Immingham Green Energy Terminal

9.3 Applicant's Responses to the Examining Authority's First Written Questions

(Responses to "Q1.2. Principle of Development")

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1 Introduction

Overview

1.1 This document has been prepared to accompany an application made to the Secretary of State for Transport (the "Application") under section 37 of the Planning Act 2008 ("PA 2008") for a development consent order ("DCO") to authorise the construction and operation of the proposed Immingham Green Energy Terminal ("the Project").

1.2 The Application is submitted by Associated British Ports ("the Applicant"). The Applicant was established in 1981 following the privatisation of the British Transport Docks Board. **The Funding Statement [APP-010]** provides further information.

1.3 The Project as proposed by the Applicant falls within the definition of a Nationally Significant Infrastructure Project ("NSIP") as set out in Sections 14(1)(j), 24(2) and 24(3)(c) of the PA 2008.

The Project

1.4 The Applicant is seeking to construct, operate and maintain the Immingham Green Energy Terminal, comprising a new multi-user liquid bulk green energy terminal located on the eastern side of the Port of Immingham (the "Port").

1.5 The Project includes the construction and operation of a green hydrogen production facility, which would be delivered and operated by Air Products (BR) Limited ("Air Products"). Air Products will be the first customer of the new terminal, whereby green ammonia will be imported via the jetty and converted on-site into green hydrogen, making a positive contribution to the UK's net zero agenda by helping to decarbonise the United Kingdom's (UK) industrial activities and in particular the heavy transport sector.

1.6 A detailed description of the Project is included in **Chapter 2: The Project** of the Environmental Statement ("ES") **[APP-044]**.

Purpose and Structure of this Document

1.7 This document contains the Applicant's responses to those of the Examining Authority's Written Questions 1 **[PD-008]** grouped under the theme "Q1.2. Principle of Development". It represents one of a collection of eighteen such documents, each of which addresses a different theme.

1.8 Responses are ordered ascendingly by reference number, replicating the structure of the Examining Authority's Written Questions 1.

1.9 Responses are provided in a table. The text of the question appears on the lefthand side, with the Applicant's answer to its right.

1.10 Further materials pertinent to the Applicant's response are included at the end of the document as appendices where necessary.

2 Applicant's Responses to the Examining Authority's First Round of Written Questions

Q1.2. Principle of Development	
Q1.2.1 Need	
Q1.2.1.1	
Question	**Response**
Demand Forecasts a) Provide the National Demand Forecast 2019 with reference to NPSfP (Paragraph 3.4.3). b) What effect might any changes to the demand forecasts originally set out in the NPSfP have on the Proposed Development's need case? Explain with reasons.	By way of introductory context, the Applicant highlights that matters relating to the demand forecasts referred to in the National Policy Statement for Ports ("NPSfP") are only one element of one aspect of the overall compelling and urgent need for substantial additional port capacity, including the type of infrastructure being provided by the Project, that is identified in the NPSfP. Furthermore, the Applicant highlights that in respect of the demand forecasts and any new update forecasts the NPSfP makes clear (at Paragraph 3.4.7) that: "*The Government does not, however, expect that any new forecasts will prompt any change in its policy: that it is for each port to take its own commercial view and its own risks on its particular traffic forecasts. The purpose of the national forecasts will, unless expressly stated otherwise as part of a review of the NPS under section 6 of the Act, remain as only to help set the context of overall national capacity need, alongside competition and resilience considerations as set out below.*"

	This in turn, reflects one of the aspects of the Government's policy – described as fundamental – set out in the NPSfP (Paragraph 3.3.1) that judgements about when and where new developments might be proposed are to be made on the basis of commercial factors by the port industry or port developers operating within a free market environment. The forecasts of demand for port capacity that are specifically referred to in the NPSfP (Paragraphs 3.4.2 to 3.4.10) are those produced by MDS Transmodal on behalf of the Department for Transport in 2006 and updated in 2007 (see NPSfP, Paragraph 3.4.3). Paragraph 3.4.6 of the NPSfP makes clear that: "*The Government may from time to time commission new port freight demand forecasts to be published on its behalf. These new forecasts would then replace the 2006–07 MDS forecasts …*" In January 2019 the Department for Transport published UK Port Freight Traffic 2019 Forecasts ("the 2019 Forecasts") – a copy of which accompany this response as **Appendix 1**. Paragraph 1 of the Executive Summary of the 2019 Forecasts makes clear: "*This document sets out the Department for Transport (DfT) 2019 forecasts for freight traffic at UK ports, covering the years 2017-2050. The primary purpose of these port traffic forecasts is to inform long term strategic thinking for the future direction of the UK ports sector. They supersede the previous set of forecasts that were produced by MDS Transmodal for DfT in May 2006.*"

	This is further reiterated in Paragraph 1.1 of the 2019 Forecasts, which states: "*This document sets out the Department for Transport (DfT) 2019 forecasts for freight traffic at UK ports. The forecasts cover the years 2017 through to 2050. These forecasts supersede the previous set of forecasts that were produced by MDS Transmodal in May 2006.*" The 2019 Forecasts identify four 'Cargo groups', namely unitised freight, Liquid Bulk, Dry bulk and General cargo. Within these cargo groups a series of cargo categories are identified for which traffic forecasts are provided. The Project will handle products that fall within the 'Liquid Bulk' cargo group and which then fall within the 'Liquefied gases' cargo category within that cargo group. Page 24 of the 2019 Forecasts suggests that, for the Central case scenario considered, this cargo category will experience a 68.2% growth in the period 2016 to 2050. The Applicant in respect of the Project has had regard to the 2019 national forecasts (which were available and in place during the pre-application process) entirely in accordance with the purpose of the forecasts specified in Paragraph 3.4.7 of the NPSfP. Namely, the Applicant has had regard to the context and indications provided by the 2019 Forecasts in taking its own commercial view and its own risks in respect of the Project, a view which has also included appropriate considerations of competition and resilience matters, amongst other things. The changes to the demand forecasts originally set out in the NPSfP have no other effect on the Project's need case.

	As explained in the application documentation and during Issue Specific Hearing 1, the need for the Project is established by the NPSfP. The changes to the demand forecasts have not promoted any change in that policy. Insofar as the Applicant has gone further than is required and demonstrated the existence of a specific need in the material submitted with the application, this is based on a significantly broader set of considerations than simply meeting demand predicted in the national forecasts. That aspect of the Applicant's need case has had regard as relevant to the 2019 Forecasts and is consistent with them.
Q1.2.1.2	
Question	**Response**
Capacity Generated by the Proposed Development The Planning Statement [APP-226, Paragraph 5.3.3] sets out that the liquid bulk handling capacity of the Proposed Development would be around 11 million tonnes and up to 292 vessel calls per annum. To help further contextualise the need case: a) How much additional liquid bulk handling capacity, in percentage terms, would the Proposed Development create at the port? b) How much additional liquid bulk handling capacity, in percentage terms, would the Proposed Development create within the UK?	Prior to responding to the specific questions raised it is first necessary to provide some background points of context to inform the answers given. As explained at Issue Specific Hearing 1 ("ISH1") and within various answers to first written questions, the need for the Project, in terms of the provision of additional port capacity, is established by the National Policy Statement for Ports ("NPSfP") (Department for Transport, 2012). That need has to be accepted by the decision maker and is of such a level and urgency that the decision maker should also start with a presumption in favour of granting consent. The context for the establishment of that need is set by section 3 of the NPSfP. Matters relating to port capacity and demand form only one element of the compelling need for new port infrastructure which has been identified and established by the NPSfP. Furthermore, the purpose of any national forecasts is only to help set the context of overall national capacity need alongside the various other elements that make up the Government's

c) What proportion of the NPSfP demand forecast for liquid bulk handling would be met by the Proposed Development? d) How does the capacity of the Proposed Development compare with other UK liquid bulk handling port developments consented or planned during the NPSfP demand forecast period? e) What weight should be given in favour of the Proposed Development in these contexts? Explain with reasons.	assessment of the total need for new port infrastructure that is identified and established in the NPSfP (NPSfP, Paragraph 3.4.7). In terms of specific proposals, it is the role of the ports industry or port developers operating within a free market environment to make judgements about when and where such proposals might come forward on the basis of commercial factors (NPSfP, Paragraph 3.3.1, bullet point 2). This reflects the position that the ports industry has proved itself capable of responding to demand in this way (NPSfP, Paragraph 3.3.2) and that the Government believes the port industry and port developers are best placed to assess their ability to obtain new business and the level of any new capacity that will be commercially viable (NPSfP, Paragraph 3.4.13). It is very difficult to give a definitive position on the cargo handling capacity of a specific piece of port infrastructure over its lifetime. This is because the handling capacity of port infrastructure is influenced by a number of different matters including, in summary, factors such as the precise type of cargo or product to be handled by that infrastructure, the available berth capability and capacity, the capability and capacity of available landside storage facilities, the capability and capacity of relevant loading/unloading infrastructure and the length of time the cargo or product 'dwells' at the relevant landside storage facilities. Against that contextual background, and having regard to the fundamental policy principle contained within the NPSfP that it is for each port to take its own commercial view and its own risks in terms of what it considers to be viable, the Applicant – doing the best that it can at this stage of the process – estimates that the maximum theoretical capacity of the marine infrastructure is the handling of 292 vessels moving approximately 11 million tonnes of liquid bulk cargo products per year. It is, however,

	emphasised – as was made clear during ISH1 – that this level of throughput has been identified primarily to ensure that a reasonable worst case environmental assessment has been undertaken of the Project and does not necessarily reflect the throughput that will in reality be achieved. *a) How much additional liquid bulk handling capacity, in percentage terms, would the Proposed Development create at the port?* In responding to this part of the question the Applicant would highlight that it does not itself operate the liquid bulk facilities at the Port of Immingham – it is effectively the landlord for those facilities which are operated by relevant operators. As an estimate of the handling capacity of those facilities will necessarily, as indicated above, depend upon matters relating to the operation of those facilities it is not possible for the Applicant to, therefore, give a reliable quantitative response to this question. That being said, the liquid bulk facilities at the Port of Immingham are used for the handling of various liquid products including: (i) Oil related products (ii) Liquefied gases (iii) Edible liquid products (iv) Chemicals The Project will, however, provide handling capacity to be utilised by additional liquified gas products which are currently not handled through the existing liquid bulk facilities at the Port of Immingham. To further assist the Examining Authority ("ExA"), the Applicant highlights that the Port of Immingham – as indicated in the most recent freight

	statistics provided to the Department for Transport ("DfT") – handled in the order of 16 million tonnes of liquid bulk products in 2022, although throughput is a different metric than handling capacity. *b) How much additional liquid bulk handling capacity, in percentage terms, would the Proposed Development create within the UK?* For similar reasons to those outlined above, the Applicant is unable to provide a reliable quantitative response to this question. To answer this question would require each operator of every liquid bulk facility around the country to accurately set out what they consider the handling capacity of their facility is. Leaving aside the difficulties operators would have in identifying a definitive level of handling capacity, such an exercise would also likely require the release of potentially commercially sensitive information, something which operators – having regard to the competitive nature of the industry – would in all probability be unwilling to do. For context, the Applicant would nevertheless draw attention to the fact that, according to statistics produced by the DfT, UK ports handled around 180 million tonnes of liquid bulk products in 2022. *c) What proportion of the NPSfP demand forecast for liquid bulk handling would be met by the Proposed Development?* As indicated at the outset of this response, the purpose of any national forecasts is only to help set the context of overall national capacity need alongside the various other elements that make up the Government's assessment of the total need for new port infrastructure that is identified and established in the NPSfP (NPSfP Paragraph 3.4.7).

	The latest national forecasts – contained in the UK Port Freight Traffic 2019 Forecasts produced by the DfT in January 2019 and which make clear that they supersede the earlier forecasts referred to in the NPSfP – indicate a growth in Liquefied gases from 8.13 million tonnes in 2020 to 22.54 million tonnes in 2050 under the central case specified or around 30 million tonnes under the high scenario considered. However, the key drivers for the forecast for this particular cargo category (Liquefied gases) appear, from Appendix A of the document, to be liquefied natural gas ("LNG") and liquefied petroleum gas ("LPG") imports so it is potentially the case – as the forecasts for this particular cargo category overall appear to be based upon just those two types of liquified gas products – that the forecasts underestimate the level of likely growth for this particular cargo category. In addition to the UK Port Freight Traffic forecasts, the level of ambition of relevance to the type of product specifically envisaged to be handled by the Project has already been highlighted to the ExA during ISH1 and ISH3. In summary: (i) The British Energy Security Strategy (April 2022) sets an ambitious target of 10GW of low carbon hydrogen production capacity by 2030. For context, when constructed and in operation the Project, will provide 300MW of low carbon hydrogen production, the equivalent of 3% of the Government's 2030 target. (ii) The Net Zero Strategy: Build Back Greener (October 2021) sets out an aim to use ("CCUS") technology to capture and store 20–30Mt of CO_2 by 2030, and at least 50Mt by the mid 2030s.

	d) How does the capacity of the Proposed Development compare with other UK liquid bulk handling port developments consented or planned during the NPSfP demand forecast period? The latest national forecasts – contained in the UK Port Freight Traffic 2019 Forecasts produced by the DfT in January 2019 – cover the period 2016 to 2050. The Applicant is unaware of any significant new liquid bulk handling port developments that have been consented since the end of 2016, although it is entirely possible that minor changes to existing facilities – potentially achievable through the use of permitted development rights if located within an appropriate port location – have taken place since that time. To understand what liquid bulk handling port developments have occurred over the forecast period (whether that be the period from the original NPSfP forecasts or the more recent 2019 forecasts) would require a detailed analysis of relevant planning and licensing records for all relevant liquid bulk facilities. That would be an unnecessary and disproportionate exercise, particularly for the purposes of examining a proposed development for which need is established by the NPSfP. Even such an exercise, however, may not provide an accurate picture because – as indicated above – certain related developments may well have taken place by relying upon permitted development rights. For these summarised reasons, the Applicant is unable to provide the type of quantitative comparison that is requested. *e) What weight should be given in favour of the Proposed Development in these contexts? Explain with reasons.*

	Subsection 104(3) of the Planning Act 2008 ("PA 2008") sets out a legal obligation that, "*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.*" As explained at the outset of this answer, and in further detail both at ISH1 and ISH3, and in the response to first written question Q1.2.1.14, the need for the Project is established in the NPSfP, and this need is one which the decision maker has to accept and to which the NPSfP presumption in favour applies (NPSfP, Paragraph 3.5.2). As explained during ISH1, the need established by the NPSfP is more than simply a consideration of matters relating to demand and capacity and includes wider considerations concerning the public interest in responding to demand and creating capacity (including spare capacity). These other factors and matters, as detailed within Chapter 3 of the NPSfP, also contribute to the need established in the NPSfP. Furthermore, in respect of the demand and capacity element of the need established, the NPSfP makes it clear – in the context of the fundamental policy set out at Paragraph 3.3.1 bullet point 2 of the NPSfP – that it is for each port to take its own commercial view and that the purpose of the national forecasts is only to help set the context of overall national capacity need. In respect of the presumption in favour of granting consent, Paragraph 3.5.2 of the NPSfP further makes it clear that this is only able to be disapplied in limited circumstances. There is no weighting or balancing exercise to be undertaken in this regard. The presumption either applies or – for the limited reasons specified in NPSfP Paragraph 3.5.2 – it does not. For the avoidance of doubt, there are no relevant reasons why the presumption in favour is disapplied in respect of the Project.

	Therefore, in respect of the subsection 104(3) obligation, in respect of need matters, the decision maker has to accept the need for the Project and apply the presumption in favour. The only exercise whereby consideration then needs to be given to attaching weight to such matters is through the subsequent consideration of subsection 104(7) of the PA 2008, which applies "*if the Secretary of State is satisfied that the adverse impact of the proposed development would outweigh its benefits*". However, subsection 104(7) cannot be used to circumvent subsection 104(3). So, for example, where through the analysis undertaken in respect of subsection 104(3) it is clear that the NPSfP has identified the need for the Project and established that the presumption in favour applies, it is not then permissible for these matters to be considered again under subsection 104(7). Rather, under subsection 104(7) the decision maker is required to consider whether the benefits of the Project are outweighed by the adverse impact of the Project. In others words, under subsection 104(7) it is not permissible to seek to re-consider the issues of need and the presumption in favour established by the NPSfP but rather under subsection 104(7) the exercise is more one of correctly understanding that position and the related benefits generated by the Project so that such benefits can be correctly considered in the subsection 104(7) balancing exercise. In respect of the weight to be given to the benefits of the Project – which it is highlighted include, but are not limited to, the benefits associated with

	its contribution to meeting the need for the infrastructure which has been identified within the NPSfP – the NPSfP itself highlights that: (i) The need it identifies is for 'substantial' additional port capacity (NPSfP, Paragraph 3.4.16). (ii) The need for that substantial additional port capacity is 'compelling' (NPSfP, Paragraph 3.4.16). (iii) The need for additional port infrastructure is of such a level and urgency that it results in the presumption in favour of granting consent (NPSfP, Paragraph 3.5.2). (iv) The decision maker should give 'substantial weight' to the positive impacts associated with economic development (NPSfP, Paragraph 4.3.5) – such positive impacts clearly include the fact that the Project will contribute towards meeting the need identified in the NPSfP, and the adverse impact of the Project would clearly have to be significant to offset this under s104(7). Furthermore, the Applicant – even though it does not need to do so – has also produced further separate evidence of the urgent and compelling need for the Project at this location within the Humber Estuary. This separate identification of need relates to matters of energy security, energy decarbonisation and the wider decarbonisation of the economy and society, and is, in summary, based upon: (i) The need for energy security through a diversity of technologies, fuels and supply routes. (ii) The need to scale up low carbon hydrogen production capability as an established alternative clean source of energy. (iii) The general need for carbon capture and storage technologies to support decarbonisation and the related specific need to address the growing and changing needs of the energy sector in respect of

	the decarbonisation of the Humber Industrial Cluster and the Humber Enterprise Zone. The benefits associated with the contribution the Project will make to achieving these need matters should also be given substantial weight, for the reasons which are explained further in the answer to ExA First Written Question Q1.2.1.10 which considers important and relevant NPSs other than the NPSfP.
Q1.2.1.3	
Question	**Response**
How Capacity Would be Used The Planning Statement [APP-226, Paragraph 5.3.5] sets out that the Proposed Development would have substantial residual capacity beyond the 12 vessel calls associated with ammonia. a) To what extent would the residual capacity be safeguarded for carbon dioxide? b) Could the residual capacity be used to serve other UK markets instead, such as the LNG market or other energy markets that might not necessarily support the UK's shift towards net zero, and would this affect how the need case should be assessed?	These matters were touched on during Issue Specific Hearing 1 ("ISH1"), for example, in respect of Agenda Item 3(vi) and the discussion held in respect of the potential users of the jetty – see the written summary of oral submissions **[TR030008/EXAM/9.11]**. Before answering the specific questions raised, therefore, the following contextual points are emphasised. The need for the Project in terms of the compelling and urgent need to provide additional port capacity is established by the National Policy Statement for Ports ("NPSfP"). Although it does not need to do so, the Applicant has also produced separate evidence of an urgent and compelling need for the Project at this location within the Humber which relates to matters of energy security, energy decarbonisation and the wider decarbonisation of the economy and society. Having regard to, amongst other things, the fundamental policy contained within the NPSfP that it is for each port to take its own commercial view

c) To create certainty about how the capacity would be used to meet the UK's needs and strategic objectives, is it necessary for the dDCO to include controls to this effect? Explain with reasons.	and its own risks in terms of what it considers to be viable, the Applicant – doing the best it can at this stage of the process for the reasons summarised during ISH1 – has made an estimate of the maximum theoretical capacity of the marine infrastructure. It is important to highlight, however, that the capacity level estimated is not a specific target which the Project has to achieve, but rather this is the upper level of activity which has been defined to ensure that a reasonable worst-case environmental assessment has been undertaken of the Project. It is not, therefore, necessary that this estimated capacity has to be utilised or achieved overall, and neither is it necessary for certain levels of capacity to be utilised by a particular point in time. It is certainly not necessary for such matters to be achieved in order for the need for the Project to be proved, for the presumption in favour to be engaged or for the benefits of the Project to be achieved. In terms of the breakdown of the estimated capacity, the Applicant's commercial view is that this results in: (i) a minority element of the estimated capacity being utilised for the handling of liquid ammonia – reflecting the requirements of Air Products, and (ii) the majority of the estimated capacity being highly likely to be used for the handling of carbon dioxide. In terms of the carbon dioxide element of the Project, the Applicant considers that this use is highly likely to occur, having regard to both the wider policy context surrounding such activity and the commercial discussions the Applicant has had and continues to have in this regard –

	matters which were explained at ISH1. In accordance with the approach identified in the NPSfP, it is the Applicant's commercial judgement – having regard to relevant commercial factors – that there is a clear need for capacity to serve the 'carbon dioxide' market in this location and that the capacity to be made available through the Project will be significantly used for this purpose. The actual use of the marine infrastructure for carbon dioxide purposes will, however, clearly require some form of additional supporting infrastructure (i.e. a further new storage or processing facility or, at the very least, a landside connection to an existing storage facility or distribution network). Such additional supporting infrastructure will trigger the need for further consents and approvals, along with the associated assessment of impacts through the Environmental Impact Assessment ("EIA") process, as necessary. For the reasons explained at ISH1, there is, however, in the Applicant's view, no obvious impediment to the delivery of such infrastructure. If, however, for whatever reason, the envisaged carbon dioxide use of the Project were not to occur into the future – and, for the avoidance of any doubt having regard to the clear policy support for such activity and the clear need the Applicant is aware of, this is considered highly unlikely – and another liquid bulk product were proposed to be handled, then this would similarly require some form of landside infrastructure and potentially even marine side infrastructure changes triggering the need for further necessary consents and approvals, along with associated assessment of impacts through the EIA process as necessary. The acceptability of any such future proposal would have to be judged through the relevant statutory process against the relevant policy and material considerations applicable at that time.

	Against this summarised contextual background, and in answer specifically to part a) of the question, the Applicant does not consider that it is either necessary or appropriate to safeguard the residual capacity of the proposed infrastructure specifically for carbon dioxide use and does not intend in any way to safeguard the residual capacity in this way. Fundamentally, any other use of the infrastructure will require separate consents and approvals in any event, the acceptability of which would need to be determined as appropriate at that relevant time. Seeking to safeguard the residual capacity of the proposed infrastructure specifically for carbon dioxide use through the imposition of a requirement within the Development Consent Order ("DCO") would not satisfy the tests for the imposition of requirements. In particular, such a suggested requirement would not be necessary or reasonable. In answer to part b) of the question, it is theoretically possible that the residual capacity of the marine infrastructure proposed could be used for products and trades other than carbon – even though the Applicant's clear judgement, reflecting the policy position contained within the NPSfP, is that this is not likely to be the case. The use of the marine infrastructure for such other products and trades would, however, as indicated above require separate consents and approvals, the acceptability of which would need to be determined as appropriate at that relevant time. As indicated in the contextual background provided above, the need for the Project is established in the NPSfP irrespective of the need matters the Applicant has separately identified relating to net zero or decarbonisation. Furthermore, the ammonia/hydrogen aspects of the Project – aspects for which there is a clear first user of the infrastructure – would still remain and would, in their own right, constitute a significant benefit in respect of net zero and decarbonisation matters. For these

	reasons, the Applicant considers that a compelling and urgent need case would still exist for the Project even if, for whatever reason, the envisaged carbon dioxide use did not occur, albeit that the Applicant's clear commercial judgement is that such use is very likely to occur. In answer to part c) of the question, it is not necessary for the draft Development Consent Order [PDA-004] to include the type of controls implied. As indicated above the use of the marine infrastructure for any purpose other than in respect of the proposed ammonia/hydrogen and proposed carbon dioxide use would – through the need for, at least, additional landside infrastructure – result in the need for additional separate consents and approvals. The process of obtaining such consents and approvals as appropriate and necessary, which would include justifying the acceptability of any such proposal through the relevant statutory process against the relevant policy and material considerations (including environmental effects) applicable at that time, provides the necessary degree of control on the use of the marine infrastructure. Furthermore, and for completeness, the Applicant, in response to ISH1 Action Point 3 (provided in the answer to Q1.2.1.14) and in the answer to Q1.2.1.6, has further explained how the decision maker can take account of the benefits – including those relating to net zero and decarbonisation matters – that would result from the use of the Project for the purposes envisaged.
Q1.2.1.4	
Question	**Response**

Operational Link with Viking CCS The Planning Statement [APP-226, Paragraph 5.4.8] mentions a collaboration agreement between ABP and Harbour Energy to link the Proposed Development with Viking CCS. In the interests of establishing more certainty about how the Proposed Development would operate, can the Applicant provide more information about the collaboration agreement and link with Viking CCS?	As explained during ISH1, the Applicant's commercial judgement – reflecting the approach to such considerations set out within the National Policy Statement for Ports ("NPSfP") – is that the Project will in the future handle significant volumes of Carbon Dioxide. In this respect, the Applicant and Harbour Energy (in its role as Operator of the Viking CCS project on the Humber and one of the two eligible CO_2 Transportation and Storage Systems announced by Government in July 2023 under Track-2 of the cluster sequencing process) announced in October 2022 that they have entered an exclusive commercial relationship to develop a Carbon Dioxide import terminal at the Port of Immingham that would link to Harbour Energy's Viking CCS project and the Carbon Dioxide transport and storage network. Since that time, commercially confidential discussions and work has been undertaken by both parties, and the Applicant will seek to update the ExA as and when it is able to (subject to commercial confidentiality matters) during the course of the examination. In December 2023 the Applicant, Harbour Energy and London-based recycling and waste management company Cory Group announced an exclusive commercial relationship to collaborate on the transport and storage of shipped Carbon Dioxide emissions from Cory's energy from waste (EfW) facilities to be processed through the Viking CCS project. Again, the Applicant will seek to update the ExA as and when it is able to (subject to commercial confidentiality matters) during the course of the examination.
Q1.2.1.5	
Question	**Response**

Emerging Novel Technologies NPSfP (Paragraph 3.5.1) states the decision maker should accept the need for future capacity to offer a sufficiently wide range of facilities at a variety of locations to match existing and expected trade. Should the reference to a wide range of facilities be considered to encapsulate novel technologies like hydrogen production, and consequently is there policy support for the Proposed Development in this context?	The objectives set out within Paragraph 3.5.1 of the National Policy Statement for Ports ("NPSfP") are those which the decision maker is clearly told they should accept the need for future capacity to achieve. Those objectives in turn – as the introductory words to Paragraph 3.5.1 make clear – reflect and emerge from the detailed analysis of need contained within the earlier parts of the NPSfP, including the explanation of the Government's policy for ports (contained within Section 3.3 of the NPSfP) and the Government's assessment of the need for new port infrastructure (contained within Section 3.4 of the NPSfP) and have to be read in the context of that preceding analysis. It is emphasised that the need for future capacity to "*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 coastal shipping*" (NPSfP, Paragraph 3.5.1 bullet point 3) is only one aspect underlying the need which is established in the NPSfP and which has to be accepted by the decision maker. In respect of this particular aspect of the need established in the NPSfP (and in answer to the specific question raised) the reference to a wide range of facilities would encapsulate or include both novel and well-established technologies. That is reflective of the fact that the Government's analysis of need recognises that it is not possible for the Government itself to anticipate future commercial opportunities and that new shipping routes and technologies may emerge. That is why capacity needs to be provided at a wide range of facilities (see paragraph 3.4.11). Furthermore, in this regard it is emphasised that whether the provision of a particular facility matches existing and expected trade, ship call and distribution patterns is not a matter which the NPSfP requires the decision-maker to determine. It is a matter the NPSfP recognises is best

	left to the commercial judgment of the ports industry or a port developer. By way of example, the NPSfP makes clear that: • The Government's fundamental policy is to allow judgements about when and where new port development might be proposed to be made by the port industry or port developers on the basis of commercial factors operating within a free market environment (NPSfP, Paragraph 3.3.1, bullet 2). • 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 (NPSfP, Paragraph 3.4.11). • The Government does not wish to dictate where port development should occur with such development needing to be responsive to changing commercial demands and for which the market is the best mechanism for getting right with developers bringing forward applications for port developments where they consider them to be commercially viable (NPSfP, Paragraph 3.4.12). • The port industry and port developers are best placed to assess their ability to obtain new business and the level of any new capacity that will be commercially viable (NPSfP, Paragraph 3.4.13). This aspect of Paragraph 3.5.1 of the NPSfP, therefore, not only provides policy support for the Project but sets out an objective underlying the need for the Project which is established in the NPSfP and which has to be accepted by the decision maker.

Q1.2.1.6	
Question	**Response**
Worst Case Scenario for Benefits The ES [APP-045] refers to the need for hydrogen production and CCS and the Proposed Development is designed to facilitate the import of cargo to meet this need. Should minimum volume thresholds be applied to low carbon energy cargo imports in order to establish a worst case scenario for benefits in this regard? Explain with reasons.	Aside from the requirements of section 24 of the Planning Act 2008 ("PA 2008") that need to be met for the Project to constitute a Nationally Significant Infrastructure Project, there is no legal or policy requirement for the capacity to be generated by the Project to be formally secured. In addition, there is no legal or policy requirement for specific volumes of specific cargoes to be secured. Furthermore, there is no legal requirement that benefits which are to be considered and given weight by the decision-maker need to be somehow legally secured. On the facts of relevance to the Project, the Applicant considers that any such controls are both unnecessary and inappropriate. The matters of particular relevance include: • The need for the Project, in terms of the compelling need for substantial additional port capacity, is established in the National Policy Statement for Ports ("NPSfP"). This need, which the decision maker should accept and results in a presumption in favour of granting consent, exists irrespective of the separate urgent and compelling need identified by the Applicant which relates to low carbon energy matters. • In establishing the need for additional port capacity the NPSfP does not in any way set a quantitative level or target for utilisation of that capacity which a Project must achieve in order for the benefit of the presumption in favour of consent to apply.

	• It is established policy within the NPSfP that it is for the ports industry and port developers, who are best placed in this regard, to determine the level of capacity that will be viable. Furthermore, in this regard policy makes it clear that spare capacity is required and provides important benefits in the public interest. • As explained further in the answer to written question Q1.2.1.2 and in response to Issue Specific Hearing 3 ("ISH3") Action Point 12 (provided in the response given to Q1.2.1.14), by reference to aspects of the NPSfP and having regard to the above matters, the benefits associated with the Project contributing to the need identified in the NPSfP (which it is emphasised are not the only benefits to be taken into account) should be given substantial weight. • In respect of the separate low carbon energy related need for the Project that has been identified by the Applicant, the urgent need for the type of infrastructure to be provided by the Project and the reasons for this urgent need that are made clear in, for example, the recently published Overarching National Policy Statement for Energy (EN-1). Any measurable contribution which the Project would make in this regard would clearly be a significant benefit in the public interest to which substantial weight should be applied – see also the answer to written question Q1.2.1.10. • It is the Applicant's intention to fully build out the proposed marine infrastructure and the intention of the Applicant's first customer – Air Products – to fully build out the landside hydrogen production facilities.

	• In terms of the carbon dioxide element of the Project, having regard to both the supportive policy context surrounding such activity and the commercial discussions the Applicant has had and continues to have in this regard – matters which the Applicant explained during ISH1 – it is the Applicant's commercial judgement that there is a clear need for capacity to serve the 'carbon dioxide' market in this location and that the capacity to be made available through the Project will be highly likely to be significantly used for this purpose. • The use of the proposed marine infrastructure for the handling of another liquid bulk product other than liquid ammonia or liquified carbon dioxide would require some form of additional landside infrastructure and potentially even changes to the marine infrastructure. Such infrastructure would trigger the need for further necessary consents and approvals, along with associated assessment of impacts through the Environmental Impact Assessment process as necessary. The acceptability of any such future proposal would have to be judged through the relevant statutory process against the relevant policy and material considerations applicable at that time. The need for such future consents for an alternative use of the marine infrastructure, therefore, appropriately safeguards the use of the marine infrastructure for the purposes envisaged. For the reasons summarised above, and having regard to the law and policy of relevance to the imposition of requirements within a Development Consent Order, any attempt to secure minimum low carbon energy cargo threshold controls through requirements would not be necessary or reasonable and there is no practical manner in which such controls could be enforced.

Q1.2.1.7	
Question	**Response**
British Energy Security Strategy The ES [APP-045, Paragraph 3.2.14 and 3.2.15] references the British Energy Security Strategy's low carbon hydrogen target and states that the Proposed Development would deliver 3% of this target. Explain how the British Energy Security Strategy defines low carbon hydrogen, and whether the hydrogen produced by the Proposed Development would be consistent with it.	The British Energy Security Strategy[1] sets out that the Government's ambition for hydrogen production is for up to 10GW of low carbon hydrogen production capacity by 2030, with at least half of this coming from electrolytic hydrogen. The strategy does not itself define low carbon hydrogen, however, it commits to setting up a hydrogen certification scheme by 2025.[2] The hydrogen certification scheme will be based on the UK Low Carbon Hydrogen Standard (the "Standard")[3]. Paragraph 1.1 of the Standard (version 3 December 2023) issued by the Department for Energy Security & Net Zero confirms that, to support the implementation of various strategies including the British Energy Security Strategy, the Standard defines what constitutes 'low carbon hydrogen' up to the point of production. Amongst other requirements, the Standard requires the hydrogen to have a carbon intensity of less than or equal to $20gCO_2e/MJ_{LHV}$. Paragraph 3.2 of the Standard states that claims of Standard compliance cannot be made until the facility has started producing hydrogen. Hydrogen produced from the hydrogen production facility which forms part of the Project is anticipated to be consistent with the Standard. This would be subject to auditing to ensure compliance as detailed in Chapter 8 of the Standard and as explained in the response to Q1.3.3.4. [1] Department for Business, Energy and Industrial Strategy (2022). Policy paper - British energy security strategy. [Online]

	https://www.gov.uk/government/publications/british-energy-security-strategy/british-energy-security-strategy (accessed March 2024). [2] Department for Energy Security and Net Zero (2023). Low Carbon Hydrogen Certification Scheme, Government Response. [Online] https://www.gov.uk/government/consultations/uk-low-carbon-hydrogen-certification-scheme (accessed March 2024). [3] Department of Energy Security and Net Zero (2023) UK Low Carbon Hydrogen Standard [Online] https://www.gov.uk/government/publications/uk-low-carbon-hydrogen-standard-emissions-reporting-and-sustainability-criteria (accessed March 2024).
Q1.2.1.8	
Question	**Response**
Quantifying the Benefits of CCS Infrastructure The ES [APP-045] claims that one benefit of the Proposed Development would be its ability to serve the needs of CCS infrastructure and contribute to the UK's net zero aims. However, elsewhere in the ES [APP-061, Paragraphs 19.8.25] it states that these benefits are not quantifiable. a) Explain why the benefits associated with serving CCS are not quantifiable. b) Furthermore, if the benefits associated with serving CCS	a) The wording of **Paragraph 19.8.25** of **Environmental Statement Chapter 19: Climate Change [APP-061]** reflects the fact that, at this stage, the actual amount of carbon dioxide to be handled across the marine infrastructure cannot be quantified. This is because the precise details of how the marine infrastructure will be used for that purpose are not yet known.

are not quantifiable, how can the ExA give the matter weight in its consideration of the need case?	b) As has been explained in a number of other answers to first written questions (see for example, the answers given to Q1.2.1.2, Q1.2.1.3, Q1.2.1.6, Q1.2.1.10 and Q1.2.1.14): • The Government considers that there is an urgent need for carbon capture and storage ("CCS") infrastructure to support the transition to net zero; to support this urgent need, new CCS infrastructure, CCS technologies, pipelines and storage infrastructure are also considered to be Critical National Priority infrastructure (see analysis of the Overarching National Policy Statement for Energy ("EN-1") (November 2023) provided in response to answer Q1.2.1.10). • The urgent need for such infrastructure should be given substantial weight (again see the analysis of the policy statement EN-1 (November 2023) provided in response to answer Q1.2.1.10). • EN-1 (November 2023) highlights that it is not necessary to consider separately the specific contribution of any individual project to satisfying the need established in that policy statement. • Having regard to both the clear supportive policy context surrounding CCS and the commercial discussions the Applicant has had and continues to have in this regard – matters which the Applicant explained during Issue Specific Hearing 1 – it is the Applicant's commercial judgement (reflecting the position on such judgements set out within the National Policy Statement for Ports ("NPSfP")) that there is a clear need for capacity to serve the 'carbon' market in this location and that the capacity to be made

	available through the Project in this regard will be significantly used for this purpose. • Given the recognised urgent need for the type of CCS-related infrastructure to be provided by the Project and the reasons for this urgent need that are made clear in, for example, the recently published EN-1, the creation of infrastructure capacity which can make a measurable contribution to meeting that need would clearly be a benefit in the public interest. Furthermore, having regard to the policy background, the urgency of the need identified and the locational advantages of the proposed facility in terms of the ability to meet that need, the opportunity that this development provides to make a measurable contribution to meeting that need would be a benefit to which substantial weight should be applied (see also the answer to written questions Q1.2.1.6 and Q1.2.1.10). Therefore, in response to part b) of the question, for the reasons summarised above, even though at this stage the actual amount of carbon dioxide to be handled across the marine infrastructure cannot be quantified, the benefits associated with the provision of capacity to serve CCS should be given substantial weight. Finally, it is emphasised that matters relating to the CCS aspect of the Project concern the separate identification by the Applicant of an urgent and compelling need for the Project. The freestanding need for the Project as part of the compelling need for substantial additional port capacity established by the NPSfP means that the decision maker should in any event start with a presumption in favour of granting consent for the Project.

Q1.2.1.9	
Question	**Response**
Export Markets The Planning Statement [APP-226, Paragraph 5.2.17] talks about exporting cargo. a) How does this fit in with your assessment of need given your justification relies on the argument that UK markets would benefit from the Proposed Development, particularly in relation to decarbonising the economy and achieving energy security? b) Would exports need to be controlled in order to preserve these potential benefits? Explain with reasons. c) What types of liquid bulk cargo would be exported and what would be their destination?	a) As explained at Issue Specific Hearing ("ISH") 1 the need for the Project, in terms of the need for additional port capacity is established in the National Policy Statement for Ports ("NPSfP"). The Applicant's separate identification of an urgent and compelling need for the Project relates to matters of green energy and decarbonisation. **Paragraph 5.2.17** of the **Planning Statement [APP-226]** indicates that liquid ammonia could potentially be exported from the Immingham facility. There are two potential scenarios for such exports, namely: • As the market for green hydrogen develops, other hydrogen production units may potentially be built around the UK in locations without access to a deep-water port. Such facilities could be supplied with ammonia, exported from the Immingham facility in the form of coastal shipping, using smaller vessels. • In the event of disruption to the supply chain for green ammonia, export of ammonia from Immingham could also be used to balance inventories across other hydrogen production facilities to ensure continued production of hydrogen. Any such export of liquid ammonia from the storage tank would not reduce the capacity of the proposed facility in terms of hydrogen

	production or affect the production rate but would represent the export of spare ammonia inventory. Furthermore, as explained at ISH1 and ISH3 and in the responses to various of the ExA's 'Principle of Development' questions, the Project does not need to achieve a certain level of throughput or production for the benefits associated with decarbonisation and green energy to occur or for those elements of the need to be established. Finally, in response to this part of the question, it should be noted that the potential for liquid ammonia to be coastally shipped from the facility is a further benefit of the Project in that such activity contributes to an aspect of the need for additional port capacity established in the NPSfP. b) As outlined above, the UK benefits due to hydrogen production would be unaffected by any future export of spare ammonia inventory. Any controls on export, in order to protect UK benefits, would therefore be unnecessary. c) As outlined above, liquid ammonia could potentially be exported from the facility at Immingham.
Q1.2.1.10	
Question	**Response**

Important and Relevant NPS's other than the NPSfP The ES [APP-045] identifies a number of important and relevant designated and draft NPS's other than the NPSfP in support of the Proposed Development's need case. Update your policy assessment in light of material changes, if any, to the important and relevant designated or draft NPS's and WMSs that may have emerged subsequent to the application's submission and acceptance.	The IGET application was submitted on 21 September 2023. As far as the Applicant has been able to determine, the only National Policy Statement ("NPS") or written ministerial statement ("WMS") of relevance published since that date is the updated version of the Overarching National Policy Statement for Energy ("EN-1") which was published in November 2023 and subsequently designated in January 2024. In respect of the policy contained within EN-1 (November 2023), the following, amongst other things, is noted: (i) Although of particular importance in respect of energy projects that fall within the scope of the Nationally Significant Infrastructure Project regime, EN-1 may also be an important and relevant material consideration in respect of other energy related projects taken forward under the wider planning system (Section 1.2). The Applicant considers that – although not the NPS that has effect in respect of the Project – EN-1 is an important and relevant consideration in respect of the Project. (ii) It is recognised that to produce the energy required for the UK and ensure it can be transported to where it is needed, a significant amount of infrastructure is needed at both local and national scale and that the need for such infrastructure is urgent (Paragraphs 2.1.3 and 3.1.1). (iii) The Government's objectives for the energy system are to ensure the supply of energy always remains secure, reliable, affordable and consistent with meeting the target to cut greenhouse gas ("GHG") emissions to net zero by 2050, which will require a step change in the decarbonisation of the energy system (Paragraphs 2.3.3 and 3.2.1).

	(iv) A range of different types of energy infrastructure is needed to deliver the above objectives (Paragraph 3.2.2). (v) For the types of infrastructure covered by EN-1 the Government has demonstrated that there is a need which is urgent, and that substantial weight should be given to this need (Paragraphs 3.2.6 and 3.2.7). In respect of other technologies or processes which may emerge, where these contribute to the Government's objectives it should similarly be determined that there is a need for them, and that substantial weight should be given to that need (Paragraph 3.2.10). (vi) There is an urgent need for all types of low carbon hydrogen infrastructure to allow hydrogen to play its role in the transition to net zero (Paragraph 3.4.12). (vii) In the future, low carbon hydrogen may also become an internationally-traded energy vector, piped or shipped from areas of low-cost production to areas of demand. Whilst the development of this market is uncertain, the UK could potentially become both an exporter and importer of low carbon hydrogen, potentially necessitating current gas infrastructure to be reconfigured or for new infrastructure to be put in place (Paragraph 3.4.18). (viii) There is an urgent need for new carbon capture and storage infrastructure to support the transition to a net zero economy (Paragraph 3.5.1). (ix) Ensuring the UK is more energy independent, resilient and secure requires the smooth transition to abundant low-carbon energy. The

	UK's strategy to increase supply of low carbon energy is dependent on deployment of renewable and nuclear power generation, alongside hydrogen and carbon capture usage and storage ("CCUS"). Energy security and net zero will only be delivered if we can enable the development of new low carbon sources of energy at speed and scale (Paragraph 4.2.2). (x) As a result of this analysis, the Government has concluded that there is a 'critical national priority' ("CNP") for the provision of nationally significant low carbon infrastructure, and, for the purposes of the policy, low carbon infrastructure includes fuels, pipelines and storage infrastructure which fits within the normal definition of 'low carbon' such as hydrogen distribution and carbon dioxide distribution (Paragraphs 4.2.4 and 4.2.5). (xi) To support the urgent need for low carbon hydrogen infrastructure, hydrogen distribution, pipeline and storage, are considered to be CNP infrastructure (Paragraph 3.4.22). (xii) To support the urgent need for new CCS infrastructure, CCS technologies, pipelines and storage infrastructure are also considered to be CNP infrastructure (Paragraph 3.5.8). Identification of hydrogen and carbon dioxide related infrastructure as a 'critical national priority' demonstrates the importance of these technologies in forming part of the Government's energy security ambitions and the energy transition to net zero. As made clear in **Paragraph 5.2.26** of the **Planning Statement [APP-226]**: "*The Project would facilitate the development of a diverse range of technologies, fuels and supply routes to support decarbonisation, including*

	through an established opportunity to produce low carbon hydrogen, an opportunity to maximise the potential of emerging CCS infrastructure across the UK by CO2 shipping and by providing capacity for future projects and energy supply routes. This project will therefore help to secure the UK's energy security." Having regard to the clear policy position set out in EN-1, the benefits of the Project in contributing to the urgent needs identified in EN-1 are benefits that should be given substantial weight.
Q1.2.1.14	
Question	**Response**
Case Law a) Provide the judgement in relation to R (on the application of Friends of the Earth Ltd and others) (Respondents) v Heathrow Airport Ltd (Appellant) [2020] UKSC 52 and explain the relevance to the Proposed Development. b) Provide the judgement in relation to R (ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy [2021] EWCA Civ 43 and explain the relevance to the Proposed Development. c) These explanations should include but not necessarily limited to the operation of the presumption in favour of granting consent and how need is assessed under NPSfP.	a) This judgment has been provided as **Appendix A** of the court judgements submitted as **Appendix 2** of this document. b) This judgment has been provided as **Appendix C** of the court judgements submitted as **Appendix 2** of this document.. c) A cover note has been provided with the court judgments requested to explain their relevance to the Project. In relation to the operation of the presumption in favour of granting consent as well as how need is assessed under the National Policy Statement for Ports ("NPSfP"), these points are addressed with reference to the cases provided at **Appendices B** and **E** of the cover note provided at **Appendix 2** to this response, being the *ClientEarth* and *Aquind* judgments respectively. Amongst other things these judgments consider the structured approach to decision making that is mandated by section 104 of the Planning Act 2008 ("PA 2008") including in respect of policy contained within a relevant national policy statement (in those instances the former Overarching

	National Policy Statement for Energy ("EN-1") (July 2011) although the same principles apply in relation to a project in respect of which the NPSfP has effect). Where, as here, a national policy statement has effect, subsection 104(3) of the PA 2008 provides that: "*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.*" As Lieven J in *Aquind* makes clear, "*… It is important for the Court not to be too mechanistic in its approach to planning decisions, and not to require an obstacle course of analysis which then needlessly trips up decision makers. However, s.104 imposes a very clear structure on the decision-making process. The scheme of the Planning Act 2008 is to give a particular status in the decision-making process to a National Policy Statement. Part 2 of the Act sets out the process for adopting NPSs and s.9 establishes the Parliamentary requirements, which then give an NPS a particular status different from any other government statement of planning policy. Therefore, an NPS is not simply another policy document which is weighed in the planning balance and to which the SoS can give more or less weight. The amount of weight is a matter for him, but that is subject to the presumption in s.104(3) and the specific matters in subsections (4) to (7).*" (Paragraph 99)

	As a first step, therefore, the Secretary of State must consider and analyse whether the application for the Project is in accordance with the NPSfP for the purposes of subsection 104(3). As explained during Issue Specific Hearing 1, the NPSfP establishes the need for the Project and (at Paragraph 3.5.2) provides that given the level and urgency of need for infrastructure of the types identified, the Secretary of State should start with a presumption in favour of granting consent to applications for ports development. It is further made clear that this presumption applies unless: 1. Any more specific and relevant policies set out in the NPSfP clearly indicate that consent should be refused, or 2. Any more specific and relevant policies set out in another national policy statement ("NPS") clearly indicate that consent should be refused. NPSfP Paragraph 3.5.2 notes that the presumption is also subject to the provisions of the PA 2008. Therefore, to determine whether the presumption is disapplied the Secretary of State needs to analyse whether any more specific and relevant policies in the NPSfP or another NPS clearly indicate that consent should be refused. In this regard it is emphasised that the use of the words 'clearly indicate' means that it is only engaged where any specific and relevant policies in the NPSfP or another NPS make it clear that a breach of those policies would lead to refusal (see, for example, Paragraph 5.7.7

	of the NPSfP in respect of a project leading to non-compliance with a statutory air quality limit). For the avoidance of doubt, the Applicant, for the reasons set out within its application documentation – in particular its **Planning Statement [APP-226]** – does not consider that there are any specific and relevant policies within the NPSfP or another NPS which clearly indicate that consent should be refused for the Project. If it is concluded that the Project is in accordance with the NPSfP (and thus that the presumption in favour within the NPSfP is not disapplied), then the Secretary of State – pursuant to the second part of subsection 104(3) of the PA 2008 and the last sentence of NPSfP Paragraph 3.5.2 – then has to consider whether any of subsections 104(4) to (8) apply. If not, the statutory obligation in subsection 104(3) is to decide the application for the Project in accordance with the NPSfP and thus to grant consent. One of those subsections, subsection 104(7) of the PA 2008, applies "*if the Secretary of State is satisfied that the adverse impact of the proposed development would outweigh its benefits*". Under subsection 104(7) the statutory presumption, therefore, applies unless the Secretary of State is 'satisfied' that notwithstanding compliance with the NPSfP the adverse impacts are such as to outweigh the benefits. Subsection 104(7), however, cannot be used to circumvent subsection 104(3). So, for example, where through the analysis undertaken in respect of subsection 104(3) it is clear that the NPSfP has identified the need for the Project and established that the presumption in favour applies, it is not then permissible for these matters to be considered again under

	subsection 104(7). Such a re-consideration would constitute a challenge to the merits of the policy contained within the NPSfP – something which is not open to the process of examining or determining a Development Consent Order application. The above position is explained further in, for example, Paragraphs 107 and 108 of the first instance *ClientEarth* judgment. Rather, under subsection 104(7) the Secretary of State is required to consider whether the benefits of the Project are outweighed by its adverse impact. In others words, under subsection 104(7) it is not permissible to seek to re-consider the issues of need and the presumption in favour established by the NPSfP but rather under subsection 104(7) the exercise is more one of correctly understanding that position and the related benefits generated by the Project so that such benefits can be correctly considered in the subsection 104(7) balancing exercise. For the purposes of weighing the impacts of the Project, if it has been concluded that the various assessment and impact related policies contained within the NPSfP (found within Section 4 and 5 of the policy document) are complied with, then it is very hard to see how the adverse impact of the Project could reasonably be said to outweigh the benefits without undermining the intended role and function of the NPSfP. In terms of the benefits of the Project, as made clear, for example, in Paragraph 4.2.2 of the NPSfP, these include, but are not limited to, the benefits associated with the Project's contribution to meeting the need for the infrastructure which has been identified both within the NPSfP and separately by the Applicant.

	In terms of the extent of the weight to be given to such benefits the NPSfP, in summary, highlights that: 1. The need it identifies is for 'substantial' additional port capacity (NPSfP, Paragraph 3.4.16). 2. The need for that substantial additional port capacity is 'compelling' (NPSfP, paragraph 3.4.16). 3. The need for additional port infrastructure is of such a level and urgency that it results in the presumption in favour of granting consent (NPSfP, Paragraph 3.5.2). 4. The decision maker should give 'substantial weight' to the positive impacts associated with economic development (NPSfP, Paragraph 4.3.5) – such positive impacts clearly include the fact that the Project will contribute towards meeting the need identified in the NPSfP. In respect of the Applicant's separate identification of an urgent and compelling need for the Project that relates to decarbonisation and energy security matters, and as explained further in the answer to Q1.2.1.10, the benefits of the Project in contributing to the urgent needs identified in that regard are also benefits that should be given substantial weight in the balancing exercise undertaken pursuant to subsection 104(7). For the avoidance of doubt, the Applicant, for the detailed reasons set out within its application documentation, does not consider that the adverse impact of the Project could properly be said to outweigh its benefits – which for the reasons summarised above should be given substantial weight.

	The Applicant also, for completeness, highlights that nothing in subsections 104(4), (5), (6) or (8) indicate that consent should not be granted for the Project.
Q1.2.1.15	
Question	**Response**
Hydrogen Transport Infrastructure a) Provide evidence on the number and location of hydrogen filling stations throughout the UK. b) Explain whether there is sufficient hydrogen filling infrastructure available in order to fully realise the potential benefits of the Proposed Development. c) Would the Proposed Development act as a catalyst for future hydrogen investment, whether locally as a cluster or nationally? Provide case studies to support your answer.	a) At the time of writing, there are only four publicly accessible hydrogen refuelling stations ("HRS") in the UK. Air Products designed, owns and operates one of these located in the vicinity of Heathrow Airport where it delivers fuel to cars, Heavy Goods Vehicles ("HGVs"), buses, refuse trucks, vans and minibuses. The other stations are operated by Motive Fuels in Birmingham and Rotherham and by BOC in Aberdeen. These can be seen in **Figure 1**, which is a publicly accessible map of the HRS locations throughout Europe. Additionally, in the UK, Air Products designed, owns and operates a private, or 'back-to-base', HRS located within the depot of a bus company in Crawley, Sussex. This installation is currently the largest HRS in Europe. There are other private HRS in the UK but these are all much smaller in scale. b) At the time of writing, the dispensing capability of the UK's HRS infrastructure is <2 tonnes per day, so circa two orders of magnitude lower than the maximum 200 tonnes per day throughput of the Project. However, as explained below, this is an emerging market (aside from the separate

	demand from hydrogen by industrial users) and the reliable supply of fuel is a crucial factor in its growth. c) The Project will act as a catalyst for future hydrogen investment by providing certainty to the market on the availability and reliability of green hydrogen. Knowing that the supply chain is robust will encourage end-users to invest in hydrogen technology, infrastructure and vehicles as an enabler towards their decarbonisation and sustainability goals. In the UK, the transport sector was responsible for over a quarter of the UK's 406.2 million tonnes carbon dioxide equivalent ("MtCO2e") emissions in 20221. HGVs, light duty vehicles and buses together contributed 36% of these transport emissions; HGVs, a 'hard to electrify' transport mode, made up 17% alone1. With an upcoming ban on all non-zero-emission HGVs on UK roads by 20406, zero-emission options must become more accessible and available. The European Union ("EU") has created both funding mechanisms for hydrogen refuelling development and set its members targets through regulation, such as the Alternative Fuels Infrastructure Regulation ("AFIR"), for the deployment of alternative fuels infrastructure in the EU. There is a requirement for publicly accessible HRS to be deployed with a maximum distance of 150km between HRS along major road networks, and at least one should be available in every urban node2. A visual representation of the current status across Europe can be seen in Figure 1, where the green/red markers represent HRS that are in operation (green) or non-operational due to maintenance (red) and the blue markers represent HRS

	that are in-build. By providing that certainty of provision, the market in Europe has responded with developments in: 1. Hydrogen production, including green ammonia import terminals as set out in the response to Q1.2.2.7 2. Hydrogen infrastructure, including the HRS infrastructure as set out in Figure 1 3. Hydrogen vehicles: major manufacturers have publicly announced that they are developing, and in some cases already offering, vehicles powered by hydrogen to meet the demand. A sample of these are: a. Cars: Toyota Mirai, Hyundai Nexo, BMW iX5 b. Trucks: Mercedes, DAF, Daimler, Volvo, HVS c. Van/Minibus: Vauxhall Vivaro, Toyota, JCB d. Buses: Alexander-Dennis, Ricardo, WrightBus, Solaris e. Other: Construction (JCB, Hitachi, Toyota), Forklift (Linde, Toyota, Hyster) The UK will need to develop and deploy a similarly structured network for two reasons: 1. To enable coverage of the UK with adequate refuelling options for our domestic supply chain. 2. To enable EU freight to travel to the UK. The UK Government's Hydrogen Strategy states: "[it is] *clear that hydrogen has an important role to play in decarbonising heavier transport applications*"[3]. Research carried out by the industry consortium H2Accelerate[5] recommended that a minimum of 11 strategically located public HRSs would be required to kick-start the hydrogen economy (see Figure 2); this would be in addition to any private depot based HRSs. It is

anticipated that the market demand by 2035 would require a network of approximately 250 HRSs. To meet this market demand Air Products has been developing plans to invest in hydrogen refuelling infrastructure and anticipates installing a network of new public refuelling stations by 2030. The location of these HRSs is commercially sensitive and cannot be shared at the time of writing.

Figures:

Figure 1: Hydrogen Refuelling Stations in Europe[4]

- in operation (green)
- non-operational due to maintenance (red)
- in-build (blue)

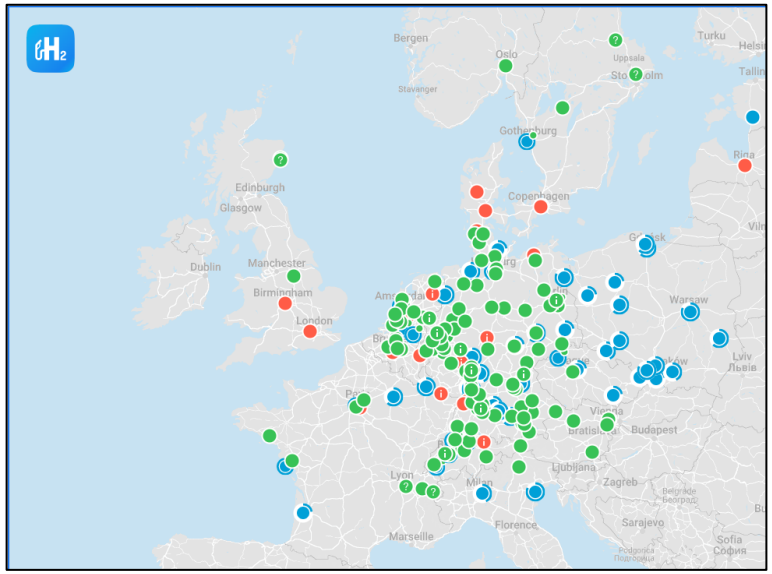
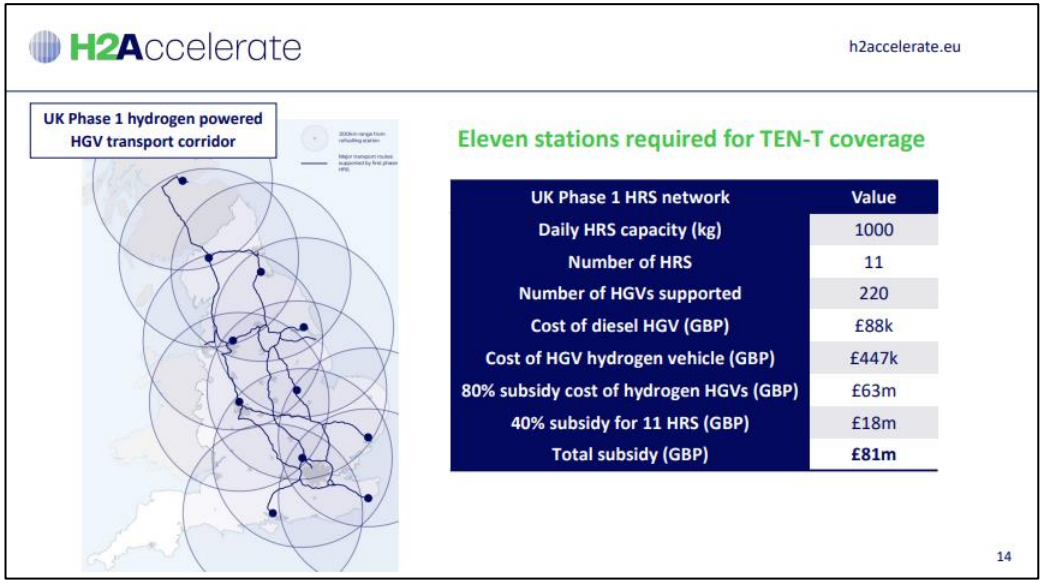


Figure 2: Output from H2Accelerate study on HRS locations within the UK[5]



UK Phase 1 HRS network	Value
Daily HRS capacity (kg)	1000
Number of HRS	11
Number of HGVs supported	220
Cost of diesel HGV (GBP)	£88k
Cost of HGV hydrogen vehicle (GBP)	£447k
80% subsidy cost of hydrogen HGVs (GBP)	£63m
40% subsidy for 11 HRS (GBP)	£18m
Total subsidy (GBP)	**£81m**

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Q1.2.2 Associated Development	
Q1.2.2.1	
Question	**Response**
Additional Justification for the Associated Development The ExA requests additional analysis and justification for the AD, further to what has been provided in the ES [APP-043 and APP-044]. This should include, but not necessarily be limited to, the following areas: a) Legislative and policy basis for the AD.	a) There is a direct relationship between the Nationally Significant Infrastructure Project ("NSIP") forming part of the Development Consent Order ("DCO") application ("the principal development") and the associated development ("AD") comprised in the DCO application. This relationship is explained further below. Firstly, in response to the written questions the Applicant confirms and describes what compromises the

b) How the AD accords with DCLG guidance on AD, in particular the criteria within Paragraphs 5 and 6. Please submit a copy of the guidance for inclusion in the Examination. c) Precedents, making sure to demonstrate that each precedent is sufficiently similar to the particular circumstances of this case so as to be considered important and relevant.	NSIP or principal development and the AD forming part of the DCO application for the Project. The proposed Terminal constitutes an NSIP under subsections 14(1)(j), 24(2) and 24(3)(c) of the Planning Act 2008 ("PA 2008"). Subsection 14(1)(j) of the PA 2008 specifies that the construction and alteration of harbour facilities is an NSIP. Subsections 24(2) and s24(3) of the PA 2008 specify the criteria that have to be met for the alteration of a harbour facility to be an NSIP. The first criterion is that the alteration of the harbour facilities (i.e. the Port of Immingham) is wholly in England or in waters adjacent to England (see subsection 24(2)(a)(i) of the PA 2008). The second criterion is that the effect of the alteration would be to increase the quantity of material the embarkation or disembarkation of which the altered harbour would be capable of handling by at least the relevant quantity of material per year, which in the case of facilities for cargo ships is 5 million tonnes (see subsection 24(3)(c) of the PA 2008). As explained further below, the proposed Terminal will have a capacity of up to 11 million tonnes per annum. 'Cargo ship' is defined in subsection 24(6) of the PA 2008 and includes liquid bulk carriers. The proposed alteration to the harbour facility at Immingham represented by Work No. 1 meets both criteria and hence the proposed alteration is an NSIP.

	The harbour facility NSIP is described in Work No. 1 in Schedule 1 of the draft Development Consent Order ("dDCO") [**PDA-004**] for the Project and comprises the berth adjacent to the main navigational channel of the River Humber, the jetty linking the berth to the land including jetty access ramp that makes land fall just above the mean high water mark and the topside loading and unloading infrastructure, pipes, pipelines and utilities and associated works included on the berth and the jetty. Subsection 115(1) of the PA 2008 provides that: "*Development consent may be granted for development which is—* (a) development for which development consent is required, or (b) associated development …." Subsection 115(2) of the PA 2008 provides that: "*Associated development" means development which—* (a) is associated with development within subsection (1)(a)(or any part of it), (b) …. (c) is within subsection (3)….." Development is within subsection (3) if it is in England or territorial waters adjacent to England, which the Project is. The AD in the Project includes the jetty access road (Work No. 2 in Schedule 1 of the dDCO) which connects Work No. 1 to the public

	highway and the hydrogen production facility ("HPF") including the pipelines, pipes and other utilities connecting the NSIP to the HPF (those connections are also part of Work No. 2). The HPF is laid out over two sites: (a) The East Site includes the ammonia storage tank that receives the ammonia imported over the jetty (Work No. 3 in Schedule 1 of the dDCO) and hydrogen production units (Work No. 5 in Schedule 1 of the dDCO). The East Site comprises two parts with Work No. 3 located to the south of Laporte Road and Work No. 5 to the north of Laporte Road. The parts are linked by a culvert carrying pipelines and conducting and cable media under Laporte Road (Work No. 4 in Schedule 1 of the dDCO). (b) The West Site provides further hydrogen production units, hydrogen liquefiers and storage facilities and facilities for loading hydrogen into tankers for transport to point of use and consumption (Work No. 7 in Schedule 1 of the dDCO). (c) The East and West Sites are linked by pipelines and other service media connections (Work No. 6 in Schedule 1 of the dDCO). (d) Two construction compounds are provided (Work No. 8 in Schedule 1 of the dDCO adjacent to the West Site including access from Queens Road and Work No. 9 in Schedule 1 of the dDCO to the east of the jetty access road (Work No. 2 in Schedule 1 of the dDCO)). Work No. 10 comprises various minor modifications to overhead lines and street furniture on Kings Road.

	Collectively the NSIP and the AD constitute the 'authorised project' described in the dDCO. It is for the Secretary of State to decide whether or not development should be treated as AD (Paragraph 5 of the Guidance on associated development applications for major infrastructure projects – published by the Department of Communities and Local Government in April 2013 (the "Guidance")). Paragraph 5 of the Guidance specifies four 'core principles' to be taken into account in making such a decision. The application of those principles is addressed in response to Q1.2.2.1(b) below. Paragraph 6 of the Guidance notes the expectation that "associated development will, in most cases, be typical of development brought forward alongside the relevant type of principal development or of a kind that is usually necessary to support a particular type of project…". It does not, however, set any further test or additional principle. b) As requested, a copy of the Guidance is attached as **Appendix 3**. The four principles are addressed in turn below, demonstrating that the HPF is plainly AD, having regard to the Guidance. This was explained at Issue Specific Hearing 1 (ISH1) (please see **Appendix B** of the written summary of oral case made at ISH1 **[TR030008/EXAM/9.29]).** (a) Core Principle 1: Is there a direct relationship between the AD and the NSIP? (Paragraph 5(i) of the Guidance)

	Core principle 1 is addressed at **Paragraph 2.16** of the **Explanatory Memorandum** [PDA-006]. The further details set out below are consistent with relevant information provided in the **Explanatory Memorandum**. The relationship between the AD and the NSIP is 'direct'. The principle in Paragraph 5(i) of the Guidance is that AD should either support the construction or operation of the NSIP or help address its impacts. In each case the AD either supports the construction or operation of the NSIP or helps to address its impacts. Any one of those three possibilities is sufficient to satisfy this principle. The core principle is not that the AD is 'strictly necessary' in respect of one or other of those possibilities, as is the implication of the language of Q1.2.2.2(a). To assess the issue on that basis would be to fall into legal error. Instead, the question is simply whether there is a direct relationship between the AD and the NSIP which involves either supporting its construction or operation, or helping to address its impacts. In this case the jetty cannot operate as designed without appropriate landside facilities to receive the cargo that is imported. The HPF supports the operation of the NSIP by providing essential storage for the ammonia imported over the jetty comprised in the NSIP (Work No. 1) and related and necessary production facilities for converting ammonia to hydrogen. Without such facilities ammonia could not be imported as it has to be stored and then processed close to point of landing. This is explained below.

	Ammonia is a hazardous toxic substance, which if not handled and processed properly can and would represent a significant risk to the environment and the human population. Ammonia is not transported for significant distances as a refrigerated liquid in either pipelines or tankers in the UK for reasons of health and safety. Once imported, ammonia must therefore be stored and then treated in a way which limits the toxic risk which arises from it before onward transportation: that requires that the ammonia be processed into hydrogen close to the jetty. The refrigerated nature of the imported liquid ammonia also means that it is preferable to limit the distance from the point of offload from the ship to the storage tank as is the case here. The further the ammonia is moved in pipes the greater the loss of refrigeration of the liquid and hence the greater the energy use in maintaining the ammonia at the correct refrigeration temperature. The HPF plainly has a direct relationship with, and supports the operation of, the jetty by facilitating the efficient and effective import of ammonia for the production of green hydrogen. Equally, without the jetty enabling a supply of ammonia the HPF would not be constructed because it relies directly on the import of ammonia via the jetty. The AD clearly supports the operation of the NSIP. Without the AD, the function of the jetty to import ammonia cannot be performed. As explained in more detail below, this is entirely typical of the way ports function. It is a common and essential function and part of the nature of operational ports that they provide facilities for customers of the port to store and where necessary process the imported cargo before onward transport to the point of use. The nature of those facilities and the intensity at which they operate necessarily varies depending on the cargo in question.

