development of CCS, in line with carbon reduction targets. Therefore there is a F need for *CCR fossil fuel generating stations* and the need for the CCS *demonstration* projects is *urgent*." (Emphasis added.)

**95** We have seen that paras 3.1.4 and 3.2.3 address the weight to be given to the contribution which a project makes to the need for a particular type of infrastructure. In the "Assessment Principles" in Part 4, para 4.1.2 sets out a presumption in favour of granting consent to applications for energy NSIPs:

G

> "Given the level and urgency of need for infrastructure of the types covered by the energy NPSs set out in Part 3 of this NPS, the IPC should start with a presumption in favour of granting consent to applications for energy NSIPs. That presumption applies unless any more specific and relevant policies set out in the relevant NPSs clearly indicate that consent should be refused. The presumption is also subject to the provisions of H the Planning Act 2008 referred to at para 1.1.2 of this NPS."

*EN-2*

**96** EN-2 applies to fossil fuel electricity generating infrastructure, including gas-fired power stations with a capacity over 50 megawatts (para

1.8.1). It is to be read in conjunction with EN-1, which covers inter alia the need and urgency for new energy infrastructure to be consented and built with the objective of contributing to a secure, diverse, and affordable energy supply and supporting the Government's politics on sustainable development, in particular by mitigating and adapting to climate change (para 1.3.1). Para 1.1.1 refers to the "vital role" played by fossil fuel generating stations in "providing reliable electricity supplies and a secure and diverse energy mix as the UK makes the transition to a low carbon economy".

**97** The Government's policy is to require a substantial proportion of the capacity of all new coal-fired stations to be the subject of CCS. It is expected that new stations of that type will retrofit CCS to their "full capacity" during the lifetime of the plant. Other fossil fuel generating stations are expected to be "carbon capture ready". All such stations will be required to comply with emissions performance standards (para 1.1.2).

*General legal principles*

**98** The general principles upon which the court may be asked under section 288 of the TCPA 1990 to review a planning appeal decision have been summarised in, for example, *Seddon Properties Ltd v Secretary of State for the Environment* (1978) 42 P & CR 26, 28 and *Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government* [2017] PTSR 1283, para 19. The basis upon which the court may review the legal adequacy of the reasons given in a decision has been explained more fully in *Save Britain's Heritage v Number 1 Poultry Ltd* [1991] 1 WLR 153 and *South Bucks District Council v Porter (No 2)* [2004] 1 WLR 1953. The same approach applies to a judicial review under section 118 of the PA 2008 to a decision on a DCO application, so long as the specific requirements of that statutory code are kept in mind.

**99** In *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] PTSR 221 the Supreme Court endorsed the legal tests in *Derbyshire Dales District Council v Secretary of State for Communities and Local Government* [2010] 1 P & CR 19 and *CREEDNZ Inc v Governor General* [1981] 1 NZLR 172, 182 which must be satisfied where it is alleged that a decision-maker has failed to take into account a material consideration. It is insufficient for a claimant simply to say that the decision-maker did not take into account a legally relevant consideration. A legally relevant consideration is only something that is *not* irrelevant or immaterial, and therefore something which the decision-maker is *empowered or entitled* to take into account. But a decision-maker does not *fail* to take a relevant consideration into account unless he was *under an obligation* to do so. Accordingly, for this type of allegation it is necessary for a claimant to show that the decision-maker was expressly or impliedly required by the legislation (or by a policy which had to be applied) to take the particular consideration into account, or whether on the facts of the case, the matter was so "obviously material", that it was irrational not to have taken it into account.

**100** It is also plain from the endorsement by the Supreme Court in *Samuel Smith*, at para 31, of *Derbyshire Dales*, para 28, and the cross-reference to *Bolton Metropolitan Borough Council v Secretary of State for the Environment* [2017] PTSR 1063 but solely to p 1071, that principles (2) and (6) in the judgment of Glidewell LJ in *Bolton*, at p 1072 (which were

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A relied upon in the claimant's skeleton under grounds 3 and 4) are no longer good law.

*Interpretation of policy*

**101** The general principles governing the interpretation of planning policy have been set out in a number of authorities, including *Tesco* B *Stores Ltd v Dundee City Council (Asda Stores Ltd intervening)* [2012] PTSR 983; *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] PTSR 623; *East Staffordshire Borough Council v Secretary of State for Communities and Local Government* [2018] PTSR 88; *R (Mansell) v Tonbridge and Malling Borough Council* [2019] PTSR 1452; *St Modwen Developments Ltd v Secretary of State for Communities and Local Government* [2018] PTSR 746; *Canterbury City Council v Secretary of State* C *for Communities and Local Government* [2019] PTSR 81; and *Samuel Smith* [2020] PTSR 221.

**102** These principles apply also to the interpretation of an NPS, as was held by Lindblom LJ in *Scarisbrick* [2017] EWCA Civ 787 at [19]:

> "The court's general approach to the interpretation of planning D 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] 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 JSC in *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] PTSR 623, E paras 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 JSC'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 F court (see para 18 of Lord Reed JSC's judgment in *Tesco v Dundee City Council*). But the role of the court should not be overstated. Even when dispute arises over the interpretation of policy, it may not be decisive in the outcome of the proceedings. It is always important to distinguish issues of the interpretation of policy, which are appropriate for judicial analysis, from issues of planning judgment in the application of that policy, which are for the decision-maker, whose exercise of planning G judgment is subject only to review on public law grounds (see paras 24–26 of Lord Carnwath JSC's judgment in *Hopkins Homes*). It is not suggested that those basic principles are inapplicable to the NPS—notwithstanding the particular statutory framework within which it was prepared and is to be used in decision-making."

**103** In *Samuel Smith* [2020] PTSR 221 the Supreme Court reinforced the H distinction between the proper scope of the legal interpretation of policy by the courts and the use of planning judgment in the application of policy. They did so when considering the concept of "openness" in paragraph 146 of the National Planning Policy Framework (2019), holding that the issue of whether visual effects may be taken into account is not a matter of legal principle. It is not a mandatory consideration which legislation or policy

requires to be taken into account. Instead, it is a matter of judgment for the decision-maker whether to have regard to that factor, subject to the legal test whether, in the circumstances of the case, it was so "obviously material" as to require consideration (paras 30–32 and 39).

**104** Planning policies should not be interpreted as if they were statutory or contractual provisions. They are not analogous in nature or purpose to a statute or a contract. Planning policies are intended to guide or shape practical decision-making, and should be interpreted with that purpose in mind. They have to be applied and understood by planning professionals and by the public to whom they are primarily addressed. Decision-makers are entitled to expect both national and local planning policy to be as clearly and simply stated as it can be and, however well or badly it may be expressed, the courts to provide a straightforward interpretation of such policy (*Mansell*, at para 41; *Canterbury*, at para 23; *Monkhill Ltd v Secretary of State for Housing, Communities and Local Government* [2020] PTSR 416, para 38).

*The Planning Act 2008*

**105** The Secretary of State and Drax relied upon the legal analysis by the Divisional Court in *Spurrier* [2020] PTSR 240, paras 99–112. This was not the subject of any criticism by the claimant.

**106** The merits of policy set out in a NPS are not open to challenge in the examination process or in the determination of an application for a DCO. That is the object of sections 87(3), 94(8) and 106(1).

**107** Furthermore, section 104(7) cannot be used to circumvent section 104(3), so, for example, where a particular NPS stated that there was a need for a particular project and ruled out alternatives, it was not permissible for that subject to be considered under section 104(7), even where a change of circumstance has occurred or material has come into existence after the designation of the NPS (see *Thames Blue Green Economy Ltd* [2015] EWHC 727 (Admin) at [8]–[9], [37]–[43] and [2016] JPL 157, paras 11–16; *Spurrier*, at paras 103–105 and 107).

**108** This inability to use section 104(7) to challenge the merits of policy in a NPS also precludes an argument that there has been a change in circumstance since the policy was designated so that reduced, or even no, weight should be given to it. Although that is a conventional planning argument in development control under the TCPA 1990, it "relates to the merits of policy" for the purposes of the PA 2008 and therefore is to be disregarded. The appropriate procedure for dealing with a contention that a policy, or the basis for a policy, has been overtaken by events, or has become out of date, is the review mechanism in section 6 (*Spurrier*, at paras 107–108).

**109** The NPS for Hazardous Waste considered in *Scarisbrick* [2017] EWCA Civ 787 is expressed in much more general terms than the highly specific NPS considered in *Thames Blue Green Economy*. Para 3.1 identified a national need for additional hazardous waste facilities and a range of technologies that could be put forward to meet that need. However, the NPS did not indicate the scale of the need to be met, whether on a national or any regional or local basis. It did not indicate how much weight should be given to need, unlike EN-1.

**110** The Hazardous Waste NPS was set in the context of the "waste hierarchy" in the Waste Framework Directive (Parliament and Council

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A Directive 2008/98/EC), which placed landfill at the bottom. There was to be a reduction in the use of landfill, which was only to be considered as a last resort. Nevertheless, the NPS identified a need for NSIPs falling within "generic types" which included hazardous waste landfill (*Scarisbrick*, paras 14–16). Para 4.1.2 of the NPS set out a presumption in favour of granting consent for hazardous waste NSIPs which clearly met the need established in the NPS. Potential benefits were said to include "the contribution" of B a project "to meeting the need for hazardous waste infrastructure" (para 4.1.3).

**111** The preclusive or presumptive effect of a NPS is dependent upon the wording of the policy and its proper interpretation, applying the principles set out above.

**112** The Court of Appeal held in *Scarisbrick* that the language of the NPS C established the need for *all*, not merely some, NSIPs falling within the generic types to which para 3.1 referred. The policy identified a general, qualitative need for such facilities. It did not define a quantitative need or set an upper limit to the number or capacity of the facilities required. It created a "general assumption" of need for the facilities identified, applicable to "every relevant project capable of meeting the identified need, regardless of the scale, capacity D and location of the development proposed". An applicant for a DCO was entitled to proceed on that basis (para 24). But the presumption in favour of granting consent was "not automatically conclusive of the outcome of a particular application" for a DCO. The balancing exercise in section 104(7) remained to be carried out (para 28). Given that the NPS in the *Scarisbrick* case did not prescribe the weight to be given to need, that weight remained to be assessed as a matter of planning judgment in the particular circumstances E of each case (para 31).

**113** In his decision letter in the *Scarisbrick* case the Secretary of State agreed with the examining authority that by para 3.1 of the NPS need was taken to be established for the proposed development and that the applicant had not been required to demonstrate a specific local or regional need. He gave "considerable weight" to the need identified in the NPS (paras 47– F 48).

**114** Mr Scarisbrick contended that the Secretary of State had misunderstood the NPS by treating it as requiring him to assume a need for a facility falling within the scope of the policy, irrespective of the size proposed and precluding any evaluation of evidence and submissions on the extent of the real need for the project proposed (para 53). The argument was similar to that advanced by ClientEarth in the present case.

G **115** The Court of Appeal rejected that argument. The examining authority and the Secretary of State had gone no further than to decide that the NPS had established a generic, qualitative need for the type of project proposed; without going on to say that the NPS identified a requirement for a facility of a particular size. The existence of that national need according to the policy did not depend upon the scale, capacity or location of the H facility proposed. The NPS did not set any target level of provision, or limit to the capacity or location of new facilities, leaving it to operators to use their judgment on those matters (paras 57–59). In my judgment, that NPS is similar to EN-1 in this respect.

**116** The Court of Appeal went on to hold that no legal criticism could be made of the Secretary of State for having given "considerable weight" to the

need established by the NPS. That had been a matter of planning judgment for him, subject only to a challenge on the grounds of irrationality (*Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, per Lord Hoffmann at p 780F). The court held that to give "considerable weight" to that need was consistent with the presumption in the NPS in favour of granting consent (a similar presumption to that contained in para 4.1.2 of EN-1). The Secretary of State had not increased that weight because of the large size of the project, nor had he treated the need established by the NPS as a conclusive or automatically overriding factor (paras 62–63 and 72). The court did not accept that the Secretary of State had been obliged to assess the individual contribution that the proposed development would make to meeting national need.

*Grounds 1 and 2*

**117** It is convenient to take these two grounds together.

*Ground 1*

**118** Under ground 1 the claimant submits that on a proper interpretation of EN-1 the decision-maker is required to assess the individual contribution that any particular project will make towards satisfying the general need for a type of infrastructure set out in the NPS. This is said to be based upon para 3.1.4 of EN-1, which accords substantial weight to the "contribution" which a project makes towards satisfying "this need" (i e the need described in paras 3.1.1–3.1.3), and para 3.2.3 which states that the weight attributable to need in any given case should be "proportionate" to that contribution. Mr Jones submits that the Secretary of State erred in law in deciding that there was no requirement for the individual need for the proposal to be assessed. The decision-maker wrongly assumed that because the proposal fell within one of the types of infrastructure said to be needed, it would necessarily contribute to that need for the purposes of EN-1. The claimant argues that a quantitative assessment was required by the NPS (paras 46, 52 and 74 of skeleton). It is also submitted that the Secretary of State misinterpreted para 3.2.3 of EN-1 by posing the question whether there was any reason for not giving substantial weight to the need for the proposal in accordance with para 3.1.4.

**119** Under ground 2, the claimant criticises DL 4.19–4.20 for failing to give legally adequate reasons for disagreeing with the Panel's conclusions as to why no weight should be given to the need for the proposed development (paras 7.2.4 and 7.2.7 of the Panel report). It is submitted that where the minister disagreed with specific findings of the Panel, she was under a heightened duty to provide "fuller" reasons for that disagreement, seeking to rely upon *Horada v Secretary of State for Communities and Local Government* [2016] PTSR 1271.

*The examination*

**120** In summary, the case for ClientEarth in the examination was that there was no need for the proposal, having regard to Government projections of energy infrastructure and consents already granted. Indeed, ClientEarth went so far as to say that "the UK does not need *any* new-build large gas power capacity to achieve energy security" (emphasis added) (paras 4.2.4 and 5.2.32–5.2.34 of the Panel's report).

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A **121** The Panel first considered whether the issue of the individual need for the proposal was a matter for the examination. Drax submitted that it was not, whereas the claimant said that it was relying upon para 3.2.3 of EN-1. The Panel asked Drax to justify the need for the proposal with regard to "national targets and UK energy need/demand", and the specific need for the proposed units X and Y (report para 5.2.12). Another objector, Biofuelwatch, relied upon para 3.3.18 of EN-1 to argue that it was implicit B in the NPS that "the assessment of need should be informed by the latest government models and projections alongside the NPS". Drax responded that material of that kind, and the issue of whether the weight given by policy to need should change, were matters for a future review under section 6 of the PA 2008, and not for determination through individual applications for DCO (para 5.2.14 of the report).

C **122** However, the Panel concluded that because EN-1 had been based on "a road map and direction of travel for future energy generation sources", it was necessary, when applying paras 3.1.3 and 3.2.3 of the NPS, to take account of the changes in energy generation capacity during the passage of time since its publication in 2011. Because the need to increase low carbon technology and to reduce the dependence on fossil fuels had "become D increasingly significant" over that period, the Panel concluded that it should consider current information on energy generation and the "individual contribution of the proposed development to meeting the overarching policy objectives of security of supply, affordability and decarbonisation" and hence to meeting the need for infrastructure (paras 5.2.22–5.2.26 of the report).

**123** In relation to security of supply the Panel concluded in summary that:

(i) Current models and projections, in particular BEIS's 2017 UEP, E "should be taken into account in determining the need for fossil fuel generation in the proposed development" (para 5.2.40).

(ii) Gas generation capacity for which consents had already been granted exceeded the capacity projected in the 2010 and 2017 UEP projections. Although not all that capacity was guaranteed to be delivered, the realistic likelihood was that "some" would be built out, thereby calling into question F the need for more fossil fuel development and, in particular, the proposal (paras 5.2.41–5.2.42).

(iii) The need for the proposed development was likely to be limited to "system inertia".[1*] Plants such as Drax may sometimes be brought on, ahead of, or as a replacement to, renewable generation, to maintain an adequate level of system inertia. This amounted to "low level need and urgency" (para 5.2.42). The need for the proposal was otherwise limited to G providing flexibility to support renewable energy generation (paras 5.2.42–5.2.43).

**124** The Secretary of State referred to the Panel's view that EN-1 drew a distinction between the need for energy NSIPs in general and the need for any particular development and so it had been appropriate to consider changes in energy generation since its publication in 2011 (DL 4.4–4.5). Having referred H to a number of policies in EN-1, the Secretary of State decided that the proposal was for a type of infrastructure to which EN-1 applied and so the presumption in para 4.1.2 in favour of granting consent applied (DL 4.9–

[*] *Reporter's note*. The superior figure in the text refers to the note at the end of the judgment on p 1766.

4.12). In DL 4.13 the Secretary of State explained why she considered that EN-1 continued to provide policies which are capable of facilitating, for the foreseeable future, the consenting of energy infrastructure on the scale and of the kinds necessary to meet the objectives of the NPS. In her view the policies in EN-1 took account of the need to achieve security of supply, affordability and decarbonisation at a high strategic level and there was no requirement for a decision-maker to assess whether a proposed development would meet an identified need for gas generation capacity by reference to those objectives. The Secretary of State then addressed issues relating to GHG emissions and decarbonisation (DL 4.14–4.17).

**125** She returned to the subject of need at DL 4.18–4.20 and DL 6.6:

> "4.18 The ExA's views on the need for the development and how this is considered in the planning balance have also been scrutinised by the Secretary of State. As set out above, paras 3.1.3 of EN-1, and the presumption in favour of the development already assume a general need for CCR fossil fuel generation. Furthermore, para 3.1.4 of EN-1 states: '*the [decision-maker] should give substantial weight to the contribution which projects would make towards satisfying this need when considering applications for development consent*.' The ExA recommends that no weight should be given to the development's contribution towards meeting this need within the overall planning balance. This is predicated on its view that EN-1 draws a distinction between the need for energy NSIPs in general and the need for any particular proposed development. The Secretary of State disagrees with this approach. The Secretary of State considers that applications for development consent for energy NSIPs for which a need has been identified by the NPS should be assessed on the basis that they will contribute towards meeting that need and that this contribution should be given significant weight.
>
> "4.19 The Secretary of State notes that para 3.2.3 of EN-1 states that '*the weight which is attributed to considerations of need in any given case should be proportionate to the anticipated extent of a project's actual contribution to satisfying the need for a particular type of infrastructure*'. The Secretary of State has, therefore, considered whether, in light of the ExA's findings, there is any reason why she should not attribute substantial weight to the development's contribution to meeting the identified need for new CCR fossil fuel generation infrastructure in this case. In particular, she has considered the ExA's views on the changes in energy generation since the EN-1 was published in 2011, and the implications of current models and projections of future demand for gas-fired electricity generation and the evidence regarding the pipeline of consented gas-fired infrastructure which the ExA considered to be relevant [ER 5.2.40–43].
>
> "4.20 The Secretary of State's consideration of the ExA's position is that (i) whilst a number of other schemes may have planning consent, there is no guarantee that these will reach completion; (ii) para 3.3.18 of EN-1 sets out that the updated energy and emissions projections (on which the ExA partially relies on to reach its conclusions on current levels of need) do not '*reflect a desired or preferred outcome for the Government in relation to the need for additional generating or the*

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A *types of electricity required*'; and (iii) para 3.1.2 of EN-1 explains that '*it is for industry to propose new energy infrastructure projects within the strategic framework set by Government. The Government does not consider it appropriate for planning policy to set target for or limits on different technologies*'. These points are reinforced elsewhere in EN-1, for example in paras 2.2.4 and 2.2.19, which explain that B the planning system will complement other commercial and market based mechanisms and rules, incentives and signals set by Government to deliver the types of infrastructure that are needed in the places where it is acceptable in planning terms—decisions on which consented energy schemes to build will therefore also be driven by these factors. In light of this, the Secretary of State does not accept that the ExA's findings on these issues should diminish the weight to be attributed C to the development's contribution towards meeting the identified need for CCR gas fired generation within the overall planning balance. The Secretary of State considers that this matter should be given substantial weight in accordance with para 3.1.4 of EN-1. The Secretary of State's overall conclusions on the planning balance are set out at paras 6.1–6.14 below."

D "6.6 The Secretary of State considers that the ExA's interpretation of the need case set out in the NPSs is incorrect. In taking the position it did on need and GHG emissions, the ExA arrived at a position where it recommended that consent for the development should be refused. The Secretary of State considers that the NPSs support the case for new energy infrastructure in general and, in particular, the need for new CCR fossil fuel generation of the kind which the development E would provide. While acknowledging the GHG emissions from the development, the generating capacity of the development in either two- or one-unit configurations is a significant argument in its favour, with a maximum of 3.8 gigawatts possible if the applicant builds out both gas-fired and battery storage units as proposed. Therefore, the Secretary of State considers, that the development would contribute to meeting F the identified need for CCR fossil fuel generation set out in the NPS and that substantial weight should be given to this in the planning balance." (Emphasis in original.)

*Analysis*

G **126** The essential issue under ground 1 is whether the Secretary of State misinterpreted EN-1 when she rejected the Panel's view that the NPS draws a distinction between the need for energy NSIPs in general and the need for any particular proposed development (DL 4.18). She added that applications for a DCO for energy NSIPs for which a need has been identified in EN-1 should be assessed on the basis that they will contribute towards meeting that need and that contribution should be given significant weight. Nonetheless, the H Secretary of State went on to consider whether the Panel's findings provided any reason for not giving that weight to the proposal (DL 4.19–4.20).

**127** It is common ground between the parties that the interpretation and legal effect of the NPS in order to resolve the issue under ground 1 are objective questions of law for the court. I have summarised relevant principles in paras 101–116 above.

**128** The claimant's argument places great emphasis upon the use of the word "contribution" in paras 3.1.4 and 3.2.3 of EN-1 in order to justify a requirement that the need for a proposed project should be individually assessed. The claimant goes so far as to contend that that individual need must be assessed on a quantitative basis (see para 118 above). Indeed, it is necessary for the claimant to advance this argument because the Panel's reasoning, with which the Secretary of State disagreed, was based upon its quantitative assessment (see report at paras 5.2.40–5.2.42, 7.3.2 and 7.3.14). The Panel considered that the evaluation of need for this project should be based upon the changes in generation capacity since 2011, the latest UEP projections, and the "pipeline" of consented gas-fired infrastructure.

**129** But it is necessary to read EN-1 as a whole, rather than selectively. It is plain that the NPS (as summarised in paras 53–97 above) does not require need to be assessed in quantitative terms for any individual application. The only quantitative assessments in the document related to the need to replace certain fossil-fuel plant and the estimate of a *minimum* need requirement for new-build capacity by the "interim milestone" of 2025, along with the broad statement that overall generating capacity might need to be doubled or trebled by 2050 (see paras 73–78 above). It is not suggested that either ClientEarth or the Panel sought to relate the capacity of the Drax proposal to any of those matters.

**130** The NPS does not set out a general requirement for a quantitative assessment of need in the determination of individual applications for DCOs. Putting to one side the "interim milestone" which did not feature in the discussion in this case, there are no benchmarks against which a quantitative analysis (eg consents in the pipeline or projections of capacity) could be related. Indeed, the document makes it clear that the 2010 UEP projections should not be taken as expressing "a demand or preferred outcome" in relation to need for additional generating capacity or types of generation required (para 3.3.18). Para 3.3.20 explained that those projections assumed that electricity demand would be no greater in 2025 than in 2011, but went on to add that that demand could be underestimated as moves to decarbonise may lead to increased use of electricity (see eg para 60 above). Both paras 3.1.2 and 3.3.24 make it plain that it is not the function of planning policy to set targets or limits for different technologies and the 2010 UEP figures were not to be used for that purpose (see paras 75–80 above). As Mr Tait explained, EN-1 adopts a market-based approach and relies in part upon market mechanisms for the delivery of desired objectives.

**131** Given those clear statements of policy in EN-1 there was no justification for the Panel to have regard to the 2017 UEP projections in order to assess the contribution of the Drax proposal to meeting the qualitative need identified in the NPS. Likewise, an analysis of the consents for gas-fuelled power stations was irrelevant for that purpose. Moreover, the Panel's assessment was benchmarked against the 2017 UEP projections, which self-evidently do not form the basis for the policy contained in EN-1.

**132** The case advanced by ClientEarth was a barely disguised challenge to the merits of the policy. As we have seen, they contended that because of what had taken place since 2011 there was no need for any future new large gas-fuelled power stations to be built. Indeed, the conclusions reached by the Panel would be equally applicable to any other similar proposal. That flies in the face of EN-1 which states that there is a qualitative need for such

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A development, for example the vital contribution it makes to the provision of reliable electricity supplies (para 3.6.1), security of energy supply from different sources and vital flexibility to support an increasing amount of low-carbon generation (para 3.6.2). ClientEarth's case and the conclusions of the Panel effectively involved rewriting those and other passages (eg para 3.6.8). Consequently, whereas EN-1 specifically gives substantial weight to the qualitative need it establishes, the logic of the Panel's reasoning led them to B give effectively no weight to that need.

**133** Mr Jones described the role of the proposed development as merely to provide back-up to renewable sources (referring to paras 5.2.39 and 5.2.42 of the Panel's report). But paras 3.3.11 and 3.3.12 of EN-1 explain the importance given to that role (see paras 85–86 above). The Secretary of State had those matters well in mind (see eg DL 4.10). The Secretary of State C assessed the contribution which the proposed development would make to need in terms of both function and scale (eg DL 4.12–4.13, 4.18–4.20, 5.5, 6.6 and 6.9).

**134** Whatever may be the merits of ClientEarth's arguments which found favour with the Panel (something which it is not for this court to consider), they were not matters which should have been taken into account in the D examination (section 87(3) of the PA 2008). Instead, these arguments about the current or continuing merits of the policy on need could be relevant to any decision the Secretary of State might be asked to make on whether or not to exercise the power to review the NPS under section 6 of the PA 2008. No such decision has been taken and this claim has not been brought as a challenge to an alleged failure to act under section 6.

**135** The effect of the interpretation of EN-1 advanced by ClientEarth, E and accepted by the Panel, is that any applicant for a DCO for gas-fuelled power generation would need to demonstrate a quantitative need for the development proposed. Indeed, because paras 3.1.3 and 3.2.3 of the NPS apply to all types of energy infrastructure, their interpretation would apply across the board. There is no reason to think that that could have been the object of these policies. It would run counter to the thinking which lay behind F the introduction of the PA 2008 and the energy NPSs. EN-1 has not been drafted in such a way as to produce that result.