	In the case of ammonia the processing requirement is significant and, for the reasons stated above, important. The berth forming part of the NSIP and which is linked to the shore by the jetty allows cargo to pass over the jetty, initially in this case ammonia. The HPF is required to firstly store and then to process the ammonia into hydrogen before it is then transported for use elsewhere in the UK for the reasons set out above and in this way the HPF helps address the impacts of the NSIP from the import of ammonia. . This is no different from the fundamental nature of import/store and process operations for a number of cargoes that already take place at various locations in the Port of Immingham (e.g. the Immingham Oil Terminal, the Drax Biomass Terminal, The Coal and Coke Terminal and the Humber International Terminal) and numerous other ports around the country. Please see the Applicant's further response below and to Q1.2.2.7. The proposed operations comprised in the Project are quintessential examples of activities which support port operations and occur at and around ports all around the UK as a consequence of import of cargo and are typical AD for a ports NSIP. (b) Core Principle 2: Is the AD an aim in itself? AD should be subordinate to the main development. (Paragraph 5(ii)) Core Principle 2 is addressed at Paragraph 2.17 of the Explanatory Memorandum [PDA-006]. The further details set out below are consistent with relevant information provided in the Explanatory Memorandum. The HPF is subordinate to the jetty. It would not be constructed and would not be able to operate without the jetty. That is reinforced by draft

	Requirement 5 which imposes a legal constraint to prevent this from occurring. Subordinate status also needs to be understood by reference to the nature and in particular the capacity of this NSIP, and how port facilities are provided as explained in the National Policy Statement for Ports. The jetty is not being provided solely for the provision of the HPF. The jetty will have a capacity in the order of 11 million tonnes per annum. The import of ammonia to supply the HPF will only account for a minority of that capacity. It is anticipated that most of the remaining capacity will be taken up by the import of up to 9.8 million tonnes of CO_2 for onward capture and storage. Hence the relative physical size of the two developments or the area of land occupied by them is not the appropriate metric for considering subordinate status in this context. Rather it is the functional operational relationship that dictates subordinate status. This is typical of NSIPs of this type, where the harbour facility itself might be relatively small (e.g. a new berth) but the additional import capacity it creates is substantial and generates a need for much larger areas where the imported cargo can be stored and/or processed. The HPF is simply the first of a number of facilities of this type that will support the operation of the jetty. (c) Core Principle 3: Associated development should not be permitted if it is only necessary to cross-subsidise the NSIP. (Paragraph 5(iii))

	Core Principle 3 is addressed briefly at **Paragraph 2.19** of the **Explanatory Memorandum [PDA-006]** on the basis that the principle was not relevant as the AD is not cross-subsidising the jetty. This explained in further detail below. It is only development which is provided for the sole purpose of cross subsidy that infringes this core principle. The Guidance makes clear that AD can cross subsidise provided that is not its sole function. As explained in ISH1 (see **Appendix B** of the written summary of oral case made at ISH1 **[TR030008/EXAM/9.29]**), a hypothetical example of a development that would be contrary to this principle might be the development of a casino alongside the jetty that had no functional relationship with it at all, but was needed to generate sufficient income to make the principal development (i.e. the NSIP) commercially viable. Once the mischief towards which this Core Principle is directed has been properly understood, it is evident that it is not engaged on the facts of this case. The issue is not whether the port operator would make the commercial decision to develop the NSIP without a first customer. It is simply whether the only relationship between the NSIP and the AD is financial cross-subsidy. None of the AD is being provided only to cross-subsidise the cost of the NSIP. (d) Core Principle 4: Is the Associated development proportionate to the scale and nature of the principal development? (Paragraph 5(iv))

	Core Principle 4 is addressed at **Paragraph 2.18** of the **Explanatory Memorandum [PDA-006]**. The further details set out below are consistent with relevant information provided in the **Explanatory Memorandum**. The nature of the NSIP is that it is designed to facilitate the import of liquid bulks and in particular (as a first user) ammonia for the production of green hydrogen. The provision of the necessary storage and production facilities to enable this to be achieved is very clearly proportionate in terms of its nature. The HPF is phased and scaled to process the amount of ammonia that Air Products plans to import to the HPF, that is a small proportion of the overall capacity of the jetty (in terms of both ship movements and associated cargo). In that respect the HPF is proportionate as it does not seek to provide more capacity than is necessary to meet the volume of ammonia planned to be imported by Air Products. As explained, the NSIP will have substantial residual capacity to embark and disembark significant quantities of other cargoes notably CO_2, as explained in a number of other answers to the first round of written questions, in addition to the ammonia for Air Products. How the HPF supports and is subsidiary to the jetty has already been explained and those two points go directly to the fact that the AD is proportionate to the NSIP/principal development. The AD is therefore also very clearly proportionate in scale to the NSIP. It should also be noted that port storage and related processing facilities are often large in comparison to the marine facilities such as the jetties and quays that service them. Please see response to Q1.2.2.7 below and slides 5 and 6 of **Appendix A** (see **Appendix F** of the written summary of oral case made at ISH1 **[TR030008/EXAM/9.29]**). The physical scale of the HPF is not indicative of proportionality given that it is frequently the

	case that storage and processing far exceeds in size and scale the facilities which enable the cargoes to be imported and exported in the first place. Processing requirements for cargo and dwell time, i.e. the amount of time a cargo is stored before it is taken from the port or exported, are important considerations in that respect (but not factors that are determinative as to whether those facilities are AD). c) Development consent orders for other port developments have authorised significant facilities as AD to the NSIP comprised in those projects on the basis of the same Core Principles in the Guidance covered above (please see **Paragraph 2.20** of the **Explanatory Memorandum [PDA-006]**). For example: (a) The Port of Tilbury (Expansion) Order 2019 authorised a NSIP comprising a Ro-Ro berth and a construction materials and aggregates berth with extensive AD in the form of a Ro-Ro terminal and construction materials and aggregates terminal including infilling of land, construction of roads and railways including extensive sidings and warehouses, the construction of conveyors, silos and weighbridges, and the alteration of watercourses. In that case the NSIP finished where the marine facilities for the import and export of cargo made landfall which is exactly the same arrangement as is provided for at Immingham in respect of the IGET project. The AD at Tilbury was clearly associated with the processing of Ro-Ro units and aggregates that came over the two new berths forming the NSIP in that case in the same way that the IGET project AD will store and process ammonia coming over the jetty. The Tilbury facilities were being provided in response to demand from the port operator's existing and future customers: the

	same factual position as is the case with the IGET Project. It is the functional relationship between the NSIP and the AD that is the key consideration and not the commercial drivers that may sit behind or give rise to that relationship or the scale of the proposed AD. (b) The Immingham Eastern Ro-Ro Terminal application is following the same approach to Tilbury where the new Ro-Ro jetty is the NSIP and the new Ro-Ro terminal facilities are the AD. (c) The York Potash Harbour Facilities Order 2016 authorised an NSIP comprising the demolition of an existing jetty and construction of a quay of closed and open construction with loading equipment and pipework. The related storage and material handling facility for the polyhalite that was being exported in that case and all other related development to be provided, was approved as AD. The NSIP was limited to solely those marine facilities to get the cargo from the land to the ships being used to export the polyhalite. This is the reverse of the IGET project, export as opposed to import, but it is further precedent for the AD included in the IGET project further to Core Principle 1. Please also see the Applicant's response to Q1.2.2.7 as to examples of jetty facilities and associated storage and processing facilities at the Immingham Oil Terminal, at Milford Haven in Pembrokeshire in West Wales and at Fawley on Southampton Water.
Q1.2.2.2	
Question	**Response**

The need for the Hydrogen Production Facility a) In relation to DCLG guidance on AD (Paragraph 5(i)), is the need for a hydrogen production facility naturally arising and strictly necessary to support the operation of the principaldevelopment? b) For example, the principal development's operation involves the arrival and departure of ships, and the embarking and disembarking of ammonia cargo. Are these operations possible without the presence of a hydrogen production facility? c) As such, would a hydrogen production facility be an added benefit rather than a strict necessity, and should this be a factor when determining if something is considered AD or not?	a) The Explanatory Memorandum [PDA-006] sets out at Paragraph 2.16 that Paragraph 5(i) of the Department for Communities and Local Government Planning Act 2008: Guidance on associated development applications for major infrastructure projects ("the Guidance") provided at Appendix 3 requires a direct relationship between the associated development ("AD") and the principal development. The relationship between the AD and the Nationally Significant Infrastructure Project ("NSIP") is 'direct'. As explained in response to Q1.2.2.1, in each case the AD either: (a) Supports the construction of the NSIP; or (b) Supports the operation of the NSIP; or (c) Helps to address its impacts Any one of those three possibilities is sufficient. To be AD the development only has to comply with one of those functions, it does not need to meet all three or even two of the three options. The hydrogen production facility ("HPF") meets the functions set at paragraphs (b) and (c) above. It is important to understand that the core principle as set out in the Guidance is not whether the AD in the form of the HPF is 'strictly necessary' to the operation of the NSIP as implied in the written question. The right question to be asked by reference to Paragraph 5(i) is simply whether there is a direct relationship with the NSIP and then whether the AD supports its operation or helps to address its impacts. That

	requirement is met as explained in the response to Q1.2.2.1 and at Issue Specific Hearing 1 ("ISH1") (see Paragraph 22 of Appendix B of the written summary of oral case made at ISH1 **[TR030008/EXAM/9.29]**). b) As the **Explanatory Memorandum [PDA-006]** sets out at **Paragraph 2.16**, the IGET jetty cannot operate without appropriate landside facilities to receive the cargo, liquid ammonia. In the case of the jetty's first customer, Air Products, the import of ammonia for the production of hydrogen requires facilities to receive, store and process that ammonia. Ammonia is a hazardous substance and once imported over the jetty it must be stored and treated in a way that limits the associated toxic risk. That leads to the need for storage and processing facilities close to the point of landing. The pipeline from the jetty to the ammonia storage tank represents the greatest risk of potential damage and accidental leakage and needs to be kept as short as practical. In addition, the further the ammonia is moved in pipes the greater the loss of refrigeration of the liquid and hence the greater the energy use in maintaining the ammonia at the correct refrigeration temperature. The HPF plainly has a direct relationship with and supports the operation of the jetty by enabling the efficient and effective import of ammonia for production of green hydrogen. Equally, without the jetty enabling a supply of ammonia the HPF would not be constructed, because it relies directly on the import of ammonia via the jetty.

	For the same reasons, all other elements of AD which enable the ammonia to be transported from the incoming vessels to the HPF and thereafter transported off-site to end users in the form of hydrogen support the operation of the jetty. c) Regard should be had to the response to Q1.2.2.2(a) above. The requirement is for there to be a direct relationship between the NSIP and the AD and not for the AD to be a benefit of or strictly necessary for the operation of the NSIP. It follows therefore that for the decision-maker to apply a test of 'strict necessity or added benefit' when deciding whether the facility is AD would be to misunderstand the Guidance and therefore to take into account an immaterial consideration. It is clear that there is a direct relationship between the NSIP and the AD in this case, that the core principles are satisfied, and therefore the HPF is correctly classified as AD.
Q1.2.2.3	
Question	**Response**

Whether the Hydrogen Production Facility is an Aim in Itself In relation to DCLG guidance on AD (Paragraph 5(ii)), and to help determine whether the hydrogen production facility would be an aim in itself, explain how the principal development would function if the hydrogen production facility fell away (whether through market forces or otherwise).	The **Explanatory Memorandum [PDA-006]** sets out at **Paragraph 2.17** that Paragraph 5(ii) of the Department for Communities and Local Government Planning Act 2008: Guidance on associated development applications for major infrastructure projects requires that the associated development ("AD") be subordinate to the principal development. By virtue of the fact that the hydrogen production facility ("HPF") supports the operation of the principal development, and would not be constructed without the jetty being in place, it is also subordinate to it. It would not be constructed and would not be able to operate without the jetty (see also Requirement 5 in the **draft Development Consent Order ("dDCO") [PDA-004]** which prevents that from occurring). As explained above, it supports the operation of the jetty and is not an aim in itself. Subordinate status also needs to be understood by reference to the nature and in particular the capacity of this particular Nationally Significant Infrastructure Project, and how port facilities are provided as explained in the National Policy Statement for Ports. The IGET jetty will have a capacity of up to 11 million tonnes per annum (on a conservative basis, i.e. high assessment of its annual capacity for the import of bulk liquids). The import of ammonia to the HPF will only account for a minority of the capacity created. It is anticipated that most of the remaining capacity will be taken up in due course by the import of CO_2 for onward transportation, capture and storage. It is expected that the HPF will be constructed, will remain in operation and will utilise a proportion of the jetty capacity, with the remainder being utilised for CO_2. If the HPF is not constructed the jetty remains available for an alternative liquid bulk product and the necessary landside consents

	to authorise the necessary facilities to enable such use to occur would have to be secured for that purpose at that stage. The development of port facilities is undertaken on a commercial basis in response to market demand. Hence the fact that the jetty is brought forward partly in response to demand from a particular customer needing its own AD so as to facilitate the intended import operation, is typical. Those commercial factors will dictate if and when the jetty is constructed. That commercial relationship does not make the AD 'an aim in itself' or mean it is not subordinate. It simply reflects the way port development comes forward in a market economy.
Q1.2.2.4	
Question	**Response**
Financial Viability without Associated Development In relation to DCLG guidance on AD (Paragraph 5(iii)), would the principal development be financially viable without the hydrogen production facility being built? Explain with reasons.	The **Explanatory Memorandum [PDA-006]** explains at **Paragraph 2.19** that Paragraph 5(iii) of the Department for Communities and Local Government Planning Act 2008: Guidance on associated development applications for major infrastructure projects ("the Guidance") does not apply to the associated development ("AD") as it is not cross-subsidising the jetty. Further explanation of this point is set out below. Paragraph 5(iii) of the Guidance deals with cross subsidy and not with financial viability. Financial viability is not the test for determining whether development is or can be considered to be AD under Paragraph 5(iii). If it was the test, market conditions would dictate whether works would constitute AD, and so fluctuations in market demand and other matters such as cost of financing and hence financial viability of a particular development over time, could change the status of the development between being AD and not being AD. This is not the case and is not what

	the Guidance states or implies. For the decision-maker to decide whether the proposed development is AD or not on that basis would be to misunderstand the Guidance and, therefore, to take into account an immaterial consideration. As explained above and at Issue Specific Hearing 1 ("ISH1") (see **Paragraph 24** of **Appendix B** of the written summary of oral case made at ISH1 **[TR030008/EXAM/9.29]**), core principle (iii) of the Guidance provides that development is not AD if it is **only** necessary as a source of additional revenue to cross-subsidise the principal development. That is not the case here. The AD is not cross-subsidising the principal development, i.e. the jetty. It is only development that is provided for the sole purpose of cross-subsidy which infringes Paragraph 5(iii) of the Guidance. The commercial decision to build the jetty is influenced by the fact that ABP has a first customer for the jetty and there will be further customers in the future. That is consistent with the market-led approach to developing new port infrastructure that is set out in the National Policy Statement for Ports which makes clear that it is for port operators to decide when and where they will make investment in new infrastructure. The issue therefore is not whether the port operator would make the commercial decision to develop the Nationally Significant Infrastructure Project ("NSIP") without a customer signed up to use it, but instead whether the item of AD concerned is only being provided as a source of revenue to fund the NSIP. That is not the case here. None of the AD is being provided only to cross-subsidise the cost of the NSIP.

Q1.2.2.5	
Question	**Response**
Proportionality of the Hydrogen Production Facility In relation to DCLG guidance on AD (Paragraph 5(iv)), it is not clear whether the hydrogen production facility would be proportionate in nature to the principal development. For example, the principal development's nature is transport focussed, that is the movement of ships and cargo. Explain how the production of hydrogen is proportionate in nature to the movement of ships and cargo.	The **Explanatory Memorandum [PDA-006]** explains at **Paragraph 2.18** that the associated development ("AD") is proportionate to the principal development (i.e. the jetty) as required by Paragraph 5(iv) of the Department for Communities and Local Government Planning Act 2008: Guidance on associated development applications for major infrastructure projects ("the Guidance"). The jetty is designed to facilitate the import of liquid bulks. The first user wishes to import liquid ammonia for the purpose of producing green hydrogen. As explained in the response to Q1.2.2.1 and at Issue Specific Hearing 1 ("ISH1") (see **Paragraph 22** of **Appendix B** of the written summary of oral case made at ISH1 **[TR030008/EXAM/9.29]**), the operation of importing liquid ammonia for this purpose is directly supported by the provision of suitable facilities close to the point of import where the ammonia can be stored and processed. In principle the nature of this functional relationship is no different from other typical port operations (see answer to Q1.2.2.1 in respect of Core Principle 1 in the Guidance). The provision of a hydrogen production facility is therefore entirely proportionate in nature to the use of the Nationally Significant Infrastructure Project for the import of ammonia for this purpose.
Q1.2.2.6	
Question	**Response**

Whether the Hydrogen Production Facility is Typical a) In relation to DCLG guidance on AD (Paragraph 6), could a novel and emerging technology such as a hydrogen production facility reasonably be described as typical? b) Furthermore, is a hydrogen production facility strictly necessary to support the principal development, or is it desirable as an added benefit?	a) Although the import of ammonia for the production of green hydrogen is in itself novel, in as much as it is the first proposal of this nature in the UK, the technology is not and the underlying nature of the relationship between the jetty and the AD is entirely typical for port Nationally Significant Infrastructure Projects ("NSIPs"). In short, facilities for the storage, processing and onward transport of imported cargo are typical associated development ("AD") for a harbour facility NSIP. As the **Explanatory Memorandum [PDA-006]** explains at **Paragraph 2.20**, the Ro-Ro terminal and aggregates terminal authorised at Tilbury2 had essentially the same relationship with the two berths authorised as NSIPs at Tilbury as the AD proposed in this case. The fact that the particular cargo and the particular processing facility for that cargo proposed here is novel, being the first of its kind in the UK, does not change that essential relationship. It is an inevitable fact that the type of cargo imported through ports changes over time in response to changing needs and emerging and established markets. This is expressly recognised in Paragraph 3.1.5 of the National Policy Statement for Ports that records that there will be changes in the type of energy supplies handled by ports over time. Similarly, the storage and material handling facilities for polyhalite at the York Potash Harbour Facility (another unique facility) were treated and approved as AD with the NSIP being limited to the marine facilities necessary to move the cargo from the landside storage area to the vessels used to export the polyhalite. This is the reverse of the Project, export as opposed to import, but it is further precedent for the AD included in the IGET project further to Paragraph 5(i) of the Department for

	Communities and Local Government Planning Act 2008: Guidance on associated development applications for major infrastructure projects ("the Guidance"). b) The expectation identified in Paragraph 6 of the Guidance is that in most cases the AD will be "*typical of development brought forward alongside the relevant type of principal development* ***or*** *of a kind that is usually necessary to support a particular type of project*" (emphasis added). As explained above, the implicit assumption in Q1.2.2.6(b) that there is a test of 'strict necessity' in relation to AD is not correct. There is no such test or principle in the Guidance and to approach the issue on that basis would be to fall into legal error. The supporting nature of the AD is explained in the Applicant's response to Q1.2.2.2. It would not be accurate to characterise the hydrogen production facility ("HPF") as an 'added benefit' and neither is that the test under Paragraphs 5(i) to 5(iv) or Paragraph 6 of the Guidance to establish that the HPF is AD. Further the Applicant has explained above in response to Q1.2.2.6(a), that facilities for the storage, processing and onward transport of imported cargo are typical AD for a harbour facilities NSIP and in that respect they meet the first part of the Guidance in Paragraph 6 that advises the AD will "*be typical of development brought forward alongside the relevant type of principal development*".
Q1.2.2.7	
Question	**Response**

Examples of Other Port Developments a) Provide examples demonstrating how the Proposed Development is typical of other port developments in terms of the presence of cargo processing facilities being intrinsic to jetty, cargo handling and storage infrastructure. b) Provide marked up illustrations of the port developments that were shown on the slides during ISH1 [EV3-002 and EV3-003]. The mark ups should identify the spatial relationship between the components associated with each port development. For example, the jetty location relative to cargo handling/storage/processing facility locations.	As is typical of projects of this type and scale, the storage and processing facilities are located near to the jetty to minimise the length of pipeline(s) containing hazardous material. A short distance is also required to avoid a large amount of heat leak from the ambient air into the refrigerated ammonia during transport; this is similar to Liquefied Natural Gas ("LNG") facilities. Please refer to the response to Q1.2.3.1. Whilst other large portside ammonia facilities do not currently exist in the UK, **Table 1** presents a number of future green ammonia import terminal projects that have been publicly announced to supply green hydrogen to the European market. It should be noted that: • The four geographical locations reflect the expected markets for green hydrogen, namely the UK, the Netherlands ("NL"), Belgium ("BE") and Germany ("DE"), with ports in the latter countries acting as gateways into inland Europe. • The developers include companies from the Industrial Gases, Chemicals and Energy sectors. **Table 1: Sample of green ammonia import terminal projects in Europe**

Location	Developer(s)
Rotterdam (NL)	Gasunie, Vopak, HES, ACE Terminal
Rotterdam (NL)	OCI
Rotterdam (NL)	Air Products, Gunvor
Vlissingen (DE)	Vesta, Uniper, Proton Ventures

Vlissingen (DE)	Vopak
Antwerp (BE)	Fluxys, Advario
Brunsbüttel (DE)	Yara
Brunsbüttel (DE)	RWE
Wilhelmshaven (DE)	BP
Wilhelmshaven (DE)	Uniper
Hamburg (DE)	Air Products, Mabanaft
Duisburg (DE)	Duisport, Koole Terminals
Rostock (DE)	Yara, VNG
Immingham (UK)	Air Products, Associated British Ports
Stanlow (UK)	Essar Group, Stanlow Terminals

LNG facilities in the UK, such as the Isle of Grain in Kent or the Dragon Milford Haven facility in Wales, are examples of large energy import terminals of a liquefied gas. In both cases the facilities comprise jetties, local storage and processing facilities to process the imported material to its final state.

	At Issue Specific Hearing 1 ("ISH1") the Applicant referred to three specific examples of other port developments with cargo processing facilities being intrinsic to the jetty, cargo handling and storage infrastructure. These were the Immingham Oil Terminal, Milford Haven in Pembrokeshire in West Wales and Fawley on Southampton Water (see slides 5 and 6 of **Appendix A** of the written summary of oral case made at ISH1 **[TR030008/EXAM/9.29]**). Images of these facilities are provided below. All of the facilities were provided prior to the Planning Act 2008 but the Applicant has nevertheless indicated what elements of the facility are the equivalent of a harbour Nationally Significant Infrastructure Project ("NSIP") and what elements are equivalent to associated development ("AD") under the Planning Act 2008. **Immingham Oil Terminal ("IOT")** The IOT comprises a deep water liquid bulk jetty approximately 900 metres in length extending from the south shore of the River Humber immediately adjacent to the site for the Immingham Green Energy Terminal which lies to the east of the IOT. IOT provides seven bulk liquid berths and can take vessels up to 366 metres in length with drafts of up to 13.1 metres. These are comparable to the very large gas carrying ships that will deliver ammonia to the Immingham Green Energy Terminal. The IOT includes 8 hectares of storage tanks and related processing and transfer infrastructure adjacent to the land fall of the IOT jetty. From there an 8km pipeline connects the oil storage area at the IOT to the Prax Lindsey Oil Refinery and Phillips 66 Humber Refinery that lie to the south-west and west of the Port of Immingham.

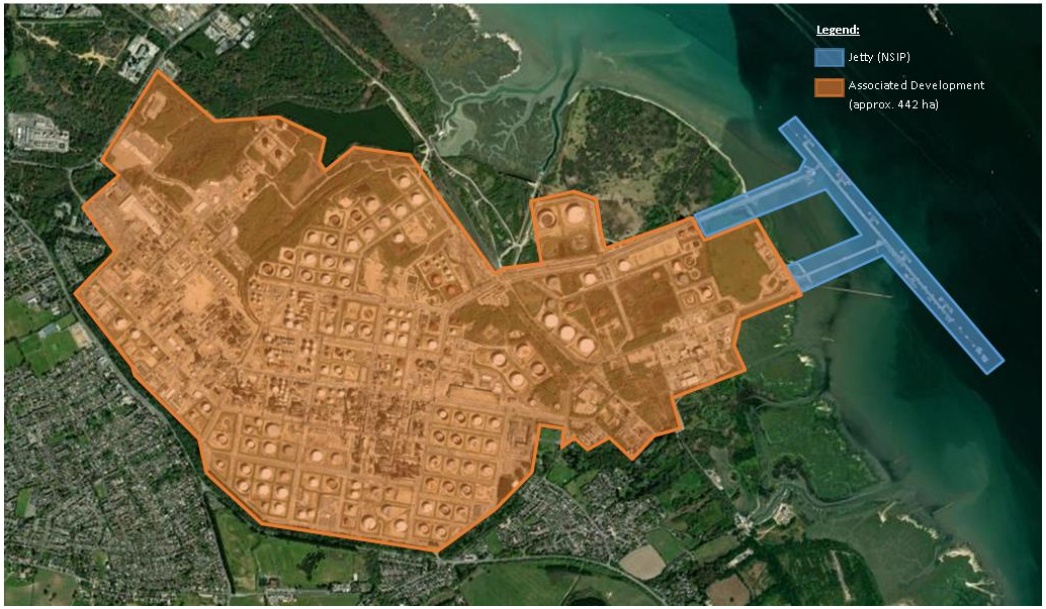
Immingham Oil Terminal

Milford Haven

Milford Haven accommodates four deep water jetties for liquid bulks providing 14 liquid bulk berths, the largest of which is 950 metres in length. The berths can accommodate ships up to 366 metres in length with drafts of up to 16.1 metres. There are large areas associated with the storage and processing of various liquid bulk products that are imported and exported via the jetties. The Valero facilities at Milford Haven have a storage capacity

	of 85,000,000 bbl in 52 tanks. The facilities can handle 270,000 barrels per day (bpd) total throughput capacity and the associated refineries produce gasoline, diesel, jet fuel, heating oil and low-sulphur fuel oil. The largest jetty at Milford Haven connects to the South Hook LNG terminal. The South Hook terminal has extensive storage capacity and a processing capacity of 15.6 million tonnes per annum. Valero Pembrokeshire Oil Terminal 

	Please note this is a more focused image of Milford Haven than that included on slide 5 of the Applicant's presentation to ISH1 provided at **Appendix A** of the written summary of oral case made at ISH1 **[TR030008/EXAM/9.29]**. **Fawley Oil Terminal ("FOT")** FOT comprises two liquid bulk jetties. Each is around 450 metres long. The jetties service nine liquid bulk berths (the jetty head is over 1.5km long). The berths can accommodate vessels up to 368 metres long with drafts of up to 14.9 metres. The jetty and berths are used for the FOT which provides storage and refining processes. There are over 200 storage tanks on site. FOT refines 270,000 barrels of oil a day.

	Fawley Oil Terminal 
Q1.2.2.8	
Question	**Response**

General Scope and Application of DCLG Guidance on Associated Development a) Should the benefits be considered when assessing whether something is AD in accordance with DCLG guidance on AD? b) Should NPSfP and other matters of importance and relevance, which provide context about the future development needs of ports, be considered when assessing whether something is AD in accordance with DCLG guidance on AD?	a) The four core principles identified in the Department for Communities and Local Government Planning Act 2008: Guidance on associated development applications for major infrastructure projects ("the Guidance") do not include reference to the issue of 'benefits' as a separate consideration. That is because the issue is the directness or otherwise of the relationship between the Nationally Significant Infrastructure Project ("NSIP") and the associated development ("AD"), and not the benefits resulting from that relationship per se. For example, AD which directly supports the operation of the NSIP will be consistent with core principle (i). It may well also be the case that by directly supporting the operation of the NSIP the AD will provide benefits, but that is not a freestanding consideration in determining whether it is AD. b) The definition of AD is set out in section 115 of the Planning Act ("PA 2008"). The Guidance provides further assistance by identifying the core principles to be applied when determining whether development should be treated as AD. These core principles have been addressed in previous answers to questions on AD. Section 104 of the PA 2008 sets out what the Secretary of State must have regard to when deciding an application for development consent. This includes any national policy statement relevant to the application and any other matters which the Secretary of State thinks are important and relevant to the decision. The National Policy Statement for Ports ("NPSfP") sets out national planning policy for ports in accordance with

	which decisions on port related NSIP applications must be taken (see section 104(3) of the PA 2008). The NPSfP provides no specific guidance or policy on what is or may be AD in the context of a port NSIP. As explained above by reference to Q1.2.2.4, however, the NPSfP makes clear that ports NSIPs will be developed on a commercial basis in response to market-demand, and that it is for ports operators to decide when and where they will invest in new infrastructure. Hence the NPSfP can be seen to provide some indirect assistance insofar as it demonstrates the fact that bringing a particular ports NSIP forward in response to demand from a particular customer needing its own AD to facilitate the intended commercial import operation is typical.
Q1.2.2.9	
Question	**Response**
Illustrative Examples of Associated Development DCLG guidance on AD (Annex A) sets out illustrative examples of general types of AD, including in relation to development undertaken for the purposes of addressing impacts associated with the principal development (which is also consistent with the core principles within Paragraph 5(i)). a) Would the hydrogen production facility help address direct impacts arising from the operation of the principal development?	a) The Applicant's answer to this question assumes that the reference to 'direct impacts' arising from the operation of the principal development in paragraph (a) of the question is a reference to Paragraph 5(i) of the Department for Communities and Local Government Planning Act 2008: Guidance on associated development applications for major infrastructure projects ("the Guidance"). Paragraph 5(i) of the Guidance requires a direct relationship between the associated development ("AD") and the principal development. That relationship arises according to the Guidance where the AD either:

b) For example, is there an inherent need to process the ammonia quickly instead of storing it or transporting for processing elsewhere?	(i) Supports the construction of the principal development; or (ii) Supports the operation of the principal development; or (iii) Helps address the impacts of the principal development Only one of these tests needs to be met in order to establish the necessary direct relationship. The Applicant's answer to Q 1.2.2.2 explains how the hydrogen production facility ("HPF") supports the operation of the principal development. It also explains the need for the HPF to manage ammonia in a way that would avoid impacts that would otherwise arise from its import. It can be seen therefore that the test in paragraphs (ii) and (iii) above are met. b) The Applicant's answer to Q1.2.2.2 above explains why ammonia has to be treated close to where it is imported as opposed to storing it or transporting it for processing elsewhere. It is not a necessity that ammonia is processed quickly once stored but it is a necessity that it is stored safely and quickly once imported for the reasons given. In the UK, ammonia is not transported long distances by pipeline. It is expensive to do so and because of safety concerns it would be difficult to obtain the necessary permits to allow for this to be done. Vehicles suitably equipped for the transport of liquid ammonia (e.g. from the port to a remote processing facility) do not exist in the UK and their use would also give rise to safety concerns. The hydrogen that results from processing ammonia is both easier to transport and is not toxic so the onward movement of hydrogen by vehicle is a safer transport operation than the equivalent onward movement of ammonia.

Q1.2.3 Alternatives	
Q1.2.3.1	
Question	**Response**
Segregating Sites a) When considering alternatives within the ES [APP-045, Paragraph 3.8.10], did the Applicant explore opportunities to segregate parts of the Proposed Development in the interests of managing environmental impacts? b) For example, Paragraph 5.2.20 of the NPSfP sets out that AD does not need to be located on, or indeed, close to the port estate. As such, did the Applicant explore alternative sites for the hydrogen production facility, perhaps at a more regional level? c) Would this have helped avoid sensitive residential receptors and potentially the need for CA, which at least in part is being justified on safety grounds?	The response to a), b) and c) is combined below: **Paragraph 3.8.11** of **Environmental Statement ("ES") Chapter 3: Needs and Alternatives [APP-045]** lists the reasons why the sites were selected and explains at **Paragraph 3.8.11(c)** that the sites *"…are close to the jetty to minimise onshore transport distances for ammonia, for safety reasons and to minimise heat leak*". For this reason, opportunities to segregate parts of the Project (for example locating the hydrogen production facility elsewhere in the region) to manage environmental impacts were not considered in the **ES**. By way of further explanation, **Table 22-5** of **ES Chapter 22: Major Accidents and Disasters [APP-064]** identifies (in the context of Risk Event 6) the need to minimise potential leak points. Ammonia pipelines should therefore be kept as short as possible as the longer the length, the higher the number of potential leak points. In addition, ammonia in its safest form is a refrigerated liquid. Its transport over long distance requires a high level of insulation and increases the leak potential, the complexity of the process and energy consumption. Locating the hydrogen production facility further away from the jetty would also lead to a requirement for additional land for the pipeline and its ancillaries. Longer pipelines or more remote sites would likely require the further exercise of powers of compulsory acquisition.

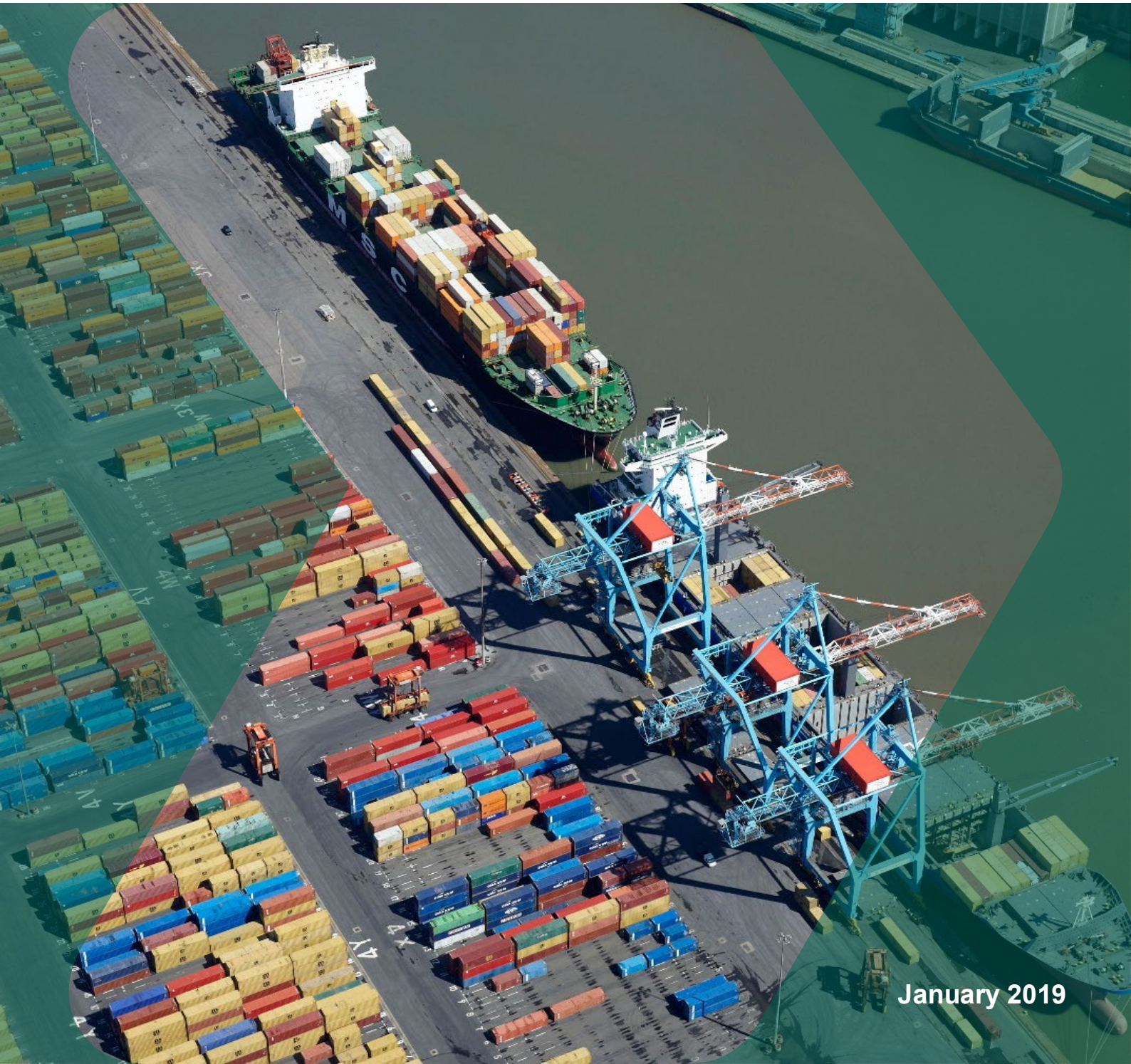
3 Appendices to the Applicant's Responses to the Examining Authority's First Round of Written Questions

Appendix 1 – UK Port Freight Traffic 2019 Forecasts

Department for Transport

UK Port Freight Traffic
2019 Forecasts

Moving Britain Ahead



January 2019

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Department for Transport
Great Minster House
33 Horseferry Road
London SW1P 4DR
Telephone 0300 330 3000
Website www.gov.uk/dft
General enquiries: https://forms.dft.gov.uk

Contents

Executive summary

Introduction

1 This document sets out the Department for Transport (DfT) 2019 forecasts for freight traffic at UK ports, covering the years 2017-2050. The primary purpose of these port traffic forecasts is to inform long term strategic thinking for the future direction of the UK ports sector. They supersede the previous set of forecasts that were produced by MDS Transmodal for DfT in May 2006.

2 It is important to recognise that projections about the future of a particular sector are inherently uncertain. The performance of the UK ports sector is dependent on the performance of other sectors of the economy, which introduces a high level of uncertainty. To recognise this uncertainty the forecasts use scenarios of different economic or population outlooks. It should also be noted that these are long-term forecasts which aim to predict the overall trend of port traffic and not the exact movements in individual years.

3 The forecasts presented in this document use an in-house forecasting model built by DfT for the first time. As work continues to refine and develop the forecasting model further, we are keen to invite views on the forecasts themselves, the methodology and how people will use these forecasts, to inform how we will produce future forecasts.

Principles of the model

4 The port traffic forecast model looks at 14 categories of cargo, matching the cargo categories used in port freight statistics published by DfT, which can be grouped into four broad types reflecting how they are transported: unitised freight, liquid bulk, dry bulk, and general cargo.

5 The general approach taken to each cargo category is as follows:

- Identify potential drivers that could have a causal effect on the amount of traffic transported through UK ports, using existing literature and research.
- Use historical data to calculate and test the numerical relationships between the drivers and port traffic and identify the key drivers with the greatest predictive power.
- Calculate short-term port traffic forecasts (2017-2035) by applying the numerical relationships to forecasts of the key drivers.
- Produce long-term port traffic forecasts (2036-2050) using the average annual growth rate of the short-term forecasts.

6 The forecasts are given at a national level and are for unconstrained growth (they do not take into account ports' existing or planned capacity, or any potential future

events that could limit capacity). They are based on freight traffic data for major UK ports and do not include freight passing through minor ports, which accounted for 2% of total port freight traffic in 2016.

Inputs and assumptions

7 The port forecasts are based on forecasts of the key drivers produced by other organisations. Namely, these are OBR GDP forecasts, ONS population projections, National Grid gas supply projections, OGA oil production and demand forecasts, BEIS coal power plant capacity, US EIA Brent price forecasts.

8 External forecasts were not available for some of the key drivers. In these cases we have made assumptions about future trends, based on historic levels and patterns. Additionally, it was not possible to identify key drivers for some cargo categories, so for these categories we have also assumed that traffic will follow the trend seen in historic data.

9 The main forecasts are for a central case, in other words based on central projections for the key drivers. In addition to this central case, we have produced low and high scenarios where projections of the key drivers under different scenarios were available. These scenarios have been produced to give an indication of the impact that a change in the outturn of the key drivers could have on the forecasts.

10 For most cargoes, we have used either low and high growth GDP projections, or low and high population projections for the scenario forecasts, depending on the key drivers. For some cargoes, the scenarios reflect uncertainty around specific assumptions.

11 Different cargo forecasts use different drivers and some do not use any drivers with alternative scenario forecasts. As a result, the scenarios are not directly comparable across cargo categories and the lack of scenarios for any cargo category does not indicate a higher level of certainty in that forecast. The scenarios, and the general treatment of uncertainty in the forecasts, is something that we will work to refine in future forecasts.

Forecasts

12 Overall, port traffic is forecast to remain relatively flat in the short term, but grow in the long-term, with tonnage 39% higher in 2050 compared to 2016. The long-term growth in port traffic is driven by increases in unitised freight traffic. In the short-term, this growth in unitised traffic is offset by decreases in the other categories.

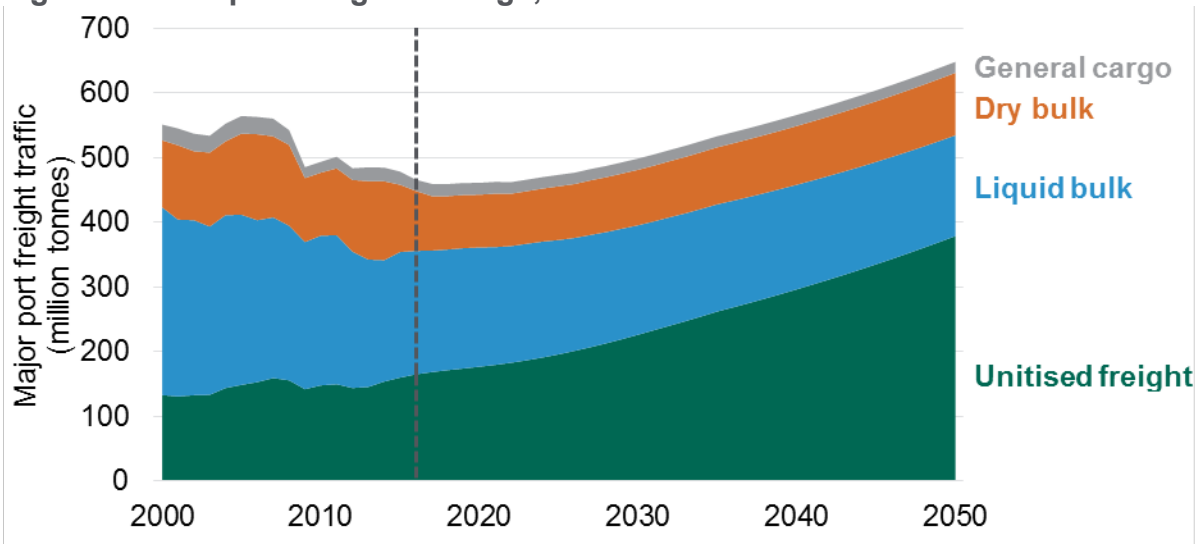
13 Liquid bulk traffic has the largest forecasted decreases. This is almost entirely due to falls in crude oil traffic, in line with the decreases which have been seen historically. It is likely that the projected decrease in other liquid bulk traffic is partly due to the shift from liquid bulk to tank containers for some shipments.

14 Similarly, general cargo is also forecast to decrease, in line with the historic decreasing trend, which is also likely to be partly driven by increased containerisation of goods.

15 Dry bulk traffic is forecast to have a relatively large decrease in the short-term, driven primarily by demand for coal being projected to fall. However, in the long-term, dry bulk traffic is forecast to increase, with other dry bulk, the largest category, continuing to increase as it has done historically. This historical increase is linked to the

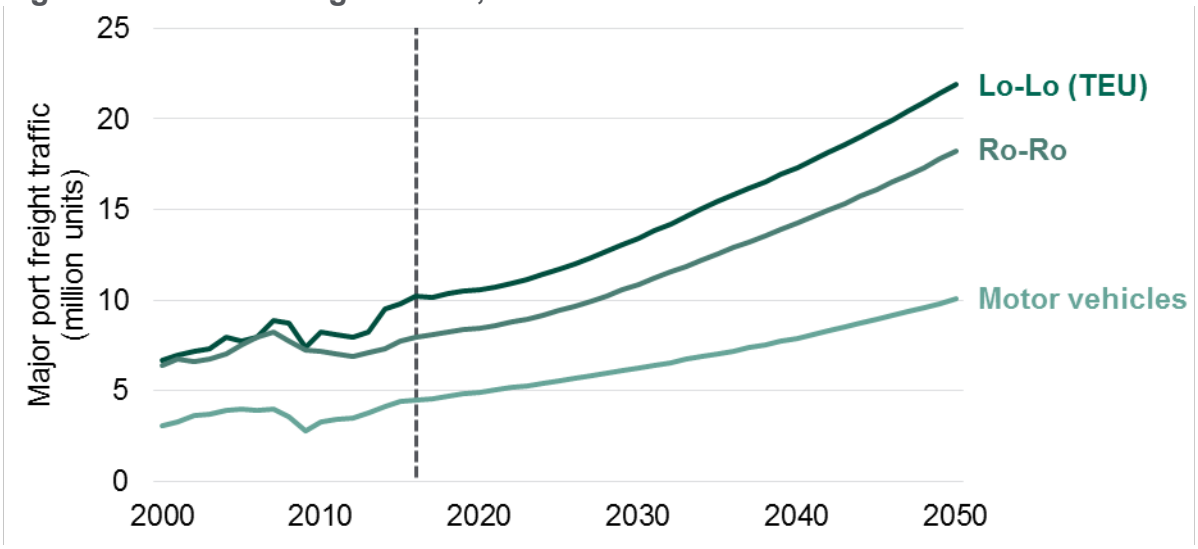
increase in the trade of biomass.

Figure 1 Total port freight tonnage, 2000-2050



16 The unitised freight tonnage forecasts do not include motor vehicles, which are forecast in units and are also forecast to strongly grow, as is the twenty-foot equivalent units (TEU) forecast for Load-on/Load-off (Lo-Lo) traffic and the units forecast for Roll-on/Roll-off (Ro-Ro) traffic. These are all driven by economic growth.

Figure 2 Unitised freight traffic, 2000-2050



17 The individual cargo category forecasts are discussed in Chapter 4 and the figures can be found in the accompanying data tables.

Next phase

18 While this document represents the conclusion of a project to build a bespoke forecasting model for UK port traffic, future developments are lined up in this project. This will involve:

- Collecting user feedback on the structure and format of outputs;
- Testing the accuracy of the models and investigating the use of alternative methods for producing the short and long term forecasts;

- Reviewing the tools that go in the forecasting model, such as the treatment of uncertainty, taking into account user feedback; and
- Regularly updating the forecasts with the latest data.

19 If you have any feedback on the forecasts, please get in touch at MaritimeForecasts@dft.gov.uk.

1. Introduction

Summary

1.1 This document sets out the Department for Transport (DfT) 2019 forecasts for freight traffic at UK ports. The forecasts cover the years 2017 through to 2050. These forecasts supersede the previous set of forecasts that were produced by MDS Transmodal in May 2006.[1]

1.2 The forecasts presented in this document use an in-house forecasting model built by DfT for the first time. We will continue to refine and develop the forecasting model further and are keen to invite views on how people will use these forecasts, to inform how we will produce future reports in this area.

Nature and purpose of forecasts

1.3 The primary purpose of these port traffic forecasts is to inform long term strategic thinking for the future direction of the UK ports sector. The *National Policy Statement for Ports* (NPS) highlights the importance of the ports sector to the UK economy[2]. It also emphasises the need for new infrastructure in the ports sector to meet the demand forecasts last published in 2006. Page 14 of the NPS states *"The Government may from time to time commission new port freight demand forecasts to be published on its behalf. These new forecasts would then replace the 2006-07 MDS forecasts, and the commentary in [the NPS] may be subject to some change in the light of them."* This document presents the findings of these new port freight demand forecasts.

1.4 It is important to recognise that predictions about the future of a particular sector are inherently uncertain. Given the nature of the UK ports sector as a means of moving passengers and freight from land to sea, the sector is heavily reliant on the performance of other sectors of the economy, such as the steel industry and the construction sector. To explore this uncertainty the forecasts use scenarios of different economic or population outlooks.

1.5 It should also be noted that these forecasts are long-term forecasts which aim to predict the overall trend of port traffic and not the exact movements in individual years. Port traffic levels can be volatile and vary greatly from year to year. We are not modelling those individual year movements and instead looking at the overall direction traffic is heading, averaging out the peaks and troughs that will occur along the way.

1.6 An important characteristic of these forecasts is that they consider an 'unconstrained demand' approach. That is, the forecasts do not take into consideration ports' existing

[1] UK Port Demand Forecasts to 2030, MDS Transmodal
http://webarchive.nationalarchives.gov.uk/+/http:/www.dft.gov.uk/consultations/archive/2006/ppr/ukportdemandforecaststo2030.pdf
[2] National Policy Statement for Ports, February 2012
https://www.gov.uk/government/publications/national-policy-statement-for-ports

or future capacity to handle freight. The DfT believes it is the responsibility of the ports sector to meet the changes in demand. They also do not take into account any future events that could limit capacity, for example any impact on ports of the UK's departure from the EU.

1.7 The direction of these national forecasts may differ from individual port level forecasts. The latter may be produced for different purposes and may be informed by specific commercial and local information, such as capacity constraints, the shift of demand between ports, and other factors affecting specific shipping routes. They may also be more focussed on short-term changes than these long-term forecasts. As these national forecasts do not take into account local information, they cannot be disaggregated to port level without introducing a large amount of uncertainty.

1.8 Unrounded forecasts are generally reported throughout this document and in the accompanying data tables. This is done for the sake of transparency of the modelling outputs. However, it must be stressed that the reporting of unrounded forecasts does not reflect a greater level of certainty with the forecast estimates.

1.9 The forecasts presented in this document use a forecasting model that has been used for the first time. It has been validated and verified by external consultants and the results have also been sense-checked against a working group of stakeholders in the ports sector, who have confirmed that the forecasts seem reasonable. We will continue to develop and build on the forecasting tools in future years and publish new forecasts accordingly.

Document structure

1.10 The rest of this document is structured as follows:

- **Chapter 2** covers the principles of the port forecasting model.
- **Chapter 3** covers the inputs and assumptions that we use in the models.
- **Chapter 4** shows the forecasts themselves
- **Chapter 5** discusses the next phase of this model

1.11 The Annexes provide full technical details of the model. This report is supplemented by electronic versions of the data tables.

2. Principles of the DfT port forecasting model

Overview

2.1 This section describes the methodology for producing port traffic forecasts. It also covers general principles for how we have approached the forecasting work.

2.2 The port traffic forecast model looks at 14 categories of cargo, matching the cargo categories used in port freight statistics published by DfT[3]. These categories are listed in Table 1 below and more details can be found in the published statistics.

Table 1 Cargo categories used in the model

Cargo group	Cargo category	Metric
Unitised freight	Roll-on, roll-off traffic (Ro-Ro)	Tonnes and units
	Containers / Load-on, load-off traffic (Lo-Lo)	Tonnes and twenty-foot equivalent units (TEU)[4]
	Motor vehicles (as freight)	Units
Liquid Bulk	Crude oil	Tonnes
	Oil products	Tonnes
	Liquefied gases	Tonnes
	Other liquid bulk	Tonnes
Dry bulk	Agricultural products	Tonnes
	Coal	Tonnes
	Ores	Tonnes
	Other dry bulk	Tonnes
General cargo	Forestry products	Tonnes
	Iron and steel products	Tonnes
	Other general cargo	Tonnes

[3] Maritime and shipping statistics, DfT
https://www.gov.uk/government/collections/maritime-and-shipping-statistics
[4] TEU is a standardised measure to allow for the different sizes for containers. As the name suggests, it is based on the length of containers, so a 20ft long container is measured as 1 TEU and a 40ft long container is measured as 2 TEU.

Review of previous forecasts

2.3 Previous port freight traffic forecasts were produced for DfT by MDS Transmodal in May 2006 covering the period 2005-2030[5].

2.4 Before producing these latest forecasts, we assessed how the 2006 projections compared against actual port traffic to identify weaknesses and flaws in the previous methodology so that we could avoid them in the new model.

2.5 The results of this assessment are reflected in the forecasting approach and principles described below.

Forecasting approach

2.6 The general approach taken to each cargo market is as follows:

- **Identify potential drivers that could have a causal effect on the amount of traffic transported through UK ports.** In bulk markets, drivers principally focus on the UK's demand for bulk products and also the UK's own production of the products. Other types of traffic rely more on generic economic or demographic factors, such as GDP and population. The selection of drivers was informed by existing literature and research on these topics.
- **Use historical data to calculate and test the numerical relationships between the drivers and port traffic and identify the key drivers with the greatest predictive power.** The forecasts in this model generally use an Ordinary Least Squares (OLS) approach, however future forecasting developments will consider if this is an appropriate technique to use.
- **Calculate short-term port traffic forecasts by applying the numerical formula to other forecasted data.** For instance, if there is a relationship between port traffic and GDP, then port forecasts can be calculated using GDP forecasts from the OBR. These forecasts are used for years up to and including 2035.
- **Produce long-term port traffic forecasts using the average annual growth rate of the short-term forecasts.** It was considered inappropriate to use regression models for long-term forecasts due to the relatively short periods of data available to build the models and the uncertainty surrounding the key drivers in the long-term. In the lack of any strong evidence for long-term traffic forecasts, simple trend projections are used instead.

2.7 The details of each model are given in Annex A.

Forecasting principles

2.8 The following section covers come general principles and rules that we have adopted in building the new forecasting model.

2.9 Forecasts are based on unconstrained growth i.e. no consideration of actual capacity is taken on board.

[5] UK Port Demand Forecasts to 2030, MDS Transmodal
http://webarchive.nationalarchives.gov.uk/+/http:/www.dft.gov.uk/consultations/archive/2006/ppr/ukportdemandforecaststo2030.pdf

2.10 There is no regional disaggregation of port traffic forecasts. We have not done this as feedback from stakeholders indicated it was not needed and because it risks adding further inherent uncertainty into the forecasting process.

2.11 Forecasts use historic freight traffic data for major UK ports only[6], as cargo category breakdowns are not available for minor ports. In 2016, minor ports accounted for 3% of bulk freight traffic and less than 1% of unitised freight traffic.

2.12 The approach to forecasting port traffic is parsimonious, that is, we begin with a basic forecasting model and only add complexity into it if we feel it will improve model performance. It is on this basis that the list of key drivers may appear to be small, and also why an OLS estimation approach has been used to start with.

2.13 This report presents forecasts in 5-year gaps, but the forecasting tools are able to produce annual forecasts up to the year 2050. Annual forecasts can be found in the supplementary data files.

2.14 The forecasts build on forecasts produced by other Government bodies. For instance, these forecasts build upon GDP forecasts by the OBR and population forecasts produced by the ONS.

2.15 The port traffic forecasting model does not consider any interaction or substitution with air traffic forecasts. We consider the market for air freight and sea freight to be completely separate because of the scale of the sea freight market, the high costs of transporting freight by air and the fact that different types of cargo are transported by air and sea.

2.16 Lastly, the forecasts for unitised freight do not consider the contents of the container, only the number of units that are transported by that method. This is because the infrastructure required to transport the freight is for container vessels, not dry bulk. For instance, it is possible that forestry products can be put in a containerised unit and transported via ports on a container ship. In this case, the unit of measurement is the container, not the weight of the forestry products inside them.

Engagement with others

2.17 Throughout the process of developing a methodology for new port traffic forecasts, in addition to presenting emerging findings, we have engaged with industry and other stakeholders to check the forecasts in this report are reasonable. This engagement has been useful in ensuring the forecasts are credible and realistic without pre-judging the solution.

2.18 Separately, within Government we have worked with colleagues in BEIS, DEFRA, the CCC and the Home Office to understand how our forecasts will fit alongside their own forecasting capabilities. Some bodies rely on the MDS 2006 estimates in their forecasting, so now we encourage the use of the forecasts in this document in the future.

[6] Major ports are ports handling over one million tonnes per year and a small number of other key ports. A full list can be found in the published port freight statistics.

3. Inputs and assumptions

Overview

3.1 This chapter outlines the inputs and assumptions that go into the port traffic forecasting model. The assumptions that feed into this model are designed to reduce complexity inherent in forecasting port traffic, however there is a risk that if the assumptions are too extreme they will not represent real life situations.

Forecasts from other organisations

3.2 One important principle of the port traffic forecasting model is that it is built on forecasts produced by other organisations. This means the port traffic forecasts must also consider the uncertainty of other forecasts as well as the uncertainty generated in the model.

3.3 The following forecasts from other organisations are used in the model:

Gross Domestic Product (GDP)

3.4 Economic theory explains that GDP is linked to aggregate demand, in which net exports are included as a measure of a nation's production. There is a strong relationship between GDP and international trade, so it is not surprising that this will be a key feature of the port traffic forecasting model.

3.5 GDP is used in the Ro-Ro, Lo-Lo, motor vehicles, and forestry products forecasts.

3.6 The historical GDP estimates in this model come from the Office for National Statistics (ONS). GDP forecasts come from applying growth rates forecast by the Office for Budget Responsibility (OBR) to the historic ONS data.

Population

3.7 Most bulk cargoes transported through ports are raw materials which will be manufactured into goods that the UK population will consume. Therefore including the UK population as a key driver can be interpreted as a proxy for overall consumer demand. We would expect port traffic to increase as the UK population increases.

3.8 Population is used in forestry products and iron/steel forecasts. It also feeds into the ores forecast, via the iron/steel forecast.

3.9 Both historic and forecast population estimates come from the ONS.

Cargo specific drivers

3.10 Other drivers are specific to certain cargoes:

- LNG import forecasts from National Grid are used in the liquefied gases forecast.
- Oil production forecasts from the Oil & Gas Authority (OGA) are used in the crude oil forecast.

- Oil product demand forecasts from OGA are used in the oil products forecast.
- Coal power plant capacity forecasts from BEIS are used in the coal forecast.
- Brent price forecasts from the US Energy Information Administration (EIA) are used in the Lo-Lo TEU forecasts.

Other assumptions

3.11 External forecasts were not available for some of the key drivers. In these cases we have made assumptions about future trends, based on historic levels and patterns. For example, the coal forecast uses coal production figures, which we have projected based on the trend seen historically.

3.12 Additionally, it was not possible to identify key drivers for some cargo categories, namely the other liquid bulk, other dry bulk, and other general cargo categories. For these categories we have also assumed that traffic will follow the trend seen in historic data.

Scenarios

3.13 The main forecasts are for a central case, in other words based on central case projections for the key drivers. In addition to this central case, we have produced low and high scenarios where alternative projections of the key drivers have been available.

3.14 These scenarios have been produced to give an indication of the impact that a change in the outturn of the key drivers could have on the forecasts and to highlight the uncertainty in the inputs we are using.

3.15 For most cargoes, we have used either low and high growth GDP projections, or projections for other drivers which correspond to low and high growth projections. We have also used low and high population projections for the cargo forecasts which used population.

3.16 For liquefied gases, the scenarios reflect uncertainty around the supply of gas and how this will be split between continental gas and LNG in the future.

3.17 For coal, the scenarios use low and high energy price projections of coal power plant capacity.

3.18 For Ro-Ro units, the scenarios reflect uncertainty around the conversion from tonnage to units, in addition to low and high growth GDP.

Table 2 Projections of key drivers used in scenarios

Driver	Central case	Low scenario	High scenario
GDP	OBR central projection	OBR central projection with growth decreased by 0.5pp	OBR central projection with growth increased by 0.5pp
Population	ONS principal projection	ONS low migration projection	ONS high migration projection
Brent price	US EIA reference case projection	US EIA low economic growth projection	US EIA high economic growth projection

Driver	Central case	Low scenario	High scenario
Generic gas imports supplied by LNG	50%	20%	80%
Oil products demand	OGA projection	OGA projection reduced in-line with BEIS low growth projection of energy consumption	OGA projection uplifted in-line with BEIS high growth projection of energy consumption
Coal power plant capacity	BEIS reference scenario projection	BEIS low price scenario projection	BEIS high price scenario projection
Tonnes per Ro-Ro unit	Average of historic data	95% confidence interval around historic average	

3.19 It is important to note that not all of the forecasts use drivers with alternative scenario forecasts. For example, the crude oil forecast only uses a projection of oil production, for which there are no alternative forecasts. The lack of scenarios for any cargo category does not indicate a higher level of certainty in that forecast and instead is just a reflection of the model's structure and the input data available.

3.20 Also, as different cargo forecasts use different drivers, the scenarios are not directly comparable across cargo categories. For example, the iron and steel forecast uses population, so the scenarios for this cargo are high and low population scenarios, whereas the forestry products forecast uses GDP, so the scenarios are high and low GDP scenarios.

3.21 The scenarios, and the general treatment of uncertainty in the forecasts, is something that we will work to refine in future forecasts.

4. Forecasts

Introduction

4.1 This chapter provides the results of the port traffic forecasting model. It gives forecasts for the entire ports sector, then breaks down forecasts into cargo categories.

4.2 Further details and full forecasts for each cargo category can be found in the supplementary tables accompanying this report.

Headline forecasts

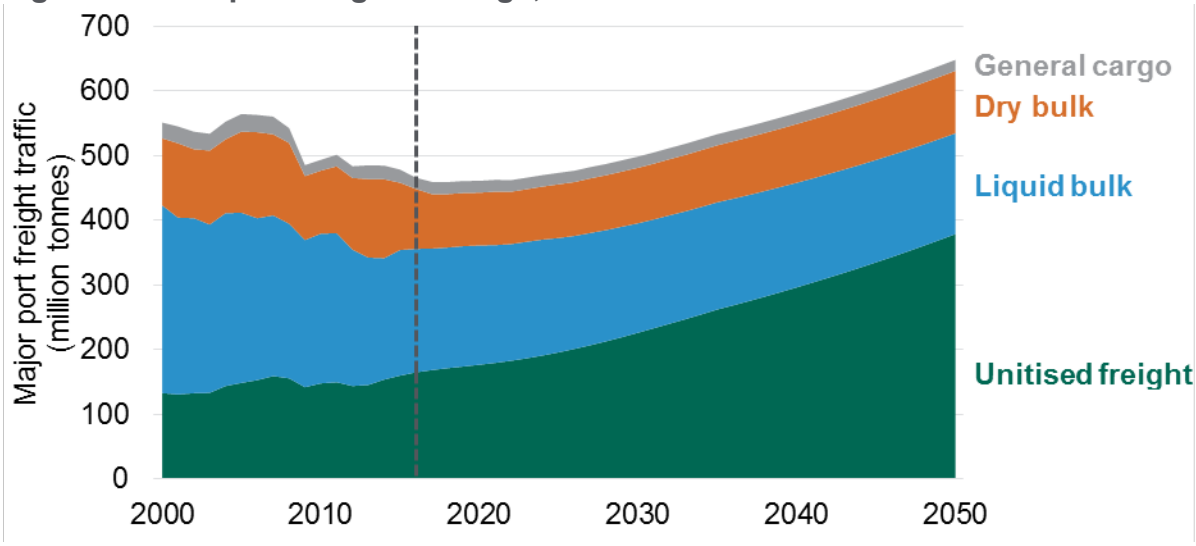
Total port freight

4.3 Overall, port traffic is forecast to remain relatively flat in the short term, but grow in the long-term, with tonnage 39% higher in 2050 compared to 2016.

4.4 The long-term growth in port traffic is driven by increases in unitised freight traffic. In the short-term, this growth in unitised traffic is offset by decreases in the other categories.

4.5 It is worth noting that some of the decrease in non-unitised freight is due to the increased containerisation of goods, for example the decline in general cargo is partially due to some of these goods becoming unitised traffic.

Figure 3 Total port freight tonnage, 2000-2050

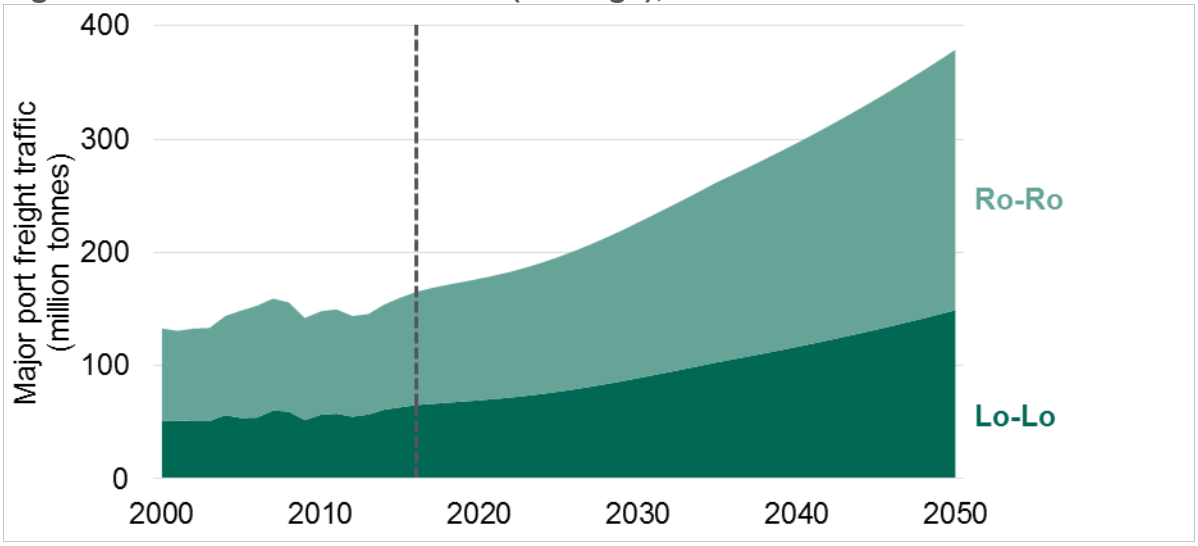


Unitised freight

4.6 Unitised freight traffic is forecast to strongly grow, with all categories of unitised freight more than doubling by 2050.

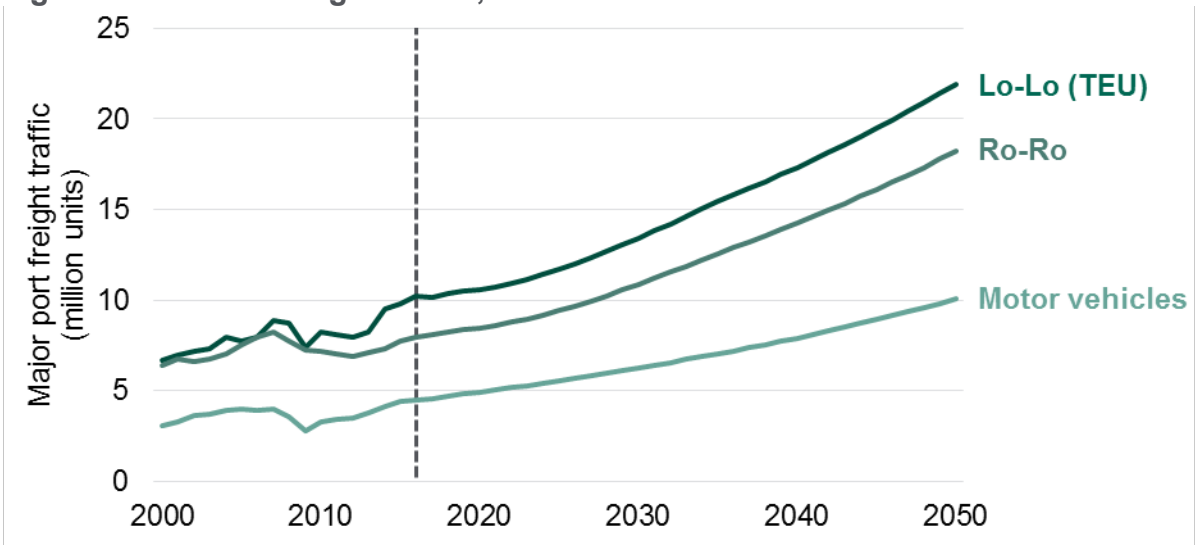
4.7 For Lo-Lo and Ro-Ro tonnage forecasts, we have assumed that the split between the two categories will be similar to the split seen historically, which has been fairly consistent over time. We have used the average split of 1988-2016 freight for the forecasts, which has 39% of unitised tonnage being transported as Lo-Lo.

Figure 4 Lo-Lo and Ro-Ro traffic (tonnage), 2000-2050



4.8 It should be noted that unitised freight tonnage forecasts do not include motor vehicles, which are forecast separately in units and are also forecast to strongly grow, as is the TEU forecast for Lo-Lo and the unit forecast for Ro-Ro.