**136** The Panel considered that all that EN-1 established was that "the principle of need for energy NSIPs in general is not for debate" but it was appropriate to consider the specific need for the development proposed "because of the evidence presented into this examination" (paras 5.2.23 and 5.2.69). Thus, in para 5.2.24 they considered that because the evidence G showed that energy generation is moving to lower carbon sources, in line with the policy objective in EN-1 requiring transition to a low-carbon economy over time, "it follows that requirements from each energy NSIPs must too continually change with time, to reflect the transitioning energy market". I do not accept the proposition that the proper interpretation of a policy such as a NPS, an objective question of law, depends on the evidence H which happens to be presented in one particular examination.

**137** It may well be that the Panel thought that they had moved on to the *application* of policy in EN-1. That, of course, is a separate matter which should not be elided or confused with the interpretation of policy (*Tesco Stores Ltd v Dundee City Council* [2012] PTSR 983, paras 18–19; *Hopkins* [2017] PTSR 623, para 26; *Scarisbrick* [2017] EWCA Civ 787 at

[19]; and *Samuel Smith* [2020] PTSR 221, paras 21–22). But the problem with the Panel's approach is that it begs the prior question whether they had understood EN-1 correctly. Here, EN-1 contained no language to indicate that the "requirements" or "needs" for each type of energy NSIP set out in EN-1 should be reassessed from time to time, in the consideration of individual applications for a DCO, or were dependent upon quantitative need being shown. That approach would amount to a revision of the policy and belongs to the process of review under section 6.

**138** The policy on need in EN-1 is analogous to that considered in *Scarisbrick*. Mr Jones sought to support the claimant's interpretation of the need policies in EN-1 by referring also to para 4.1.3 which provides that in "considering any proposed development" the Secretary of State should take into account (inter alia) "its contribution to meeting the need for energy infrastructure" (skeleton argument, para 30). This may have been the passage which the Panel had in mind in paras 5.2.23 and 5.2.69 of their report. But it does not support their approach to the policy on need. The same policy appeared in the NPS considered in *Scarisbrick* (see para 17) and yet the Court of Appeal rejected the argument of the claimant in that case, that the NPS required the Secretary of State to assess project-specific need when determining an application for a DCO. The policy created a "general assumption of need" for all infrastructure proposals of a type falling within its ambit, to which the Secretary of State had been entitled to give considerable weight (paras 24, 53 and 57–59—see paras 112–116 above).

**139** In *Scarisbrick* the Court of Appeal also stated that the weight to be given to the "general assumption" of need established by the NPS was a matter to be evaluated in each case, but in that case the policy did not prescribe the weight to be given to the identified need (para 31). Here, EN-1 is different, in that it expressly provides that "substantial weight" is to be given to the contribution which a project makes to that need (para 3.1.4). The "need" is that defined in para 3.1.3 which is said to be described in the following sections in terms of "scale" and urgency for each type of infrastructure. Given that EN-1 does not set targets or limits for different types of technology, "scale" could only refer to the expression of *minimum* need by the "interim milestone" of 2025 (paras 3.3.16 and 3.3.22–3.3.24), which was not in play in this challenge.

**140** The other factor referred to in para 3.1.3 is "urgency of need". So, for example, para 3.5.9 refers to the importance of new nuclear power stations being constructed as soon as possible and significantly earlier than 2025. Similarly, para 3.4.5 states that it is necessary to bring forward renewable generating projects as soon as possible. The importance of fossil fuelled power stations is explained in section 3.6 of EN-1. In that context para 3.3.12 explains that increasing reliance on renewables will mean that total electricity capacity will need to increase, with "a larger proportion being built *only or mainly* to perform back-up functions" (see also para 3.3.14).

**141** Para 3.2.3 does not alter this analysis. It states that the weight attributable to need in any given case should be proportionate to the extent to which the project would actually contribute "to satisfying *the need for a particular type of infrastructure*" (emphasis added). It does not call for that contribution to be assessed relative to the need for each type of infrastructure covered by EN-1. Para 3.2.3 is therefore entirely consistent with paras 3.1.3 and 3.1.4. The need for fossil fuel generation is dealt with by reference

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A to section 3.6 and related paras which describe the role played by that technology. Para 3.2.3 does not require an assessment of quantitative need for gas-fired generation. Bearing in mind that EN-1 does not express the need for energy infrastructure in quantitative terms (other than figures given for the 2025 "interim milestone"), the words "proportionate", "extent" and "contribution" are consistent with need being assessed in qualitative terms.

B **142** For these reasons, the interpretation of EN-1 for which ClientEarth has contended, and which the Panel accepted, and upon which ground 1 is dependent, must be rejected. The Secretary of State was entirely correct to dismiss that approach at DL 4.13 and 4.18.

**143** The claimant raises a subsidiary issue criticising DL 4.19 in which the Secretary of State went on to apply the last sentence of para 3.2.3 of EN-1 by asking whether, in the light of the Panel's findings, there C was "any reason why she should not attribute substantial weight to the development's contribution to meeting the identified need for new CCR fossil fuel generation infrastructure in this case". The claimant submits that this involved asking the wrong question or applying the wrong policy test; in other words something which was not compatible with EN-1.

**144** There is nothing in this point. The Secretary of State's decision did D not involve increasing the weight attributed to need beyond "substantial". Logically therefore, she devoted her reasoning in the circumstances of this case to the merits of the arguments as to why that weight should be *reduced*. That was an entirely proper approach to take to paras 3.14 and 3.2.3 of EN-1 in the context of the issues which were raised before her in this case.

**145** For all these reasons ground 1 must be rejected.

E *Ground 2*

**146** I cannot accept the claimant's submission that the Secretary of State's decision to disagree with the Panel's conclusions gave rise to a heightened obligation to give fuller reasons (see para 119 above). True enough, *Horada* [2016] PTSR 1271 was a case where the Secretary of State disagreed with the reasons given by the inspector for recommending that the compulsory F purchase order should not be confirmed, but the Court of Appeal did not lay down any more stringent test for judging the legal adequacy of his reasoning than is generally applied. That would have been inconsistent with the decision of the House of Lords in the *Save* case (see Lord Bridge of Harwich at [1991] 1 WLR 153, 165H–166H and see also the Court of Appeal in *Allen v Secretary of State for Communities and Local Government* [2016] G EWCA Civ 767 at [19]). It would also be inappropriate to judge the adequacy of the reasoning in the decision letter in this case by making a comparison with that criticised by the Court of Appeal in *Horada*, an exercise which the Court of Appeal firmly discouraged in *Mordue v Secretary of State for Communities and Local Government* [2016] 1 WLR 2682, para 27.

**147** I accept the submission made for the Secretary of State and for Drax that if, as I have concluded, the Panel's interpretation of EN-1 was wrong H and that of the Secretary of State was correct, then ground 2 adds nothing to ground 1. The Secretary of State had no need to address the reasons given by the Panel for attributing no weight to the case on need, because they involved discounting that need by reference to a quantitative assessment.

**148** In saying that, I acknowledge that the Panel did also rely upon one qualitative aspect, namely their view that "the need for the proposed

development in the context of the consented gas generation capacity, is likely to be limited to system inertia" which they treated as showing "low level need and urgency" (para 5.2.42). They subsequently broadened that to add "flexibility to support renewable energy generation" (paras 5.2.43 and 5.2.71). Mr Jones submits that the Secretary of State failed to address that factor in DL 4.20. *A*

**149** In a reasons challenge, there is a single indivisible question, namely whether the claimant has been substantially prejudiced by an inadequacy in the reasons given (*Save*, at p 167D). In other words, it is insufficient for a claimant simply to show one of the examples of "substantial prejudice" given by Lord Bridge at p 167F–H. In addition, it must be shown that the reasons given may well conceal a public law error, or that they raise a substantial doubt as to whether the decision is free from any flaw which would provide a ground for quashing the decision (p 168B–E). *B* *C*

**150** It is plain from the cross-reference at the end of DL 4.19 to the Panel's report that the Secretary of State had well in mind their views on the function or role of the proposed development. It cannot be said that there is anything to indicate a substantial doubt about whether she had regard to that matter. Furthermore, I accept the Secretary of State's submission that this factor is built into the relevant parts of EN-1. That is plain from the analysis of the NPS set out earlier in this judgment. The Secretary of State made that very point in DL 4.13. She even referred specifically to the proposed battery storage units and the "important role" they play under EN-1, reinforcing her conclusion on weight in DL 4.20 (see DL 5.5). There is nothing in the claimant's criticism. *D*

**151** As the claimant pointed out (para 67 of the skeleton argument), the three quantitative aspects of the Panel's findings were concerned with: (i) changes in energy generation capacity since 2011; (ii) the implications of current models and projections of future demand for gas-fired electricity generation; and (iii) the pipeline of consented gas-fired infrastructure. *E*

**152** Although the Secretary of State was under no legal obligation to give further reasons on these matters because (as I have already explained) they all arose from the Panel's misinterpretation of EN-1, which she had already addressed, and moreover they involved questioning the merits of NPS policy, she nonetheless gave legally adequate reasoning on each of them in DL 4.20. This was sufficient to enable a participant in the examination, familiar with the issues, to understand why the Secretary of State did not consider that all or any of these matters justified reducing the weight to be given to the need for the proposal. She was entitled to do so by relying (in part) upon relevant passages in EN-1, which she correctly understood. In relation to point (iii), it is obvious from DL 4.20 that the Secretary of State was treating the uncertainty about the implementation of consents previously granted as a significant factor. *F* *G*

**153** For the reasons set out above ground 2 must be rejected.

*Ground 3* *H*

**154** This ground is concerned with the way in which the Secretary of State treated the assessment of GHG emissions from the proposed development, having regard to EN-1 and EN-2.

**155** Para 5.2.2 of EN-1 states:

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A "$CO_2$ emissions are a significant adverse impact from some types of energy infrastructure which cannot be totally avoided (even with full deployment of CCS technology). However, given the characteristics of these and other technologies, as noted in Part 3 of this NPS, and the range of non-planning policies aimed at decarbonising electricity generation such as EU ETS (see section 2.2 above), Government has determined that $CO_2$ emissions are not reasons to prohibit the B consenting of projects which use these technologies or to impose more restrictions on them in the planning policy framework than are set out in the energy NPSs (eg the CCR and, for coal, CCS requirements). Any ES on air emissions will include an assessment of $CO_2$ emissions, but the policies set out in section 2, including the EU ETS, apply to these emissions. The IPC does not, therefore need to assess individual C applications in terms of carbon emissions against carbon budgets and this section does not address $CO_2$ emissions or any Emissions Performance Standard that may apply to plant."

**156** Para 2.5.2 of EN-2 states:

D "$CO_2$ emissions are a significant adverse impact of fossil fuel generating stations. Although an ES on air emissions will include an assessment of $CO_2$ emissions, the policies set out in section 2.2 of EN-1 will apply, including the EU ETS. The IPC does not, therefore need to assess individual applications in terms of carbon emissions against carbon budgets and this section does not address $CO_2$ emissions or any Emissions Performance Standard that may apply to plant."

E

**157** The Panel addressed GHG emissions primarily in section 5.3 of their report. They concluded that the percentage increase in these emissions from the baseline position would lie somewhere between the estimates presented by ClientEarth and by Drax. They acknowledged that it was difficult to establish an accurate baseline in view of the wide range of assumptions F involved and the potential for rapid changes over a relatively long time frame (para 5.3.22). It had been agreed between the parties at the examination that the total percentage increase in emissions, as estimated in the ES produced by Drax, should be treated as "a significantly adverse effect". Consequently, the Panel concluded that their finding indicated an impact of greater severity and that this was a negative factor in the planning balance (paras 5.3.27–5.3.28, G 7.2.11 and 7.3.6). They added that whether the DCO should be granted turned on the balancing exercise under section 104(7) (para 7.3.7).

**158** When the Panel came to consider the application of section 104 of the PA 2008, they identified firstly a number of positive benefits, namely biodiversity, socioeconomics and the reuse of existing infrastructure which attracted "significant weight" (paras 7.3.11–7.3.12). They then identified various factors which were judged to have a neutral effect (para 7.3.13). H Finally, they brought together the negative impacts of the proposal in para 7.3.14: (i) the decarbonisation objective would be undermined by increasing gas-fired capacity where that already exceeds UEP forecasts; (ii) a significant increase in GHG emissions would have a significant adverse effect on climate change; (iii) the development would have a significant adverse effect on landscape and visual receptors.

**159** The Panel attached "considerable weight" to (i) and (ii), but they said that (iii) had "not weighed heavily" in their overall conclusions. The Panel struck the overall balance in para 7.3.15, concluding that factors (i) and (ii) outweighed the benefits of the proposal. In reaching that judgment they relied upon their assessment that the *actual* contribution that would be made by the proposed development to need was "minimal" and so no significant weight should be given to that matter.

**160** It is therefore apparent that the Panel's overall conclusion turned on the significance they attached to the UEP projections compared to consented capacity and the implications that had for their assessment of the proposal's contribution to need and the decarbonisation objective, weighed against the benefits of the proposal.

**161** In her decision letter the Secretary of State noted at DL 4.15 the explanation in section 2.2 of EN-1 as to how climate change and GHG has been taken into account in the preparation of the Energy NPSs (see paras 60–70 above). She then quoted para 5.2.2 of EN-1.

**162** In DL 4.16 and 4.17 she stated:

> "4.16 This policy is also reflected in para 2.5.2 of EN-2. It is the Secretary of State's view, therefore, that, while the significant adverse impact of the proposed development on the amount of greenhouse gases that will be emitted to atmosphere is acknowledged, the policy set out in the relevant NPSs makes clear that this is not a matter that that should displace the presumption in favour of granting consent.
>
> "4.17 In light of this, the Secretary of State considers that the development's adverse carbon impacts do not lead to the conclusion that the development is not in accordance with the relevant NPSs or that they would be inconsistent with the CCA. The Secretary of State notes the need to consider these impacts within the overall planning balance to determine whether the exception test set out in section 104(7) of the 2008 Act applies in this case. The ExA considers that the development will have significant adverse impacts in terms of GHG emissions which the Secretary of State accepts may weigh against it in the balance. However, the Secretary of State does not consider that the ExA was correct to find that these impacts, and the perceived conflict with NPS policy which they were found to give rise to, should carry determinative weight in the overall planning balance once the benefits of the project are properly considered, including in particular its contribution towards meeting need as explained below."

**163** It is important to note that in the middle of DL 4.17 the Secretary of State accepted that GHG emissions did represent "significant adverse impacts" which could be weighed in the balance against the proposed development. But she considered that once the project's contribution to policy need and, thus its overall benefits, were correctly evaluated, the adverse carbon and GHG impacts were not determinative. In other words, she considered that the weight to be given to those disbenefits was outweighed by the benefits of the proposal. The submission in para 89 of the claimant's skeleton that the Secretary of State did not weigh the GHG impacts in that manner fails to read the paragraph as a whole and instead focuses unrealistically on a single word "may". That approach to reading the decision letter involves excessive legalism of the kind deprecated in a number

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A of authorities, including *East Staffordshire Borough Council v Secretary of State for Communities and Local Government* [2018] PTSR 88, para 50.

**164** In DL 6.6 (quoted in para 125 above) the Secretary of State returned to the subject of need and went on to address GHG emissions and the overall balance in DL 6.7:

> "In assessing the issue of GHG emissions from the development and B the ExA's conclusions in this matter, the Secretary of State notes that the Government's policy and legislative framework for delivering a net zero economy by 2050 does not preclude the development and operation of gas-fired generating stations in the intervening period. Therefore, while the policy in the NPS says GHG emissions from fossil fuel generating stations are accepted to be a significant adverse impact, the NPSs also say C that the Secretary of State does not need to assess them against emissions reduction targets. Nor does the NPS state that GHG emissions are a reason to withhold the grant of consent for such projects. It is open to the Secretary of State to depart from the NPS policies and give greater weight to GHG emissions in the context of the Drax application but there is no compelling reason to do so in this instance."

D **165** In summary, the claimant criticises the decision letter on the grounds that the Secretary of State misinterpreted EN-1 as requiring the decision-maker to treat the GHG emissions of the proposal either as irrelevant or as having no weight.

*Analysis*

E **166** Treating a consideration as irrelevant is not the same thing as giving it no weight. As Lord Hoffmann pointed out in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 780F–G, there is a distinction between deciding whether a consideration is relevant, which is a question of law for the court, and deciding how much weight to give to a relevant consideration which is a question of fact for the decision-maker. If a consideration is relevant, it is entirely a matter for the decision-maker F (subject only to *Wednesbury* irrationality (see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223)) to determine how much weight to give to it, which includes giving no weight to it. A determination that no weight should be given to a matter does not mean that it has been treated as legally irrelevant.

**167** In fact, it is plain from the passages in the decision letter to which I G have already referred that the Secretary of State did not treat GHG emissions as irrelevant, nor did she treat them as something to which no weight should be given. In DL 4.17 the Secretary of State moved from her conclusions on section 104(3) and section 104(5) to considering the balance under section 104(7). She accepted that the Panel's finding on the significant adverse impacts of GHG emissions from the development could be weighed in the balance against the proposal. But she disagreed with the Panel's evaluation H of the benefits of the proposal, including its contribution towards meeting policy need. Once those benefits were correctly weighed, she found that the impact of GHG emissions should not "carry determinative weight in the overall planning balance". That can only mean that the disbenefits did not carry more weight than the benefits. Rather, it was the other way round. Thus, in DL 4.17 the Secretary of State was describing a straightforward

balancing exercise which was in no way dependent upon the terms of paras 5.2.2 of EN-1 or 2.5.2 of EN-2. She returned to this exercise in DL 6.3–DL 6.9.

**168** The claimant's criticisms are really directed at the Secretary of State's reliance upon EN-1 and EN-2 in DL 4.16 and DL 6.7. It should be noted, however, that DL 4.16 forms part of the Secretary of State's reasoning in support of the conclusion that the proposal accorded with the NPSs for the purposes of section 104(3), not the balancing exercise under section 104(7). On the other hand, DL 6.7 formed part of the balancing exercise under section 104(7) carried out between DL 6.3 and DL 6.9.

**169** Before examining the passages in the decision letter criticised by the claimant, it is necessary to consider the meaning of the relevant policies in the NPS. Para 5.2.2 of EN-1 plainly states that the $CO_2$ emissions from a proposed energy NSIP do not provide a reason for refusing an application for a DCO. The rationale for that statement is that such emissions are adequately addressed by the regimes described in section 2.2 of EN-1. There has been no challenge to the legality of that part of EN-1. Any such challenge would now be precluded by the ouster clause in section 13(1) of the PA 2008.

**170** In any event, I do not see how it could be legally objectionable for a NPS to state that a particular factor is insufficient by itself to justify refusal of a planning consent because it is addressed by other regimes. Section 5(5)(c) enables a NPS to prescribe how much weight is to be given to a particular factor in a decision on a DCO application, which could include giving no weight to it. The approach in para 5.2.2 is also supported by established case law on the significance of alternative systems of control (see eg *Gateshead Metropolitan Borough Council v Secretary of State for the Environment* (1994) 71 P & CR 350) and, to some extent, by regulation 21(3)(c) of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (see ground 6 below).

**171** In DL 4.16 the Secretary of State merely said that the policy in the NPSs makes it clear that GHG emissions are "not a matter which should displace the presumption in favour of granting development". That was a reference to the presumption in para 4.1.2 of EN-1 (see para 95 above). Given that EN-1 also states that the matter of GHG emissions should not itself be treated as a reason for refusal, it is plain that that would not be sufficient to override the presumption in para 4.1.2 of EN-1. The Secretary of State's reliance upon those NPS policies in that way when considering the application of section 104(3) of the PA 2008 is wholly unobjectionable.

**172** In DL 6.7 the Secretary of State was in the midst of carrying out the exercise required by section 104(7). No criticism can be made of either of her statements that (a) she did not need to assess GHG emissions against emissions reduction targets or (b) such emissions are not a reason for refusing to grant consent. They accurately summarise relevant parts of para 5.2.2 of EN-1 and para 2.5.2 of EN-2. Neither of those policies treat GHG emissions as an irrelevant consideration in a DCO application or as a disbenefit to which no weight may be given. The Secretary of State did not suggest otherwise in her decision letter, either in her reliance upon those policies or in her treatment of the subject.

**173** For all these reasons ground 3 must be rejected.

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A *Ground 4*

**174** ClientEarth submits that the Secretary of State failed to comply with her obligation under section 104(7) of the PA 2008 to weigh the adverse impact of the proposed development against its benefits. Instead, the Secretary of State merely repeated the assessment she had already carried out under section 104(3). It is said that she unduly fettered her discretion on the B issue posed by section 104(7) by looking at that matter exclusively through the lens of the NPSs.

**175** ClientEarth accepts (skeleton argument, paras 106–107) that policy contained in the NPSs is relevant to the exercise under section 104(7), for example the statement of national need (see *Thames Blue Green Economy* [2016] JPL 157, para 16). However, the claimant criticises the decision taken C in this case because the same approach was taken to (i) need at DL 6.6 (see para 125 above) and (ii) GHG emissions at DL 6.7 (see para 164 above) as had previously been applied in the consideration of NPS policies under section 104(3) (skeleton argument, para 109). ClientEarth submits that the same policy tests should not be applied when section 104(7) is considered.

*Analysis*

D

**176** The relationship between section 104(3) and (7) should also be considered in the context of sections 87(3) and 106(2). The object of the latter provisions is that matters settled by a NPS which has been subjected to SEA and has satisfied all the procedural requirements of the legislation should not be revisited or reopened in the DCO process. Where the Secretary of State considers it appropriate, policy in an NPS can be reviewed under section 6 E of the PA 2008, a process which is subject to the same requirements for inter alia SEA, consultation, public participation and parliamentary scrutiny. That statutory scheme also avoids policy being made ad hoc or even "on the hoof". Section 104(7) may not be used to circumvent the application of sections 87(3), 104(3) and 106(2) (*Thames Blue Green Economy* in the High Court and the Court of Appeal; *Spurrier* [2020] PTSR 240, paras 103–108).

F **177** For the reasons I have already given under ground 1, both ClientEarth and the Panel misunderstood the policy in EN-1 on need. The Secretary of State was legally entitled to reject their approach and to give "substantial weight" to the need case in accordance with the NPS. As *Thames Blue Green Economy* confirms (eg Sales LJ at para 16), the Secretary of State was fully entitled to take that assessment into account under section 104(7). No G possible criticism can be made of DL 6.6.

**178** As we have seen under ground 3, EN-1 and EN-2 do not state that GHG emissions may not be taken into account in the DCO process. They do not prescribe how much weight should be given to such emissions as a disbenefit, except to say that this factor does not in itself justify a refusal of consent, given the other mechanisms for achieving decarbonisation. The NPSs proceed on the basis that there is no justification in *land use planning* H *terms* for treating GHG emissions as a disbenefit which in itself is dispositive of an application for a DCO.

**179** In DL 6.7 the Secretary of State repeated these considerations, as she was entitled to do. She also stated that GHG emissions are treated in the NPS as a significant adverse impact (see EN-2 para 2.5.2) and then went on to consider whether, in the section 104(7) balance, that factor should be given

greater weight in the case of the Drax proposal. The NPSs did not preclude that possibility, so long as GHG emissions were not treated as a freestanding reason for refusal. In this case the proposal also gave rise to landscape and visual impacts which were treated as further disbenefits (DL 6.5 and 6.8). Plainly the suggestion that the Secretary of State looked at the balance under section 104(7) solely through the lens of, or improperly fettered by, the NPSs is untenable.

**180** The Secretary of State decided not to give greater weight to GHG emissions because she found there to be "no compelling reason in this instance". ClientEarth criticises that phrase as improperly introducing a "threshold test". Once again, this is an overly legalistic approach to the reading of the decision letter. The Secretary of State was simply expressing a matter of planning judgment. She was simply saying that there was no sufficiently cogent reason for giving more weight to this matter. She was entitled to exercise her judgment in that way. The Secretary of State then went on to weigh all the positive and negative effects of the proposal before concluding that the benefits outweighed the adverse effects of the proposal (DL 6.9).

**181** For all these reasons, ground 4 must be rejected.

*Ground 5*

**182** ClientEarth submits that the Secretary of State failed to assess the compliance of the proposal with policy requirements for CCR contained primarily in EN-1 in particular the economic feasibility of CCS forming part of the development during its lifetime.

**183** These policy requirements are based upon article 33 of Parliament and Council Directive 2009/31/EC of 23 April 2009 on the geological storage of carbon dioxide (OJ 2009 L140, p 114), which inserted article 9a into Parliament and Council Directive 2001/80/EC on the limitation of emissions of certain pollutants into the air from combustion plants (OJ 2001 L309, p 1) ("the Large Combustion Plants Directive"). These provisions have been transposed into domestic law by the Carbon Capture Readiness (Electricity Generating Stations) Regulations 2013 (SI 2013/2696) ("the 2013 Regulations"). No criticism is made of that transposition.

**184** The effect of regulation 3(1) is that the Secretary of State may not make a development consent order for the construction of a "combustion plant" (as defined) with a rated electrical output of 300 megawatts or more unless she has determined whether "the CCR conditions" are met in relation to that proposal. The Drax proposal engaged this provision. Regulation 2(2) defines how the CCR conditions are to be met:

> "For the purposes of these Regulations, the CCR conditions are met in relation to a combustion plant, if, in respect of all of its expected emissions of $CO_2$— (a) suitable storage sites are available; (b) it is technically and economically feasible to retrofit the plant with the equipment necessary to capture that $CO_2$; and (c) it is technically and economically feasible to transport such captured $CO_2$ to the storage sites referred to in sub-paragraph (a)."

**185** So it is necessary for it to be shown that sites suitable for the storage of carbon dioxide emissions from the plant are available, and that it is technically and "economically feasible" to retrofit the plant necessary to

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A capture those emissions and to transport them to those storage sites. When the Directive and Regulations were passed the practical and commercial feasibility of CCS technology had not been demonstrated. Hence, it is necessary to reserve land for that purpose and to consider the retrofitting of the technology. This demonstration of technical and economic feasibility involves looking into the future.

B **186** Regulation 3(2) requires that the Secretary of State's determination under regulation 3(1) be made on the basis of a CCR assessment proposed by the applicant for a DCO (in this case Drax) and "any other available information, particularly concerning the protection of the environment and human health".