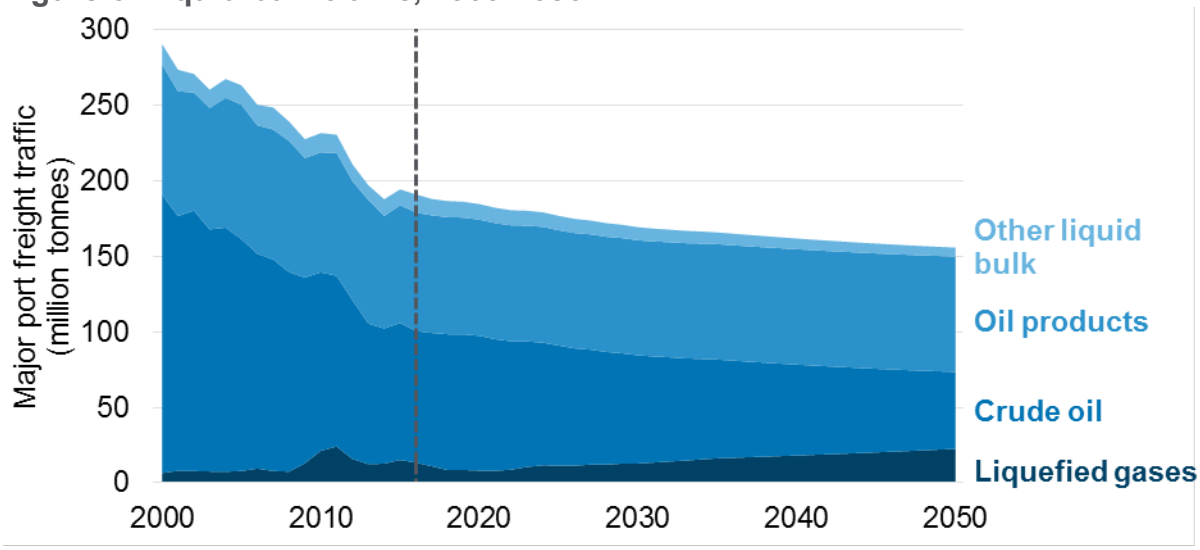
Figure 5 Unitised freight traffic, 2000-2050



Liquid bulk

4.9 Liquid bulk traffic is forecast to decrease, with the largest proportional decrease of the four cargo groups – an 18% reduction in tonnage by 2050. This is almost entirely due to falls in crude oil traffic, in line with the decreases which have been seen historically.

Figure 6 Liquid bulk traffic, 2000-2050

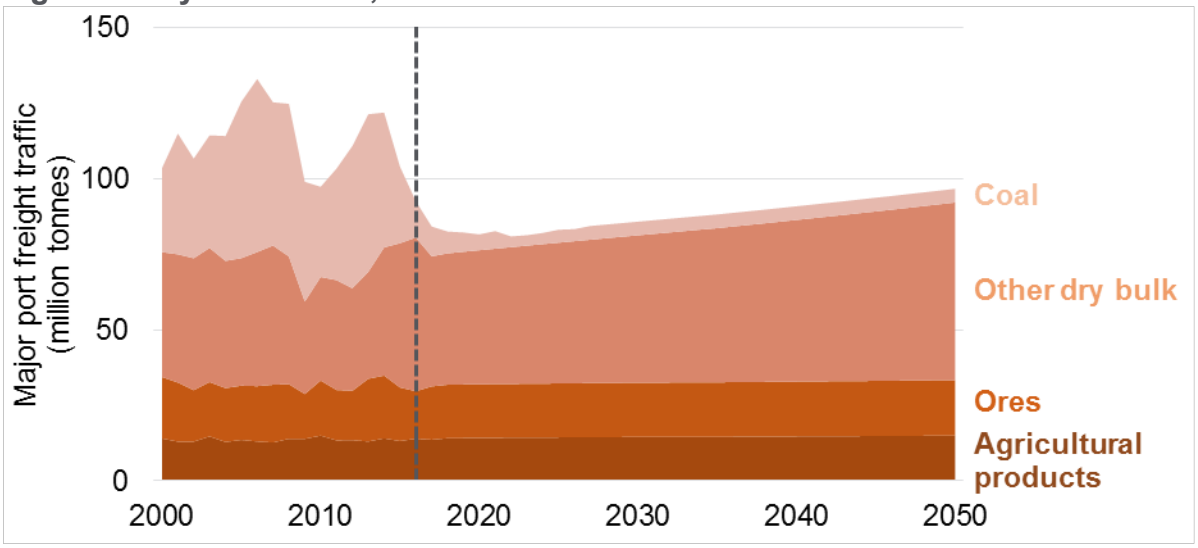


Dry bulk

4.10 Dry bulk traffic is forecast to have a large proportional decrease in the short-term, falling by 11 million tonnes from 2016 to 2020, driven primarily by demand for coal being projected to fall.

4.11 However in the long-term, dry bulk traffic is forecast to increase, with other dry bulk, the largest category, continuing to increase as it has done historically.

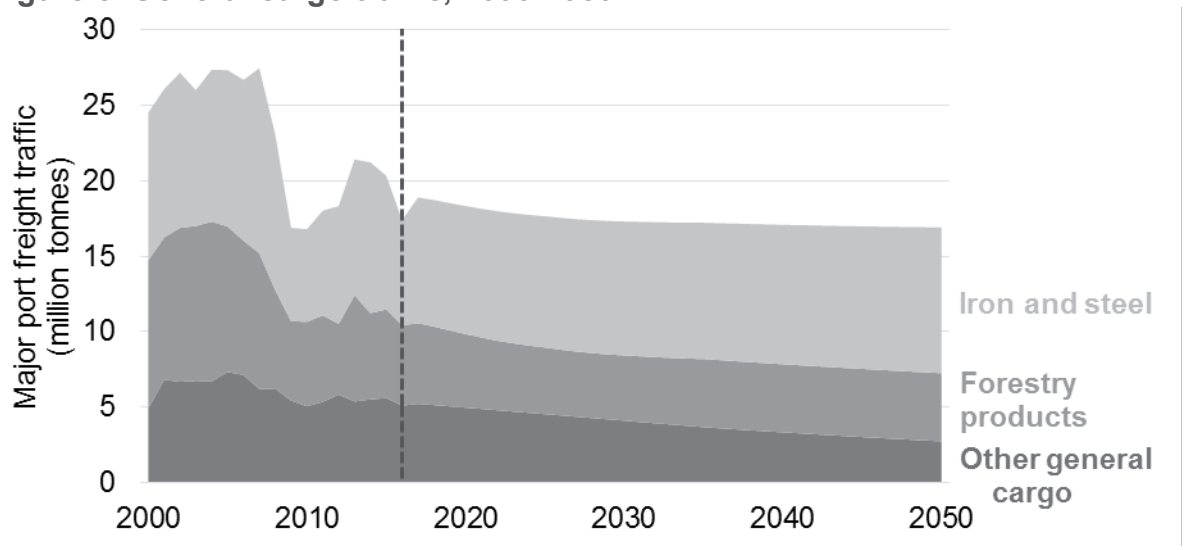
Figure 7 Dry bulk traffic, 2000-2050



General cargo

4.12 General cargo is forecast to decrease, primarily due to other general cargo continuing the decreasing trend seen historically. Iron and steel freight traffic is forecast to increase, but is not enough to offset the decreases in the other two categories.

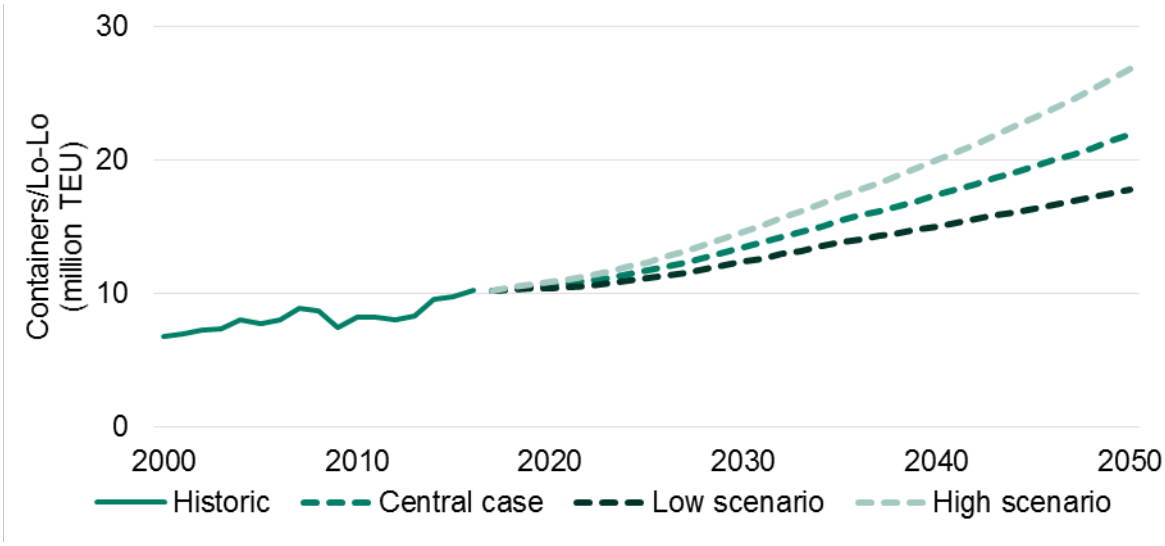
Figure 8 General cargo traffic, 2000-2050



Detailed forecasts

4.13 Forecasts for each individual cargo category are given on the following pages.

Unitised freight: Containers/Lo-Lo



Notes:
A tonnage forecast has also been produced and the figures for this can be found in the accompanying tables.

Key drivers

GDP, Brent price

Commentary

The forecasts show strong growth in Lo-Lo traffic, with an average growth rate of 2.5% per year for tonnage and 2.4% per year for TEU.
This growth is driven by GDP growth, with Brent price having a very minor impact on the TEU forecast only, but also reflects the underlying trend of increased containerisation of other cargo categories.

Summary figures

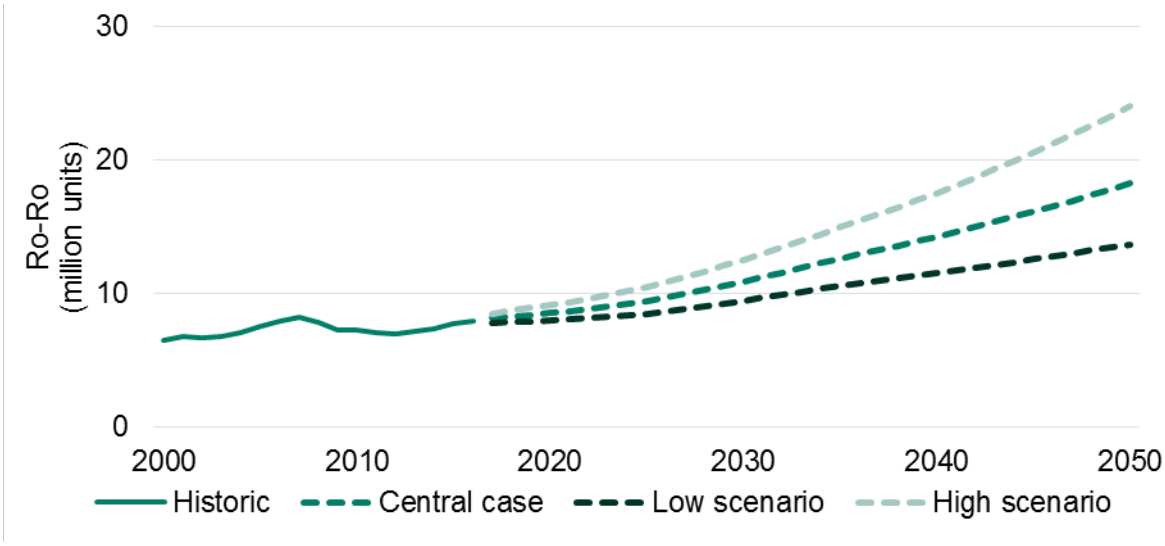
Year	2016	2020	2025	2030	2035	2040	2050
Million tonnes	65.33	69.54	77.12	89.05	10.31	11.66	14.91
Growth from 2016		+6.4%	+18.0%	+36.3%	+57.9%	+78.5%	+128.2%
Million TEU	10.20	10.59	11.69	13.42	15.43	17.34	21.89
Growth from 2016		+3.8%	+14.6%	+31.6%	+51.3%	+70.0%	+114.6%

Scenarios

The scenarios reflect alternative projections of GDP growth and associated Brent price projections.

1. In a low GDP growth scenario, Lo-Lo traffic still grows strongly, but at a slightly lower rate of 1.7% per year on average for both tonnage and TEU.
2. In a high GDP growth scenario, the Lo-Lo traffic growth is even stronger with 3.2% growth per year for tonnage and 2.9% growth per year for TEU, on average.

Unitised freight: Ro-Ro



Notes:
The units forecast is calculated by converting the tonnage forecast into units based on the historic average tonnes per unit.

Key drivers

GDP

Commentary

The forecasts show similar levels of strong growth to Lo-Lo traffic, which is unsurprising as the tonnage forecasts are modelled together. The growth rates for Ro-Ro tonnage and units are exactly the same, averaging 2.5% per year.

Summary figures

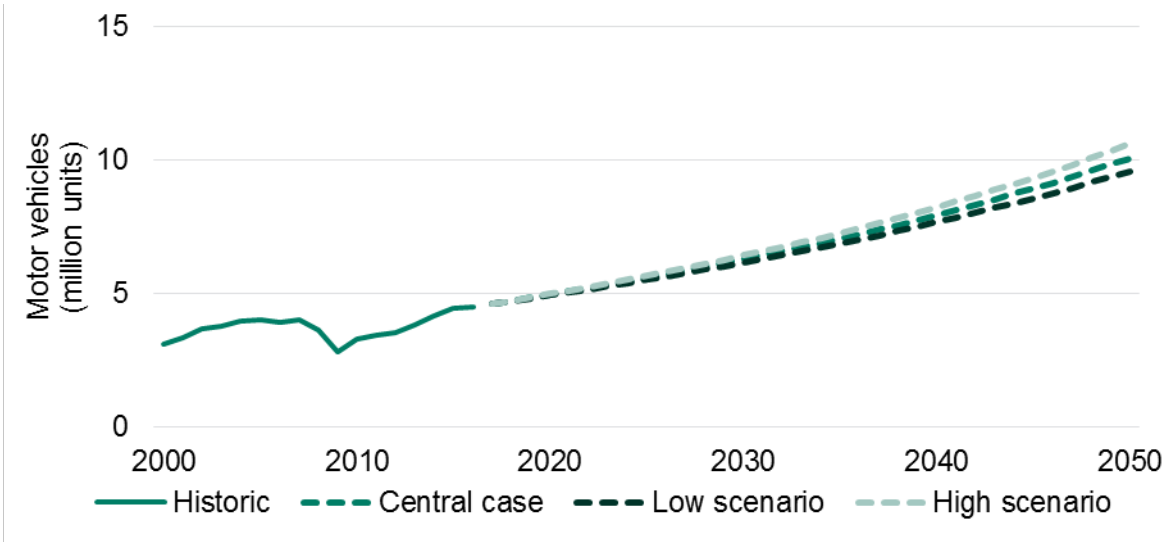
Year	2016	2020	2025	2030	2035	2040	2050
Million tonnes	99.73	107.25	118.94	137.34	159.09	179.89	229.92
Growth from 2016		+7.5%	+19.3%	+37.7%	+59.5%	+80.4%	+130.5%
Million units	7.94	8.49	9.42	10.9	12.6	14.2	18.2
Growth from 2016		+7.5%	+19.3%	+37.7%	+59.5%	+80.4%	+130.5%

Scenarios

The scenarios reflect alternative projections of GDP growth. For units, they also include uncertainty around the tonnes per unit conversion factor.

1. In a low GDP growth scenario, Ro-Ro traffic still grows strongly, but at a slightly lower rate of 1.7% per year on average for both tonnage and units.
2. In a high GDP growth scenario, the Ro-Ro traffic growth is even stronger with 3.2% growth per year on average for both tonnage and units.

Unitised freight: Motor vehicles



Key drivers

GDP per adult

Commentary

The forecast continues the GDP related growth that has been seen historically, with an average growth rate of 2.4% per year.
There are questions about how sustainable the long-term growth is due to changing attitudes towards driving[7], but there is a lack of firm evidence on exactly how this could change demand for motor vehicles. As a result, we have chosen to continue the growth in the long-term, which is consistent with the car ownership projections used in DfT's Road Traffic Forecasts[8].

Summary figures

Year	2016	2020	2025	2030	2035	2040	2050
Million units	4.46	4.94	5.57	6.28	7.04	7.93	10.06
Growth from 2016		+10.7%	+24.9%	+40.7%	+57.6%	+77.6%	+125.5%

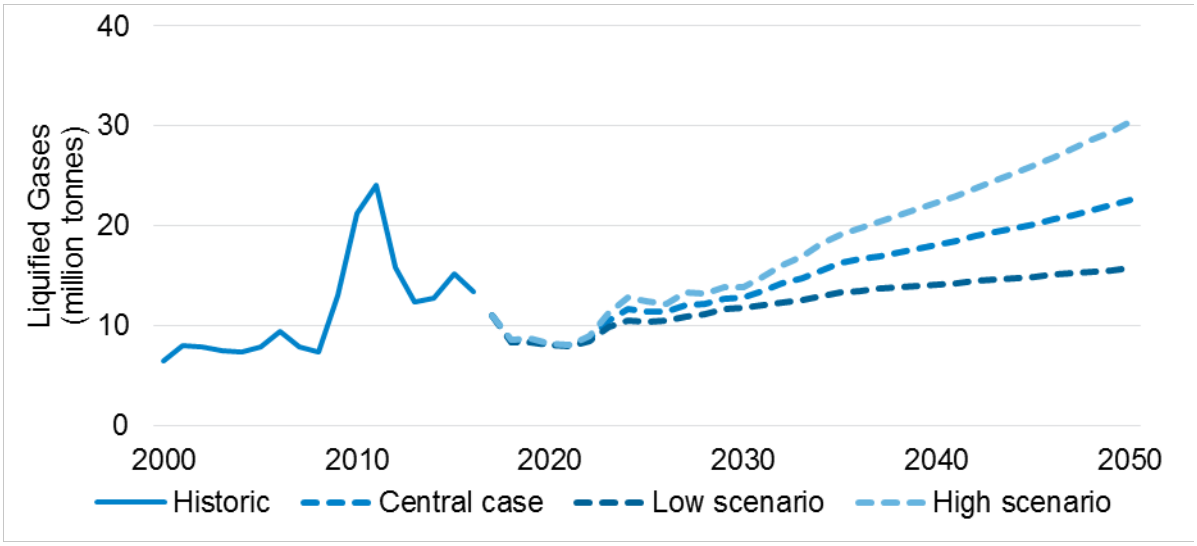
Scenarios

The scenarios reflect alternative projections of GDP growth.

1. In a low GDP growth scenario, the forecast is slightly lower, with an average growth rate of 2.3% per year.
2. In a high GDP growth scenario, the forecast is slightly higher, with an average growth rate of 2.6% per year.

[7] Young people's travel – what's changed and why, UWE Bristol / University of Oxford
https://www.gov.uk/government/publications/young-peoples-travel-whats-changed-and-why
[8] Road Traffic forecasts 2018, DfT
https://www.gov.uk/government/publications/road-traffic-forecasts-2018

Liquid bulk: Liquefied gases



Key drivers

Gas supply – LNG and generic imports

Commentary

The forecast of liquefied gas initially drops in 2017 and 2018 (18% and 23% decreases respectively), before roughly levelling at just over 8 million tonnes. There are large increases projected during 2022-2024 (averaging 13% growth per year), with growth levelling off in the long term at 2% per year on average. Liquefied gases traffic has been volatile historically, as it is strongly affected by global supply and prices, and there is a large amount of uncertainty around future gas supply in general.

Summary figures

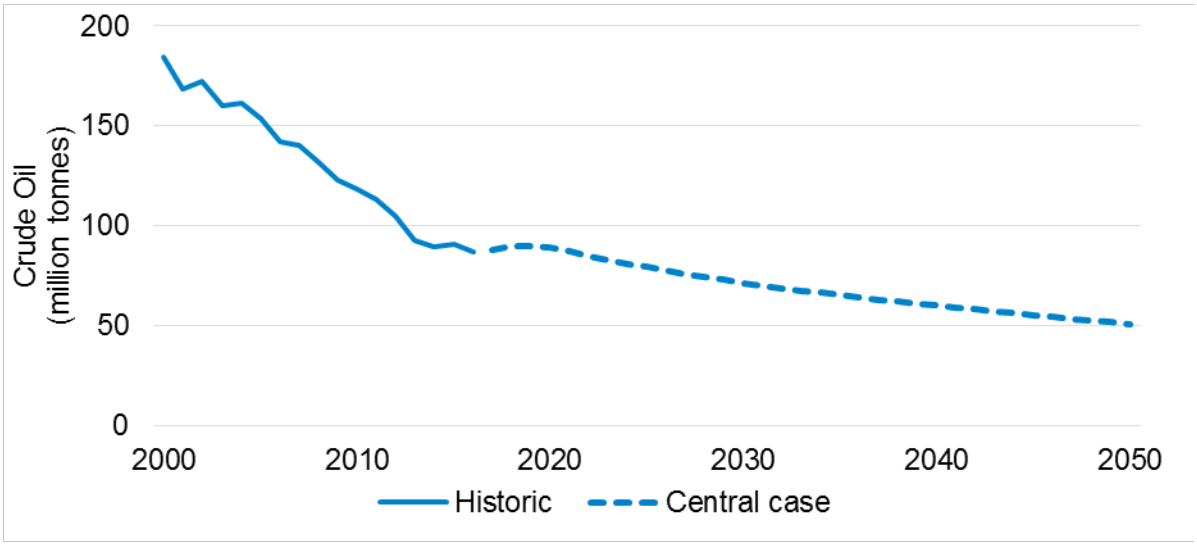
Year	2016	2020	2025	2030	2035	2040	2050
Million tonnes	13.40	8.13	11.47	12.86	16.28	18.15	22.54
Growth from 2016		-39.4%	-14.4%	-4.0%	+21.5%	+35.4%	+68.2%

Scenarios

The scenarios are based on alternative assumptions about the proportion of generic gas imports being provided by LNG, reflecting uncertainty about the future gas supply.

1. In a low LNG supply scenario, the forecast is slightly lower in the short term with a larger gap in the long term where tonnage grows 1% per year.
2. Similarly, in a high LNG supply scenario, the forecast is only slightly higher in the short term, but has much higher growth in the long term at 3% per year.

Liquid bulk: Crude oil



Key drivers

Oil production, oil refinery throughput

Commentary

The crude oil forecast shows a fairly steady downward trend, in line with oil production projections. Tonnage is forecast is decrease 1.7% per year on average.
It should be noted that crude oil imports are strongly related to oil refinery throughput. As there are no official forecasts of refinery throughput, for this forecast, we have projected it based on the percentage change in 2017 (-0.2%), which is almost flat. However, there could easily be large changes in refinery throughput in the future which would greatly impact crude oil traffic.

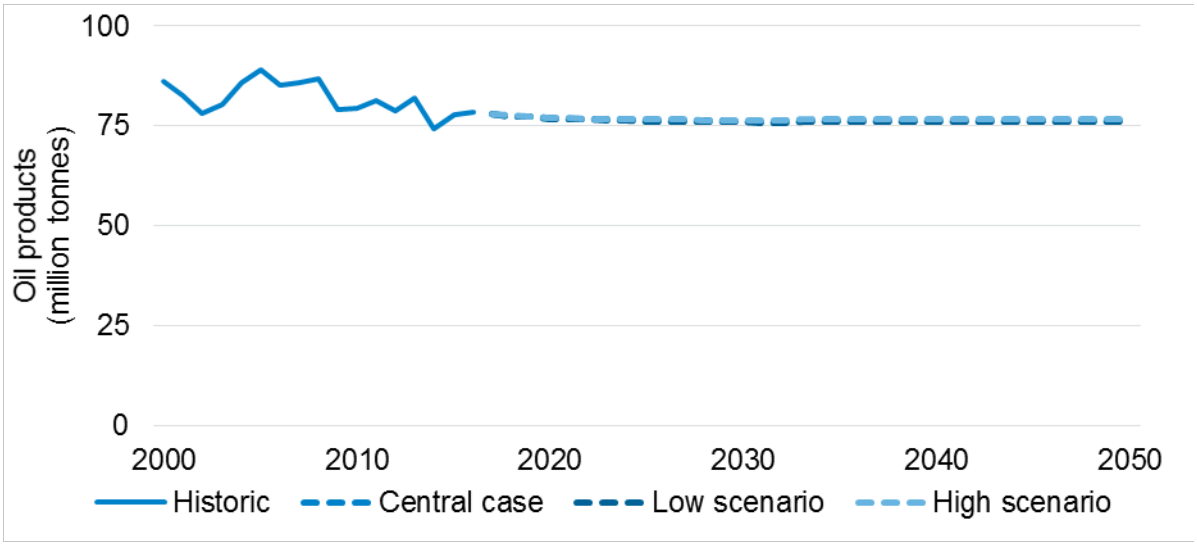
Summary figures

Year	2016	2020	2025	2030	2035	2040	2050
Million tonnes	87.09	89.26	79.41	71.61	65.39	60.17	50.94
Growth from 2016		+2.5%	-8.8%	-17.8%	-24.9%	-30.9%	-41.5%

Scenarios

There are no scenarios for this forecast.

Liquid bulk: Oil products



Key drivers

Oil products demand

Commentary

The oil products forecast has a small decreasing trend during 2017-2035, dropping -0.1% per year on average over that period. Beyond 2035 the forecast is flat-lined at 76 million tonnes.

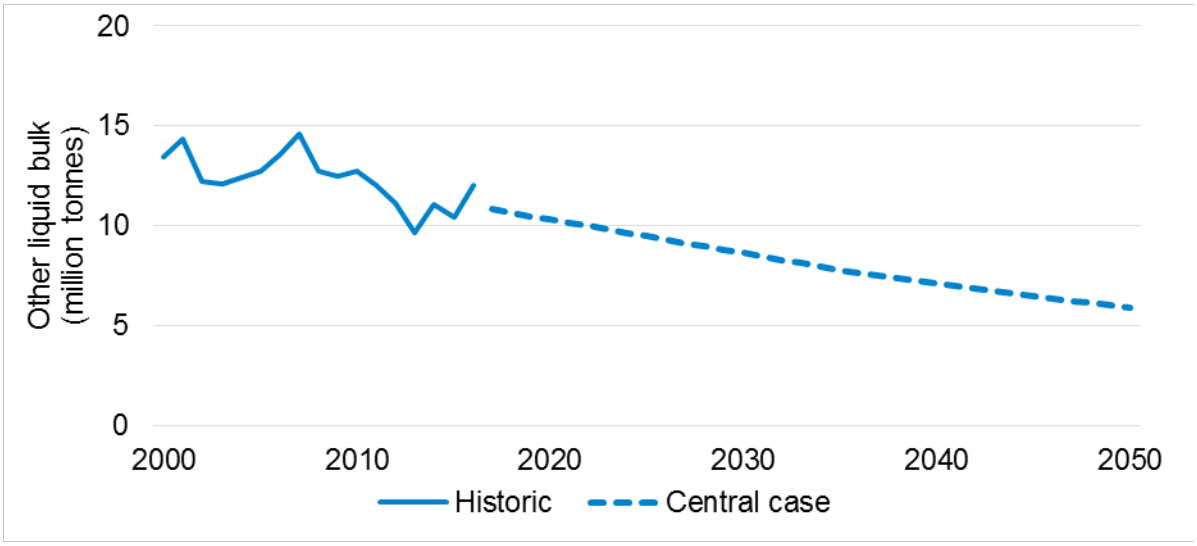
Summary figures

Year	2016	2020	2025	2030	2035	2040	2050
Million tonnes	78.45	76.89	76.42	76.20	76.38	76.38	76.28
Growth from 2016		-2.0%	-2.6%	-2.9%	-2.6%	-2.6%	-2.6%

Scenarios

The scenarios reflect alternative projections of oil products, in line with high and low GDP growth scenarios. These alternative projections make very minor changes to the forecast, with slightly greater and lesser decreases in the short-term forecasts.

Liquid bulk: Other



Key drivers

Historic trend

Commentary

Other liquid bulk includes a wide range of non-petrochemical liquids (e.g. molasses, juices, and ethanol) which cover a range of industries. As a result, it was not possible to identify external key drivers for the whole group and the forecast for other liquid bulk is based solely on the historic downward trend. This trend has an average decrease of -1.8% per year, which results in tonnage halving by 2050. It is likely that this decrease is partly driven by the shift from liquid bulk to tank containers for some shipments.

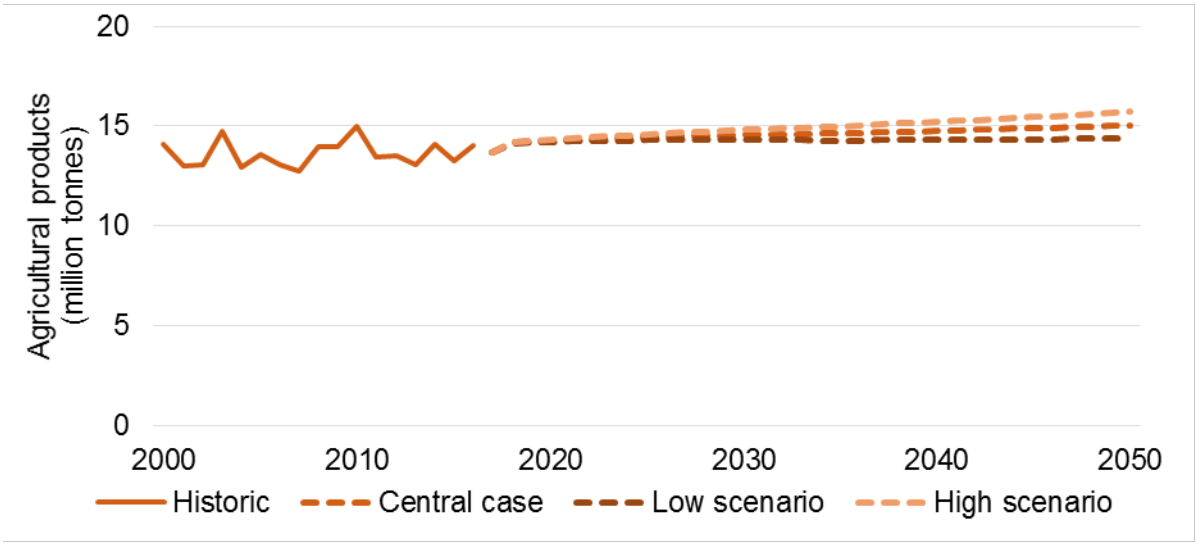
Summary figures

Year	2016	2020	2025	2030	2035	2040	2050
Million tonnes	12.05	10.33	9.48	8.64	7.80	7.12	5.93
Growth from 2016		-14.3%	-21.3%	-28.3%	-35.3%	-41.0%	-50.8%

Scenarios

There are no scenarios for this forecast.

Dry bulk: Agricultural products



Notes:
The 2017 value uses actual data on cereal trade and cereal exports had dropped that year, which is why traffic drops in that year unlike the rest of the forecast.

Key drivers

Population, trends in cereal production and cereal trade

Commentary

The forecasts show a small but steady increase in agricultural products traffic, with an average growth rate of 0.2% per year.
Most of this growth comes from imports, which accounted for 55% of this traffic in 2016. These imports are mainly driven by population, as a larger population will consume more agricultural products.

Summary figures

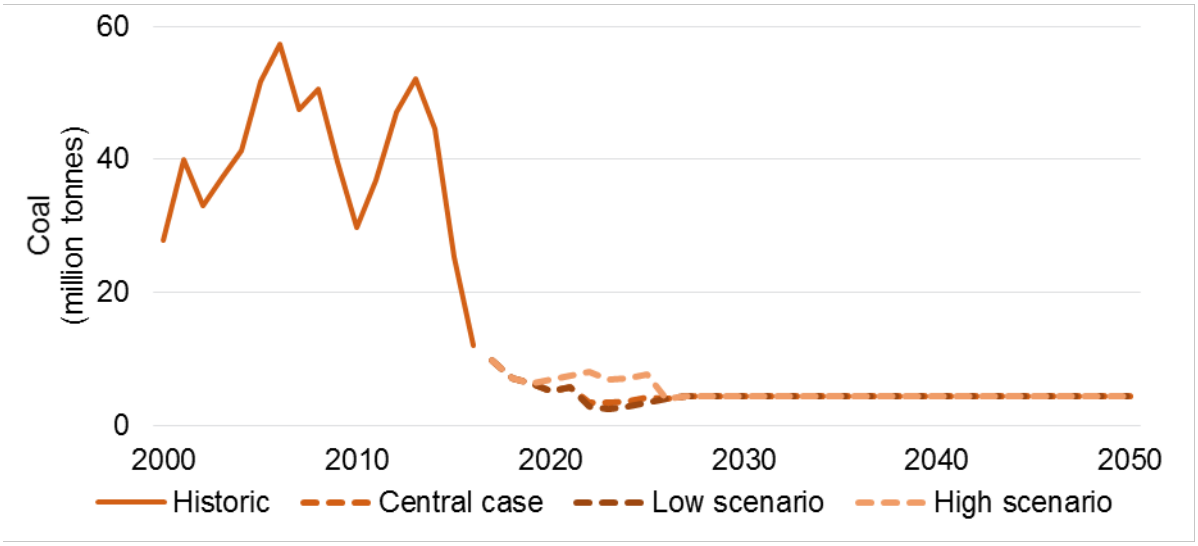
Year	2016	2020	2025	2030	2035	2040	2050
Million tonnes	14.01	14.28	14.44	14.56	14.63	14.77	15.04
Growth from 2016		+1.9%	+3.1%	+4.0%	+4.4%	+5.4%	+7.4%

Scenarios

The scenarios reflect alternative projections of population growth.

1. In a low population scenario, agricultural products are almost flat, increasing by only 0.05% per year on average.
2. In a high population scenario, agricultural products have a higher rate of growth, increasing by 0.3% per year on average.

Dry bulk: Coal



Key drivers

Coal power plant capacity, trends in coal production

Commentary

Coal power plant capacity is set to drop to 0 by 2026, which drives decreases in coal traffic from 2016 to 2026. After that, coal traffic is forecast to level off to meet the remaining level of demand for other purposes, such as coke manufacture and blast furnaces.
The slight increases seen 2024 to 2027 are due to declining coal production resulting in the need for more coal imports.

Summary figures

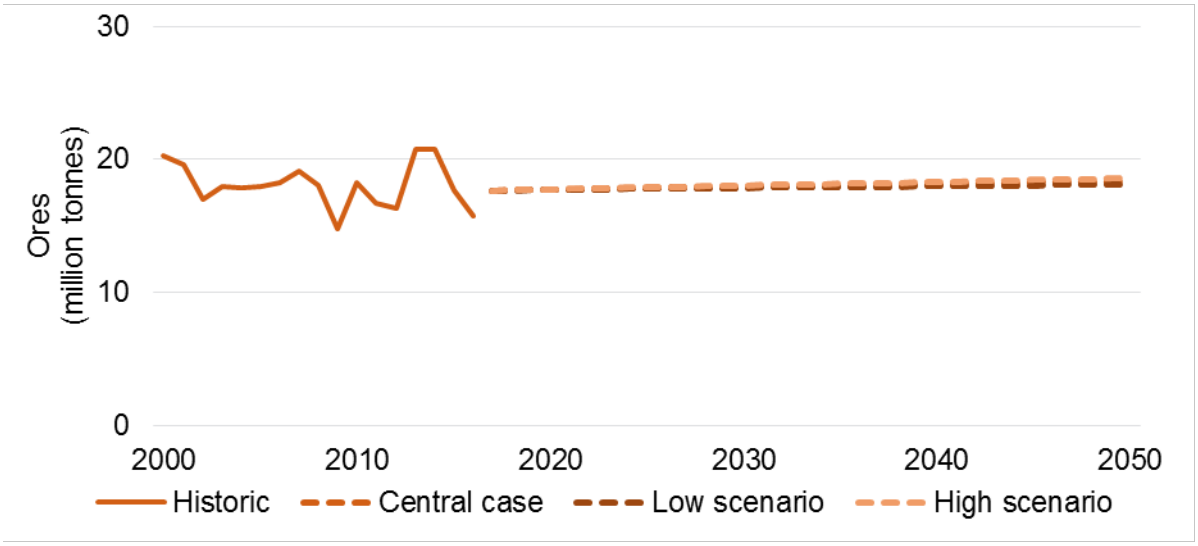
Year	2016	2020	2025	2030	2035	2040	2050
Million tonnes	12.01	5.23	4.26	4.52	4.52	4.52	4.52
Growth from 2016		-56.4%	-64.5%	-62.4%	-62.4%	-62.4%	-62.4%

Scenarios

The scenarios reflect alternative projections of coal power plant capacity under low and high energy prices scenarios.

1. In a low energy price scenario, coal power plant capacity drops to 0 faster, so coal traffic is slightly lower 2022-2026.
2. In a high energy price scenario, coal power plant capacity stays at higher levels for longer, but still drops to 0 in 2026. As a result, coal traffic actually increases 2020-2022 before dropping to the same level as the central case in 2026.

Dry bulk: Ores



Key drivers

Iron/steel products traffic (which is driven by steel use and population projections)

Commentary

The forecasts show a small steady increase in ores traffic, with an average growth rate of 0.1% per year.
This forecast is driven by the iron/steel products forecast which is discussed later.

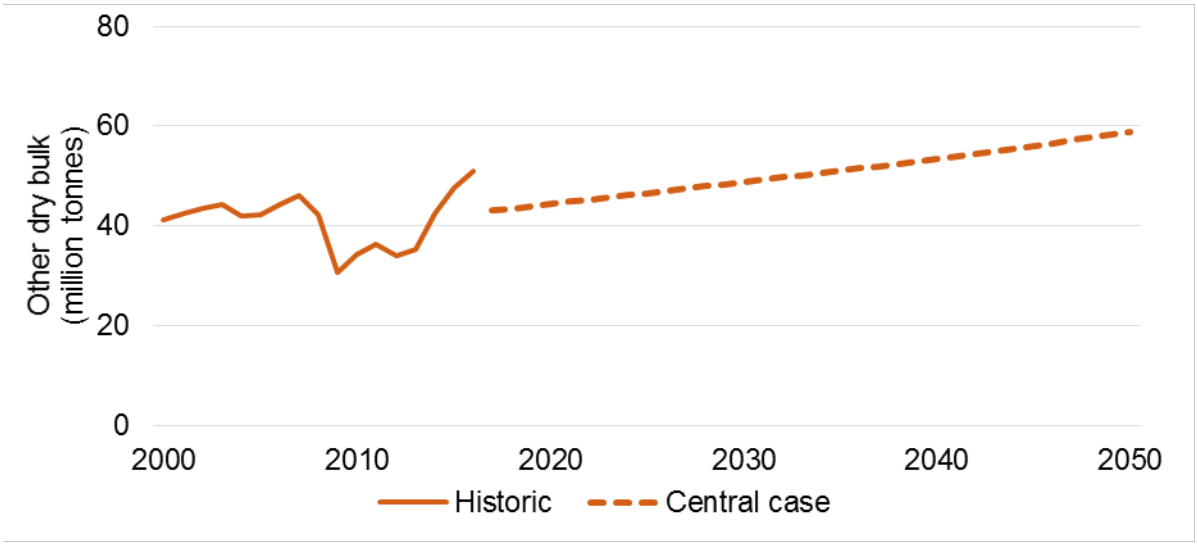
Summary figures

Year	2016	2020	2025	2030	2035	2040	2050
Million tonnes	15.71	17.74	17.86	17.96	18.04	18.15	18.37
Growth from 2016		+12.9%	+13.6%	+14.3%	+14.8%	+15.5%	+16.9%

Scenarios

The scenarios reflect alternative projections of population. These alternative projections make very slight changes to the forecast, with low population corresponding to a slightly lower forecast and high population corresponding to a slightly higher forecast.

Dry bulk: Other



Key drivers

Historic trend

Commentary

As with other liquid bulk, other dry bulk includes a wide range of products (e.g. cement, aggregates, wood pellets) and it was not possible to identify external key drivers for the whole group.
The forecast is based on the historic trend, which results in an average increase of 0.9% per year. This growth is likely due to increasing demand for biomass[9].
The port freight statistics do not record biomass separately, but HMRC statistics on trade with non-EU countries do and these show that biomass trade has greatly increased historically.

Summary figures

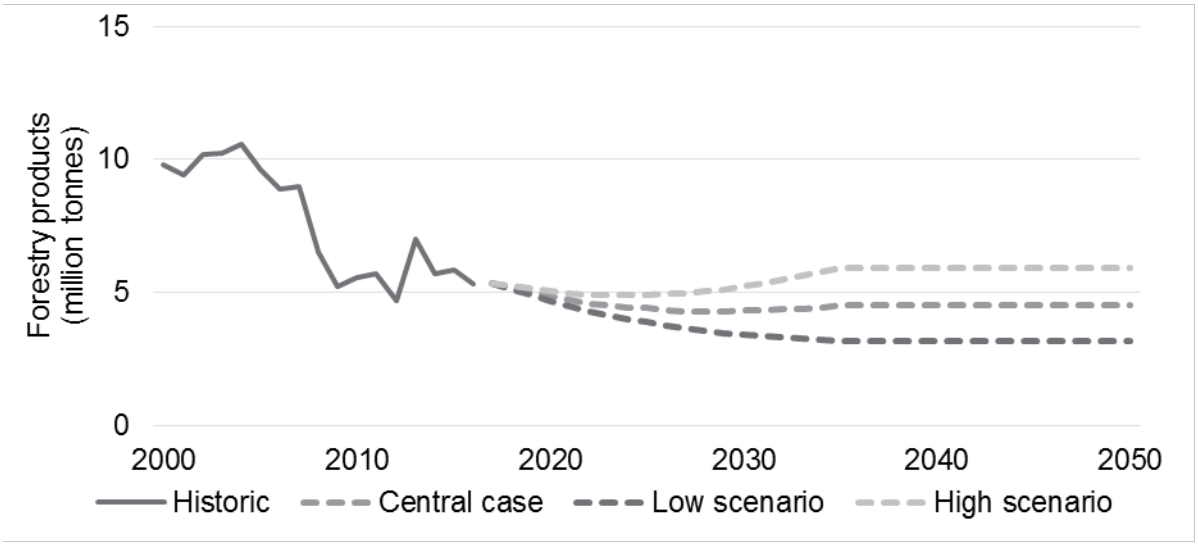
Year	2016	2020	2025	2030	2035	2040	2050
Million tonnes	50.88	44.40	46.61	48.83	51.05	53.51	58.82
Growth from 2016		-12.8%	-8.4%	-4.0%	+0.3%	+5.2%	+15.6%

Scenarios

There are no scenarios for this forecast.

[9] Biomass: Biological material that can be used as fuel or for industrial production.

General cargo: Forestry products



Key drivers

GDP

Commentary

Forestry products are forecast to initially decrease, driven by the decreasing trend seen historically, to a low point of 4.3 million tonnes in 2029 (-19% from 2016, averaging -1.6% per year). After that, GDP growth begins to counter the trend and forestry products increase slightly. The forecast is then flat-lined from 2035.

Summary figures

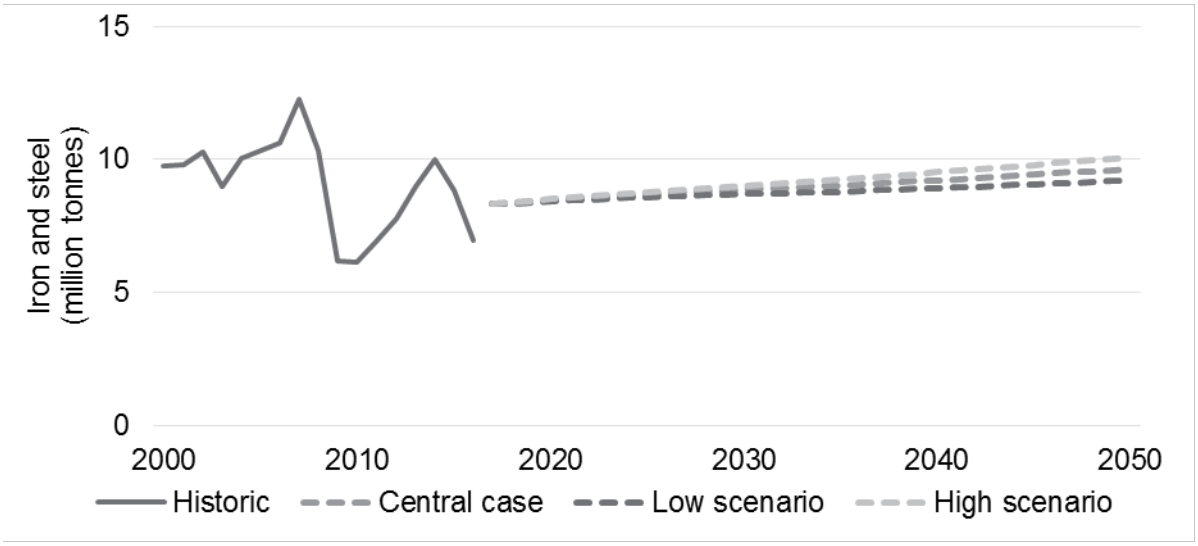
Year	2016	2020	2025	2030	2035	2040	2050
Million tonnes	5.31	4.86	4.41	4.32	4.51	4.51	4.51
Growth from 2016		-8.4%	-16.9%	-18.7%	-15.1%	-15.1%	-15.1%

Scenarios

The scenarios reflect alternative projections of GDP growth.

1. In a low GDP growth scenario, GDP growth is not strong enough to counter the historic downwards trend and forestry products decrease by an average of -2.8% per year until being flat-lined from 2035 at a level 29% lower than the central case.
2. In a high GDP growth scenario, forestry products only decrease up to 2023 (averaging -1.2% per year) before increasing 0.8% per year on average up to 2035. The forecast is flat-lined from 2035 at a level 31% higher than the central case.

General cargo: Iron/steel products



Key drivers

Steel use per capita, population

Commentary

Iron and steel products traffic is forecast to steadily increase, with an average growth of +0.4% per year.
This forecast assumes that steel use per capita will remain constant in the future. In practice, steel use is related to the performance of other industries, such as the construction and automotive sectors, and has fluctuated historically due to this.

Summary figures

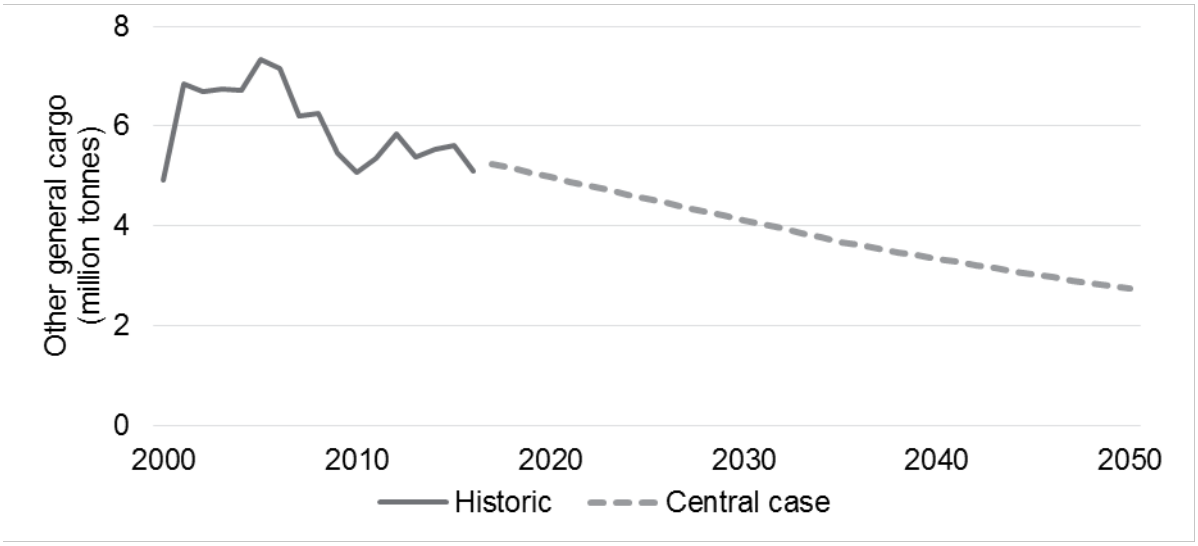
Year	2016	2020	2025	2030	2035	2040	2050
Million tonnes	6.96	8.47	8.68	8.87	9.02	9.22	9.64
Growth from 2016		+21.7%	+24.7%	+27.3%	+29.5%	+32.4%	+38.5%

Scenarios

The scenarios reflect alternative projections of population.

1. In a low population scenario, iron/steel products grows at a slightly lower rate, averaging +0.3% per year.
2. In a high population scenario, iron/steel products have a slightly higher growth rate, averaging +0.6% per year.

General cargo: Other



Key drivers

Historic trend

Commentary

Other general cargo includes break-bulk cargo (e.g. pipes, produce in bags, cable reels) and containers less than 20ft in length. Due to this wide range of products it was not possible to identify external key drivers for the whole group.
The forecast is based solely on the historic trend, which results in an average decrease of -1.9% per year. This decrease is likely partly due to increased containerisation of goods, i.e. shipments previously carried as break-bulk being moved in containers instead.

Summary figures

Year	2016	2020	2025	2030	2035	2040	2050
Million tonnes	5.11	4.98	4.55	4.12	3.69	3.34	2.75
Growth from 2016		-2.6%	-11.0%	-19.5%	-27.9%	-34.6%	-46.2%

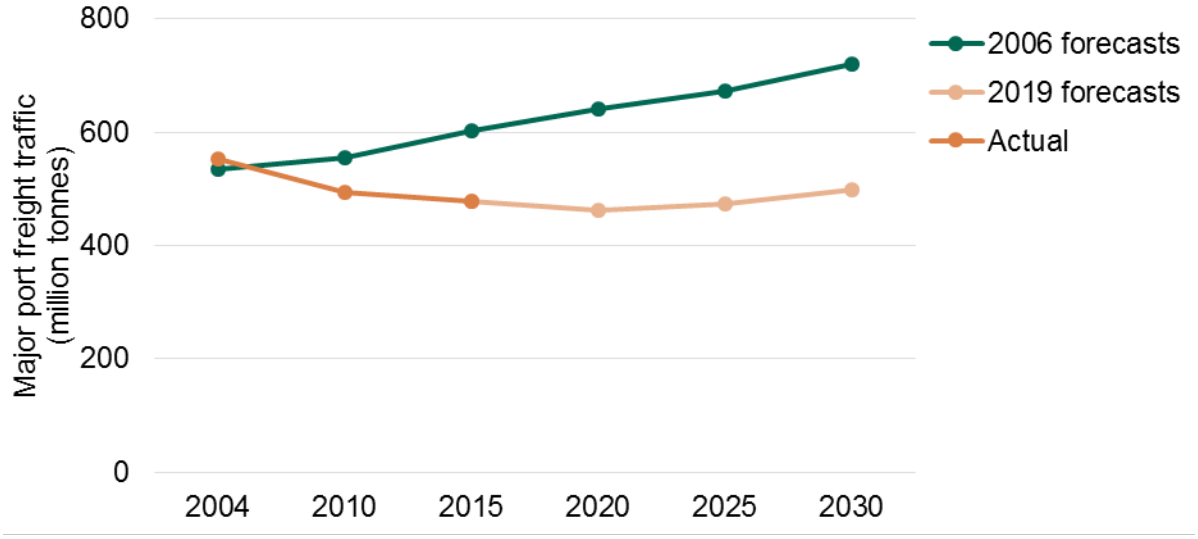
Scenarios

There are no scenarios for this forecast.

Comparison with previous forecasts

4.14 The previous port freight traffic forecasts produced in 2006 were based on 2004 data and forecast in 5 year intervals out to 2030. As these forecasts were produced shortly before the 2008/09 drop in port freight caused by the global recession, they overestimated freight and consequently the new forecast start at a lower level.

Figure 9 Comparison of 2006 and 2019 forecasts (excluding motor vehicles)



4.15 Looking at the forecasted percentage changes, the 2006 forecasts had many cargo categories relatively flat for the period 2020-2030. These new forecasts have clearer directions for each cargo category during this period, reflecting the fact that as it is closer there is less uncertainty about the direction of travel.

4.16 Some noticeable differences are the more negative forecasts for liquid bulk, coal and general cargo, in line with the large decreases which were seen 2004-2015. At the other end of the spectrum, the 2019 forecasts have a more positive forecast for other dry bulk.

Table 3 Comparison of percentage changes in 2006 and 2019 forecasts

	Percentage change 2004-2015		Percentage change 2020-2030	
	2006 forecasts	Actual	2006 forecasts	2019 forecasts
Lo-Lo & Ro-Ro	45%	11%	30%	28%
Liquefied gas	320%	105%	0%	58%
Crude oil	-18%	-44%	0%	-20%
Oil products	11%	-9%	14%	-1%
Other liquid bulk	10%	-16%	0%	-16%
Liquid bulk	2%	-27%	5%	-8%
Agriproducts	-1%	2%	-2%	2%
Coal	-3%	-39%	-2%	-14%
Ores	5%	-1%	3%	1%
Other dry bulk	5%	13%	0%	10%

	Percentage change 2004-2015		Percentage change 2020-2030	
Dry bulk	2%	-9%	-1%	5%
Forestry products	13%	-44%	5%	-11%
Iron/steel	1%	-12%	3%	5%
Other general cargo	1%	-17%	0%	-17%
General cargo	6%	-26%	3%	-6%
Total	12%	-13%	12%	8%

5. Next phase

5.1 While this report represents the conclusion of a project to build a bespoke forecasting model for UK port traffic, it is intended to be the first step in an iterative process of engaging with industry and other users and developing the forecasts. This section sets out the next phase of work.

Collecting feedback from users and stakeholders

5.2 The first step of the next phase will be to listen to the people who use this report and the forecasts to understand how they use them. This will allow us to consider whether to change the structure and format of outputs from the model to take account of the needs of the end user. Initial engagement suggests that some further breakdown of categories would be useful for some users (for example, Ro-Ro split into accompanied and unaccompanied trailers).

5.3 If you have any feedback on the forecasts, please get in touch at MaritimeForecasts@dft.gov.uk.

Testing

5.4 One future project strand will focus on testing the accuracy and predictive power of the forecasting model itself. This will consider the use of alternative methods for identifying the relationship between historic port traffic and historic key drivers. At present a linear regression approach is used, but other options may have stronger predictive power.

5.5 It may also involve reviewing the forecasting method for long-term (i.e. after 2035) forecasts and exploring the options of more sophisticated methods instead of the current simple trend.

Products in the forecasting model

5.6 Another project strand will investigate the tools that go in the forecasting model itself, on the basis of user feedback. This will likely include the treatment of uncertainty, for example refining the scenarios, or incorporating other measures of uncertainty, such as prediction intervals.

New data points

5.7 There will naturally be a process of periodically updating all the datasets to cover the latest historic data points and also to include revised versions of other forecasts. The assumptions used in the model will also need reviewing and updating as more information becomes available and in the light of user feedback.

Annex A: Model details

Short-term forecasts methodology

A.1 In general, each of the cargo categories has its own model, which is unrelated to the other forecasts (except for possibly using the same key drivers). There are three exceptions for this:

- Ro-Ro and Lo-Lo tonnage, which are forecast together and then split.
- Ro-Ro units, which is forecast based on the Ro-Ro tonnage forecast.
- Ores, which is forecast based on the iron and steel forecast.

A.2 The following sections detail the methodology used for each cargo category to produce forecasts up to 2035.

Tonnage models

A.3 Combined **Ro-Ro and Lo-Lo** tonnage traffic is forecast using a regression model on first order differences with GDP. This combined forecast is split into Ro-Ro and Lo-Lo based on the average proportional split seen in historic data (1988-2016).

A.4 **Liquefied gases** traffic is forecast in three components:

- LNG imports: Forecast based on National Grid's Future Energy Scenarios, with an assumption about the proportion of generic imports that will be LNG.
- LNG exports: Forecast based on the percentage of LNG imports re-exported in 2016 and 2017 (the only two full years since the UK began exporting LNG).
- LPG traffic: Historic traffic is estimated as the difference between liquefied gases traffic and LNG imports/exports. It is forecast as the average for 2009-2016.

A.5 **Crude oil** traffic is forecast in two components:

- Crude oil outward traffic: Forecast using a regression model with oil production projections.
- Crude oil inward traffic: Forecast using a regression model with oil refinery throughput (which is projected based on the percentage change in throughput from 2016 to 2017).

A.6 **Oil products** traffic is forecast using a regression model with oil products demand.

A.7 **Agricultural products** traffic is forecast using a regression model with cereal trade. To produce a projection of cereal trade:

1 The area of land used for cereal production is projected based on the CAGR of the period 1984-2017.

2 The volume of cereal produced is forecast using a regression model with cereal production area.

3 Change in cereal stock is projected as the average value from 2008-2017.

4 Domestic use of cereal is forecast using a regression model with population.

5 Cereal exports are projected based on the trend for the period 2000-2017.

6 Cereal imports = domestic use + exports + change in stock - production

A.8 **Coal** traffic is forecast using a regression model with coal trade. To produce a projection of coal trade:

1 Coal production is projected by source:

   a. Surface-mined coal production is projected using the trend seen in 1996-2017.

   b. Deep-mined and other sources of coal production is projected as a flat-line from 2017.

2 Coal demand is projected by type:

   a. Heat generation, coke manufacture, and blast furnaces demand is projected as a flat-line from 2017.

   b. Electricity generation demand is projected using the projected percentage change in coal power plant capacity.

3 Coal exports are forecast as the average value 2012-2017.

4 Coal imports = demand + exports - production

A.9 **Iron and steel** traffic is forecast using a regression model with steel use (which is projected based on population projections and the average steel use per capita during 2008-2016).

A.10 **Ores** traffic is forecast using a regression model with iron and steel traffic.

A.11 **Forestry products** traffic is forecast using a regression model on first order differences with:

- Trade in wood in rough, which is projected using a regression model on first order differences with GDP per capita;
- Trade in pulp, which is projected using a regression model on first order differences with GDP; and
- Trade in newsprint, which is projected using the trend 2009-2017.

A.12 **Other liquid bulk**, **other dry bulk**, and **other general cargo** are forecast using the trends in historical data. For other liquid bulk and other general cargo, the trends for 2000-2016 are used. For other dry bulk, the trend for 2006-2016 is used.

Unitised models

A.13 **Lo-Lo** traffic is forecast using a regression model with GDP and Brent prices.

A.14 **Ro-Ro** traffic is forecast using Ro-Ro tonnage forecast and the average tonnes per unit.

A.15 **Motor vehicles** traffic is forecast using a regression model on first order differences with the number of private cars (which is projected using a regression model on first order differences with GDP per adult).

Long-term forecasts methodology

A.16 It was considered inappropriate to use regression models for long-term forecasts due to the relatively short periods of data used to build the models and the uncertainty surrounding the key drivers in the long-term. In the lack of any strong evidence for long-term traffic forecasts, simple trend projections or flat-line projections are used.

A.17 The trend projections use the compound annual growth rate (CAGR) of the short-term forecast to project beyond 2035 and are used for all cargo categories except oil products, coal, and forestry products. These forecasts are instead held constant from 2035. This was done because there was insufficient evidence to judge which direction the forecasts would move in.

Table 4 Long term growth rates in the central case forecasts

Cargo group	Cargo category	Long-term growth rate
Unitised freight	Ro-Ro (tonnage)	+2.5%
	Ro-Ro (units)	+2.5%
	Lo-Lo (tonnage)	+2.5%
	Lo-Lo (TEU)	+2.4%
	Motor vehicles (units)	+2.4%
Liquid Bulk (tonnage)	Crude Oil	-1.7%
	Oil products	0.0%
	Liquefied gases	+2.2%
	Other liquid bulk	-1.8%
Dry bulk (tonnage)	Agricultural products	+0.2%
	Coal	0.0%
	Ores	+0.1%
	Other dry bulks	+0.9%
General cargo (tonnage)	Forestry products	0.0%
	Iron and Steel	+0.4%
	Other general cargo	-1.9%

Annex B: Data sources

B.1 Data on port freight came from DfT's published port statistics, with the exception of Lo-Lo units. For Lo-Lo units, data from 2000 onwards came from DfT's published port statistics, but data prior to 2000 came from OECD container transport statistics.

B.2 The table below shows the years of freight data used in the models.

Table 5 Time periods of port freight data used in models

Cargo group	Cargo category	Time period used
Unitised freight	Ro-Ro (tonnage)	1988-2016
	Ro-Ro (units)	1988-2016
	Lo-Lo (tonnage)	1988-2016
	Lo-Lo (TEU)	1982-2016
	Motor vehicles (units)	1996-2016
Liquid Bulk	Crude oil	2000-2016
	Oil products	1994-2016
	Liquefied gases	2000-2016
	Other liquid bulk	2000-2016
Dry bulk	Agricultural products	1996-2016
	Coal	1994-2016
	Ores	2000-2016
	Other dry bulk	2006-2016
General cargo	Forestry products	1996-2016
	Iron and steel products	2000-2016
	Other general cargo	2000-2016

B.3 Sources for all other data used are listed in the table below. Unless otherwise stated, the data used covered the UK.

Table 6 Data sources

Name	Historical data source	Projection source	Scenario projections
GDP	ONS - ABMI series (1970-2017)	OBR - Economic & Fiscal Outlook and Fiscal Sustainability Report	Central projection with growth decreased/increased by 0.5pp

Name	Historical data source	Projection source	Scenario projections
Population	ONS - Mid-year population estimates (1971-2017)	ONS - Principal population projections	Low/high migration projections
Private cars	DfT - Vehicles statistics (1996-2017)	Produced in model	Produced in model based on GDP and population scenarios
Wood in rough, pulp, and newsprint trade	HMRC - Trade statistics (1996-2017)	Produced in model	Produced in model based on GDP and population scenarios
Coal power plant capacity	Not used	BEIS - Energy & emissions projections (reference scenario)	Low/high energy price projections
Coal demand, imports, exports, and production	BEIS - Digest of UK Energy statistics (DUKES) (1996-2017)	Produced in model	Demand linked to coal power plant capacity scenarios
Brent price	US EIA - Europe Brent spot price (1982-2017)	US EIA - Annual energy outlook (reference case)	Low/high economic growth projections
Steel use	World Steel Association - Apparent steel use (2000-2016)	Produced in model	Produced in model based on population scenarios
Energy consumption of petroleum products	BEIS - Energy & emissions projections (1998-2017)	BEIS - Energy & emissions projections (reference scenario)	Low/high growth scenarios
Oil products demand	OGA - Production and expenditure projections (2000-2017)	OGA - Production and expenditure projections	Adjusted in line with energy consumption of petroleum products scenarios
LNG imports and exports	BEIS - DUKES (2000-2017)	Imports: National Grid - Future energy scenarios (Two Degrees) Exports: Produced in model	Assumption of the proportion of generic imports met by LNG varied
Cereal production area, production volume, change in stock, imports, exports, and domestic use	DEFRA - UK agriculture statistics (1984-2017)	Produced in model	Produced in model based on population scenarios
Oil production	Production and expenditure projections, OGA (1998-2017)	Production and expenditure projections, OGA	None
Oil refinery throughput	DUKES, BEIS (1997-2017)	Produced in model	None

Annex C: Econometric methods

C.1 The forecast approach uses an Ordinary Least Squares calculation of dependent and explanatory variables to identify a time-series relationship between historic port traffic and the set of explanatory variables defined in Annex A.

C.2 For each cargo market, the general form of the relationship is described below:

$$Fit = \alpha i + \beta i Zit + \varepsilon it$$

Where

F_{it} = Port traffic at time t for market i

Z_{it} = A set of explanatory variables at time t for market i

ε_{it} = error in prediction at time t for market i

α_i, β_i = parameters to be estimated

C.3 The variables that are used for forecasting are selected following a process of assessing the performance various regression models, by considering:

- Sign of the individual explanatory variables; for instance, if GDP increases we might expect port traffic imports to go up. We would expect, therefore, to find an estimate in the regression output that is positive. If the regression estimate is negative, this would be a cause for concern.
- Measures of model fit, such as the F-test, adjusted R-squared, Mallows CP stat and Bayesian Information Criterion (BIC).
- T-statistics of individual explanatory variables for statistical significance.
- Tests for heteroskedasticity, normality of residuals and autocorrelation, to ensure that the OLS approach produces non-biased, efficient parameters.

Appendix 2 – Court Judgements

1 **INTRODUCTION**

1.1 This note provides a brief introduction to the various court judgments that are provided in response to Q1.2.1.14 and Q1.6.1.3, and in support of the Applicant's submissions at Issue Specific Hearings 1 and 3. The court judgments referred to within this note are provided at appendices A-E. For ease of reference, we have highlighted the relevant paragraphs in each of the judgments in blue.

2 **APPENDIX A: R (Friends of the Earth Ltd) v Secretary State for Transport [2020] UKSC 52**

2.1 This judgment is provided in relation to the Applicant's submissions at Issue Specific Hearing 1. Paragraphs 20 to 30 are the most relevant and address the background to the policy framework within which applications for development consent must be determined.

2.2 As part of this, the Court explains the mischief to which the advent of National Policy Statements (NPSs) were addressed, drawing on the White Paper, and their central role in decision-making under the Planning Act 2008. In particular, the objective was to obviate the necessity when determining individual applications to assess whether there is a need for the proposed infrastructure, and to avoid the problems associated with that. As submitted at Issue Specific Hearing 1, this is why issues of need are now addressed within the NPSs.

3 **APPENDIX B: R (Client Earth) v Secretary of State for BEIS (First Instance) [2020] EWHC 1303**

3.1 This judgment is provided in relation to the Applicant's submissions at Issue Specific Hearing 1. Paragraphs 37 to 38, 41 and 106 to 116 are the most relevant. This case involved a challenge by objectors to the Secretary of State's decision to grant development consent for a proposed gas powered generating station at Drax. The Examining Authority had concluded that as part of their examination of the application it was appropriate for them to reach a decision on whether the proposed power station was needed, based on their interpretation of the NPS and the passage of time since the NPS had been designated. The Secretary of State disagreed with the Examining Authority and the Court rejected the objectors' challenge to the Secretary of State's decision.

3.2 The Court held that once an NPS has been designated, it is not for the decision-maker to make judgments on the merits of policy within that NPS, or to consider whether it remains up to date. Those matters do not fall for consideration in response to an individual application for development consent. Any issue as to the merits of the NPS and whether it remains up to date can only be raised through the separate statutory process for review of NPS provided by section 6.

4 **APPENDIX C: R (Client Earth) v Secretary of State for BEIS (Court Of Appeal) [2021] EWCA Civ 43**

4.1 This judgment is provided in relation to the Applicant's submissions at Issue Specific Hearing 1. Paragraphs 33, 40, 55 to 75 and 98 to 105 are the most relevant. This is the Court of Appeal's

judgment in the case produced as Appendix B, and it is helpful to see both judgments because the Court of Appeal refers to and draws upon the first instance judgment of Mr Justice Holgate.

4.2 Whilst the case is concerned with the then current Energy NPSs it is nevertheless also helpful to see how the Court interpreted and applied the policy on need and the presumption in favour, including by reference to other NPS.

4.3 The judgment also explains that the balancing exercise within section 104(7) of the Planning Act 2008 may not be used to challenge the merits of a policy within the NPS and circumvent the statutory review process for designated NPSs.

5 **APPENDIX D: R (Substation Action Save East Suffolk Ltd) v Secretary Of State For Business, Energy And Industrial Strategy [2022] EWHC 3177**

5.1 This judgment is provided in relation to the Applicant's submissions at Issue Specific Hearing 3. Paragraphs 161 and 168 are the most relevant.

5.2 The Court held that potential benefits of a project do not need to be legally secured in order to be treated as material considerations by a decision-maker and that the weight attached to a potential benefit is a matter of judgment for the decision-maker.

6 **APPENDIX E: R (Aquind Limited) v Secretary Of State For Business, Energy And Industrial Strategy and Portsmouth City Council [2023] EWHC 98 (Admin)**

6.1 This judgment is provided in relation to the Applicant's submissions at Issue Specific Hearing 3. Paragraphs 83, 99 and 100 are the most relevant.

6.2 The Court upheld a challenge to the Secretary of State's decision on the basis, amongst other things, that his decision failed to follow the structured approach required by section 104 of the Planning Act 2008. It emphasises the importance of that structured approach, starting with the issue of whether or not the application accords with the relevant NPS, and whether the presumption in favour is thus engaged. In doing so, the Court stresses the legal status given to NPSs by section 104 of the Planning Act 2008 and the relationship between section 104(3) and (7) in that context.

APPENDIX A

*190 Regina (Friends of the Earth Ltd and another) v Secretary of State for Transport

Positive/Neutral Judicial Consideration

Court
Supreme Court

Judgment Date
16 December 2020

Report Citation
[2020] UKSC 52
[2021] P.T.S.R. 190

ICLR

[On appeal from Regina (Plan B Earth) v Secretary of State for Transport]

Supreme Court

Lord Reed PSC , Lord Hodge DPSC , Lady Black , Lord Sales , Lord Leggatt JJSC

2020 Oct 7, 8; Dec 16

Planning—Development—National policy statement—Secretary of State designating national policy statement on new runway capacity and airport infrastructure—Statement indicating preferred location for airport development as Heathrow and rejecting alternatives—Whether statement lawful—Whether United Kingdom's ratification of Paris Agreement on Climate Change (2016) creating obligations in domestic law—Whether commitment to Paris Agreement "Government policy"— Whether ministerial statements to House of Commons on Government's approach to Paris Agreement to be regarded as "Government policy"—Whether failure to take Paris Agreement into account rendering designation of national policy statement unlawful— Planning Act 2008 (c 29), ss 5(7)(8) , 10(2)(3)

In June 2018, after having received a report by the independent Airports Commission and conducted a consultation exercise, the Secretary of State designated the Airports National Policy Statement pursuant to the Planning Act 2008 ("the Act") [1] for the purpose of outlining the policy framework in which an application for a development consent order would be determined. The policy statement set out the Government's preference to meet the need for new airport capacity in the South East of England through a scheme for a third runway at Heathrow Airport to the north west of the existing runways. Several objectors to that scheme, including two claimants who were charities concerned with climate change, sought judicial review challenging the lawfulness of the policy statement. The owner of Heathrow Airport appeared as an interested party in the proceedings. The key grounds of the two claimants' challenge were that the Secretary of State (i) had failed to take account of the various targets for the reduction of greenhouse gas emissions and global warming set out in the Paris Agreement on Climate Change, which the United Kingdom had ratified in November 2016, and (ii) had been in breach of the requirements under section 5(8) of the Act to have regard to "Government policy" particularly in view of two ministerial statements made to the House of Commons regarding the Government's approach to the Paris Agreement.

The Divisional Court dismissed all the objectors' the claims and held that the policy statement had been lawfully produced. The Court of Appeal allowed the two claimants' appeals on the grounds that "Government policy" within the meaning of section 5(8) of the Act was to be broadly construed and that it was clear from the United Kingdom's ratification of the Paris Agreement and the two ministerial statements that the Paris Agreement formed part of "Government policy", that the Secretary of State had acted unlawfully in failing to take the Paris Agreement into account and that therefore the national policy statement was unlawful and of no legal effect. ***191**

On appeal by the owner of Heathrow Airport—

Held , allowing the appeal, (1) that a purposive approach had to be adopted to section 5(8) of the Act which expanded upon the obligation that a national policy statement should give reasons for the policy set out in it, and the statutory words had to be interpreted in their context; that the purpose of the provision was to make sure that there was a degree of coherence between the policy set out in the statement, and established Government policies relating to the mitigation of and adaptation to climate change; that "Government policy" within the meaning of section 5(8) pointed towards a policy which had been cleared by the relevant departments on a government-wide basis and was in carefully formulated written statements of policy; that for section 5(8) to operate sensibly "Government policy" had to be given a relatively narrow meaning so that the relevant policies could be readily identified because otherwise civil servants would have to trawl through Hansard and press statements to see if anything that had been said by a minister might be characterised as "policy"; that Parliament could not have intended to create a bear trap for ministers by requiring them to take into account any ministerial statement which could as a matter of ordinary language be described as a statement of policy relating to the relevant field; that the epitome of "Government policy" was a formal written statement of established policy, but in so far as it might in exceptional circumstances extend beyond written statements, it was appropriate that there were clear limits on what statements counted as "Government policy" in order to render them readily identifiable as such; that the criteria for a "policy" to which the doctrine of legitimate expectations could be applied was the absolute minimum required for a statement to constitute "policy" for the purposes of section 5(8) ; that the statement qualified as policy only if it was clear, unambiguous and devoid of relevant qualification; that the two ministers' statements, which plainly reflected the fact that there was a inchoate or developing policy being worked on within Government, did not fall within the criteria for the statutory phrase; and that, accordingly, the Court of Appeal had been wrong in its construction of "Government policy" and in concluding that the two ministerial statements constituted that policy (post, paras 101–107).

(2) That the fact that the United Kingdom had ratified the Paris Agreement was not of itself a statement of "Government policy" in the requisite sense; that ratification was an act on the international plane and gave rise to the United Kingdom's obligations in international law which continued regardless of which particular government remained in office; that as treaty obligations they were not part of United Kingdom law and did not give rise to legal rights or obligations in domestic law; that ratification did not constitute a commitment operating on the plane of domestic law to perform obligations under the treaty; and that, accordingly, the Paris Agreement was not "Government policy" within the meaning of section 5(8) of the Act (post, paras 108, 112).

(3) That in promulgating the national policy statement the Secretary of State had fulfilled the obligations under section 5(10) of the Act to act with the objective of contributing to the achievement of sustainable development; that the policy statement covered the Paris Agreement and followed the advice of the Committee on Climate Change that the existing measures under the Climate Change Act 2008 were capable of being compatible with the target set by the Paris Agreement; that the policy statement explained how aviation emissions were taken into account in setting carbon budgets under the Climate Change Act 2008 in accordance with the advice given by the Climate Change Committee; that on all the evidence it could not be said that the Secretary of State had omitted to give consideration to greenhouse gas emissions or to give sufficient weight to the Paris Agreement when issuing the policy statement; that the Secretary of State had asked himself whether the Paris Agreement should be taken into account beyond the extent to which it was already reflected in the Climate Change Act 2008 ***192** and had concluded, in the exercise of his discretion, that it would not be appropriate to

do so; that the Secretary of State's view that the Paris Agreement had sufficiently been taken into account for the purposes of the designation of the policy statement was a rational one; and that, accordingly, the Secretary of State's assessment was within his discretion and could not be faulted (post, paras 120, 121, 124, 125, 128–134).

(4) That although the obligation to produce an appraisal of sustainability and an environmental report to accompany the national policy statement was required by European Union Directives, and their application was governed by European Union law, the type of complex assessment required in compiling an environmental report for the purposes of environmental assessment was an area where domestic public law principles had the same effect as the parallel requirements of European Union law; that the intended objective of the report was to inform the public by providing an appropriate and comprehensible explanation of the relevant policy context for a proposed plan or project to enable them to comment on it and suggest reasonable alternatives; that it was implicit in that objective that the public authority responsible for promulgating an environmental report should have a significant editorial discretion in compiling the report to ensure that it was properly focused on the factors which might have a bearing on the proposed plan or project; that there was a real danger that defensive drafting by the Secretary of State to include reference to a wide range of considerations which he did not consider helpful or appropriate in the context of the decision to be taken would result in the public being drowned in unhelpful detail so that their ability to comment effectively would be undermined; that the Secretary of State had not treated the Paris Agreement as irrelevant and on that basis refuse to consider whether reference should be made to it; that on the contrary the evidence showed that he had followed the Climate Change Committee's advice that the United Kingdom's obligations under the Agreement were sufficiently taken into account; and that, therefore, the reports accompanying the policy statement were not defective (post, paras 145–150).

R (Blewett) v Derbyshire County Council [2004] Env LR 29 and *Upjohn Ltd v Licensing Authority Established Under Medicines Act 1968 (Case C-120/97) [1999] 1 WLR 927* , ECJ considered.

(5) That the Secretary of State had not acted irrationally in not attempting in the national policy statement to assess post-2050 carbon emissions against policies which had yet to be determined; that the policy in response to the global goals of the Paris Agreement was in the course of development when the national policy statement was designated, and it remained in development; that the policy statement did not immunise the new runway scheme from complying with future changes of law and policy; that the scheme would fall to be assessed against the emission targets at the date of the determination of the application for a development consent order and there were provisions in place to ensure that the new runway scheme complied with law and policy at the date when such an application was determined and mechanisms available by which emissions from the use of the runway could be controlled; that the policy statement reflected the uncertainty over the climate change effects of non-carbon emissions and the absence of an agreed metric which could inform policy; that the Secretary of State's decision was consistent with the advice of the Climate Change Committee and had been taken in the context of the response to the Paris Agreement which included an aviation strategy to address non-carbon emissions; that the national policy statement was only the first stage in a process by which permission would be given for the new runway scheme to proceed, and at that stage the Secretary of State had powers to address the emissions; and that, accordingly, the Secretary of State had not failed to have regard to the desirability of mitigating and adapting to ***193** climate change pursuant to his duties under section 10(2) and (3) of the Act (post, paras 156–158, 161–163, 165–167).

Decision of the Court of Appeal [2020] EWCA Civ 214; [2020] **PTSR** 1446 reversed.

The following cases are referred to in the judgment of Lord Hodge DPSC and Lord Sales JSC:

Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223; [1947] 2 All ER 680 , CA

Attorney General v De Keyser's Royal Hotel Ltd [1920] AC 508 , HL(E)
Cogent Land LLP v Rochford District Council [2012] EWHC 2542 (Admin); [2013] 1 P & CR 2
Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374; [1984] 3 WLR 1174; [1985] ICR 14; [1984] 3 All ER 935 , HL(E)
CREEDNZ Inc v Governor General [1981] 1 NZLR 172
Findlay, In re [1985] AC 318; [1984] 3 WLR 1159; [1984] 3 All ER 801 , HL(E)
*Newick (Baroness Cumberlege of) v Secretary of State for Communities and Local Government [2018] EWCA Civ 1305; [2018] **PTSR** 2063* , CA
No Adastral New Town Ltd v Suffolk Coastal District Council [2015] EWCA Civ 88; [2015] Env LR 28 , CA
Plan B Earth v Secretary of State for Business, Energy and Industrial Strategy [2018] EWHC 1892 (Admin); [2019] Env LR 13
R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd [1990] 1 WLR 1545; [1990] 1 All ER 91; [1989] STC 873 , DC
R v Secretary of State for the Home Department, Ex p Fire Brigades Union [1995] 2 AC 513; [1995] 2 WLR 464; [1995] 2 All ER 244 , HL(E)
R v Somerset County Council, Ex p Fewings [1995] 1 WLR 1037; [1995] 3 All ER 20; 93 LGR 515 , CA
R (Blewett) v Derbyshire County [2003] EWHC 2775 (Admin); [2004] Env LR 29
R (Corner House Research) v Director of the Serious Fraud Office (JUSTICE intervening) [2008] UKHL 60; [2009] AC 756; [2008] 3 WLR 568; [2008] 4 All ER 927 , HL(E)
R (Davies) v Revenue and Customs Comrs [2011] UKSC 47; [2011] 1 WLR 2625; [2012] 1 All ER 1048
R (Edwards) v Environment Agency [2008] UKHL 22; (Note) [2008] 1 WLR 1587; [2009] 1 All ER 57 , HL(E)
R (Heathrow Hub Ltd) v Secretary of State for Transport (Speaker of the House of Commons intervening) [2019] EWHC 1069 (Admin) , DC
R (Hurst) v London Northern District Coroner [2007] UKHL 13; [2007] 2 AC 189; [2007] 2 WLR 726; [2007] 2 All ER 1025 , HL(E)
R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5; [2018] AC 61; [2017] 2 WLR 583; [2017] 1 All ER 593 , SC(E)
*R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council [2020] UKSC 3; [2020] **PTSR** 221; [2020] 3 All ER 527* , SC(E)
Shadwell Estates Ltd v Breckland District Council [2013] EWHC 12 (Admin); [2013] Env LR D2
Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759; [1995] 2 All ER 636; 93 LGR 403 , HL(E)
Upjohn Ltd v Licensing Authority Established Under Medicines Act 1968 (Case C-120/97) EU:C:1999:14; [1999] 1 WLR 927; [1999] ECR I-223 , ECJ
*Walton v Scottish Ministers [2012] UKSC 44; [2013] **PTSR** 51* , SC(Sc) ***194**

No additional cases were cited in argument.

APPEAL from the Court of Appeal

The claimants, Friends of the Earth Ltd and Plan B Earth, sought judicial review pursuant to section 13 of the Planning Act 2008 , of the decision of the Secretary of State for Transport on 26 June 2018 to designate a national policy statement entitled "Airports National Policy Statement: new runway capacity and infrastructure at airports ***195** in the South East of England". The statement was issued under section 5 of the 2008 Act for the purpose of setting out the policy framework within which any application for a development consent order for such development was to be determined and indicating that the Government's preferred location and scheme for meeting the need for new airport capacity in the South East of England was a third runway at Heathrow to the north west of the existing runways. Heathrow Airport Ltd appeared as an interested party to the claims.

On 1 May 2019 the Divisional Court (Hickinbottom LJ and Holgate J) [2019] EWHC 1070 (Admin); [2020] **PTSR** 240 dismissed the claims for judicial review. On 27 February the Court of Appeal (Lindblom, Singh and Haddon-Cave LJJ) [2020] **PTSR** 1446 allowed the claimants' appeal and held that the national policy statement was unlawful and of no legal effect.

On 6 May 2020 the Supreme Court (Lord Reed PSC, Lord Hodge DPSC and Lord Sales JSC) granted Heathrow Airport Ltd

permission to appeal, pursuant to which it appealed. The issue on the appeal was whether the Secretary of State's failure to take account of the United Kingdom's climate change commitments under the Paris Agreement on Climate Change rendered the designation of the Airports National Policy Statement favouring the development of a third runway at Heathrow Airport unlawful.

The facts are stated in the judgment of Lord Hodge DPSC and Lord Sales JSC, post, para 7.

Lord Anderson of Ipswich QC, Michael Humphries QC, Richard Turney and *Malcolm Birdling* (instructed by *Bryan Cave Leighton Paisner LLP*) for Heathrow Airport Ltd.

David Wolfe QC, Peter Lockley and *Andrew Parkinson* (instructed by *Leigh Day*) for the claimant Friends of the Earth Ltd.

The claimant Plan B Earth appeared by its director *Tim Crosland* .

The Secretary of State did not appear and was not represented.

The court took time for consideration.

16 December 2020. LORD HODGE DPSC and LORD SALES JSC (with whom LORD REED PSC, LADY BLACK and LORD LEGGATT JJSC agreed)

handed down the following judgment.

Introduction

1. This case concerns the framework which will govern an application for the grant of development consent for the construction of a third runway at Heathrow Airport. This is a development scheme promoted by the appellant, Heathrow Airport Ltd ("HAL"), the owner of the airport.

2. As a result of consideration over a long period, successive governments have come to the conclusion that there is a need for increased airport capacity in the South East of England to foster the development of the national economy.

3. An independent commission called the Airports Commission was established in 2012 under the chairmanship of Sir Howard Davies to consider the options. In its interim report dated 17 December 2013 the Airports Commission reached the conclusion that there was a clear case for building one new runway in the South East, to come into operation by 2030. In that report the Airports Commission set out scenarios, including a carbon-traded scenario under which overall carbon dioxide ("CO2") emissions were set at a cap consistent with a goal to limit global warming to 2ºC. The Commission reduced the field of proposals to three main candidates. Two of these involved building additional runway capacity at Heathrow Airport, either to the north west of the existing two runways ("the NWR Scheme") or by extending the existing northern runway ("the ENR Scheme"). The third involved building a second runway at Gatwick airport ("the G2R Scheme").

4. The Airports Commission carried out an extensive consultation on which scheme should be chosen. In its final report dated 1 July 2015 ("the Airports Commission Final Report") the Commission confirmed that there was a need for additional runway capacity in the South East by 2030 and concluded that, while all three options could be regarded as credible, the NWR Scheme was the best way to meet that need, if combined with a significant package of measures which addressed environmental and community impacts.

5. The Government carried out reviews of the Airports Commission's analysis and conclusions. It assessed the Airports Commission Final Report to be sound and robust. On 14 December 2015 the Secretary of State for Transport ("the Secretary of State") announced that the Government accepted the case for airport expansion; agreed with, and would consider further, the Airports Commission's shortlist of options; and would use the mechanism of a national policy statement ("NPS") issued under the Planning Act 2008 ("the PA 2008") to establish the policy framework within which to consider an application by a developer for a development consent order ("DCO"). The announcement also stated that further work had to be done in relation to environmental impacts, including those arising from carbon emissions.

6. In parallel with the development of national airports policy, national and international policy to combat climate change has also been in a state of development. The Climate Change Act 2008 ("the CCA 2008") was enacted on the same day as the PA 2008 . It sets a national carbon target (section 1) and requires the Government to establish carbon budgets for the UK (section 4). There are mechanisms in the CCA 2008 to adjust the national target and carbon budgets (in sections 2 and 5 , respectively) as circumstances change, including as scientific understanding of global warming develops.

7. In 1992 the United Nations adopted the United Nations Framework Convention on Climate Change. 197 states are now parties to the Convention. Following the 21st Conference of the parties to the Convention, on 12 December 2015 the text of the Paris Agreement on Climate Change was agreed and adopted. The Paris Agreement set out certain obligations to reduce emissions of greenhouse gases, in particular CO2, with the object of seeking to reduce the rate of increase in global warming and to contain such increase to well below 2ºC above, and if possible to 1.5ºC, above pre- ***196** industrial levels. On 22 April 2016 the United Kingdom signed the Paris Agreement and on 17 November 2016 the United Kingdom ratified the Agreement.

8. An expansion of airport capacity in the South East would involve a substantial increase in CO2 emissions from the increased number of flights which would take place as a result. The proposals for such expansion have therefore given rise to a considerable degree of concern as to the environmental impact it would be likely to have on global warming and climate change. This is one aspect of the proposals for expansion of airport capacity, among many others, which have made the decision whether to proceed with such expansion a matter of controversy.

9. On 25 October 2016 the Secretary of State announced that the NWR Scheme was the Government's preferred option. In February 2017 the Government commenced consultation on a draft of an Airports NPS which it proposed should be promulgated pursuant to the PA 2008 to provide the national policy framework for consideration of an application for a DCO in respect of the NWR Scheme. A further round of consultation on a draft of this NPS was launched in October 2017. There were many thousands of responses to both consultations. In June 2018 the Government published its response to the consultations. It also published a response to a report on the proposed scheme dated 1 November 2017 by the Transport Committee (a Select Committee of the House of Commons).

10. On 5 June 2018 the Secretary of State laid before Parliament the final version of the Airports NPS ("the ANPS"), together with supporting documents. As is common ground on this appeal, the policy framework set out in the ANPS makes it clear that issues regarding the compatibility of the building of a third runway at Heathrow with the UK's obligations to contain carbon emissions and emissions of other greenhouse gases could and should be addressed at the stage of the assessment of an application by HAL for a DCO to allow it to proceed with the development. As is also common ground, the ANPS makes it clear that the emissions obligations to be taken into account at the DCO stage will be those which are applicable at that time, assessed in the light of circumstances and the detailed proposals of HAL at that time.

11. On 25 June 2018 there was a debate on the proposed ANPS in the House of Commons, followed by a vote approving the ANPS by 415 votes to 119, a majority of 296 with support from across the House.

12. On 26 June 2018 the Secretary of State designated the ANPS under section 5(1) of the PA 2008 as national policy. It is the Secretary of State's decision to designate the ANPS which is the subject of legal challenge in these proceedings.

13. Objectors to the NWR Scheme commenced a number of claims against the Secretary of State to challenge the lawfulness of the designation of the ANPS on a wide variety of grounds. For the most part, those claims have been dismissed in the courts below in two judgments of the Divisional Court (Hickinbottom LJ and Holgate J) in the present proceedings [2020] **PTSR** 240 and an associated action *R (Heathrow Hub Ltd) v Secretary of State for Transport (Speaker of the House of Commons intervening) [2019] EWHC 1069 (Admin)* , and in the judgment of the Court of Appeal in the present proceedings [2020] **PTSR** 1446. ***197**

14. The Divisional Court dismissed all the claims brought by objectors, including those brought by the respondents to this appeal (Friends of the Earth—"FoE"—and Plan B Earth). FoE is a non-governmental organisation concerned with climate change. Plan B Earth is a charity concerned with climate change.

15. However, the Court of Appeal allowed appeals by FoE and Plan B Earth and granted declaratory relief stating that the ANPS is of no legal effect and that the Secretary of State had acted unlawfully in failing to take into account the Paris Agreement in making his decision to designate the ANPS. The Court of Appeal set out four grounds for its decision: (i) the Secretary of State breached his duty under section 5(8) of the PA 2008 to give an explanation of how the policy set out in the ANPS took account of Government policy, which was committed to implementing the emissions reductions targets in the Paris Agreement ("the section 5(8) ground"); (ii) the Secretary of State breached his duty under section 10 of the PA 2008 , when promulgating the ANPS, to have regard to the desirability of mitigating and adapting to climate change, in that he failed to have proper regard to the Paris Agreement ("the section 10 ground"); (iii) the Secretary of State breached his duty under article 5 of the Strategic Environmental Assessment Directive ("the SEA Directive", Parliament and Council Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment) to issue a suitable environmental report for the purposes of public consultation on the proposed ANPS, in that he failed to refer to the Paris Agreement ("the SEA Directive ground"); and (iv) the Secretary of State breached his duty under section 10 of the PA 2008 , when promulgating the ANPS, in that he failed to have proper regard to (a) the desirability of mitigating climate change in the period after 2050 ("the post-2050 ground") and (b) the desirability of mitigating climate change by restricting emissions of non-CO2 impacts of aviation, in particular nitrous oxide ("the non-CO2 emissions ground").

16. The Court of Appeal also rejected a submission by HAL, relying on section 31 of the Senior Courts Act 1981 , that it should exercise its discretion as to remedy to refuse any relief, on the grounds that (HAL argued) it was highly likely that even if there had been no breach of duty by the Secretary of State the decision whether to issue the ANPS would have been the same.

17. HAL appeals to this court with permission granted by the court. HAL is joined in the proceedings as an interested party. It has already invested large sums of money in promoting the NWR Scheme and wishes to carry it through by applying for a DCO in due course and then building the proposed new runway. The Secretary of State has chosen not to appeal and has made no submissions to us. However, HAL is entitled to advance all the legal arguments which may be available in order to defend the validity of the ANPS.

18. Prior to the Covid-19 pandemic, Heathrow was the busiest two-runway airport in the world. The pandemic has had a major impact in reducing aviation and the demand for flights. However, there will be a lead time of many years before any third runway at Heathrow is completed and HAL's expectation is that the surplus of demand for aviation services over airport capacity will have been restored before a third runway would be operational. Lord Anderson QC for HAL informed the court that HAL intends to proceed with the NWR Scheme despite the pandemic. ***198***

The Planning Act 2008

19. We are grateful to the Divisional Court for their careful account of the PA 2008 , on which we draw for this section. The PA 2008 established a new unified "development consent" procedure for "nationally significant infrastructure projects" defined to include certain "airport-related development" including the construction or alteration of an airport that is expected to be capable of providing air passenger services for at least 10 million passengers per year (sections 14 and 23). Originally, many of the primary functions under the Act were to be exercised by the Infrastructure Planning Commission, established under section 1 . However, those functions were transferred to the Secretary of State by the Localism Act 2011 .

20. The mischiefs that the Act was intended to address were identified in the White Paper published in May 2007, Planning for a Sustainable Future (Cm 7120) ("the 2007 White Paper"). Prior to the PA 2008 , a proposal for the construction of a new airport or extension to an airport would have required planning permission under the Town and Country Planning Act 1990 . An application for permission would undoubtedly have resulted in a public inquiry, whether as an appeal against refusal of consent or a decision by the Secretary of State to "call in" the matter for his own determination. As para 3.1 of the 2007 White Paper said:

> "A key problem with the current system of planning for major infrastructure is that national policy and, in particular, the national need for infrastructure, is not in all cases clearly set out. This can cause significant delays at the public inquiry stage, because national policy has to be clarified and

> the need for the infrastructure has to be established through the inquiry process and for each individual application. For instance, the absence of a clear policy framework for airports development was identified by the inquiry secretary in his report on the planning inquiry as one of the key factors in the very long process for securing planning approval for Heathrow Terminal 5. Considerable time had to be taken at the inquiry debating whether there was a need for additional capacity. The Government has since responded by publishing the Air Transport White Paper to provide a framework for airport development. This identifies airport development which the Government considers to be in the national interest, for reference at future planning inquiries. But for many other infrastructure sectors, national policy is still not explicitly set out, or is still in the process of being developed."

21. Para 3.2 identified a number of particular problems caused by the absence of a clear national policy framework. For example, inspectors at public inquiries might be required to make assumptions about national policy and national need, often without clear guidance and on the basis of incomplete evidence. Decisions by ministers in individual cases might become the means by which government policy would be expressed, rather than such decisions being framed by clear policy objectives beforehand. In the absence of a clear forum for consultation at the national level, it could be more difficult for the public and other interested parties to have their say in the formulation of national policy on infrastructure. The ability of developers to make long-term investment decisions is influenced by the availability of ***199** clear statements of government policy and objectives, and might be adversely affected by the absence of such statements.

22. The 2007 White Paper proposed that national policy statements would set the policy framework for decisions on the development of national infrastructure. "They 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." The role of ministers would be to set policy, in particular the national need for infrastructure development (para 3.4).

23. Para 3.11 envisaged that any public inquiry dealing with individual applications for development consent would not have to consider issues such as whether there is a case for infrastructure development, or the types of development most likely to meet the need for additional capacity, since such matters would already have been addressed in the NPS. It was said that NPSs should have more weight than other statements of policy, whether at a national or local level: they should be the primary consideration in the determination of an application for a DCO (para 3.12), although other relevant considerations should also be taken into account (para 3.13). To provide democratic accountability, it was said that NPSs should be subject to parliamentary scrutiny before being adopted (para 3.27).

24. In line with the 2007 White Paper recommendation, Part 2 of the PA 2008 provides for NPSs which give a policy framework within which any application for development consent, in the form of a DCO, is to be determined. Section 5(1) gives the Secretary of State the power to designate an NPS for development falling within the scope of the Act; and section 6(1) provides that "[the] Secretary of State must review each [NPS] whenever the Secretary of State thinks it appropriate to do so".

25. The content of an NPS is governed by section 5(5)–(8) which provide that:

> "(5) The policy set out in [an NPS] may in particular— (a) 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; (b) set out criteria to be applied in deciding whether a location is suitable (or potentially suitable) for a specified description of development; (c) set out the relative weight to be given to specified criteria; (d) identify one or more locations as suitable (or potentially suitable) or unsuitable for a specified description of development; (e) identify one or

> more statutory undertakers as appropriate persons to carry out a specified description of development; (f) 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.
>
> "(6) If [an NPS] sets out policy in relation to a particular description of development, the statement must set out criteria to be taken into account in the design of that description of development.
>
> "(7) [An NPS] must give reasons for the policy set out in the statement. ***200**
>
> "(8) The reasons must (in particular) 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."

As is made clear, the NPS may (but is not required to) identify a particular location for the relevant development.

26. In addition, under the heading "Sustainable development", section 10 provides (so far as relevant to these claims):

> "(1) This section applies to the Secretary of State's functions under sections 5 and 6 .
>
> "(2) The Secretary of State must, in exercising those functions, do so with the objective of contributing to the achievement of sustainable development.
>
> "(3) For the purposes of subsection (2) the Secretary of State must (in particular) have regard to the desirability of— (a) mitigating, and adapting to, climate change …"

27. The process for designation of an NPS is also set out in the Act. The PA 2008 imposed for the first time a transparent procedure for the public and other consultees to be involved in the formulation of national infrastructure policy in advance of any consideration of an application for a DCO.

28. The Secretary of State produces a draft NPS, which is subject to (i) an appraisal of sustainability ("AoS") (section 5(3)), (ii) public consultation and publicity (section 7), and (iii) parliamentary scrutiny (sections 5(4) and 9). In addition, there is a requirement to carry out a strategic environmental assessment under the SEA Directive as transposed by the Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004/1633) ("the SEA Regulations") (see regulation 5(2) of the SEA Regulations).

29. The consultation and publicity requirements are set out in section 7 , which so far as relevant provides:

> "(1) This section sets out the consultation and publicity requirements referred to in sections 5(4) and 6(7) .
>
> "(2) The Secretary of State must carry out such consultation, and arrange for such publicity, as the Secretary of State thinks appropriate in relation to the proposal. This is subject to subsections (4) and (5).

"(3) In this section 'the proposal' means— (a) the statement that the Secretary of State proposes to designate as [an NPS] for the purposes of this Act or (b) (as the case may be) the proposed amendment.

"(4) The Secretary of State must consult such persons, and such descriptions of persons, as may be prescribed.

"(5) If the policy set out in the proposal identifies one or more locations as suitable (or potentially suitable) for a specified description of development, the Secretary of State must ensure that appropriate steps are taken to publicise the proposal.

"(6) The Secretary of State must have regard to the responses to the consultation and publicity in deciding whether to proceed with the proposal."

30. A proposed NPS must be laid before Parliament (section 9(2) and (8)). The Act thus provides an opportunity for a committee of either House of ***201** Parliament to scrutinise a proposed NPS and to make recommendations; and for each House to scrutinise it and make resolutions (see section 9(4)).

31. An NPS is not the end of the process. It simply sets the policy framework within which any application for a DCO must be determined. Section 31 provides that, even where a relevant NPS has been designated, development consent under the PA 2008 is required for development "to the extent that the development is or forms part of a nationally significant infrastructure project". Such applications must be made to the relevant Secretary of State (section 37).

32. Chapter 2 of Part 5 of the Act makes provision for a pre-application procedure. This provides for a duty to consult pre-application, which extends to consulting relevant local authorities and, where the land to be developed is in London, the Greater London Authority (section 42). There are also duties to consult the local community, and to publicise and to take account of responses to consultation and publicity (sections 47–49 ; and see also regulation 12 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/572), which makes provision for publication of and consultation on preliminary environmental information). Any application for a DCO must be accompanied by a consultation report (section 37(3)(c)); and adequacy of consultation is one of the criteria for acceptance of the application (section 55(3) and (4)(a)).

33. Part 6 of the PA 2008 is concerned with "Deciding applications for orders granting development consent". Once the application has been accepted, section 56 requires the applicant to notify prescribed bodies and authorities and those interested in the land to which the application relates, who become "interested parties" to the application (section 102). The notification must include a notice that interested parties may make representations to the Secretary of State. Section 60(2) provides that where a DCO application is accepted for examination there is a requirement to notify any local authority for the area in which land, to which the application relates, is located (see section 56A)) and, where the land to be developed is in London, the Greater London Authority, inviting them each to submit a "local impact report" (section 60(2)).

34. The Secretary of State may appoint a panel or a single person to examine the application ("the Examining Authority") and to make a report setting out its findings and conclusions, and a recommendation as to the decision to be made on the application. The examination process lasts six months, unless extended (section 98); and the examination timetable is set out in the Infrastructure Planning (Examination Procedure) Rules 2010 (SI 2010/103) ("the Examination Rules"). In addition to local impact reports (section 60), the examination process involves written representations (section 90), written questions by the Examining Authority (rules 8 and 10 of the Examination Rules), and hearings (which might be open floor and/or issue specific and/or relating to compulsory purchase) (sections 91–93). As a result of the examination process, the provisions of the proposed DCO may be amended by either the applicant or the Examination Authority, eg in response to the representations of interested parties; and it is open to the Secretary of State to modify the proposed DCO before making it.

35. Section 104 constrains the Secretary of State when determining an application for a DCO for development in relation to which an NPS has effect, in the following terms (so far as relevant to these claims): ***202**

> "(2) In deciding the application the Secretary of State must have regard to— (a) any [NPS] which has effect in relation to development of the description to which the application relates (a 'relevant [NPS]') … (b) any local impact report … (c) any matters prescribed in relation to development of the description to which the application relates, and (d) any other matters which the Secretary of State thinks are both important and relevant to the Secretary of State's decision.
>
> "(3) The Secretary of State must decide the application in accordance with any relevant [NPS], except to the extent that one or more of subsections (4) to (8) applies.
>
> "(4) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant [NPS] would lead to the United Kingdom being in breach of any of its international obligations.
>
> "(5) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant [NPS] would lead to the Secretary of State being in breach of any duty imposed on the Secretary of State by or under any enactment.
>
> "(6) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant [NPS] would be unlawful by virtue of any enactment.
>
> "(7) This subsection applies if the Secretary of State is satisfied that the adverse impact of the proposed development would outweigh its benefits.
>
> "(8) This subsection applies if the Secretary of State is satisfied that any condition prescribed for deciding an application otherwise than in accordance with [an NPS] is met.
>
> "(9) For the avoidance of doubt, the fact that any relevant [NPS] identifies a location as suitable (or potentially suitable) for a particular description of development does not prevent one or more of subsections (4) to (8) from applying."

36. Section 104 is complemented by section 106 which, under the heading "Matters which may be disregarded when determining an application", provides (so far as relevant to these claims):

> "(1) In deciding an application for an order granting development consent, the Secretary of State may disregard representations if the Secretary of State considers that the representations— (a) … (b) relate to the merits of policy set out in [an NPS] …
>
> "(2) In this section 'representation' includes evidence."

That is also reflected in sections 87(3) and 94(8) , under which the Examining Authority may disregard representations

(including evidence) or refuse to allow representations to be made at a hearing if it considers that they "relate to the merits of the policy set out in [an NPS]".

37. By section 120(1) , a DCO may impose requirements in connection with the development for which consent is granted, eg it may impose conditions considered appropriate or necessary to mitigate or control the environmental effects of the development. Section 120(3) is a broad provision enabling a DCO to make provision relating to, or to matters ancillary to, the development for which consent is granted including any of the matters ***203** listed in Part 1 of Schedule 5 (section 120(4)). That Schedule lists a wide range of potentially applicable provisions, including compulsory purchase, the creation of new rights over land, the carrying out of civil engineering works, the designation of highways, the operation of transport systems, the charging of tolls, fares and other charges and the making of byelaws and their enforcement.

38. Section 13 concerns "Legal challenges relating to [NPSs]". Section 13(1) provides:

> "A court may entertain proceedings for questioning [an NPS] or anything done, or omitted to be done, by the Secretary of State in the course of preparing such a statement only if— (a) the proceedings are brought by a claim for judicial review, and (b) the claim form is filed before the end of the period of six weeks beginning with the day after— (i) the day on which the statement is designated as [an NPS] for the purposes of this Act, or (ii) (if later) the day on which the statement is published."

It was under section 13 that the claims by objectors to the ANPS were brought.

The Climate Change Act 2008

39. Again, we gratefully draw on the account given by the Divisional Court. As they explain, the UK has for a long time appreciated the desirability of tackling climate change, and wished to take a more rigorous domestic line. In the 2003 White Paper, "Our Energy Future—Creating a Low Carbon Economy" (Cm 5761), the Government committed to reduce CO2 emissions by 60% on 1990 levels by 2050; and to achieve "real progress" by 2020 (which equated to reductions of 26–32%). The 60% figure emanated from the EU Council of Ministers' "Community Strategy on Climate Change" in 1996, which determined to limit emissions to 550 parts per million ("ppm") on the basis that to do so would restrict the rise in global temperatures to 2ºC above pre-industrial levels which, it was then considered, would avoid the serious consequences of global warming. However, by 2005, there was scientific evidence that restricting emissions to 550ppm would be unlikely to be effective in keeping the rise to 2ºC; and only stabilising CO2 emissions at something below 450ppm would be likely to achieve that result.

40. Parliament addressed these issues in the CCA 2008 .

41. Section 32 established a Committee on Climate Change ("the CCC"), an independent public body to advise the UK and devolved Governments and Parliaments on tackling climate change, including on matters relating to the UK's statutory carbon reduction target for 2050 and the treatment of greenhouse gases from international aviation.

42. Section 1 gives a mandatory target for the reduction of UK carbon emissions. At the time of designation of the ANPS, it provided:

> "It is the duty of the Secretary of State [then, the Secretary of State for Energy and Climate Change: now, the Secretary of State for Business, Enterprise and Industrial Strategy ('BEIS')] to ensure that the net UK carbon account for the year 2050 is at least 80% lower than the 1990 baseline." ***204**

The figure of 80% was substituted for 60% during the passage of the Bill, as evolving scientific knowledge suggested that the lower figure would not be sufficient to keep the rise in temperature to 2ºC in 2050. Therefore, although the CCA 2008 makes no mention of that temperature target, as the CCC said in its report on the Paris Agreement issued in October 2016 (see para 73 below): "This 2050 target was derived as a contribution to a global emissions path aimed at keeping global average temperatures to around 2ºC above pre-industrial levels." The statutory target of a reduction in carbon emissions by 80% by 2050 was Parliament's response to the international commitment to keep the global temperature rise to 2ºC above pre-industrial levels in 2050. Since the designation of the ANPS, the statutory target has been made more stringent. The figure of 100% was substituted for 80% in section 1 of the CCA 2008 by the Climate Change Act 2008 (2050 Target Amendment) Order 2019 (SI 2019/1056).

43. The Secretary of State for BEIS has the power to amend that percentage (section 2(1) of the CCA 2008), but only: (i) if it appears to him that there have been significant developments in scientific knowledge about climate change since the passing of the Act, or developments in European or international law or policy (section 2(2) and (3)): the Explanatory Note to the Act says, as must be the case, that "this power might be used in the event of a new international treaty on climate change"; (ii) after obtaining, and taking into account, advice from the CCC (section 3(1)); and (iii) subject to parliamentary affirmative resolution procedure (section 2(6)).

44. Section 1 of the CCA 2008 sets a target that relates to carbon only. Section 24 enables the Secretary of State for BEIS to set targets for other greenhouse gases, but subject to similar conditions to which an amendment to the section 1 target is subject.

45. In addition to the carbon emissions target set by section 1 —and to ensure compliance with it (see sections 5(1)(b) and 8)—the Secretary of State for BEIS is also required to set for each succeeding period of five years, at least 12 years in advance, an amount for the net UK carbon account ("the carbon budget"); and ensure that the net UK carbon account for any period does not exceed that budget (section 4). The carbon budget for the period including 2020 was set to be at least 34% lower than the 1990 baseline.

46. Section 10(2) sets out various matters which are required to be taken into account when the Secretary of State for BEIS sets, or the CCC advises upon, any carbon budget, including:

> "(a) scientific knowledge about climate change; (b) technology relevant to climate change; (c) economic circumstances, and in particular the likely impact of the decision on the economy and the competitiveness of particular sectors of the economy; (d) fiscal circumstances, and in particular the likely impact of the decision on taxation, public spending and public borrowing; (e) social circumstances, and in particular the likely impact of the decision on fuel poverty; (f) … (h) circumstances at European and international level; (i) the estimated amount of reportable emissions from international aviation and international shipping …"

Therefore, although for the purposes of the CCA 2008 emissions from greenhouse gases from international aviation do not generally count as emissions from UK sources (section 30(1)), by virtue of section 10(2)(i) , in ***205*** relation to any carbon budget, the Secretary of State for BEIS and the CCC must take such emissions into account.

47. The evidence for the Secretary of State explains that the CCC has interpreted that as requiring the UK to meet a 2050 target which includes these emissions. The CCC has advised that, to meet the 2050 target on that basis, emissions from UK aviation (domestic and international) in 2050 should be no higher than 2005 levels, ie 37.5 megatons (million tonnes) of CO2 ("MtCO2"). This is referred to by the respondents as "the Aviation Target". However, the Aviation Policy Framework issued by the Government in March 2013 explains that the Government decided not to take a decision on whether to include international aviation emissions in its carbon budgets, simply leaving sufficient headroom in those budgets consistent with meeting the 2050 target including such emissions, but otherwise deferring a decision for consideration as part of the

emerging Aviation Strategy. The Aviation Strategy is due to re-examine how the aviation sector can best contribute its fair share to emissions reductions at both the UK and global level. It is yet to be finalised.

The SEA Directive

48. Again, in this section we gratefully draw on the careful account given by the Divisional Court. As they explain, Parliament and Council Directive 2011/92/EU of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment as amended ("the EIA Directive"), as currently transposed by the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/571), requires a process within normal planning procedures. (For the purposes of these claims, the transposing regulations have not materially changed over the relevant period; and we will refer to them collectively as "the EIA Regulations".) The SEA Directive as transposed by the SEA Regulations concerns the environmental impact of plans and programmes. The SEA Directive and Regulations applied to the ANPS. The EIA Directive would apply when there was a particular development for which development consent was sought, at the DCO stage.

49. Recital (1) to the SEA Directive states:

> "Article 174 of the Treaty provides that Community policy on the environment is to contribute to, inter alia, the preservation, protection and improvement of the quality of the environment, the protection of human health and the prudent and rational utilisation of natural resources and that it is to be based on the precautionary principle. Article 6 of the Treaty provides that environmental protection requirements are to be integrated into the definition of Community policies and activities, in particular with a view to promoting sustainable development."

As suggested here, the SEA Directive relies upon the "precautionary principle" where appropriate.

50. Recital (4) states:

> "Environmental assessment is an important tool for integrating environmental considerations into the preparation and adoption of certain plans and programmes which are likely to have significant effects on the environment in the member states, because it ensures that such ***206** effects of implementing plans and programmes are taken into account during their preparation and before their adoption."

51. Recital (9) states:

> "This Directive is of a procedural nature, and its requirements should either be integrated into existing procedures in member states or incorporated in specifically established procedures. With a view to avoiding duplication of the assessment, member states should take account, where appropriate, of the fact that assessments will be carried out at different levels of a hierarchy of plans and programmes."

Thus, the requirements of the SEA Directive are essentially procedural in nature; and it may be appropriate to avoid duplicating assessment work by having regard to work carried out at other levels or stages of a policy-making process (see article 5(2)–(3) below).

52. Recital (17) states:

> "The environmental report and the opinions expressed by the relevant authorities and the public, as well as the results of any transboundary consultation, should be taken into account during the preparation of the plan or programme and before its adoption or submission to the legislative procedure."

53. The objectives of the SEA Directive are set out in article 1 :

> "The objective of this Directive is to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development, by ensuring that, in accordance with this Directive, an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment."

54. Article 3(1) requires an "environmental assessment" to be carried out, in accordance with articles 4 to 9 , for plans and programmes referred to in article 3(2)–(4) which are likely to have significant environmental effects. Article 3(2) requires strategic environmental assessment generally for any plan or programme which is prepared for (inter alia) transport, town and country planning or land use and which sets the framework for future development consent for projects listed in Annexes I and II to the EIA Directive . Strategic environmental assessment is also required for other plans and programmes which are likely to have significant environmental effects (article 3(4)). By virtue of sections 104 and 106 of the PA 2008 , the ANPS designated under section 5 sets out the framework for decisions on whether a DCO for the development of an additional runway at Heathrow under Part 6 of that Act should be granted. That development would, in due course, require environmental impact assessment under the EIA Directive and Regulations; and there is no dispute that the ANPS needed to be subjected to strategic environmental assessment under the SEA Directive and the SEA Regulations.

55. Article 2(b) of the SEA Directive defines "environmental assessment" for the purposes of the Directive: ***207**

> "'environmental assessment' shall mean the preparation of an environmental report, the carrying out of consultations, the taking into account of the environmental report and the results of the consultations in decision-making and the provision of information on the decision in accordance with articles 4 to 9 ."

56. Article 4(1) requires "environmental assessment [to be] … carried out during the preparation of a plan or programme and before its adoption", which in this instance would refer to the Secretary of State's decision to designate the ANPS.

57. Article 5 sets out requirements for an "environmental report". By article 2(c) : "'environmental report' shall mean the part of the plan or programme documentation containing the information required in article 5 and Annex I." In the case of the ANPS the environmental report was essentially the AoS.

58. Article 5(1) provides:

> "Where an environmental assessment is required under article 3(1) , an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated. The information to be given for this purpose is referred to in Annex I."

Annex I states, under the heading, "Information referred to in article 5(1) ":

> "The information to be provided under article 5(1) , subject to article 5(2) and (3) , is the following: (a) an outline of the contents, main objectives of the plan or programme and relationship with other relevant plans and programmes; (b) the relevant aspects of the current state of the environment and the likely evolution thereof without implementation of the plan or programme; (c) the environmental characteristics of areas likely to be significantly affected; (d) any existing environmental problems which are relevant to the plan or programme including, in particular, those relating to any areas of a particular environmental importance, such as areas designated pursuant to Directives 79/409/EEC and 92/43/EEC [the Habitats and Birds Directives]; (e) the environmental protection objectives, established at international, Community or member state level, which are relevant to the plan or programme and the way those objectives and any environmental considerations have been taken into account during its preparation; (f) the likely significant effects on the environment, including on issues such as biodiversity, population, human health, fauna, flora, soil, water, air, climatic factors, material assets, cultural heritage including architectural and archaeological heritage, landscape and the interrelationship between the above factors; (g) the measures envisaged to prevent, reduce and as fully as possible offset any significant adverse effects on the environment of implementing the plan or programme; (h) an outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties (such as technical deficiencies or ***208** lack of know-how) encountered in compiling the required information; (i) a description of the measures envisaged concerning monitoring in accordance with article 10 ; (j) a non-technical summary of the information provided under the above headings."

Thus, the information required by the combination of article 5(1) and Annex I is subject to article 5(2) and (3) , which provide:

> "(2) The environmental report prepared pursuant to paragraph 1 shall include the information that *may reasonably be required* taking into account current knowledge and methods of assessment, the contents and level of detail in the plan or programme, its stage in the decision-making process and the extent to which certain matters *are more appropriately assessed at different levels in that*

> *process in order to avoid duplication of the assessment* . (3) Relevant information available on environmental effects of the plans and programmes and obtained *at other levels of decision-making or through other Community legislation* may be used for providing the information referred to in Annex I." (Emphasis added.)

59. Accordingly, the information which is required to be included in an "environmental report", whether by article 5(1) itself or by that provision in conjunction with Annex I , is qualified by article 5(2) and (3) in a number of respects. First, the obligation is only to include information that "may reasonably be required", which connotes the making of a judgment by the plan-making authority. Second, that judgment may have regard to a number of matters, including current knowledge and assessment methods. In addition, the contents and level of detail in a plan such as the ANPS, the stage it has reached in the decision-making process and the ability to draw upon sources of information used in other decision-making, may affect the nature and extent of the information required to be provided in the environmental report for the strategic environmental assessment.

60. The stage reached by the ANPS should be seen in the context of the statutory framework of the PA 2008 , as set out above (see paras 19–38). Section 5(5) authorises the Secretary of State to set out in an NPS the type and size of development appropriate nationally or for a specified area and to identify locations which are either suitable or unsuitable for that development. In addition, the Secretary of State may set out criteria to be applied when deciding the suitability of a location. Section 104(3) requires the Secretary of State to decide an application for a DCO in accordance with a relevant NPS, save in so far as any one or more of the exceptions in section 104(4)–(8) applies, which include the situation where the adverse impacts of a proposal are judged to outweigh its benefits (section 104(7)). Section 106(1) empowers the Secretary of State to disregard a representation objecting to such a proposal in so far as it relates to the merits of a policy contained in the NPS.

61. In the present case, the Secretary of State made it plain in the strategic environmental assessment process that the AoS drew upon and updated the extensive work which had previously been carried out by, and on behalf of, the Airports Commission, including numerous reports to the Airports Commission and its own final report. It is common ground that the Secretary of State was entitled to take that course. ***209***

62. Article 6 of the SEA Directive sets out requirements for consultation. Article 6(1) requires that the draft plan or programme and the environmental report be made available to the public and to those authorities designated by a member state under article 6(3) which, by virtue of their specific environmental responsibilities, are likely to be concerned by the environmental effects of implementing plans and programmes. In England, the designated authorities are Natural England, Historic England and the Environment Agency (see regulation 4 of the SEA Regulations). In the case of the ANPS, the Secretary of State also had to consult those designated authorities on the scope and level of detail of the information to be included in the environmental report (article 5(4)).

63. In relation to the consultation process, article 6(2) provides:

> "The authorities referred to in paragraph 3 and the public referred to in paragraph 4 shall be given an early and effective opportunity within appropriate time frames to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan or programme or its submission to the legislative procedure."

64. "The public referred to in [article 6(4)]" is a cross-reference to the rules made by each member state for defining the public affected, or likely to be affected by, or having an interest in the decision-making on the plan. Regulation 13(2) of the SEA Regulations leaves this to be determined as a matter of judgment by the plan-making authority.

65. Article 8 requires the environmental report prepared under article 5 , the opinions expressed under article 6 , and the results of any transboundary consultations under article 7 to be "taken into account during the preparation of the plan or programme and before its adoption or submission to the legislative procedure".

66. In *Cogent Land LLP v Rochford District Council [2013] 1 P & CR 2* Singh J held that a defect in the adequacy of an environmental report prepared for the purposes of the SEA Directive may be cured by the production of supplementary material by the plan-making authority, subject to there being consultation on that material (see paras 111–126). He held that articles 4 , 6(2) and 8 of the Directive, along with their transposition in the SEA Regulations, are consistent with that conclusion; and that none of the previous authorities on the SEA Directive (which he reviewed) suggested otherwise. He held that SEA is not a single document, still less is it the same thing as the "environmental report". Rather, it is a process, during the course of which an environmental report must be produced (see para 112). The Court of Appeal endorsed this analysis in *No Adastral New Town Ltd v Suffolk Coastal District Council [2015] Env LR 28* , in deciding that SEA failures in the early stages of an authority's preparation of its Core Strategy (a statutory development plan) were capable of being, and were in fact, cured by the steps taken in subsequent stages (see paras 48–54). We agree with this analysis.

67. It follows that strategic environmental assessment may properly involve an iterative process; and that it is permissible for a plan-making authority to introduce alterations to its draft plan subject to complying with the information requirements in article 5 and the consultation requirements in articles 6 and 7 . ***210**

68. Regulation 12 of the SEA Regulations transposes the main requirements in article 5 of the Directive governing the content of an environmental report as follows (emphasis added):

> "(2) The report shall identify, describe and evaluate the likely significant effects on the environment of— (a) implementing the plan or programme; and (b) reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme.
>
> "(3) The report shall include such of the information referred to in Schedule 2 to these Regulations *as may reasonably be required* , taking account of— (a) current knowledge and methods of assessment; (b) the contents and level of detail in the plan or programme; (c) the stage of the plan or programme in the decision-making process; and (d) the extent to which certain measures are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment."

Schedule 2 replicates the list of items in Annex I to the SEA Directive . No issue is raised as to the adequacy of that transposition.

69. As the Divisional Court observed, it is plain from the language "as may reasonably be required" that the SEA Regulations, like the SEA Directive, allow the plan-making authority to make a judgment on the nature of the information in Schedule 2 and the level of detail to be provided in an environmental report, whether as published initially or in any subsequent amendment or supplement.

Factual background

70. At the heart of the challenge to the ANPS is the Paris Agreement (para 7 above) which acknowledged that climate change represents "an urgent and potentially irreversible threat to human societies and the planet" (Preamble to the Decision to adopt the Paris Agreement). In article 2 the Paris Agreement sought to enhance the measures to reduce the risks and impacts of climate change by setting a global target of "holding the increase in the global average temperature to well below 2ºC above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5ºC above pre-industrial levels".

Each signatory of the Paris Agreement undertook to take measures to achieve that long-term global temperature goal "so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century" (article 4(1)). Each party agreed to prepare, communicate and maintain successive nationally determined contributions ("NDCs") that it intended to achieve and to pursue domestic mitigation measures with the aim of achieving the objectives of such NDCs (article 4(2)). A party's successive NDC was to progress beyond its current NDC and was to reflect its highest possible ambition (article 4(3)).

71. Notwithstanding the common objectives set out in articles 2 and 4(1) , the Paris Agreement did not impose an obligation on any state to adopt a binding domestic target to ensure that those objectives were met. The specific legal obligation imposed in that regard was to meet any NDC applicable to the state in question. So far as concerns the United Kingdom, it is common ground that the relevant NDC is that adopted and communicated on behalf of the EU, which set a binding target of achieving 40% reduction of 1990 emissions by 2030. This is less stringent than the targets which had already ***211** been set in the fourth and fifth carbon budgets issued pursuant to section 4 of the CCA 2008 , which were respectively a 50% reduction on 1990 levels for the period 2023–2027 and a 57% reduction for the period 2028–2032.

72. Before the United Kingdom had signed or ratified the Paris Agreement two government ministers made statements in the House of Commons about the Government's approach to the Paris Agreement. On 14 March 2016 the Minister of State for Energy, Andrea Leadsom MP, told the House of Commons that the Government

> "believe we will need to take the step of enshrining the Paris goal of net zero emissions in UK law—the question is not whether, but how we do it, and there is an important set of questions to be answered before we do".

Ten days later (24 March 2016) Amber Rudd MP, Secretary of State for Energy and Climate Change, responded to an oral question on what steps her department was taking to enshrine the net zero emissions commitment of the Paris Climate Change Conference by stating that: "the question is not whether we do it but how we do it."

73. The Government received advice from the CCC on the UK's response to the Paris goal. At a meeting on 16 September 2016 the CCC concluded that while a new long-term target would be needed to be consistent with the Paris goal, "the evidence was not sufficient to specify that target now".

74. In October 2016 the CCC published a report entitled "UK Climate Action following the Paris Agreement" on what domestic action the Government should take as part of a fair contribution to the aims of the Paris Agreement. In that report the CCC stated that the goals of the Paris Agreement involved a higher level of global ambition in the reduction of greenhouse gases than that which formed the basis of the UK's existing emissions reduction targets. But the CCC advised that it was neither necessary nor appropriate to amend the 2050 target in section 1 of the CCA 2008 or alter the level of existing carbon budgets at that time. It advised that there would be "several opportunities to revisit the UK's targets in the future" and that "the UK 2050 target is potentially consistent with a wide range of global temperature outcomes". In its executive summary (p 7) the CCC summarised its advice: "Do not set new UK emissions targets now … The five-yearly cycle of pledges and reviews created by the Paris Agreement provides regular opportunities to consider increasing UK ambition."

75. In October 2017 the Government published its "Clean Growth Strategy" which set out its policies and proposals to deliver economic growth and decreased emissions. In Annex C in its discussion of UK climate action it acknowledged the risks posed by the growing level of global climate instability. It recorded the global goals of the Paris Agreement and that global emissions of greenhouse gases would need to peak as soon as possible, reduce rapidly thereafter and reach a net zero level in the second half of this century. It recorded the CCC's advice in these terms:

> "In October 2016 the [CCC] said that the Paris Agreement target 'is more ambitious than both the

> ambition underpinning the UK 2050 target and previous international agreements', but that the UK should not set new UK emissions targets now, as it already had stretching targets and achieving them will be a positive contribution to global ***212** climate action. The CCC advised that the UK's fair contribution to the Paris Agreement should include measures to maintain flexibility to go further on UK targets, the development of options to remove greenhouse gases from the air, and that its targets should be kept under review."

76. In December 2017 Plan B Earth and 11 other claimants commenced judicial review proceedings against the Secretary of State for BEIS and CCC alleging that the Secretary of State had unlawfully failed to revise the 2050 target in section 1 of the CCA 2008 in line with the Paris Agreement.

77. The Secretary of State pleaded:

> "[While] the Government is fully committed to the objectives in the Paris Agreement, the legal obligation upon the Parties is to prepare, communicate and maintain nationally determined contributions to reduce net emissions, with a view to achieving the purpose of holding global average temperature increases to 'well below 2ºC' above pre-industrial levels and pursuing efforts to limit them to 1.5ºC. *This is not the same as a legal duty or obligation for the Parties, individually or collectively, to achieve this aim* ." (Emphasis in original.)

The CCC also explained its position in its written pleadings:

> "The CCC recommended no change to the existing UK 2050 target (at that time, October 2016), not because a more ambitious target was unfeasible, but rather because the existing UK target was potentially consistent with more ambitious global temperature goals, including that in the Paris Agreement."

78. At an oral hearing (*Plan B Earth v Secretary of State for Business, Energy and Industrial Strategy [2019] Env LR 13)* , Supperstone J refused permission to proceed with the judicial review, holding among other things that the Paris Agreement did not impose any legally binding target on each contracting party, that section 2 of the CCA 2008 gave the Secretary of State the power, but did not impose a duty, to amend the 2050 target in the event of developments in scientific knowledge or European or international law or policy, and that on the basis of the advice of the CCC, the Secretary of State was plainly entitled to refuse to change the 2050 target. Asplin LJ refused permission to appeal on 22 January 2019.

79. In January 2018 the CCC published "An independent assessment of the UK's Clean Growth Strategy". In that report the CCC explained that the aim of the Paris Agreement for emissions to reach net zero in the second half of the century was likely to require the UK to revise its statutory 2050 target to seek greater reductions and advised that "it is therefore essential that actions are taken now to enable these deeper reductions to be achieved" (p 21). The CCC invited the Secretary of State for BEIS to seek further advice from it and review the UK's long-term emissions targets after the publication of the report by the Intergovernmental Panel on Climate Change ("IPCC") on the implications of the Paris Agreement's 1.5ºC goal.

80. In January 2018 the Government published "A Green Future: Our 25 Year Plan to Improve the Environment" in which it undertook to continue its work in providing international leadership to meet the goals of the Paris Agreement (for example, p 118). In early 2018 governments, including the UK Government, were able to review a draft of the IPCC report and in early ***213** June 2018 the UK Government submitted final comments on the draft of the IPCC report.

81. On 17 April 2018 the Government announced at the Commonwealth Heads of Government Meeting that after the publication of the IPCC report later that year, it would seek the advice of the CCC on the implications of the Paris Agreement for the UK's long-term emissions reductions targets.

82. At the same time the Government was working to develop an aviation strategy which would address aviation emissions. In April 2018, after public consultation, the Department for Transport published "Beyond the Horizon: The Future of UK Aviation—Next Steps towards an Aviation Strategy" in which it undertook to investigate technical and policy measures to address aviation emissions and how those measures related to the recommendations of the CCC. It stated (para 6.24):

> "The Government will look again at what domestic policies are available to complement its international approach and will consider areas of greater scientific uncertainty, such as the aviation's contribution to non-carbon dioxide climate change effects and how policy might make provision for their effects."

83. On 1 May in response to an oral parliamentary question concerning the offshore wind sector Claire Perry MP, Minister of State for Energy and Clean Growth, stated that the UK was the first developed nation to have said that it wanted to understand how to get to a zero-carbon economy by 2050.

84. On 5 June 2018 the Government issued its response to the consultation on the draft ANPS and the Secretary of State laid the proposed ANPS before Parliament. On the same day, the Secretary of State presented a paper on the proposed ANPS to a Cabinet sub-committee giving updated information on the three short-listed schemes and the Government's preference for the NWR Scheme. In relation to aviation emissions it stated that it was currently uncertain how international carbon emissions would be incorporated into the Government's carbon budget framework, that policy was developing and would be progressed during the development of the Aviation Strategy. The Government's position remained that action to address aviation emissions was best taken at an international level.

85. On 14 June 2018 the Chair of the CCC (Lord Deben) and Deputy Chair (Baroness Brown) wrote to the Secretary of State expressing surprise that he had not referred to the legal targets in the CCA 2008 or the Paris Agreement commitments in his statement to the House of Commons on the proposed ANPS on 5 June and stressing the need for his department to consider aviation's place in the overall strategy for UK emissions reduction. They stated that the Government should not plan for higher levels of aviation emissions "since this would place an unreasonably large burden on other sectors".

86. The Secretary of State responded on 20 June 2018 stating that the Government remained committed to the UK's climate change target and that the proposed ANPS made it clear that an increase in carbon emissions that would have a material impact on the Government's ability to meet its carbon reduction targets would be a reason to refuse development consent for the NWR. He stated that the Government was confident that the measures and requirements set out in the proposed ANPS provided a strong basis for mitigating the environmental impacts of expansion. He explained that ***214** the forthcoming Aviation Strategy would put in place a framework for UK carbon emissions to 2050, "which ensures that aviation contributes its fair share to action on climate change, taking into account the UK's domestic and international obligations".

87. After the parliamentary debate on 25 June 2018 (para 11 above), the Secretary of State designated the ANPS as national policy on 26 June 2018 (para 12 above). Section 5 of the ANPS focused on the potential impacts of the NWR Scheme and the assessments that any applicant would have to carry out and the planning requirements which it would have to meet in order to gain development consent. In its discussion of greenhouse gas emissions the ANPS stated that the applicant would have to

undertake an environmental impact assessment quantifying the greenhouse gas impacts before and after mitigation so that the project could be assessed against the Government's carbon obligations. In para 5.82 the ANPS stated:

> "Any increase in carbon emissions alone is not a reason to refuse development consent, unless the increase in carbon emissions resulting from the project is so significant that it would have a material impact on the ability of Government to meet its carbon reduction targets, including carbon budgets."

88. As in this appeal a challenge has been made as to the factual basis of the Secretary of State's decision not to consider the possible new domestic emissions targets which might result from the Paris Agreement, it is necessary to mention the evidence before the Divisional Court on this matter. In her first witness statement Ms Caroline Low, the Director of the Airport Capacity Programme at the Department for Transport, stated (para 458):

> "In October 2016 the CCC said that the Paris Agreement 'is more ambitious than both the ambition underpinning the UK 2050 target and previous international agreements' but that the UK should not set new UK emissions targets now, as it already has stretching targets and achieving them will be a positive contribution to global climate action. Furthermore, the CCC acknowledged in the context of separate legal action brought by Plan B against the Secretary of State for Business, Energy and Industrial Strategy that it is possible that the existing 2050 target could be consistent with the temperature stabilisation goals set out in the Paris Agreement. Subsequently, in establishing its carbon obligations for the purpose of assessing the impact of airport expansion, my team has followed this advice and considered existing domestic legal obligations as the correct basis for assessing the carbon impact of the project, and that it is not appropriate at this stage for the Government to consider any other possible targets that could arise through the Paris Agreement."

89. Her account was corroborated by Ms Ursula Stevenson, an engineering and project management consultant whom the Secretary of State retained to deal with the process for consideration of the environmental impacts of the NWR Scheme. She stated (witness statement para 3.128) that the Department had followed the CCC's advice when preparing the AoS required by the PA 2008 (see para 28 above) and accordingly had considered existing domestic legal obligations to be the correct basis for assessing the carbon impact of the project. She added: ***215**

> "At this stage, it is not possible to consider what any future targets [sic] might be recommended by the CCC to meet the ambitions of the Paris Agreement. It is expected that, should more ambitious targets be recommended and set through the carbon budgets beyond 2032, then government will be required to make appropriate policy decisions across all sectors of the economy to limit emissions accordingly."

She emphasised (para 3.129) that the obligations under the CCA 2008 could be made more stringent in future, should that prove necessary, and that the ANPS provided that any application for a DCO would have to be assessed by reference to whatever obligations were in place at that time.

90. The IPCC Special Report on Global Warming of 1.5ºC was published on 8 October 2018. It concluded that limiting global warming to that level above pre-industrial levels would significantly reduce the risks of challenging impacts on ecosystems and human health and wellbeing and that it would require "deep emissions reductions" and "rapid, far-reaching and unprecedented changes to all aspects of society". To achieve that target global net emissions of CO2 would need to fall by about 45% from 2010 levels by 2030, reaching zero by 2050.

91. The Government commissioned the CCC to advise on options by which the UK should achieve (i) a net zero greenhouse gas target and/or (ii) a net zero carbon target in order to contribute to the global ambitions set out in the Paris Agreement, including whether now was the right time to set such a target.

92. In December 2018 the Department for Transport published consultation materials on its forthcoming Aviation Strategy. In "Aviation 2050: The future of UK aviation" the Department stated (paras 3.83–3.87) that it proposed to negotiate in the International Civil Aviation Organisation (the UN body responsible for tackling international aviation climate emissions) for a long-term goal for international aviation that is consistent with the temperature goals of the Paris Agreement and that it would consider appropriate domestic action to support international progress. It stated that the Government would review the CCC's revised aviation advice and advice on the implications of the Paris Agreement. In the same month, in a paper commissioned and published by the Department and written by David S Lee, "International aviation and the Paris Agreement temperature goals" the author acknowledged that the Paris Agreement had a temperature-based target which implied the inclusion of all emissions that affect the climate. The author stated that aviation had significant climate impacts from the oxides of nitrogen, particle emissions, and effects on cloudiness but that those impacts were subject to greater scientific uncertainty than the impacts of CO2. It recorded that examples of CO2 emission equivalent metrics indicated up to a doubling of aviation CO2 equivalent emissions to account for those non-CO2 effects.

93. On 1 May 2019 Parliament approved a motion to declare a climate and environmental emergency.

94. On the following day, the CCC published a report entitled "Net zero: The UK's contribution to stopping global warming", in which they recommended that legislation should be passed as soon as possible to create a new statutory target of net-zero greenhouse gases by 2050 and the inclusion of international aviation and shipping in that target (p 15). That ***216** recommendation, so far as it related to the CO2 target, was implemented on 26 June 2019 when the Climate Change Act (2050 Target Amendment) Order 2019 amended section 1(1) of the CCA 2008 .

95. On 24 September 2019 the CCC wrote to the Secretary of State for Transport advising that the international aviation and shipping emissions should be brought formally within the UK's net-zero statutory 2050 target. The statutory target has not yet been changed to this effect but international aviation and shipping are taken into account when the carbon budgets are set against the statutory target: section 10(2)(i) of the CCA 2008 .

96. On 25 June 2020 the CCC published its 2020 Progress Report to Parliament entitled "Reducing UK emissions", in which it recommended that international aviation and shipping be included in the UK climate targets when the Sixth Carbon Budget is set (which should be in **2021**) and net zero plans should be developed (p 22). It recommended that the UK's airport capacity strategy be reviewed in the light of COVID-19 and the net-zero target and that action was needed on non-CO2 effects from aviation (p 180). The parties to this appeal have stated in the agreed statement of facts and issues that it was expected that the Government's Aviation Strategy will be published before the end of 2020.

97. From this narrative of events it is clear that the Government's response to the targets set in the Paris Agreement has been developing over time since 2016, that it has led to the amendment of the statutory CO2 target in section 1(1) of the CCA 2008 approximately one year after the Secretary of State designated the ANPS, and that the Government is still in the process of developing its Aviation Strategy in response to the advice of the CCC.

98. Before turning to the legal challenges in this appeal it is also important to emphasise that, as we have stated in para 10 above, HAL, FoE and Plan B Earth agree that should the NWR Scheme be taken forward to a DCO application, the ANPS would not allow it to be assessed by reference to the carbon reduction targets, including carbon budgets, that were in place when the ANPS was designated in June 2018. The ANPS requires that the scheme be assessed against the carbon reduction targets in place at the time when a DCO application is determined: para 5.82 of the ANPS which we have set out in para 87 above. There is therefore no question of the NWR Scheme being assessed in future against outdated emissions targets.

The judgments of the Divisional Court and the Court of Appeal

99. A number of objectors to the NWR Scheme and the ANPS brought a large number of disparate claims in these proceedings to challenge the ANPS. The Divisional Court heard the claims on a "rolled up" basis, that is to say by considering the question of whether to grant permission to apply for judicial review at the same time as considering the merits of the claims should permission be granted. The hearing lasted for seven days and involved a full merits consideration of all the claims by the Divisional Court. In a judgment of high quality, described by the Court of Appeal as a tour de force, the Divisional Court dismissed all of the claims. For some claims it granted permission to apply for judicial review and then dismissed them on the merits. For others, it decided that they were not reasonably arguable on the merits and refused to grant permission. After thorough examination, the Divisional Court reached the conclusion that none of the claims which ***217** form the subject of grounds (i) to (iv) in the present appeal were reasonably arguable, and accordingly refused permission to apply for judicial review in relation to each of them.

100. In relation to those claims, the Court of Appeal decided that they were both arguable and that they were made out as good claims. Accordingly, the Court of Appeal granted permission in relation to them for the respondents to apply for judicial review of the decision to designate the ANPS and then held that the ANPS was of no legal effect unless and until a review was carried out rectifying the legal errors.

Analysis

Ground (i)—the section 5(8) ground

101. This ground raises a question of statutory interpretation. Section 5(7) and (8) of the PA 2008 , which we set out in para 25 above, provide that an NPS must give reasons for the policy set out in the statement and that the reasons must explain how the policy in the NPS "takes account of Government policy relating to the mitigation of, and adaptation to, climate change".