**187** The claimant does not suggest that there has been any failure to comply with the 2013 Regulations as such. Instead, it is said that there was C a failure to comply with one aspect of the policy in EN-1 which elaborates upon those statutory requirements. Para 4.7.13 of EN-1 states:

> "Applicants should conduct a single economic assessment which encompasses retrofitting of capture equipment, $CO_2$ transport and the storage of $CO_2$. Applicants should provide *evidence of reasonable scenarios*, taking into account the cost of the capture technology D and transport option chosen for the technical CCR assessments and the estimated costs of $CO_2$ storage, which make operational CCS economically feasible for the proposed development." (Emphasis added.)

**188** Para 4.7.10 of EN-1 also refers to guidance given by the Secretary of State in November 2009 which stated that the Government would not grant E consent where the applicant could not "envisage any reasonable scenarios under which operational CCS would be economically feasible".

**189** Inevitably a CCR assessment has to involve projections into the future. The projections upon which Drax relied involved making assumptions about future carbon trading prices. The claimant makes no criticism about that as a matter of principle. But instead, drilling down into F the evidence before the Panel, the complaint is that Drax only put forward certain carbon price scenarios in which CCS would be economic "and did not clarify that these were reasonable". This is said to be "crucial" (paras 121 and 123 of the claimant's skeleton).

*Analysis*

G **190** The Panel was satisfied that the requirements of the 2013 Regulations and of EN-1 in relation to CCR were met, including the economic and technical feasibility requirements (paras 3.3.49–3.3.53 and 5.4.1–5.4.12 of the report). The Secretary of State agreed in DL 4.29–4.31. I would have thought that it was obviously implicit that a conclusion that it would be "economically *feasible*" to install and operate CCS in future was based upon reasonable assumptions. There would be little point in legislating for this H matter on the basis that unreasonable projections would be compliant. The "reasonable scenarios" criterion seems to be no more than a statement of the obvious and in reality is not a separate or additional requirement.

**191** Mr Jones accepted that during the examination ClientEarth did not raise any issue regarding the "reasonable scenarios" criterion. Their case was that a condition should be imposed requiring the provision of CCS from the

outset (which was, in effect, a challenge to the merits of policy in the NPS which makes it plain that proposals for new fossil fuel plants only have to demonstrate that they are carbon capture ready).

**192** Although there is no absolute bar on the raising of a new point which was not taken in a planning inquiry or examination, one factor which may weigh strongly against allowing the point to be pursued is where it would have been necessary or appropriate for submissions or evidence to have been advanced, so that the decision-maker would have been able to make specific findings on the point (see eg *Trustees of the Barker Mill Estates v Test Valley Borough Council* [2017] PTSR 408, para 77). There is a public interest in points being raised at the appropriate stage in the appropriate fact-finding forum, partly in order to promote finality and to reduce the need for legal challenge. If ClientEarth had followed that normal approach to the narrow issue now raised under ground 5, the matter could, if necessary, have been dealt with by some brief clarification of the material before the examination. If there was a genuine dispute about the matter, it could have been tested through cross-examination, or by the production of evidence to the contrary, in the normal way. However, I am satisfied that the material before the Panel and the Secretary of State adequately addressed this point in any event.

**193** Para 4.7.14 of EN-1 puts this ground of challenge into a sensible context:

> "The preparation of an economic assessment will involve a wide range of assumptions on each of a number of factors, and Government recognises the inherent uncertainties about each of these factors. There can be no guarantee that an assessment which is carried out now will predict with complete accuracy either in what circumstances it will be feasible to fit CCS to a proposed power station or when those circumstances will arise, but it can indicate the circumstances which would need to be the case to allow operational CCS to be economically feasible during the lifetime of the proposed new station."

**194** The CCR statement by Drax put forward scenarios and explained why those met the requirements of the 2013 Regulations and EN-1 and EN-2 and the Government's Guidance on CCR. Para 40 of a submission to the Panel by ClientEarth, responded to submissions by Drax on CCS in the following terms:

> "In line with this principle, the courts have established that is possible to impose a condition prohibiting the implementation of a consent until that condition has been met—even where there are no reasonable prospects of the condition being met. However, in the context of the present application, the applicant appears to believe that there is a reasonable prospect of CCS being economically and technically feasible 'by the mid-2020s'."

**195** In other written representations ClientEarth commented favourably on the reasonableness of the assumptions made about future prices in the CCR assessment by Drax in contrast to its treatment elsewhere of the baseline for climate change analysis:

> "Moreover, it has made its assumption of economic feasibility entirely contingent on 'the end price of electricity' without assessing

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A the reasonableness of such assumptions about future prices. This is in contrast to the approach taken in the applicant's CCR statement where the applicant has carried out a detailed assessment of the future economics, including wholesale electricity prices, to arrive at a set of justified conclusions about the economic feasibility of CCS."

**196** The attempt by Mr Hunter-Jones (the solicitor representing B ClientEarth) in his second witness statement to explain certain of these passages, with respect, amounts to no more than special pleading.

**197** Ground 5 is wholly without merit. It should not have been raised.

*Ground 6*

C **198** ClientEarth submits that the Secretary of State failed to comply with requirements in regulations 21 and 30 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 ("the 2017 Regulations") regarding measures for the monitoring of GHG emissions. A "monitoring measure" is defined by regulation 3(1) as: "a provision requiring the monitoring of any significant adverse effects on the environment of proposed development, including any measures contained in D a requirement imposed by an order granting development consent …"

**199** Regulation 21 deals with the consideration of whether a DCO should be granted. Paragraph (1) provides:

"When deciding whether to make an order granting development consent for EIA development the Secretary of State must— (a) examine E 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."

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**200** It will be noted that sub-paragraphs (a)–(c) apply irrespective of whether the decision is to grant or to refuse consent. However, the consideration under sub-paragraph (d) of whether monitoring measures should be imposed only arises if it is decided that the DCO should be granted. In that event, regulation 21(3) provides:

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"When considering whether to impose a monitoring measure under paragraph (1)(d), the Secretary of State must— (a) if monitoring is considered to be appropriate, consider whether to make provision for potential remedial action; (b) take steps to ensure that the type of parameters to be monitored and the duration of the monitoring are proportionate to the nature, location and size of the proposed H development and the significance of its effects on the environment; and (c) consider, in order to avoid duplication of monitoring, whether any existing monitoring arrangements carried out in accordance with an obligation under the law of any part of the United Kingdom, other than under the Directive, are more appropriate than imposing a monitoring measure."

**201** The claimant submits that regulation 21 must be interpreted in the context of the preventative and precautionary principles of European Union law (article 191FEU of the FEU Treaty).

**202** Regulation 30 provides for the contents of decision notices. Regulation 30(1) requires that the notice of the decision on the application for a DCO must contain the information specified in paragraph (2) which provides (in so far as relevant):

> "The information is— (a) information regarding the right to challenge the validity of the decision and the procedures for doing so; and (b) if the decision is— (i) to approve the application— (aa) the reasoned conclusion of the Secretary of State or the relevant authority, as the case may be, on the significant effects of the development on the environment, taking into account the results of the examination referred to, in the case of an application for an order granting development consent in regulation 21, and in the case of a subsequent application, in regulation 25; (bb) where relevant, any requirements to which the decision is subject which relate to the likely significant environmental effects of the development on the environment; (cc) a description of any features of the development and any measures envisaged in order to avoid, prevent or reduce and, if possible, offset, likely significant adverse effects on the environment; and (dd) any monitoring measures considered appropriate by the Secretary of State or relevant authority, as the case may be; or (ii) …"

**203** Regulation 30(2)(b)(i)(aa) requires a reasoned conclusion to be given by the decision-maker on the significant effects of the development taking into account the examination of environmental information under regulation 21(1). In effect, the reasoned conclusion required under regulation 30(2) relates to the requirements in regulation 21(1)(a) to (c), but not sub-paragraph (d). There is no requirement in regulation 30 to give a "reasoned conclusion" in relation to any "monitoring measures" considered appropriate. Instead, regulation 30(2)(b)(i)(dd) simply requires the decision notice to set out the monitoring measures considered to be appropriate. There is no requirement in the 2017 Regulations to give "reasoned conclusions" on that matter. Mr Jones did not argue to the contrary.

**204** The claimant submits that there is no indication in the decision letter that the Secretary of State considered whether monitoring measures would be appropriate "particularly (but not only) in relation to GHG emissions" (para 142 of the skeleton argument).

*Analysis*

**205** Mr Tait pointed out that the decision made by the Secretary of State, which includes the DCO itself, involved the imposition of a number of monitoring measures. They are set out in Schedule 2 to the Order under requirements 8(1)–(2), 15(3), 16(5), 21(2)–(3) and 23 and cover monitoring of such matters as ecological mitigation, ground contamination mitigation, archaeological interest, noise, and CCR. These matters are addressed where appropriate in the Panel's report and in the decision letter.

**206** I therefore agree that the Secretary of State had well in mind the requirement in regulation 21 to consider whether it was appropriate to impose monitoring measures.

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A **207** The legislation to which I have referred makes it plain that there is no requirement for the Secretary of State to give reasons for a decision not to impose a particular monitoring measure, for example, in respect of GHG emissions, whether because it would be inappropriate or because other existing monitoring arrangements required by law are more appropriate. Accordingly, I accept Mr Tait's submission that the Secretary of State's obligation under section 116(1) of the PA 2008 to give reasons for her B decision would only apply to the "principal important controversial issues" in the examination (see *Save* [1991] 1 WLR 153, 165 and *South Bucks District Council* [2004] 1 WLR 1953, paras 34 and 36).

**208** In the present case the Panel referred to the need for Drax to obtain a greenhouse gas permit from the Environmental Agency under the Greenhouse Gas Emissions Trading Scheme Regulations 2012 C (SI 2012/3038) ("the 2012 Regulations") to deal with GHG emissions from the proposed development (see report at para 1.7.1).

**209** Ordinarily, a monitoring measure is imposed to see that a development conforms to certain parameters, failing which remedial measures may be taken, or to ensure that mitigation measures are effective. The 2017 Regulations do not require the imposition of monitoring simply for D the sake of monitoring. This may be seen in recital (35) of Directive 2014/52 (which inserted article 8a into Directive 2011/92/EU):

> "Member states should ensure that mitigation and compensation measures are implemented, and that appropriate procedures are determined regarding the monitoring of significant adverse effects on the environment resulting from the construction and operation of a project, E inter alia, to identify unforeseen significant adverse effects, in order to be able to undertake appropriate remedial action."

**210** Mr Jones submitted that the monitoring of GHG emissions under the 2017 Regulations was necessary here because of the wide divergence in the estimates before the Panel of the percentage increase in emissions (para 141 of skeleton). This is a wholly spurious point. As para 12 of the F agreed statement of facts prepared for this hearing plainly states, there was no disagreement over the projections of the total emissions that would be produced by the proposed development. The disagreement related instead to the baseline scenarios, the existing coal-powered generation or replacement thereof elsewhere on the National Grid (see the Panel's report at paras 5.3.7–5.3.17). Plainly, monitoring measures imposed on the new gas-fired power G station could achieve nothing whatsoever in relation to that difference.

**211** It is common ground that during the examination process no one, including ClientEarth, suggested that the DCO should contain a monitoring measure for GHG and what significant purpose that would achieve which would not otherwise be achieved under the 2012 Regulations.

**212** I have already referred to the approach taken by the courts to the raising of a new point in a legal challenge which could have been, but was not, H pursued in a public inquiry or examination (para 192 above). If ClientEarth had raised the matter in the normal way in the examination, issues of the kind which are now mentioned in para 147 of their skeleton argument could have been covered and if necessary tested at that stage and appropriate findings made by the Panel. Although I will address the remaining arguments under ground 6, I do so with some hesitation as to whether it is appropriate.

**213** The 2012 Regulations were made in order to give effort to a series of EU Directives establishing a scheme for trading in emission allowances for GHG, otherwise referred to in EN-1 as EU ETS. The monitoring arrangements they contain were made in order to give effect to Commission Regulation (EU) No 601/2012 of 21 June 2012 on the monitoring and reporting of greenhouse gas emissions pursuant to Directive 2003/87/EC and Commission Regulation (EU) No 601/2012 of 21 June 2012 on the monitoring and reporting of greenhouse gas emissions pursuant to Parliament and Council Directive 2003/87/EC (Text with EEA relevance) (OJ 2012 L181, p 30) and Commission Implementing Regulation (EU) 2018/2067 of 19 December 2018 on the verification of data and on the accreditation of verifiers pursuant to Parliament and Council Directive 2003/87/EC (Text with EEA relevance) (OJ 2018 L334, p 94). The scheme is focused on achieving decarbonisation.

**214** Regulation 9 prohibits the carrying on of a "regulated activity" at an "installation" without a permit issued by the Environment Agency. This would apply to the operation of the gas-fired generating units. The application for a GHG emissions permit may be granted if the Agency is satisfied that the applicant will be able to monitor and report emissions from the installation in accordance with the requirements of the permit (regulation 10(4)). An application for a permit must contain a defined monitoring plan and procedures (paragraph 1(1) of Schedule 4). The permit must contain (inter alia) the monitoring plan, monitoring and reporting requirements (to cover "the annual reportable emissions of the installation") and a requirement for verification of the report (paragraph 2(1) of Schedule 4).

**215** In relation to the anti-duplication provision in regulation 21(3)(c) of the 2017 Regulations, ClientEarth submits that the GHG permit regime does not qualify as an "existing" monitoring arrangement. I cannot accept that argument. The statutory requirement for a permit is in place along with a detailed specification of what the permit must contain in order to comply with the "Monitoring and Reporting Regulation" (ie Regulation (EU) No 601/2012). The content of these requirements is sufficiently defined to qualify as an "existing monitoring arrangement" for the purposes of regulation 21(3)(c) of the 2017 Regulations. No specific case was advanced by ClientEarth which would enable the court to conclude otherwise.

**216** The 2017 Regulations operate within the EU ETS regime summarised in EN-1 at paras 2.2.12–2.2.15. All of this must have been well known to the Panel and the Secretary of State. The ETS scheme involves a gradually reducing cap on GHG emissions from large industrial sectors such as electricity generation which translates into finite allowances to emit GHG available to specific operators. Para 5.2.2 of EN-1 envisages that the decarbonising of electricity generation is to be achieved through the regimes described in section 2.2. I therefore accept the Secretary of State's submission that EN-1 proceeds on the basis that GHG emissions will be separately controlled. It is unsurprising therefore, that no one suggested during the examination that GHG emissions should be controlled under the PA 2008, or what cap or caps should be imposed, without which it is difficult to see what purpose GHG monitoring under the terms of the DCO would serve. Ultimately, Mr Jones submitted that monitoring would enable it to be seen whether the projected total emissions had been estimated accurately. It was

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A not explained why that could not be achieved under the 2012 Regulations, if that was thought to be necessary.

**217** Looking at the position as a whole, I am satisfied that no breach of regulation 21 of the 2017 Regulations has occurred. However, even if I had taken a different view, I am also certain that it would be inappropriate to grant any relief. The focus of the statement of facts and grounds and of the claimant's skeleton is to seek an order quashing the DCO. In *R (Champion) v North Norfolk District Council* [2015] 1 WLR 3710 the Supreme Court held that even where a breach of EIA Regulations is established, the court may refuse relief where the applicant has in practice been able to enjoy the rights conferred by European legislation and there has been no substantial prejudice: para 54.

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**218** I accept the submissions for the Secretary of State and Drax that in substance the requirements and objectives of regulation 21 have been met and no substantial prejudice has occurred. The legal issue raised under ground 6 would not affect whether the project is consented and may go ahead. There is an existing monitoring regime under the 2012 Regulations. GHG emissions will be monitored, recorded, validated and passed to the EA. This is within the context of the ETS regime which is focused on achieving decarbonisation over time. No evidence has been filed to explain how any real prejudice has been caused by the alleged breach of regulation 21 (see, for example, Ouseley J in *R (Midcounties Co-operative Ltd) v Wyre Forest District Council* [2009] EWHC 964 (Admin) at [104]–[116]). ClientEarth has not indicated the nature of any monitoring condition (including measures consequent upon the results obtained) which, they say, ought to have been imposed on the DCO. It is simply said that monitoring measures could be linked to further "requirements" in the DCO, without saying what they might be (para 147 of the claimant's skeleton). If there had been any real substance in such points, ClientEarth had every opportunity to raise them during the examination process in the normal way; but they did not take it. This is a hollow complaint.

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**219** I have also been asked to consider applying section 31(2A) of the Senior Courts Act 1981, as inserted. Given the need for compliance with the GHG permitting regime and for the other reasons set out above, I am satisfied that if the monitoring of GHG emissions under the DCO had been addressed during the examination or in the Secretary of State's consideration of the matter, it is highly likely that the outcome would not have been substantially different. The DCO would still have been granted and there is no reason to think, on the material before the court, that GHG monitoring would have been included as an additional requirement of the order. Nothing has been advanced which would justify the grant of relief in reliance upon section 31(2B).

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**220** One further point has been raised by the claimant which the Secretary of State has addressed in para 90 of her skeleton argument:

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> "[Para 150 of the claimant's skeleton argument] introduces a separate and unparticularised assertion that '*the Secretary of State failed lawfully to comply with*' … regulation 30 of the EIA Regulations. The point made appears to be that the Secretary of State did not include a '*reasoned conclusion … on the significant effects of the development on the environment*' as required by regulation 30(2)(b)(i)(aa). That is a

new ground outside the scope of the SFG that has nothing to do with monitoring and is baseless. The DL, read with the ExA, sets out detailed conclusions on the environmental impacts of the Drax Power proposal."

I agree.

**221** For all these reasons ground 6 must be rejected.

*Ground 7*

*Introduction*

**222** On 27 June 2019 the target for the UK's net carbon account for 2050 set out in section 1 of the CCA 2008 was changed from 80% to 100% below the 1990 baseline (see the Climate Change Act 2008 (2050 Target Amendment) Order 2019 (SI 2019/1056)). This is referred to as "the net zero target". In para 3.4.2 the Panel explained that because this amendment had occurred after the close of the examination and only one week before they were to submit their report to the Secretary of State, it had not formed the basis for their examination of the application or had any bearing upon their final conclusions. They suggested that it would, nonetheless, be a matter for the Secretary of State to consider in the planning balance.

**223** Although in paras 7.2.10 and 7.3.6 of their report the Panel concluded that the projected increase in total GHG emissions of more than 90% above the current baseline for Drax would undermine the Government's commitment to cut GHG emissions, as contained in the CCA 2008, at para 7.3.8 the Panel stated that they had received no evidence that the proposed development would in itself lead to a breach of section 1 of that Act. Accordingly, they concluded that the exception to section 104(3) provided by section 104(5) (see para 49 above) did not apply.

**224** In DL 4.28 the Secretary of State agreed with the conclusion at para 7.3.8 of the Panel's report and said that the implications of the amendment to the CCA 2008 would be addressed subsequently. At DL 5.7 she stated that the "net zero target" was "a matter which was both important and relevant to the decision on whether to grant consent for the [proposed] development and that regard should be had to it when determining the application".

**225** At DL 5.8–5.9 the Secretary of State stated:

"5.8 The Secretary of State notes with regard to the amendment to the CCA that it does not alter the policy set out in the national policy statements which still form the basis for decision-making under the Act. Section 2.2 of EN-1 explains how climate change and the UK's GHG emissions targets contained in the CCA have been taken into account in preparing the suite of Energy NPSs. As para 2.2.6 of EN-1 makes clear, the relevant NPSs were drafted considering a variety of illustrative pathways, including some in which '*electricity generation would need to be virtually [greenhouse gas] emission-free, given that we would expect some emissions from industrial and agricultural processes, transport and waste to persist*'. The policies contained in the relevant NPSs regarding the treatment of GHG emissions from energy infrastructure continue to have full effect.

"5.9 The move to Net Zero is not in itself incompatible with the existing policy in that there are a range of potential pathways

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A that will bring about a minimum 100% reduction in the UK's emissions. While the relevant NPSs do not preclude the granting of consent for developments which may give rise to emissions of GHGs provided that they comply with any relevant NPS policies or requirements which support decarbonisation of energy infrastructure (such as CCR requirements), potential pathways may rely in future on other infrastructure or mechanisms outside the planning regime offset or B limit those emissions to help achieve Net Zero. Therefore, the Secretary of State does not consider that Net Zero currently justifies determining the application otherwise than in accordance with the relevant NPSs or attributing the Development's negative GHG emissions impacts any greater weight in the planning balance. In addition, like the ExA, the Secretary of State does not consider there to be any evidence that C granting consent for the Development would in itself result in a direct breach of the duties enshrined in the CCA, given the scope of the targets contained in the CCA which apply across many different sectors of the economy. This remains the case following the move to Net Zero and therefore she does not consider that the exception in section 104(5) of the 2008 Act should apply in this case." (Emphasis in original.)

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**226** In summary the Secretary of State concluded that:

(i) The policy in the NPSs had not been altered by the amendment to the CCA 2008 and still remained the basis for decision-making under the 2008 Act.

(ii) The UK's target of an 80% reduction in GHG emissions had been taken into account in the preparation of the energy NPSs.

E (iii) The net zero target was not in itself incompatible with those policies, given that there was a range of potential pathways that will bring about a minimum 100% reduction in GHG by 2050.

(iv) Developments giving rise to GHG emissions are not precluded by the NPSs provided that they comply with any relevant NPS policy supporting decarbonisation of energy infrastructure, such as CCR requirements. F Potential pathways may rely in future on other infrastructure or mechanisms outside the planning regime to offset or limit those emissions to help achieve net zero.

(v) Accordingly, the net zero target did not justify determining the application otherwise than in accordance with the NPSs or increasing the negative weight in the planning balance given to GHG emissions from the development.

G (vi) Given that the targets in the CCA 2008 apply across many different sectors of the economy, there was no evidence that the proposed development would in itself result in a breach of that Act and so section 104(5) did not apply.

**227** In DL 6.12 the Secretary of State concluded:

H "In the case of section 104(5), notwithstanding the ExA's conclusions on the development's adverse climate change impacts, it also found that there was no evidence to suggest that granting consent for the development would in itself lead to the Secretary of State to be in breach of the duty set out in the CCA to ensure that the UK's target for 2050 is met. The Secretary of State agrees with this conclusion."

**228** At DL 6.18–6.20 the Secretary of State dealt with "late submissions", that is representations made by Pinsent Masons on behalf of Drax after the close of the examination. This challenge is only concerned with their 11-page letter dated 4 September 2019, which sought to address the amendment of the CCA 2008. At DL 6.20 the Secretary of State stated that: "In respect of the second submission, the Secretary of State does not consider that this provides any information that alters her conclusions set out in paras 5.6–5.9 and 6.7 above."

**229** Under ground 7A ClientEarth submits that the Secretary of State acted in breach of her duty to act fairly by having regard to the letter dated 4 September without supplying a copy of it to the other participants in the examination and giving them an opportunity to make representations about its contents.

**230** ClientEarth does not challenge the evidence in the witness statement of Mr Gareth Leigh (Head of the Energy Infrastructure Planning Team in the Energy Development and Resilience Directorate of BEIS) that the letter from Pinsent Masons was not taken into account by the Secretary of State herself. Nonetheless, it is accepted that it was read by officials to see whether it was a matter that should be referred to the minister, and so ClientEarth submits it has influenced, or there is a risk that it has influenced, the advice that they did in fact give to her on the decision to be taken.

**231** In response to a question from the court, ClientEarth submits in the alternative that, putting the letter from Pinsent Masons to one side, it was in any event unfair for the Secretary of State to have regard to the issue whether the amendment to the CCA 2008 had implications for her decision on the application for a DCO without giving the claimant and other participants in the examination to make representations on that matter. This became the subject of an application to amend the statement of facts and grounds to rely upon this contention as an additional ground 7B. It was agreed between the parties that the question of whether permission to amend should be granted depended on whether this additional ground is arguable. Counsel for the Secretary of State and Drax confirmed that they were able to deal with the point during the hearing and on the material already before the court. Accordingly, it was agreed that the question of whether the permission to amend should be granted ought to be left to be dealt with in this judgment.

*Ground 7A*

**232** Mr Jones referred to rule 19(3) of the Infrastructure Planning (Examination Procedure) Rules 2010 (SI 2010/103) ("the 2010 Rules") (as amended by regulation 5(8) of the Localism Act 2011(Infrastructure Planning) (Consequential Amendments) Regulations 2012 (SI 2012/635)), which provides that:

> "If after the completion of the examining authority's examination, the Secretary of State— (a) differs from the examining authority on any matter of fact mentioned in, or appearing to the Secretary of State to be material to, a conclusion reached by the examining authority; or (b) takes into consideration any new evidence or new matter of fact, and is for that reason disposed to disagree with a recommendation made by the examining authority, the Secretary of State shall not come to a decision which is at variance with that recommendation without—

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A (i) notifying all interested parties of the Secretary of State's disagreement and the reasons for it; and (ii) giving them an opportunity of making representations in writing to the Secretary of State in respect of any new evidence or new matter of fact."

**233** Mr Jones accepts that this case does not fall within sub-paragraph B (b), given that the Secretary of State did not disagree with the Panel's recommendations because of the letter from Drax's solicitors. However, it is well established that procedural rules of this nature may not necessarily exhaust the requirements of natural justice. He relies upon the purpose and spirit of rule 19(3).

**234** More particularly, Mr Jones relies upon statements in *Bushell v Secretary of State for the Environment* [1981] AC 75, 102A and *Broadview* C *Energy Developments Ltd v Secretary of State for Communities and Local Government* [2016] JPL 1207, paras 25–26, to the effect that a decision-maker should not "accept" fresh evidence from one side supporting their case without giving other parties an opportunity to deal with it. In a much earlier authority, *Errington v Minister of Health* [1935] 1 KB 249, it was held that the minister had acted unlawfully by taking into account and relying upon D material from one side (the authority promoting a housing clearance order) without giving landowners an opportunity to make representations about it. *Broadview* was in some ways a striking case where the minister received oral representations privately from the local constituency MP. But the court did not intervene because the representations had not added materially to what had been addressed at the public inquiry and they could not have materially influenced the outcome.