102. Mr Crosland for Plan B Earth presented this argument. Mr Wolfe QC for FoE adopted his submissions. Mr Crosland submits that it was unlawful for the Secretary of State when stating the reasons for the policy in the ANPS in June 2018 to have treated as irrelevant the Government's commitment to (a) the temperature target in the Paris Agreement and (b) the introduction of a new net-zero carbon target. The Government's commitment to the Paris Agreement targets constituted "Government policy" within the meaning of section 5(8) of the PA 2008 and so should have been addressed in giving the reasons for the ANPS.

103. Plan B Earth advanced this argument before the Divisional Court, which rejected the submission. The Divisional Court held that the Paris Agreement did not impose an obligation on any individual state to implement its global objective in any particular way, Parliament had determined the contribution of the UK towards global targets in section 1 of the CCA 2008 as a national carbon cap which represented the relevant policy in an entrenched form, and the Secretary of State could not change that carbon target unless and until the conditions set out in that Act were met.

104. The Court of Appeal disagreed with the approach of the Divisional Court and held that Government policy in section 5(8) was not confined to the target set out in the CCA 2008 . The words "Government policy" were words of the ordinary English language. Taking into account the consequences of the Paris Agreement involved no inconsistency with the provisions of the CCA 2008 . Based on the Secretary of State's written pleadings the Court of Appeal concluded that the Secretary of State had received and accepted legal advice that he was legally obliged not to take into account the Paris Agreement and the court characterised that as a misdirection of law. We address that conclusion in the next section of this judgment at paras 124–129 below. The court held that section 5(8) of the PA 2008 simply required the Government to take into account its own policy. The statements of Andrea Leadsom MP and Amber Rudd MP in March 2016 (para 72 above) and the formal ratification of the Paris Agreement showed that the Government's commitment to the Paris Agreement was part ***218** of "Government policy" by the time of the designation of the ANPS in June 2018.

105. The principal question for determination is the meaning of "Government policy" in section 5(8) of the PA 2008 . We adopt a purposive approach to this statutory provision which expands upon the obligation in section 5(7) that an NPS give

reasons for the policy set out in it and interpret the statutory words in their context. The purpose of the provision is to make sure that there is a degree of coherence between the policy set out in the NPS and established Government policies relating to the mitigation of and adaptation to climate change. The section speaks of "Government policy", which points toward a policy which has been cleared by the relevant departments on a government-wide basis. In our view the phrase is looking to carefully formulated written statements of policy such as one might find in an NPS, or in statements of national planning policy (such as the National Planning Policy Framework), or in government papers such as the Aviation Policy Framework. For the subsection to operate sensibly the phrase needs to be given a relatively narrow meaning so that the relevant policies can readily be identified. Otherwise, civil servants would have to trawl through Hansard and press statements to see if anything had been said by a minister which might be characterised as "policy". Parliament cannot have intended to create a bear trap for ministers by requiring them to take into account any ministerial statement which could as a matter of ordinary language be described as a statement of policy relating to the relevant field.

106. In our view, the epitome of "Government policy" is a formal written statement of established policy. In so far as the phrase might in some exceptional circumstances extend beyond such written statements, it is appropriate that there be clear limits on what statements count as "Government policy", in order to render them readily identifiable as such. In our view the criteria for a "policy" to which the doctrine of legitimate expectations could be applied would be the absolute minimum required to be satisfied for a statement to constitute "policy" for the purposes of section 5(8) . Those criteria are that a statement qualifies as policy only if it is clear, unambiguous and devoid of relevant qualification: see for example *R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd [1990] 1 WLR 1545* , 1569, per Bingham LJ; *R (Davies) v Revenue and Customs Comrs [2011] 1 WLR 2625* , paras 28 and 29, per Lord Wilson JSC, delivering the judgment with which the majority of the court agreed, and para 70, per Lord Mance JSC. The statements of Andrea Leadsom MP and Amber Rudd MP (para 72 above) on which the Court of Appeal focused and on which Plan B Earth particularly relied do not satisfy those criteria. Their statements were not clear and were not devoid of relevant qualification in this context. They did not refer to the temperature targets at all and they both left open the question of how the Paris Agreement goal of net zero emissions would be enshrined in UK law. Andrea Leadsom went out of her way to emphasise that "there is an important set of questions to be answered before we do." The statements made by these ministers were wholly consistent with and plainly reflected the fact that there was then an inchoate or developing policy being worked on within Government. This does not fall within the statutory phrase.

107. We therefore respectfully disagree with the Court of Appeal in so far as they held ([2020] **PTSR** 1446, para 224) that the words "Government ****219*** policy" were ordinary words which should be applied in their ordinary sense to the facts of a given situation. We also disagree with the court's conclusion (para 228) that the statements by Andrea Leadsom MP and Amber Rudd MP constituted statements of "Government policy" for the purposes of section 5(8) .

108. Although the point had been a matter of contention in the courts below, no party sought to argue before this court that a ratified international treaty which had not been implemented in domestic law fell within the statutory phrase "Government policy". Plan B Earth and FoE did not seek to support the conclusion of the Court of Appeal (para 228) that it "followed from the solemn act of the United Kingdom's ratification of [the Paris Agreement]" that the Government's commitment to it was part of "Government policy". The fact that the United Kingdom had ratified the Paris Agreement is not of itself a statement of Government policy in the requisite sense. Ratification is an act on the international plane. It gives rise to obligations of the United Kingdom in international law which continue whether or not a particular government remains in office and which, as treaty obligations, "are not part of UK law and give rise to no legal rights or obligations in domestic law" (*R (Miller) v Secretary of State for Exiting the European Union [2018] AC 61* , para 55). Ratification does not constitute a commitment operating on the plane of domestic law to perform obligations under the treaty. Moreover, it cannot be regarded in itself as a statement devoid of relevant qualification for the purposes of domestic law, since if treaty obligations are to be given effect in domestic law that will require law-making steps which are uncertain and unspecified at the time of ratification.

109. Before applying these conclusions to the facts of this case, it is necessary to consider another argument which HAL advances in this appeal. HAL renews an argument which the Divisional Court had accepted at least in part. HAL argues that because Parliament had set out the target for the reduction of carbon emissions in section 1 of the CCA 2008 and had established a statutory mechanism by which the target could be altered only with the assent of Parliament, "Government policy" was entrenched in section 1 and could not be altered except by use of the subordinate legislation procedure in sections 2 and 3 of the CCA 2008 . The statutory scheme had either expressly or by necessary implication displaced the prerogative power of the Government to adopt any different policy in this field. In support of this contention HAL refers to

the famous cases of *Attorney General v De Keyser's Royal Hotel Ltd [1920] AC 508* and *R v Secretary of State for the Home Department, Ex p Fire Brigades Union [1995] 2 AC 513* , to which this court referred in *R (Miller) v Secretary of State for Exiting the European Union [2018] AC 61* .

110. The short answer to that submission is that it is possible for the Government to have a policy that it will seek parliamentary approval of an alteration of the carbon target, which is to be taken into account in section 5(8) of the PA 2008 . The ousting of a prerogative power in a field which has become occupied by a corresponding power conferred or regulated by statute is a legal rule which is concerned with the validity of the exercise of a power, and to the extent that exercise of powers might require reference to the target set out in section 1 of the CCA 2008 it would not be open to the Government to make reference to a different target, not as yet endorsed by Parliament under the positive resolution procedure applicable to changes to ***220** that statutory target. However, the rule does not address what is Government policy for the purposes of section 5(8) of the PA 2008 . If at the date when the Secretary of State designated the ANPS, the Government had adopted and articulated a policy that it would seek to introduce a specified new carbon target into section 1 of the CCA 2008 by presenting draft subordinate legislation to that effect for the approval of Parliament, the Secretary of State could readily record in the ANPS that the Government had resolved to seek that change but that it required the consent of Parliament for the new target to have legal effect. Further, questions such as how to mitigate non-CO2 emissions fell outside the carbon emissions target in the CCA 2008 .

111. Turning to the facts of the case, it is clear from the narrative of events in paras 70–96 above that in June 2018, when the Secretary of State for Transport designated the ANPS, the Government's approach on how to adapt its domestic policies to contribute to the global goals of the Paris Agreement was still in a process of development. There was no established policy beyond that already encapsulated in the CCA 2008 . The Government followed the advice of the CCC. The CCC's advice in 2016 was that the evidence was not sufficient to specify a new carbon target and that it was not necessary to do so at that time (paras 73–74 above). In early 2018 the CCC invited the Government to seek further advice from it after the publication of the IPCC's report (para 79 above). During 2018 the Government's policy in relation to aviation emissions was in a process of development and no established policy had emerged on either the steps to be taken at international level or about which domestic measures would be adopted; it was expected that the forthcoming Aviation Strategy would clarify those matters (paras 83 and 86 above). The Government's consultation in December 2018 confirmed that the development of aviation-related targets was continuing and in 2020 the Government's Aviation Strategy is still awaited (paras 92 and 96 above).

112. Against this background, the section 5(8) challenge fails and HAL's appeal on this ground must succeed. It is conceded that the Paris Agreement itself is not Government policy. The statements by Andrea Leadsom MP and Amber Rudd MP in 2016, on which Plan B Earth principally founds, do not amount to Government policy for the purpose of section 5(8) of the PA 2008 . The statements concerning the development of policy which the Government made in 2018 were statements concerning an inchoate and developing policy and not an established policy to which section 5(8) refers. Mr Crosland placed great emphasis on the facts (i) that the Airports Commission had assessed the rival schemes against scenarios, one of which was that overall CO2 emissions were set at a cap consistent with a worldwide goal to limit global warming to 2ºC, and (ii) that that scenario was an input into Secretary of State's assessment of the ANPS at a time when the UK Government had ratified the Paris Agreement and ministers had made the statements to which we referred above. But those facts are irrelevant to the section 5(8) challenge. It is not in dispute that the internationally agreed temperature targets played a formative role in the development of government policy. But that is not enough for Plan B Earth to succeed in this challenge. What Mr Crosland characterised as a "policy commitment" to the Paris Agreement target did not amount to "Government policy" under that subsection.

113. Finally, Mr Crosland sought to raise an argument under section 3 of the Human Rights Act 1998 that interpreting section 5(8) so as to preclude consideration of the temperature limit in the Paris Agreement would tend ***221** to allow major national projects to be developed and that those projects would create an intolerable risk to life and to people's homes contrary to articles 2 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"). This argument must fail for two reasons. First, as Lord Anderson for HAL submits, the argument was advanced as a separate ground before the Divisional Court and rejected, that finding was not appealed to the Court of Appeal, and is therefore not before this court. Secondly, even if it were to be treated as an aspect of Plan B Earth's section 5(8) submission and thus within the scope of the appeal (as Mr Crosland sought to argue), it is in any event unsound because any effect on the lives and family life of those affected by the climate change consequences of the NWR Scheme would result not from the

designation of the ANPS but from the making of a DCO in relation to the scheme. As HAL has conceded and the respondents have agreed, the ANPS requires the NWR Scheme to be assessed against the emissions targets which would be current if and when an application for a DCO were determined.

Ground (ii): the section 10 ground

114. Mr Wolfe for FoE presented the submissions for the respondents on this ground and grounds (iii) and (iv). Mr Crosland for Plan B Earth adopted those submissions.

115. Section 10 of the PA 2008 applies to the Secretary of State's function in promulgating an NPS. In exercising that function the Secretary of State must act with the objective of contributing to the achievement of sustainable development. Sustainable development is a recognised term in the planning context and its meaning is not controversial in these proceedings. As explained in paras 7 and 8 of the National Planning Policy Framework (July 2018), at a very high level the objective of sustainable development involves "meeting the needs of the present without compromising the ability of future generations to meet their own needs"; it has three overarching elements, namely an environmental objective, an economic objective and a social objective. For a major infrastructure project like the development of airport capacity in the South East, which promotes economic development but at the cost of increased greenhouse gases emissions, these elements have to be taken into account and balanced against each other. Section 10(3)(a) provides that the Secretary of State must, in particular, have regard to the desirability of "mitigating, and adapting to, climate change". Unlike in section 5(8) of the PA 2008 , this is not a factor which is tied to Government policy.

116. As it transpired, very little divided the parties under this ground. The basic legal approach is agreed. A useful summation of the law was given by Simon Brown LJ in *R v Somerset County Council, Ex p Fewings [1995] 1 WLR 1037* , 1049, in which he identified three categories of consideration, as follows:

> "the judge speaks of a 'decision-maker who fails to take account of all and only those considerations material to his task'. It is important to bear in mind, however … that there are in fact three categories of consideration. First, those clearly (whether expressly or impliedly) identified by the statute as considerations to which regard must be had. Second, those clearly identified by the statute as considerations to which ***222** regard must not be had. Third, those to which the decision-maker may have regard if in his judgment and discretion he thinks it right to do so. There is, in short, a margin of appreciation within which the decision-maker may decide just what considerations should play a part in his reasoning process."

117. The three categories of consideration were identified by Cooke J in the New Zealand Court of Appeal in *CREEDNZ Inc v Governor General [1981] NZLR 172* , 183:

> "What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the [relevant public authority] as a matter of legal obligation that the court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision."

Cooke J further explained at p 183 in relation to the third category of consideration that, notwithstanding the silence of the statute:

> "there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by [the public authority] … would not be in accordance with the intention of the Act."

118. These passages were approved as a correct statement of principle by the House of Lords in *In re Findlay [1985] AC 318* , 333–334. See also *R (Hurst v London Northern District Coroner [2007] 2 AC 189* , paras 55–59 (Lord Brown of Eaton-under Heywood, with whom a majority of the Appellate Committee agreed); *R (Corner House Research) v Director of the Serious Fraud Office (JUSTICE intervening) [2009] AC 756* , para 40 (Lord Bingham of Cornhill, with whom a majority of the Appellate Committee agreed); and *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council [2020] PTSR 221* , paras 29–32 (Lord Carnwath, with whom the other members of the court agreed). In the *Hurst* case, Lord Brown pointed out that it is usually lawful for a decision-maker to have regard to unincorporated treaty obligations in the exercise of a discretion (para 55), but that it is not unlawful to omit to do so (para 56).

119. As the Court of Appeal correctly held in *Baroness Cumberlege of Newick v Secretary of State for Communities and Local Government [2018] PTSR 2063* , paras 20–26, in line with these other authorities, the test whether a consideration falling within the third category is "so obviously material" that it must be taken into account is the familiar *Wednesbury* irrationality test (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223* ; *Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374* , 410–411, per Lord Diplock).

120. It is possible to subdivide the third category of consideration into two types of case. First, a decision-maker may not advert at all to a particular consideration falling within that category. In such a case, unless the consideration is obviously material according to the *Wednesbury* irrationality test, the decision is not affected by any unlawfulness. Lord Bingham deals with such a case in *Corner House Research* at para 40. There ***223** is no obligation on a decision-maker to work through every consideration which might conceivably be regarded as potentially relevant to the decision they have to take and positively decide to discount it in the exercise of their discretion.

121. Secondly, a decision-maker may in fact turn their mind to a particular consideration falling within the third category, but decide to give the consideration no weight. As we explain below, this is what happened in the present case. The question again is whether the decision-maker acts rationally in doing so. Lord Brown deals with a case of this sort in *Hurst* (see para 59). This shades into a cognate principle of public law, that in normal circumstances the weight to be given to a particular consideration is a matter for the decision-maker, and this includes that a decision-maker might (subject to the test of rationality) lawfully decide to give a consideration no weight: see, in the planning context, *Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759* , 780 (Lord Hoffmann).

122. The Divisional Court ([2020] PTSR 240, para 648) and the Court of Appeal ([2020] PTSR 1446, para 237) held that the Paris Agreement fell within the third category identified in *Fewings [1995] 1 WLR 1037* . In so far as it is an international treaty which has not been incorporated into domestic law, this is correct. In fact, however, as we explain (para 71 above), the UK's obligations under the Paris Agreement are given effect in domestic law, in that the existing carbon target under section 1 of the CCA 2008 and the carbon budgets under section 4 of that Act already meet (and, indeed, go beyond) the UK's obligations under the Paris Agreement to adhere to the NDCs notified on its behalf under that Agreement. The duties under the CCA 2008 clearly were taken into account when the Secretary of State decided to issue the ANPS.

123. At para 5.69 of the ANPS the Secretary of State stated:

> "The Government has a number of international and domestic obligations to limit carbon emissions.

> Emissions from both the construction and operational phases of the [NWR Scheme] project will be relevant to meeting these obligations."

This statement covered the Paris Agreement as well as other international treaties. At para 5.71 the ANPS correctly stated that "[the] UK's obligations on greenhouse gas emissions are set under the [CCA 2008]". As explained above, the relevant NDCs required to be set under the Paris Agreement were covered by the target in the CCA 2008 and the carbon budgets set under that Act. At paras 5.72–5.73 of the ANPS it was explained how aviation emissions were taken into account in setting ***224** carbon budgets under the CCA 2008 in accordance with the advice given by the CCC.

124. We have set out the evidence of Ms Low and Ms Stevenson regarding this topic (paras 88 and 89 above) which confirms that, in acting for the Secretary of State in drawing up the ANPS, they followed the advice of the CCC that the existing measures under the CCA 2008 were capable of being compatible with the 2050 target set by the Paris Agreement. The CCC did not recommend adjusting the UK's targets further at that stage. They were to be kept under review and appropriate adjustments could be made to the emissions target and carbon budgets under the CCA 2008 in future as necessary. According to that advice, therefore, sufficient account was taken of the Paris Agreement by ensuring that the relevant emissions target and carbon budgets under the CCA 2008 would be properly taken into account in the construction and operation of the NWR Scheme. The ANPS ensured that this would occur: see para 5.82 (set out at para 87 above).

125. Therefore, on a correct understanding of the ANPS and the Secretary of State's evidence, this is not a case in which the Secretary of State omitted to give any consideration to the Paris Agreement; nor is it one in which no weight was given to the Paris Agreement when the Secretary of State decided to issue the ANPS. On the contrary, the Secretary of State took the Paris Agreement into account and, to the extent that the obligations under it were already covered by the measures under the CCA 2008 , he gave weight to it and ensured that those obligations would be brought into account in decisions to be taken under the framework established by the ANPS. On proper analysis the question is whether the Secretary of State acted irrationally in omitting to take the Paris Agreement further into account, or give it greater weight, than in fact he did.

126. In its judgment, the Divisional Court recorded (para 638) that the Secretary of State accepted that, in designating the ANPS, he took into account only the CCA 2008 carbon emission targets and did not take into account either the Paris Agreement or otherwise any post-2050 target or non-CO2 emissions (these latter points are relevant to ground (iv) below). However, this way of describing the position masks somewhat the way the Paris Agreement did in fact enter into consideration by the Secretary of State. In the same paragraph, the Divisional Court summarised two submissions advanced by counsel for the Secretary of State as to why the Secretary of State's approach was not unlawful: (i) on its proper construction, and having regard to the express reference to the UK's international obligations in section 104(4) of the PA 2008 , the PA 2008 requires the Secretary of State to ignore international commitments except where they are expressly referred to in that Act; alternatively, (ii) even if not obliged to ignore such commitments, the Secretary of State had a discretion as to whether to do so and was not obliged to take them into account. The Divisional Court rejected the first argument but accepted the second. It noted that the Secretary of State was bound by the obligations in the CCA 2008 , "which … effectively transposed international obligations into domestic law" (para 643). Beyond that, the Secretary of State had a discretion whether to take the Paris Agreement further into account, and had not (even arguably) acted irrationally in deciding not to do so. It therefore refused to give permission for judicial review of the ANPS on this ground. The court said ([2020] **PTSR** 240, para 648):

> " … In our view, given the statutory scheme in the CCA 2008 and the work that was being done on if and how to amend the domestic law to take into account the Paris Agreement, the Secretary of State did not arguably act unlawfully in not taking into account that Agreement when preferring the NWR Scheme and in designating the ANPS as he did. As we have described, if scientific circumstances change, it is open to him to review the ANPS; and, in any event, at the DCO stage this issue will be revisited on the basis of the then up-to-date scientific position."

127. Mr Wolfe sought to support the judgment of the Court of Appeal in relation to this ground. He argued that the evidence for the Secretary of State had to be read in the light of the first submission made by his counsel in the ***225** Divisional Court, and that the true position was that the Secretary of State (acting by his officials and advisers) had been advised that he was not entitled to have regard to the Paris Agreement when deciding whether to designate the ANPS and had proceeded on that basis, with the result that he had not in fact exercised any discretion in deciding not to have further regard to the Paris Agreement. He also submitted that it was obvious that it was a material consideration. Mr Wolfe was successful in persuading the Court of Appeal on these points ([2020] **PTSR** 1446, paras 203 and 234–238 of its judgment). The Court of Appeal accepted his submissions that there was an error of law in the approach of the Secretary of State "because he never asked himself the question whether he could take into account the Paris Agreement pursuant to his obligations under section 10 " and

> "[if] he had asked himself that question … the only answer that would reasonably have been open to him is that the Paris Agreement was so obviously material to the decision he had to make in deciding whether to designate the ANPS that it was irrational not to take it into account".

128. With respect to the Court of Appeal, they were wrong to overturn the judgment of the Divisional Court on this ground. Mr Wolfe's submissions conflated a submission of law (submission (i) above) made by counsel for the Secretary of State as recorded in para 638 of the judgment of the Divisional Court and the evidence of fact given by the relevant witnesses for the Secretary of State. In making his submission of law, counsel was not giving evidence about the factual position. There is a fundamental difference between submissions of law made by counsel and evidence of fact. Clearly, if the Secretary of State had been correct in submission (i) that would have provided an answer to the case against him whatever the position on the facts. This explains why counsel advanced the submission. But it is equally clear that if that submission failed, the Secretary of State made an alternative submission that he had a discretion whether to take the Paris Agreement further into account than was already the case under the CCA 2008 and that there had been no error of law in the exercise of that discretion. That was the submission accepted by the Divisional Court.

129. In our view, both the submissions of Mr Wolfe which the Court of Appeal accepted are unsustainable. The Divisional Court's judgment on this point is correct. On the evidence, the Secretary of State certainly did ask himself the question whether he should take into account the Paris Agreement beyond the extent to which it was already reflected in the obligations under the CCA 2008 and concluded in the exercise of his discretion that it would not be appropriate to do so. As mentioned above, this case is in the class referred to in para 121 above.

130. Mr Wolfe sought to suggest that in deciding the case as it did, the Court of Appeal had acted as a first instance court (since the Divisional Court had refused to give permission for judicial review on this ground) and that it had made factual findings to contrary effect which this court was not entitled to go behind. He also submitted that HAL, in its notice of appeal, had not questioned the factual position as it was taken to be by the Court of Appeal and was therefore not entitled to dispute it on this appeal.

131. Neither of these submissions has any merit. The Divisional Court considered the claims brought against the Secretary of State at a rolled-up ***226** hearing lasting many days and considered each claim in full and in depth. In respect of all aspects of the Divisional Court's decision, both in relation to those claims on which it granted permission for judicial review but then dismissed the claim and in relation to those claims (including those relating to grounds (i) to (iv) in this appeal) on which after full consideration it decided they were unarguable and so refused to grant permission for judicial review, the Court of Appeal correctly understood that its role was the conventional role of an appellate court, to examine whether the Divisional Court had erred in its decision. In any event, this court can read the undisputed evidence of Ms Low and Ms Stevenson for itself and has the benefit of an agreed statement of facts and issues which makes it clear what the true factual position was. The Court of Appeal was wrong to proceed on the basis of a different assessment of the facts. On a fair reading of HAL's notice of appeal, it indicated that its case under this ground was to be that the Secretary of State had a discretion whether to

have regard to the Paris Agreement, which discretion had been exercised lawfully. In any event, that was put beyond doubt by HAL's written case. FoE and Plan B Earth have been on notice of HAL's case under this ground for a long time and are in no way prejudiced by it being presented in submissions to this court.

132. The view formed by the Secretary of State, that the international obligations of the UK under the Paris Agreement were sufficiently taken into account for the purposes of the designation of the ANPS by having regard to the obligations under the CCA 2008 , was in our judgment plainly a rational one. Mr Wolfe barely argued to the contrary. The Secretary of State's assessment was based on the advice of the CCC, as the relevant independent expert body. The assessment cannot be faulted. Further, the ANPS itself indicated at para 5.82 that the up-to-date carbon targets under the CCA 2008 , which would reflect developing science and any change in the UK's international obligations under the Paris Agreement, would be taken into account at the stage of considering whether a DCO should be granted. That was a necessary step before the NWR Scheme could proceed. Moreover, as observed by the Divisional Court, there was scope for the Secretary of State to amend the ANPS under section 6 of the PA 2008 , should that prove to be necessary if it emerged in the future that there was any inconsistency between the ANPS and the UK's obligations under the Paris Agreement.

133. It should also be observed that the carbon emissions associated with all three of the principal options identified by the Airports Commission (that is, the NWR Scheme, the ENR Scheme and the G2R Scheme) were assessed to be broadly similar. Accordingly, reference to the Paris Agreement does not provide any basis for preferring one scheme rather than another. To the extent the obligations under the Paris Agreement have a bearing on the decision to designate the ANPS, therefore, they are only significant if it is to be argued that there should not be any decision to meet economic needs by increasing airport capacity by one of these schemes. But in light of the extensive work done by the Airports Commission about the need for such an increase in capacity it could not be said that the Secretary of State acted irrationally in considering that the case for airport expansion had been sufficiently made out to allow the designation of the ANPS. The respondents did not seek to argue that this aspect of his reasoning was irrational. As we have noted above, the concept of sustainability in section 10 of the PA 2008 includes consideration of economic and social factors as well as environmental ones. ***227**

134. In light of the factual position, it is not necessary to decide the different question whether, if the Secretary of State had omitted to think about the Paris Agreement at all (so that this was a case of the type described in para 120 above), as an unincorporated treaty, that would have constituted an error of law. That is not a straightforward issue and we have not heard submissions on the point. We say no more about it.

Ground (iii): The SEA Directive ground

135. The SEA Directive operates along with the EIA Directive to ensure that environmental impacts from proposals for major development are properly taken into account before a development takes place. The relationship between the Directives was explained by Lord Reed JSC in *Walton v Scottish Ministers [2013] **PTSR** 51* , paras 10–30. The SEA Directive applies "upstream", at the stage of preparation of strategic development plans or proposals. The EIA Directive requires assessment of environmental impacts "downstream", at the stage when consent for a particular development project is sought. Although the two Directives are engaged at different points in the planning process for large infrastructure projects such as the NWR Scheme, they have similar objects and have to deal with similar issues of principle, including in particular the way in which regard should be had to expert assessment of various factors bearing on that process. These points indicate that a similar approach should apply under the two Directives.

136. The SEA Directive is implemented in domestic law by the SEA Regulations. It is common ground that the SEA Regulations are effective in transposing the Directive into domestic law. Accordingly, it is appropriate to focus the discussion of this ground on the SEA Directive itself.

137. The structure of the SEA Directive appears from its provisions, set out and discussed above. The Directive requires that an environmental assessment of major plans and proposals should be carried out. The ANPS is such a plan, which will have a significant effect in setting the policy framework for later consideration of whether to grant a DCO for implementing the NWR Scheme. Therefore the proposal to designate it under section 5 of the PA 2008 required an "environmental assessment" as defined in article 2(b) . The environmental assessment had to include "the preparation of an environmental report" and "the carrying out of consultations". An environmental report for the purposes of the Directive is directed to providing a basis for informed public consultation on the plan.

138. The decision-making framework under the SEA Directive is similar to that under the EIA Directive for environmental assessment of particular projects. Under the EIA Directive, an applicant for planning consent for particular projects has to produce an environmental statement which, among other things, serves as a basis for consultation with the public. Under the SEA Directive, the public authority which proposes the adoption of a strategic plan has to produce an environmental report for the same purpose. In due course, any application by HAL for a DCO will have to go through the process of environmental assessment pursuant to the EIA Directive and the EIA Regulations.

139. FoE and Plan B Earth complain that the environmental report which the Secretary of State was required under the SEA Directive to prepare and publish was defective, in that it did not make reference to the Paris ***228** Agreement. Mr Wolfe pointed out that the Secretary of State did not include the Paris Agreement in the long list of legal instruments and other treaties appended to the scoping report produced in March 2016 (ie after the Paris Agreement was adopted in December 2015 but before it was signed by the UK in April 2016 and ratified by it in November 2016) for the purposes of preparing the draft AoS which was to stand as the Secretary of State's environmental report for the purposes of the SEA Directive for the consultation on the draft ANPS. No reference to the Paris Agreement was included in the AoS used for the February 2017 consultation on the draft ANPS, nor in that used for the October 2017 consultation on the draft ANPS.

140. Against this, HAL points out that the carbon target in the CCA 2008 and the carbon budgets set under that Act were referred to in the AoS, as well as in the draft ANPS itself, so to that extent the UK's obligations under the Paris Agreement were covered in the environmental report. Beyond that, the evidence of Ms Stevenson (who led the team who prepared the AoS on behalf of the Secretary of State) makes it clear that the Secretary of State followed the advice of the CCC in deciding that it was not necessary and would not be appropriate to make further reference to the Paris Agreement in the AoS. The existing domestic legal obligations were considered to be the correct basis for assessing the carbon impact of the project, and it would be speculative and unhelpful to guess at what different targets might be recommended by the CCC in the future. Therefore, despite its omission from the scoping report, when the AoS actually came to be drafted the Paris Agreement (which had been ratified by the UK after the scoping report was issued) had been considered and the Secretary of State, acting by Ms Stevenson and her team, had decided in the exercise of his discretion not to make distinct reference to it.

141. As regards the law, the parties are in agreement. Any obligation to make further reference to the Paris Agreement in the environmental report depended on the application of three provisions of the SEA Directive. Under paragraph (e) of Annex I , the AoS had to provide information in the form of "the environmental protection objectives, established at international, Community or member state level, which are relevant to the plan or programme and the way those objectives and any environmental considerations have been taken into account during its preparation". But, as stated in the introduction to Annex I , this was "subject to article 5(2) and (3) " of the Directive, set out at para 58 above.

142. It is common ground that the effect of article 5(2) and (3) is to confer on the Secretary of State a discretion regarding the information to include in an environmental report. It is also common ground that the approach to be followed in deciding whether the Secretary of State has exercised his discretion unlawfully for the purposes of that provision is that established in relation to the adequacy of an environmental statement when applying the EIA Directive, as set out by Sullivan J in *R (Blewett) v Derbyshire County Council [2004] Env LR 29* (" *Blewett* "). *Blewett* has been consistently followed in relation to judicial review of the adequacy of environmental statements produced for the purposes of environmental assessment under the EIA Directive and endorsed at the highest level. In *Shadwell Estates Ltd v Breckland District Council [2013] EWHC 12 (Admin)* Beatson J held that the *Blewett* approach was also applicable in relation to the adequacy of an environmental report under the SEA Directive. The Divisional Court and the ***229** Court of Appeal in the present case endorsed this view (at paras 401–435 and paras 126–144 of their respective judgments). The respondents have not challenged this and we see no reason to question the conclusion of the courts below on this issue.

143. As Sullivan J held in *Blewett* (paras 32–33), where a public authority has the function of deciding whether to grant planning permission for a project calling for an environmental impact assessment under the EIA Directive and the EIA Regulations, it is for that authority to decide whether the information contained in the document presented as an environmental statement is sufficient to meet the requirements of the Directive, and its decision is subject to review on normal *Wednesbury* principles. Sullivan J observed (para 39) that the process of requiring that the environmental statement is publicised and of public consultation "gives those persons who consider that the environmental statement is inaccurate or inadequate or incomplete an opportunity to point out its deficiencies". The EIA Directive and Regulations do not impose a

standard of perfection in relation to the contents of an environmental statement in order for it to fulfil its function in accordance with the Directive and the Regulations that it should provide an adequate basis for public consultation. At para 41 Sullivan J warned against adoption of an "unduly legalistic approach" in relation to assessment of the adequacy of an environmental statement and said:

> "The [EIA] Regulations should be interpreted as a whole and in a common-sense way. The requirement that 'an [environmental impact assessment] application' (as defined in the Regulations) must be accompanied by an environmental statement is not intended to obstruct such development. As Lord Hoffmann said in *R v North Yorkshire County Council, Ex p Brown [2000] 1 AC 397* , 404, the purpose is 'to ensure that planning decisions which may affect the environment are made on the basis of full information'. In an imperfect world it is an unrealistic counsel of perfection to expect that an applicant's environmental statement will always contain the 'full information' about the environmental impact of a project. The Regulations are not based upon such an unrealistic expectation. They recognise that an environmental statement may well be deficient, and make provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting 'environmental information' provides the local planning authority with as full a picture as possible. There will be cases where the document purporting to be an environmental statement is so deficient that it could not reasonably be described as an environmental statement as defined by the Regulations … but they are likely to be few and far between."

Lord Hoffmann (with whom the other members the Appellate Committee agreed on this issue) approved this statement in *R (Edwards) v Environment Agency [2009] 1 All ER 57* , para 38.

144. As the Divisional Court and the Court of Appeal held in the present case, the discretion of the relevant decision-maker under article 5(2) and (3) of the SEA Directive as to whether the information included in an environmental report is adequate and appropriate for the purposes of providing a sound and sufficient basis for public consultation leading to ***230** a final environmental assessment is likewise subject to the conventional *Wednesbury* standard of review. We agree with the Court of Appeal when it said ([2020] **PTSR** 1446, para 136):

> "The court's role in ensuring that an authority—here the Secretary of State—has complied with the requirements of article 5 and Annex I when preparing an environmental report, must reflect the breadth of the discretion given to it to decide what information 'may reasonably be required' when taking into account the considerations referred to—first, 'current knowledge and methods of assessment'; second, 'the contents and level of detail in the plan or programme'; third, 'its stage in the decision-making process'; and fourth 'the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment'. These requirements leave the authority with a wide range of autonomous judgment on the adequacy of the information provided. It is not for the court to fix this range of judgment more tightly than is necessary. The authority must be free to form a reasonable view of its own on the nature and amount of information required, with the specified considerations in mind. This, in our view, indicates a conventional ' *Wednesbury* ' standard of review—as adopted, for example, in *Blewett* . A standard more intense than that would risk the court being invited, in effect, to substitute its own view on the nature and amount of information included in environmental reports for that of the decision-maker itself. This would exceed the proper remit of the court."

145. The EIA Directive and the SEA Directive are, of course, EU legislative instruments and their application is governed by EU law. However, as the Court of Appeal observed (paras 134–135), the type of complex assessment required in compiling an environmental report for the purposes of environmental assessment is an area where domestic public law principles have the same effect as the parallel requirements of EU law. As Advocate General Léger stated in his opinion in *Upjohn Ltd v Licensing Authority Established Under Medicines Act 1968 (Case C-120/97) [1999] 1 WLR 927* , 937, point 50:

> "… The court has always taken the view that when an authority is required, in the exercise of its functions, to undertake complex assessments, a limited judicial review of the action which that authority alone is entitled to perform must be exercised, since otherwise that authority's freedom of action would be definitively paralysed."

146. The appropriateness of this approach is reinforced in the present context, having regard to the function which an environmental report is supposed to fulfil under the scheme of the SEA Directive. It is intended that such a report should inform the public by providing an appropriate and comprehensible explanation of the relevant policy context for a proposed strategic plan or project to enable them to provide comments thereon, and in particular to suggest reasonable alternatives by which the public need for development in accordance with the proposed plan or project could be met. As article 6(2) states, the public is to have an early and "effective" opportunity to express their opinion on a proposed plan or programme. It is implicit in this objective that the public authority responsible for ***231** promulgating an environmental report should have a significant editorial discretion in compiling the report to ensure that it is properly focused on the key environmental and other factors which might have a bearing on the proposed plan or project. Absent such a discretion, there would be a risk that public authorities would adopt an excessively defensive approach to drafting environmental reports, leading to the reports being excessively burdened with irrelevant or unfocused information which would undermine their utility in informing the general public in such a way that the public is able to understand the key issues and comment on them. In the sort of complex environmental report required in relation to a major project like the NWR Scheme, there is a real danger that defensive drafting by the Secretary of State to include reference to a wide range of considerations which he did not consider to be helpful or appropriate in the context of the decision to be taken would mean that the public would be drowned in unhelpful detail and would lose sight of the wood for the trees, and their ability to comment effectively during the consultation phase would be undermined.

147. The appositeness of Sullivan J's analysis in *Blewett* at para 41, quoted above, has been borne out in this case. The draft ANPS issued with the AoS for the purposes of consultation included the statement that it was compatible with the UK's international obligations in relation to climate change. Concerns about the impact of the expansion of Heathrow on the UK's ability to meet its climate change commitments were raised in representations made during the consultation. In the Government's response to the consultation published on 5 June 2018 these representations were noted and the Government's position in relation to them was explained (paras 8.18–8.19 and 8.25). The Government's view was that the NWR Scheme was capable of being compatible with the UK's international obligations and that there was no good reason to hold up the designation of the ANPS until future policy in relation to aviation carbon emissions, which was in a state of development internationally and domestically, was completely fixed. Accordingly, it is clear that the public was able to comment on the Paris Agreement in the course of the consultation and that their comments were taken into account in the environmental assessment required by the SEA Directive. It again appears from this material that the Secretary of State did have regard to the Paris Agreement when deciding to designate the ANPS.

148. As we have said, Mr Wolfe did not challenge the legal framework set out above. In particular, he did not challenge the appropriateness of applying the *Wednesbury* standard in relation to the exercise of discretion under article 5(2) and (3) . Instead, in line with his submission under ground (ii) above, his submission was that the Secretary of State had decided that the Paris Agreement was not a relevant statement of international policy falling within Annex I , paragraph (e), because he had been advised that it was legally irrelevant to the decision he had to take as to whether to designate the ANPS. Thus, according to Mr Wolfe, the Secretary of State had never reached the stage of exercising his discretion whether to include a

distinct reference to the Paris Agreement in the AoS. The Secretary of State's decision that the Paris Agreement was irrelevant as a matter of law was wrong, and therefore the Secretary of State had erred in law because he simply did not turn his mind to whether reference to it should be included in the environmental report (the AoS). This was the argument which the Court of Appeal accepted at ***232** paras 242 to 247. The Court of Appeal's reasoning on this point was very short because, as it pointed out, it followed its reasoning in relation to the respondents' submissions in relation to section 10 of the PA 2008 (ground (ii) above).

149. In our view, as with the ground (ii) above, Mr Wolfe's submission and the reasoning of the Court of Appeal cannot be sustained in light of the relevant evidence on the facts. As we have explained, the Secretary of State did not treat the Paris Agreement as legally irrelevant and on that basis refuse to consider whether reference should be made to it. On the contrary, as Ms Stevenson explains in her evidence, in compiling the AoS as the environmental statement required under the SEA Directive the Secretary of State decided to follow the advice of the CCC to the effect that the UK's obligations under the Paris Agreement were sufficiently taken into account in the UK's domestic obligations under the CCA 2008 , which were referred to in the ANPS and the AoS. Further reference to the Paris Agreement was not required. As we have already held above, this was an assessment which was plainly rational and lawful.

150. Therefore, we would uphold this ground of appeal as well. Having regard to the evidence regarding the factual position, the Divisional Court was right to reject this complaint by the respondents (paras 650–656). The Secretary of State did not act in breach of any of his obligations under the SEA Directive in drafting the AoS as the relevant environmental report in respect of the ANPS, and in omitting to include any distinct reference in it to the Paris Agreement.

Ground (iv)—the post-2050 and non-CO2 emissions grounds

151. This ground concerns other matters which it is said that the Secretary of State failed to take into consideration in the performance of his duty under section 10(2) and (3) of the PA 2008 . Those provisions, as we have said, obliged the Secretary of State in performing his function of designating the ANPS to do so "with the objective of contributing to sustainable development" and in so doing to "have regard to the desirability of … mitigating, and adapting to, climate change".

152. FoE has argued and the Court of Appeal (paras 248–260) has accepted that the Secretary of State failed in his duty under section 10 to have regard to (i) the effect of emissions created by the NWR Scheme after 2050 and (ii) the effect of non-CO2 emissions from that scheme. The Divisional Court dealt with this matter together with the matter which has become ground (ii) in this appeal, namely whether the Secretary of State failed to have regard to the Paris Agreement in breach of section 10 , as issue 19 in the rolled up hearing (paras 633–648, 659(iv)) and held that that FoE's case was not arguable. The Court of Appeal (para 256) correctly treated this issue as closely bound up with what is now ground (ii) in this appeal. It is not in dispute in this appeal that in assessing whether the Secretary of State was bound to address the effect of the post-2050 emissions and the effect of the non-CO2 emissions in the ANPS we are dealing with the third category of considerations in Simon Brown LJ's categorisation in *R v Somerset County Council, Ex p Fewings* (para 116 above). The Secretary of State had a margin of appreciation in deciding what matters he should consider in performing his section 10 duty. It is also not in dispute that it is appropriate to apply the *Wednesbury* irrationality test to that decision (para 119 above). The task ***233** for the court therefore is one of applying that legal approach to the facts of this case.

153. We address first the question of post-2050 emissions before turning to the non-CO2 emissions.

(i) post-2050 emissions

154. FoE's argument on the relevance to the objectives of the Paris Agreement of the impacts of emissions after 2050 was straightforward. An assessment of the impact of the emissions from aircraft using the north west runway by reference to a greenhouse gas target for 2050 fails to consider whether it would be sustainable for the additional aviation emissions from the use of the north west runway to occur after 2050 given the goal of the Paris Agreement for global emissions to reach net zero in the second half of the century.

155. HAL submitted that the Secretary of State's approach is entirely rational. Lord Anderson points out, and FoE accepts,

that the Airports Commission assessed the carbon emissions of each of the short-listed schemes over a 60-year appraisal period up to 2085/2086 and that the same appraisal period was used in the AoS which accompanied the ANPS. The Secretary of State therefore did take into account the fact that there would be carbon emissions from the use of the north west runway after 2050 and quantified those emissions. It was not irrational to decide not to attempt to assess post-2050 emissions by reference to future policies which had yet to be formulated. It was rational for him to assume that future policies in relation to the post-2050 period, including new emissions targets, could be enforced by the DCO process and mechanisms such as carbon pricing, improvements to aircraft design, operational efficiency improvements and limitation of demand growth.

156. In our view, HAL is correct in its submission that the Secretary of State did not act irrationally in not attempting in the ANPS to assess post-2050 emissions against policies which had yet to be determined. It is clear from the AoS that the Department for Transport modelled the likely future carbon emissions of both Heathrow and Gatwick airports, covering aircraft and other sources of emissions, to 2085/2086 (paras 6.11.1–6.11.3, 6.11.13 and Table 6.4). As we have set out in our discussion of ground (i) above, policy in response to the global goals of the Paris Agreement was in the course of development in June 2018 when the Secretary of State designated the ANPS and remains in development.

157. Further, as we have already pointed out (paras 10 and 98 above), the designation of the NWR Scheme in the ANPS did not immunise the scheme from complying with future changes of law and policy. The NWR Scheme would fall to be assessed against the emissions targets which were in force at the date of the determination of the application for a DCO. Under section 120 of the PA 2008 (para 37 above) the DCO may impose requirements corresponding to planning conditions and requirements that the approval of the Secretary of State be obtained. Under section 104 (para 35 above), the Secretary of State is not obliged to decide the application for the DCO in accordance with the ANPS if (i) that would lead the United Kingdom ***234*** to be in breach of any of its international obligations, (ii) that would lead the Secretary of State be in breach of any duty imposed by or under any other enactment, (iii) the Secretary of State is satisfied that deciding the application in accordance with the ANPS would be unlawful by virtue of any enactment and (iv) the Secretary of State is satisfied that the adverse impact of the proposed development would outweigh its benefits. There are therefore provisions in place to make sure that the NWR Scheme complies with law and policy, including the Government's forthcoming Aviation Strategy, at the date when the DCO application is determined.

158. There are also mechanisms available to the Government, as HAL submits (para 155 above), by which the emissions from the use of the north west runway can be controlled.

(ii) non-CO2 emissions

159. To understand FoE's argument in relation to non-CO2 emissions, it is necessary first to identify what are the principal emissions which give rise to concern. Mr Tim Johnson, of the Aviation Environmental Federation, explained in his first witness statement that aircraft emit nitrogen oxides, water vapour and sulphate and soot aerosols, which combine to have a net warming effect. Depending on atmospheric humidity, the hot air from aircraft exhausts combines with water vapour in the atmosphere to form ice crystals which appear as linear condensation trails and can lead to cirrus-like cloud formation. Using the metric of radiative forcing (RF), which is a measure of changes in the energy balance of the atmosphere in watts per square metre, it is estimated that the overall RF by aircraft is 1.9 times greater than the forcing by aircraft CO2 emissions alone, but the RF metric is not suitable for forecasting future impacts. He recognised that there is continuing uncertainty about the impacts of non-CO2 emissions, which tend to be short-lived, but he stated that there is high scientific consensus that the total climate warming effect of aviation is more than that from CO2 emissions alone. Scientists are exploring metrics to show how non-CO2 impacts can be reflected in emission forecasts for the purpose of formulating policy.

160. There is substantial agreement between the parties that there is continuing uncertainty in the scientific community about the effects of non-CO2 emissions. The Department for Transport acknowledged this uncertainty in the AoS (para 6.11.11):

> "The assessment undertaken is based on CO2 emissions only … There are likely to be highly significant climate change impacts associated with non-CO2 emissions from aviation, which could be of a similar magnitude to the CO2 emissions themselves, but which cannot be readily quantified due to the level of scientific uncertainty and have therefore not been assessed. There are also non-CO2 emissions associated with the operation of the airport infrastructure, such as from refrigerant leaks and organic waste arisings, however, evidence suggests that these are minor and not

likely to be material." ***235**

The AoS returned to this topic (Appendix A-9, para 9.11.5):

> "In addition, there are non-carbon emissions associated with the combustion of fuels in aircraft engines while in flight, which are also thought to have an impact on climate change. As well as CO2, combustion of aviation fuel results in emission of water vapour, nitrogen oxides (NOx) and aerosols. NOx are indirect greenhouse gases, in that they do not give rise to a radiative effect themselves, but influence the concentration of other direct greenhouse gases … With the exception of sulphate aerosols, all other emissions cause warming. In addition, the flight of aircraft can also cause formation of linear ice clouds (contrails) and can lead to further subsequent aviation-induced cloudiness. These cloud effects cause additional warming. Evidence suggests that the global warming impact of aviation, with these sources included, could be up to two times that of the CO2 impact by itself, but that the level of scientific uncertainty involved means that no multiplier should be applied to the assessment. For these reasons the [Airports Commission] did not assess the impact of the non-CO2 effects of aviation and these have not been included in the AoS assessment. This position is kept under review by DfT but it is worth noting that non-CO2 emissions of this type are not currently included in any domestic or international legislation or emissions targets and so their inclusion in the assessment would not affect its conclusion regarding legal compliance. *It is recommended that further work be done on these impacts by the applicant during the detailed scheme design, according to the latest appraisal guidance* ." (Emphasis added.)

161. This approach of addressing the question of capacity by reference to CO2 emissions targets, keeping the policy in relation to non-CO2 emissions under review and requiring an applicant for a DCO to address such impacts by reference to the state of knowledge current at the time of the determination of its application was consistent with the advice of the CCC to the Airports Commission and to the Secretary of State. The Airports Commission recorded that advice in its interim report in December 2013: because of the uncertainties in the quantification of the impact of non-CO2 emissions, the target for constraining CO2 emissions remained the most appropriate basis for planning future airport capacity. The approach of reconsidering the effect of all significant emissions when determining an application for a DCO is reflected in the ANPS which addressed the CO2 emissions target and stated (para 5.76):

> "Pursuant to the terms of the Environmental Impact Assessment Regulations, the applicant should undertake an assessment of the project as part of the environmental statement, to include an assessment of *any likely significant climate factors* … The applicant should quantify the greenhouse gas impacts before and after mitigation to show the impacts of the proposed mitigation." (Emphasis added.)

The approach remains consistent with the CCC's advice since the designation of the ANPS. In its letter of 24 September 2019 to the Secretary of State recommending that international aviation and shipping emissions be included in a net-zero CO2 emissions target, the CCC stated: ***236**

> "Aviation is likely to be the largest emitting sector in the UK by 2050, even with strong progress on technology and limiting demand. *Aviation also has climate warming effects beyond CO2, which it will be important to monitor and consider within future policies* ." (Emphasis added.)

162. The Government in its response to consultations on the ANPS (para 11.50) stated that it will address how policy might make provision for the effects of non-CO2 aviation emissions in its Aviation Strategy. That strategy is due to be published shortly.

163. The Secretary of State when he designated the ANPS was aware that the applicant for a DCO in relation to the NWR Scheme would have to provide an environmental assessment which addressed, and would be scrutinised against, the then current domestic and international rules and policies on aviation and other emissions. He would have been aware of his power to make requirements under section 120 of the PA 2008 and to depart from the ANPS in the circumstances set out in section 104 of that Act (para 157 above).

164. The Court of Appeal ([2020] **PTSR** 1446, para 258) upheld FoE's challenge stating the precautionary principle and common sense suggested that scientific uncertainty was not a reason for not taking something into account at all, even if it could not be precisely quantified at this stage. The court did not hold in terms that the Secretary of State had acted irrationally in this regard but said (para 261) that, since it was remitting the ANPS to the Secretary of State for reconsideration, the question of non-CO2 emissions and the effect of post-2050 emissions would need to be taken into account as part of that exercise.

165. We respectfully disagree with that approach. The precautionary principle adds nothing to the argument in this context and we construe the judgment as equating the principle with common sense. But a court's view of common sense is not the same as a finding of irrationality, which is the only relevant basis on which FoE seeks to impugn the designation in its section 10 challenges. In any event we are satisfied that the Secretary of State's decision to address only CO2 emissions in the ANPS was not irrational.

166. In summary, we agree with the Divisional Court that it is not reasonably arguable that the Secretary of State acted irrationally in not addressing the effect of the non-CO2 emissions in the ANPS for six reasons. First, his decision reflected the uncertainty over the climate change effects of non-CO2 emissions and the absence of an agreed metric which could inform policy. Secondly, it was consistent with the advice which he had received from the CCC. Thirdly, it was taken in the context of the Government's inchoate response to the Paris Agreement. Fourthly, the decision was taken in the context in which his department was developing as part of that response its Aviation Strategy, which would seek to address non-CO2 emissions. Fifthly, the designation of the ANPS was only the first stage in a process by which permission could be given for the NWR Scheme to proceed and the Secretary of State had powers at the DCO stage to address those emissions. Sixthly, it is clear from both the AoS and the ANPS itself that the applicant for a DCO would have to address the environmental rules and policies which were current when its application would be determined. ***237**

Conclusion

167. It follows that HAL succeeds on each of grounds (i) to (iv) of its appeal. It is not necessary therefore to address ground (v) which is concerned with the question whether the court should have granted the relief which it did. We would allow the appeal.

Shiranikha Herbert, Barrister ***238**

Appeal allowed.

Footnotes

1 Planning Act 2008, s 5(5)–(8) : see post, para 25. S 10(1)–(3) : see post, para 26.

APPENDIX B

Neutral Citation Number: [2020] EWHC 1303 (Admin)

Case No: CO/4498/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/05/2020

Before :

THE HON. MR JUSTICE HOLGATE

- -

Between :

The Queen on the application of ClientEarth	**Claimant**
- and -	
Secretary of State for Business, Energy and Industrial Strategy	**Defendant**
-and-	
Drax Power Ltd	**Interested Party**

- -

- -

Mr Gregory Jones QC and Ms Merrow Golden (instructed by **ClientEarth**) for the **Claimant**
Mr Andrew Tait QC and Mr Ned Westaway (instructed by **Government Legal Department**) for the **Defendant**
Mr James Strachan QC and Mr Mark Westmoreland Smith (instructed by **Pinsent Masons LLP**) for the **Interested Party**

Hearing dates: 28th – 30th April 2020

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, released to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 14:00 on the 22th May 2020

Mr Justice Holgate :

Introduction

1. The Claimant, ClientEarth, applies under s. 118 of the Planning Act 2008 ("PA 2008") for judicial review of the decision by the Defendant, the Secretary of State for Business, Energy and Industrial Strategy, on 4 October 2019 to grant the application made by Drax Power Limited ("Drax") for a development consent order ("DCO") for a "nationally significant infrastructure project" ("NSIP"): the construction and operation of two gas-fired generating units situated at the existing Drax Power Station near Selby in North Yorkshire ("the development"). The Order made by the Secretary of State is The Drax Power (Generating Stations) Order 2019 (SI 2019 No. 1315) ("the Order").

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

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

4. The proposal by Drax gave rise to a number of controversial issues which were considered during the examination of the application. Some of those issues are raised in grounds of challenge in these proceedings. It is important to emphasise at the outset that it is not for the court to consider the merits of the proposed development or of the objections made to it. It is only concerned with whether an error of law was made in the decision or in the process leading up to it.

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

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

The development

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

8. The development also includes switchgear buildings, a natural gas reception facility, an above ground gas installation, an underground gas pipeline, underground electrical connections, temporary construction areas, a reserve space for Carbon Capture Storage ("CCS"), landscaping and biodiversity measures, demolition and construction of sludge lagoons, removal of an existing 132 kV overhead line, pylons and further associated development. The development would also involve a 3 km gas pipeline connecting to the National Grid Feeder lying to the east of the site.

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

Need for the development

10. The Claimant participated in the examination, by attending hearings and submitting a number of written representations. The Claimant objected to the development on the grounds that its adverse impacts outweighed its benefits, both as assessed under the NPSs and through the application of the balancing exercise required by s 104(7) of PA 2008 (see below). The Claimant's position was that there was no need for the proposed development and that it would have significant adverse environmental impacts, particularly in respect of likely GHG emissions, the risk of "carbon lock-in" and impact on climate change.

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

Climate change and GHG emissions

12. The Environmental Statement ("ES") submitted with the application contained an assessment of the likely significant effects of the development upon climate change. It estimated that the development would cause GHG emissions to increase from 188,323,000 tCO2e to 287,568,000 tCO2e over the period 2020 to 2050 against the baseline position, a 90% net increase. But at the same time, there would be an increase in the maximum generating capacity from 1320 MW to 3600 MW for the

development (excluding the battery storage capability), representing an increase of 173% in the maximum electricity generating capacity.

13. Relating the emissions produced to the generating capacity, the ES assessed that the GHG emissions *intensity* for the existing coal fired units would be 840 gCO2e/kWh in the period 2020 to 2025 and fall to 450 gCO2e/kWh in the period 2026 to 2050 in the baseline scenario. For the development, the figure would be 380 gCO2e/kWh, representing a 55% reduction in GHG intensity for the period 2023 to 2025 and a 16% reduction in the period 2026 to 2050.

14. According to the Claimant's assessment, the development would result in a 443% increase in emissions intensity (using an average baseline emissions intensity of 70 gCO2e/kWh) and a 488% increase in total GHG emissions.

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

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

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

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

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

19. The Secretary of State disagreed with the Panel's recommendation and decided that the Order should be made, concluding at DL 7.1 that "there is a compelling case for granting consent for the development" and that:-

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

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

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

22. In DL 6.8 and 6.9 the Secretary of State referred to negative visual and landscape impacts and to the positive effects of the development regarding biodiversity and socio-economic matters and the proposed re-use of existing infrastructure at the power station. She concluded that "there are strong arguments in favour of granting consent for the full, two gas units and two battery storage units, 3.8 GW project because of its contribution to meeting the need case set out in the NPSs". She therefore considered that the benefits of the proposal outweighed its adverse effects for the purposes of s. 104(7) of the PA 2008.

23. Originally the Claimant advanced 9 grounds of challenge to the Secretary of State's decision. In summary the raised the following issues:

> **Ground 1:** The Defendant misinterpreted the NPS EN-1 on the assessment of the "need" for the Development.
>
> **Ground 2:** The Defendant failed to give adequate reasons for her assessment of the "need" for the Development.
>
> **Ground 3:** The Defendant misinterpreted NPS EN-1 on the assessment of GHG emissions.
>
> **Ground 4:** The Defendant misinterpreted and misapplied section 104(7) of the Planning Act 2008.
>
> **Ground 5:** The Defendant failed to assess the carbon-capture readiness of the Development correctly in accordance with EN-1.
>
> **Ground 6:** The Defendant failed to comply with the requirements of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017.
>
> **Ground 7:** The Defendant's consideration of the net zero target was procedurally unfair and, or in the alternative, the Defendant failed to give adequate reasons for her consideration of the net zero target.
>
> **Ground 8:** The Defendant failed to fully consider the net zero target, including whether to impose a time-limiting condition on the Development.
>
> **Ground 9:** The Decision was irrational.

24. This judgment is structured as follows (with paragraph numbers):-

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

The Planning Act 2008

The White Paper: Planning for a Sustainable Future

26. The statutory framework of the Planning Act 2008 was summarised by the Divisional Court in R (Spurrier) v Secretary of State for Transport [2020] PTSR 240 at [20] to [40]. This bespoke form of development control for NSIPs had its origins in the White Paper published in May 2007, "Planning for a Sustainable Future" (Cm. 7120). A key problem which the legislation was designed to tackle was the lack of clear statements of national policy, particularly on the national need for infrastructure. This had caused, for example, significant delays at the public inquiry stage because national policy had to be clarified and need had to be established through the inquiry process for each individual application. Sometimes the evidence at individual inquiries might not have given a sufficiently full picture. Furthermore, there was no prior consultation

process by which the public and interested parties could participate in the formulation of national policy, which might only emerge through ad hoc decisions by ministers on individual planning appeals.

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

28. Paragraph 3.4 stated that NPSs:-

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

29. Paragraph 3.8 explained that NPSs would need to reflect differences between infrastructure sectors, so that in contrast to projects dependent on public funding where Government has a large influence on what goes ahead:-

> "where government policy is primarily providing a framework for private sector investment determined by the market, policy statements are likely to be less prescriptive."

Likewise, paragraph 3.9 recognised that in the energy sector:-

> "the precise energy mix, and therefore the nature of infrastructure needed to meet demand, is determined to a large extent by the market."

30. Paragraph 3.11 stated:-

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

31. So the object was for policies on matters such as the need for infrastructure to be formulated and tested through the process leading up to the decision to adopt a national policy statement and to that extent they would not be open to challenge through subsequent consenting procedures. New evidence, such as a change in circumstance since the policy was adopted, would be addressed by the Secretary of

State making a revision to the policy, in so far as he or she judged that to be appropriate. In essence, the 2008 Act gave effect to these principles.

Statutory Framework

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

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

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

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

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

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

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

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

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

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

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

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

42. Mr. Tait QC for the Secretary of State and Mr. Strachan QC for Drax submitted that these provisions give effect to the principle that the policy laid down in an NPS, for example on the need for particular infrastructure, is to be treated as settled for the purposes of examining and determining an application for a DCO, and thus not open to challenge in that process. That principle has been considered by the courts in R (Thames Blue Green Economy Limited) v Secretary of State for Communities and Local Government [2015] EWHC 727 (Admin); [2015] EWCA Civ 876; [2016] J.P.L. 157; R (Scarisbrick) v Secretary of State for Communities and Local Government [2017] EWCA Civ 787; and Spurrier at [99] to [111], to which I return below.

43. The Claimant in this case seeks to protect environmental and health interests of great public importance which it says argue strongly against any development of the kind proposed taking place. But those matters are not freestanding. There are also other public interest issues which operate in favour of such development, such as its contribution to security and diversity of energy supply and the provision of support for the transition to a low carbon economy. Policy-making in this area involves the

striking of a balance in which these and a great many other issues are assessed and weighed, This is carried on at a high strategic level and involves political judgment as to what is in the public interest.

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

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

45. Also in Alconbury Lord Clyde stated at [140]:-

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

and at [141]:-

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

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

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

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

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

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

49. Section 104(5) provides:-

> "This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the Secretary of State being in breach of any duty imposed on the Secretary of State by or under any enactment."

50. Section 104(7) provides:-

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

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

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

The National Policy Statements on energy infrastructure

EN-1

53. EN-1 sets out the overarching policy for delivery of major energy infrastructure. It is to be read alongside 5 technology-specific NPSs for the energy sector (para. 1.7). In the present case EN-2 is relevant.

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

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

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

57. In accordance with the requirements of the 2004 Regulations for SEA, the AoS assessed "reasonable alternatives" to the policies set out in EN-1 at a strategic level (para. 1.7.5). Alternative A3 placed more emphasis on reducing CO_2 emissions which would be beneficial for climate change (para.1.7.8). It was concluded that it would not be possible to give practical effect to that alternative *through the planning system* in the next 10 years or so without adverse risks to the security of supply. Alternative A3 was not preferred to the policies in EN-1, but the Government said that it would consider other ways in which to encourage industry to accelerate progress towards a low carbon economy, particularly through the Electricity Market Reform project addressed in section 2.2 of the NPS (para.1.7.9). Paragraph 1.7.12 explained that because all the alternatives were "assessed as performing less well than EN-1 against one or more of the criteria for climate change or security of energy supply that are fundamental objectives of the plan" the Government's preferred option was to proceed with EN-1 to EN-6.

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

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

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

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

62. Paragraph 2.2.4 states:-

> "…the planning system is only one of a number of vehicles that helps to deliver Government energy and climate change policy. The role of the planning system is to provide a framework which permits the construction of whatever Government – and players in the market responding to rules, incentives or signals from

> Government – have identified as the types of infrastructure we need in the places where it is acceptable in planning terms."

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

64. The CCA 2008 has been put in place in order to drive the transition needed, by delivering emission reductions through a series of 5 year carbon budgets setting a trajectory to 2050 (para. 2.2.8).

65. Paragraphs 2.2.12 to 2.2.15 explain how the EU Emissions Trading System ("EU ETS") "forms the cornerstone of UK action to reduce greenhouse gas emissions from the power sector." The system sets a cap on emissions for different sectors of industry, including electricity generation. The cap translates to a finite number of allowances to emit GHG, which can be traded between operators, creating a carbon price, which in turn makes the production of electricity from carbon intensive power stations less attractive and creates an incentive for investment in cleaner electricity generation. The Government proposed to increase the emissions reduction target from 20% to 30% by 2020 and intended to go further than EU ETS to ensure developers invest in low carbon generation "to decarbonise the way in which we produce electricity and reinforce our security of supply, …" through its "Electricity Market Reform project" described in paragraphs 2.2.16 to 2.2.19. Paragraph 2.2.17 of EN-1 described a package of reforms which included an emissions performance standard.

66. Paragraph 2.2.19 makes this important statement:-

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

67. It is fundamental to a proper understanding of the policies in Part 3 on need that they be seen within the overall policy context in EN-1. Thus, planning operates in a market-based system and is only one of a number of vehicles for the delivery of energy and climate change policy. Planning provides a framework which allows the construction of whatever Government, or "players in the market" responding to rules, incentives or signals from Government, identify as the types of infrastructure needed

in locations acceptable in planning terms. The "incentives" and "signals" (further explained in para. 2.2.24) may be given through the EU ETS and Electricity Market Reforms.

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

69. Paragraph 2.2.23 states that:

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

70. According to paragraph 2.2.25 the two main challenges to security of supply during that transition are:-

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

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

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

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

72. Mr. Jones QC for the Claimant laid much emphasis on the reference in paragraph 3.1.4 to the contribution made by a project to satisfying need, which also appears towards the end of paragraph 3.2.3:-

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

73. However, Mr. Jones QC accepted that although paragraph 3.1.3 states that the "scale" and "urgency" of need is described for each type of infrastructure, EN-1 does not seek to define need in quantitative terms (save in the limited respects mentioned below). In my judgment, this is consistent with (a) the broad indications of the potential need to double or treble generating capacity by 2050 previously given in Part 2 of the NPS (see paragraph 60 above) and (b) the unequivocal statement in paragraph 3.1.2 that it is inappropriate for planning policy to set targets for, or limits on, different types of technology.

74. One aspect of quantitative need concerns the requirement to replace power stations which have to be closed (paras. 3.3.7 to 3.3.9). Within the UK at least 22 GW of existing generating capacity will need to be replaced, particularly during the period to 2020, as the result of stricter environmental standards and ageing power stations. The closure of about 12 GW capacity relates to coal and oil power stations and results from controls under the Large Combustion Plant Directive (Directive 2001/80/EC) on emissions of sulphur and nitrogen dioxide. In addition, approximately 10 GW of nuclear generating capacity is expected to close by about 2031. The imposition of even stricter limits on emissions of sulphur and NO_X is likely to result in additional closures of power stations. It will be recalled that the present proposal is for the construction of two gas fired units in place of 2 coal fired units which are to be decommissioned in 2022.

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

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

76. Paragraph 3.3.18 warned that it was not possible to make an accurate prediction of the size and shape of demand for electricity in 2025, but used "Updated Energy and Emissions" projections ("UEP") published by the former Department of Energy and Climate Change ("DECC") as a "starting point" to get "a sense of the possible scale of future demand to 2025". It is also essential to note the further warning that:-

> "The projections do not reflect a desired or preferred outcome for the Government in relation to the need for additional electricity generating capacity or the types of electricity generation required."

Paragraph 3.3.21 added that the projections helped to illustrate the scale of the challenge faced by the UK and the Government to understand *how the market might respond.*

77. Based on one of the scenarios studied, paragraph 3.3.22 indicated that by 2025 the UK would need at least 113 GW of total electricity generating capacity, compared to 85 GW in 2011, of which 59 GW would be new build. Around 33 GW of new capacity by 2025 would need to come from renewable sources, and it would be for industry to determine the exact mix of the remaining 26 GW within the strategic framework set by Government. After allowing for projects already under construction, the NPS suggested that 18 GW remained to be provided as new non-renewable capacity by 2025. The Government stated that it would like a significant proportion of that balance of 18 GW to be provided by new low carbon generation and, in principle, nuclear power should be free to contribute as much as possible towards this need up to the interim milestone of 2025. Footnote 36 expressed the judgment that it would not be prudent when determining national policy to take into account consents for other energy projects where construction had yet to begin.

78. Paragraph 3.3.23 stated that:-

> "To minimise risks to energy security and resilience, the Government therefore believes it is prudent to plan for a *minimum* need of 59 GW of new electricity capability by 2025." (emphasis added)

79. To avoid any misunderstanding of the exercise carried out in paragraphs 3.3.15 to 3.3.23 of EN-1, paragraph 3.3.24 repeated the approach which had already been clearly laid down in Part 2 and in paragraph 3.1.2:-

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

80. Thus, it is plain that, apart from indicating need for a *minimum* amount of new capacity by 2025, the references to need in EN-1 were not expressed in quantitative terms. That is said to be consistent with the market-based system under which

electricity generation is provided and the other non-planning mechanisms by which Government seeks to influence the operation of the market.

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

82. Paragraphs 3.3.2 to 3.3.3 state:-

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

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

> "• fossil fuel generation can be brought on line quickly when there is high demand and shut down when demand is low, thus complementing generation from nuclear and the intermittent generation from renewables. However, until such time as fossil fuel generation can effectively operate with Carbon Capture and Storage (CCS), such power stations will not be low carbon (see Section 3.6).
>
> • renewables offer a low carbon and proven (for example, onshore and offshore wind) fuel source, but many renewable technologies provide intermittent generation (see Section 3.4); and
>
> • nuclear power is a proven technology that is able to provide continuous low carbon generation, which will help to reduce the UK's dependence on imports of fossil fuels (see Section 3.5). Whilst capable of responding to peaks and troughs in demand or supply, it is not as cost efficient to use nuclear power stations in this way when compared to fossil fuel generation."

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

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

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

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

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

86. Paragraph 3.3.12 then makes a statement which was directly relevant to the present case:-

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

87. It will be recalled that paragraph 3.1.3 of EN-1 says that the "scale" and "urgency" of the need for each type of infrastructure is indicated in the following sections of Part 3. Section 3.4 describes the important role of renewable electricity generation. Paragraph 3.4.1 refers to the UK's commitment to producing 15% of its total energy from renewable sources by 2020. Paragraph 3.4.5 states:-

> > "To hit this target, and to largely decarbonise the power sector by 2030, it is necessary to bring forward new renewable electricity generating projects as soon as possible. The need for new renewable electricity generation projects is therefore urgent."

88. Section 3.5 addresses the role of nuclear power. It is a low carbon, proven technology, which is anticipated to play an increasingly important role in the move to diversifying and decarbonising sources of electricity (para. 3.5.1). According to paragraph 3.5.2, "it is Government policy that new nuclear power should be able to contribute as much as possible to the UK's need for new capacity", before going on to acknowledge that

it is not possible to predict whether or not there will be a reactor (or more than one reactor) at each of the eight sites identified in EN-6.

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

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

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

91. Paragraph 3.6.2 states:-

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

92. Paragraph 3.6.3 states:-

> "Some of the new conventional generating capacity needed is likely to come from new fossil fuel generating capacity in order to maintain security of supply, and to provide flexible back-up for intermittent renewable energy from wind. The use of fossil fuels to generate electricity produces atmospheric emissions of carbon dioxide. The amount of carbon dioxide produced depends, amongst other things, on the type of fuel and the design and age of the power station. At present coal typically produces about twice as much carbon dioxide as gas, per unit of electricity generated. However, as explained further below, new technology offers the prospect of reducing the carbon dioxide emissions of both fuels to a level where, whilst retaining many of their existing advantages, they also can be regarded as low carbon energy sources."

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

93. Paragraph 3.6.4 explains the importance of Carbon Capture and Storage ("CCS") which has the potential to reduce carbon emissions from fossil fuel generation by up to 90%. Whilst there is a high level of confidence that CCS technology will be effective, there is uncertainty about its impact on the economics of power station operation and hence its development. CCS needs to be demonstrated on a commercial scale. Consequently, the Government was providing support for four commercial

scale demonstration projects on coal fired stations (paras. 3.6.5 and 4.7.4). Paragraph 3.6.6 requires all commercial fossil fuel power stations with a capacity over 300 MW to be constructed Carbon Capture Ready ("CCR"). This requirement is explained in more detail in paragraphs 4.7.10 to 4.7.17 of EN-1.

94. The need for fossil fuel electricity generation was addressed in paragraph 3.6.8:-

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

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

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

EN-2

96. EN-2 applies to fossil fuel electricity generating infrastructure, including gas-fired power stations with a capacity over 50 MW (para. 1.8.1). It is to be read in conjunction with EN-1, which covers *inter alia* the need and urgency for new energy infrastructure to be consented and built with the objective of contributing to a secure, diverse, and affordable energy supply and supporting the Government's politics on sustainable development, in particular by mitigating and adapting to climate change (para. 1.3.1). Paragraph 1.1.1 refers to the "vital role" played by fossil fuel generating stations in "providing reliable electricity supplies and a secure and diverse energy mix as the UK makes the transition to a low carbon economy."

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

General Legal Principles

98. The general principles upon which the court may be asked under s.288 of the TCPA 1990 to review a planning appeal decision have been summarised in, for example, Seddon Properties Limited v Secretary of State for the Environment (1981) 42 P & CR 26, 28 and Bloor Homes East Midlands Limited v Secretary of State for Communities and Local Government [2017] PTSR 1283 at [19]. The basis upon which the court may review the legal adequacy of the reasons given in a decision has been explained more fully in Save Britain's Heritage v Number 1 Poultry Limited [1991] 1 WLR 153 and South Bucks District Council v Porter (No. 2) [2004] 1 WLR 1953. The same approach applies to a judicial review under s.118 of the PA 2008 to a decision on a DCO application, so long as the specific requirements of that statutory code are kept in mind.

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

100. It is also plain from the endorsement by the Supreme Court in Samuel Smith at [31] of Derbyshire Dales at [28], and the cross-reference to Bolton Metropolitan Borough Council v Secretary of State for the Environment [2017] PTSR 1063 but solely to page 1071, that principles (2) and (6) in the judgment of Glidewell LJ in Bolton at p 1072 (which were relied upon in the Claimant's skeleton under grounds 3 and 4) are no longer good law.

Interpretation of Policy

101. The general principles governing the interpretation of planning policy have been set out in a number of authorities, including Tesco Stores Limited v Dundee City Council [2012] PTSR 983; Hopkins Homes Limited v Secretary of State for Communities and Local Government [2017] 1 WLR 1865; East Staffordshire Borough Council v Secretary of State for Communities and Local Government [2018] PTSR 88; R (Mansell) v Tonbridge and Malling Borough Council [2019] PTSR 1452; St Modwen Developments Limited v Secretary of State for Communities and Local Government [2018] PTSR 746; Canterbury City Council v Secretary of State for Communities and Local Government [2019] PTSR 81; and Samuel Smith [2020] PTSR 221.

102. These principles apply also to the interpretation of a NPS, as was held by Lindblom LJ in Scarisbrick at [19]:-

> "The court's general approach to the interpretation of planning policy is well established and clear (see the decision of the Supreme Court in *Tesco Stores Ltd. v Dundee City Council* [2012] UKSC 13, in particular the judgment of Lord Reed at paragraphs 17 to 19). The same approach applies both to development plan policy and statements of government policy (see the judgment of Lord Carnwath in *Suffolk Coastal District Council v Hopkins Homes Ltd. and Richborough Estates Partnership LLP v Cheshire East Borough Council* [2017] UKSC 37, at paragraphs 22 to 26). Statements of policy are to be interpreted objectively in accordance with the language used, read in its proper context (see paragraph 18 of Lord Reed's judgment in *Tesco Stores v Dundee City Council*). The author of a planning policy is not free to interpret the policy so as to give it whatever meaning he might choose in a particular case. The interpretation of planning policy is, in the end, a matter for the court (see paragraph 18 of Lord Reed's judgment in *Tesco v Dundee City Council*). But the role of the court should not be overstated. Even when dispute arises over the interpretation of policy, it may not be decisive in the outcome of the proceedings. It is always important to distinguish issues of the interpretation of policy, which are appropriate for judicial analysis, from issues of planning judgment in the application of that policy, which are for the decision-maker, whose exercise of planning judgment is subject only to review on public law grounds (see paragraphs 24 to 26 of Lord Carnwath's judgment in *Suffolk Coastal District Council*). It is not suggested that those basic principles are inapplicable to the NPS – notwithstanding the particular statutory framework within which it was prepared and is to be used in decision-making."

103. In Samuel Smith the Supreme Court reinforced the distinction between the proper scope of the legal interpretation of policy by the courts and the use of planning judgment in the application of policy. They did so when considering the concept of "openness" in paragraph 146 of the National Planning Policy Framework (2019), holding that the issue of whether visual effects may be taken into account is not a matter of legal principle. It is not a mandatory consideration which legislation or policy requires to be taken into account. Instead, it is a matter of judgment for the decision-maker whether to have regard to that factor, subject to the legal test whether, in the circumstances of the case, it was so "obviously material" as to require consideration ([30] to [32] and [39]).

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

The Planning Act 2008

105. The Secretary of State and Drax relied upon the legal analysis by the Divisional Court in Spurrier at [99] to [112]. This was not the subject of any criticism by the Claimant.

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

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

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

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

110. The Hazardous Waste NPS was set in the context of the "waste hierarchy" in the Waste Framework Directive, which placed landfill at the bottom. There was to be a reduction in the use of landfill, which was only to be considered as a last resort. Nevertheless, the NPS identified a need for NSIPs falling within "generic types" which included hazardous waste landfill (Scarisbrick [14] to [16]). Paragraph 4.1.2 of the NPS set out a presumption in favour of granting consent for hazardous waste NSIPs which clearly met the need established in the NPS. Potential benefits were said to include "the contribution" of a project "to meeting the need for hazardous waste infrastructure" (para. 4.1.3).

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

112. The Court of Appeal held in Scarisbrick that the language of the NPS established the need for *all*, not merely some, NSIPs falling within the generic types to which paragraph 3.1 referred. The policy identified a general, qualitative need for such facilities. It did not define a quantitative need or set an upper limit to the number or capacity of the facilities required. It created a "general assumption" of need for the facilities identified, applicable to "every relevant project capable of meeting the identified need, regardless of the scale, capacity and location of the development proposed." An applicant for a DCO was entitled to proceed on that basis ([24]). But the presumption in favour of granting consent was "not automatically conclusive of

the outcome of a particular application" for a DCO. The balancing exercise in s.104(7) remained to be carried out ([28]). Given that the NPS in the Scarisbrick case did not prescribe the weight to be given to need, that weight remained to be assessed as a matter of planning judgment in the particular circumstances of each case ([31]).

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

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

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

116. The Court of Appeal went on to hold that no legal criticism could be made of the Secretary of State for having given "considerable weight" to the need established by the NPS. That had been a matter of planning judgment for him, subject only to a challenge on the grounds of irrationality (Tesco Stores Limited v Secretary of State for the Environment [1995] 1 WLR 759 per Lord Hoffmann at p.780F). The Court held that to give "considerable weight" to that need was consistent with the presumption in the NPS in favour of granting consent (a similar presumption to that contained in paragraph 4.1.2 of EN-1). The Secretary of State had not increased that weight because of the large size of the project, nor had he treated the need established by the NPS as a conclusive or automatically overriding factor ([62] to [63] and [72]). The Court did not accept that the Secretary of State had been obliged to assess the individual contribution that the proposed development would make to meeting national need.

Grounds 1 and 2

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

Ground 1

118. Under ground 1 the Claimant submits that on a proper interpretation of EN-1 the decision-maker is required to assess the individual contribution that any particular project will make towards satisfying the general need for a type of infrastructure set out in the NPS. This is said to be based upon paragraphs 3.1.4 of EN-1, which accords

substantial weight to the "contribution" which a project makes towards satisfying "this need" (i.e. the need described in 3.1.1 to 3.1.3), and paragraph 3.2.3 which states that the weight attributable to need in any given case should be "proportionate" to that contribution. Mr. Jones QC submits that the Secretary of State erred in law in deciding that there was no requirement for the individual need for the proposal to be assessed. The decision-maker wrongly assumed that because the proposal fell within one of the types of infrastructure said to be needed, it would necessarily contribute to that need for the purposes of EN-1. The Claimant argues that a quantitative assessment was required by the NPS (paras. 46, 52 and 74 of skeleton). It is also submitted that the Secretary of State misinterpreted paragraph 3.2.3 of EN-1 by posing the question whether there was any reason for not giving substantial weight to the need for the proposal in accordance with paragraph 3.1.4.

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

The examination

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

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

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

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

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

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

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

124. The Secretary of State referred to the Panel's view that EN-1 drew a distinction between the need for energy NSIPs in general and the need for any particular development and so it had been appropriate to consider changes in energy generation since its publication in 2011 (DL 4.4 to 4.5). Having referred to a number of policies in EN-1, the Secretary of State decided that the proposal was for a type of infrastructure to which EN-1 applied and so the presumption in paragraph 4.1.2 in favour of granting consent applied (DL 4.9 to 4.12). In DL 4.13 the Secretary of State explained why she considered that EN-1 continued to provide policies which are capable of facilitating, for the foreseeable future, the consenting of energy infrastructure on the scale and of the kinds necessary to meet the objectives of the NPS. In her view the policies in EN-1 took account of the need to achieve security of supply, affordability and decarbonisation at a high strategic level and there was no requirement for a decision-maker to assess whether a proposed development would meet an identified need for gas generation capacity by reference to those objectives. The Secretary of State then addressed issues relating to GHG emissions and decarbonisation (DL 4.14 to 4.17).

125. She returned to the subject of need at DL 4.18 to 4.20 and DL 6.6:-

> "4.18 The ExA's views on the need for the Development and how this is considered in the planning balance have also been scrutinised by the Secretary of State. As set out above, paragraphs 3.1.3 of EN-1, and the presumption in favour of the Development already assume a general need for CCR fossil fuel generation. Furthermore, paragraph 3.1.4 of EN-1 states: *"the [decision maker] should give substantial weight to the contribution which projects would make towards satisfying this need when considering applications for development consent".* The ExA recommends that no weight should be given to the Development's contribution towards meeting this need within the overall

[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.

planning balance. This is predicated on its view that EN-1 draws a distinction between the need for energy NSIPs in general and the need for any particular proposed development. The Secretary of State disagrees with this approach. The Secretary of State considers that applications for development consent for energy NSIPs for which a need has been identified by the NPS should be assessed on the basis that they will contribute towards meeting that need and that this contribution should be given significant weight.

4.19 The Secretary of State notes that paragraph 3.2.3 of EN-1 states that *"the weight which is attributed to considerations of need in any given case should be proportionate to the anticipated extent of a project's actual contribution to satisfying the need for a particular type of infrastructure"*. The Secretary of State has, therefore, considered whether, in light of the ExA's findings, there is any reason why she should not attribute substantial weight to the Development's contribution to meeting the identified need for new CCR fossil fuel generation infrastructure in this case. In particular, she has considered the ExA's views on the changes in energy generation since the EN-1 was published in 2011, and the implications of current models and projections of future demand for gas-fired electricity generation and the evidence regarding the pipeline of consented gas-fired infrastructure which the ExA considered to be relevant [ER 5.2.40-43].

4.20 The Secretary of State's consideration of the ExA's position is that (i) whilst a number of other schemes may have planning consent, there is no guarantee that these will reach completion; (ii) paragraph 3.3.18 of EN-1 sets out that the Updated Energy and Emissions Projections (on which the ExA partially relies on to reach its conclusions on current levels of need) do not *"reflect a desired or preferred outcome for the Government in relation to the need for additional generating or the types of electricity required*"; and (iii) paragraph 3.1.2 of EN-1 explains that *"[i]t is for industry to propose new energy infrastructure projects within the strategic framework set by Government. The Government does not consider it appropriate for planning policy to set target for or limits on different technologies"*. These points are reinforced elsewhere in EN-1, for example in paragraphs 2.2.4 and 2.2.19, which explain that the planning system will complement other commercial and market based mechanisms and rules, incentives and signals set by Government to deliver the types of infrastructure that are needed in the places where it is acceptable in planning terms – decisions on which consented energy schemes to build will therefore also be driven by these factors. In light of this, the Secretary of State does not accept that the ExA's findings on these issues should diminish the weight to be attributed to the Development's contribution towards meeting the identified need for CCR gas fired generation within the overall planning balance. The Secretary of State considers that this matter should be given substantial weight in accordance with paragraph 3.1.4 of EN-1. The Secretary of State's overall conclusions on the planning balance are set out at paragraphs 6.1 – 6.14 below.

6.6 The Secretary of State considers that the ExA's interpretation of the need case set out in the NPSs is incorrect. In taking the position it did on need and GHG emissions, the ExA arrived at a position where it recommended that consent for the Development should be refused. The Secretary of State considers that the NPSs support the case for new energy infrastructure in general and, in particular,

> the need for new CCR fossil fuel generation of the kind which the Development would provide. While acknowledging the GHG emissions from the Development, the generating capacity of the Development in either two- or one-unit configurations is a significant argument in its favour, with a maximum of 3.8GW possible if the Applicant builds out both gas-fired and battery storage units as proposed. Therefore, the Secretary of State considers, that the Development would contribute to meeting the identified need for CCR fossil fuel generation set out in the NPS and that substantial weight should be given to this in the planning balance." (original emphasis)

Analysis

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

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

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

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

130. The NPS does not set out a general requirement for a quantitative assessment of need in the determination of individual applications for DCOs. Putting to one side the "interim milestone" which did not feature in the discussion in this case, there are no benchmarks against which a quantitative analysis (eg. consents in the pipeline or

projections of capacity) could be related. Indeed, the document makes it clear that the 2010 UEP projections should not be taken as expressing "a demand or preferred outcome" in relation to need for additional generating capacity or types of generation required (para. 3.3.18). Paragraph 3.3.20 explained that those projections assumed that electricity demand would be no greater in 2025 than in 2011, but went on to add that that demand could be underestimated as moves to decarbonise may lead to increased use of electricity (see eg. paragraph 60 above). Both paragraphs 3.1.2 and 3.3.24 make it plain that it is not the function of planning policy to set targets or limits for different technologies and the 2010 UEP figures were not to be used for that purpose (see paragraphs 75 to 80 above). As Mr Tait QC explained, EN-1 adopts a market-based approach and relies in part upon market mechanisms for the delivery of desired objectives.

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

132. The case advanced by ClientEarth was a barely disguised challenge to the merits of the policy. As we have seen, they contended that because of what had taken place since 2011 there was no need for any future new large gas-fuelled power stations to be built. Indeed, the conclusions reached by the Panel would be equally applicable to any other similar proposal. That flies in the face of EN-1 which states that there is a qualitative need for such development, for example the vital contribution it makes to the provision of reliable electricity supplies (para. 3.6.1), security of energy supply from different sources and vital flexibility to support an increasing amount of low carbon generation (para. 3.6.2). ClientEarth's case and the conclusions of the Panel effectively involved rewriting those and other passages (e.g. paragraph 3.6.8). Consequently, whereas EN-1 specifically gives substantial weight to the qualitative need it establishes, the logic of the Panel's reasoning led them to give effectively no weight to that need.

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

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

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

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

137. It may well be that the Panel thought that they had moved on to the *application* of policy in EN-1. That, of course is a separate matter which should not be elided or confused with the interpretation of policy (Tesco [2012] PTSR 983 at [18] to [19]; Hopkins [2017 1 WLR 1865 at [26]; Scarisbrick [2017] EWCA Civ 787 at [19]; and Samuel Smith [2020] PTSR 221 at [21] to [22]). But the problem with the Panel's approach is that it begs the prior question whether they had understood EN-1 correctly. Here, EN-1 contained no language to indicate that the "requirements" or "needs" for each type of energy NSIP set out in EN-1 should be reassessed from time to time, in the consideration of individual applications for a DCO, or were dependent upon quantitative need being shown. That approach would amount to a revision of the policy and belongs to the process of review under s.6.

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

139. In Scarisbrick the Court of Appeal also stated that the weight to be given to the "general assumption" of need established by the NPS was a matter to be evaluated in each case, but in that case the policy did not prescribe the weight to be given to the

identified need [31]. Here, EN-1 is different, in that it expressly provides that "substantial weight" is to be given to the contribution which a project makes to that need (para. 3.1.4). The "need" is that defined in paragraph 3.1.3 which is said to be described in the following sections in terms of "scale" and urgency for each type of infrastructure. Given that EN-1 does not set targets or limits for different types of technology, "scale" could only refer to the expression of *minimum* need by the "interim milestone" of 2025 (paras. 3.3.16 and 3.3.22 to 3.3.24), which was not in play in this challenge.

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

141. Paragraph 3.2.3 does not alter this analysis. It states that the weight attributable to need in any given case should be proportionate to the extent to which the project would actually contribute "to satisfying *the need for a particular type of infrastructure*" (emphasis added). It does not call for that contribution to be assessed relative to the need for each type of infrastructure covered by EN-1 Paragraph 3.2.3 is therefore entirely consistent with paragraphs 3.1.3 and 3.1.4. The need for fossil fuel generation is dealt with by reference to section 3.6 and related paragraphs which describe the role played by that technology. Paragraph 3.2.3 does not require an assessment of quantitative need for gas-fired generation. Bearing in mind that EN-1 does not express the need for energy infrastructure in quantitative terms (other than figures given for the 2025 "interim milestone"), the words "proportionate", "extent" and "contribution" are consistent with need being assessed in qualitative terms.

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

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

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

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

Ground 2

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

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

148. In saying that, I acknowledge that the Panel did also rely upon one qualitative aspect, namely their view that "the need for the proposed development in the context of the consented gas generation capacity, is likely to be limited to system inertia" which they treated as showing "low level need and urgency" (para. 5.2.42). They subsequently broadened that to add "flexibility to support renewable energy generation" (paras. 5.2.43 and 5.2.71). Mr. Jones QC submits that the Secretary of State failed to address that factor in DL 4.20.

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

150. It is plain from the cross-reference at the end of DL 4.19 to the Panel's report that the Secretary of State had well in mind their views on the function or role of the proposed development. It cannot be said that there is anything to indicate a substantial doubt about whether she had regard to that matter. Furthermore, I accept the Secretary of State's submission that this factor is built into the relevant parts of EN-1. That is plain from the analysis of the NPS set out earlier in this judgment. The Secretary of State made that very point in DL 4.13. She even referred specifically to the proposed battery storage units and the "important role" they play under EN-1, reinforcing her

conclusion on weight in DL 4.20 (see DL 5.5). There is nothing in the Claimant's criticism.

151. As the Claimant pointed out (para. 67 of skeleton), the three quantitative aspects of the Panel's findings were concerned with:-

(i) Changes in energy generation capacity since 2011;

(ii) The implications of current models and projections of future demand for gas-fired electricity generation; and

(iii) The pipeline of consented gas-fired infrastructure.

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

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

Ground 3

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

155. Paragraph 5.2.2 of EN-1 states:-

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

156. Paragraph 2.5.2 of EN-2 states:-

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

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

158. When the Panel came to consider the application of s.104 of PA 2008, they identified firstly a number of positive benefits, namely bio-diversity, socio-economics and the re-use of existing infrastructure which attracted "significant weight" (paras. 7.3.11 to 7.3.12). They then identified various factors which were judged to have a neutral effect (para. 7.3.13). Finally, they brought together the negative impacts of the proposal in paragraph 7.3.14:-

(i) the decarbonisation objective would be undermined by increasing gas-fired capacity where that already exceeds UEP forecasts;

(ii) a significant increase in GHG emissions would have a significant adverse effect on climate change;

(iii) the development would have a significant adverse effect on landscape and visual receptors.

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

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

161. In her decision letter the Secretary of State noted at DL 4.15 the explanation in section 2.2 of EN-1 as to how climate change and GHG has been taken into account in the

preparation of the Energy NPSs (see paragraphs 60 to 70 above). She then quoted paragraph 5.2.2 of EN-1.

162. In DL 4.16 and 4.17 she stated:-

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

163. It is important to note that in the middle of DL 4.17 the Secretary of State accepted that GHG emissions did represent "significant adverse impacts" which could be weighed in the balance against the proposed development. But she considered that once the project's contribution to policy need and, thus its overall benefits, were correctly evaluated, the adverse carbon and GHG impacts were not determinative. In other words, she considered that the weight to be given to those disbenefits was outweighed by the benefits of the proposal. The submission in paragraph 89 of the Claimant's skeleton that the Secretary of State did not weigh the GHG impacts in that manner fails to read the paragraph as a whole and instead focuses unrealistically on a single word "may". That approach to reading the decision letter involves excessive legalism of the kind deprecated in a number of authorities, including East Staffordshire Borough Council v Secretary of State for Communities and Local Government [2018] PTSR 88 at [50].

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

> "In assessing the issue of GHG emissions from the Development and the ExA's conclusions in this matter, the Secretary of State notes that the Government's policy and legislative framework for delivering a net zero economy by 2050 does not preclude the development and operation of gas-fired generating stations in the intervening period. Therefore, while the policy in the NPS says GHG emissions from fossil fuel generating stations are accepted to be a significant adverse impact, the NPSs also say that the Secretary of State does not need to assess them

> against emissions reduction targets. Nor does the NPS state that GHG emissions are a reason to withhold the grant of consent for such projects. It is open to the Secretary of State to depart from the NPS policies and give greater weight to GHG emissions in the context of the Drax application but there is no compelling reason to do so in this instance."

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

Analysis

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

167. In fact, it is plain from the passages in the decision letter to which I have already referred that the Secretary of State did not treat GHG emissions as irrelevant, nor did she treat them as something to which no weight should be given. In DL 4.17 the Secretary of State moved from her conclusions on s.104(3) and s.104(5) to considering the balance under s.104(7). She accepted that the Panel's finding on the significant adverse impacts of GHG emissions from the development could be weighed in the balance against the proposal. But she disagreed with the Panel's evaluation of the benefits of the proposal, including its contribution towards meeting policy need. Once those benefits were correctly weighed, she found that the impact of GHG emissions should not "carry determinative weight in the overall planning balance." That can only mean that the disbenefits did not carry more weight than the benefits. Rather, it was the other way round. Thus, in DL 4.17 the Secretary of State was describing a straight forward balancing exercise which was in no way dependent upon the terms of paragraphs 5.2.2 of EN-1 or 2.5.2 of EN-2. She returned to this exercise in DL 6.3 to DL 6.9.

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

169. Before examining the passages in the decision letter criticised by the Claimant, it is necessary to consider the meaning of the relevant policies in the NPS. Paragraph 5.2.2 of EN-1 plainly states that the CO_2 emissions from a proposed energy NSIP do not provide a reason for refusing an application for a DCO. The rationale for that statement is that such emissions are adequately addressed by the regimes described in section 2.2 of EN-1. There has been no challenge to the legality of that part of EN-1.

Any such challenge would now be precluded by the ouster clause in s.13(1) of PA 2008.

170. In any event, I do not see how it could be legally objectionable for a NPS to state that a particular factor is insufficient by itself to justify refusal of a planning consent because it is addressed by other regimes. Section 5(5)(c) enables a NPS to prescribe how much weight is to be given to a particular factor in a decision on a DCO application, which could include giving no weight to it. The approach in paragraph 5.2.2 is also supported by established case law on the significance of alternative systems of control (see e.g. Gateshead Metropolitan Borough Council v Secretary of State for the Environment (1996) 71 P & CR 350) and, to some extent, by Regulation 21(3)(c) of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017 No. 572) (see Ground 6 below).

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

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

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

Ground 4

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

175. ClientEarth accepts (skeleton paras. 106-107) that policy contained in the NPSs is relevant to the exercise under s.104(7), for example the statement of national need (see Thames Blue Green Economy at [16]). However, the Claimant criticises the decision taken in this case because the same approach was taken to (i) need at DL 6.6 (see paragraph 125 above) and (ii) GHG emissions at DL 6.7 (see paragraph 164 above) as had previously been applied in the consideration of NPS policies under s.

104(3) (skeleton para. 109). ClientEarth submits that the same policy tests should not be applied when s.104(7) is considered.

Analysis

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

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

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

179. In DL 6.7 the Secretary of State repeated these considerations, as she was entitled to do. She also stated that GHG emissions are treated in the NPS as a significant adverse impact (see EN-2 para. 2.5.2) and then went on to consider whether, in the s.104(7) balance, that factor should be given greater weight in the case of the Drax proposal. The NPSs did not preclude that possibility, so long as GHG emissions were not treated as a freestanding reason for refusal. In this case the proposal also gave rise to landscape and visual impacts which were treated as further disbenefits (DL 6.5 and 6.8). Plainly the suggestion that the Secretary of State looked at the balance under s.104(7) solely through the lens of, or improperly fettered by, the NPSs is untenable.

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

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

Ground 5

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

183. These policy requirements are based upon Article 33 of the EU Directive on the Geological Storage of Carbon Dioxide (Directive 2009/31/EC), which inserted Article 9a into the Large Combustion Plants Directive (Directive 2001/80/EC). These provisions have been transposed into domestic law by the Carbon Capture Readiness (Electricity Generating Stations) Regulations 2013 (SI 2013 No. 2696) ("the 2013 Regulations"). No criticism is made of that transposition.

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

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

185. So it is necessary for it to be shown that sites suitable for the storage of carbon dioxide emissions from the plant are available, and that it is technically and "economically feasible" to retrofit the plant necessary to capture those emissions and to transport them to those storage sites. When the Directive and Regulations were passed the practical and commercial feasibility of CCS technology had not been demonstrated. Hence, it is necessary to reserve land for that purpose and to consider the retrofitting of the technology. This demonstration of technical and economic feasibility involves looking into the future.

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

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

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

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

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

Analysis

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

191. Mr. Jones QC accepted that during the examination ClientEarth did not raise any issue regarding the "reasonable scenarios" criterion. Their case was that a condition should be imposed requiring the provision of CCS from the outset (which was, in effect, a challenge to the merits of policy in the NPS which makes it plain that proposals for new fossil fuel plants only have to demonstrate that they are Carbon Capture Ready).

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

that the material before the Panel and the Secretary of State adequately addressed this point in any event.

193. Paragraph 4.7.14 of EN-1 puts this ground of challenge into a sensible context:-

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

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

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

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

> "Moreover, it has made its assumption of economic feasibility entirely contingent on "the end price of electricity" without assessing the reasonableness of such assumptions about future prices. This is in contrast to the approach taken in the Applicant's CCR Statement where the Applicant has carried out a detailed assessment of the future economics, including wholesale electricity prices, to arrive at a set of justified conclusions about the economic feasibility of CCS."

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

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

Ground 6

198. ClientEarth submits that the Secretary of State failed to comply with requirements in regulations 21 and 30 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017 No. 572) ("the 2017 Regulations") regarding measures for the monitoring of GHG emissions. A "monitoring measure" is defined by regulation 3(1) as:-

> "a provision requiring the monitoring of any significant adverse effects on the environment of proposed development, including any measures contained in a requirement imposed by an order granting development consent"

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

> "When deciding whether to make an order granting development consent for EIA development the Secretary of State must—
>
> (a) examine the environmental information;
>
> (b) reach a reasoned conclusion on the significant effects of the proposed development on the environment, taking into account the examination referred to in sub-paragraph (a) and, where appropriate, any supplementary examination considered necessary;
>
> (c) integrate that conclusion into the decision as to whether an order is to be granted; and
>
> (d) if an order is to be made, consider whether it is appropriate to impose monitoring measures."

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

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

201. The Claimant submits that Regulation 21 must be interpreted in the context of the preventative and precautionary principles of EU law (Article 191 of the Treaty on the Functioning of the European Union).

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

> "The information is—

(a) information regarding the right to challenge the validity of the decision and the procedures for doing so; and

(b) if the decision is —

(i) to approve the application—

(aa) the reasoned conclusion of the Secretary of State or the relevant authority, as the case may be, on the significant effects of the development on the environment, taking into account the results of the examination referred to, in the case of an application for an order granting development consent in regulation 21, and in the case of a subsequent application, in regulation 25;

(bb) where relevant, any requirements to which the decision is subject which relate to the likely significant environmental effects of the development on the environment;

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

(dd) any monitoring measures considered appropriate by the Secretary of State or relevant authority, as the case may be; or

(ii) ..…"

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

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

Analysis

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

matters are addressed where appropriate in the Panel's report and in the decision letter.

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

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

208. In the present case the Panel referred to the need for Drax to obtain a Greenhouse Gas Permit from the Environmental Agency under the Greenhouse Gas Emissions Trading Scheme Regulations 2012 (SI 2012 No. 3038) ("the 2012 Regulations") to deal with GHG emissions from the proposed development (see Report at para. 1.7.1).

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

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

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

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

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

213. The 2012 Regulations were made in order to give effort to a series of EU Directives establishing a scheme for trading in emission allowances for GHG, otherwise referred to in EN-1 as EU ETS. The monitoring arrangements they contain were made in order to give effect to EU Regulation 601/2012 and EU Regulation 2018/2067. The scheme is focused on achieving decarbonisation.

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

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

216. The 2017 Regulations operate within the EU ETS regime summarised in EN-1 at paragraphs 2.2.12 to 2.2.15. All of this must have been well-known to the Panel and the Secretary of State. The ETS scheme involves a gradually reducing cap on GHG emissions from large industrial sectors such as electricity generation which translates into finite allowances to emit GHG available to specific operators. Paragraph 5.2.2 of EN-1 envisages that the decarbonising of electricity generation is to be achieved through the regimes described in section 2.2. I therefore accept the Secretary of State's submission that EN-1 proceeds on the basis that GHG emissions will be separately controlled. It is unsurprising therefore, that no one suggested during the examination that GHG emissions should be controlled under the PA 2008, or what cap or caps should be imposed, without which it is difficult to see what purpose GHG monitoring under the terms of the DCO would serve. Ultimately, Mr. Jones QC submitted that monitoring would enable it to be seen whether the projected total emissions had been estimated accurately. It was not explained why that could not be achieved under the 2012 Regulations, if that was thought to be necessary.

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

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

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

220. One further point has been raised by the Claimant which the Secretary of State has addressed in paragraph 90 of her skeleton:-

> "[Paragraph 150 of the Claimant's skeleton] introduces a separate and unparticularised assertion that "*the Secretary of State failed lawfully to comply with* …… Reg.30 of the EIA Regulations. The point made appears to be that the Secretary of State did not include a "*reasoned conclusion … on the significant effects of the development on the environment*" as required by Reg.30(2)(b)(i)(aa). That is a new ground outside the scope of the SFG that has nothing to do with monitoring and is baseless. The DL, read with the ExA, sets out detailed conclusions on the environmental impacts of the Drax Power proposal."

I agree.

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

Ground 7

Introduction

222. On 27 June 2019 the target for the UK's net carbon account for 2050 set out in s.1 of the CCA 2008 was changed from 80% to 100% below the 1990 baseline (see the Climate Change Act 2008 (2050 Target Amendment) Order 2019 (SI 2019 No. 1056)). This is referred to as "the net zero target". In paragraph 3.4.2 the Panel explained that because this amendment had occurred after the close of the examination and only one week before they were to submit their report to the Secretary of State, it had not formed the basis for their examination of the application or had any bearing upon their final conclusions. They suggested that it would, nonetheless, be a matter for the Secretary of State to consider in the planning balance.

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

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

225. At DL 5.8 to 5.9 the Secretary of State stated:-

> "5.8 The Secretary of State notes with regard to the amendment to the CCA that it does not alter the policy set out in the National Policy Statements which still form the basis for decision making under the Act. Section 2.2 of EN-1 explains how climate change and the UK's GHG emissions targets contained in the CCA have been taken into account in preparing the suite of Energy NPSs. As paragraph 2.2.6 of EN-1 makes clear, the relevant NPSs were drafted considering a variety of illustrative pathways, including some in which *"electricity generation would need to be virtually [greenhouse gas] emission-free, given that we would expect some emissions from industrial and agricultural processes, transport and waste to persist."* The policies contained in the relevant NPSs regarding the treatment of GHG emissions from energy infrastructure continue to have full effect.
>
> 5.9 The move to Net Zero is not in itself incompatible with the existing policy in that there are a range of potential pathways that will bring about a minimum 100% reduction in the UK's emissions. While the relevant NPSs do not preclude the granting of consent for developments which may give rise to emissions of GHGs provided that they comply with any relevant NPS policies or requirements which support decarbonisation of energy infrastructure (such as CCR

> requirements), potential pathways may rely in future on other infrastructure or mechanisms outside the planning regime offset or limit those emissions to help achieve Net Zero. Therefore, the Secretary of State does not consider that Net Zero currently justifies determining the application otherwise than in accordance with the relevant NPSs or attributing the Development's negative GHG emissions impacts any greater weight in the planning balance. In addition, like the ExA, the Secretary of State does not consider there to be any evidence that granting consent for the Development would in itself result in a direct breach of the duties enshrined in the CCA, given the scope of the targets contained in the CCA which apply across many different sectors of the economy. This remains the case following the move to Net Zero and therefore she does not consider that the exception in section 104(5) of the 2008 Act should apply in this case." (original emphasis)

226. In summary the Secretary of State concluded that:-

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

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

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

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

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

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

227. In DL 6.12 the Secretary of State concluded:-

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

228. At DL 6.18 to 6.20 the Secretary of State dealt with "late submissions", that is representations made by Pinsent Masons on behalf of Drax after the close of the

examination. This challenge is only concerned with their 11 page letter dated 4 September 2019, which sought to address the amendment of the CCA 2008. At DL 6.20 the Secretary of State stated that:-

> "In respect of the second submission, the Secretary of State does not consider that this provides any information that alters her conclusions set out in paragraphs 5.6 – 5.9 and 6.7 above."

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

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

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

Ground 7A

232. Mr. Jones QC referred to Rule 19(3) of the Infrastructure Planning (Examination Procedure) Rules 2010 (SI 2010 No. 103) ("the 2010 Rules") which provides that:-

> "(3) If after the completion of the Examining authority's examination, the Secretary of State-
>
> > (a) differs from the Examining authority on any matter of fact mentioned in, or appearing to the Secretary of State to be material to, a conclusion reached by the Examining authority; or
> >
> > (b) takes into consideration any new evidence or new matter of fact, and is for that reason disposed to disagree with a recommendation made by the

> Examining authority, the Secretary of State shall not come to a decision which is at variance with that recommendation without —
>
> > (i) notifying all interested parties of the Secretary of State's disagreement and the reasons for it; and
> >
> > (ii) giving them an opportunity of making representations in writing to the Secretary of State in respect of any new evidence or new matter of fact."

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

234. More particularly, Mr. Jones QC relies upon statements in Bushell v Secretary of State for the Environment [1981] AC 75 at 102A and Broadview Energy Developments Limited v Secretary of State for Communities and Local Government [2016] EWCA Civ 562 at [25] to [26], to the effect that a decision-maker should not "accept" fresh evidence from one side supporting their case without giving other parties an opportunity to deal with it. In a much earlier authority, Errington v Minister of Health [1935] 1 KB 249, it was held that the Minister had acted unlawfully by taking into account and relying upon material from one side (the authority promoting a housing clearance order) without giving landowners an opportunity to make representations about it. Broadview was in some ways a striking case where the Minister received oral representations privately from the local constituency MP. But the court did not intervene because the representations had not added materially to what had been addressed at the public inquiry and they could not have materially influenced the outcome.

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

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

237. I do not accept that submission. The position has been very clearly explained in the witness statement of Mr. Leigh, in particular at paragraphs 20 to 24. The conclusions in the decision letter to which I have already referred were informed by internal communications with other officials in the Department dealing with the net zero target. They were asked to advise on the implications of the amended target for the

policy in EN-1 and EN-2 dealing with unabated gas fired electricity generation. The approach set out in their response reflected the existing policy in the NPSs.

238. The reasoning in DL 5.8 clearly relates to material in EN-1. In a written note Mr. Tait QC showed how relevant parts of DL 5.9 related back to passages in EN-1. Thus, when paragraph 17 of Mr. Leigh's witness statement is read in the context of the later parts of his evidence, and with the further explanation provided by Mr. Tait QC, I accept that DL 5.6 to 5.9 were essentially dealing with matters of existing Government policy set out in EN-1. One of the main conclusions in DL 5.9 was the Secretary of State's judgment that the policies in the relevant NPSs on the treatment of GHG emissions from energy infrastructure continued to have full effect. That is why Mr. Leigh stated that neither the Secretary of State nor her officials needed submissions on policy from Drax. They had reached their own conclusions on those matters for themselves.

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

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

241. But even if I had taken the contrary view ground 7A would still fail. The relevant legal test for determining both grounds 7A and 7B is whether "there has been procedural unfairness which materially prejudiced the [claimant]" (Hopkins Developments Limited v Secretary of State for Communities and Local Government [2014] PTSR 1145 at [49]). This reflects the principle previously stated by Lord Denning MR in George v Secretary of State for the Environment (1979) 77 LGR 689 that:-

> "there is no such thing as a 'technical breach of natural justice'… One should not find a breach of natural justice unless there has been substantial prejudice to the applicant as the result of the mistake or error that has been made."

and by Lord Wilberforce in Malloch v Aberdeen Corporation [1971] 1 WLR 1578, 1595 that:-

> "A breach of procedure, whether called a failure of natural justice, or an essential administrative fault, cannot give him a remedy in the courts unless behind it there is something of substance which has been lost by the failure."

242. Mr. Jones QC identified the prejudice upon which ClientEarth relies in terms of the additional submissions and/or evidence which it would have wished to produce to the Secretary of State had it been given an opportunity to comment, as summarised in paragraphs 21 to 34 of Mr. Hunter-Jones's first witness statement and paragraphs 11 to 18 of his second witness statement. It is plain that the object of these submissions would have been to undermine the basis upon which policies in EN-1 on GHG

emissions and gas fired electricity generation were prepared and adopted. By way of example, it is said that to be compatible with the net zero target, gas fired power stations would have to operate with CCS, and not merely be consented with CCR. Alternatively, a "more rigorous standard" than CCR should have been required in this case. In addition, ClientEarth would have contended that the DCO should have been subject to a condition preventing the operation of the facility beyond 2050 without CCS. It is plain that the thrust of ClientEarth's contentions is that the net zero target is incompatible with existing policy in EN-1 and EN-2.

243. I accept the submission made by the Secretary of State and by Drax that ClientEarth's contentions would have been disregarded under s.106(1) of PA 2008 as relating to the merits of policy in the NPSs. Mr. Jones QC did not argue to the contrary. The import of ClientEarth's points is that key policies in EN-1 and EN-2 are out of date by virtue of the net zero target enshrined in the CCA 2008. It is not the function of the court to say whether that view is right or wrong. But it is the function of the court to say that this line of argument undoubtedly falls outside the scope of the process created by Parliament by which an application for a DCO is examined and determined. Instead, it is a matter which could only be addressed through a decision to carry out a review under s.6 of PA 2008 (see above). There has been no such decision and no claim for judicial review relating to any allegation of failure to institute such a review.

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

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

Ground 7B

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

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

248. A similar situation arose in Bushell. Following the closure of the public inquiry into a motorway scheme, the relevant Government department issued (a) new design standards that treated the capacity of existing roads as greater than had previously

been assumed and (b) a revised national method of predicting traffic growth that produced lower estimates of future traffic than had previously been given. So objectors to the scheme asked for the inquiry to be reopened so that they could contend that the need for the new scheme had been undermined. The Secretary of State refused to reopen the inquiry and in his decision letter stated that the new publications did not materially affect the evidence on which the Inspector had decided to recommend that the scheme should be approved; the estimation of traffic need using the revised methods did not differ materially from the earlier assessment. The House of Lords held that this procedure had not involved any unfairness because the objectors were not entitled to use the forum of a local inquiry to criticise and debate the merits of the revised methods, which were a form of Government policy ([1981] AC at 99-100 and 103D).

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

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

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

Conclusion

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

Ground 8

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

254. Then it was submitted that officials and the Secretary of State asked the wrong question, namely whether the proposed development would lead to a breach of the CCA 2008 or would result in incompatibility with the net zero target, because those questions cannot be answered at this point in time (para. 174 of skeleton). However, the Secretary of State did address those questions and concluded that the proposed development was not incompatible with the net zero target (DL 5.9 and 6.12). That

was a matter of judgment for the Secretary of State which could only be challenged on the grounds of irrationality. Here it is appropriate to have in mind the discussion of the Divisional Court in Spurrier on intensity of review ([2020] PTSR 240 at [141] et seq.) and in particular cases dealing with challenges to consents, such as Newsmith Stainless Limited v Secretary of State for the Environment, Transport and the Regions [2017] PTSR 1126 at [6] to [8] and R (Mott) v Environment Agency [2016] 1 WLR 4338 at [75] et seq. ClientEarth have put forward reasons as to why they disagree with the Secretary of State on this subject, but the Court is in no position to say on the material which has been produced that her judgment was irrational.

255. Next, the Claimant submitted that the Defendant failed to "fully consider, and grapple with, the impact of the Development on achieving Net Zero by 2050 and whether current NPS policy concerning unabated fossil fuel generation was consistent with the new target" (para. 174 of skeleton and see also paras. 176-178). A criticism that a decision-maker has failed to take into a material consideration is now to be dealt with in accordance with the principles settled in the Samuel Smith case (see paragraphs 99 to 100 above). As I have already explained under ground 7, the Secretary of State did in fact address that question.

256. Where a decision-maker decides to have regard to a matter then it is generally a matter for his or her judgment as to how far to go into it, something which may only be challenged on the grounds of irrationality (R (Khatun) v Newham London Borough Council [2005] QB 37 at [35]. Mr. Jones QC relied upon the requirement in Article 8a(4) of Directive 2011/92/EU (as amended) that Member States shall ensure that measures are implemented by the developer to avoid, prevent, reduce or offset "significant adverse effects on the environment" and regulation 21(1)(b) and 30(2)(b) of the 2017 Regulations. However, the general approach to judicial review of the adequacy of compliance with requirements of this nature, whether in the context of SEA or EIA, is for the court to intervene only if the decision-maker has acted irrationally (see e.g. Spurrier [2020] PTSR 240 at [434] and R (Plan B Earth) v Secretary of State for Transport [2020] EWCA Civ 214 at [126] to [144]). Once again, there is no material here upon which the court could conclude that the Secretary of State's approach was irrational.

257. Mr Tait QC and Mr Strachan QC submitted that as a matter of judgment the Secretary of State was entitled to rely upon other mechanisms outside the planning system, such as the Electricity Market Reform and the EU ETS, to control emissions from fossil fuel electricity generation when potential pathways are drawn up to help achieve the net zero target, consistently with policies contained in EN-1 (DL 5.9). I agree that that reasoning does not disclose any error of law.

258. ClientEarth takes a different view on the compatibility of NPS policy with the net zero target, but for the reasons previously given this was not a matter which, even if it had been raised by ClientEarth between the amendment of CCA 2008 and the issuing of the decision letter, could properly have been considered and resolved in a determination on an application for a DCO. It would have been a matter for review under s.6 of the Act (with all the related procedural safeguards) if the Secretary of State considered that to be appropriate in terms of s.6(3). No challenge has been made by ClientEarth in these proceedings to a failure on the part of the Secretary of State to act under s.6. It does not appear that ClientEarth raised the review mechanism under s.6 as a matter which the Secretary of State ought to address.

259. In paragraph 179 to 181 of their skeleton ClientEarth submit that the Secretary of State failed to consider whether a "time-limiting condition" was necessary to address GHG emissions from the proposed development after 2050. It is suggested that the Secretary of State should at the very least have "considered" imposing a condition preventing the development from being operated after 2050 without "further consideration of appropriate offsetting and/or CCS requirements." It is plain that the Secretary of State had regard to the position up to 2050 and beyond. She dealt with the CCS issue in accordance with the policy in EN-1 and EN-2. For the reasons I have already given, she was entitled in law to do so. The implication of the complaint that those policies should be revised was not a matter for consideration in the DCO process, nor is it a matter for this court in this challenge to the decision to grant the DCO.

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

Ground 9

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

Conclusion

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

APPENDIX C

Neutral Citation Number: [2021] EWCA Civ 43

Case No: C1/2020/0998/QBACF

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(PLANNING COURT)
THE HONOURABLE MR JUSTICE HOLGATE
[2020] EWHC 1303 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/01/2021

Before:

LORD JUSTICE LEWISON
SIR KEITH LINDBLOM, SENIOR PRESIDENT OF TRIBUNALS
and
LORD JUSTICE LEWIS

- -

Between:

R. (on the application of ClientEarth)	**Appellant**
- and -	
(1) Secretary of State for Business, Energy and Industrial Strategy	**Respondents**
- and -	
(2) Drax Power Limited	

- -
- -

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

Hearing dates: 17 and 18 November 2020

- -

Approved Judgment

The Senior President of Tribunals:

Introduction

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

2. With permission granted by Lewison L.J., the appellant, ClientEarth, appeals against the order of Holgate J., dated 22 May 2020, dismissing its claim for judicial review of the decision of the first respondent, the Secretary of State for Business, Energy and Industrial Strategy, on 4 October 2019, to make the Drax Power (Generating Stations) Order 2019 (S.I. 2019 No.1315) ("the DCO"), approving an application made by the second respondent, Drax Power Ltd. The claim was brought by ClientEarth under section 118 of the Planning Act 2008 ("the Planning Act").

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

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

The issues in the appeal

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

The Planning Act

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

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

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

Section 104(7) states:

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

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

EN-1

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

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

11. The text in section 2.2, "The road to 2050", assumed the target then in place under the Climate Change Act 2008 ("the Climate Change Act") of reducing greenhouse gas emissions in 2050 by at least 80% compared to 1990 levels. This would require the "electrification" of

much of the United Kingdom's heating, industry and transport (paragraph 2.2.1). Delivery of this change would be "a major challenge not least for energy providers …" (paragraph 2.2.2).

12. Paragraph 2.2.4 states:

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

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

> "2.2.19 The Planning Act and any market reforms associated with the Electricity Market Reform project will complement each other and are consistent with the Government's established view that the development of new energy infrastructure is market-based. While the Government may choose to influence developers in one way or another to propose to build particular types of infrastructure, it remains a matter for the market to decide where and how to build, as market mechanisms will deliver the required infrastructure most efficiently. Against this background of possibly changing market structures, developers will still need development consent for each proposal. Whatever incentives, rules or other signals developers are responding to, the Government believes that the NPSs set out planning policies which both respect the principles of sustainable development and are capable of facilitating, for the foreseeable future, the consenting of energy infrastructure on the scale and of the kinds necessary to help us maintain safe, secure, affordable and increasingly low carbon supplies of energy."

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

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

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

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

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

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

A footnote to paragraph 3.1.4 – footnote 16 – states:

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

16. Paragraph 3.2.3 states:

> “3.2.3 This Part of the NPS explains why the Government considers that, without significant amounts of new large-scale energy infrastructure, the objectives of its energy and climate change policy cannot be fulfilled. However, … it will not be possible to develop the necessary amounts of such infrastructure without some significant residual adverse impacts. This Part also shows why the Government considers that the need for such infrastructure will often be urgent. The IPC should therefore give substantial weight to considerations of need. The weight which is attributed to considerations of need in any given case should be proportionate to the anticipated extent of a project’s actual contribution to satisfying the need for a particular type of infrastructure.”

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

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

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

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

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

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

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

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

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

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

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

> "3.3.18 It is not possible to make an accurate prediction of the size and shape of demand for electricity in 2025, but in order to get a sense of the possible scale of future demand to 2025, one possible starting point is provided by the most recent Updated Energy and Emissions Projections (UEP) which DECC published in June 2010. It

> is worth noting that models are regularly updated and the outputs will inevitably fluctuate as new information becomes available. … The projections do not reflect a desired or preferred outcome for the Government in relation to the need for additional electricity generating capacity or the types of electricity generation required."

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

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

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

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

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

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

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

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

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

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

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

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

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

> "5.2.2 CO2 emissions are a significant adverse impact from some types of energy infrastructure which cannot be totally avoided (even with full deployment of CCS technology). However, given the characteristics of these and other technologies … and the range of non-planning policies aimed at decarbonising electricity generation such as EU ETS … , Government has determined that CO2 emissions are not reasons to prohibit the consenting of projects which use these technologies or to impose more restrictions on them in the planning policy framework than are set out in the energy NPSs (e.g. the CCR and, for coal, CCS requirements). Any ES on air emissions will include an assessment of CO2 emissions, but the policies set out in Section 2, including the EU ETS, apply to these emissions. The IPC does not, therefore, need to assess individual applications in terms of carbon emissions against carbon budgets and this section does not address CO2 emissions or any Emissions Performance Standard that may apply to plant."

EN-2

31. EN-2 stresses the "vital role" played by fossil fuel generating stations in "providing reliable electricity supplies and a secure and diverse energy mix as the UK makes the transition to a low carbon economy" (paragraph 1.1.1). It confirms that the Government's policy is to require a substantial proportion of the capacity of all new coal-fired stations to be subject to

CCS, that new stations of that kind will be expected to retrofit CCS to their "full capacity", that other fossil fuel generating stations are expected to be "carbon capture ready, and that all such stations will be required to comply with Emissions Performance Standards (paragraph 1.1.2).

32. Paragraph 2.5.2 of EN-2 states:

> "2.5.2 CO2 emissions are a significant adverse impact of fossil fuel generating stations. Although an ES on air emissions will include an assessment of CO2 emissions, the policies set out in Section 2.2 of EN-1 will apply, including the EU ETS. The IPC does not, therefore, need to assess individual applications in terms of carbon emissions against carbon budgets and this section does not address CO2 emissions or any Emissions Performance Standard that may apply to plant."

The examining authority's report

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

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

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

The Secretary of State's decision letter

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

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

37. She then said (in paragraph 4.13):

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

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

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

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

climate change and the UK's GHG emissions reduction targets contained in the CCA have been taken into account in preparing the suite of Energy [national policy statements]. She has also noted the policy contained in paragraph 5.2.2 of EN-1[, which she then quoted in full].

4.16 This policy is also reflected in paragraph 2.5.2 of EN-2. It is the Secretary of State's view, therefore, that, while the significant adverse impact of the proposed Development on the amount of greenhouse gases that will be emitted to atmosphere is acknowledged, the policy set out in the relevant NPSs makes clear that this is not a matter that … should displace the presumption in favour of granting consent.

4.17 In light of this, the Secretary of State considers that the Development's adverse carbon impacts do not lead to the conclusion that the Development is not in accordance with the relevant NPSs or that they would be inconsistent with the CCA. The Secretary of State notes the need to consider these impacts within the overall planning balance to determine whether the exception test set out in section 104(7) of the 2008 Act applies in this case. The ExA considers that the Development will have significant adverse impacts in terms of GHG emissions which the Secretary of State accepts may weigh against it in the balance. However, the Secretary of State does not consider that the ExA was correct to find that these impacts, and the perceived conflict with NPS policy which they were found to give rise to, should carry determinative weight in the overall planning balance once the benefits of the project are properly considered, including in particular its contribution towards meeting need as explained below."

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

"4.18 The ExA's views on the need for the Development and how this is considered in the planning balance have also been scrutinised by the Secretary of State. As set out above, paragraph 3.1.3 of EN-1, and the presumption in favour of the Development already assume a general need for CCR fossil fuel generation. Furthermore, paragraph 3.1.4 of EN-1 states: *"the [decision-maker] should give substantial weight to the contribution which projects would make towards satisfying this need when considering applications for development consent"*. The ExA recommends that no weight should be given to the Development's contribution towards meeting this need within the overall planning balance. This is predicated on its view that EN-1 draws a distinction between the need for energy NSIPs in general and the need for any particular proposed development. The Secretary of State disagrees with this approach. The Secretary of State considers that applications for development consent for energy NSIPs for which a need has been identified by the NPS should be assessed on the basis that they will contribute towards meeting that need and that this contribution should be given significant weight.

4.19 The Secretary of State notes that paragraph 3.2.3 of EN-1 states that *"the weight which is attributed to considerations of need in any given case should be proportionate to the anticipated extent of a project's actual contribution to satisfying the need for a particular type of infrastructure"*. The Secretary of State has, therefore, considered whether, in the light of the ExA's findings, there is any

reason why she should not attribute substantial weight to the Development's contribution to meeting the identified need for new CCR fossil fuel generation infrastructure in this case. In particular, she has considered the ExA's views on the changes in energy generation since the EN-1 was published in 2011, and the implications of current models and projections of future demand for gas-fired electricity generation and the evidence regarding the pipeline of consented gas-fired infrastructure which the ExA considered to be relevant [ER 5.2.40-43].

4.20 The Secretary of State's consideration of the ExA's position is that (i) whilst a number of other schemes may have planning consent, there is no guarantee that these will reach completion; (ii) paragraph 3.3.18 of EN-1 sets out that the Updated Energy and Emissions Projections (on which the ExA partially relies … to reach its conclusions on current levels of need) do not *"reflect a desired or preferred outcome for the Government in relation to the need for additional generating or the types of electricity required"*; and (iii) paragraph 3.1.2 of EN-1 explains that *"[i]t is for industry to propose new energy infrastructure projects within the strategic framework set by Government. The Government does not consider it appropriate for planning policy to set targets for or limits on different technologies"*. These points are reinforced elsewhere in EN-1, for example in paragraphs 2.2.4 and 2.2.19, which explain that the planning system will complement other commercial and market based mechanisms and rules, incentives and signals set by Government to deliver the types of infrastructure that are needed in the places where it is acceptable in planning terms – decisions on which consented energy schemes to build will therefore also be driven by these factors. In light of this, the Secretary of State does not accept that the ExA's findings on these issues should diminish the weight to be attributed to the Development's contribution towards meeting the identified need for CCR gas fired generation within the overall planning balance. The Secretary of State considers that this matter should be given substantial weight in accordance with paragraph 3.1.4 of EN-1. The Secretary of State's overall conclusions on the planning balance are set out at paragraphs 6.1-6.14 below."

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

42. In section 6 of the decision letter, "Conclusions on the Case for Development Consent", the Secretary of State set out the provisions of section 104(3) and (7), and said that she "therefore … needs to consider the impacts of any proposed development and weigh these against the benefits of any scheme" (paragraph 6.1). On the question of whether the proposed development was in accordance with EN-1 for the purposes of section 104(3), she referred again – as she had in paragraph 4.4 – to the fact that the examining authority had not applied

"the policy presumption in favour of granting consent for energy NSIPs set out in EN-1 when determining whether the Development was in accordance with the relevant NPSs". She considered that "the Development should benefit from the presumption because there are no more specific and more relevant NPS policies which clearly indicate that consent should be refused and therefore the Development accords with the relevant NPSs" (paragraph 6.2).

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

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

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

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

> "6.7 In assessing the issue of GHG emissions from the Development and the ExA's conclusions in this matter, the Secretary of State notes that the Government's policy and legislative framework for delivering a net zero economy by 2050 does not preclude the development and operation of gas-fired generating stations in the intervening period. Therefore, while the policy in the NPS says GHG emissions from fossil fuel generating stations are accepted to be a significant adverse impact, the NPSs also say that the Secretary of State does not need to assess them against emissions reduction targets. Nor does the NPS state that GHG emissions are a reason to withhold the grant of consent for such projects. It is open to the Secretary of State to depart from the NPS policies and give greater weight to GHG emissions in the context of the Drax application but there is no compelling reason to do so in this instance."

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

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

47. Her overall conclusion was that there was a "compelling case for granting consent for the development". She considered "that the Development would be in accordance with the relevant NPSs and, given the national need for such development as set out in the relevant NPSs, [she did] not believe that its benefits are outweighed by [its] potential adverse impacts, as mitigated by the terms of the Order". She therefore "decided to make the Order granting development consent" (paragraph 7.1).

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

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

49. In Holgate J.'s view, the fact that EN-1 does not seek to define need in "quantitative" terms, except in some limited respects, is "consistent with (a) the broad indications of the potential need to double or treble generating capacity by 2050 previously given in Part 2 of the NPS … and (b) the unequivocal statement in paragraph 3.1.2 that it is inappropriate for planning policy to set targets for, or limits on, different types of technology" (paragraph 73 of the judgment). In paragraphs 3.1.2 and 3.3.15 to 3.3.24 of EN-1 it is "plain that, apart from indicating need for a *minimum* amount of new capacity by 2025, the references to need in EN-1 were not expressed in quantitative terms". This "is said to be consistent with the market-based system under which electricity generation is provided and the other non-planning mechanisms by which Government seeks to influence the operation of the market" (paragraph 80). Instead, EN-1 "focuses on qualitative need such as functional requirements". Paragraph 3.1.1 states that the United Kingdom needs all types of energy infrastructure covered by EN-1 "in order to achieve energy security while at the same time dramatically reducing GHG", and paragraphs 3.3.2 to 3.3.6 "explain how those twin objectives should be addressed" (paragraph 81).

50. The judge said that, reading EN-1 as a whole, rather than selectively, "[it] is plain that the NPS … does not require need to be assessed in quantitative terms for any individual

application" (paragraph 129), that "[putting] to one side the "interim milestone" which did not feature in the discussion in this case, there are no benchmarks against which a quantitative analysis ([e.g.] consents in the pipeline or projections of capacity) could be related" (paragraph 130); and that "[given] those clear statements of policy in EN-1 there was no justification for the Panel to have regard to the 2017 UEP projections in order to assess the contribution of the Drax proposal to meeting the qualitative need identified in the NPS" (paragraph 131).

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

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

53. Mr Jones maintained that EN-1 requires the decision-maker to consider, case by case, the "anticipated … actual contribution" of the individual project to satisfying the need for a "particular type" of infrastructure (paragraphs 3.1.3, 3.1.4, 3.2.3 and 4.1.3). He relied in particular on the statement in the last sentence of paragraph 3.2.3 that "[the] weight which is attributed to considerations of need in any given case should be proportionate to the anticipated extent of a project's actual contribution to satisfying the need for a particular type of infrastructure". As the examining authority concluded (in paragraphs 5.2.21 and 5.2.23 of its report), paragraph 3.2.3 of EN-1 distinguishes between the need for energy NSIPs and the need for the proposed development. EN-1 is not to be read as simply telling the decision-maker to give "substantial weight" to a need for certain types of energy infrastructure

established in the policy (paragraph 3.1.1). That would be to adopt an approach of the kind rejected in *Scarisbrick* (at paragraph 31) – "the bigger the project, the greater is the need for it".

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

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

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

57. Starting with the most salient passages on need in EN-1, in Part 3, one can see seven things. First, there is a recognised need for "all the types of energy infrastructure" within its scope. Secondly, this is compatible, in principle, not only with the aim to "achieve energy security" but also with that of "dramatically reducing greenhouse gas emissions" (paragraph 3.1.1). Thirdly, in the Government's view it would be inappropriate "to set targets for or limits on" different technologies (paragraph 3.1.2). Fourthly, "all applications" for development consent should be assessed "on the basis that the Government has demonstrated that there is a need for those types of infrastructure" and "the scale and urgency of that need is as described in [Part 3]" (paragraph 3.1.3). Fifthly, when development consent is sought, "substantial weight" should be given to "the contribution which projects would make towards satisfying this need" (paragraph 3.1.4). Sixthly, because "without significant amounts of new large-scale energy infrastructure, the objectives of [the Government's] energy and climate change policy cannot be fulfilled", it is right that "substantial weight" should be given to "considerations of need" (paragraph 3.2.3). And seventhly, "[the] weight which is attributed to considerations of need in any given case should be proportionate to the anticipated extent of a project's actual contribution to satisfying the need for a particular type of infrastructure" (paragraph 3.2.3).

58. Those seven points are expanded elsewhere in EN-1. In Part 2 there is a clear emphasis on the "market-based system" (paragraph 2.2.2); on the proposition that "the planning system is only one of a number of vehicles that helps to deliver Government energy and climate change policy" (paragraph 2.2.4); on the place of the EU Emissions Trading Systems as "the cornerstone of UK action to reduce greenhouse gas emissions from the power sector" (paragraph 2.2.12); on the changes being promoted under the Electricity Market Reform

project (paragraph 2.2.15); and on the complementary relationship between the Planning Act and the Electricity Market Reform project, which is "consistent with the Government's established view that the development of new energy infrastructure is market-based", it being "a matter for the market to decide where and how to build, as market mechanisms will deliver the required infrastructure most efficiently" (paragraph 2.2.19).

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

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

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

62. The principles guiding the consideration of applications, in Part 4, flow from the text on decision-making in paragraphs 3.1.1 to 3.1.4. They provide a "presumption in favour of granting consent to applications for energy NSIPs" (paragraph 4.1.2). They also include as a potential benefit, in the balancing of "adverse impacts" against "benefits", a proposed development's "contribution to meeting the need for energy infrastructure" (paragraph 4.1.3).

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

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

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

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

67. There is, in my view, no justification for reading such a requirement into the policy. The way in which a decision-maker's task is to be carried out in a particular case is for him to resolve. The policy leaves him with an ample discretion to decide how best to go about making the evaluative judgment required. As its language makes clear, the assessment of weight must be grounded in reality. But it demands a predictive assessment: hence the reference to the "anticipated extent" of the development's "actual contribution" to satisfying the relevant need. It should be remembered that paragraph 3.2.3 applies not merely to fossil fuel generating capacity, but to every kind of energy infrastructure to which EN-1 relates, including renewable energy projects. Even without there being in the relevant national policy

statements a specific target or limit for a particular type of infrastructure, or a range of the likely requirement for such capacity within a given timescale, it might still be possible to carry out a "quantitative" assessment of need. And there may be circumstances in which, for a particular type of infrastructure, or a particular proposal, it is appropriate to undertake a "quantitative assessment". The important point here, however, is that paragraph 3.2.3 does not compel the decision-maker to do it.

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

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

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

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

72. The issue was not left there. The Secretary of State applied the principle in the final sentence of paragraph 3.2.3 of EN-1. Again, in my view, she did so impeccably. First, she quoted the relevant words. Secondly, she made it clear that her mind was open to the possibility of reducing the weight given to the development's contribution to satisfying the relevant need. She said she had considered whether, in light of the examining authority's findings, there was "any reason why she should not attribute substantial weight to the Development's contribution to meeting the identified need for new CCR fossil fuel generation infrastructure in this case". Thirdly, she pointed to the three considerations relevant to this question: the examining authority's "views on the changes in energy generation since … EN-1 was published in 2011", the "implications of current models and projections of future demand for gas-fired electricity generation", and "the evidence regarding the pipeline of consented gas-fired infrastructure" (paragraph 4.19). It is not suggested that this was an incomplete description of the three main points in the examining authority's assessment.

73. The Secretary of State explained why she was not persuaded by the examining authority's assessment to conclude that less than "substantial weight" should be given to the identified need. There were three points: first, the lack of any "guarantee" that other schemes with consent would "reach completion"; second, as paragraph 3.3.18 of EN-1 says, the updated projections on which the examining authority had relied did not reflect "a desired or preferred outcome … in relation to … need …"; and third, the principle, in paragraph 3.1.2, that it is the responsibility of "industry" to propose new infrastructure "within the strategic framework set by Government", and "the Government does not consider it appropriate for planning policy to set targets for or limits on different technologies". All three of these points were, in the Secretary of State's view, reinforced by other passages in EN-1. The examining authority's findings did not, in her view, "diminish the weight to be attributed to the [development's] contribution towards meeting the identified need for CCR gas fired generation …". This, she concluded, "should be given substantial weight in accordance with paragraph 3.1.4 of EN-1" (paragraph 4.20).

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

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

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

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

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

78. Holgate J. saw no force in that argument. In his view it was "plain … that the Secretary of State did not treat GHG emissions as irrelevant, nor did she treat them as something to which

no weight should be given". In paragraph 4.17 of the decision letter she moved from her conclusions on section 104(3) and (5) to the balance under section 104(7). She accepted that the examining authority's finding on the "significant adverse impacts of GHG emissions" from the development "could be weighed in the balance against the proposal". But she disagreed with their "evaluation of the benefits of the proposal, including its contribution towards meeting policy need". Once those benefits were "correctly weighed", she found "the impact of GHG emissions should not "carry determinative weight in the overall planning balance"". This, said the judge, "can only mean that the disbenefits did not carry more weight than the benefits"; it was "the other way round". In paragraph 4.17 the Secretary of State was "describing a straight forward balancing exercise … in no way dependent upon the terms of paragraphs 5.2.2 of EN-1 or 2.5.2 of EN-2". She returned to this exercise in paragraphs 6.3 to 6.9 of the decision letter (paragraph 167 of the judgment).

79. The judge did not see the approach in paragraph 5.2.2 of EN-1 as "legally objectionable". It accorded with section 5(5)(c) of the Planning Act, and was also "supported by established case law on the significance of alternative systems of control (see e.g. [*Gateshead Metropolitan Borough Council v Secretary of State for the Environment* (1996) 71 P. & C.R. 350])" (paragraph 170). In paragraph 6.7 of the decision letter, when carrying out the exercise required by section 104(7), the Secretary of State did not suggest that the policy in paragraph 5.2.2 of EN-1 and paragraph 2.5.2 of EN-2 treats greenhouse gas emissions as "an irrelevant consideration in a development consent order application or as a disbenefit to which no weight may be given" (paragraph 172). EN-1 and EN-2 "proceed on the basis that there is no justification in *land use planning terms* for treating GHG emissions as a dis-benefit which in itself is dispositive of an application for a DCO" (paragraph 178). EN-1 does not preclude greenhouse gas emissions being given "greater weight" in the section 104(7) balance, "so long as [they are] not treated as a freestanding reason for refusal" (paragraph 179).

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

81. This understanding of paragraph 5.2.2, submitted Mr Jones, is confirmed by its reference to the environmental statement for a project, which, it says "on air emissions … will include an assessment of CO2 emissions". Under the Environmental Impact Assessment Directive 2011/92/EU (as amended) ("the EIA Directive") and the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 ("the EIA Regulations"), greenhouse gas emissions would have to be assessed and taken into account within the "environmental information" before the decision-maker when considering whether to grant consent (regulation 21). Under the regime for environmental impact assessment, a significant environmental effect such as CO2 emissions must potentially be capable of providing a reason for refusing consent for a project. EN-1 could not prevent that outcome, because it must be interpreted in accordance with EU law (see *Marleasing SA v La Comercial Internacional de Alimentacion SA* (1990) C-106/89), and otherwise would be overridden by the statutory exceptions under section 104(5) and (6) of the Planning Act. It was not open to the Government, through national policy, to prevent greenhouse gas emissions and their

contribution to climate change from being, as Mr Jones put it, a "material consideration" in a decision on an application for a development consent order (see the speech of Lord Hoffmann in *Tesco Stores Ltd. v Secretary of State for the Environment* [1995] 1 W.L.R. 759, at pp.764, 780, 783 and 784; and *R. (on the application of Wright) v Forest of Dean District Council* [2019] UKSC 53, at paragraphs 42, 52 and 53). That there are other means by which the United Kingdom seeks to reduce greenhouse gas emissions from existing infrastructure, including the EU Emissions Trading System, does not bear on this analysis.