E **235** The present case is very different. As I have said, neither the letter from Pinsent Masons, nor a summary of its contents was provided to the Secretary of State. She had no actual knowledge of any such material. In *R (National Association of Health Stores) v Secretary of State for Health* [2005] EWCA Civ 154; The Times, 9 March 2005 the Court of Appeal held at paras 23–38 that what is known to the officials in a minister's department is F not to be imputed to the minister when he or she reaches a formal decision. A minister is treated as having taken into account only those matters about which he or she actually knew.

**236** Mr Jones accepted that this principle applied in the present case. But he submitted that the process had nonetheless been unfair because the officials who advised the Secretary of State read the letter from Pinsent G Masons and those representations influenced, or may have influenced, their briefing to the Secretary of State.

**237** I do not accept that submission. The position has been very clearly explained in the witness statement of Mr Leigh, in particular at paras 20–24. The conclusions in the decision letter to which I have already referred were informed by internal communications with other officials in the department dealing with the net zero target. They were asked to advise H on the implications of the amended target for the policy in EN-1 and EN-2 dealing with unabated gas fired electricity generation. The approach set out in their response reflected the existing policy in the NPSs.

**238** The reasoning in DL 5.8 clearly relates to material in EN-1. In a written note Mr Tait showed how relevant parts of DL 5.9 related back to passages in EN-1. Thus, when para 17 of Mr Leigh's witness statement is

read in the context of the later parts of his evidence, and with the further explanation provided by Mr Tait, I accept that DL 5.6–5.9 were essentially dealing with matters of existing government policy set out in EN-1. One of the main conclusions in DL 5.9 was the Secretary of State's judgment that the policies in the relevant NPSs on the treatment of GHG emissions from energy infrastructure continued to have full effect. That is why Mr Leigh stated that neither the Secretary of State nor her officials needed submissions on policy from Drax. They had reached their own conclusions on those matters for themselves.

**239** I appreciate that the letter from Pinsent Masons also covered matters other than the implications of the net zero target for EN-1, but those matters did not form any part of the reasoning in the decision letter, or the briefing to the Secretary of State. Mr Jones did not suggest otherwise.

**240** I have therefore reached the firm conclusion that the advice actually given by officials to the Secretary of State was not influenced or tainted by the letter from Pinsent Masons. There was no requirement for the Secretary of State to refer that letter to ClientEarth and to other parties for comment before she reached her decision in order to discharge her duty to act fairly.

**241** But even if I had taken the contrary view ground 7A would still fail. The relevant legal test for determining both grounds 7A and 7B is whether "there has been procedural unfairness which materially prejudiced the [claimant]" (*Hopkins Developments Ltd v Secretary of State for Communities and Local Government* [2014] PTSR 1145, para 49). This reflects the principle previously stated by Lord Denning MR in *George v Secretary of State for the Environment* (1979) 77 LGR 689 that "there is no such thing as a 'technical breach of natural justice'… One should not find a breach of natural justice unless there has been substantial prejudice to the applicant as the result of the mistake or error that has been made"; and by Lord Wilberforce in *Malloch v Aberdeen Corpn* [1971] 1 WLR 1578, 1595 that "[a] breach of procedure, whether called a failure of natural justice, or an essential administrative fault, cannot give him a remedy in the courts, unless behind it there is something of substance which has been lost by the failure".

**242** Mr Jones identified the prejudice upon which ClientEarth relies in terms of the additional submissions and/or evidence which it would have wished to produce to the Secretary of State had it been given an opportunity to comment, as summarised in paras 21–34 of Mr Hunter-Jones's first witness statement and paras 11–18 of his second witness statement. It is plain that the object of these submissions would have been to undermine the basis upon which policies in EN-1 on GHG emissions and gas-fired electricity generation were prepared and adopted. By way of example, it is said that to be compatible with the net zero target, gas fired power stations would have to operate with CCS, and not merely be consented with CCR. Alternatively, a "more rigorous standard" than CCR should have been required in this case. In addition, ClientEarth would have contended that the DCO should have been subject to a condition preventing the operation of the facility beyond 2050 without CCS. It is plain that the thrust of ClientEarth's contentions is that the net zero target is incompatible with existing policy in EN-1 and EN-2.

**243** I accept the submission made by the Secretary of State and by Drax that ClientEarth's contentions would have been disregarded under section 106(1) of the PA 2008 as relating to the merits of policy in the NPSs.

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A Mr Jones did not argue to the contrary. The import of ClientEarth's points is that key policies in EN-1 and EN-2 are out of date by virtue of the net zero target enshrined in the CCA 2008. It is not the function of the court to say whether that view is right or wrong. But it is the function of the court to say that this line of argument undoubtedly falls outside the scope of the process created by Parliament by which an application for a DCO is examined and determined. Instead, it is a matter which could only be addressed through a B decision to carry out a review under section 6 of the PA 2008 (see above). There has been no such decision and no claim for judicial review relating to any allegation of failure to institute such a review.

**244** It therefore follows that the way in which the Secretary of State's officials handled the letter from Pinsent Masons has not caused the claimant to lose an opportunity to advance a case which would have been admissible C under the PA 2008 or could have affected the determination of Drax's application for a DCO. The claimant has not shown that any relevant prejudice has been suffered by virtue of the matters about which it complains.

**245** For all these reasons ground 7A must be rejected.

*Ground 7B*

D

**246** ClientEarth's additional argument is that it was unfair for the Secretary of State to have regard to the issue whether the substitution of the net zero target in section 1 of the CCA 2008 had implications for the determination of the application for the DCO without giving the parties an opportunity to make submissions.

**247** Mr Jones accepted that ordinarily a minister is entitled to reach a E decision on a planning appeal or an application for a DCO relying upon advice from officials without disclosing that advice to the parties so that they can make representations. If that were not so, the system would be unworkable. This was recognised by the Court of Appeal in *R v Secretary of State for Education, Ex p S* [1995] ELR 71 subject to one qualification, namely where a new point is raised by the advice upon which the parties have F not had any opportunity to comment (see also the *National Association of Health Stores* case [2005] EWCA Civ 154 at [34]). Mr Jones submits that the implications of the amendment to the CCA 2008 amounted to a new point and participants in the examination had had no opportunity to address it before that process was completed.

**248** A similar situation arose in *Bushell* [1981] AC 75. Following G the closure of the public inquiry into a motorway scheme, the relevant Government department issued (a) new design standards that treated the capacity of existing roads as greater than had previously been assumed and (b) a revised national method of predicting traffic growth that produced lower estimates of future traffic than had previously been given. So objectors to the scheme asked for the inquiry to be reopened so that they could contend that the need for the new scheme had been undermined. The Secretary of H State refused to reopen the inquiry and in his decision letter stated that the new publications did not materially affect the evidence on which the inspector had decided to recommend that the scheme should be approved; the estimation of traffic need using the revised methods did not differ materially from the earlier assessment. The House of Lords held that this procedure had not involved any unfairness because the objectors were not entitled to use

the forum of a local inquiry to criticise and debate the merits of the revised methods, which were a form of government policy (pp 99–100 and 103D).

**249** Thus, the duty to act fairly may not entitle a party to be given an opportunity to make representations on a "new point" in so far as his challenge relates to the *merits* of a new government policy, for example whether it should be applied nationally to the assessment of schemes. This aspect of the decision in *Bushell* presaged the approach taken by Parliament in sections 6, 87(3) and 106(1) of the PA 2008. Challenges to the merits of existing policy in a NPS are not a matter for consideration in the examination and determination of individual applications for a DCO. Such policy is normally applicable to many DCO applications and the appropriate forum for arguments of that nature is a review under section 6.

**250** As I have already explained when dealing with ground 7A, the additional arguments that ClientEarth says it would have wished to advance fall outside the legitimate ambit of the DCO process and therefore no prejudice has occurred. Accordingly, ground 7B is unarguable, it must be rejected and the application for permission to amend the statement of facts and grounds refused.

**251** For completeness I mention a faint suggestion by ClientEarth that the Secretary of State failed to comply with her duty to give reasons in relation to this topic. With respect, that contention is hopeless.

*Conclusion*

**252** For all the above reasons, grounds 7A and 7B must be rejected.

*Ground 8*

**253** There was some overlap in the arguments advanced by the claimant under grounds 7 and 8. It was said that the advice which Mr Leigh's team took from other officials on the implications of the net zero target for EN-1 and EN-2 in relation to unabated gas-fired electricity generation ought to have been made publicly available before it was taken into account. I have dealt with that issue under ground 7.

**254** Then it was submitted that officials and the Secretary of State asked the wrong question, namely whether the proposed development would lead to a breach of the CCA 2008 or would result in incompatibility with the net zero target, because those questions cannot be answered at this point in time (para 174 of skeleton). However, the Secretary of State did address those questions and concluded that the proposed development was not incompatible with the net zero target (DL 5.9 and 6.12). That was a matter of judgment for the Secretary of State which could only be challenged on the grounds of irrationality. Here it is appropriate to have in mind the discussion of the Divisional Court in *Spurrier* [2020] PTSR 240 on intensity of review (para 141 et seq) and in particular cases dealing with challenges to consents, such as *Newsmith Stainless Ltd v Secretary of State for the Environment, Transport and the Regions* [2017] PTSR 1126, paras 6–8 and *R (Mott) v Environment Agency* [2016] 1 WLR 4338, para 75 et seq. ClientEarth has put forward reasons as to why it disagrees with the Secretary of State on this subject, but the court is in no position to say on the material which has been produced that her judgment was irrational.

**255** Next, the claimant submitted that the defendant failed to "fully consider, and grapple with, the impact of the development on achieving net

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A zero by 2050 and whether current NPS policy concerning unabated fossil fuel generation was consistent with the new target" (para 174 of the skeleton argument and see also paras 176–178). A criticism that a decision-maker has failed to take into a material consideration is now to be dealt with in accordance with the principles settled in the *Samuel Smith* case [2020] PTSR 221 (see paras 99–100 above). As I have already explained under ground 7, the Secretary of State did in fact address that question.

B **256** Where a decision-maker decides to have regard to a matter then it is generally a matter for his or her judgment as to how far to go into it, something which may only be challenged on the grounds of irrationality (*R (Khatun) v Newham London Borough Council* [2005] QB 37, para 35. Mr Jones relied upon the requirement in article 8a(4) of Directive 2011/92 (as amended) that member states shall ensure that measures are implemented

C by the developer to avoid, prevent, reduce or offset "significant adverse effects on the environment" and regulations 21(1)(b) and 30(2)(b) of the 2017 Regulations. However, the general approach to judicial review of the adequacy of compliance with requirements of this nature, whether in the context of SEA or EIA, is for the court to intervene only if the decision-maker has acted irrationally (see eg *R (Spurrier) v Secretary of State for Transport*

D [2020] PTSR 240, para 434 and [2020] PTSR 1446, paras 126–144 (sub nom *R (Plan B Earth) v Secretary of State for Transport (WWF-UK intervening)*). Once again, there is no material here upon which the court could conclude that the Secretary of State's approach was irrational.

**257** Mr Tait and Mr Strachan submitted that as a matter of judgment the Secretary of State was entitled to rely upon other mechanisms outside the planning system, such as the Electricity Market Reform and the EU ETS,

E to control emissions from fossil fuel electricity generation when potential pathways are drawn up to help achieve the net zero target, consistently with policies contained in EN-1 (DL 5.9). I agree that that reasoning does not disclose any error of law.

**258** ClientEarth takes a different view on the compatibility of NPS policy with the net zero target, but for the reasons previously given this

F was not a matter which, even if it had been raised by ClientEarth between the amendment of the CCA 2008 and the issuing of the decision letter, could properly have been considered and resolved in a determination on an application for a DCO. It would have been a matter for review under section 6 of the Act (with all the related procedural safeguards) if the Secretary of State considered that to be appropriate in terms of section 6(3). No challenge has been made by ClientEarth in these proceedings to a failure

G on the part of the Secretary of State to act under section 6. It does not appear that ClientEarth raised the review mechanism under section 6 as a matter which the Secretary of State ought to address.

**259** In paras 179–181 of its skeleton argument ClientEarth submits that the Secretary of State failed to consider whether a "time-limiting condition" was necessary to address GHG emissions from the proposed development

H after 2050. It is suggested that the Secretary of State should at the very least have "considered" imposing a condition preventing the development from being operated after 2050 without "further consideration of appropriate offsetting and/or CCS requirements". It is plain that the Secretary of State had regard to the position up to 2050 and beyond. She dealt with the CCS issue in accordance with the policy in EN-1 and EN-2. For the reasons I have already

given, she was entitled in law to do so. The implication of the complaint that those policies should be revised was not a matter for consideration in the DCO process, nor is it a matter for this court in this challenge to the decision to grant the DCO. A

**260** For all these reasons ground 8 must be rejected.

*Ground 9*

B

**261** This was a bare allegation that the decision to grant the DCO was irrational because the decision "did not add up" or was tainted by erroneous reasoning which "robbed the decision of logic". No particulars were given. Mr Jones withdrew ground 9. He was right to do so. Ground 9 added nothing.

*Conclusion*

C

**262** For the reasons set out above, the claim for judicial review must be dismissed.

*Note*

D

1. It is agreed that "system inertia" is necessary to address imbalances between electricity generation and variations in demand, resulting in changes to frequency on the network. The greater the system inertia, the slower the change in frequency and therefore the more time the network operator has to restore the balance between generation and demand.

*Claim dismissed.* E

SALLY DOBSON, Barrister

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## Appendix 2 – R (ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy [2021] EWCA Civ 43

Court of Appeal A

# Regina (ClientEarth) *v* Secretary of State for Business, Energy and Industrial Strategy

## [2021] EWCA Civ 43 B

2020 Nov 17, 18; Lewison LJ, Sir Keith Lindblom SPT, Lewis LJ
2021 Jan 21

*Planning — Development — National policy statement — Secretary of State granting development consent order for gas-fired energy generating units — Whether wrongly deciding "need" for such development established by applicable national policy statements so that quantitative assessment of need not required in individual case — Whether erring in approach to greenhouse gas emissions — Climate Change Act 2008 (c 27) — Planning Act 2008 (c 29), s 104(7)[1] — Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/572) — Parliament and Council Directive 2011/92/EU* C

The interested party applied to the Secretary of State for a development consent order for a nationally significant infrastructure project ("NSIP") comprising the construction and operation of two gas-fired generating units situated at an existing power station. Both the Overarching National Policy Statement for Energy ("EN-1") and the National Policy Statement for Fossil Fuel Electricity Generating Infrastructure ("EN-2"), made by the Secretary of State pursuant to section 5 of the Planning Act 2008, applied to the development. The Secretary of State accepted the application and a panel was appointed as the examining authority. At the examination the claimant, an environmental law charity, objected to the development on the ground that its adverse impacts outweighed its benefits, as assessed under the two national policy statements, since there was no need for the proposed development and it would have significant adverse environmental impacts. The panel considered that, while the national policy statements supported a need for additional energy infrastructure in general, the interested party had not demonstrated that the development itself met an identified need for gas generation capacity when assessed against EN-1's overarching policy objectives of security of supply, affordability and decarbonisation. It found that the development would not accord with the national policy statements and would undermine the Government's commitment to cut greenhouse gas emissions, as set out in the Climate Change Act 2008, and that the adverse impacts of the development therefore outweighed the benefits, and it recommended that consent be withheld. The Secretary of State disagreed with that recommendation and decided to make the order sought with minor modifications, taking the view, inter alia, that the need for the development, being a type of generating station identified in Part 3 of EN-1, was thereby established and did not have to be demonstrated, and that once the project's contribution to policy need, and thus its overall benefits, were correctly evaluated, the adverse greenhouse gas impacts were not determinative. The claimant sought judicial review of that decision, contending, inter alia, that the Secretary of State had misinterpreted EN-1 on the approach to the assessment of need and on the approach to greenhouse gas emissions. The judge dismissed the claim. On the issue of need, the judge held that EN-1 plainly did not require need to be assessed in quantitative terms and that the Secretary of State had been correct to dismiss the approach to the

[1] Planning Act 2008, s 104: see post, para 7.

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A interpretation of EN-1 advanced by the claimant and accepted by the panel which in effect required an assessment of quantitative need. On the issue of greenhouse gas emissions, the judge held that the Secretary of State had not treated greenhouse gas emissions as irrelevant, or as something to which no weight should be given, but had disagreed with the panel's evaluation of the benefits of the proposal and had concluded that once those benefits were correctly weighed the impact of greenhouse gas emissions ought not to carry determinative weight in the overall planning balance.
B The judge also rejected the contention that the Secretary of State had fettered her assessment to weigh the "adverse impact" of the proposed development against its "benefits" under section 104(7) of the Planning Act 2008.

On the claimant's appeal—

*Held*, dismissing the appeal, (1) that nowhere in national policy statement EN-1, or indeed EN-2, did it stipulate that a quantitative assessment of need always had to be carried out in a development consent order process; that it was clear
C from paragraph 3.2.3 of EN-1 that while "substantial weight" should be given to "considerations of need", the weight due to those considerations in a particular case was not immutably fixed and the decision-maker could determine whether there were reasons in the particular case for departing from that fundamental policy; that the decision-maker had to consider that question by judging what weight would be "proportionate" to the "anticipated extent" of the development's "actual
D contribution" to satisfying the need for infrastructure of that type, those being matters of planning judgment, which involved looking into the future; that beyond the description of the decision-maker's task in those terms, there was no single prescribed way of performing that task and there were no specified considerations to be taken into account or excluded; that since the policy gave the decision-maker an ample discretion to decide how best to go about making the evaluative judgment required, there was no justification for reading into the policy a requirement that it be
E approached on a quantitative basis; and that in the present case the Secretary of State had interpreted the relevant policies correctly and proceeded to apply them lawfully (post, paras 63, 65–67, 74, 76, 111, 112, 113).

*R (Scarisbrick) v Secretary of State for Communities and Local Government* [2017] EWCA Civ 787, CA considered.

(2) That read in its entirety and in its context paragraph 5.2.2 of EN-1 did not diminish the need for relevant energy infrastructure established in national policy or
F undo the general presumption in favour of granting consent to applications for NSIPs in paragraph 4.1.2, but nor did it prevent greenhouse gas emissions from being taken into account as a consideration attracting weight in a particular case; that how much weight was for the decision-maker to resolve; that in a particular case such weight could be significant, or even decisive, whether with or without another "adverse impact"; and that in the present case the Secretary of State had not misdirected herself on the meaning and effect of the policy in paragraph 5.2.2 of EN-1 and
G paragraph 2.5.2 of EN-2, or misapplied it, nor had she misunderstand the purpose of environmental impact assessment under Environmental Impact Assessment Directive 2011/92/EU and the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017, or the relevance of an assessment of $CO_2$ emissions in an environmental statement for a project within the scope of EN-1 and EN-2 (post, paras 85–87, 94–95, 97, 112, 113).

H (3) That the Secretary of State, having carried out the balancing exercise required and taken into account the considerations relevant to it and given them lawful weight, had not adopted an unlawful approach to the assessment required under section 104(7) of the Planning Act 2008, nor had she fettered that assessment (post, paras 102–110, 112, 113).

Decision of Holgate J [2020] EWHC 1303 (Admin); [2020] PTSR 1709 affirmed.

The following cases are referred to in the judgment of Sir Keith Lindblom SPT: *A*

*Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] UKSC 37; [2017] PTSR 623; [2017] 1 WLR 1865; [2017] 4 All ER 938, SC(E)

*Marleasing SA v La Comercial Internacional de Alimentación SA* (Case C-106/89) EU:C:1990:395; [1990] ECR I-4135, ECJ

*R (Scarisbrick) v Secretary of State for Communities and Local Government* [2017] EWCA Civ 787, CA *B*

*R (Spurrier) v Secretary of State for Transport* [2019] EWHC 1070 (Admin); [2020] PTSR 240, DC; sub nom *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214; [2020] PTSR 1446, CA

*R (Thames Blue Green Economy Ltd) v Secretary of State for Communities and Local Government* [2015] EWHC 727 (Admin); [2015] EWCA Civ 876; [2016] JPL 157, CA

*R (Wright) v Forest of Dean District Council (Secretary of State for Housing, Communities and Local Government intervening)* [2019] UKSC 53; [2019] 1 WLR 6562; [2020] 2 All ER 1, SC(E) *C*

*Tesco Stores Ltd v Dundee City Council (Asda Stores Ltd intervening)* [2012] UKSC 13; [2012] PTSR 983, SC(Sc)

*Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759; [1995] 2 All ER 636; 93 LGR 403, HL(E)

The following additional case was cited in argument: *D*

*CREEDNZ Inc v Governor General* [1981] 1 NZLR 172

The following additional case, although not cited, was referred to in the skeleton arguments:

*Gateshead Metropolitan Borough Council v Secretary of State for the Environment* (1994) 71 P & CR 350 *E*

**APPEAL** from Holgate J

By a claim form the claimant, ClientEarth, an environmental law charity, applied under section 118 of the Planning Act 2008 for judicial review of the decision of the defendant, the Secretary of State for Business, Energy and Industrial Strategy, on 4 October 2019 granting a *F* development consent order, the Drax Power (Generating Stations) Order 2019 (SI 2019/1315), to the interested party, Drax Power Ltd, for a nationally significant infrastructure project ("NSIP") comprising the construction and operation of two gas-fired generating units situated at the existing Drax Power Station near Selby in North Yorkshire, contrary to the recommendation of the examining authority in its prior report dated 4 July 2019. The grounds of challenge were that the Secretary of State *G* had: (1) misinterpreted the Overarching National Policy Statement for Energy ("EN-1") on the assessment of the "need" for the development; (2) failed to give adequate reasons for her assessment of the "need" for the development; (3) misinterpreted EN-1 on the assessment of greenhouse gas ("GHG") emissions; (4) misinterpreted and misapplied section 104(7) of the Planning Act 2008; (5) failed to assess the carbon-capture readiness *H* of the development correctly in accordance with EN-1; (6) failed to comply with the requirements of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/572); (7) that her consideration of the net zero target had been procedurally unfair and/or, she had failed to give adequate reasons for her consideration of the net zero target; (8) the

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A Secretary of State had failed to fully consider the net zero target, including whether to impose a time limiting condition on the development; and (9) the decision was irrational. By a judgment dated 22 May 2020 Holgate J [2020] PTSR 1709 dismissed the claim.

By an appellant's notice filed on 12 June 2020 and pursuant to permission granted by the Court of Appeal (Lewison LJ) on 14 July 2020, the claimant appealed on the grounds that the judge had erred: (1) in his interpretation of B EN-1 on how to assess an energy NSIP's contribution to satisfying the need for the type of infrastructure in question and on the weight to be applied to "need" when deciding an application; (2) in his interpretation of EN-1 on the assessment of GHG emissions; and (3) in finding that the Secretary of State had acted lawfully in her interpretation and application of section 104(7) of the Planning Act 2008.

C The facts are stated in the judgment of Sir Keith Lindblom SPT, post, paras 1–4, 33–47.

*Gregory Jones QC* and *Merrow Golden* (instructed by *ClientEarth*) for the claimant.

*Andrew Tait QC* and *Ned Westaway* (instructed by *Treasury Solicitor*) for the Secretary of State.

D *James Strachan QC* and *Mark Westmoreland Smith* (instructed by *Pinsent Masons LLP*) for the interested party.

The court took time for consideration.

21 January 2021. The following judgments were handed down.

E

**SIR KEITH LINDBLOM SPT**

*Introduction*

**1** This appeal raises questions on the interpretation of the Overarching National Policy Statement for Energy ("EN-1") and the National Policy F Statement for Fossil Fuel Electricity Generating Infrastructure ("EN-2"), both designated in July 2011, and their legal effect in the determination of an application for a development consent order to approve a nationally significant infrastructure project ("NSIP"). The NSIP in question is the proposal to construct and operate two gas-fired generating units at the Drax Power Station, near Selby in North Yorkshire.

G **2** With permission granted by Lewison LJ, the appellant, ClientEarth, appeals against the order of Holgate J, dated 22 May 2020 ([2020] PTSR 1709), dismissing its claim for judicial review of the decision of the first respondent, the Secretary of State for Business, Energy and Industrial Strategy, on 4 October 2019, to make the Drax Power (Generating Stations) Order 2019 (SI 2019/1315) ("the DCO"), approving an application made by the second respondent, Drax Power Ltd. The claim was brought by H ClientEarth under section 118 of the Planning Act 2008 ("the Planning Act").

**3** The proposed generating units, known as "Unit X" and "Unit Y", would incorporate parts of two coal-fired units currently in operation at the site, which are due to be decommissioned in 2022. They would be fuelled by natural gas. Each would have a capacity of up to 1,800 megawatts, battery

storage of up to 100 megawatts and carbon capture and storage reserve space, giving a total capacity of up to 3,800 megawatts, with a designed operational life of up to 25 years. That development is an NSIP.

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

*The issues in the appeal*

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

*The Planning Act*

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

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

> "(3) The Secretary of State must decide the application in accordance with any relevant national policy statement, except to the extent that one or more of subsections (4) to (8) applies."

Section 104(7) states:

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

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

*EN-1*

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

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

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

**12** Paragraph 2.2.4 states:

E

> "2.2.4 Not all aspects of Government energy and climate change policy will be relevant to [Infrastructure Planning Commission ('IPC')] decisions or planning decisions by local authorities, and the planning system is only one of a number of vehicles that helps to deliver Government energy and climate change policy. The role of the planning system is to provide a framework which permits the construction of F whatever Government—and players in the market responding to rules, incentives or signals from Government—have identified as the types of infrastructure we need in the places where it is acceptable in planning terms. ... ."

**13** The proposed transition to a low carbon economy is described, and the role of the Climate Change Act in driving that transition by delivering G reductions in emissions through a series of five-year carbon budgets setting a trajectory to 2050 is explained (paragraphs 2.2.5 to 2.2.11). It is stated that "[the] EU Emissions Trading System ... forms the cornerstone of UK action to reduce greenhouse gas emissions from the power sector" (paragraph 2.2.12). Paragraph 2.2.19 states:

> "2.2.19 The Planning Act and any market reforms associated with H the Electricity Market Reform project will complement each other and are consistent with the Government's established view that the development of new energy infrastructure is market-based. While the Government may choose to influence developers in one way or another to propose to build particular types of infrastructure, it remains a matter for the market to decide where and how to build, as market mechanisms

will deliver the required infrastructure most efficiently. Against this background of possibly changing market structures, developers will still need development consent for each proposal. Whatever incentives, rules or other signals developers are responding to, the Government believes that the NPSs set out planning policies which both respect the principles of sustainable development and are capable of facilitating, for the foreseeable future, the consenting of energy infrastructure on the scale and of the kinds necessary to help us maintain safe, secure, affordable and increasingly low carbon supplies of energy."

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

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

"3.1.1 The UK needs all the types of energy infrastructure covered by this NPS in order to achieve energy security at the same time as dramatically reducing greenhouse gas emissions.

"3.1.2 It is for industry to propose new energy infrastructure projects within the strategic framework set by Government. The Government does not consider it appropriate for planning policy to set targets for or limits on different technologies.

"3.1.3 The IPC should therefore assess all applications for development consent for the types of infrastructure covered by the NPSs on the basis that the Government has demonstrated that there is a need for those types of infrastructure and that the scale and urgency of that need is as described for each of them in this Part.

"3.1.4 The IPC should give substantial weight to the contribution which projects would make towards satisfying this need when considering applications for development consent under the Planning Act 2008[16]."

A footnote to paragraph 3.1.4—footnote 16—states:

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

**16** Paragraph 3.2.3 states:

"3.2.3 This Part of the NPS explains why the Government considers that, without significant amounts of new large-scale energy infrastructure, the objectives of its energy and climate change policy cannot be fulfilled. However, ... it will not be possible to develop

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A the necessary amounts of such infrastructure without some significant residual adverse impacts. This Part also shows why the Government considers that the need for such infrastructure will often be urgent. The IPC should therefore give substantial weight to considerations of need. The weight which is attributed to considerations of need in any given case should be proportionate to the anticipated extent of a B project's actual contribution to satisfying the need for a particular type of infrastructure."

**17** The means of addressing the objectives of achieving energy security and reducing greenhouse gas emissions are explained. In a passage headed "Meeting energy security and carbon reduction objectives", it is stated that the Government "needs to ensure sufficient electricity generating capacity C is available to meet maximum peak demand, with a safety margin or spare capacity to accommodate unexpectedly high demand and to mitigate risks such as unexpected plant closures and extreme weather events" (paragraph 3.3.2). Paragraph 3.3.4 states:

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

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

**18** Therefore, to meet the challenges of energy security and climate E change, the Government "would like industry to bring forward many new low carbon developments (renewables, nuclear and fossil fuel generation with [Carbon Capture and Storage ('CCS')])" within the period up to 2025 (paragraph 3.3.5). The conclusion, in paragraph 3.3.6, again recalls the earlier text in paragraph 3.1.2:

F "3.3.6 Within the strategic framework established by the Government it is for industry to propose the specific types of developments that they assess to be viable. This is the nature of a market-based energy system. The IPC should therefore act in accordance with the policy set out in Section 3.1 when assessing proposals for new energy NSIPs."

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

"3.3.11 An increase in renewable electricity is essential to enable the UK to meet its commitments under the EU Renewable Energy Directive. … However, some renewable sources (such as wind, solar and tidal) are intermittent and cannot be adjusted to meet demand. As a result, H the more renewable generating capacity we have the more generation capacity we will require overall, to provide back-up at times when the availability of intermittent renewable sources is low. If fossil fuel plant remains the most cost-effective means of providing such back-up, particularly at short notice, it is possible that even when the UK's electricity supply is almost entirely decarbonised we may still need fossil

> fuel power stations for short periods when renewable output is too low to meet demand, for example when there is little wind."

Paragraph 3.3.12 says it is "therefore likely that increasing reliance on renewables will mean that we need more total electricity capacity than we have now, with a larger proportion being built only or mainly to perform back-up functions".

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

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

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

> "3.3.18 It is not possible to make an accurate prediction of the size and shape of demand for electricity in 2025, but in order to get a sense of the possible scale of future demand to 2025, one possible starting point is provided by the most recent Updated Energy and Emissions Projections (UEP) which DECC published in June 2010. It is worth noting that models are regularly updated and the outputs will inevitably fluctuate as new information becomes available. … The projections do not reflect a desired or preferred outcome for the Government in relation to the need for additional electricity generating capacity or the types of electricity generation required."

**22** Paragraph 3.3.21 adds that "[whilst] no such projections of the UK's future energy mix can be definitive, they illustrate the scale of the challenge the UK is facing and help the Government to understand how the market may respond". And paragraph 3.3.23 says that "[to] minimise risks to energy security and resilience, the Government therefore believes it is prudent to plan for a minimum need of 59 GW of new electricity capacity by 2025".

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

> "3.3.24 It is not the Government's intention in presenting the above figures to set targets or limits on any new generating infrastructure to be consented in accordance with the energy NPSs. It is not the IPC's role to deliver specific amounts of generating capacity for each technology type. The Government has other mechanisms to influence the current delivery of a secure, low carbon, affordable electricity mix. Indeed, the aim of the Electricity Market Reform project … is to review the role of the variety of Government interventions within the electricity market."

**24** The important role of renewable electricity generation is described in section 3.4. The United Kingdom's commitment to producing 15% of its total energy from renewable sources by 2020 is confirmed (in paragraph 3.4.1). The role of nuclear power is dealt with in section 3.5. Nuclear power

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A is expected to play an increasingly important role in the move to diversifying and decarbonising sources of electricity (paragraph 3.5.1). It is said to be "Government policy that new nuclear power should be able to contribute as much as possible to the UK's need for new capacity" (paragraph 3.5.2).

**25** The role of fossil fuel electricity generation is addressed in section 3.6. Paragraph 3.6.1 says that "[fossil] fuel power stations play a vital role in providing reliable electricity supplies: they can be operated flexibly in B response to changes in supply and demand, and provide diversity in our energy mix ... as the UK makes the transition to a low carbon economy, and Government policy is that they must be constructed, and operate, in line with increasingly demanding climate change goals". And paragraph 3.6.2 adds this:

C "3.6.2 ... Gas will continue to play an important role in the electricity sector—providing vital flexibility to support an increasing amount of low-carbon generation and to maintain security of supply."

**26** Paragraph 3.6.3 says that "[some] of the new conventional generating capacity needed is likely to come from new fossil fuel generating capacity in order to maintain security of supply, and to provide flexible back-up D for intermittent renewable energy from wind". It is also noted that "new technology offers the prospect of reducing the carbon dioxide emissions of both fuels [ie coal and gas] to a level where, whilst retaining many of their existing advantages, they can also be regarded as low carbon energy sources". Paragraph 3.6.4 emphasises the importance of CCS, which is said to have the potential to reduce carbon emissions from fossil fuel generation by up to 90%.

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

"3.6.8 ... [A] number of fossil fuel generating stations will have to close by the end of 2015. Although this capacity may be replaced by new nuclear and renewable generating capacity in due course, it is clear that there must be some fossil fuel generating capacity to provide back-up F for when generation from intermittent renewable generating capacity is low and to help with the transition to low carbon electricity generation. It is important that such fossil fuel generating capacity should become low carbon, through development of CCS, in line with carbon reduction targets. Therefore there is a need for [Carbon Capture Ready ('CCR')] fossil fuel generating stations and the need for the CCS demonstration G projects is urgent."

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

"4.1.2 Given the level and urgency of need for infrastructure of the H types covered by the energy NPSs set out in Part 3 of this NPS, the IPC should start with a presumption in favour of granting consent to applications for energy NSIPs ...".

**29** Paragraph 4.1.3 says that "[in] considering any proposed development, and in particular when weighing its adverse impacts against its benefits, the IPC should take into account" both "its potential benefits

including its contribution to meeting the need for energy infrastructure, job creation and any long-term or wider benefits" and "its potential adverse impacts, including any long-term and cumulative adverse impacts, as well as any measures to avoid, reduce or compensate for any adverse impacts". *A*

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

> "5.2.2 $CO_2$ emissions are a significant adverse impact from some types of energy infrastructure which cannot be totally avoided (even with full deployment of CCS technology). However, given the characteristics of these and other technologies … and the range of non-planning policies aimed at decarbonising electricity generation such as EU ETS … , Government has determined that $CO_2$ emissions are not reasons to prohibit the consenting of projects which use these technologies or to impose more restrictions on them in the planning policy framework than are set out in the energy NPSs (eg the CCR and, for coal, CCS requirements). Any ES on air emissions will include an assessment of $CO_2$ emissions, but the policies set out in Section 2, including the EU ETS, apply to these emissions. The IPC does not, therefore, need to assess individual applications in terms of carbon emissions against carbon budgets and this section does not address $CO_2$ emissions or any Emissions Performance Standard that may apply to plant." *B* *C* *D*

*EN-2*

**31** EN-2 stresses the "vital role" played by fossil fuel generating stations in "providing reliable electricity supplies and a secure and diverse energy mix as the UK makes the transition to a low carbon economy" (paragraph 1.1.1). It confirms that the Government's policy is to require a substantial proportion of the capacity of all new coal-fired stations to be subject to CCS, that new stations of that kind will be expected to retrofit CCS to their "full capacity", that other fossil fuel generating stations are expected to be "carbon capture ready", and that all such stations will be required to comply with Emissions Performance Standards (paragraph 1.1.2). *E* *F*

**32** Paragraph 2.5.2 of EN-2 states:

> "2.5.2 $CO_2$ emissions are a significant adverse impact of fossil fuel generating stations. Although an ES on air emissions will include an assessment of $CO_2$ emissions, the policies set out in Section 2.2 of EN-1 will apply, including the EU ETS. The IPC does not, therefore, need to assess individual applications in terms of carbon emissions against carbon budgets and this section does not address $CO_2$ emissions or any Emissions Performance Standard that may apply to plant." *G*

*The examining authority's report*

**33** On the question of need, the examining authority accepted ClientEarth's contention that, under EN-1, no weight should be given to the need for the proposed development, because, when current projections and other relevant factors were considered, there was no need for it. It concluded that an assessment of need is required for every energy NSIP and although the national policy statements supported a need for additional energy infrastructure in general, Drax Power had not demonstrated that this *H*

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A development would itself meet an identified need for gas generation capacity when assessed against EN-1's "overarching policy objectives of security of supply, affordability and decarbonisation" (paragraphs 5.2.4, 5.2.24, 5.2.26, 5.2.27 to 5.2.74, 5.3.27, 7.2.7 and 11.1.1 of the examining authority's report).

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

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

*The Secretary of State's decision letter*

D **36** In a section of her decision letter headed "The Principle of the Proposed Development and Conformity with National Policy Statements", the Secretary of State referred to the examining authority's conclusions on "need", in particular its conclusion "that the Development would not be in accordance with the relevant National Policy Statements for the purposes of section 104(3) of [the Planning Act]". She noted that "when considering E the planning balance for the purposes of section 104(7) ... , the ExA gave no positive weight to the contribution of the Development towards meeting identified need and gave considerable negative weight in the planning balance to both the adverse effects of the Development's GHG emissions on climate change ... and the perceived conflict with the NPSs' overarching decarbonisation objective" (para 4.7). Having referred to paragraphs 3.1.1 and 3.1.3 of EN-1, she quoted the statement in paragraph 3.6.1 that F fossil-fuel power stations play a "vital role in providing reliable electricity supplies", and the statement in paragraph 3.6.8 that "there is a need for [carbon capture ready] fossil fuel generating stations" (para 4.10). And she acknowledged that the proposed development—"a gas-fired generating station which would be carbon capture ready (with directly linked battery storage)"—is "a type of infrastructure ... covered by EN-1 and [EN-2] and G as such the presumption in favour of granting consent ... in paragraph 4.1.2 of EN-1 should apply" (para 4.12).

**37** She then said (in para 4.13):

> "4.13 The Secretary of State has considered the assessment that [the examining authority] has undertaken to determine whether the Development would meet an identified need for gas generation H capacity by reference to the high-level objectives of security of supply, affordability and decarbonisation. However, the Secretary of State is of the view that the NPSs clearly set out the specific planning policies which the Government believes both respect the principles of sustainable development and are capable of facilitating, for the foreseeable future, the consenting of energy infrastructure on the scale and of the kinds

necessary to help us maintain safe, secure, affordable and increasingly low carbon supplies of energy. The Secretary of State's view is that these policies, including the presumption in favour of granting consent for energy NSIPs in EN-1 have already taken account of the need to achieve security of supply, affordability and decarbonisation at a strategic level. The NPSs do not, therefore, require decision makers to go beyond the specific and relevant policies they contain to assess individual applications against those high level objectives and there was no need, therefore, for the ExA to make a judgement on those issues when assessing whether this specific application was in accordance with the NPS. The ExA's views on these matters do not, therefore, remove the need to apply the general presumption in favour of Carbon Capture Ready ('CCR') fossil fuel generation which already assumes a positive contribution from such infrastructure."

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

**39** She went on to say (in paras 4.15–4.17):

"4.15 However, in line with paragraph 4.13 above, the Development's impacts on decarbonisation must, in the first instance, be assessed by reference to the specific policies on carbon emissions from energy NSIPs which are contained in the relevant [national policy statements] and which reflect the appropriate role of the planning system in delivering wider climate change objectives and meeting the emissions reduction targets contained in the [Climate Change Act ('CCA')]. In this regard, the Secretary of State has noted that section 2.2 of EN-1 explains how climate change and the UK's GHG emissions reduction targets contained in the CCA have been taken into account in preparing the suite of Energy [national policy statements]. She has also noted the policy contained in paragraph 5.2.2 of EN-1[, which she then quoted in full].

"4.16 This policy is also reflected in paragraph 2.5.2 of EN-2. It is the Secretary of State's view, therefore, that, while the significant adverse impact of the proposed Development on the amount of greenhouse gases that will be emitted to atmosphere is acknowledged, the policy set out in the relevant NPSs makes clear that this is not a matter that ... should displace the presumption in favour of granting consent.

"4.17 In light of this, the Secretary of State considers that the Development's adverse carbon impacts do not lead to the conclusion that the Development is not in accordance with the relevant NPSs or that they would be inconsistent with the CCA. The Secretary of State notes the need to consider these impacts within the overall planning balance to determine whether the exception test set out in section 104(7) of the 2008 Act applies in this case. The ExA considers that the Development

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A will have significant adverse impacts in terms of GHG emissions which the Secretary of State accepts may weigh against it in the balance. However, the Secretary of State does not consider that the ExA was correct to find that these impacts, and the perceived conflict with NPS policy which they were found to give rise to, should carry determinative weight in the overall planning balance once the benefits of the project are properly considered, including in particular its contribution towards B meeting need as explained below."

**40** The Secretary of State's conclusions on need were these (in paras 4.18–4.20):

"4.18 The ExA's views on the need for the Development and how this is considered in the planning balance have also been scrutinised by C the Secretary of State. As set out above, paragraph 3.1.3 of EN-1, and the presumption in favour of the Development already assume a general need for CCR fossil fuel generation. Furthermore, paragraph 3.1.4 of EN-1 states: '*the [decision-maker] should give substantial weight to the contribution which projects would make towards satisfying this need when considering applications for development consent*'. The ExA D recommends that no weight should be given to the Development's contribution towards meeting this need within the overall planning balance. This is predicated on its view that EN-1 draws a distinction between the need for energy NSIPs in general and the need for any particular proposed development. The Secretary of State disagrees with this approach. The Secretary of State considers that applications for development consent for energy NSIPs for which a need has been E identified by the NPS should be assessed on the basis that they will contribute towards meeting that need and that this contribution should be given significant weight.

"4.19 The Secretary of State notes that paragraph 3.2.3 of EN-1 states that '*the weight which is attributed to considerations of need in any given case should be proportionate to the anticipated extent of* F *a project's actual contribution to satisfying the need for a particular type of infrastructure*'. The Secretary of State has, therefore, considered whether, in the light of the ExA's findings, there is any reason why she should not attribute substantial weight to the Development's contribution to meeting the identified need for new CCR fossil fuel generation infrastructure in this case. In particular, she has considered G the ExA's views on the changes in energy generation since the EN-1 was published in 2011, and the implications of current models and projections of future demand for gas-fired electricity generation and the evidence regarding the pipeline of consented gas-fired infrastructure which the ExA considered to be relevant [ER 5.2.40–43].

"4.20 The Secretary of State's consideration of the ExA's position is that (i) whilst a number of other schemes may have planning consent, H there is no guarantee that these will reach completion; (ii) paragraph 3.3.18 of EN-1 sets out that the Updated Energy and Emissions Projections (on which the ExA partially relies … to reach its conclusions on current levels of need) do not '*reflect a desired or preferred outcome for the Government in relation to the need for additional generating or the types of electricity required*'; and (iii) paragraph 3.1.2 of EN-1

explains that '*[i]t is for industry to propose new energy infrastructure projects within the strategic framework set by Government. The Government does not consider it appropriate for planning policy to set targets for or limits on different technologies*'. These points are reinforced elsewhere in EN-1, for example in paragraphs 2.2.4 and 2.2.19, which explain that the planning system will complement other commercial and market based mechanisms and rules, incentives and signals set by Government to deliver the types of infrastructure that are needed in the places where it is acceptable in planning terms—decisions on which consented energy schemes to build will therefore also be driven by these factors. In light of this, the Secretary of State does not accept that the ExA's findings on these issues should diminish the weight to be attributed to the Development's contribution towards meeting the identified need for CCR gas fired generation within the overall planning balance. The Secretary of State considers that this matter should be given substantial weight in accordance with paragraph 3.1.4 of EN-1. The Secretary of State's overall conclusions on the planning balance are set out at paragraphs 6.1–6.14 below."

**41** Under the heading "The Climate Change Act 2008 (2050 Target Amendment) Order 2019: 'Net Zero'", the Secretary of State concluded that the amendment to the Climate Change Act, which set a new legally binding target of at least a 100% reduction in greenhouse gas emissions against the 1990 benchmark ("Net Zero"), was "a matter which is both important and relevant to the decision on whether to grant consent for the Development and that regard should be had to it when determining the Application" (para 5.7). She noted that the amendment "does not alter the policy set out in the National Policy Statements which still form the basis for decision making under the Act" (para 5.8). And she did "not consider that Net Zero currently justifies determining the application otherwise than in accordance with the relevant NPSs or attributing the Development's negative GHG emissions impacts any greater weight in the planning balance" (para 5.9).

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

**43** Turning to the question of whether the adverse impacts of the development would outweigh its benefits under section 104(7), she summarised the relevant conclusions of the examining authority on matters they had given a "neutral weighting" (para 6.3); on those they had given "positive weight"—namely "biodiversity outcomes, socio-economics and the

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A proposed re-use of existing infrastructure at the Drax Power Station" (para 6.4); on those they had given "considerable negative weight", namely "impacts on decarbonisation and climate change"; and on "landscape and visual impacts", which were "negative" but did "not weigh heavily in the overall consideration of planning balance for the Development" (para 6.5).

**44** She then returned to the issue of need (in para 6.6):

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> "6.6 The Secretary of State considers that the ExA's interpretation of the need case set out in the NPSs is incorrect. In taking the position it did on need and GHG emissions, the ExA arrived at a position where it recommended that consent for the Development should be refused. The Secretary of State considers that the NPSs support the case for new energy infrastructure in general and, in particular, the need for new CCR fossil fuel generation of the kind which the Development would provide. While acknowledging the GHG emissions from the Development, the generating capacity of the Development in either two- or one-unit configurations is a significant argument in its favour, with a maximum of 3.8GW possible if the Applicant builds out both gas-fired and battery storage units as proposed. Therefore, the Secretary of State considers ... that the Development would contribute to meeting the identified need for CCR fossil fuel generation set out in the NPS and that substantial weight should be given to this in the planning balance."

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

> "6.7 In assessing the issue of GHG emissions from the Development and the ExA's conclusions in this matter, the Secretary of State notes that the Government's policy and legislative framework for delivering a net zero economy by 2050 does not preclude the development and operation of gas-fired generating stations in the intervening period. Therefore, while the policy in the NPS says GHG emissions from fossil fuel generating stations are accepted to be a significant adverse impact, the NPSs also say that the Secretary of State does not need to assess them against emissions reduction targets. Nor does the NPS state that GHG emissions are a reason to withhold the grant of consent for such projects. It is open to the Secretary of State to depart from the NPS policies and give greater weight to GHG emissions in the context of the Drax application but there is no compelling reason to do so in this instance."

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

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

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[the] Secretary of State considers that the benefits of the Development outweigh its adverse effects." A

**47** Her overall conclusion was that there was a "compelling case for granting consent for the development". She considered "that the Development would be in accordance with the relevant NPSs and, given the national need for such development as set out in the relevant NPSs, [she did] not believe that its benefits are outweighed by [its] potential adverse impacts, as mitigated by the terms of the Order". She therefore "decided to make the Order granting development consent" (para 7.1). B

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

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

**49** In Holgate J's view, the fact that EN-1 does not seek to define need in "quantitative" terms, except in some limited respects, is "consistent with (a) the broad indications of the potential need to double or treble generating capacity by 2050 previously given in Part 2 of the NPS … and (b) the unequivocal statement in paragraph 3.1.2 that it is inappropriate for planning policy to set targets for, or limits on, different types of technology" (para 73 of the judgment). In paragraphs 3.1.2 and 3.3.15 to 3.3.24 of EN-1 it is "plain that, apart from indicating need for a *minimum* amount of new capacity by 2025, the references to need in EN-1 were not expressed in quantitative terms". This "is said to be consistent with the market-based system under which electricity generation is provided and the other non-planning mechanisms by which Government seeks to influence the operation of the market" (para 80). Instead, EN-1 "focuses on qualitative need such as functional requirements". Paragraph 3.1.1 states that the United Kingdom needs all types of energy infrastructure covered by EN-1 "in order to achieve energy security while at the same time dramatically reducing GHG", and paragraphs 3.3.2 to 3.3.6 "explain how those twin objectives should be addressed" (para 81). E F G

**50** The judge said that, reading EN-1 as a whole, rather than selectively, "[it] is plain that the NPS … does not require need to be assessed in quantitative terms for any individual application" ([2020] PTSR 1709, para 129), that "[putting] to one side the 'interim milestone' which did not feature in the discussion in this case, there are no benchmarks against which a quantitative analysis ([eg] consents in the pipeline or projections of capacity) could be related" (para 130); and that "[given] those clear statements of policy in EN-1 there was no justification for the Panel to have regard to the 2017 UEP projections in order to assess the contribution of the Drax proposal to meeting the qualitative need identified in the NPS" (para 131). H

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

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

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

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

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

**56** As always, it is necessary to undertake the exercise of policy interpretation by construing the language of the relevant policy objectively, in its context, and having regard to its evident purpose (see the judgment of Lord Reed JSC in *Tesco Stores Ltd v Dundee City Council (Asda Stores Ltd intervening)* [2012] PTSR 983, at paras 17–19, the judgment of Lord Carnwath JSC in *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] PTSR 623, at paras 22–26). These general principles apply equally to the interpretation of national policy statements as they do to the interpretation of other planning policies (see my judgment in *Scarisbrick* [2017] EWCA Civ 787 at [19]).

**57** Starting with the most salient passages on need in EN-1, in Part 3, one can see seven things. First, there is a recognised need for "all the types of energy infrastructure" within its scope. Secondly, this is compatible, in principle, not only with the aim to "achieve energy security" but also with that of "dramatically reducing greenhouse gas emissions" (paragraph 3.1.1). Thirdly, in the Government's view it would be inappropriate "to set targets for or limits on" different technologies (paragraph 3.1.2). Fourthly, "all applications" for development consent should be assessed "on the basis that the Government has demonstrated that there is a need for those types of infrastructure" and "the scale and urgency of that need is as described in [Part 3]" (paragraph 3.1.3). Fifthly, when development consent is sought, "substantial weight" should be given to "the contribution which projects would make towards satisfying this need" (paragraph 3.1.4). Sixthly, because "without significant amounts of new large-scale energy infrastructure, the objectives of [the Government's] energy and climate change policy cannot be fulfilled", it is right that "substantial weight" should be given to "considerations of need" (paragraph 3.2.3). And seventhly, "[the] weight which is attributed to considerations of need in any given case should be proportionate to the anticipated extent of a project's actual contribution to satisfying the need for a particular type of infrastructure" (paragraph 3.2.3).

**58** Those seven points are expanded elsewhere in EN-1. In Part 2 there is a clear emphasis on the "market-based system" (paragraph 2.2.2); on the proposition that "the planning system is only one of a number of vehicles that helps to deliver Government energy and climate change policy" (paragraph 2.2.4); on the place of the EU Emissions Trading Systems as "the cornerstone of UK action to reduce greenhouse gas emissions from the power sector" (paragraph 2.2.12); on the changes being promoted

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A under the Electricity Market Reform project (paragraph 2.2.15); and on the complementary relationship between the Planning Act and the Electricity Market Reform project, which is "consistent with the Government's established view that the development of new energy infrastructure is market-based", it being "a matter for the market to decide where and how to build, as market mechanisms will deliver the required infrastructure most efficiently" (paragraph 2.2.19).

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

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

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

**62** The principles guiding the consideration of applications, in Part 4, flow from the text on decision-making in paragraphs 3.1.1 to 3.1.4. They provide a "presumption in favour of granting consent to applications for energy NSIPs" (paragraph 4.1.2). They also include as a potential benefit, in the balancing of "adverse impacts" against "benefits", a proposed development's "contribution to meeting the need for energy infrastructure" (paragraph 4.1.3).

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

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

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

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

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

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

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

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

her reasons for differing from the examining authority are inadequate or unclear.

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

**72** The issue was not left there. The Secretary of State applied the principle in the final sentence of paragraph 3.2.3 of EN-1. Again, in my view, she did so impeccably. First, she quoted the relevant words. Secondly, she made it clear that her mind was open to the possibility of reducing the weight given to the development's contribution to satisfying the relevant need. She said she had considered whether, in light of the examining authority's findings, there was "any reason why she should not attribute substantial weight to the Development's contribution to meeting the identified need for new CCR fossil fuel generation infrastructure in this case". Thirdly, she pointed to the three considerations relevant to this question: the examining authority's "views on the changes in energy generation since … EN-1 was published in 2011", the "implications of current models and projections of future demand for gas-fired electricity generation", and "the evidence regarding the pipeline of consented gas-fired infrastructure" (para 4.19). It is not suggested that this was an incomplete description of the three main points in the examining authority's assessment.