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

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

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

85. The policy in paragraph 5.2.2 of EN-1 must be read in its entirety, and in its context. It should not be read in a way that puts it into conflict with other provisions in EN-1. The first sentence of the paragraph recognises that CO2 emissions are "a significant adverse impact from some types of energy infrastructure which cannot be totally avoided (even with full deployment of CCS technology)". The second sentence begins with a reference to "the characteristics of these and other technologies, as noted in Part 3 of this NPS" and to "the range of non-planning policies aimed at decarbonising electricity generation such as EU ETS …". It is clear therefore that the policy is seen by the Government as compatible with the policies on need in Part 3. There is no suggestion that it removes or qualifies the general "presumption in favour of granting consent to applications for energy NSIPs" in paragraph 4.1.2, which is founded on the "level and urgency of need for infrastructure of the types covered by the energy NSIPs set out in Part 3" – including fossil fuel generating capacity.

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

87. The force of the policy, therefore, is not that CO2 emissions are irrelevant to a development consent decision, or cannot be given due weight in such a decision. It is simply that CO2

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

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

89. That, however, was not the end of the Secretary of State's consideration of greenhouse gas emissions. As she went on to say, she was aware of the "need to consider these impacts within the overall planning balance to determine whether the exception test set out in section 104(7) of [the Planning Act] applies in this case". She referred to the examining authority's conclusion that the development would have "significant adverse impacts in terms of GHG emissions", which she accepted "may weigh against it in the balance". But she disagreed with the examining authority's finding "that these impacts and the perceived conflict with NPS policy … should carry determinative weight in the overall planning balance once the benefits of the project are properly considered, including in particular its contribution towards meeting need …" (paragraph 4.17). In saying this, the Secretary of State was accepting that greenhouse gas emissions had a place in the balancing exercise she was going to conduct, though she concluded that they should not have "determinative weight". There is no legal flaw in this conclusion. It is faithful to the policy in paragraph 5.2.2 of EN-1.

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

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

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

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

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

95. One cannot say that she misunderstood the purpose of environmental impact assessment under the EIA Directive and the EIA Regulations, or the relevance of an assessment of CO2 emissions in an environmental statement for a project within the scope of EN-1 and EN-2. As Mr Tait submitted, the requirement to assess the environmental impacts of a development,

under regulation 21 of the EIA Regulations, is not incompatible with a statement of national policy in which the Government explains how impacts of a particular kind are viewed, and how they are being addressed by different means. And there is no basis here for the submission that the Secretary of State thought the policy in paragraph 5.2.2 of EN-1 could, in principle, prevent greenhouse gas emissions, if assessed as a likely significant effect on the environment in an environmental statement, from warranting a refusal of development consent. This was not a conclusion she reached, nor implicit in any she did.

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

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

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

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

99. Holgate J. saw no difficulty in rejecting this ground of the claim. Citing the decision of this court in *R. (on the application of Thames Blue Green Economy Ltd.) v Secretary of State for Communities and Local Government* [2015] EWCA Civ 876, and at first instance in the same case ([2015] EWHC 727 (Admin)), and also that of the Divisional Court in *R. (on the application of Spurrier) v Secretary of State for Transport* [2020] P.T.S.R. 240, he acknowledged that section 104(7) may not be used to "circumvent the application of ss.87(3), 104(3) and 106(2)" of the Planning Act (paragraph 176 of the judgment). But the Secretary of State was "legally entitled to … give "substantial weight" to the need case in accordance with the NPS", and "fully entitled to take that assessment into account under s.104(7)" (paragraph 177 of the judgment). In paragraph 6.7 of the decision letter she recognised that in EN-1 greenhouse gas emissions are accepted to be a "significant adverse impact", and then went on to consider whether, in the section 104(7) balance, that factor should be given "greater weight" in the case of the Drax proposal. The proposal also gave rise to landscape and visual

impacts, which were "further disbenefits". The suggestion that the Secretary of State looked at the balance under section 104(7) "solely through the lens of, or improperly fettered by, the NPSs" was "untenable" (paragraph 179). She decided not to give "greater weight" to greenhouse gas emissions because she found there to be "no compelling reason in this instance". To criticise this as improperly introducing a "threshold test" was "an overly legalistic approach to the reading of the decision letter". The Secretary of State was "simply expressing a matter of planning judgment", and "saying that there was no sufficiently cogent reason for giving more weight to this matter". She was "entitled to exercise her judgment in that way". She went on, in paragraph 6.9, to "weigh all the positive and negative effects of the proposal before concluding that the benefits outweighed the adverse effects of the proposal" (paragraph 180).

100. Mr Jones submitted that the availability of the power to review under section 6 of the Planning Act does not prevent reduced weight being given to policies in a national policy statement that have become out-of-date, or greater weight to other "material considerations" because circumstances have changed since the designation of the national policy statement – such as greenhouse gas emissions in the light of the target of "Net Zero" (see *Spurrier*, at paragraph 109). If that balancing exercise results in "adverse impacts" outweighing "benefits", the obligation under section 104(3) to determine the application in accordance with the national policy statement is released. The section 104(3) assessment must not be allowed to override the operation of section 104(7).

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

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

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

104. First, the purpose of the balancing exercise in section 104(7) is to establish whether an exception should be made to the requirement in section 104(3) that an application for

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

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

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

107. Fourthly, the Secretary of State concluded in paragraph 6.2, on the basis of her earlier conclusions in paragraphs 4.8 to 4.20, that the proposed development was "in accordance with EN-1", having satisfied herself that it "should benefit from [the policy presumption in favour of granting consent for energy NSIPs in EN-1] because there are no more specific and more relevant NPS policies which clearly indicate that consent should be refused" and that "therefore the Development accords with relevant NPSs". This was a lawful conclusion.

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

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

"strong arguments" weighing in favour of granting consent for a development of this capacity, because of its "contribution to meeting the need case set out in the NPSs".

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

Conclusion

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

Lord Justice Lewis

112. I agree.

Lord Justice Lewison

113. I also agree.

APPENDIX D

A King's Bench Division

Rex (Substation Action Save East Suffolk Ltd) *v* Secretary of State for Business, Energy and Industrial Strategy

B **[2022] EWHC 3177 (Admin)**

2022 Nov 15, 16; Dec 13 Lang J

Planning — Development — National policy statement — Development consent granted for wind turbine projects comprising offshore and onshore development — Whether development consent orders unlawful — Whether flood risk from surface water properly taken into account — Whether insufficient weight given to harm to heritage assets — Whether sufficient consideration of alternative sites — Planning Act 2008 (c 29), ss 104, 114 — Infrastructure Planning (Decision) Regulations 2010 (SI 2010/305), reg 3 — National Planning Policy Framework (2021), paras 161, 162 — Overarching National Policy Statement for Energy EN-1, Pts 4.4, 5.7

C

D

The interested parties applied for development consent orders under section 114 of the Planning Act 2008[1] to authorise nationally significant infrastructure projects consisting of two proposed offshore wind farms with associated onshore and offshore development, including the construction of a new National Grid substation and two project substations. In determining the application the Secretary of State was required by section 104 of the 2008 Act to "have regard" to any relevant national policy E statement and to determine the application in accordance with it unless a relevant exception applied. Following an examination process, the Secretary of State accepted the examining authorities' recommendation to grant the development consent orders, concluding that the benefits of the proposed development, which would provide significant additional renewable energy generation consistent with climate change targets and the national energy policy statements, on balance outweighed its negative impacts. The claimant, a company formed by concerned local residents, challenged F the development consent orders as being unlawful by reason of the location of the onshore part of the development, in that, inter alia: (i) contrary to the requirement in the National Planning Policy Framework[2], the Overarching National Policy Statement for Energy EN-1[3] ("NPS EN-1") and associated guidance, the "sequential test" had not been properly applied to the risk of surface water flooding at the stage of site selection, in relation to which the examining authorities' finding of flood risk from surface water made it necessary for the interested parties to demonstrate that G no other sites with lower flood risk were available; (ii) the Secretary of State had relied on an unlawful interpretation of regulation 3 of the Infrastructure Planning (Decisions) Regulations 2010[4] concerning the preservation of heritage assets and

[1] Planning Act 2008, s 104: see post, para 32.
S 114(1): "When the Secretary of State has decided an application for an order granting H development consent, the Secretary of State must either— (a) make an order granting development consent, or (b) refuse development consent."

[2] National Planing Policy Framework, paras 161, 162: see post, para 59.

[3] Overarching National Policy Statement for Energy EN-1, Pt 4.4: see post, para 216. Pt 5.7: see post, paras 53–57.

[4] Infrastructure Planning (Decisions) Regulations 2010, reg 3: see post, para 94.

had consequently failed to give sufficient weight in the planning balance to the heritage harm identified in the examining authorities' report; and (iii) having regard to section 104 of the 2008 Act and the policy guidance in NPS EN-1, and given the substantial adverse effects at the chosen development site and the interested parties' reliance on the benefits of the proposed development, the Secretary of State had erred in failing to consider alternative sites in which to situate the project substations and National Grid substation.

On the claim for judicial review—

Held, dismissing the claim, (1) that the express aim of planning policy under the National Planning Policy Framework and Overarching National Policy Statement for Energy EN-1 was to ensure that the risks of flooding from all sources, including surface water, were taken into account at all stages of the planning process; that, while the specific guidance on the application of the "sequential test" only referred to the location of projects in different flood zones, such zones were designated on the basis of the risk of fluvial flooding, not surface water or other sources of flooding, and thus were not a sufficient means of assessing surface water flood risks; that in the absence of any further direction in the Framework or policy guidance as to how surface water flooding was to be factored into the sequential approach, it was a matter of judgment for an applicant, and ultimately the decision-maker, as to how flood risks from other sources such as surface water ought to be factored into the sequential test; that, further, the application of the sequential test did not require that, where some surface water risk existed, it needed to be positively demonstrated that there were no other sites with lower surface water flood risk reasonably available for the development; and that, in the present case, the Secretary of State having accepted that all sources of flooding had been considered and that the applicants had applied the sequential test as part of site selection, it had been a lawful exercise of planning judgment for him to conclude that, in all the circumstances, the flood risk assessment was appropriate for the development (post, paras 53, 58, 64, 65, 76, 81, 82).

(2) That, while the duty to "have regard" in regulation 3 of the Decisions Regulations 2010 required the decision-maker to take into account the "desirability of preserving the listed building or its setting or any features of special architectural or historic interest which it possesses", it did not include the higher duty found in section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 to treat a finding of heritage harm as a consideration to which the decision-maker ought to give "considerable importance and weight" when assessing the planning balance; and that, therefore, as the weight to be accorded to the heritage harm was not prescribed by statute, the Secretary of State had not been required by law to apply "considerable importance and weight" to it in the planning balance (post, paras 104, 111, 112).

Howell v Secretary of State for Communities and Local Government [2014] EWHC 3627 (Admin) applied.

(3) That there was no principle of law that in any case where the beneficial effects of a proposed development outweighed its adverse effects, the existence of alternative sites became a mandatory material consideration; that consideration of alternative sites would only be relevant to a planning application in exceptional circumstances; that, while a requirement to consider alternative sites might arise from the terms of a national policy statement, paragraph 4.4.3 of National Policy Statement EN-1 only required alternatives that were not main alternatives studied by an applicant to be considered to the extent that they were "important and relevant", in accordance with section 104(2) of the Planning Act 2008; that the circumstances at the interested parties' chosen site could not be characterised as wholly exceptional; that the examining authorities, having considered the issues and evidence including whether a different site offered viable connection alternatives, had been entitled

A lawfully to conclude, as a matter of planning judgment, that the alternative sites were not "important and relevant" and that the legal and policy framework for the considerations of alternatives had been met; and that the Secretary of State's decision agreeing with that analysis and those conclusions disclosed no public law error (post, paras 211, 214, 215, 219, 222, 223, 225–230).

Langley Park School for Girls v Bromley London Borough Council [2010] 1 P & CR 10, CA, *R (Mount Cook Land Ltd) v Westminster City Council* [2017] PTSR B 1166, CA and *R (Save Stonehenge World Heritage Site Ltd) v Secretary of State for Transport* [2022] PTSR 74 considered.

The following cases are referred to in the judgment:

Bath Society v Secretary of State for the Environment [1991] 1 WLR 1303; [1992] 1 All ER 28; 89 LGR 834, CA

C *Derbyshire Dales District Council v Secretary of State for Communities and Local Government* [2009] EWHC 1729 (Admin); [2010] 1 P & CR 19

East Northamptonshire District Council v Secretary of State for Communities and Local Government [2014] EWCA Civ 137; [2015] 1 WLR 45, CA

Hale Bank Parish Council v Halton Borough Council [2019] EWHC 2677 (Admin)

Howell v Secretary of State for Communities and Local Government [2014] EWHC 3627 (Admin)

D *Langley Park School for Girls v Bromley London Borough Council* [2009] EWCA Civ 734; [2010] 1 P & CR 10, CA

Pepper v Hart [1993] AC 593; [1992] 3 WLR 1032; [1993] ICR 291; [1993] 1 All ER 42, HL(E)

R (Jones) v North Warwickshire Borough Council [2001] EWCA Civ 315; [2001] 2 PLR 59, CA

E *R (Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ 1346; [2017] PTSR 1166, CA

R (Pearce) v Secretary of State for Business, Energy and Industrial Strategy [2021] EWHC 326 (Admin); [2022] Env LR 4

R (Save Stonehenge World Heritage Site Ltd) v Secretary of State for Transport [2021] EWHC 2161 (Admin); [2022] PTSR 74

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

F *R (Spurrier) v Secretary of State for Transport* [2019] EWHC 1070 (Admin); [2020] PTSR 240, DC; sub nom *R (Friends of the Earth Ltd) v Secretary of State for Transport* [2020] UKSC 52; [2021] PTSR 190; [2021] 2 All ER 967, SC(E)

R (Swire) v Secretary of State for Housing, Communities and Local Government [2020] EWHC 1298 (Admin); [2020] Env LR 29

South Lakeland District Council v Secretary of State for the Environment [1992] 2 AC 141; [1992] 2 WLR 204; [1992] 1 All ER 573; 90 LGR 201, HL(E)

G

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

Barker Mill Estates (Trustees of the) v Test Valley Borough Council [2016] EWHC 3028 (Admin); [2017] PTSR 408

City & Country Bramshill Ltd v Secretary of State for Housing, Communities and Local Government [2021] EWCA Civ 320; [2021] 1 WLR 5761, CA

H *East Staffordshire Borough Council v Secretary of State for Communities and Local Government* [2017] EWCA Civ 893; [2018] PTSR 88, CA

Gillespie v First Secretary of State [2003] EWCA Civ 400; [2003] Env LR 30, CA

Hutchings, In re [2019] UKSC 26; [2020] NI 801, SC(NI)

London Historic Parks and Gardens Trust v Minister of State for Housing [2022] EWHC 829 (Admin); [2022] JPL 1196

Mordue v Secretary of State for Communities and Local Government [2015] EWCA Civ 1243; [2016] 1 WLR 2682, CA
Newcastle upon Tyne City Council v Secretary of State for Levelling Up, Housing and Communities [2022] EWHC 2752 (Admin)
Newick (Baroness Cumberlege of) v Secretary of State for Communities and Local Government [2018] EWCA Civ 1305; [2018] PTSR 2063, CA
R v Rochdale Metropolitan Borough Council, Ex p Milne [2000] Env LR 1
R (Champion) v North Norfolk District Council [2015] UKSC 52; [2015] 1 WLR 3710; [2015] 4 All ER 169; [2015] LGR 593, SC(E)
R (ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy [2020] EWHC 1303 (Admin); [2020] PTSR 1709
R (Hampton Bishop Parish Council) v Herefordshire Council [2014] EWCA Civ 878; [2015] 1 WLR 2367, CA
R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department [2022] UKSC 3; [2023] AC 255; [2022] 2 WLR 343; [2022] 4 All ER 95, SC(E)
R (Wright) v Forest of Dean District Council [2019] UKSC 53; [2019] 1 WLR 6562; [2020] 2 All ER 1, SC(E)
R (Zurich Assurance Ltd (trading as Threadneedle Property Investments)) v North Lincolnshire Council [2012] EWHC 3708 (Admin)
Secretary of State for Communities and Local Government v Allen [2016] EWCA Civ 767, CA
Trusthouse Forte Hotels Ltd v Secretary of State for the Environment (1986) 53 P & CR 293

CLAIM for judicial review

By a claim form, and pursuant to section 118 of the Planning Act 2008, the claimant, Substation Action Save East Suffolk Ltd, sought judicial review of the decision dated 31 March 2022 of the defendant, the Secretary of State for Business, Energy and Industrial Strategy, on applications by the interested parties, East Anglia One North Ltd and East Anglia Two Ltd, to grant two development consent orders under section 114 of the 2008 Act for the construction of two offshore wind farms with associated onshore and offshore development. On 1 July 2022 Lang J, considering the matter on the papers, granted permission to proceed with the claim. The grounds of challenge were, inter alia, that the Secretary of State had: (1) erred in his assessment of the adequacy of the interested parties' flood risk assessment, and in his overall assessment of flood risk, in that the sequential test, properly applied, required assessment of all sources of flooding at the stage of site selection and the Secretary of State had instead applied the sequential test at the stage of design after site selection and had otherwise acted irrationally in reaching his conclusions on flood risk; and (2) substantively adopted the examining authorities' reasoning on heritage harm which was based on an unlawful interpretation of the Infrastructure Planning (Decisions) Regulations 2010, which consequently infected his analysis of heritage harm; alternatively, while purporting to give heritage harm "considerable importance and weight", such weight was not reflected in the overall planning balance, which followed the examining authorities' analysis, and which unlawfully attributed only "medium" weight to the issue, contrary to the legal requirement. The full grounds of challenge are set out in the judgment, post, paras 8–14.

The facts are stated in the judgment, post, paras 1–7, 15–28.

Richard Turney and *Charles Bishop* (instructed by *Richard Buxton Solicitors, Cambridge*) for the claimant.

Mark Westmoreland Smith and *Jonathan Welch* (instructed by *Treasury Solicitor*) for the Secretary of State.

Hereward Phillpot KC and *Hugh Flanagan* (instructed by *Shepherd and Wedderburn LLP*) for the interested parties.

The court took time for consideration.

13 December 2022. **LANG J** handed down the following judgment.

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

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

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

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

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

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

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

Grounds of challenge

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 *Ground 5: Cumulative effects*. The defendant irrationally excluded from consideration the cumulative effects of known plans for extension (outlined in the applicants' "Extension of National Grid Substation Appraisal"), through the addition of other projects to connect at the same location in Friston, and failed to take into account environmental information relating to those projects, in breach of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/572) ("the EIA Regulations 2017").

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

Factual background

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

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

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

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

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

to capital and operational cost, and technical, regulatory, environmental, planning and deliverability factors.

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

(i) Bramford 400kV substation;
(ii) Sizewell 400kV substation;
(iii) Leiston 400kV substation; and
(iv) Norwich Main 400kV substation.

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

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

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

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

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

25 The applications for development consent were submitted on 25 October 2019. They were accepted for examination under section 55 PA 2008 on 22 November 2019, and the ExA was appointed on 13 December 2019. The simultaneous examination of EA1N and EA2 took place from October 2020 to July 2021. The ExA reported to the defendant on 6 October 2021.

26 The ExA's overall conclusions were as follows:

A "*28.4 Overall conclusion on the case for development*

"28.4.1. Because the Proposed Development meets specific relevant Government policy set out in NPS EN-1, NPS EN-3, and NPS EN-5, as a matter of law, a decision on the application in accordance with any relevant NPS (PA 2008 S104(2)(a) and S104(3)) also indicates that development consent should be granted unless a relevant consideration arising from the following subsections of the Act (PA 2008 S104(4) to (8)) applies.

B

"28.4.2. The Proposed Development is also broadly compliant with the MPS. Regard has been had to the Marine Plans in force and again, the Proposed Developments broadly comply (PA 2008 section 104(2)(aa)).

28.4.3. Regard has been had to the LIR (PA 2008 section 104(2)(b),

C to prescribed matters (PA 2008 section 104(2)(c)) and to all other important and relevant policy (including but not limited to the Development Plan) and to other important and relevant matters identified in this Report (PA 2008 section 104(2)(d).

"28.4.4. In the ExA's judgement, the benefits of the Proposed Development at the national scale, providing highly significant additional renewable energy generation capacity in scalar terms and in

D a timely manner to meet need, are sufficient to outweigh the negative impacts that that have been identified in relation to the construction and operation of the Proposed Development at the local scale. The local harm that the ExA has identified is substantial and should not be underestimated in effect. Its mitigation has in certain key respects been found to be only just sufficient on balance. However, the benefits of the

E Proposed Development principally in terms of addressing the need for renewable energy development identified in NPS EN-1 outweigh those effects. In terms of PA 2008 section 104(7) the ExA specifically finds that the benefits of the Proposed Development do on balance outweigh its adverse impacts.

"28.4.5. In reaching this conclusion, the ExA has had regard to the

F effect of the Proposed Development cumulatively with the other East Anglia development and with such other relevant policies and proposals as might affect its development, operation or decommissioning and in respect of which there is information in the public domain. In that regard, the ExA observes that effects of the cumulative delivery of the Proposed Development with the other East Anglia development on the transmission connection site near Friston are so substantially

G adverse that utmost care will be required in the consideration of any amendments or additions to those elements of the Proposed Development in this location. This ExA does not seek to fetter the discretion of future decision-makers about additional development proposals at this location. However, it can and does set out a strong view that the most substantial and innovative attention to siting, scale,

H appearance and the mitigation of adverse effects within design processes would be required if anything but immaterial additional development were to be proposed in this location.

"28.4.6. In relation to this conclusion, the ExA observes that particular regard needs to be had at this location to flood and drainage effects (where additional impermeable surfaces within the

existing development site have the potential to affect the proposed flood management solution), to landscape and visual impacts and to impacts on the historic built environment, should these arise from additional development proposals in the future.

"28.4.7. The ExA concludes overall that, for the reasons set out in the preceding chapters and summarised above, the SoS should decide to grant development consent.

"28.4.8. The ExA acknowledges that this is a conclusion that may well meet with considerable dismay amongst many local residents and businesses who became IPs and contributed positively and passionately to the Examination across a broad range of matters and issues. To them the ExA observes that their concerns are real and that the planning system provided a table to which they could be brought. However, highly weighty global and national considerations about the need for large and timely additional renewable energy generating capacity to meet need and to materially assist in the mitigation of adverse climate effects due to carbon emissions have to be accorded their due place in the planning balance. In the judgment of the ExA, these matters must tip a finely balanced equation in favour of the decision to grant development consent for the Proposed Development."

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

"27. *The Secretary of State's consideration of the planning balance*

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

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

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

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

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

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

"27.4 After reviewing the ExA Report, the Secretary of State has reached the following conclusions on the weight of other individual topics to be taken forward into the planning balance: flooding & drainage—high negative weighting; landscapes & visual amenity— D medium negative weighting; onshore historic environment—medium negative weighting; seascapes—neutral weighting; onshore ecology—low negative weighting; coastal processes—neutral weighting; onshore water quality & resources; noise and vibration—medium negative weighting; air quality, light pollution, and impacts on human health —low negative weighting; transport & traffic—medium negative weighting; socio-economic effects onshore—medium positive weighting; E land use effects—medium negative weighting; offshore ornithology—medium negative weighting; marine mammals—low negative weighting; other offshore biodiversity—low negative weighting; marine physical effects & water quality—low negative weighting; offshore historic environment—low negative weighting; offshore socio-economic & other effects—neutral weighting; good design—low negative weighting; F other overarching matters—neutral weighting.

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

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

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

"27.8 The Secretary of State has also considered the proposal supported by multiple interested parties that there should be a split

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

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

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

Statutory and policy framework

Planning Act 2008

29 A detailed account of the PA 2008 was provided by the Supreme Court in *R (Friends of the Earth Ltd) v Secretary of State for Transport* [2021] PTSR 190, paras 19–38.

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

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

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

"104 *Decisions in cases where national policy statement has effect*

"(1) This section applies in relation to an application for an order granting development consent if a national policy statement has effect in relation to development of the description to which the application relates.

"(2) In deciding the application the Secretary of State must have regard to— (a) any national policy statement which has effect in relation to development of the description to which the application relates (a 'relevant national policy statement'), (aa) the appropriate marine policy documents (if any), determined in accordance with section 59 of the Marine and Coastal Access Act 2009, (b) any local impact report (within the meaning given by section 60(3)) submitted to the Secretary of State

A before the deadline specified in a notice under section 60(2), (c) any matters prescribed in relation to development of the description to which the application relates, and (d) any other matters which the Secretary of State thinks are both important and relevant to the Secretary of State's decision.

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

"(4) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the United Kingdom being in breach of any of its international obligations.

"(5) This subsection applies if the Secretary of State is satisfied that C deciding the application in accordance with any relevant national policy statement would lead to the Secretary of State being in breach of any duty imposed on the Secretary of State by or under any enactment.

"(6) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would be unlawful by virtue of any enactment.

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

"(8) This subsection applies if the Secretary of State is satisfied that any condition prescribed for deciding an application otherwise than in accordance with a national policy statement is met.

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

33 Section 104(2)(d) PA 2008 allows the Secretary of State to exercise a judgment on whether he should take into account any matters which are relevant, but not mandatory, material considerations in line with the F established case law on relevant considerations: *R (Pearce) v Secretary of State for Business, Energy and Industrial Strategy* [2022] Env LR 4, per Holgate J at para 11.

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

National Policy Statements

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

36 The Overarching NPS for Energy (EN-1) was made in July 2011. It sets out the wider national policy for energy and applies in combination with the other technology-specific NPSs. Part 3 of EN-1 establishes the need for new energy NSIPs. Part 4 of EN-1 sets out principles applicable to assessing DCO applications. Paragraph 4.1.2 sets a presumption in favour of

granting consent to applications for energy NSIPs, unless any more specific and relevant policies set out in the relevant NPSs clearly indicate that consent should be refused, and subject to the provisions of the PA 2008.

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

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

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

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

> "The court's general approach to the interpretation of planning policy is well established and clear (see the decision of the Supreme Court in *Tesco Stores Ltd v Dundee City Council* [2012] 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] 1 WLR 1865, 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's judgment in *Tesco Stores v Dundee City Council*). The author of a planning policy is not free to interpret the policy so as to give it whatever meaning he might choose in a particular case. The interpretation of planning policy is, in the end, a matter for the court (see para 18 of Lord Reed JSC's judgment in *Tesco Stores v Dundee City Council*). But the role of the court should not be overstated. Even when dispute arises over the interpretation of policy, it may not be decisive in the outcome of the proceedings. It is always important to distinguish issues of the interpretation of policy, which are appropriate for judicial analysis, from issues of planning judgment in the application of that policy, which are for the decision-maker, whose exercise of planning judgment is subject only to review on public law grounds (see paras 24–26 of Lord Carnwath 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."

National Planning Policy Framework and Planning Practice Guidance

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

A **42** The Planning Practice Guidance ("PPG") is relevant to ground 1 (flood risk). The claimant referred to authorities on the status of the PPG which confirm that it is merely practice guidance, not policy.

Ground 1: Flood risk (as amended)

Claimant's submissions

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

44 The claimant pleaded in its reply to the summary grounds of resistance (para 2) that "for the purposes of the claim the court can simply proceed on the basis that all parties are agreed that to find compliance with the sequential test, it was necessary to find that the IPs had demonstrated that there were no sites available for the substation with lower pluvial flood risk".

D **45** The claimant accepted that the applicants applied the sequential test to the risk of fluvial flooding, but complained that it had not been applied to the risk of surface water flooding, which the ExA found to be a high risk (ER 6.5.5). The ExA wrongly concluded that the applicants had complied with the requirements of NPS EN-1. The ExA also erred in finding that the revised Framework, issued in July 2021, had introduced a policy change by requiring that the sequential approach should be applied to all sources of flood risk, E including surface water. This was not a change in policy; NPS EN-1, Planning Policy Statement 25 ("PPS 25") and the earlier editions of the Framework all required assessment of surface water flood risks, using the sequential test.

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

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

Defendant and applicants' submissions

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

49 The defendant did not misinterpret national policy and guidance on the sequential test. It was relevant that the guidance in the PPG had not

been updated. The policy and guidance is not prescriptive as to how surface water flooding risk is to be taken into account in applying the sequential test. It leaves a significant element of judgment to the decision-maker, as emphasised in PPG para 7-034 (Ref ID 7-034-20140306). That judgment can only be challenged on public law grounds, such as irrationality.

50 The claimant's assertion in para 2 of the reply to the summary grounds (set out at para 44 above) was incorrect; that was not what the policy or guidance stated.

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

Conclusions

Policies and guidance

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

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

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

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

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

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

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

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

B "*The Sequential Test*

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

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

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

"*Planning and flood risk*

"159. Inappropriate development in areas at risk of flooding should be avoided by directing development away from areas at highest risk (whether existing or future). Where development is necessary in such areas, the development should be made safe for its lifetime without F increasing flood risk elsewhere.

"160. Strategic policies should be informed by a strategic flood risk assessment, and should manage flood risk from all sources. They should consider cumulative impacts in, or affecting, local areas susceptible to flooding, and take account of advice from the Environment Agency and other relevant flood risk management authorities, such as lead local G flood authorities and internal drainage boards.

"161. All plans should apply a sequential, risk-based approach to the location of development—taking into account all sources of flood risk and the current and future impacts of climate change—so as to avoid, where possible, flood risk to people and property. They should do this, and manage any residual risk, by:

(a) applying the sequential test and then, if necessary, the exception H test as set out below;

(b) safeguarding land from development that is required, or likely to be required, for current or future flood management;

(c) using opportunities provided by new development and improvements in green and other infrastructure to reduce the causes and impacts of flooding, (making as much use as possible of natural flood

management techniques as part of an integrated approach to flood risk management); and

(d) where climate change is expected to increase flood risk so that some existing development may not be sustainable in the long-term, seeking opportunities to relocate development, including housing, to more sustainable locations.

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

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

"164. The application of the exception test should be informed by a strategic or site-specific flood risk assessment, depending on whether it is being applied during plan production or at the application stage. To pass the exception test it should be demonstrated that: a) the development would provide wider sustainability benefits to the community that outweigh the flood risk; and b) the development will be safe for its lifetime taking account of the vulnerability of its users, without increasing flood risk elsewhere, and, where possible, will reduce flood risk overall.

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

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

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

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

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

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

(d) any residual risk can be safely managed; and

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

"168. Applications for some minor development and changes of use [Footnote 56: This includes householder development, small non-
C residential extensions (with a footprint of less than 250m^2) and changes of use; except for changes of use to a caravan, camping or chalet site, or to a mobile home or park home site, where the sequential and exception tests should be applied as appropriate.] should not be subject to the sequential or exception tests but should still meet the requirements for site-specific flood risk assessments set out in footnote 55.

D "169. Major developments should incorporate sustainable drainage systems unless there is clear evidence that this would be inappropriate. The systems used should:

(a) take account of advice from the lead local flood authority;

(b) have appropriate proposed minimum operational standards;

(c) have maintenance arrangements in place to ensure an acceptable standard of operation for the lifetime of the development; and

E (d) where possible, provide multifunctional benefits."

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

61 The PPG, at para 7.019, provides:

"*The aim of the Sequential Test*

"*What is the aim of the Sequential Test for the location of development?*

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

taking into account the flood risk vulnerability of land uses and applying the Exception Test if required."

"Within each flood zone, surface water and other sources of flooding also need to be taken into account in applying the sequential approach to the location of development.

"Paragraph: 019 Reference ID: 7–019–20140306

"Revision date: 06 03 2014"

62 Para 7.033 of the PPG provides:

"*Applying the Sequential Test to individual planning applications*

"*How should the Sequential Test be applied to planning applications?*

"See advice on the sequential approach to development and the aim of the sequential test.

"The Sequential Test does not need to be applied for individual developments on sites which have been allocated in development plans through the Sequential Test, or for applications for minor development or change of use (except for a change of use to a caravan, camping or chalet site, or to a mobile home or park home site).

"Nor should it normally be necessary to apply the Sequential Test to development proposals in Flood Zone 1 (land with a low probability of flooding from rivers or the sea), unless the Strategic Flood Risk Assessment for the area, or other more recent information, indicates there may be flooding issues now or in the future (for example, through the impact of climate change).

"For individual planning applications where there has been no sequential testing of the allocations in the development plan, or where the use of the site being proposed is not in accordance with the development plan, the area to apply the Sequential Test across will be defined by local circumstances relating to the catchment area for the type of development proposed. For some developments this may be clear, for example, the catchment area for a school. In other cases it may be identified from other Local Plan policies, such as the need for affordable housing within a town centre, or a specific area identified for regeneration. For example, where there are large areas in Flood Zones 2 and 3 (medium to high probability of flooding) and development is needed in those areas to sustain the existing community, sites outside them are unlikely to provide reasonable alternatives.

"When applying the Sequential Test, a pragmatic approach on the availability of alternatives should be taken. For example, in considering planning applications for extensions to existing business premises it might be impractical to suggest that there are more suitable alternative locations for that development elsewhere. For nationally or regionally important infrastructure the area of search to which the Sequential Test could be applied will be wider than the local planning authority boundary.

"Any development proposal should take into account the likelihood of flooding from other sources, as well as from rivers and the sea. The sequential approach to locating development in areas at lower flood risk should be applied to all sources of flooding, including development in an area which has critical drainage problems, as notified to the local

planning authority by the Environment Agency, and where the proposed location of the development would increase flood risk elsewhere.

"See also advice on who is responsible for deciding whether an application passes the Sequential Test and further advice on the Sequential Test process available from the Environment Agency (flood risk standing advice).

"Paragraph: 033 Reference ID: 7–033–20140306.

"Revision date: 06 03 2014."

63 Para 7.034 of the PPG provides:

"*Who is responsible for deciding whether an application passes the Sequential Test?*

"It is for local planning authorities, taking advice from the Environment Agency as appropriate, to consider the extent to which Sequential Test considerations have been satisfied, taking into account the particular circumstances in any given case. The developer should justify with evidence to the local planning authority what area of search has been used when making the application. Ultimately the local planning authority needs to be satisfied in all cases that the proposed development would be safe and not lead to increased flood risk elsewhere.

"Paragraph: 034 Reference ID: 7–034–20140306.

"Revision date: 06 03 2014."

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

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

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

The decisions

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

"*Updates to the National Planning Policy Framework: Post Examination Consultation*

"4.27 The Secretary of State consulted on the issue of updates to the NPPF on 2 November 2021 and 20 December 2021, the key responses are summarised below:

• SCC (the Lead Local Flood Authority)—the changes to the NPPF would require the Applicant to undertake a Sequential Test, and if necessary, an Exception Test. However, SCC acknowledge that as the PPG has not been updated, it is not clear how the Sequential and Exception Tests would be applied.

• ESC—states that the reference in the updated NPPF has the potential to have important implications for the East Anglia ONE North and East Anglia TWO projects. However, they also acknowledge that as the PPG has not been updated, it is not clear how the Sequential and Exception Tests would be applied.

• SASES—consider that it is clear from the Applicant's submissions that surface water and ground water were not taken into account during the site selection process and, consequently, the Sequential test was not properly applied. Additionally, SASES consider that the updates to the NPPF do not impose any new policy requirement but rather reinforce the existing requirements. SASES also reiterated that they considered the infiltration testing conducted by the Applicant was insufficient and had concerns about the Applicant's approach to applying the Sequential Test. Overall, SASES considered that because of the defects of the Applicant's approach, that policy requirements had not been met.

• The Applicant—acknowledges that the updated NPPF is more explicit in the use of the term 'any source' of flooding but note that the criteria for the assessment and application of the Sequential Test remains unchanged, and that the PPG does not provide any criteria for the assessment of suitability of a location to determine whether a development is appropriate or not. The Applicant also highlighted:

(i) they have considered all sources of flooding in the design of the Proposed Development;

(ii) the substation site and National Grid infrastructure have been located in an area at low risk of surface water flooding;

(iii) appropriate mitigation measures have been adopted to address any remaining surface water flood risk concerns;

(iv) SCC had already given surface water flooding equal weighting when reviewing the Proposed Development's assessment of flood risk throughout the examination;

(v) that the emphasis in the updated NPPF to move away from hard engineered flood solutions is not considered by the Applicant to be a fundamental change that would alter their proposed drainage strategy or adoption of SuDS measures;

(vi) that the extensive landscape planting proposed would reduce the speed of surface water runoff compared to that currently experienced, as well as soil erosion and silt levels in runoff;

(vii) modelling undertaken for the Friston Surface Water Flood Study15 confirms that surface water flooding within Friston primarily results from surface water flow from a number of locations unrelated to the substation site; and

(viii) by attenuating surface water and ensuring a controlled discharge rate from the site there is no increase in flood risk to the surrounding area, specifically Friston."

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

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

B

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

C

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

D

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

E

F

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

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

G

74 On 25 March 2021, the applicants submitted a "Flood Risk and Drainage Clarification Note" and on 6 May 2021, the applicants submitted comments on the claimant's deadline 9 submissions.

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

H

"23. While the applicants have considered all sources of flooding, in the absence of any criteria as to how this should be implemented, they have sought to address the potential risk from surface water flooding by

locating the onshore substations and National Grid infrastructure in an area at low risk of surface water flooding, and by adopting appropriate mitigation measures within the design to address any remaining surface water flood risk concerns.

"24. In considering the revised wording it is also noted that SCC (as the LLFA) had already given surface water flooding equal weighting when reviewing the Projects' assessment of flood risk throughout the DCO examinations and prior to the publication of the updated NPPF.

"25. All development sites have an element of potential surface water flood risk and any development that changes the surface of a site so that it is more impermeable will need to address this matter through the application of appropriate mitigation measures. There is greater emphasis in the updated NPPF on 'making as much use as possible of natural flood management techniques as part of an integrated approach to flood risk management', which is part of the shift in focus away from hard engineering solutions. However, this is not considered to be a fundamental change that would alter the Projects' Drainage Strategy or the adoption of the proposed SuDS measures. It should also be noted that the extensive landscape planting being proposed as part of the Projects' landscape mitigation strategy would reduce the speed of surface water runoff compared to that currently experienced, as well as soil erosion and silt levels in runoff. On this basis, the landscape mitigation strategy will afford opportunities for further flood mitigation over and above that already included within the concept drainage design.

"26. Regarding surface water flooding, the onshore substation and National Grid infrastructure locations were reviewed against the Environment Agency's surface water flood risk mapping and identified as being predominantly located in an area at very low risk of surface water flooding. Furthermore, the National Grid substation location was selected in full cognisance of the presence of a shallow surface water flow route (comprising approximately 4cm of water depth during a 1 in 100 year storm event), noting that such features can be diverted, and their continued conveyance ensured using well established and proven techniques. A commitment to this is made within the OODMP (REP13–020), along with a commitment to offset any reduction in volume relating to other existing surface water features in the vicinity of the substation locations.

"27. Additionally, a review of the modelling undertaken for the Friston Surface Water Flood Study (BMT, 2020) further confirmed that the surface water conveyance routes onsite do not constitute a significant risk to the onshore substations or National Grid infrastructure, and that the risk falls well below the lowest hazard."

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

77 At DL 4.1 to 4.5, the defendant summarised the relevant policies, clearly recording that all sources of flood risk were to be taken into account at all stages, and that development was directed away from areas at highest risk of flooding by the application of the sequential test.

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

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

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

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

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

Ground 2: Heritage assets

Claimant's submissions

83 The claimant submitted that the defendant's conclusions as to heritage harm were unlawful in that:

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

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

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

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

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

Defendant's and applicants' submissions

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

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

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

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

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

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

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

Conclusions

The tests to be applied

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

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

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

> "5.8.13 The [Secretary of State] should take into account the desirability of sustaining and, where appropriate, enhancing the significance of heritage assets, the contribution of their settings and the positive contribution they can make to sustainable communities and economic vitality …
>
> "5. 8.14 There should be a presumption in favour of the conservation of designated heritage assets and the more significant the designated heritage asset, the greater the presumption in favour of its conservation should be …"

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

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

> "66 *General duty as respects listed buildings in exercise of planning functions*
>
> "(1) In considering whether to grant planning permission … for development which affects a listed building or its setting, the local planning authority or, as the case may be, the Secretary of State shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses.

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

98 The duty under section 66(1) LBCA 1990 was considered by the Court of Appeal in *East Northamptonshire District Council v Secretary of State for Communities and Local Government* [2015] 1 WLR 45. Sullivan LJ held that there was an overarching statutory duty to treat a finding of harm to a listed building as a consideration to which the decision-maker must give "considerable importance and weight" when carrying out the balancing exercise. It was not open to the decision-maker merely to give the harm such weight as he thought fit, in the exercise of his planning judgment. In *East Northamptonshire DC*, the inspector erred in not giving the harm to the listed building "considerable importance and weight" in the planning balance, and instead treating the less than substantial harm to the setting of the listed buildings as a less than substantial objection to the grant of planning permission (at para 29).

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

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

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

> "199. When considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation (and the more important the asset, the greater the weight should be). This is irrespective of whether any potential harm amounts to substantial harm, total loss or less than substantial harm to its significance."

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

> "42. This first ground of challenge is that the Inspector made an error of law in misinterpreting his duty with respect to the Broads. Under section 17A of the 1988 Act, in exercising or performing any functions in relation to, or so as to affect, land in the Broads, the

A Secretary of State (and hence the Inspector) 'shall have regard to the purposes of— (a) conserving and enhancing the natural beauty, wildlife and cultural heritage of the Broads; (b) promoting opportunities for the understanding and enjoyment of the special qualities of the Broads by the public; and (c) protecting the interests of navigation.'"

"45. [Counsel for the claimant] submitted that the Inspector had fallen into the same trap as had occurred in *East Northamptonshire* B *District Council v Secretary of State for Communities and Local Government* [2015] 1 WLR 45. That was a case involving a listed building. Section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 provides for the general duty as respects granting planning permission for development which affects a listed building or its setting: the planning authority must 'have special regard C to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses'. In that case it was common ground between the parties that 'preserving' meant doing no harm: para 16. That did not mean that no harm could be done: however, there was a presumption against the grant of planning permission and considerable importance and weight had to be given to the desirability of preserving the setting of heritage assets when D balancing the proposal against other material considerations: paras 27–28. The planning inspector in that case had not done that.

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

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

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

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

> "5.9.21 When considering the impact of a proposed development on the significance of a designated heritage asset, the Secretary of State should give great weight to the asset's conservation. The more important the asset, the greater the weight should be. This is irrespective of whether any potential harm amounts to substantial harm, total loss, or less than substantial harm to its significance."

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

107 I agree with the defendant and applicants that this point did not arise nor was it decided by Holgate J in the case of *Stonehenge* [2022] PTSR 74. Furthermore, Holgate J made no finding that the LBCA 1990 case law should be applied to the PA 2008.

Decision

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

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

of 'great weight' to be important and relevant, noting the Barnwell decision and the text of later NPSs in this regard."

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

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

• Harm caused to the onshore historic environment has a medium negative weighting to be carried forward in the planning balance.

• Cumulative effects with the other East Anglia application increase this harm.

• Medium levels of harm are found as opposed to high due to the fact that harm to heritage assets has been found to be less than substantial. However, for several heritage assets the harm within this scale is at the higher end (including to a Grade II* listed building) and there would be substantial harm to a non-designated heritage asset. The ExA consider therefore that harm within the medium level of harm is at the top end of the scale."

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

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

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

112 Therefore ground 2 does not succeed.

Ground 3: Noise

Claimant's submissions

113 The claimant submitted that the defendant erred in his treatment of noise impacts, in that he:

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

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

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

Sub-paragraph (i)

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

Sub-paragraph (ii)

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

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

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

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

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

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

Sub-paragraph (iii)

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

Defendant and applicants' submissions

Sub-paragraph (i)

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

Sub-paragraph (ii)

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

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

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

Sub-paragraph (iii)

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

Conclusions

Sub-paragraph (i)

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

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

• mitigate and minimise other adverse impacts on health and quality of life from noise; and

• where possible, contribute to improvements to health and quality of life through the effective management and control of noise.

"5.11.10 When preparing the development consent order, the IPC should consider including measurable requirements or specifying the mitigation measures to be put in place to ensure that noise levels do not exceed any limits specified in the development consent."

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

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

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

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

(i) In respect of operational noise, it concluded:

"the Applicant's commitment to adopt Best Practicable Means (BPM) and the reduced operational noise limits now specified in Requirement 27 in the dDCO are consistent with national policy" (ER 13.2.116)

"… notwithstanding the differences of opinion, the ExA is satisfied that the Requirements in the dDCO must nevertheless be met, and consequently the ExA concludes that operational noise impacts can be satisfactorily mitigated." (ER 13.2.118.)

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

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

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

Sub-paragraph (ii)

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

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

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

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

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

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

139 The applications originally proposed an operational noise limit of 34dB LAeq at the nearest sensitive receptors, as recorded at ER 13.2.31. The limit was assessed as achievable in the ES, Chapter 25 Noise and Vibration, at paras 185–193. Subsequently, the applicants were able to commit to reduced operational noise limits of 31dB LAeq and 32dB LAeq, as recorded at ER 13.2.52. These limits have been incorporated into requirement 27. This was only 1dB or 2dB higher than the noise limit of 30dB LAeq which the claimant considered acceptable. The reduction was possible due to design refinements and identification of additional mitigation, and the new limits were again assessed as achievable (see "Clarification Note—Noise Modelling" at paras 49–53 and 90–93).

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

141 The applicants submitted an expert report on noise dated 4 March 2021 by Colin Cobbing BSc (Hons) CEnvH FCIEH MIOA, an acoustics

consultant. The report addressed the achievability of requirement 27, including the two contentions now particularly relied upon by the claimant, stating (p 12):

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

142 The ExA recorded this evidence at ER 13.2.68–13.2.69. Accordingly, the ExA had regard to expert evidence explaining why there could be confidence that the design of the projects enabled the limits to be achieved, notwithstanding the points raised by the claimant. Even where an impact cannot be ruled out, consent can be granted, subject to a requirement that prevents operation of the development beyond an acceptable noise level.

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

144 In addition, as noted at ER 13.2.60, the applicants submitted the onshore substation operational noise assessment which had been undertaken by the applicants to measure the sound levels from the already operational East Anglia ONE substation. As Mr Cobbing observed in the passage quoted

A above, this provided useful further evidence of the likely operational noise effects from the substation components of the proposed developments.

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

146 The achievability of the limit in requirement 27 was also confirmed and explained repeatedly in other submissions from the applicants to the examination: the applicants' position statement on noise, at paras 41–51; D the applicants' comments on the claimant's deadline 8 submissions, at ID4 p 16; the applicants' comments on the claimant's deadline 9 submissions at ID15–16 pp 8–9; the applicants' comments on the claimant's deadline 11 submissions at ID2 pp 26–33; and the applicants' final position statement for each application, at paras 65–66.

147 Requirement 12 requires the local planning authority's agreement to E be obtained to the design of the substations, including any noise mitigation, prior to commencement of relevant work. In particular, the applicants are required by the substations design principles statement to submit an operational noise design report for approval in accordance with requirement 12(2) which must include information on avoiding tonal penalties. That mechanism further enabled the ExA to be satisfied that the limits would be F achieved.

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

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

Sub-paragraph (iii)

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

> "Operational impacts were assessed using BS4142. The dominant operational noise sources are substation transformers, shunt reactors

> and rotating plant such as transformer coolers. The National Grid infrastructure does not contain any of these, so operational noise would come from switchgear and control systems, with noise levels imperceptible at the nearest NSR [noise sensitive receptor]."

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

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

152 The applicants responded to the claimant's comments on this issue, including orally at issue-specific hearing 12, and in writing in its comments on the claimant's deadline 8 submissions.

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

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

Ground 4: Generating capacity

Claimant's submissions

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

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

Defendant and applicants' submissions

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

158 The defendant was not obliged by law to include such a requirement. Furthermore, the defendant was entitled to take into account the benefits of the proposed electricity generation without those benefits formally secured

A as a requirement. These were matters of planning judgment for the defendant to determine.

Conclusions

159 Schedule 1 to the DCO describes the development authorised by work number 1(a) as: "an offshore wind turbine generating station with a
B gross electrical output capacity of over 100MW comprising up to 67 wind turbine generators … situated within the area shown on the works plans."

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

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

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

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

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

(i) The applicants' intention was "to build out both projects to their
G maximum capacity" and they "have engaged extensively with the turbine and grid supply chains on this basis" (applicants' comments on the claimant's deadline 11 submissions).

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

(iii) The market mechanism nevertheless operates so as to drive delivery towards the higher end of the transmission capacity created in order to

achieve the price reductions reported in the Energy White Paper (the applicants explained the economic factors that lie behind that effect) (applicants' comments on the ExA's commentary on the draft DCO dated 24 February 2021).

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

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

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

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

166 The ExA conclusions on this issue were as follows:

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

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

A the potential generating capacity, rather than any specific and fixed minimum scale of generation being delivered above the 100MW threshold.

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

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

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

Ground 5: Cumulative effects

Claimant's submissions

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

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

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

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

H (i) The defendant was required to consider the likely significant cumulative effects of the proposed development together with other projects. The Extension Appraisal contained information in respect of those effects which had been expressly required to be provided. Failing to take that information into account was a breach of the EIA Regulations, and irrational: see *Pearce* [2022] Env LR 4.

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

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

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

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

Defendant and applicants' submissions

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

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

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

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

181 The reasons in the DL were sufficient and intelligible.

Conclusions

The EIA Regulations 2017 and case law

182 Regulation 21 of the EIA Regulations 2017 provides:

A "21 *Consideration of whether development consent should be granted*

(1) When deciding whether to make an order granting development consent for EIA development the Secretary of State must— (a) examine the environmental information; (b) reach a reasoned conclusion on the significant effects of the proposed development on the environment, taking into account the examination referred to in sub-paragraph (a) and, where appropriate, any supplementary examination considered necessary; (c) integrate that conclusion into the decision as to whether an order is to be granted; and (d) if an order is to be made, consider whether it is appropriate to impose monitoring measures."

183 Regulation 3—"Interpretation" defines the following relevant terms:

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

D "'environmental statement' has the meaning given by regulation 14; …"

"'further information' means additional information which, in the view of the Examining authority, the Secretary of State or the relevant authority, is directly relevant to reaching a reasoned conclusion on the significant effects of the development on the environment and which it is necessary to include in an environmental statement or updated environmental statement in order for it to satisfy the requirements of regulation 14(2); …"

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

F **184** Regulation 14 provides:

"14 *Environmental statements*

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

"(2) An environmental statement is a statement which includes at least— (a) a description of the proposed development comprising G information on the site, design, size and other relevant features of the development; (b) a description of the likely significant effects of the proposed development on the environment; (c) a description of any features of the proposed development, or measures envisaged in order to avoid, prevent or reduce and, if possible, offset likely significant adverse effects on the environment; (d) a description of the reasonable H alternatives studied by the applicant, which are relevant to the proposed development and its specific characteristics, and an indication of the main reasons for the option chosen, taking into account the effects of the development on the environment; (e) a non-technical summary of the information referred to in sub-paragraphs (a) to (d); and (f) any additional information specified in Schedule 4 relevant to the specific

characteristics of the particular development or type of development and to the environmental features likely to be significantly affected.

"(3) The environmental statement referred to in paragraph (1) must — (a) where a scoping opinion has been adopted, be based on the most recent scoping opinion adopted (so far as the proposed development remains materially the same as the proposed development which was subject to that opinion); (b) include the information reasonably required for reaching a reasoned conclusion on the significant effects of the development on the environment, taking into account current knowledge and methods of assessment; and (c) be prepared, taking into account the results of any relevant UK environmental assessment, which is reasonably available to the applicant with a view to avoiding duplication of assessment."

185 Schedule 4 sets out information for inclusion in environmental statements. Paragraph 5 requires a

"description of the likely significant effects of the development on the environment resulting from, inter alia … (e) the cumulation of effects with other existing and/or approved projects, taking into account any existing environmental problems relating to areas of particular environmental importance likely to be affected or the use of natural resources".

It continues that the description of likely significant effects should cover "cumulative" effects of the development.

186 In *Pearce* [2022] Env LR 4, Holgate J quashed a DCO where the Secretary of State deferred his evaluation of the cumulative impacts of a substation development on the basis that the information on the development was "limited", without giving a properly reasoned conclusion as to whether an evaluation could be made.

187 Holgate J summarised the relevant case law at paras 95–117, which I have cited in part below:

"108. Although it is a matter of judgment for the decision-maker as to what are the environmental effects of a proposed project and whether they are significant, EIA legislation proceeds on the basis that he is required to evaluate and weigh those effects he considers to be significant (and any related mitigation) in the decision on whether to grant development consent (see eg *European Commission v Ireland* (Case C-50/09) [2011] PTSR 1122) …

"109. The next issue is whether consideration of an environmental effect can be deferred to a subsequent consenting process. If, for example, the decision-maker has judged that a particular environmental effect is not significant, but further information and a subsequent approval is required, a decision to defer consideration and control of that matter, for example, under a condition imposed on a planning permission, would not breach EIA legislation (see *R v Rochdale Metropolitan Borough Council, Ex p Milne* [2000] Env LR 1).

"110. But the real question in the present case is whether the evaluation of an environmental effect can be deferred if the decision-maker treats the effect as being significant, or does not disagree with the 'environmental information' before him that it is significant? A range,

A or spectrum, of situations may arise, which I will not attempt to describe exhaustively."

"114. In order to comply with the principle identified in *Commission v Ireland*, and illustrated by [*Ex p Milne*] and [*R v Cornwall County Council, Ex p Hardy* [2001] Env LR 25], consideration of the details of a project defined in an outline consent may be deferred to a subsequent process of approval, provided that: (1) the likely B significant effects of that project are evaluated at the outset by adequate environmental information encompassing: (a) the parameters within which the proposed development would be constructed and operated (a 'Rochdale envelope'); and (b) the flexibility to be allowed by that consent; and (2) the ambit of the consent granted is defined by those parameters (see *Ex p Milne* at paras 90 and 93–95). Although in *Ex* C *p Milne* the local planning authority had deferred a decision on some matters of detail, it had not deferred a decision on any matter which was likely to have a significant effect (see Sullivan J at para 126), a test upon which the Court of Appeal lay emphasis when refusing permission to appeal (C/2000/2851 on 21 December 2000 at para 38). Those matters which were likely to have such an effect had been adequately evaluated at the outline stage.

D "115. Sullivan J also held in *Ex p Milne* that EIA legislation plainly envisages that the decision-maker on an application for development consent will consider the adequacy of the environmental information, including the ES. He held that what became regulation 3(2) of the [Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 (SI 2009/2263)] imposes an obligation on the E decision-maker to have regard to a 'particularly material consideration', namely the 'environmental information'. Accordingly, if the decision-maker considers that the information about significant environmental effects is too uncertain or is inadequate, he can either require more detail or refuse consent (paras 94–95 and 106–111). I would simply add that the issue of whether such information is truly inadequate in a particular F case may be affected by the definition of 'environmental statement', which has regard to the information which the applicant can 'reasonably be required to compile' (regulation 2(1) of the 2009 Regulations—see para 19 above).

"116. The principle underlying … *Ex p Milne* and *Hardy* can also be seen in *R (Larkfleet Ltd) v South Kesteven District Council* [2016] Env LR 4 when dealing with significant cumulative impacts. There, G the Court of Appeal held that the local planning authority had been entitled to grant planning permission for a link road on the basis that it did not form part of a single project comprising an urban extension development. The court held:

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

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

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

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

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

"117. However, in some cases these principles may allow a decision-maker properly to defer the assessment of cumulative impacts arising from the subsequent development of a separate site not forming part of the same project. In *R (Littlewood) v Bassetlaw District Council* [2009] Env LR 21 the court held that it had not been irrational for the local authority to grant consent for a freestanding project, without assessing cumulative impacts arising from future development of the remaining part of the site, where that development was inchoate, no proposals had been formulated and there was not any, or any adequate, information available on which a cumulative assessment could have been based (pp 413–415 in particular para 32).

"118. I agree with [counsel for the claimant] that the circumstances of the present case are clearly distinguishable from *Littlewood*. Here, the two projects are closely linked, site selection was based on a strategy of co-location and the second project has followed on from the first after a relatively short interval. They share a considerable amount of infrastructure, they have a common location for connection to the National Grid at Necton (the cumulative impacts of which are required to be evaluated) and the DCO for the first project authorises enabling works for the second. In the present case, proposals for the second project have been formulated and the promoter of the first project has put forward what it considered to be sufficient information on the second to enable cumulative impacts to be evaluated in the DCO decision on the first. This information was before the defendant. I reject the attempt by NVL to draw any analogy with the circumstances in *Littlewood* (at para 32) or with those in [*Preston New Road Action Group v Secretary of State for Communities and Local Government* [2018] Env LR 18] (at para 75). In any event, the decision-maker in the present case, unsurprisingly, did not rely upon any reasoning of that kind in his decision letter (nor did the examining authority in the ExAR).

"119. Instead, this case bears many similarities with the circumstances in *Larkfleet*. If anything, the ability to assess cumulative impacts from the two projects in the decision on the first project was much more straightforward here and the legal requirement to make

A an evaluation of those impacts decidedly stronger. First, the promoter carried out an assessment identifying significant cumulative effects at Necton and it is common ground that, for this purpose, essentially the same information was provided on the two projects (see eg paras 52–53 above). Secondly, there were strong links between the two projects which were directly relevant to this subject (see para 118 above).

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

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

D "In the circumstances of this case, I am in no doubt that the defendant did act in breach of the 2009 Regulations by failing to evaluate the information before him on the cumulative impacts of the Vanguard and Boreas substation development, which had been assessed by NVL as likely to be significant adverse environmental effects. The defendant E unlawfully deferred his evaluation of those effects simply because he considered the information on the development for connecting Boreas to the National Grid was "limited". The defendant did not go so far as to conclude that an evaluation of cumulative impacts could not be made on the information available, or that it was "inadequate" for that purpose. He did not give any properly reasoned conclusion on that aspect. I would add that because he did not address those matters, the F defendant also failed to consider requiring NVL to provide any details he considered to be lacking, or whether NVL could not reasonably be required to provide them under the 2009 Regulations as part of the ES for Vanguard. It follows the defendant could not have lawfully decided not to evaluate the cumulative impacts at Necton in the decision he took on the application for the Vanguard DCO. For these reasons, as well G as those given previously, the present circumstances are wholly unlike those in *Littlewood*."

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

H

Decision

190 In my view, the facts and circumstances of this case were clearly distinguishable from those in *Pearce* [2022] Env LR 4 for the reasons given by the defendant at DL 12.16–DL 12.19.

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

> "6. The Overarching National Policy Statement for Energy (EN-1) paragraph 4.2.5 states that 'When considering cumulative effects, the ES should provide information on how the effects of the applicant's proposal would combine and interact with the effects of other development (including projects for which consent has been sought or granted, as well as those already in existence)'.
>
> "7. *Advice note seventeen: Cumulative effects assessment relevant to nationally significant infrastructure projects* (AN17) sets out a cumulative assessment process with the stages of longlisting and shortlisting projects, information gathering and assessment.
>
> "8. Information gathering "requires the applicant to gather information on each of the 'other existing development and/or approved development' shortlisted at Stage 2. As part of the Stage 3 process the applicant is expected to compile detailed information, to inform the Stage 4 assessment. The information captured should include but not be limited to:
>
> • Proposed design and location information;
>
> • Proposed programme of construction, operation and decommissioning; and
>
> • Environmental assessments that set out baseline data and effects arising from the 'other existing development and/or approved development'.
>
> "9. The applicants maintain that for the remaining projects being considered for potential connection in the vicinity of Leiston (Nautilus and Eurolink) little to none of the information specified in Advice Note seventeen is available."

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

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

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

> "5.12 In response to significant concerns from a number of parties (including the Councils') about future projects, the Applicant submitted an Extension of National Grid Substation Appraisal [ExA Ref: REP8–

074]. This Appraisal assessed the potential effects of extending the National Grid substation to accommodate future projects, including: Nautilus interconnector, EuroLink interconnector, North Falls and Five Estuaries offshore wind farms. However, the Appraisal states "it has been confirmed by both the proposed North Falls [ExA Ref: REP7–066] and Five Estuaries projects that they will not connect near Leiston.

"5.13 The Secretary of State notes that the future projects considered are in the following stages of development:

• Nautilus interconnector—National Grid Ventures requested a section 35 direction under the Planning Act 2008 on 4 March 2019, the Secretary of State received further information from National Grid Ventures on 4 April 2019 and a direction was made by the Secretary of State on 29 April 2019. The application is expected to be submitted to the Planning Inspectorate Q2 2023.

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

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

• proposed design and location information;

• proposed programme of construction, operation and decommissioning; and

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

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

"5.16 The ExA [ER 7.6.1] concludes that: 'The extension of National Grid Substation Appraisal [ExA Ref: REP8–074] demonstrates

a significant worsening of potential adverse effects for relevant VPs [Viewpoints] and for landscape character. The extension of the NG substation would intensify and worsen the effects of the Proposed Development on both the local landscape and on visual receptors. Such an effect would be added to in an unknown way by the provision of required surface water drainage."

"5.22 In reaching the above conclusions the ExA has not considered the Extension of National Grid Substation Appraisal, noting that the Applicant acknowledges that the Appraisal is 'environmental information' and is not intended to comprise a Cumulative Impact Assessment.

"5.23 The Secretary of State agrees with the ExA's conclusions on Landscape and Visual Amenity."

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

"*Cumulative Impacts with the Potential National Grid Extension*

"6.26 The Applicant submitted a National Grid Substation Appraisal during the examination which indicated the potential effects which would result from extending the National Grid substation to accommodate future projects. The Appraisal indicated that this would result in an increase in the overall length of the National Grid Substation [ER 8.5.69]. The ExA considered that an extension to the National Grid substation would increase the magnitude of harm to Little Moor Farm (Grade II), the Church of St Mary (Grade II*), Friston House (Grade II), Woodside Farm House (Grade II) and High House Farm (Grade II). However, the increase in magnitude would not result in an increase to the overall levels of less than substantial harm it had assigned, as such, the levels would remain the same as detailed in paragraph 6.17. The ExA considered that the overall level of less than substantial harm for the Friston War Memorial would potentially increase to a medium level of less than substantial harm [ER 8.5.72; 8.6.1].

"6.27 The ExA stated [ER 8.6.1] that it had not considered the National Grid Substation Appraisal in reaching its overall conclusion on Onshore Historic Environment—noting that the Applicant acknowledged that the Appraisal is 'environmental information' and is not intended to comprise a Cumulative Impact Assessment."

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

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

"12.15 Predicting the future traffic effects of projects for which very few details are available would not be helpful in determining the cumulative effects of the East Anglia ONE North and East Anglia TWO developments, as the elements of the future projects which would

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

"12.16 The Secretary of State refers to paragraph 44 of the recent C ruling from Mr Justice Holgate on the Norfolk Vanguard offshore wind farm in relation to cumulative effects which states: 'By the time the ES for the Vanguard project was submitted in June 2018, substantial progress had already been made on Boreas. Grid connection agreements at Necton had been entered into for Vanguard in July 2016 and Boreas in November 2016. The site selection process had already identified preferred substation footprints for both Vanguard D and Boreas. The decision had been taken to use HVDC technology for both developments, determining the nature and scale of onshore infrastructure, including substations at Necton. The Boreas team had a pre-application meeting with the Planning Inspectorate on 24 January 2017, a request for a scoping opinion in respect of Boreas was made in May 2017 and the opinion issued in June 2017.'

E "12.17 Unlike the Norfolk Boreas Offshore Wind Farm project, no scoping opinion request has been submitted to the Planning Inspectorate for the Nautilus interconnector project, and it is currently in the early stages of the pre-application phase of the development consent process. So far, the only documentation available on the Planning Inspectorate's website for the Nautilus project is the Section 35 Direction. The Eurolink F interconnector project is earlier in the development consent process than Nautilus, and no documentation has yet been submitted to the Planning Inspectorate.

"12.18 The Secretary of State also notes that the Applicant's decision not to include these proposed projects in its cumulative effects assessment is supported by the Planning Inspectorate's Advice Note Seventeen: Cumulative effects assessment relevant to nationally G significant infrastructure projects. Paragraph 3.3.1 of the Advice Note lists the information required to conduct stage 4 of a cumulative effects assessment:

- proposed design and location information;
- proposed programme of construction, operation and decommissioning; and

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

"12.19 As none of the above information was available prior to the close of the East Anglia ONE North and East Anglia TWO examination period for either the Nautilus or Eurolink interconnector projects, the

Secretary of State is content that it was not necessary for the Applicant to include these projects in its cumulative effects assessment."

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

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

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

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

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

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

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

Ground 6: Alternative sites

Claimant's submissions

204 In the light of the findings of substantial adverse effects at Friston, and the applicants' reliance upon the benefits of the proposed development, the ExA and the defendant erred in failing to consider alternative sites, and fell into the same error as the Secretary of State for Transport in *Stonehenge* [2022] PTSR 74.

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

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

Defendant and applicants' submissions

207 The defendant and applicants submitted that the claimant misstated the relevant legal principles on alternative sites, as applied in *Stonehenge* and the preceding case law. Furthermore, *Stonehenge* was clearly distinguishable on the facts of the case, and the findings of the court.

208 In this case, alternative sites were adequately considered by the ExA and the defendant, including Bramford. Some further alternative sites, which had not been appraised, were not progressed beyond inspection stage by the ExA, in the exercise of its planning judgment, as they were not considered to be "important and relevant" to the Secretary of State's decision under section 104(2)(d) PA 2008 and NPS EN-1. That was a lawful exercise of planning judgment.

Conclusions

Law and policy

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

> "268. The principles on whether alternative sites or options may permissibly be taken into account or whether, going further, they are an 'obviously material consideration' which must be taken into account, are well established and need only be summarised here.
>
> "269. The analysis by Simon Brown J (as he then was) in *Trusthouse Forte Hotels Ltd v Secretary of State for the Environment* (1986) 53 P & CR 293, 299–300 has subsequently been endorsed in several authorities. First, land may be developed in any way which is acceptable for planning purposes. The fact that other land exists upon which the development proposed would be yet more acceptable for such purposes would not justify the refusal of planning permission for that proposal. But, secondly, where there are clear planning objections to development upon a particular site then 'it may well be relevant and indeed necessary' to consider whether there is a more appropriate site elsewhere. 'This is particularly so where the development is bound to have significant adverse effects and where the major argument advanced in support of the application is that the need for the development outweighs the planning disadvantages inherent in it.' Examples of this second situation may include infrastructure projects of national importance. The judge added that, even in some cases which have these characteristics, it may not be necessary to consider alternatives if the environmental impact is relatively slight and the objections not especially strong.
>
> "270. The Court of Appeal approved a similar set of principles in *R (Mount Cook Land Ltd) v Westminster City Council* [2017] PTSR 1166, at para 30. Thus, in the absence of conflict with planning policy and/or other planning harm, the relative advantages of alternative uses

on the application site or of the same use on alternative sites are normally irrelevant. In those 'exceptional circumstances' where alternatives might be relevant, vague or inchoate schemes, or which have no real possibility of coming about, are either irrelevant or, where relevant, should be given little or no weight.

"271. Essentially the same approach was set out by the Court of Appeal in *R (Jones) v North Warwickshire Borough Council* [2001] 2 PLR 59, paras 22–30. At para 30 Laws LJ stated: 'it seems to me that all these materials broadly point to a general proposition, which is that consideration of alternative sites would only be relevant to a planning application in exceptional circumstances. Generally speaking —and I lay down no fixed rule, any more than did Oliver LJ or Simon Brown J—such circumstances will particularly arise where the proposed development, though desirable in itself, involves on the site proposed such conspicuous adverse effects that the possibility of an alternative site lacking such drawbacks necessarily itself becomes, in the mind of a reasonable local authority, a relevant planning consideration upon the application in question.'