**73** The Secretary of State explained why she was not persuaded by the examining authority's assessment to conclude that less than "substantial weight" should be given to the identified need. There were three points: first, the lack of any "guarantee" that other schemes with consent would "reach completion"; second, as paragraph 3.3.18 of EN-1 says, the updated projections on which the examining authority had relied did not reflect "a desired or preferred outcome … in relation to … need …"; and third, the principle, in paragraph 3.1.2, that it is the responsibility of "industry" to propose new infrastructure "within the strategic framework set by Government", and "the Government does not consider it appropriate for planning policy to set targets for or limits on different technologies". All three of these points were, in the Secretary of State's view, reinforced by other passages in EN-1. The examining authority's findings did not, in her view, "diminish the weight to be attributed to the [development's] contribution towards meeting the identified need for CCR gas fired generation …". This, she concluded, "should be given substantial weight in accordance with paragraph 3.1.4 of EN-1" (para 4.20).

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

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

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

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

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

78 Holgate J saw no force in that argument. In his view it was "plain … that the Secretary of State did not treat GHG emissions as irrelevant, nor did she treat them as something to which no weight should be given". In para 4.17 of the decision letter she moved from her conclusions on D section 104(3) and (5) to the balance under section 104(7). She accepted that the examining authority's finding on the "significant adverse impacts of GHG emissions" from the development "could be weighed in the balance against the proposal". But she disagreed with their "evaluation of the benefits of the proposal, including its contribution towards meeting policy need". Once those benefits were "correctly weighed", she found "the impact of GHG emissions should not 'carry determinative weight in the overall planning E balance'". This, said the judge, "can only mean that the disbenefits did not carry more weight than the benefits"; it was "the other way round". In para 4.17 the Secretary of State was "describing a straight forward balancing exercise … in no way dependent upon the terms of paragraphs 5.2.2 of EN-1 or 2.5.2 of EN-2". She returned to this exercise in paras 6.3 to 6.9 of the decision letter (para 167 of the judgment).

F 79 The judge did not see the approach in paragraph 5.2.2 of EN-1 as "legally objectionable". It accorded with section 5(5)(c) of the Planning Act, and was also "supported by established case law on the significance of alternative systems of control (see eg *Gateshead Metropolitan Borough Council v Secretary of State for the Environment* (1994) 71 P & CR 350)" (para 170). In para 6.7 of the decision letter, when carrying out the G exercise required by section 104(7), the Secretary of State did not suggest that the policy in paragraph 5.2.2 of EN-1 and paragraph 2.5.2 of EN-2 treats greenhouse gas emissions as "an irrelevant consideration in a development consent order application or as a disbenefit to which no weight may be given" (para 172). EN-1 and EN-2 "proceed on the basis that there is no justification in *land use planning terms* for treating GHG emissions as a dis-benefit which in itself is dispositive of an application for a DCO" (para H 178). EN-1 does not preclude greenhouse gas emissions being given "greater weight" in the section 104(7) balance, "so long as [they are] not treated as a freestanding reason for refusal" (para 179).

80 Mr Jones submitted that the judge's interpretation of EN-1 was wrong. Neither EN-1 nor EN-2 prevents greenhouse gas emissions being a reason for withholding consent for an energy NSIP, overriding the presumption

in paragraph 4.1.2 of EN-1. The statement in paragraph 5.2.2 of EN-1 that $CO_2$ emissions are not "reasons to prohibit the consenting of projects which use these technologies …" is in general terms. It reflects the selection of some of the types of energy infrastructure covered by EN-1, including developments that will emit $CO_2$. It does not dictate how greenhouse gas emissions are to be considered in decision-making on an individual project.

**81** This understanding of paragraph 5.2.2, submitted Mr Jones, is confirmed by its reference to the environmental statement for a project, which, it says "on air emissions … will include an assessment of $CO_2$ emissions". Under the Environmental Impact Assessment Directive 2011/92/EU (as amended) ("the EIA Directive") and the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/572) ("the EIA Regulations"), greenhouse gas emissions would have to be assessed and taken into account within the "environmental information" before the decision-maker when considering whether to grant consent (regulation 21). Under the regime for environmental impact assessment, a significant environmental effect such as $CO_2$ emissions must potentially be capable of providing a reason for refusing consent for a project. EN-1 could not prevent that outcome, because it must be interpreted in accordance with EU law (see *Marleasing SA v La Comercial Internacional de Alimentación SA* (Case C-106/89) [1990] ECR I-4135), and otherwise would be overridden by the statutory exceptions under section 104(5) and (6) of the Planning Act. It was not open to the Government, through national policy, to prevent greenhouse gas emissions and their contribution to climate change from being, as Mr Jones put it, a "material consideration" in a decision on an application for a development consent order (see the speech of Lord Hoffmann in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 764, 780, 783 and 784; and *R (Wright) v Forest of Dean District Council (Secretary of State for Housing, Communities and Local Government intervening)* [2019] 1 WLR 6562, at paras 42, 52 and 53). That there are other means by which the United Kingdom seeks to reduce greenhouse gas emissions from existing infrastructure, including the EU Emissions Trading System, does not bear on this analysis.

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

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

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

85 The policy in paragraph 5.2.2 of EN-1 must be read in its entirety, and in its context. It should not be read in a way that puts it into conflict with other provisions in EN-1. The first sentence of the paragraph recognises that $CO_2$ emissions are "a significant adverse impact from some types of energy B infrastructure which cannot be totally avoided (even with full deployment of CCS technology)". The second sentence begins with a reference to "the characteristics of these and other technologies, as noted in Part 3 of this NPS" and to "the range of non-planning policies aimed at decarbonising electricity generation such as EU ETS ...". It is clear therefore that the policy is seen by the Government as compatible with the policies on need in Part 3. There is C no suggestion that it removes or qualifies the general "presumption in favour of granting consent to applications for energy NSIPs" in paragraph 4.1.2, which is founded on the "level and urgency of need for infrastructure of the types covered by the energy NSIPs set out in Part 3"—including fossil fuel generating capacity.

86 Seen in this context, the policy itself is plain in its meaning. It says D that "... $CO_2$ emissions are not reasons to prohibit the consenting of projects which use these technologies ...". And it adds that although an assessment of $CO_2$ emissions will be included in an environmental statement for a proposed development, the policies in Part 2 of EN-1 apply to them, and in decision-making it is unnecessary "to assess individual applications in terms of carbon emissions against carbon budgets ...". The same policy, but specifically for "fossil fuel generating stations", appears in paragraph 2.5.2 of EN-2, which E acknowledges that "$CO_2$ emissions are a significant adverse impact of fossil fuel generating stations".

87 The force of the policy, therefore, is not that $CO_2$ emissions are irrelevant to a development consent decision, or cannot be given due weight in such a decision. It is simply that $CO_2$ emissions are not, of themselves, an automatic and insuperable obstacle to consent being F given for any of the infrastructure for which EN-1 identifies a need and establishes a presumption in favour of approval. If they were, the policy need and the policy presumption would effectively be negated for certain forms of infrastructure supported by EN-1, and those essential provisions contradicted. Paragraph 5.2.2 does not diminish the need for relevant energy infrastructure established in national policy or undo the positive presumption. But nor does it prevent greenhouse gas emissions from being G taken into account as a consideration attracting weight in a particular case. How much weight is for the decision-maker to resolve. It follows that, in a particular case, such weight could be significant, or even decisive, whether with or without another "adverse impact". This, I accept, differs from the judge's conclusion, in para 179 of his judgment, that greenhouse gas emissions are not capable of being "treated as a freestanding reason for H refusal".

88 The Secretary of State's understanding of the policy was, in my view, the correct one. Having concluded that "the presumption in favour of fossil fuel generation" applied, she directed herself to consider "whether any more specific and relevant policies ... in the relevant NPSs clearly indicate that consent should be refused", given the examining authority's conclusion

that "there would be significant adverse effects from the [development] in respect of GHG emissions which gave rise to a perceived conflict with the decarbonisation objective of EN-1" (para 4.14). She thought not, for three reasons. First, as she reminded herself in the light of section 2.2 of EN-1, "climate change and the UK's GHG emissions reduction targets contained in the [Climate Change Act] have been taken into account in preparing the suite of Energy NPSs" (para 4.15 of the decision letter). Secondly, having in mind the policy in paragraph 5.2.2 of EN-1 and paragraph 2.5.2 of EN-2, she acknowledged "the significant adverse impact of the proposed Development on the amount of greenhouse gases that will be emitted to atmosphere", but recognised that the policy "makes clear that this is not a matter that … should displace the presumption in favour of granting consent" (paras 4.15 and 4.16). And thirdly, she concluded, unequivocally, that "the Development's adverse carbon impacts do not lead to the conclusion that the Development is not in accordance with the relevant NPSs or that they would be inconsistent with the [Climate Change Act]" (para 4.17).

**89** That, however, was not the end of the Secretary of State's consideration of greenhouse gas emissions. As she went on to say, she was aware of the "need to consider these impacts within the overall planning balance to determine whether the exception test set out in section 104(7) of [the Planning Act] applies in this case". She referred to the examining authority's conclusion that the development would have "significant adverse impacts in terms of GHG emissions", which she accepted "may weigh against it in the balance". But she disagreed with the examining authority's finding "that these impacts and the perceived conflict with NPS policy … should carry determinative weight in the overall planning balance once the benefits of the project are properly considered, including in particular its contribution towards meeting need …" (para 4.17). In saying this, the Secretary of State was accepting that greenhouse gas emissions had a place in the balancing exercise she was going to conduct, though she concluded that they should not have "determinative weight". There is no legal flaw in this conclusion. It is faithful to the policy in paragraph 5.2.2 of EN-1.

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

**91** When she came to the balancing exercise under section 104(7) (in paras 6.1 to 6.9 of the decision letter), the Secretary of State expressly considered the examining authority's view that "considerable negative weight" should be attached to "impacts on decarbonisation and climate change" (para 6.5). She referred to "the GHG emissions from the Development" when considering the weight to be given to the need for it under EN-1 (para 6.6). She dealt specifically with the weight given to greenhouse gas emissions as "a significant adverse impact" of fossil fuel generating stations, which EN-2 acknowledges it to be in paragraph 2.5.2. She said, rightly, that EN-1 and EN-2 did not require her "to assess [greenhouse gas emissions] against emissions reduction targets", which matches the similar statement in paragraph 5.2.2 of EN-1 and paragraph 2.5.2 of EN-2. She also said, again rightly, that EN-1 does "[not] state that [greenhouse gas emissions] are a reason to withhold the grant of consent for such projects", which corresponds to the statement in paragraph 5.2.2 that

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A they are "not reasons to prohibit the consenting of projects which use these technologies ...". She accepted it was "open" to her to "depart from the NPS policies" and "give greater weight to GHG emissions in the context of the Drax application". But she found "no compelling reason to do so" in this case (para 6.7).

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

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

**94** The Secretary of State did not misdirect herself on the meaning and E effect of the policy in paragraph 5.2.2 of EN-1 and paragraph 2.5.2 of EN-2, or misapply it. She did not read it as purporting to make $CO_2$ emissions, or greenhouse gas emissions, irrelevant in a decision on an application for a development consent order. She clearly did not regard herself as constrained by EN-1 to treat greenhouse gas emissions as having no bearing on her decision on the Drax project—either because there are other means by F which the United Kingdom seeks to reduce greenhouse gas emissions from infrastructure, including the EU Emissions Trading System, or for any other reason.

**95** One cannot say that she misunderstood the purpose of environmental impact assessment under the EIA Directive and the EIA Regulations, or the relevance of an assessment of $CO_2$ emissions in an environmental statement for a project within the scope of EN-1 and EN-2. As Mr Tait submitted, the G requirement to assess the environmental impacts of a development, under regulation 21 of the EIA Regulations, is not incompatible with a statement of national policy in which the Government explains how impacts of a particular kind are viewed, and how they are being addressed by different means. And there is no basis here for the submission that the Secretary of State thought the policy in paragraph 5.2.2 of EN-1 could, in principle, H prevent greenhouse gas emissions, if assessed as a likely significant effect on the environment in an environmental statement, from warranting a refusal of development consent. This was not a conclusion she reached, nor implicit in any she did.

**96** The law on "material considerations" in the sphere of decision-making on applications for planning permission under section 70 of the Town and

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

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

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

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

**99** Holgate J saw no difficulty in rejecting this ground of the claim. Citing the decision of this court in *R (Thames Blue Green Economy Ltd) v Secretary of State for Communities and Local Government* [2016] JPL 157, and at first instance in the same case ([2015] EWHC 727 (Admin)), and also that of the Divisional Court in *R (Spurrier) v Secretary of State for Transport* [2020] PTSR 240, he acknowledged that section 104(7) may not be used to "circumvent the application of sections 87(3), 104(3) and 106(2)" of the Planning Act (para 176 of the judgment). But the Secretary of State was "legally entitled to … give 'substantial weight' to the need case in accordance with the NPS", and "fully entitled to take that assessment into account under section 104(7)" (para 177 of the judgment). In para 6.7 of the decision letter she recognised that in EN-1 greenhouse gas emissions are accepted to be a "significant adverse impact", and then went on to consider whether, in the section 104(7) balance, that factor should be given "greater weight" in the case of the Drax proposal. The proposal also gave rise to landscape and visual impacts, which were "further disbenefits". The suggestion that the Secretary of State looked at the balance under section 104(7) "solely through the lens of, or improperly fettered by, the NPSs" was "untenable" (para 179). She decided not to give "greater weight" to greenhouse gas emissions because she found there to be "no compelling reason in this instance". To criticise this as improperly introducing a "threshold test" was "an overly legalistic approach to the reading of the decision letter". The Secretary of State was "simply expressing a matter of planning judgment", and "saying that there was no

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A sufficiently cogent reason for giving more weight to this matter". She was "entitled to exercise her judgment in that way". She went on, in para 6.9, to "weigh all the positive and negative effects of the proposal before concluding that the benefits outweighed the adverse effects of the proposal" (para 180).

**100** Mr Jones submitted that the availability of the power to review under section 6 of the Planning Act does not prevent reduced weight being given to policies in a national policy statement that have become out-of-date, B or greater weight to other "material considerations" because circumstances have changed since the designation of the national policy statement—such as greenhouse gas emissions in the light of the target of "Net Zero" (see *Spurrier*, at para 109). If that balancing exercise results in "adverse impacts" outweighing "benefits", the obligation under section 104(3) to determine the application in accordance with the national policy statement is released. The C section 104(3) assessment must not be allowed to override the operation of section 104(7).

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

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

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

**104** First, the purpose of the balancing exercise in section 104(7) is to establish whether an exception should be made to the requirement H in section 104(3) that an application for development consent must be decided "in accordance with any relevant national policy statement". The exercise involves a straightforward balance, setting "adverse impact" against "benefits". It is not expressed as excluding considerations arising from national policy itself. It does not restrain the Secretary of State from bringing into account, and giving due weight to, the need for a particular type

of infrastructure as recognised in a national policy statement, and setting it against any harm the development would cause (see the judgment of Sales LJ in *Thames Blue Green Economy Ltd*, at para 16).

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

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

**107** Fourthly, the Secretary of State concluded in para 6.2, on the basis of her earlier conclusions in paras 4.8 to 4.20, that the proposed development was "in accordance with EN-1", having satisfied herself that it "should benefit from [the policy presumption in favour of granting consent for energy NSIPs in EN-1] because there are no more specific and more relevant NPS policies which clearly indicate that consent should be refused" and that "therefore the Development accords with relevant NPSs". This was a lawful conclusion.

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

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

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

*Conclusion*

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

**LEWIS LJ**

B **112** I agree.

**LEWISON LJ**

**113** I also agree.

*Appeal dismissed.*

C

FRASER PEH, Barrister

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H

## Appendix 7 – Sensitivity test of accompanied vs unaccompanied freight against Table 8 of Transport Assessment

**Table -** 24hr Traffic Generation Summary Based on End User Profile

| | TA Assumptions (Table 8) | | | Sensitivity Test (38/62 split) | | | Change from TA Assumptions | | |
|---|---|---|---|---|---|---|---|---|---|
| | Inbound | Outbound | Total | Inbound | Outbound | Total | Inbound | Outbound | Total |
| 00:00-01:00 | 2 | 1 | 2 | 1 | 3 | 3 | 0 | 0 | 0 |
| 01:00-02:00 | 2 | 1 | 1 | 1 | 2 | 3 | -1 | 0 | -1 |
| 02:00-03:00 | 1 | 1 | 1 | 1 | 2 | 2 | 0 | 0 | 0 |
| 03:00-04:00 | 1 | 1 | 1 | 1 | 2 | 2 | 0 | 0 | 0 |
| 04:00-05:00 | 1 | 3 | 1 | 2 | 3 | 4 | 0 | 0 | 0 |
| 05:00-06:00 | 3 | 9 | 3 | 8 | 11 | 12 | 0 | -1 | -1 |
| 06:00-07:00 | 12 | 22 | 10 | 20 | 30 | 34 | -2 | -2 | -4 |
| 07:00-08:00 | 19 | 31 | 17 | 29 | 46 | 50 | -2 | -2 | -4 |
| 08:00-09:00 | 26 | 25 | 23 | 23 | 46 | 51 | -3 | -2 | -5 |
| 09:00-10:00 | 31 | 221 | 27 | 262 | 289 | 252 | -4 | 41 | 37 |
| 10:00-11:00 | 36 | 89 | 32 | 98 | 130 | 125 | -4 | 8 | 4 |
| 11:00-12:00 | 41 | 73 | 37 | 69 | 106 | 114 | -4 | -4 | -8 |
| 12:00-13:00 | 44 | 74 | 40 | 68 | 108 | 118 | -4 | -6 | -10 |
| 13:00-14:00 | 50 | 79 | 45 | 72 | 117 | 129 | -5 | -7 | -12 |
| 14:00-15:00 | 63 | 70 | 59 | 63 | 122 | 133 | -4 | -6 | -10 |
| 15:00-16:00 | 90 | 63 | 87 | 57 | 144 | 153 | -3 | -6 | -9 |
| 16:00-17:00 | 107 | 62 | 104 | 56 | 160 | 169 | -3 | -6 | -9 |
| 17:00-18:00 | 121 | 52 | 122 | 47 | 169 | 173 | 1 | -5 | -4 |
| 18:00-19:00 | 145 | 41 | 152 | 37 | 189 | 186 | 7 | -4 | 3 |
| 19:00-20:00 | 128 | 29 | 144 | 26 | 170 | 157 | 16 | -3 | 13 |
| 20:00-21:00 | 38 | 16 | 42 | 15 | 57 | 54 | 4 | -2 | 2 |
| 21:00-22:00 | 6 | 6 | 6 | 5 | 11 | 12 | 0 | -1 | -1 |
| 22:00-23:00 | 3 | 2 | 3 | 2 | 5 | 5 | 0 | 0 | 0 |
| 23:00-24:00 | 2 | 1 | 2 | 1 | 3 | 3 | 0 | 0 | 0 |

## Appendix 8 – Intertidal and Subtidal Habitat Loss Plan

520400
521000
416500
416200
415900

N

Subtidal mudflat (below MLWS)

Direct loss of 0.006 ha of intertidal mudflat from captal dredge (considered worst case as side slope may not require dredging at this location)

Direct loss of 0.027 ha of subtidal mudflat beneath piles

Intertidal mudflat (above MLWS)

Direct loss of 0.006 ha of intertidal mudflat beneath piles

Indirect loss of 0.01 ha of intertidal mudflat (considered worst case as level of predicted change is at limit of accuracy of modelled data - likely to be immeasurable against the context of natural variability)

0 0.05 0.1 NM
0 50 100 200 m

**Legend**

- Proposed Application Site
- Indicative dredge area
- Direct intertidal loss - capital dredge
- Indirect intertial loss
- Mean Low Water Springs (MLWS)

Direct loss beneath piles

- Intertidal
- Subtidal

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Ordnance Survey 0100031673.
Mean Low Water Springs = 0.9m CD

| Date | By | QA |
|---|---|---|
| 14/08/2023 | OJR | CRO |
| Projection | British National Grid | |
| Scale (A4) | 1:4,500 | |
| Project no. | 5035 | |
| Fig_Habitat_Loss_Combined_A4.mxd | | |

**IMMINGHAM EASTERN RO-RO TERMINAL**

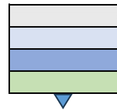
**INTERTIDAL AND SUBTIDAL HABITAT LOSS**

## Appendix 9 – Indicative construction programme

| | | 2024 | 2025 | 2026 | 2027 | 2028 | 2029 |
|---|---|---|---|---|---|---|---|
| **Constructing Berth 1&2 Concurrent with Berth 3** | | Jan Feb Mar Apr May Jun Jul Aug Sep Oct Nov Dec | Jan Feb Mar Apr May Jun Jul Aug Sep Oct Nov Dec | Jan Feb Mar Apr May Jun Jul Aug Sep Oct Nov Dec | Jan Feb Mar Apr May Jun Jul Aug Sep Oct Nov Dec | Jan Feb Mar Apr May Jun Jul Aug Sep Oct Nov Dec | Jan Feb Mar Apr May Jun Jul Aug Sep Oct Nov Dec |
| **Scenario 1a Construction Commence Q2** | Berth 1&2 Outer Finger Pier<br>Approach Jetty<br>Berth 3 Inner Finger Pier | | | | **Construction Duration**<br>25 Months | | |
| **Scenario 1b Construction Commence Q3** | Berth 1&2 Outer Finger Pier<br>Approach Jetty<br>Berth 3 Inner Finger Pier | | | | **Construction Duration**<br>26 Months | | |
| **Scenario 1c Construction Commence Q4** | Berth 1&2 Outer Finger Pier<br>Approach Jetty<br>Berth 3 Inner Finger Pier | | | | **Construction Duration**<br>32 Months | | |
| **Scenario 1d Construction Commence Q1** | Berth 1&2 Outer Finger Pier<br>Approach Jetty<br>Berth 3 Inner Finger Pier | | | | **Construction Duration**<br>29 Months | | |
| **Constructing Berth 1&2 then Constructing Berth 3** | | Jan Feb Mar Apr May Jun Jul Aug Sep Oct Nov Dec | Jan Feb Mar Apr May Jun Jul Aug Sep Oct Nov Dec | Jan Feb Mar Apr May Jun Jul Aug Sep Oct Nov Dec | Jan Feb Mar Apr May Jun Jul Aug Sep Oct Nov Dec | Jan Feb Mar Apr May Jun Jul Aug Sep Oct Nov Dec | Jan Feb Mar Apr May Jun Jul Aug Sep Oct Nov Dec |
| **Scenario 2a Construction Commence Q2** | Berth 1&2 Outer Finger Pier<br>Approach Jetty<br>Berth 3 Inner Finger Pier | | | Operations Commence - Berth 1 & 2 | | **Construction Duration**<br>49 Months | |
| **Scenario 2b Construction Commence Q3** | Berth 1&2 Outer Finger Pier<br>Approach Jetty<br>Berth 3 Inner Finger Pier | | | Operations Commence - Berth 1 & 2 | | **Construction Duration**<br>47 Months | |
| **Scenario 2c Construction Commence Q4** | Berth 1&2 Outer Finger Pier<br>Approach Jetty<br>Berth 3 Inner Finger Pier | | | Operations Commence - Berth 1 & 2 | | | **Construction Duration**<br>56 Months |
| **Scenario 2d Construction Commence Q1** | Berth 1&2 Outer Finger Pier<br>Approach Jetty<br>Berth 3 Inner Finger Pier | | | Operations Commence - Berth 1 & 2 | | | **Construction Duration**<br>53 Months |

**Legend**

Non work due to seasonal restrictions
Berth 1&2 - Outer Finger Pier Construction
Approach Jetty Construction
Berth 3 - Inner Finger Pier Construction
Operations Commence



# Appendix 10 – Migratory Fish and Marine Mammals Signposting Document

# Signposting Document

**Subject:** **Immingham Eastern Ro-Ro Terminal (IERRT) – Migratory fish and marine mammals**

**Status:** **Relevant Representations Signposting Response – 14 July 2023**

## 1. Introduction

1.1. In their Relevant Representations dated 19 April 2023, the Marine Management Organisation (MMO) raised a number of points regarding migratory fish and marine mammals. This document responds to and clarifies the points raised.

1.2. This signposting document references:

- Application Document Reference number 8.2.7 - Environmental Statement - Volume 1 - Chapter 7 – Physical Processes (APP-043);
- Application Document Reference number 8.2.9 - Environmental Statement - Volume 1 - Chapter 9 - Nature Conservation and Marine Ecology (APP-045);
- Application Document Reference number 8.4.09(b) - Environmental Statement - Volume 3 - Appendix 9.2 – Underwater Noise Assessment (APP-088); and
- Application Document Reference number 9.6 - Habitats Regulations Assessment (APP-115).

1.3. It addresses below MMO's comments set out in their Relevant Representation, specifically key issues raised in Section 4.2 and Section 4.4. In each case, MMO's comments are first summarised and ABP's responses to those comments are then provided.

## 2. MMO reference 4.2.1, 4.2.12, and 4.2.14 (Migratory fish – intra-project effects (dredging and piling))

*1) Concerns about the impacts to migratory fish from piling and dredging works being undertaken concurrently and note that the multiple stressors to fish (increased suspended sediment concentration (SSC) in water column and underwater noise (UWN) and vibration) arising from these simultaneous activities have not been examined in the intra-project effects assessment*

2.1. Changes in water quality and impacts on fish have been assessed from paragraph 9.8.125 onwards in Chapter 9 of the ES (APP-045). Changes in suspended sediment concentration (SSC) that are predicted to occur as a result of the capital dredge and disposal are considered in the Physical Processes assessment (Chapter 7 of this ES – APP-043) and informs the assessment of impacts on fish.

2.2. In summary, the Humber Estuary is highly turbid, with peak SSCs in excess of 20,000 mg/l in some cases. As noted in Chapter 7 of this ES, maximum SSCs are associated with the disposal activities (with relatively small increases in SSC arising from the dredge itself). The dredge disposal for IERRT is predicted to produce peak SSCs of around 600 to 800 mg/l above background at the disposal site. This is of a magnitude that regularly occurs naturally or as a result of ongoing maintenance dredging/disposal. Due to the existing high SSCs that

typically occur in the Humber Estuary, the predicted increase in concentrations resulting from the disposal is likely to become immeasurable (against background) within approximately 1 km of the disposal site. The measurable plume from each disposal operation is also only likely to persist for a single tidal cycle (less than 6 hours from disposal) as after this time the dispersion under the peak flood or ebb tidal flows means concentrations will have reverted to background levels. Fish within the Humber Estuary are also very well adapted to living in an area with variable and typically very high year-round suspended sediment loads. They are not considered sensitive to high SSCs.

2.3. It is also important to note the assessment presents a worst case in terms of potential increases in SSCs in that it is based on the disposal of unconsolidated material at HU060. This would result in the largest increase in SSCs. However, some of dredge material (*circa* 25%) will be consolidated glacial clay/till which will be removed by backhoe dredger. This will result in a smaller increase in SSCs.

2.4. On the basis of the above, the overall impact of increased SCCs is assessed as insignificant. As a consequence, increases in SSCs from dredging/disposal activities and elevated levels of underwater noise associated with piling are not considered to result in a significant cumulative/in-combination effect on fish.

## 3. MMO reference 4.2.3 and 4.2.15 (Migratory fish – operational effects)

*1) Applicant is yet to assess the potential impacts to fish 'during operation' (i.e., changes to fish populations and fish habitat, changes in water and sediment quality and underwater noise and vibration) as these impacts are considered to be equivalent or lower in magnitude than those from the construction phase and existing maintenance dredging and vessel movements in the river*

3.1. Operational impacts on fish have been assessed in Table 9.25 of Chapter 9 of the ES (APP-045). The following impact pathways associated with maintenance dredging/disposal and vessel movements were considered:

- Changes to fish populations and habitat;
- Changes in water and sediment quality;
- Underwater noise; and
- Lighting.

3.2. Potential effects associated with these impact pathways have been assessed as insignificant and the justification to support this conclusion has been provided.

3.3. It should be noted, as stated in paragraph 9.8.254 of Chapter 9 of the ES, that maintenance dredging required for the IERRT project already falls within the consent granted by the current marine licence for the disposal of maintenance dredge material from the Port of Immingham (L/2014/00429/2). Maintenance dredging is a near constant activity at Port of Immingham and Humber Estuary. The changes brought about as a result of the maintenance dredge and disposal of maintenance dredge material during operation of the IERRT will be comparable to that which already arises from the ongoing maintenance of the existing Immingham berths.

3.4. Furthermore, as stated in Table 9.25 of Chapter 9 of the ES, the additional operational vessel movements resulting from the proposed development will only constitute a small increase in vessel traffic in the area on a typical day. The vessel movements constitute up to six additional Ro-Ro vessel movements per day at the Port of Immingham, as well as tugs, which represents an approximately 3% increase in vessel traffic to the Port of Immingham (and even less in comparison to shipping movements in the Humber Estuary). There will also be maintenance dredger movements but that is estimated to only be necessary approximately three to four times a year.

## 4. MMO reference 4.2.5, 4.4.11 and 4.4.14 (Migratory fish/underwater noise – use of four piling rigs)

*1) It is not clear why concurrent piling using two rigs has been modelled, if four rigs are going to be in operation concurrently*

4.1. Four piling rigs may be in operation concurrently but as noted by MMO/Cefas in the next point below, it is highly unlikely that the piling hammers will strike in unison to create a cumulative effect. There is a slight possibility that two of the hammers may strike at the exact time in unison, and therefore the modelled source level has taken account of two piling sources as a reasonable worst case.

*2) Simultaneous piling from multiple rigs are unlikely to increase the received peak pressure levels or the single strike SEL, as the individual pulses (and their peaks) originating from distinct rigs do not generally overlap (due to the distinct timing of the strikes and the propagation paths)*

4.2. As noted in our previous response, we agree that simultaneous piling is unlikely. The maximum number of pile strikes per day and cumulative SEL predictions have taken account of maximum number of piles that would be installed each day by up to four rigs and is therefore considered to already represent piling from multiple rigs.

*3) Unclear whether the 'land-based approach' refers to piling above MHWS, or refers to a land-based crane being used to pile into the water*

4.3. The land-based approach refers to a land-based rig being used to pile into the water and these piles have been considered in the underwater noise assessment

*4) Describe/map location of piling rigs in UWN assessment*

4.4. The location of piles has been taken into consideration in the underwater noise assessment approach. The noise propagation modelling results have been applied to the most seaward point of the proposed development (and piling) to determine the furthest most point across the estuary that would be affected.

## 5. MMO reference 4.2.6 and 4.4.12 (Migratory fish – Temporary Threshold Shift (TTS))

*1) TTS should be modelled and presented for percussive and vibro- piling so that a range of effect can be determined. TTS is missing from Table 3 (Appendix 9.2) for piling and the MMO would expect this to be included (in addition to mortality and potential mortal injury, and recoverable injury)*

5.1. The upper and lower boundary of effects (i.e., injury and behavioural thresholds) have been modelled and assessed in Appendix 9.2 of the ES (APP-088). The TTS threshold falls within the middle of those ranges. As the worst case has already been assessed, it is not considered necessary to model TTS, as this will not change the outcome of the significance assessment presented in ES.

5.2. This was discussed with the MMO/Cefas in a meeting on 30 June 2023 and they were in agreement with the above points.

## 6. MMO reference 4.2.7, 4.4.13 and 4.4.16 (Migratory fish/underwater noise – modelling approach)

*1) Modelling approach used in the ES assessment can only be used to predict magnitude of risk, rather than to determine range of impact. In addition, the MMO understands that the range of impact may be considerably higher.*

*The simple modelling approach can only provide approximations (i.e., an indication of the order of magnitude) of the potential effects, rather than definitive ranges and percentages*

6.1. The limitations of the modelling approach are set out in Appendix 9.2 in the ES (APP-088). We recognise that the simple logarithmic spreading modelling approach that was agreed to be used at the scoping stage may not always provide definitive ranges. Rounding the predicted ranges to the nearest order of magnitude will not, however, change the outcome of the significance assessment presented in ES. Although it is recognised that simple models in complex environments can underestimate sound levels close to the source (i.e., within tens of metres), they can also substantially overestimate levels further from the source (i.e., beyond a few kilometres) (Farcas *et al.*, 2016). The distance of behavioural impacts presented in ES (*circa* 1-2 km) fall within these two ranges and are therefore considered a reasonable representation of the impact range.

*2) Using the propagation assumptions detailed in the report (i.e., TL = 17.91 + $\alpha R$), a behavioural threshold of 135 dB SELss (a conservative assumption from Hawkins et al., 2014) and a source level of 203 dB (assuming that this is SELss), then we may expect effects out to ~ 6 km. Thus, it can be concluded that there is the risk of a temporary barrier effect across part or all of the estuary*

6.2. The assumptions and model input values are set out in Table 6 in Appendix 9.2 of the ES (APP-088). When applying the simple model, which includes an absorption coefficient ($\alpha$) to the behavioural threshold of 135 dB SELss and a source level of 203 dB, effects are predicted out to ~ 2 km. When applying the

simple model without the absorption coefficient term (+ $\alpha R$) effects are predicted out to ~ 6 km. The inclusion of an absorption coefficient is considered more appropriate in constrained, shallow, and turbid water environments such as the Humber Estuary (NPL, 2014), and therefore the predictions presented in the IERRT ES are considered to be more representative of the potential effects.

## 7. MMO reference 4.2.8, 4.2.9, 4.2.10, 4.4.6 and 4.4.7 (Migratory fish/underwater noise – piling restrictions)

### *1) Justification for the 140-hour and 196-hour timeframes has not been provided*

7.1. Following previous advice from the MMO/Cefas in their response dated 18 May 2022 (to the IEERT Technical Note_migratory fish_21Apr2022), which stated "*Regarding the comments on AMEP, the MMO, in consultation with Cefas, refer the Applicant to Annex 1 of this document, which provides details of multiple seasonal piling restrictions on percussive piling to protect migratory fishes…*", a similar approach to AMEP has been followed to the development of piling restrictions for IERRT.

7.2. The rationale for the 140-hour and 196-hour periods of piling proposed for IERRT is set out in the Second Technical Note dated 13 June 2022. In summary, they are based on the rationalisation and adaptation of the AMEP restrictions to take account of the specific location, nature and scale of effects associated with IERRT, namely that IERRT will involve the use of smaller piles for a much shorter period of time, IERRT will only result in a partial acoustic barrier across the estuary compared to AMEP which will result in a complete barrier, and the fact that IERRT is located further downstream and in a slightly wider part of the outer estuary. Given these differences, it was not considered reasonable or proportionate to apply the AMEP restrictions in their entirety.

7.3. Furthermore, the AMEP restrictions provide a precedent of what was considered acceptable by all relevant stakeholders, including the MMO, based on the evidence available at that time for that project. The Statement of Common Ground (SoCG) on the Shadow Habitats Regulations Assessment between Able Humber Ports Ltd (The Applicant for AMEP) and the MMO and Natural England states that the mitigation proposed for AMEP was considered sufficient to avoid an Adverse Effect on Integrity (AEOI). No specific evidence or rationale was provided in support of this statement. Similarly, the Environment Agency's oral representation at the Issue Specific Hearings held on 11-13 September 2012 for the AMEP examination stated that the piling conditions "*are appropriate for this application*". There has been no new evidence since the restrictions for AMEP were agreed and, therefore, these restrictions are still considered to be acceptable.

7.4. It is important to understand that the proposed restrictions for migratory fish sit within a much wider package of mitigation measures for other receptors, including overwintering coastal waterbirds that are located near to the proposed development and are sensitive to noise and visual disturbance. To address this issue, ABP has committed to avoiding construction activities on or close (within approximately 200 m) to the intertidal mudflats where the overwintering bird features are located for six months of the year (October to March inclusive). This restriction applies until an acoustic barrier/visual screen has been installed

on both sides of the approach jetty – construction activity can then be undertaken on the approach jetty itself, behind the screens. Together with the restrictions that are currently proposed for fish, the construction of IERRT is already highly constrained as shown in Table 1. Any further seasonal or timing restrictions could extend the overall construction period for the project. Given the complex and comprehensive nature of the overall mitigation measures, the addition of further restrictions is likely to have a disproportionate effect on the overall construction programme.

7.5. Overall, therefore, the proposed hourly piling restrictions are considered appropriate and acceptable for the IERRT project.

**Table 1. Schedule of proposed seasonal restrictions on piling activity**

| Piling activity | Apr | May | Jun | Jul | Aug | Sep | Oct | Nov | Dec | Jan | Feb | Mar |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Outer pier | | | | | | | | | | | | |
| Approach jetty and inner pier | ^ | ^ | | | | | † | † | † | † | † | † |

^Allowed on dry intertidal areas outside the waterbody at periods of low water
†Allowed on seaward sections of approach jetty and inner pier (>200m from exposed mudflat)
Note: this table does not include other proposed mitigation measures that apply year-round (e.g., soft starts, noise suppression system etc.)

| **Key** |
|---|
| Percussive piling allowed |
| Percussive piling allowed with restrictions on duration of piling |
| Percussive piling not allowed |

*2) Within every 4 week-period, a 140-hour timeframe (taking into account daytime-only working) "could mean potentially allowing up to 11 consecutive days of piling to occur during the migratory period of salmon"*

7.6. The restriction would not mean that there would be 11 consecutive days of piling for 12 hours each day during the migratory period of fecund salmon (in June and August to October). As explained in the ES, there would be significant periods of downtime, pile positioning and set up each day. The underwater noise assessment is based on the likely timeframes for piling that are anticipated to be required. Each tubular pile is anticipated to require approximately 5 minutes of vibro-piling and approximately 45 minutes of impact piling. The maximum impact piling scenario is for four tubular piles to be installed each day, therefore, the maximum impact pile driving scenario would involve approximately 20 minutes of vibro-piling and 180 minutes of impact piling per day in a 12-hour shift.

*3) Not clear within the wording of the restriction how the 196 operational hours will be divided between what number of rigs*

7.7. The proposed restriction would mean that over every 4-week period (in June and August to October), up to 196 hours of piling could be undertaken by either 2 rigs, 3 rigs or 4 rigs. In other words, the limit and temporal exposure over these periods would always remain 196 hours, independent of the number of rigs that are used.

*4) Applicant should commit to a defined number of rigs in operation at once and set an appropriate defined number of operational hours per rig, in order to make this restriction meaningful and enforceable*

7.8. These proposed restrictions are considered meaningful as they would limit the total hours of piling, and thus the temporal exposure of migratory fish, over certain periods of the year when there is considered to be a moderate level of risk to migratory fish in the Humber Estuary (in June and August to October) as set out in Table 1 of IEERT Technical Note_migratory fish_13Jun2022. If two piling rigs are used, the limit will be 196 hours over every 4-week period, if three piling rigs are used the limit will still be 196 hours and if four piling rigs are used the limit will again still be 196 hours so there will be no increased temporal effect to fish by increasing the number of piling rigs. The restrictions are considered clear and straight forward for contractors to implement and therefore will be enforceable.

## 8. MMO reference 4.2.11 and 4.4.8 (Migratory fish/underwater noise – night-time restriction)

*1) Restriction stating that no percussive piling will take place "after sunset and before sunrise on any day", leaves considerable flexibility given that point of sunrise and sunset is somewhat subjective and dependent upon season*

8.1. We recognise that the specific timings of sunrise and sunset will vary depending on the season, but these are not subjective and can be set out in advance using

recognised data sources (e.g., UK Hydrographic Office (HO) tide tables). The application of the proposed night-time restriction will mean that fish that undertake nocturnal migrations are less exposed compared to a set daily timing restriction. The proposed restriction is therefore considered reasonable and appropriate for IERRT.

2) *What the potential risks and implications are, of allowing up to 3 hours 20 minutes of piling (3 hours of percussive and 20 minutes of vibro-piling; worst case assumption) per day during these months*

8.2. As set out in Appendix 9.2 of the ES (APP-088) and Chapter 9 of the ES (APP-045) (see paragraph 9.8.162), the potential risks to fish that migrate during the day will be temporary and intermittent. They will be exposed a maximum of up to 13% of the time during percussive piling (and up to 1% of the time during vibro piling), based on four piles a day being driven. It should also be noted that in terms of potential disturbance, four piles a day is very much a worst-case scenario.

## 9. MMO reference 4.2.11, 4.2.16, 4.4.9 and 4.4.15 (Migratory fish/underwater noise – vibro piling and piling in the dry)

1) *An explanation of why the piling restrictions should only be applied to percussive piling in respect of each species they are intended to protect*

9.1. The rationale for the piling restrictions are set out in ABPmer's First Technical Note dated 21 April 2022, ABPmer's Second Technical Note dated 13 June 2022, ABPmer's Briefing Note dated 30 September 2022 and an ABP letter to the MMO dated 14 November 2022. In summary, based on the outcomes of the underwater noise assessment presented in Appendix 9.2 of the ES (APP-088), there is a risk of a behavioural response in fish within around 1 km from the source of vibro piling which equates to less than half the width of the Humber Estuary at both low water and high water. In other words, more than half the width of the estuary will be undisturbed and available for fish to continue their migration during periods of vibro piling. Furthermore, as noted above, the vibro piling will only take place up to 20 minutes each day (5 minutes per pile) which equates to up to 1% of the time and is therefore only taking place intermittently for very short periods each day. Overall, therefore, the effects of vibro-piling from IEERT on migratory fish are not considered to be significant and do not need to be mitigated.

9.2. Furthermore, it is worth noting that the AMEP piling restrictions only applied to percussive piling and there is no known precedent on the Humber Estuary for setting a blanket seasonal restriction on all forms of piling. In fact, the use of vibro-piling as much as possible has previously been accepted by the MMO and the Environment Agency as a form of mitigation on marine projects elsewhere in the UK, for example, the Lowestoft Eastern Energy Facility (LEEF) Project, Thunderer Jetty Refurbishment at Stolthaven in Dagenham, and Oikos Deep Water Jetty on the Thames Estuary. ABPmer are not aware of any new evidence to support a deviation from the proposed approach to mitigation which has been applied to date for other projects on the Humber Estuary.

9.3. Based on the available evidence, the proposed restrictions are only considered necessary or reasonable to apply to the percussive piling activities (and not the vibro piling activities).

*2) Seems impractical to carry out 5 minutes of vibro-piling during periods when percussive piling is not permitted - therefore seems somewhat redundant to exclude vibro-piling from restrictions. Helpful to understand what works the Applicant hopes to achieve using vibro-piling only during these restricted periods.*

9.4. The project engineers have confirmed that vibro piling will still be possible in the absence of percussive piling. This will be dependent on ground conditions, penetration and pile stability.

*4) Presumably, the Popper et al. thresholds for impulsive noise have been used in this assessment of vibro-piling for fish. However, please note that the instantaneous peak is not relevant for continuous sources*

9.5. The Popper *et al.* thresholds for impulsive noise have been used in the assessment of vibro-piling as set out in Appendix 9.2 (APP-088). It is agreed that the instantaneous peak threshold is not necessarily relevant for continuous sources and can be disregarded from the assessment results. This does not modify the outcome of the significance assessment presented in ES.

*5) ABP to undertake as much piling in the dry as possible and it should be confirmed which areas will be possible to pile in the dry*

9.6. It will be possible to pile approximately four pile bents (groups of piles) within the intertidal area at the top of the foreshore in the dry.

## 10. MMO reference 4.4.18 (Underwater noise – dredging effects on fish)

*1) The Popper thresholds for impact piling could be applied in the assessment of cumulative sound exposure from continuous sources as a precautionary approach. Given the 24 hour dredging operations, we would expect larger effects than what has been presented.*

10.1. All the assumptions, model input values and published thresholds that have been used are set out in Section 6 and Table 3 in Appendix 9.2 of the ES (APP-088). It is worth noting that the source level that was applied for dredging is considered very much a worst case as it is based on the published levels for a large trailing suction hopper dredger (TSHD) undertaking aggregate dredging of coarser (sand/gravel) material which is likely to generate higher RMS SPLs than a backhoe dredger or a TSHD removing softer siltier material as is the case on the Humber Estuary.

10.2. It is not considered appropriate to apply impulsive noise thresholds to the continuous source as the thresholds were not developed for this purpose and are therefore unlikely to be realistic.

10.3. The Popper *et al.* (2014) qualitative guidelines for continuous noise sources that were applied and presented in the ES to assess the effects of dredging

activities consider that the relative risk of mortality and potential mortal injury in all fish is low in the near, intermediate and far-field. Applying the Popper *et al.* (2014) $SEL_{cum}$ thresholds for piling to the model and assumptions set out in the ES, as has been suggested by the MMO/Cefas, indicate that there is a risk of mortality/ potential mortal injury within 50 m in fish with a swim bladder involved in hearing, within approximately 30 m in fish with a swim bladder that is not involved in hearing and approximately 10 m for fish with no swim bladder. These results align with the qualitative guidelines for continuous noise sources whereby effects are limited to within tens of metres from the source.

10.4. According to the Popper *et al.* (2014) qualitative guidelines presented in the ES, the relative risk of recoverable injury is also considered to be low in the near, intermediate and far-field for fish with no swim bladder and fish with a swim bladder that is not involved in hearing, and slightly greater for fish where the swim bladder is involved in hearing (e.g., herring). Applying the $SEL_{cum}$ thresholds for piling as advised by MMO/Cefas, indicate that there is a risk of recoverable injury within approximately 80 m in fish with a swim bladder and approximately 20 m for fish with no swim bladder. These results again align with qualitative guidelines already presented in the ES which consider effects are primarily limited to within tens of metres from the source.

10.5. The qualitative guidelines presented in the ES consider there to be a moderate risk of a TTS occurring in the nearfield in fish with no swim bladder and fish with a swim bladder that is not involved in hearing and a low risk in the intermediate and far-field. There is a slightly greater risk of TTS in fish where the swim bladder is involved in hearing (e.g., herring). Applying the $SEL_{cum}$ thresholds for piling, as recommended by the MMO/Cefas, indicate that there is a risk of TTS occurring within approximately 700 m in all fish, which broadly correlates with the qualitative guidelines.

10.6. Overall, the use of the Popper *et al.* (2014) quantitative guidelines for piling does not change the conclusions of the assessment presented in the ES. There is still considered to be a low risk of any injury in fish as a result of the underwater noise generated by dredging. TTS and behavioural responses are anticipated to be relatively localised in scale and, in the context of the estuary width and the unconstrained nature of the location, fish will be able to move away and avoid the source of the noise as required. In summary, the impacts of dredging on fish are still not considered to be significant.

## 11. MMO reference 4.4.2 (Underwater noise – marine mammal sensitivity)

*1) Marine mammal species in the study area are considered to have a low sensitivity to noise due to dredging activities - the MMO do not believe this ‘low sensitivity’ is justified*

11.1. An evidence-based approach to the application of sensitivity levels has been applied and presented in the ES. Based on the literature review of the observed responses of marine mammals to different underwater noise activities (e.g., pile driving, seismic surveys, dredging etc.) in Section 7.4 of the underwater noise assessment (Appendix 9.2 of the ES – APP-088), the overall sensitivity of marine mammals to underwater noise from dredging activities is considered to

be low. There is no known evidence to suggest that they have a greater sensitivity to dredging than has been assigned.

## 12. MMO reference 4.4.19 (Underwater noise – dredging and vessel movement effects on marine mammals)

1) *The predictions in Table 16 (of Appendix 9.2) for dredging and vessel movements look smaller than expected and we recommend checking whether the SELcum over 24 hours has been appropriately assessed. Even if we assume a fleeing receptor then we would still expect larger TTS effect rangers (over part of the estuary) for harbour porpoise, based on a 24-hour exposure period.*

12.1. As explained in paragraph 9.2.25 in ES Appendix 9.2 (APP-088), the freely available online spreadsheet tool developed by the United States' regulatory body, the National Oceanic and Atmospheric Administration (NOAA), has been used to predict the range which the weighted NOAA (2018) cumulative SEL acoustic thresholds for PTS and TTS (which are considered the industry standard in the UK) are reached during the proposed dredging and vessel movements associated with the construction and operation of the proposed development. In accordance with the guidance provided in NOAA's user manual (NOAA, 2021) and the instructions included within the user spreadsheet, 'Tab C: Mobile source, non-impulsive, continuous ("safe distance" methodology)' was selected as the most appropriate method to apply for the dredging and vessel activity associated with IERRT. The assumptions and input values to this spreadsheet are set out in Table 15 of Appendix 9.2 of the ES. These have been revisited and checked and the outputs that are reported in the ES are considered to be correct.

## 13. MMO reference 4.4.10 (Underwater noise – Sound Exposure Level (SEL) metric)

1) *The 'SEL metric' should be clarified as it is not clear what this is. For impact piling, this should be the single strike sound exposure level (SELss)*

13.1. The peak, SEL and RMS levels are those that were measured directly in the field and published in the literature that is referenced in Appendix 9.2 of the ES (i.e., Illinworth & Rodkin, 2007; ICF Jones & Stokes and Illingworth and Rodkin, 2009; Rodkin and Pommerenck, 2014). The SEL that is quoted is the single strike SEL (SELss).

2) *RMS metric is generally not appropriate for assessing impulsive sources such as impact piling, so the MMO would recommend removing this*

13.2. The RMS value was quoted in the ES because it was from a published study that had provided measurements across all metrics (SEL, peak SPL and RMS). This value has not, however, specifically been used in the modelling. Only the SEL and peak SPL values were modelled against the cumulative SEL and peak SPL thresholds for impulsive sources to estimate the potential effects of impact piling on fish.

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## Appendix 11 – SSSI Features Signposting Document

# Signposting Document

**Subject:** **Immingham Eastern Ro-Ro Terminal (IERRT) – SSSI Features**

**Status:** **Relevant Representations Signposting Response – 12 June 2023**

## 1. Introduction

1.1. In their Relevant Representations dated 19 April 2023, Natural England raised a number of points regarding SSSI features. This document responds to and clarifies the points raised.

1.2. The information contained in this signposting document cross refers to the information provided in:

- Application Document Reference number 8.2.7 - Environmental Statement - Volume 1 - Chapter 7 – Physical Processes (APP-043);
- Application Document Reference number 8.2.8 - Environmental Statement - Volume 1 - Chapter 8 – Water and Sediment Quality (APP-044);
- Application Document Reference number 8.2.9 - Environmental Statement - Volume 1 - Chapter 9 - Nature Conservation and Marine Ecology (APP-045);
- Application Document Reference number 8.2.8 - Environmental Statement - Volume 3 – Appendix 6.2 – Preliminary Ecological Appraisal (APP-082); and
- Application Document Reference number 9.6 - Habitats Regulations Assessment (APP-115).

1.3. It addresses below Natural England's comments made in Part II, Table 1 of their Relevant Representation, specifically issues 36, 37 and 38. In each case, Natural England's comments are first summarised and ABP's responses to those comments are then provided.

## 2. NE key issue ref 36 – Potential impacts on Humber Estuary SSSI designated features

*1) Our advice regarding impacts on the Humber Estuary SSSI coincide with our advice regarding the potential impacts upon the Humber Estuary SAC/SPA/Ramsar - for features which do not overlap please see details below*

2.1. The IERRT project has been assessed in the context of all features of the Humber Estuary SSSI where applicable. For clarity, Table 1 outlines all of the features cited in the Humber Estuary SSSI and how and where they have been assessed within the IERRT application.

**Table 1. Humber Estuary SSSI**

| SSSI Feature | Signpost to IERRT Assessments |
|---|---|
| Estuary itself (with its component habitats of intertidal mudflats and sandflats and coastal saltmarsh) | The Estuary feature (including component habitats and species) has been assessed within the following chapters of the IERRT ES:<br>• Chapter 7 - Physical Processes (APP-043);<br>• Chapter 8 - Water and Sediment Quality (APP-044); and<br>• Chapter 9 - Nature Conservation and Marine Ecology (APP-045).<br>The Estuary Feature was also screened into the HRA. |
| Saline lagoons | There is no impact pathway through which saline lagoons could be affected.<br><br>This was formally screened within the IERRT HRA (see Table 2 of the HRA (APP-115) for further detail). |
| Sand dunes | There is no impact pathway through which sand dunes could be affected.<br><br>This was formally screened within the IERRT HRA (see Table 2 of the HRA (APP-115) for further detail). |
| Standing waters | There is no impact pathway through which standing waters (within discussed clay pits) could be affected and as such no specific assessments have been undertaken. |
| Geology and Geomorphology – South Ferriby Cliff (Late Pleistocene sediments), coastal geomorphology of the Spurn | There is no impact pathway through which the geological and geomorphological features of the SSSI could be affected and as such no specific assessments have been undertaken. |
| Wintering and Passage waterfowl species | |
| Bittern | This species was screened out of the IERRT HRA due to the lack of a viable impact pathway (see Table 2 of the HRA (APP-115) for further detail). |
| Dark-bellied brent goose, *Branta bernicla bernicla* | This species was not specifically considered within the IERRT HRA as it has not been recorded within the bird count sector adjacent to the proposed works (IOH Sector B) for the last five years (see Table 9.19 and Table 9.20 in Chapter 9 of the ES). |
| Shelduck, *Tadorna tadorna* | This species was screened into and assessed within the IERRT HRA (see Table 29 of the HRA (APP-115) for further detail). |
| Wigeon, *Anas penelope* | This species was not specifically considered within the IERRT HRA as it has not been recorded within the bird count sector adjacent to the proposed works (IOH Sector B) for the last five years (see Table 9.19 and Table 9.20 in Chapter 9 of the ES). |
| Teal, *Anas crecca* | This species was screened into and assessed as part of the waterbird assemblage within the IERRT HRA (see Table 29 of the HRA (APP-115) for further detail). |
| Pochard, *Aythya ferina* | This species was not specifically considered within the IERRT HRA as it has not been recorded within the bird count sector adjacent to the proposed works (IOH Sector B) for the last five years (see Table 9.19 and Table 9.20 in Chapter 9 of the ES). |
| Scaup, *Aythya marila* | This species was not specifically considered within the IERRT HRA as it has not been recorded within the bird count sector adjacent to the proposed works (IOH Sector B) for the last five years (see Table 9.19 and Table 9.20 in Chapter 9 of the ES). |
| Goldeneye, *Bucephala clangula* | This species was not specifically considered within the IERRT HRA as it has not been recorded within the bird count sector adjacent to the proposed works (IOH Sector B) for the |

| SSSI Feature | Signpost to IERRT Assessments |
|---|---|
| | last five years (see Table 9.19 and Table 9.20 in Chapter 9 of the ES). |
| Oystercatcher, *Haematopus ostralegus* | This species was screened into and assessed as part of the waterbird assemblage within the IERRT HRA (see Table 29 of the HRA (APP-115) for further detail). |
| Avocet | This species was screened out of the IERRT HRA due to the lack of a viable impact pathway (see Table 2 of the HRA (APP-115) for further detail). |
| Ringed plover, *Charadrius hiaticula* | This species was screened into and assessed as part of the waterbird assemblage within the IERRT HRA (see Table 29 of the HRA (APP-115) for further detail). |
| Golden plover, *Pluvialis apricaria* | This species was screened out of the IERRT HRA due to the lack of a viable impact pathway (see Table 2 of the HRA (APP-115) for further detail). |
| Grey plover, *Pluvialis squatarola* | This species was not specifically considered within the IERRT HRA as only a single individual has been recorded annually within the bird count sector adjacent to the proposed works (IOH Sector B) over the last five years (see Table 9.19 and Table 9.20 in Chapter 9 of the ES). |
| Lapwing, *Vanellus vanellus* | This species was not specifically considered within the IERRT HRA as only 1-3 individuals have been recorded annually within the bird count sector adjacent to the proposed works (IOH Sector B) over the last five years (see Table 9.19 and Table 9.20 in Chapter 9 of the ES). |
| Knot, *Calidris canutus* | This species was screened into and assessed within the IERRT HRA (see Table 29 of the HRA (APP-115) for further detail). |
| Sanderling, *Calidris alba* | This species was not specifically considered within the IERRT HRA as it has not been recorded within the bird count sector adjacent to the proposed works (IOH Sector B) for the last five years (see Table 9.19 and Table 9.20 in Chapter 9 of the ES). |
| Dunlin, *Calidris alpina* | This species was screened into and assessed within the IERRT HRA (see Table 29 of the HRA (APP-115) for further detail). |
| Black-tailed godwit, *Limosa limosa* | This species was screened into and assessed within the IERRT HRA (see Table 29 of the HRA (APP-115) for further detail). |
| Bar-tailed godwit, *Limosa lapponica* | This species was screened into and assessed within the IERRT HRA (see Table 29 of the HRA (APP-115) for further detail). |
| Curlew, *Numenius arquata* | This species was screened into and assessed as part of the waterbird assemblage within the IERRT HRA (see Table 29 of the HRA (APP-115) for further detail). |
| Redshank, *Tringa totanus* | This species was screened into and assessed within the IERRT HRA (see Table 29 of the HRA (APP-115) for further detail). |
| Turnstone, *Arenaria interpres* | This species was screened into and assessed as part of the waterbird assemblage within the IERRT HRA (see Table 29 of the HRA (APP-115) for further detail). |
| Passage waders | |
| Ringed plover, *Charadrius hiaticula* | This species was screened into and assessed as part of the waterbird assemblage within the IERRT HRA (see Table 29 of the HRA (APP-115) for further detail). |
| Grey plover, *Pluvialis squatarola* | This species was not specifically considered within the IERRT HRA as only a single individual has been recorded annually within the bird count sector adjacent to the proposed works (IOH Sector B) over the last five years (see Table 9.19 and Table 9.20 in Chapter 9 of the ES). |

| SSSI Feature | Signpost to IERRT Assessments |
|---|---|
| Sanderling, *Calidris alba* | This species was not specifically considered within the IERRT HRA as it has not been recorded within the bird count sector adjacent to the proposed works (IOH Sector B) for the last five years (see Table 9.19 and Table 9.20 in Chapter 9 of the ES). |
| Dunlin, *Calidris alpina* | This species was screened into and assessed within the IERRT HRA (see Table 29 of the HRA (APP-115) for further detail). |
| Ruff, *Philomachus pugnax* | This species was screened out of the IERRT HRA due to the lack of a viable impact pathway (see Table 2 of the HRA (APP-115) for further detail). |
| Black-tailed godwit, *Limosa limosa* | This species was screened into and assessed within the IERRT HRA (see Table 29 of the HRA (APP-115) for further detail). |
| Whimbrel, *Numenius phaeopus* | This species was not specifically considered within the IERRT HRA as only 1-2 individuals have been recorded in passage during August to September 2021 and April to September 2022 respectively within the bird count sector adjacent to the proposed works (IOH Sector B) over the last five years (see Table 9.19 and Table 9.20 in Chapter 9 of the ES). |
| Redshank, *Tringa totanus* | This species was screened into and assessed within the IERRT HRA (see Table 29 of the HRA (APP-115) for further detail). |
| Greenshank, *Tringa nebularia* | This species was not specifically considered within the IERRT HRA as only a single individual has been recorded within the bird count sector adjacent to the proposed works (IOH Sector B) over the last five years (see Table 9.19 and Table 9.20 in Chapter 9 of the ES). |
| Breeding bird assemblage of lowland open waters and their margins | Potential impacts on the breeding bird assemblage have been considered within the Preliminary Ecological Appraisal (APP-082). |
| Grey seals *Halichoerus grypus* | The potential effects of the IERRT scheme on grey seals have been assessed within both the Nature Conservation and Marine Ecology chapter (Chapter 9) of the ES (APP-045) and the HRA (APP-115). |
| River lamprey *Lampetra fluviatilis* | The potential effects of the IERRT scheme on River Lamprey have been assessed within both the Nature Conservation and Marine Ecology chapter (Chapter 9) of the ES (APP-045) and the HRA (APP-115). |
| Sea lamprey *Petromyzon marinus* | The potential effects of the IERRT scheme on Sea Lamprey have been assessed within both the Nature Conservation and Marine Ecology chapter (Chapter 9) of the ES (APP-045) and the HRA (APP-115). |
| Vascular plant assemblage | The vascular plant assemblage has been considered within the Preliminary Ecological Appraisal (APP-082). |
| Invertebrate assemblage | The invertebrate assemblage has been considered within the Preliminary Ecological Appraisal (APP-082). |

## 3. NE key issue ref 37 – Potential impacts on the Humber Estuary SSSI invertebrate assemblage

*1) Detailed advice from Natural England is to follow in relation to impact pathways on the Humber Estuary SSSI invertebrate assemblage*

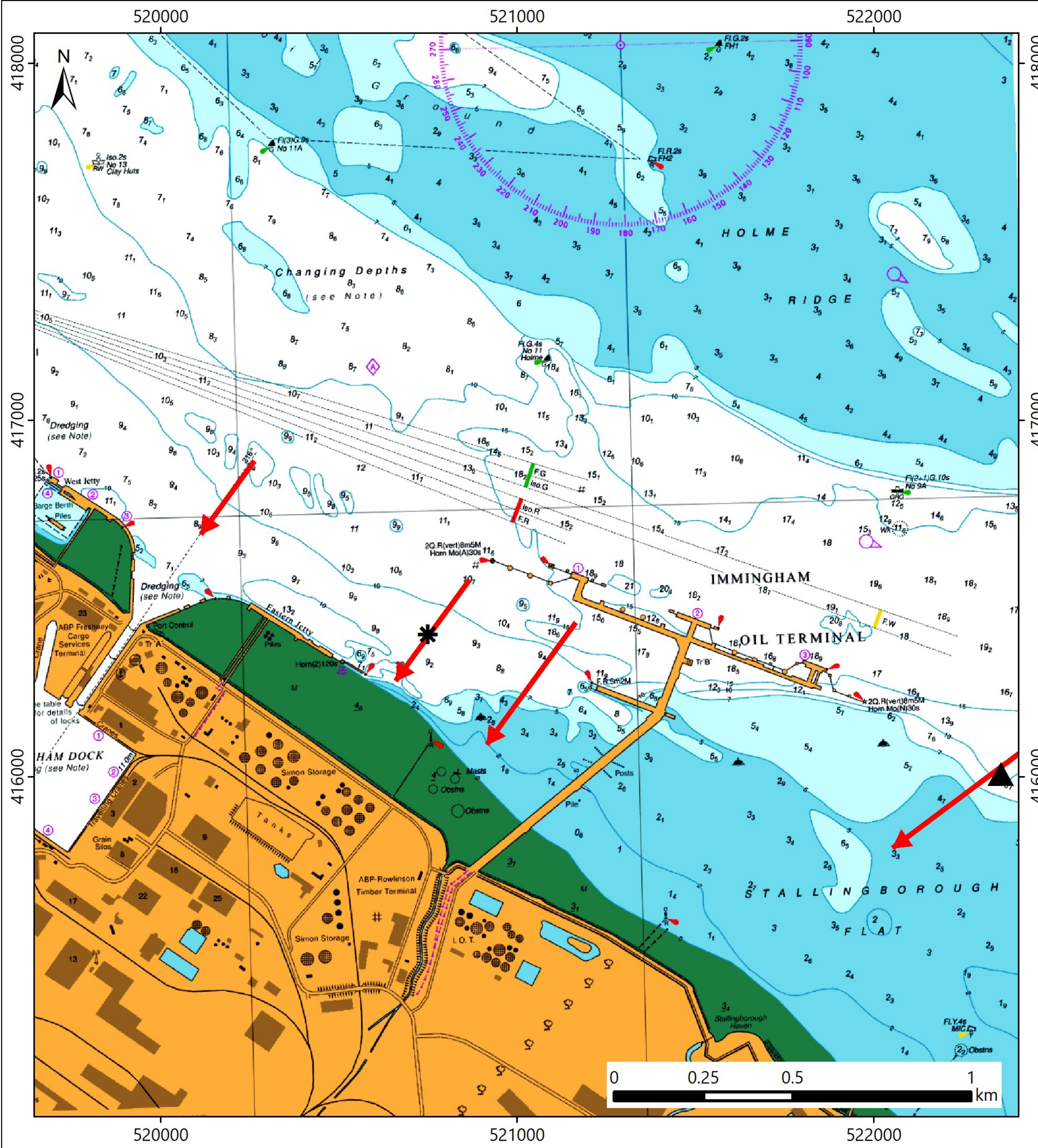
3.1. Noted, however, as identified in Table 1 above, the invertebrate assemblage has been fully considered within the Preliminary Environmental Appraisal (APP-082).

## 4. NE key issue ref 38 – Potential impacts on the Humber Estuary SSSI bird assemblage feature

*1) Detailed advice from Natural England is to follow in relation to impact pathways on the Humber Estuary SSSI bird assemblage feature*

4.1. Noted, however, as identified in Table 1 above, the breeding bird assemblage has been fully considered within the Preliminary Environmental Appraisal (APP-082).

## Appendix 12 – Tidal Current Measurement Location Plan




ADCP Transects

2019-2020 AWAC

2022 AWAC

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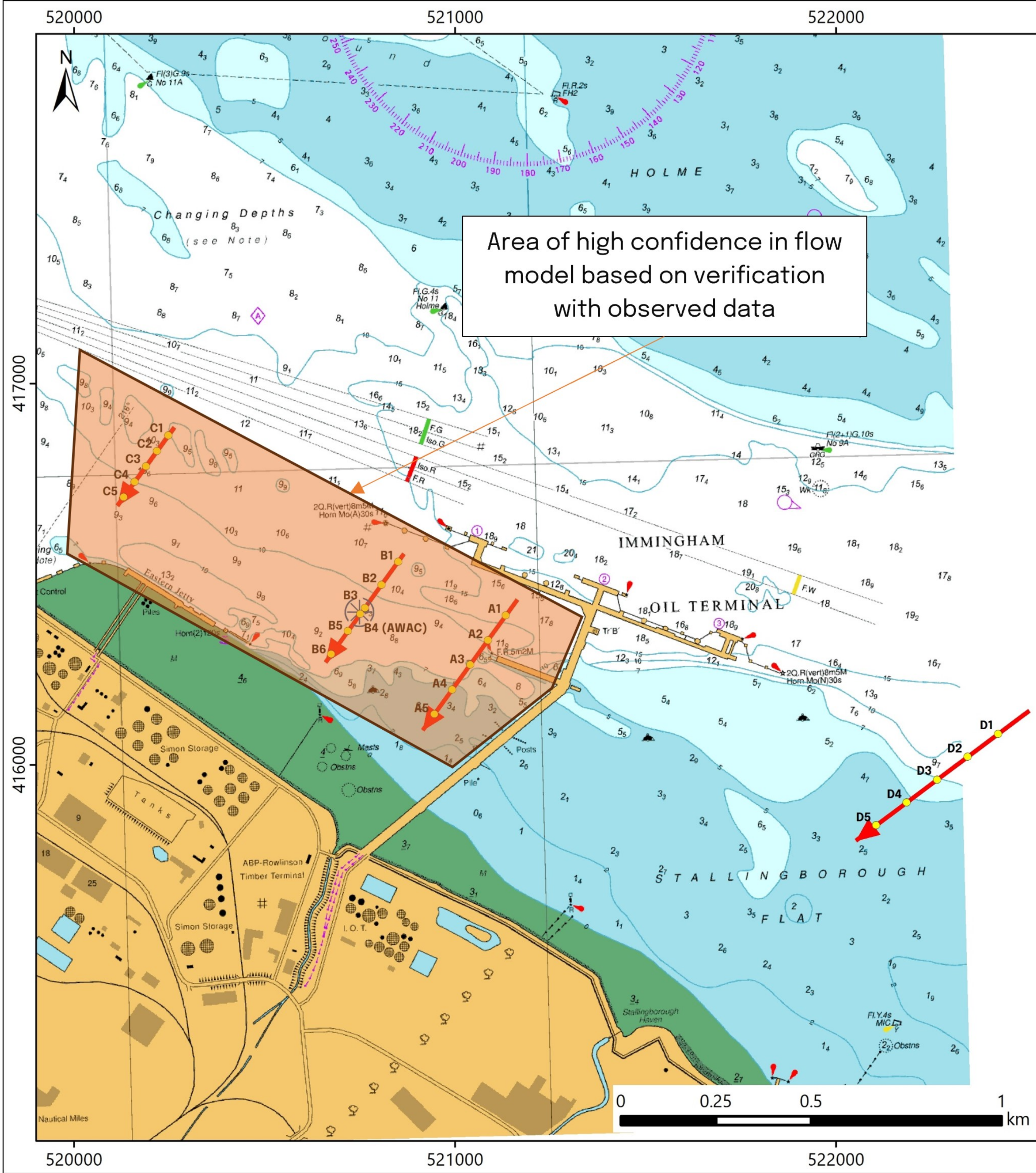
| Date | By | QA |
| --- | --- | --- |
| Nov 22 | IMD | CRO |

**Coordinate System**
British National Grid

**Projection**
Transverse Mercator

Project no. 5035
Fig_Survey_Locs.mxd

## Appendix 13 – Tidal Current Model Confidence Plan




Data Extraction Point

ADCP

2019-2020

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| Date | By | QA |
|---|---|---|
| Aug 23 | IMD | CRO |

**Coordinate System**
British National Grid

**Projection**
Transverse Mercator

Project no. 5035

Fig_Survey_Locs_updated_20230802.

# Appendix 14 – Wind Data

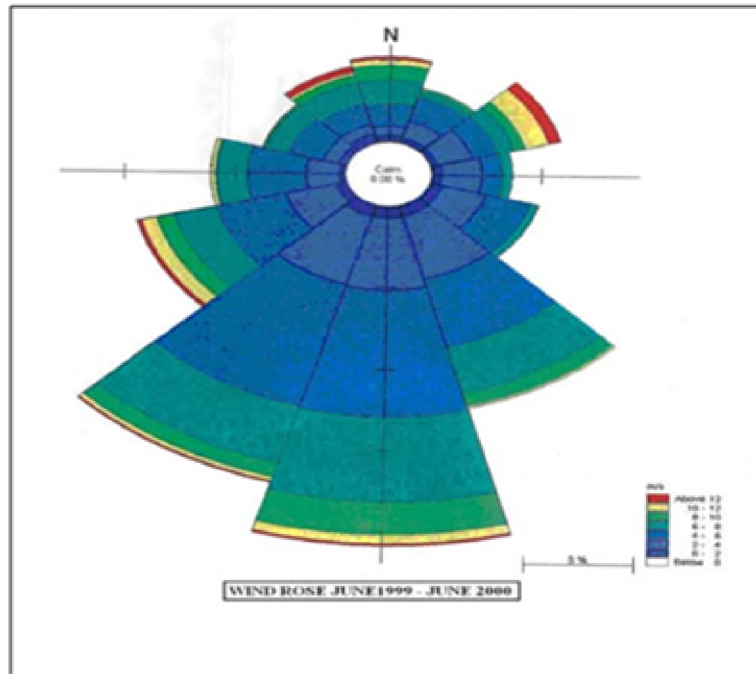



Fig 1 (Immingham Dock)

Immingham Eastern Ro-Ro Terminal | Associated British Ports

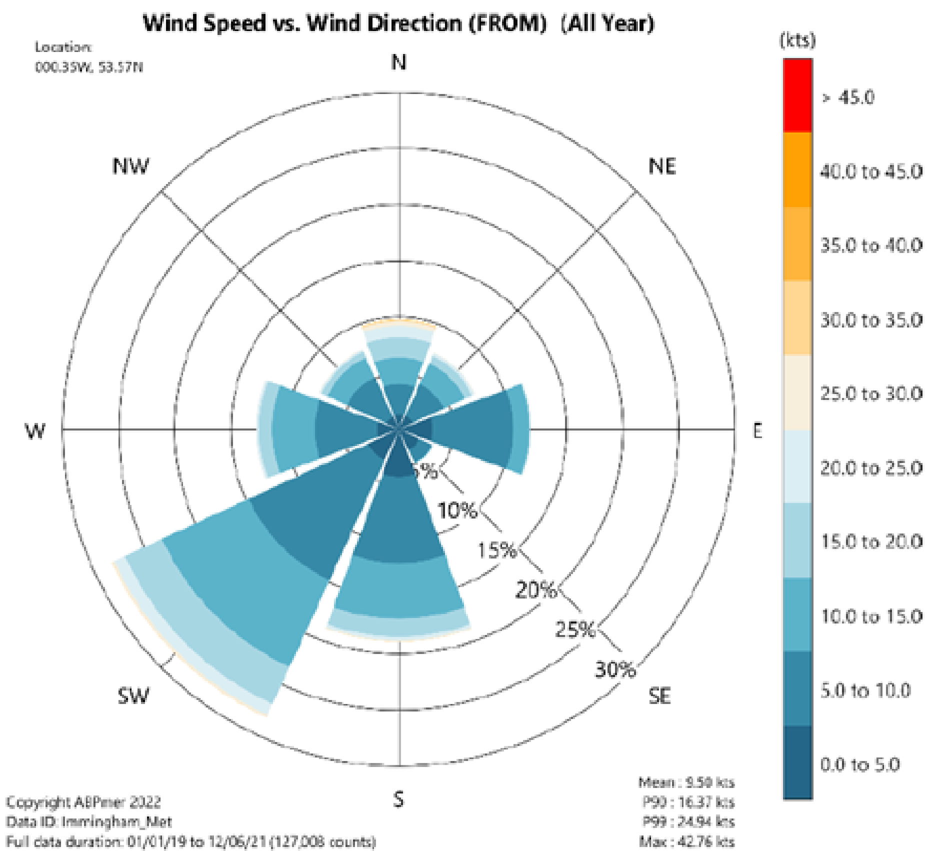
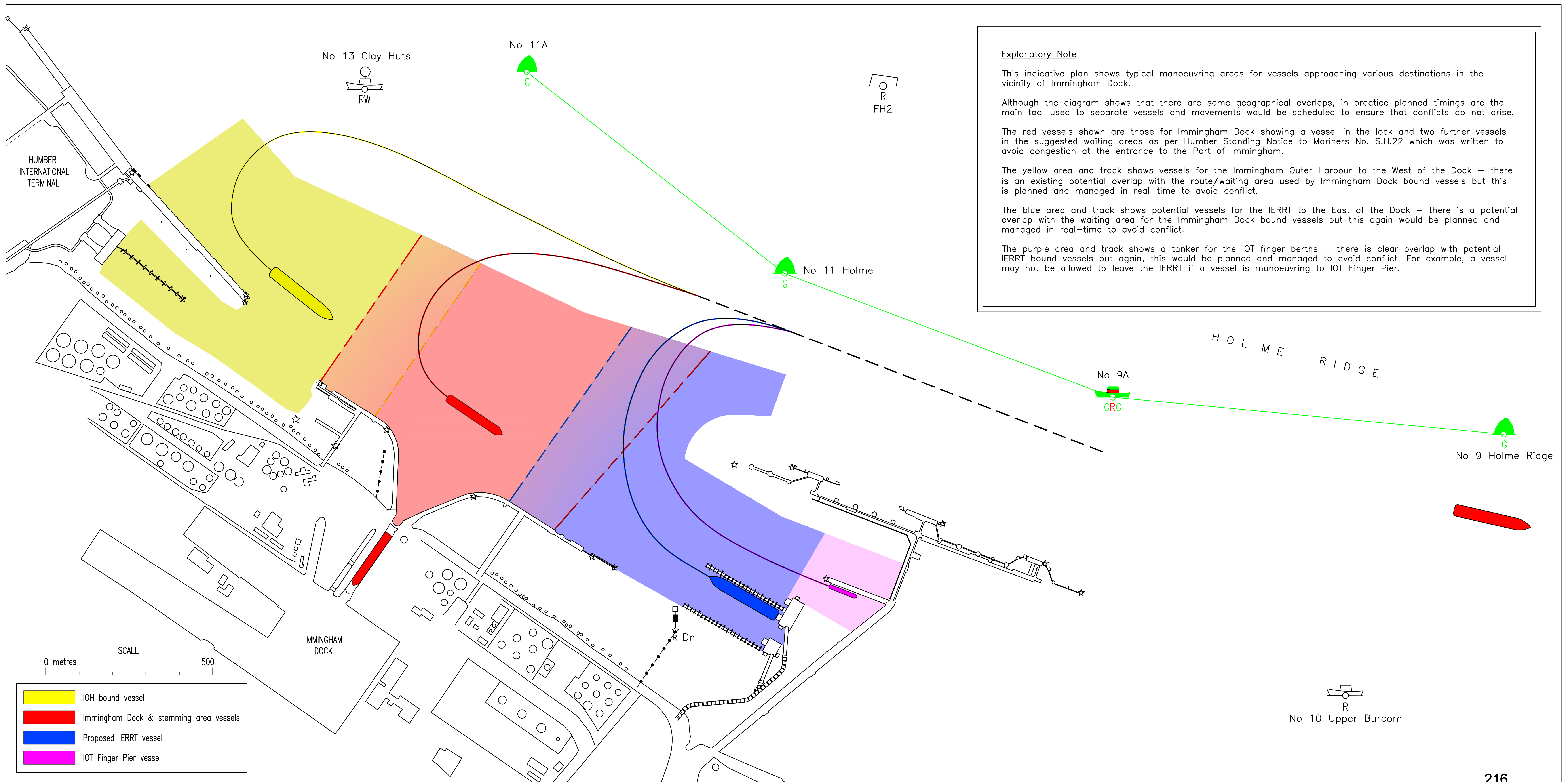



**Figure 2 Wind Speed and Direction at 10 m Above Sea Level, Rose Plot**

Fig 2 (Humberside Airport)

## Appendix 15 – Stemming and Approaches Area Plan



Explanatory Note
This indicative plan shows typical manoeuvring areas for vessels approaching various destinations in the vicinity of Immingham Dock.
Although the diagram shows that there are some geographical overlaps, in practice planned timings are the main tool used to separate vessels and movements would be scheduled to ensure that conflicts do not arise.
The red vessels shown are those for Immingham Dock showing a vessel in the lock and two further vessels in the suggested waiting areas as per Humber Standing Notice to Mariners No. S.H.22 which was written to avoid congestion at the entrance to the Port of Immingham.
The yellow area and track shows vessels for the Immingham Outer Harbour to the West of the Dock – there is an existing potential overlap with the route/waiting area used by Immingham Dock bound vessels but this is planned and managed in real–time to avoid conflict.
The blue area and track shows potential vessels for the IERRT to the East of the Dock – there is a potential overlap with the waiting area for the Immingham Dock bound vessels but this again would be planned and managed in real–time to avoid conflict.
The purple area and track shows a tanker for the IOT finger berths – there is clear overlap with potential IERRT bound vessels but again, this would be planned and managed to avoid conflict. For example, a vessel may not be allowed to leave the IERRT if a vessel is manoeuvring to IOT Finger Pier.
No 13 Clay Huts
RW
No 11A
G
R
FH2
No 11 Holme
G
HOLME RIDGE
No 9A
GRG
No 9 Holme Ridge
G
HUMBER INTERNATIONAL TERMINAL
R Dn
IMMINGHAM DOCK
R
No 10 Upper Burcom
SCALE
0 metres
500
IOH bound vessel
Immingham Dock & stemming area vessels
Proposed IERRT vessel
IOT Finger Pier vessel