"272. In *Derbyshire Dales District Council v Secretary of State for Communities and Local Government* [2010] 1 P & CR 19 Carnwath LJ emphasised the need to draw a distinction between two categories of legal error: first, where it is said that the decision-maker erred by taking alternatives into account and second, where it is said that he had erred by failing to take them into account (paras 17 and 35). In the second category an error of law cannot arise unless there was a legal or policy requirement to take alternatives into account, or such alternatives were an 'obviously material' consideration in the case so that it was irrational not to take them into account (paras 16–28).

"273. In *R (Langley Park School for Girls) v Bromley London Borough Council* [2010] 1 P & CR 10 the Court of Appeal was concerned with alternative options within the same area of land as the application site, rather than alternative sites for the same development. In that case it was necessary for the decision-maker to consider whether the openness and visual amenity of metropolitan open land ('MOL') would be harmed by a proposal to erect new school buildings. MOL policy is very similar to that applied within a Green Belt. The local planning authority did not take into account the claimant's contention that the proposed buildings could be located in a less open part of the application site resulting in less harm to the MOL. Sullivan LJ referred to the second principle in *Trusthouse Forte* and said that it must apply with equal, if not greater, force where the alternative suggested relates to different siting within the same application site rather than a different site altogether (paras 45–46). He added that no 'exceptional circumstances' had to be shown in such a case (para 40).

"274. At paras 52–53 Sullivan LJ stated:

'52. It does not follow that in every case the "mere" possibility that an alternative scheme might do less harm must be given no weight. In the *Trusthouse Forte* case the Secretary of State was entitled to conclude that the normal forces of supply and demand would operate to meet the need for hotel accommodation on another site in the Bristol area even though no specific alternative site had been identified. There is no "one

size fits all" rule. The starting point must be the extent of the harm in planning terms (conflict with policy etc) that would be caused by the application. If little or no harm would be caused by granting permission there would be no need to consider whether the harm (or the lack of it) might be avoided. The less the harm the more likely it would be (all other things being equal) that the local planning authority would need to be thoroughly persuaded of the merits of avoiding or reducing it by adopting an alternative scheme. At the other end of the spectrum, if a local planning authority considered that a proposed development would do really serious harm it would be entitled to refuse planning permission if it had not been persuaded by the applicant that there was no possibility, whether by adopting an alternative scheme, or otherwise, of avoiding or reducing that harm.

'53. Where any particular application falls within this spectrum; whether there is a need to consider the possibility of avoiding or reducing the planning harm that would be caused by a particular proposal; and if so, how far evidence in support of that possibility, or the lack of it, should have been worked up in detail by the objectors or the applicant for permission; are all matters of planning judgment for the local planning authority. In the present case the members were not asked to make that judgment. They were effectively told at the onset that they could ignore Point (b), and did so simply because the application for planning permission did not include the alternative siting for which the objectors were contending, and the members were considering the merits of that application.'

"275. The decision cited by Mr Taylor in *First Secretary of State v Sainsbury's Supermarkets Ltd* [2008] JPL 973 is entirely consistent with the principles set out above. In that case, the Secretary of State did in fact take the alternative scheme promoted by Sainsbury's into account. He did not treat it as irrelevant. He decided that it should be given little weight, which was a matter of judgment and not irrational (paras 30 and 32). Accordingly, that was not a case, like the present one, where the error of law under consideration fell within the second of the two categories identified by Carnwath LJ in *Derbyshire Dales District Council* (see para 272 above).

"276. The wider issue which the Court of Appeal went on to address at paras 33–38 of the *Sainsbury's* case does not arise in our case, namely, must *planning permission be refused* for a proposal which is judged to be 'acceptable' because there is an alternative scheme which is considered to be more acceptable. True enough, the decision on acceptability in that case was a balanced judgment which had regard to harm to heritage assets but that was, undoubtedly, an example of the first principle stated in *Trusthouse Forte* (see para 269 above). The court did not have to consider the second principle, which is concerned with whether a decision-maker may be obliged to take an alternative *into account*. Indeed, in the present case, there is no issue about whether alternatives for the western cutting should have been taken into account. As I have said, the issue here is narrower and case-specific. Was the SST entitled to go no further, in substance, than the approach set out in paragraph 4.27 of the [National Policy Statement for National Networks ('NPSNN')] and [Panel Report ('PR')] 5.4.71?"

210 Holgate J's conclusions in the *Stonehenge* case [2022] PTSR 74 were as follows: A

"277 In my judgment, the clear and firm answer to that question is 'no'. The relevant circumstances of the present case are wholly exceptional. In this case the relative merits of the alternative tunnel options compared to the western cutting and portals were an obviously material consideration which the [Secretary of State for Transport ('SST')] was required to assess. It was irrational not to do so. This was not merely a relevant consideration which the SST could choose whether or not to take into account. I reach this conclusion for a number of reasons, the cumulative effect of which I judge to be overwhelming. B

"278. First, the designation of the [World Heritage Site ('WHS')] is a declaration that the asset has 'outstanding universal value' for the cultural heritage of the world as well as the UK. There is a duty to protect and conserve the asset (article 4 of the Convention) and there is the objective inter alia to take effective and active measures for its 'protection, conservation, presentation and rehabilitation' (article 5). The NPSNN treats a World Heritage Site as an asset of 'the highest significance' (paragraph 5.131). C D

"279. Second, the SST accepted the specific findings of the Panel on the harm to the settings of designated heritage assets (eg scheduled ancient monuments) that would be caused by the western cutting in the proposed scheme. He also accepted the Panel's specific findings that [Outstanding Universal Value ('OUV')] attributes, integrity and authenticity of the WHS would be harmed by that proposal. The Panel concluded that that overall impact would be 'significantly adverse', the SST repeated that (DL 28) and did not disagree (see paras 137,139 and 144 above). E

"280. Third, the western cutting involves large scale civil engineering works, as described by the Panel. The harm described by the Panel would be permanent and irreversible.

"281. Fourth, the western cutting has attracted strong criticism from the WHC and interested parties at the Examination, as well as in findings by the Panel which the SST has accepted. These criticisms are reinforced by the protection given to the WHS by the objectives of articles 4 and 5 of the Convention, the more specific heritage policies contained in the NPSNN and by regulation 3 of the 2010 Regulations. F

"282. Fifth, this is not a case where no harm would be caused to heritage assets (see [*City & Country Bramshill Ltd v Secretary of State for Housing, Communities and Local Government* [2021] 1 WLR 5761] at para 78). The SST proceeded on the basis that the heritage benefits of the scheme, in particular the benefits to the OUV of the WHS, did not outweigh the harm that would be caused to heritage assets. The scheme would not produce an overall net benefit for the WHS. In that sense, it is not acceptable per se. The acceptability of the scheme depended upon the SST deciding that the heritage harm (and in the overall balancing exercise *all* disbenefits) were outweighed by the need for the new road and *all* its other benefits. This case fell fairly and squarely within the exceptional category of cases identified in, for example, *Trusthouse* G H

Forte, where an assessment of relevant alternatives to the western cutting was required (see para 269 above).

"283. The submission of [counsel for the Secretary of State] that the SST has decided that the proposed scheme is 'acceptable', so that the general principle applies that alternatives are irrelevant is untenable. The case law makes it clear that that principle does not apply where the scheme proposed would cause significant planning harm, as here, and the grant of consent *depends* upon its adverse impacts being outweighed by need and other benefits (as in paragraph 5.134 of the NPSNN).

"284. I reach that conclusion without having to rely upon the points on which the claimant has succeeded under ground 1(iv). But the additional effect of that legal error is that the planning balance was not struck lawfully and so, for that separate reason, the basis upon which [counsel for the Secretary of State] says that the SST found the scheme to be acceptable collapses.

"285. Sixth, it has been accepted in this case that alternatives should be considered in accordance with paragraphs 4.26 and 4.27 of the NPSNN. But the Panel and the SST misdirected themselves in concluding that the carrying out of the options appraisal for the purposes of the [Road Investment Strategy ("RIS")] made it unnecessary for them to consider the merits of alternatives for themselves. [Highways England ("IP1")]'s view that the tunnel alternatives would provide only 'minimal benefit' in heritage terms was predicated on its assessments that no substantial harm would be caused to any designated heritage asset and that the scheme would have slightly *beneficial* (not adverse) effects on the OUV attributes, integrity and authenticity of the WHS. The fact that the SST accepted that there would be net harm to the OUV attributes, integrity and authenticity of the WHS (see paras 139 and 144 above) made it irrational or logically impossible for him to treat IP1's options appraisal as making it unnecessary for him to consider the relative merits of the tunnel alternatives. The options testing by IP1 dealt with those heritage impacts on a basis which is inconsistent with that adopted by the SST.

"286. Seventh, there is no dispute that the tunnel alternatives are located within the application site for the DCO. They involve the use of essentially the same route and certainly not a completely different site or route. Accordingly, as Sullivan LJ pointed out in *Langley Park* (see para 273 above), the second principle in *Trusthouse Forte* applies with equal, if not greater force.

"287. Eighth, it is no answer for the SST to say that DL 11 records that the SST has had regard to the "environmental information" as defined in regulation 3(1) of the EIA Regulations 2017. Compliance with a requirement to take information into account does not address the specific obligation in the circumstances of this case to compare the relative merits of the alternative tunnel options.

"288. Ninth, it is no answer for the SST to say that in DL 85 the SST found that the proposed scheme was in accordance with the NPSNN and so section 104(7) of the PA 2008 may not be used as a "back door" for challenging the policy in paragraph 4.27 of the NPSNN. I have previously explained why paragraph 4.27 does not override paragraph 4.26 of the NPSNN and does not disapply the common law principles

on when alternatives are an obviously material consideration. But, in addition, the SST's finding that the proposal accords with the NPSNN for the purposes of section 104(3) of the PA 2008 is vitiated (a) by the legal error upheld under ground 1(iv) and, in any event, (b) by the legal impossibility of the SST deciding the application in accordance with paragraph 4.27 of the NPSNN.

"289. I should add, for completeness, that neither the Panel nor the SST suggested that the extended tunnel options need not be considered because they were too vague or inchoate. That suggestion has not been raised in submissions." (Original emphasis.)

211 In my judgment, Holgate J was here applying the principles in the case law which he had previously set out to the circumstances of this "wholly exceptional" and "overwhelming" case. He was not establishing as a principle of law that, in any case where a proposed development would cause adverse effects, but these are held to be outweighed by its beneficial effects, the existence of alternative sites inevitably becomes a mandatory material consideration. That is an over-simplification of the *Stonehenge* decision [2022] PTSR 74, and the preceding body of case law. In *R (Jones) v North Warwickshire Borough Council* [2001] 2 PLR 59, para 30, Laws J made it clear that neither he nor Simon Brown J in the *Trusthouse Forte* case were laying down a "fixed rule".

212 In *Derbyshire Dales District Council v Secretary of State for Communities and Local Government* [2010] 1 P & CR 19, Carnwath LJ held that an error of law could not arise unless there was a statutory or policy requirement to take alternatives into account, or such alternatives were an "obviously material" consideration in the case so that it was irrational not to take them into account (paras 16–28). This analytical approach has been widely applied.

213 In *Langley Park School for Girls v Bromley London Borough Council* [2010] 1 P & CR 10, Sullivan LJ at paras 52–53 considered the varying circumstances in which a decision-maker may be required to take alternative sites into account, and emphasised that the assessment was highly fact-sensitive and a matter within the planning judgment of the decision-maker.

214 Furthermore, in my judgment, the defendant and applicants were correct to submit that the case law does indicate that consideration of alternative sites will only be relevant to a planning application in exceptional circumstances (see *R (Mount Cook Land Ltd) v Westminster City Council* [2017] PTSR 1166, cited at para 270 in *Stonehenge*; *Jones*, cited at para 271 in *Stonehenge*; *Langley Park*, cited at para 273 in *Stonehenge*, and see also in the law report at [2010] 1 P & CR 10, at paras 37 and 40). This principle was applied by Holgate J in the *Stonehenge* case, at para 277, when he found that the circumstances were "wholly exceptional".

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

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

A "*4.4 Alternatives*

"4.4.1 As in any planning case, the relevance or otherwise to the decision-making process of the existence (or alleged existence) of alternatives to the proposed development is in the first instance a matter of law, detailed guidance on which falls outside the scope of this NPS. From a policy perspective this NPS does not contain any general requirement to consider alternatives or to establish whether the proposed project represents the best option.

B

"4.4.2 However:

• applicants are obliged to include in their ES, as a matter of fact, information about the main alternatives they have studied. This should include an indication of the main reasons for the applicant's choice, taking into account the environmental, social and economic effects and including, where relevant, technical and commercial feasibility;

C

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

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

D

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

E

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

• the IPC should be guided in considering alternative proposals by whether there is a realistic prospect of the alternative delivering the same infrastructure capacity (including energy security and climate change benefits) in the same timescale as the proposed development;

F

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

G

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

H

• as the IPC must decide an application in accordance with the relevant NPS (subject to the exceptions set out in the Planning Act 2008), if the IPC concludes that a decision to grant consent to a hypothetical alternative proposal would not be in accordance with the policies set

out in the relevant NPS, the existence of that alternative is unlikely to be important and relevant to the IPC's decision;

• alternative proposals which mean the necessary development could not proceed, for example because the alternative proposals are not commercially viable or alternative proposals for sites would not be physically suitable, can be excluded on the grounds that they are not important and relevant to the IPC's decision;

• alternative proposals which are vague or inchoate can be excluded on the grounds that they are not important and relevant to the IPC's decision; and

• it is intended that potential alternatives to a proposed development should, wherever possible, be identified before an application is made to the IPC in respect of it (so as to allow appropriate consultation and the development of a suitable evidence base in relation to any alternatives which are particularly relevant). Therefore where an alternative is first put forward by a third party after an application has been made, the IPC may place the onus on the person proposing the alternative to provide the evidence for its suitability as such and the IPC should not necessarily expect the applicant to have assessed it."

217 As NPS EN-1 indicates, there is a general requirement to address alternatives in the EIA process, in regulation 14(2)(d) of the EIA Regulations 2017, which states that the ES should include "a description of the reasonable alternatives studied by the applicant, which are relevant to the proposed development and its specific characteristics, and an indication of the main reasons for the option chosen, taking into account the effects of the development on the environment". It was not part of the claimant's case that there had been a failure to comply with this requirement.

Decision

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

"6.2 Connecting in the Bacton, Bradwell and Lowestoft areas on the coast, would require the extension of the National Grid transmission network out to the coast in addition to the construction of a new National Grid substation. A new double circuit overhead line, at minimum, from the existing 400kV network out to the coast across Norfolk, Essex or Suffolk—this would carry significant consenting and environmental challenges. Identifying route options, consulting about those, obtaining consent for them and then building new transmission lines would be environmentally challenging and would not be deliverable within the timescales the wind farms are looking to connect. For these reasons, connecting in the Bacton, Bradwell or Lowestoft areas was discounted.

"6.3 Options to connect to the transmission network in North Norfolk, near Brandon, Shipdham, Dereham, Necton, Little Dunham, Kings Lynn or Walpole, were parked in the assessment, as other options compared more favourably in environmental and cost terms. [Footnote 4: 'Parked' means that the option is not subject to further analysis as there are better alternative options which have a similar system impact.

A It can still be reconsidered if the alternative(s) were later discounted due to reasons that are not affecting the parked options.] Each of these parked options would require much longer OFTO connecting cables in addition to new National Grid substations, with resultant greater environmental impacts and costs, as they are further from the offshore wind farms compared to other options.

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

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

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

"6.7 The assessment initially indicated that connecting at Sizewell is the preferred option. This would have required the extension of the existing substation. However the substation is within the nuclear security perimeter zone, requiring the option to be under the rules of
F Civil Nuclear Constabulary. In addition to that, the potential site is highly constrained both physically and environmentally. Connecting there is therefore unlikely to be achievable.

"6.8 A connection in the Leiston area is close to Sizewell and the coast, avoiding a longer cable route penetrating further inland through Suffolk to Bramford or elsewhere on the transmission network. A short cable route means the interaction between the project and other parties,
G such as crossings, protected areas and settlements, can be minimised.

"6.9 For these reasons, when considering connections efficiency, co-ordination, economic and environmental impacts, the Leiston area compares more favourably than other connection options and forms the basis of the connection offers for the East Anglia ONE North and East Anglia TWO projects."

H

219 Site selection was considered in detail by the ExA in ER Chapter 25. It considered the issues and evidence, in particular, whether the site at Bramford or Broom Covert, near Sizewell, offered viable connection alternatives. For example, at ER 25.4.1, the ExA recorded the information that National Grid had decided not to offer the Bramford substation as

an option for grid connection and referred to site selection work within discrete topic areas such as onshore historic environment and biodiversity. At ER 25.3.12–25.3.14, it explained why the Broom Covert option had not been pursued further. In the ExA's view, the applicants' site selection process was "compliant with policy and has led to a broadly deliverable Proposed Development" (ER 25.2.6).

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

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

221 At ER 25.5.11, the ExA acknowledged the extent of "community concern and disquiet about the general adequacy of the site selection process that led to the selection of the Friston … location" but correctly observed that

> "that disquiet alone does not provide a basis under which the ExA may move at large and interrogate the adequacy of site selection processes and decisions about alternatives, other than provided for in law and policy … The adequacy of the selected site becomes a matter of the application of relevant legal and policy tests and then for the planning balance in due course".

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

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

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

> "26.10 The ExA asked the Applicant about possible alternative sites raised in representations. The Applicant considered Bramford was unsuitable due to constraints of overhead lines, other undertakers' apparatus, areas required for planting for the East Anglia ONE and East Anglia THREE projects, the need for compulsory acquisition, pinch points along the route passing through three designated sites and the cost of the longer route using AC technology, and that the

solution proposed by SASES would not work as the limit (1320MW) was insufficient for both projects; Bradwell would require extension of an overhead line with consequent environmental, timetabling and consenting challenges; Old Leiston airfield and Harrow Lane, Theberton have problems associated with the proximity of nearby residential property, caravan park, Leiston Abbey and Theberton village, the openness of the landscape and views and the absence of screening [ER 29.6.65]. The ExA was satisfied that these were not viable alternative sites [ER 29.5.146].

"26.11 The ExA investigated the possibility of an alternative grid connection at Broom Covert which was initially suggested by NNB Generation (SZC) Company Limited, but which subsequently stated the land is being used for translocation of reptiles from the construction of the Sizewell C power station and was unavailable [ER 29.5.66 et seq]. Following queries from the ExA at Compulsory Acquisition Hearing 3 the Applicant explained that in July 2017 EDF Energy had advised that this land, or any land associated with the development of Sizewell C, was not available as it was allocated for ecological compensation and mitigation for reptiles, and the Applicant was satisfied that as EDF was a statutory undertaker, coupled with the importance of the land to Sizewell C and EDF's need to protect the safety and security of Sizewell B power station meant the land was not available; it had also considered the matter following requests from ESC and SCC and concluded that the policy and consenting challenges outweighed the increased cost of further cabling to Grove Wood. The ExA was satisfied with the Applicant's response and concluded that compulsory acquisition of the land to the west was necessary and proportionate [ER 29.5.69 et seq]. The ExA concluded Broom Covert was not a viable alternative [ER 29.5.146]."

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

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

227 The facts and circumstances of this case are clearly distinguishable from those in *Stonehenge* [2022] PTSR 74. *Stonehenge* was not a case about alternative sites. It concerned a failure to take into account the relative merits of alternative tunnelling options at the site, which the court found were obviously material considerations, such that it was irrational not to take them into account. In this case, following the site selection process undertaken by the National Grid, and then the applicants, the ExA and the defendant have considered alternative sites in detail and reached rational conclusions upon the evidence before them. It is not possible to conclude that, on the evidence, the ExA and the defendant have acted irrationally by failing to take into account any obviously material consideration. By concluding (at ER 25.2.6) that further alternative sites were not "important and relevant" under section 104(2)(d) PA 2008 and NPS EN-1, the ExA was, in effect, deciding that those sites were not obviously material considerations. This conclusion was not unlawful in the circumstances of this case.

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

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

Final conclusion

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

Claim dismissed.

THOMAS BARNES, Solicitor

APPENDIX E

Neutral Citation Number: [2023] EWHC 98 (Admin)

Case No: CO/755/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/01/2023

Before :

MRS JUSTICE LIEVEN

- -

Between :

THE KING
(on the application of)
AQUIND LIMITED

Claimant

and

SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY

Defendant

and

PORTSMOUTH CITY COUNCIL

Interested Party

- -
- -

Mr Simon Bird KC and Mr Hugh Flanagan (instructed by **Herbert Smith Freehills LLP**) for the **Claimant**
Mr James Strachan KC and Mr Mark Westmoreland Smith (instructed by **Government Legal Department**) for the **Defendant**
Ms Celina Colquhoun (instructed by **Portsmouth City Council**) for the **Interested Party**

Hearing dates: **22 and 23 November 2022**

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 24 January 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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MRS JUSTICE LIEVEN

Mrs Justice Lieven DBE :

1. This is an application for judicial review under s.118(2) of the Planning Act 2008 ("PA") of the decision of the Secretary of State for Business, Energy and Industrial Strategy ("SoS") dated 20 January 2022 to refuse development consent for UK and UK marine elements of the AQUIND Interconnector.

2. The Claimant is AQUIND Limited, the promoter of the interconnector project. The project is a new 2,000MW subsea and underground bi-directional electric power transmission link between the south coast of England and Normandy in France. It would have the capacity to transmit up to 16,000,000MWh of electricity per annum, which equates to approximately 5% and 3% of the total consumption of the UK and France respectively.

3. Mr Bird KC and Mr Flanagan appeared for the Claimants, Mr Strachan KC and Mr Westmoreland Smith appeared for the Defendant, and Ms Colquhoun appeared for the Interested Party, Portsmouth City Council.

4. The application was considered by the Examining Authority ("ExA") which produced a detailed report finding compliance with National Policy Statement ("NPS") EN-1 and recommending approval. The ExA found that there was a need for the project and the harm found was outweighed by the need. The ExA considered alternatives which had been considered by the Claimant.

5. The Defendant considered the ExA report and made three Information Requests seeking further information on various issues. One of these related to the consideration that had been given to an alternative substation location at Mannington. Mannington, along with 9 other possible substations, had been considered by the Claimant at a much earlier stage, but had been rejected. The reasons for that rejection are contentious, but as a matter of fact, Mannington had been the substation which was intended to be used for a large offshore windfarm on the Solent called Navitus Bay. Navitus Bay was refused consent in September 2015.

6. The Defendant refused development consent for the interconnector on 20 January 2022. The sole ground for refusal was that the Claimant had failed to properly consider an alternative substation location at Mannington once Navitus Bay had been refused. The Defendant found that the Claimant had not properly considered alternatives and therefore the development should be refused.

Grounds of Challenge

7. The Claimant raises six grounds of challenge, the issues raised being whether in his determination to refuse development consent the Defendant:

    (i) made or was misled by his officials into making a material error of fact as to the potential feasibility of Mannington as a grid connection point for the proposed development; (Ground 1a)

    (ii) failed to take account of material evidence as to the feasibility of Mannington as a grid connection point; (Ground 1b)

(iii) failed to comply with the approach to decision-making mandated by section 104 PA; (Ground 2)

(iv) failed to apply his own NPS EN-1 policies to the proposed development; (Ground 3)

(v) failed in breach of his duty to take reasonable steps to inform himself as to the feasibility of Mannington so as to be able to discharge the requirements of section 104 PA; (Ground 4)

(vi) adopted a decision-making procedure which was procedurally unfair, causing the Claimant material prejudice; (Ground 5) and

(vii) failed to give proper, adequate and intelligible reasons for his decision (Ground 6).

8. Mrs Justice Lang granted permission for judicial review on all grounds.

The Facts

9. The interconnector is intended to bring electricity from France to link into the UK network. The nature of the project is that neither end point is fixed. In broad terms the elements of the project are the exit point on the French coast; the subsea cable; the landfall site in the UK; and the substation which allows the interconnector to link into the UK high voltage power network. Two important considerations in the planning of the scheme were the cost of the cable, and therefore the desirability of minimising length; and the need to minimise the crossing of busy shipping lanes. These factors, amongst others, led to a location near Le Havre for the landfall in France.

10. This then led to a consideration of potential landfall locations and substations along the English south coast, roughly between Hastings to the east and Weymouth to the west. Self-evidently the substations are fixed locations on the existing high voltage national transmission lines. There is a line which runs roughly parallel to the south coast, with the closest substation to Hastings being Bolney; a substation at Lovedean, north of Portsmouth and just outside the South Downs National Park; Mannington, north of Bournemouth; and Chickerell, north of Weymouth.

11. In December 2014 the Claimant requested National Grid Electricity Transmission ("NGET") to undertake a Feasibility Study of potential connections to the National Grid for the Claimant's proposed interconnector. The NGET Feasibility Study has been treated as confidential throughout the process and neither the Defendant nor the Court has seen it. Information about the Feasibility Study was subsequently given by the Claimant through the development consent process.

12. On 11 September 2015 the Navitus Bay offshore windfarm was refused. Navitus Bay was a very large proposed windfarm located off the coast at Bournemouth and relied on a potential substation connection to the National Grid at Mannington.

13. In January 2016 the final version of the NGET Feasibility Study was produced. In February NGET made a connection offer to the Claimant in respect of Lovedean as the

connection point for the Project into the National Grid. Lovedean lies to the north of Portsmouth just outside the South Downs National Park.

14. In March 2016 NGET produced the Connection and Infrastructure and Options Note ("CION").

15. On 14 November 2019 the Claimant applied for development consent under the PA. The application was for a landfall location at Eastney, which is on the coast at Portsmouth, and a connection to the Lovedean substation.

16. The application documents included the Environmental Statement ("ES"). Volume 1 Chapter 2 of the ES is the "Consideration of Alternatives". This sets out the process by which the landfall and substation locations were arrived at. In relation to the substation location, 2.4.2.1 refers to the NGET Feasibility Study, meetings between the Claimant and NGET, and the criteria that were applied (2.4.2.2). These include the proximity of the substation to the South Coast so as to minimise onshore cable length and associated environmental disruption from the cable installation.

17. At Plate 2.2 ten substation connection sites are identified within the search area. 2.4.2.4 says NGET discounted seven of these, including Mannington, and says:

> *"2.4.2.4. Utilising the above outlined criteria for the assessment and selection of the substation connection options, NGET discounted seven of the ten substations. This discounting was based on the limited thermal capacity of substations and/or feasibility to extend them to provide the required thermal capacity, and difficulties with access for the marine cable onto the shore and/or potential onshore cable routes."*

18. Chapter 2 goes on to explain in more detail why Chickerell and Bramley were rejected.

19. Section 2.4.2 considers potential landfall sites. There are 29 locations considered, from Bognor Regis in the east to West Bay (near Bridport) in the west. These are ranked on various criteria. It is worth noting that the landfall locations were assessed at the point when three substations (Lovedean, Bramley and Chickerell) were still under consideration. One of the criteria for selection was distance between landfall and connection, and the preference being for no more than 35km. Given that Chickerell lies well to the west of Mannington, the list of possible landfall locations when Chickerell was still being considered was likely to be similar to the position if Mannington had still been subject to consideration. In other words, there would not have been additional potential landfall locations in play if Mannington had been under consideration.

20. In the light of the decision to proceed with Lovedean, the landfall search narrowed to six locations within 35km of Lovedean, those being between Lee and Selsey, all lying to the east of the Solent.

21. On 19 February 2020 Portsmouth City Council ("PCC") submitted representations, including raising concerns about the consideration of alternatives, but not referring to any specific alternative locations.

22. On 6 October 2020 the Claimant submitted the ES Addendum-Appendix 3 Supplementary Alternatives ("the Supplementary ES").

The Supplementary ES

23. This is a critical document in the case and a number of sections are relevant:

a. 1.1.1.8 points to the linear nature of the project where the changing of one aspect impacts on another, with cross over between the choices of different elements;

b. 2.2.1.10 states that the Claimant carried out the assessment of alternatives, but the decision took into account information provided by National Grid regarding connection points;

c. Chapter 3 deals with the approach taken to the consideration of alternatives and 3.1.1.1 states the approach was whether there was a realistic prospect of delivering the same infrastructure capacity in the same timescale, mirroring the language in EN-1;

d. 4.1.2.7 refers to the cables being the largest part of the capital expenditure for the project, and therefore minimising the cable length being an important consideration;

e. 4.1.3 sets out initial discussions with NGET and 4.1.3.5 states:

> *"4.1.3.5 To the west of but within this search region, the 970MW Navitus Bay wind farm, off the Isle of Wight, was due to connect into Mannington substation. Further west, the FABLink 1400MW interconnector was due to connect into Exeter substation. NGET informed that the connection of a new interconnector in this region would have the effect of overloading the transmission lines, due to the power flows travelling from the west to east i.e. heading towards the major load centre of London."*

f. Section 5 deals with the grid connection points (i.e. the substations) and the process of reaching Lovedean. Reference is made to the initial ten locations and at 5.1.1.4 it states three were selected to be taken forward to identify whether they were feasible connection points. 5.1.1.5 and 5.1.1.7 state:

> *"5.1.1.5. Whilst the position of NGET was that the other substations represented similar connection issues to the sites taken forward, save for Bolney which was excluded because that part of the NETS was already constrained due to existing and planned future connection, the Applicant's preliminary views at the time on the suitability of the remaining substations were as follows:*
>
> *...*
>
> *Mannington – the shared connection point with the 970MW Navitus Bay wind farm raised technical concerns;*

> ...
>
> *5.1.1.7. As mentioned above at paragraphs 4.1.3.5 and 5.1.1.5, a connection agreement for the 970MW Navitus Bay offshore wind farm was in place in relation to the Mannington substation when the feasibility study was carried out, and therefore it was not considered to be suitable for the proposed connection. Although that project was later abandoned, the connection agreement remained in place with the developers of Navitus Bay offshore wind farm for some time following the feasibility study, during which significant progress was made advancing the proposals for Proposed Development. As a result it was not reasonable for the Applicant to re-consider the potential for a connection at Mannington at that later stage, and this was not considered further."*

5.1.1.7 (above) is an important paragraph, which Mr Strachan heavily relies upon;

g. There is then a detailed consideration of Chickerell, which included issues around landfall locations to serve that substation.

25 January 2021 letter from National Grid Electricity Systems Operator

24. On 25 January 2021 National Grid Electricity Systems Operator ("NGESO"), submitted a letter to the ExA in response to a written question "regarding NGESO's limited scope of activities in relation to the Feasibility Study and subsequent Connections and Infrastructure Options Note (CION)". In April 2019 National Grid's role as the systems operator had been separated into NGESO. For the purposes of this case this simply means that NGET became NGESO.

25. The letter produced a transmission plan, similar but slightly larger than that in the ES. The letter then says:

> *""In the case of AQUIND Interconnector, the CION did not progress with 7 existing substations. Bolney, Botley Wood, Fawley, Marchwood, Nursling, Mannington and Fleet these substations were not taken forward to the next stage of the CION due to the following reasons:*
>
> *1. Options to the West of Lovedean required all or nearly all the same network reinforcements as a connection at Lovedean plus additional reinforcements to either get the power to Lovedean or reinforcements to the west to Exeter substation and as far northwards as Minety.*
>
> *...*
>
> *With the above considerations in mind these 7 substations were not taken forward for further assessment. This is because these sites would likely have resulted in more overall reinforcements, which would therefore lead to more environmental impact, and increased costs to the GB consumer.*

> *The extent of these additional works will vary from site to site but may involve new overhead lines or cables, additional operational equipment and multiple substation extensions in addition to the works identified for a connection at Lovedean."* [emphasis added]

26. On 1 March 2021 the Claimant submitted a Post Hearing Note to the ExA. This states it was produced in the context of on-going discussion with the South Downs National Park Authority to resolve outstanding queries in relation to the selection of Lovedean. The Note states:

> *"The Applicant understands that all of the sub-stations considered would have required system reinforcement because of the significant flows of power generated or imported in the South-West and South-East of England to load centres north of the "SC1" planning boundary (i.e. London) in any case and there was no connection location that would not have been encumbered by requirements for such additional works. While such additional works to be carried out by National Grid, would have been similar in nature, all substations, which were not taken for further assessment, would have presented their specific challenges and additional costs."*

27. It then refers to all the other 7 locations and states in respect of Mannington:

> *"Mannington sub-station may not be suitable for extension at all due to the position of existing Static Var Compensation (SVC) within the substation and because there are residential properties in close proximity on three sides. It is also relevant that Navitus Bay offshore wind farm of nearly 1GW capacity was planned to connect there. In the Applicant's opinion, connecting to Mannington sub-station would have been deemed not feasible."*

28. Mr Strachan makes the valid point that the Note neither gives prices for reinforcement works nor specific reasons for rejection that go beyond the more generalised comments about Mannington, and the Navitus Bay issue. The Note ends:

> *"CONCLUSION*
>
> *Among all the sub-substations along the south coast, Lovedean provides the most direct and least constrained route to evacuate power from AQUIND Interconnector towards consumption centres in the south as well as to the north, including London, as well as to supply AQUIND Interconnector with power since most generation is further north.*
>
> *The selection of the other sub-stations would have resulted in the need for more extensive additional works which would increase the cost of such works to both the National Grid and the project and the time that it would take for the interconnector to become operational."*

29. It is worth noting, as part of the context, that Lovedean has a connection that runs north to Fleet substation and then north with connections into London and further afield.

Mannington is on the east-west South Coast line and does not have direct connectivity towards London.

30. On 8 June 2021 the ExA's report was sent to the SoS.

The Examining Authority's Report

31. The ExA recommended approval and the Examining Authority's Report ("ExAR") runs to 367 pages. The overall conclusion was "overall, the need case for the Proposed Development strongly outweighs the identified disbenefits" (12.2.1). The Report sets out the conclusions on each issue at the end of the relevant chapter. At each stage the ExA tested the proposal against the relevant National Policy Statement EN-1. Chapter 5 covers the need for the development and the consideration of alternatives; Chapter 9 has the conclusions on the case for development consent; Chapter 10 on compulsory acquisition, and Chapter 12 the overall summary of findings.

32. Chapter 5 records that:

    a. a number of objections ("Relevant Representations") argued that the ES did not provide a robust consideration of alternatives (5.4.15);

    b. NGESO confirmed the reasons behind discounting the other substations (5.4.24);

    c. At 5.4.31 the ExA said:

> *"The ExA is mindful of references to the consideration of alternatives in the NPS EN-1 including, at paragraph 4.4.3 (bullet 8), that where third parties are proposing an alternative, it is for them to provide the evidence for its suitability. In such instances it is not necessarily expected that the Applicant would have assessed every alternative put forward by another party. In this case, the Applicant has detailed a considered approach and provided additional commentary [REP1 – 152] to explain its position. Whilst offering criticism of the Applicant's approach, no party has offered substantive reasoned evidence to demonstrate that an alternative would be technically feasible or would lead to lesser environmental effects compared to the Proposed Development."* [emphasis added]

33. Ms Colquhoun makes the point that a number of the LAs impacted by the proposed development had raised the issue of alternatives, and whether they had been properly considered.

34. The ExA accepted the Claimant's need case, saying there was no substantive evidence to undermine that case (5.2.31). That case included that the proposed interconnector could transmit approximately 5% of the UK's current annual electricity consumption (5.2.10). The proposal complied with the Energy White Paper 2020, which supported

further interconnection with the European energy market, notwithstanding the UK's withdrawal from the EU.

35. Objections to the proposal had been raised in respect of a number of issues including traffic and highways; impact on heritage assets; impact on the South Downs National Park; and the impact on private interests by the use of compulsory acquisition powers. PCC were particularly concerned because the route of the connection between Eastney and Lovedean went through a densely populated area of Portsmouth. Although the connection itself is intended to be underground, there are structures at both ends, and the installation of the cables would have very material impacts during the construction phase.

36. In terms of negative impacts of the proposal the ExA concluded that there were:

    a. Temporary significant impacts on highways and traffic flows, which could be reduced to acceptable levels (9.2.17-19);

    b. Some minor temporary noise and vibration effects (9.2.15);

    c. A minor negative socio-economic effect (9.2.31);

    d. Some adverse significant landscape and visual effects on the setting of the National Park and the landfall location. The ExA gave these impacts moderate weight (9.2.54);

    e. Less than substantial harm to two heritage assets, to which the ExA gave considerable weight (9.2.62).

37. The ExA concluded on the planning balance:

> *"9.3.10. The ExA is satisfied that the identified adverse effects would be mitigated as far as is reasonably practicable and that the necessary measures could be properly secured through the Recommended DCO and the associated control documents, such that the identified significant adverse effects would be largely time-limited and reversible.*
>
> *9.3.11. Taking into account all relevant policy, the ExA concludes that the matters that are identified as disbenefits do not outweigh the significant benefits that are described, either alone or when considered together. The ExA therefore considers that the final balance indicates strongly in favour of granting development consent."*

38. The ExA fully considered the compulsory acquisition issues, including those raised by Mr and Mrs Carpenter who were subject to the proposed compulsory acquisition of 5.5ha of their land in the vicinity of Lovedean, and found that the compulsory acquisition was proportionate and justified.

39. In its final overall consideration of findings and recommendations at 12.2.1 the Report said:

> *"overall, the need case for the Proposed Development strongly outweighs the identified benefits."*

Third Information Request

40. The SoS made three requests for further information from the parties. The Third Information Request ("TIR") dated 4 November 2021 is the one relevant to this case. The statutory deadline for taking the decision had been extended to 21 January 2022. The Request included:

> *"4. The Secretary of State notes that the document Environmental Statement Addendum-Appendix 3-Supplementary Alternatives Chapter states that ten existing substations were evaluated as part of a feasibility study carried out by National Grid Electricity Transmission. One of the substations which was assessed in the feasibility study was the substation at Mannington. That substation was not considered to be suitable for the proposed connection because, at the time of the feasibility study, there was already a connection agreement in place for the proposed Navitus Bay offshore wind farm. The Addendum notes that the Navitus Bay project was subsequently abandoned but the connection agreement remained in place "for some time following the feasibility study" during which "significant progress" was made on the AQUIND interconnector proposal meaning that it was not reasonable for the Applicant to re-consider the potential for a connection at Mannington at that later stage.*
>
> *5. The Secretary of State is aware that the decision to refuse development consent for the Navitus Bay development was taken on 11 September 2015. He would be grateful for clarification from the Applicant in respect of how long the connection agreement for the Navitus Bay development remained in place following that refusal, what enquiries the Applicant made in respect of the potential use of the Mannington substation following the refusal of the Navitus Bay project and at what stage the development of the AQUIND interconnector project was when the connection agreement ended."*

41. The Claimant's Response was dated 18 November 2021. It started by referring to the history of consideration of alternatives, as set out above. At 2.6 the substance of NGESO's letter dated 25 January 2021 was set out verbatim and then 2.7 stated:

> *"In addition to NG ESOs reasons for why Mannington Substation was not taken forward for systems analysis, as is detailed at paragraph 5.1.1.5 of the Supplementary Alternatives Chapter the Applicant's preliminary view at the time on the suitability of Mannington Substation was that the shared connection point with the 970MW Navitus Bay offshore wind farm raised technical concerns."*

42. At 2.11 the Claimant quoted the ES Supplementary Alternative Addendum para 5.1.1.7, as set out above at 23. The Response then went on:

> *"2.12. In this regard, having re-examined the precise chronology and to assist with explaining the Applicant's position that it was not reasonable and/or necessary to further consider Mannington Substation following the connection agreement for Navitus Bay offshore wind farm being confirmed to no longer be in place, the timeline was that the connection*

agreement remained for some time after the Feasibility Study request in December 2014.

2.13. During this period the significant progress made advancing the proposals for Proposed Development was the preparation of the Feasibility Study itself together with the optioneering work that was undertaken by the Applicant alongside this, and which is most clearly detailed in Chapter 5 of the Supplementary Alternatives Chapter in relation to assessment of the grid connection points and paragraph 2.4.3 of the Alternatives Chapter in relation to the consideration of the potential landfall sites.

2.14. Following the refusal of development consent for the Navitus Bay offshore wind farm, the Applicant made enquiries with NGET on 14th October 2015 regarding the impact of that refusal on the Feasibility Study which was being undertaken and known to be near completion. The Applicant has not been able to locate a response to this query, though it was understood by the Applicant that at this time that refusal would have been subject to the six week legal challenge period provided for by section 118 of the Act and as such the connection agreement for Navitus Bay would have remained in place.

2.15. At a meeting with NGET in January 2016, following the issue of the final version of the Feasibility Study report and prior to the further CION processes which led to the issue of the CION in March 2016, it was noted that the Navitus Bay offshore wind farm had formally been removed from the list of future connections. It was therefore at this point in time that the Applicant was aware that the connection agreement for Navitus Bay offshore wind farm to Mannington Substation was no longer in place.

2.16. As is noted above, the Feasibility Study including the cost benefit analysis exercise was completed in November 2015, with the final version of the Feasibility Study report issued in January 2016. To include Mannington Substation in the shortlist of grid connection points for the Feasibility Study at this stage would have required the Feasibility Study process to restart, resulting in a further 10-12 months of work and the Applicant would not have been able to progress with its regulatory and other submissions until the further process was complete. This would have meant that the place of the Proposed Development in the list of future connections would have been lost. In effect, the Proposed Development would have been significantly delayed and placed at a commercial disadvantage. It would also have resulted in the incurrence of significant cost in the form of NGET's fees and cost to the Applicant. The costs incurred to date for the Feasibility Study would also have become abortive.

2.17. It was the view of the Applicant that for it to be reasonable to restart the Feasibility Study exercise to further consider the potential for a connection to Mannington Substation, noting the significant delay and cost this would have incurred, there would have needed to be a convincing

> *justification for why Mannington Substation may have been preferable to Lovedean Substation.*
>
> *2.18. As is noted above, NGET had already identified that Mannington Substation was not preferable to Lovedean, on the basis that additional reinforcements would have been required to either get the power to Lovedean or reinforcements to the west to Exeter substation and as far northwards as Minety and that this would have led to more environmental impact, and increased costs to the GB consumer."*

43. The SoS issued his decision letter on 20 January 2022. Between the receipt of the ExA Report and the issue of the decision letter there were a large number of internal departmental documents, which have been produced to this court pursuant to the duty of candour. Their detailed content is not relevant to the determination of the Court as to the lawfulness of the decision.

44. In the final submission to the SoS dated 14 January 2022 the Departmental officials set out four options. Option A was to agree to further consultation on a possible alternative substation at Mannington; Option B was a recommendation to grant consent for the interconnector. This followed the earlier submission dated 14 October 2021 which had recommended the grant of consent. Option C was to consent the entire scheme including the telecommunications equipment. Option D was to refuse consent for the entire project.

The Decision Letter

45. Section 1 of the Decision Letter ("DL") sets out the procedural history. Section 3 is a summary of the decision. DL3.3 gives a correct summary of s.104 PA. DL3.4- 3.6 states:

> *"3.4. In relation to the Application, the Secretary of State has had regard to the Overarching National Policy Statement for Energy ("NPS EN-1"). The Secretary of State has made his decision on the basis that making the Order would not be in accordance with his obligations under the Planning Act 2008.*
>
> *3.5. The Secretary of State notes that the ExA also considered at length the question of the planning balance under section 104(7) of the Planning Act 2008 i.e. whether the need for the proposed Development outweighed the planning harms inherent in the scheme and concluded that this was the case. The Secretary of State notes that the ExA identified planning harms associated with the scheme, which include less than substantial harm to the Fort Cumberland Scheduled Monument and the Grade II listed cottage known as Scotland, as well as impacts on tourism receptors, sports pitches and the Victorious Festival. The compulsory purchase powers sought by the Applicant would also result in private losses and could cause delay to the North Portsea Island Coastal Defence Scheme due to the overlapping of construction compound areas between this scheme and the proposed Development. The proposed development also has other potential adverse effects which are summarised in the ExA's report in the consideration of the planning balance [ER 9.3]. The*

> *Secretary of State agrees these adverse effects weigh against the proposed development.*
>
> *3.6. The Secretary of State has had regard to the case law in relation to the consideration of alternatives and is of the view that the alternatives, and in particular the Mannington substation initially considered by the Applicant, is an important and relevant consideration under s104(2)(d) of the Planning Act 2008. Given the adverse effects arising from the project and which have been noted above, and in particular the combination of impacts that result from the proposed landfall in an urban location, the Secretary of State considers that in the circumstances of this particular application it is exceptionally necessary to consider whether sufficient consideration has been given to whether there are more appropriate alternatives to the proposed route. In particular, consideration needs to be given to the alternative substations initially identified by the Applicant (and therefore alternative onshore routes avoiding the above harms) and whether these were adequately considered to determine whether the potential harms caused by the development from the selected route could have been avoided or reduced. In this regard the Secretary of State disagrees with the ExA's conclusion in relation to the consideration of alternatives and, as set out below, considers that there was a failure to adequately consider the original alternatives identified by the Applicant, such that it is not possible to conclude that the need for and benefits of the proposed Development would outweigh its impacts."*

46. Section 4 is headed "The Secretary of State's consideration of the Application". I note that all except the first paragraph actually deals with "the Consideration of Alternatives".

47. At DL4.2 two bullets from para 4.4.3 of EN-1 are set out verbatim. A summary is then given of the process of consideration of alternatives and at the end of DL4.5 it states:

> *"With regard to the location of the substation at Lovedean, the Secretary of State notes that National Grid Electricity System Operator's [sic] ("NGESO") submitted a representation to the examination confirming the reasons behind discounting the other substations [ER 5.4.24]."*

48. DL4.7 records the ExA's conclusion that the Claimant had undertaken an adequate consideration of alternatives and met the requirements of EN-1 in this regard.

49. DL4.8-11 states:

> *"4.8. The Secretary of State disagrees with the ExA's conclusion on this matter and considers that in this instance insufficient consideration was given by the Applicant to the alternative connection point at Mannington substation. The Secretary of State notes that the document Environmental Statement Addendum-Appendix 3-Supplementary Alternatives Chapter states that ten existing substations were evaluated as part of a feasibility study carried out by National Grid Electricity Transmission ("NGET"). The Secretary of State understands that the Applicant submitted a request to NGET for a Feasibility Study in December 2014, and that the final*

version of the Feasibility Study was issued in January 2016. The Mannington Substation was assessed as part of this Feasibility Study. The Feasibility Study notes that the substation was not considered to be suitable for the proposed connection because, at the time, there was already a connection agreement in place for the proposed Navitus Bay offshore wind farm. The Addendum notes that the Navitus Bay offshore wind farm project was subsequently abandoned but the grid connection agreement remained in place "for some time following the feasibility study" during which "significant progress" was made on the AQUIND interconnector project meaning that it was not reasonable, having regard to costs and delay, for the Applicant to re-consider the potential for a connection at Mannington at that later stage.

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

4.10. The Applicant submitted their response to this request on 18 November 2021. At paragraph 2.6 of this response, the Applicant noted that the letter submitted by NG ESO on 25 January 2021 stated that "Options to the West of Lovedean required all or nearly all the same network reinforcements to either get the power to Lovedean or reinforcements to the west to Exeter substation and as far northwards as Minety", and that "these sites would likely have resulted in more overall reinforcements, which would therefore lead to more environmental impact, and increased costs to the GB consumer". At paragraph 2.7 of its response, the Applicant noted that in addition to these reasons from NG ESO as to why Mannington Substation was not taken forward for systems analysis, the shared connection point with the 970MW Navitus Bay offshore wind farm raised technical concerns around the suitability of Mannington Substation as well.

4.11. The Applicant advises that the connection agreement for the Navitus Bay offshore wind farm at Mannington Substation remained for some time after the Feasibility Study request in December 2014. The Applicant goes on to state at paragraph 2.14 of their response that, following refusal of development consent for the Navitus Bay offshore wind farm, the Applicant made enquiries with NGET on 14 October 2015 regarding the impact of that refusal on their Feasibility Study which was being undertaken and known to be near completion. However, the Applicant has not been able to locate a response to this enquiry, though the Applicant notes that it was understood that the refusal would have been subject to the six-week legal challenge period provided for by section 118 of the Planning Act 2008 and as such the connection agreement for Navitus Bay

> *offshore wind farm would have remained in place. The Applicant was aware by January 2016 that the connection agreement was no longer in place (paragraph 2.15 of their response). The Application was submitted on 19 November 2019."*

50. At DL4.12-14 the SoS refers to the points raised by Interested Parties, including PCC, about the Claimant's consideration of alternatives, and in particular its reference to Navitus Bay and the timing of that decision and the failure to reconsider Mannington. At DL4.13 it is recorded that Winchester City Council proposed that the SoS should ask NGET for information. The DL states:

> *"The Secretary of State considers that the Applicant has access to any relevant information relating to discussions between the Applicant and NGET, and therefore considers that the Applicant would have submitted all available and relevant information on this matter and that there is therefore no requirement to seek views from NGET. The Applicant has had the opportunity to address the issue of this alternative and could have sought any information it required from NGET. It is the Secretary of State's view that it is not appropriate in the circumstances to further delay the decision for this purpose."*

51. DL4.16 to 21 states:

> *"4.16. The Secretary of State considers that at the point in the timeline (i.e. 11 September 2015) when consent for the Navitus Bay offshore wind farm was refused, that the Mannington Substation option should have been adequately explored. The Applicant states that it raised its enquiries with NGET around the impact of the refusal for Navitus Bay offshore wind farm on the Feasibility Study on 14 October 2015. At this point in time, the Feasibility Study had not yet been completed, and the six-week legal challenge period for Navitus Bay offshore wind farm was nine days away was expiry on 23 October 2015. The Secretary of State also notes that the Applicant's inability to provide a response to the enquiries it raised with NGET on 14 October 2015 regarding the impact on the Feasibility Study, means that the Secretary of State is unable to review in full the discussions that took place regarding this matter at the time.*
>
> *4.17. The Secretary of State notes the Applicant's view that it was not reasonable or necessary to further consider Mannington Substation as the grid connection point for the proposed development following the completion of the Feasibility Study. However, the Secretary of State considers that the Applicant should have pursued further the option to include Mannington Substation in the Feasibility Study given that the Applicant was aware that consent had been refused for the Navitus Bay offshore wind farm. The Secretary of State notes that the Applicant understood the potential importance of the refusal of consent for Navitus Bay offshore wind farm at the time, as it raised queries with NGET regarding the impact of this on the Feasibility Study. The Secretary of State considers that the Applicant has provided insufficient detail as to why further investigation into Mannington Substation was not undertaken. Whilst the Secretary of State understands that this could have resulted in*

further work for the Applicant, and the Applicant may not have been able to progress with regulatory and other submissions until that process was complete, the Secretary of State considers that the potential adverse effects of the proposed development (as identified by the ExA) necessitate the adequate consideration of those alternatives that the Applicant had identified. The Secretary of State also notes that the refusal of Navitus Bay was in September 2015 and the Application would not be made until over four years later.

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

4.19. The Secretary of State also acknowledges the implications of the Applicant's consideration of alternatives and the compulsory acquisition powers it seeks as part of the Application. Blake Morgan LLP submitted comments to the Secretary of State on behalf of landowners the Carpenters on 15 December 2021 which raised the concerns around the possibility of an alternative connection point at Mannington Substation and the implications this has for the compulsory acquisition of the Carpenters' land. In their comments of 15 December 20201, Portsmouth City Council noted its concerns that the Applicant had not made any assessment of the private loss to be suffered in consequence of the different options available and had not weighed that loss against the public benefits of the proposed development.

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

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

point at Mannington Substation might potentially have resulted in less adverse impact."

52. In section 7 the SoS considered the planning balance.

a. DL 7.1 correctly states that for applications under s.104 PA the primary consideration is the policy set out in the NPS;

b. DL7.2 summarises the harm found by the ExA and agrees with their summary (Report 9.3.10), but then says "… a significant number of adverse effects remain. These remaining impacts, in the view of the SoS, make the consideration of alternatives exceptionally relevant to the SoS's decision in this case."

c. DL7.3 and 7.4 state:

> *"7.3. In addition to these impacts identified by the ExA, the Secretary of State considers that the Applicant's failure to adequately assess the feasibility of Mannington Substation as an alternative connection point, means that the planning balance weighs against the Order being made, given the proposed development's obvious impacts on the City of Portsmouth and the possibility that a connection at Mannington Substation might have resulted in less adverse impact.*
>
> *7.4. Although the ExA found that the benefits of the proposed development would outweigh its adverse effects, the Secretary of State disagrees with this conclusion, as the alternative of a connection to the Mannington Substation has not been properly assessed and therefore he cannot conclude that the proposed route has been justified and determine the need for and benefits of the proposed Development would outweigh its impacts."*

The law and policy

53. The development was accepted as nationally significant and therefore fell within s.35 PA.

54. All parties agree that s.104 PA applies:

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

> (a) any national policy statement which has effect in relation to development of the description to which the application relates (a "relevant national policy statement"),
>
> …
>
> (d) any other matters which the Secretary of State thinks are both important and relevant to the Secretary of State's decision.
>
> (3) The Secretary of State must decide the application in accordance with any relevant national policy statement, except to the extent that one or more of subsections (4) to (8) applies.
>
> (4) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the United Kingdom being in breach of any of its international obligations.
>
> (5) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the Secretary of State being in breach of any duty imposed on the Secretary of State by or under any enactment.
>
> (6) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would be unlawful by virtue of any enactment.
>
> (7) This subsection applies if the Secretary of State is satisfied that the adverse impact of the proposed development would outweigh its benefits.
>
> …"

55. There is a duty to give reasons under s.116 PA.

56. The relevant NPS is EN-1 *Overarching National Policy Statement for Energy*. At Part 3 this sets out strong support for energy infrastructure supported by the NPS. EN-1 is dated 2011 but remains the extant energy NPS. The Energy White Paper 2020, although not an NPS, provides specific support for interconnectors.

57. Part 4 of EN-1 sets out the assessment principles that the SoS (when EN-1 was drawn up this was the IPC) should apply in making a decision. 4.1.2 states:

> *"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."*

58. Part 4.4 deals with the treatment of alternatives. 4.4.1 states:

> *"As in any planning case, the relevance or otherwise to the decision-making process of the existence (or alleged existence) of alternatives to the proposed development is in the first instance a matter of law, detailed guidance on which falls outside the scope of this NPS. From a policy perspective this NPS does not contain any general requirement to consider alternatives or to establish whether the proposed project represents the best option."*

59. 4.4.2 states:

> *"However applicants are obliged to include in their ES, as a matter of fact, information about the main alternatives they have studied. This should include an indication of the main reasons for the applicant's choice, taking into account the environmental, social and economic effects and including, where relevant, technical and commercial feasibility; in some circumstances there are specific legislative requirements, notably under the Habitats Directive, for the IPC to consider alternatives. These should also be identified in the ES by the applicant; and in some circumstances, the relevant energy NPSs may impose a policy requirement to consider alternatives (as this NPS does in Sections 5.3, 5.7 and 5.9)."*

60. 4.4.3 is critical in this case (I have added numbers to the bullet points for ease of reference):

> *"Where there is a policy or legal requirement to consider alternatives the applicant should describe the alternatives considered in compliance with these requirements. Given the level of urgency of need for new energy infrastructure, the IPC should, subject to any legal requirements (e.g. under the Habitats Directive) which indicate otherwise, be guided by the following principles when deciding what weight should be given to alternatives:*
>
> *1. the consideration of alternatives in order to comply with policy requirements should be carried out in a proportionate manner;*
>
> *2. the IPC should be guided in considering alternative proposals by whether there is a realistic prospect of the alternative delivering the same infrastructure capacity (including energy security and climate change benefits) in the same timescale as the proposed development;*
>
> *3. ...*
>
> *4. alternatives not among the main alternatives studied by the applicant (as reflected in the ES) should only be considered to the extent that the IPC thinks they are both important and relevant to its decision;*
>
> *5. as the IPC must decide an application in accordance with the relevant NPS (subject to the exceptions set out in the Planning Act 2008), if the IPC concludes that a decision to grant consent to a hypothetical*

> *alternative proposal would not be in accordance with the policies set out in the relevant NPS, the existence of that alternative is unlikely to be important and relevant to the IPC's decision;*
>
> *6. alternative proposals which mean the necessary development could not proceed, for example because the alternative proposals are not commercially viable or alternative proposals for sites would not be physically suitable, can be excluded on the grounds that they are not important and relevant to the IPC's decision;*
>
> *7. alternative proposals which are vague or inchoate can be excluded on the grounds that they are not important and relevant to the IPC's decision; and*
>
> *8. it is intended that potential alternatives to a proposed development should, wherever possible, be identified before an application is made to the IPC in respect of it (so as to allow appropriate consultation and the development of a suitable evidence base in relation to any alternatives which are particularly relevant). Therefore where an alternative is first put forward by a third party after an application has been made, the IPC may place the onus on the person proposing the alternative to provide the evidence for its suitability as such as the IPC should not necessarily expect the applicant to have assessed it."*

The Grounds

61. There is a good deal of overlap and inter-connection between all the Grounds. The background to each Ground is the way the Claimant in the application process, and the SoS in the decision making, approached the issue of Mannington as an alternative. I will therefore set out my analysis of the factual process and then relate that back into the analysis of each of the Grounds.

62. As is set out above, the Claimant commenced the development consent process under the PA with a conventional analysis of alternatives in the ES. This included a number of relevant selection criteria both for substation connection and landfall locations. The position was inevitably made more complicated by the fact that there is an interrelationship between those two elements of the scheme. So if the connection point changed, then the landfall might also change, and the cable length both undersea and on land would vary. The ES makes clear that cable length was a significant cost element of the scheme. The undersea cable location would in turn affect the impact on shipping lanes. It is immediately apparent that the analysis of ultimate route choice, and the rejection of alternatives, was a complex one, necessarily depending on a number of factors.

63. The ES Addendum is for that reason a complex document and has to be read as a whole to understand those interrelationships. I agree with Mr Strachan that Chapter 5 of that document, and 5.1.1.7 in particular, confuses the situation. It seems to suggest that the Navitus Bay connection was the factor which led Mannington not to be taken forward, and the fact the connection agreement remained in place for some time was what prevented Mannington being reconsidered. However, if one goes back to 4.1.3.5, set

out in 23(e), it is clear that the position was more complicated, and that the rejection of Mannington did not simply turn on the Navitus Bay connection.

64. However, during the course of the ExA Examination, NGESO (as they had become) made their position clear, or at least much clearer, in the letter dated 25 January 2021. They refer to the need for additional network reinforcements for any options west of Lovedean, which necessarily includes Mannington, and that being the reason why the other seven substations (including Mannington) were not taken forward. I accept that this response left open further possible questions, such as how much would further such reinforcements cost, and more detail on environmental impacts. However, the critical point is that NGESO made no reference to the Navitus Bay issue and made entirely clear that there were significant reasons for not progressing with connections west of Lovedean, independently of anything to do with a connection to Navitus Bay.

65. The Claimant's Technical Note of 7 March 2021 repeats these points. It brings back in the Navitus Bay issue, but that is independent of NGESO's view as set out in that Note.

66. The TIR Response repeats again the information in the NGESO letter of 25 January 2021. It then states in terms that "in addition" the Claimant's preliminary view at the time was that the connection to Navitus Bay raised technical concerns about Mannington. The rest of that Response does refer at length to Navitus Bay, and perhaps with the benefit of hindsight should have been clearer that regardless of Navitus Bay, there were strong reasons to reject Mannington. However, to a considerable degree the Response is framed by the questions in the SoS's Request, which themselves focus on Navitus Bay. At 2.18 the Response does return to the point that NGET had already identified Lovedean as being the preferable site.

67. This was the information before the SoS when he made the decision.

Ground One

68. Ground One (a) is that the SoS made a material error of fact. This Ground turns on DL4.8 and the reference to the Feasibility Study noting that Mannington was not suitable because at the time there was an agreement with Navitus Bay. Ground One (b) is that the SoS failed to take into account relevant evidence, namely that NGESO had identified that Mannington was not feasible for reasons unrelated to Navitus Bay and that there were a number of other reasons Mannington was not suitable.

69. The Claimant submits that the SoS in DL4.8 wrongly stated: *"The Feasibility Study notes that the substation was not considered to be suitable for the proposed connection because at the time, there was already a connection agreement in place for the proposed Navitus Bay offshore windfarm."* In fact, the Feasibility Study, which was drawn up by NGET, did not rely on Navitus Bay and the SoS has confused the Feasibility Study with the Claimant's own work as set out in the Supplementary ES.

70. The Claimant says that this mistake meets the tests in *E v SSHD* [2004] QB 1044 at [66]. There are four limbs to that test:

    a. There is a mistake on an existing fact;

    b. The fact is uncontentious;

c. The claimant must not have been responsible for the mistake;

d. The mistake must have played a material part in the tribunal's reasoning.

71. The Claimant seeks to rely on two pieces of evidence that were not before the SoS. An email from NGESO dated 1 March 2022 together with a letter of 8 March 2022, and an email sent by the Claimant to NGET in October 2015. The SoS resists the admission of this material on the ground that it does not meet the test in *Ladd v Marshall* [1954] 1 WLR 1489.

72. The SoS accepts that the reference, in the sentence in DL4.8 quoted above, to the Feasibility Study is wrong, and it should be a reference to the Supplementary ES. Mr Strachan submits that this is a "referencing error" and that it is clear from reading the paragraph as a whole that the SoS was referring to the latter document. Further, and in any event, he submits that the other tests in *E* are not met.

73. In my view the real thrust of this Ground is not in the error in the sentence in DL4.8, but whether the SoS properly understood and took into account NGESO's position on Mannington, as opposed to simply the Claimant's process of consideration of Mannington.

74. I accept Mr Strachan's argument that read reasonably benignly, the mis-reference in one sentence of DL4.8 could simply be a "referencing error", rather than a material error. The SoS does carefully distinguish between the documents in the paragraph, but the sentence is in substance repeating what was said in the Supplementary ES at 5.1.1.7. Therefore, it makes more sense for the DL to have intended to refer to the ES, rather than the Feasibility Study, and therefore this being a simple mistake of giving the wrong reference to the documentation.

75. The additional documents which Mr Bird seeks to rely upon, do not change this conclusion. In any event, I do not consider that they pass the *Ladd v Marshall* test because the Claimant could have submitted them to the SoS if it had considered them particularly relevant.

76. I also accept that some at least of the fault for the apparent confusion was the responsibility of the Claimant. In particular, 5.1.1.7 is confusing by muddling the Feasibility Study (with no capitalisation and presumably referring to the NGET work) and the position of the Claimant. The true position can be worked out if one goes back to 4.1.3.5, and then appreciates that NGET's position was that there would be an overloading of the transmission lines to the west of Lovedean. But even then, on the basis of that information, the degree to which that was independent of Navitus Bay was not entirely clear from reading the Supplementary ES alone.

77. Therefore, applying the tests in *E* with proper rigour, the Claimant has not made out limb (a) or limb (c) of the tests in that case.

78. However, Ground One (b) has more substance. The Claimant submits that where DL4.15 says that the Claimant *"should have undertaken further work to assess the grid connection point at Mannington"* once it became aware that Navitus Bay had been

refused, the SoS failed to take into account the material showing NGET/NGESO's broader reasons for not supporting Mannington.

79. The Claimant somewhat overstates its case by suggesting that NGESO had said in the Feasibility Study that Mannington was not "feasible" (Skeleton Argument para 33(a)). The SoS has not seen the Feasibility Study nor has the Court, so it is not known precisely what it says, or how the issues around Mannington are couched. However, NGESO had made clear in the letter of 25 January 2021 that there were significant issues with Mannington. Further, any fair reading of the Supplementary ES shows that if Mannington was chosen there would be a number of "knock-on" consequences such as the cost of longer cables; finding a suitable landfall; increased crossing of shipping lanes and crossing the IFA2 Interconnector. None of these problems are addressed by the SoS. This issue is very closely related to Ground (iv), the *Tameside* Ground (*Secretary of State for Education v Tameside MBC* [1977] AC 1014), and I will deal with it there. Even if the SoS was entitled in law not to take these problems with Mannington into account because he did not consider them to make Mannington an unrealistic alternative, he was in my view, obliged to make further inquiries pursuant to the principle in *Tameside* (and the subsequent caselaw) for the reasons I set out below.

80. Although DL4.5 refers to the NGESO submission, the SoS fails to show that he has taken into consideration the reasons for rejecting Mannington that had been put forward by NGET/NGESO quite independently of issues around Navitus Bay. This was a crucial issue in the decision-making process, and I therefore find that Ground 1(b) is made out.

Grounds Two and Three

81. Ground Two is that the SoS failed to comply with s.104 PA. Ground Three is that he failed to properly apply the NPS in EN-1. Much of the argument about s.104 turns on how the SoS approached EN-1, and I therefore deal with the two Grounds together.

82. The Claimant submits that the SoS failed to go through the structured analysis in s.104, and in particular failed to properly apply s.104(3) when setting out his reasoning in respect of EN-1.

83. Part 4 of EN-1 has a careful and highly structured approach to the assessment of projects. Mr Bird submits, and I agree, that the starting point is the presumption in favour of granting consent for energy NSIPs (4.1.2). The DL makes no reference to this presumption. This is all the more surprising given that the ExA had found that the need case "strongly outweighs" the identified disbenefits (ExA 12.2.1). Therefore, the ExA had found that the case being advanced by the Claimant went beyond the simple policy presumption in terms of the benefits of the project.

84. Part 4.4 of EN-1 sets out a very detailed policy approach to alternatives. 4.4.1 states that the relevance of alternatives is a matter of law. 4.4.2 requires (as a matter of policy) that all main alternatives considered by an applicant should be referred to in the ES (a reflection of EU law as it stood at the time). I note that Mannington was referred to and it is no part of the Claimant's case that Mannington was not a relevant consideration within the terms of the caselaw or the policy.

85. 4.4.3 sets out how the decision maker should decide what weight to give to alternatives. 4.4.3 has unnumbered bullets, but I ascribe them numbers for ease of reference. Bullet (2) states that the decision maker should be guided by whether there is a realistic prospect of the alternative delivering the same capacity in the same timescale. The SoS did not deal with this criterion in the DL.

86. Bullet (6) is that alternatives which mean the proposal could not proceed, because they are not commercially viable or not physically suitable, can be excluded. This is the criterion which makes it of imperative importance to understand what National Grid's position was in respect of Mannington. It is apparent from the letter of 25 January 2021 that NGESO considered there were material difficulties with a connection at Mannington (or the other locations west of Lovedean) because of the need to make further reinforcements to the network. That could reasonably have been interpreted as meaning that the sixth bullet point was not met. Again, the DL does not address this issue.

87. Mr Bird submitted that in the DL, having failed to properly address EN-1, the SoS then failed to apply s.104(3) PA. Section 104(3) requires detailed consideration of whether any specific and relevant policies of the NPS indicate consent should be refused. He submits that only by undertaking that exercise and giving his clear conclusion could the SoS rebut the presumption in favour of development in EN-1 4.1.2.

88. Mr Strachan submits that the DL properly records the s.104 tests at DL3.1, 3.3 and 7.1 and therefore it must be assumed that the SoS understood the statutory tests. The DL concluded that the proposal did not comply with the EN-1 policy on alternatives in DL 4.2 and 4.6-8 and as such the SoS properly conducted the balancing exercise in s.104(7).

89. Mr Strachan relies upon *R (Clientearth) v Secretary of State for Business, Energy and Industrial Strategy* [2021] EWCA Civ 43 at [104]:

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

90. He submits that the obligation on the SoS was simply to apply a balance under s.104(7). There was no duty to start with the presumption under EN-1 para 4.1.2 because that paragraph expressly refers back to the provisions of the Planning Act 2008. The SoS did not disagree with the ExA's conclusions on need and he expressly took into account the benefits of the scheme at DL7.4.

91. Mr Strachan refers to *R (Save Stonehenge World Heritage Site Limited) v Secretary of State for Transport* [2021] EWHC 2161 (Admin) at [288] where Holgate J observed that policy in an NPS did not disapply the common law principles as to when

alternatives are capable of being a material consideration. At [269] he referred to the common law duty to consider alternatives in certain cases, as set out in *Trusthouse Forte v Secretary of State for the Environment* [1987] 53 P&CR 293, and that the policy does not seek to, nor could, displace that duty.

92. In my view, Mr Strachan's submissions rather miss the detail and the specificity of the issue in respect of alternatives. It is not being suggested that the SoS erred in law by referring to Mannington, nor that in principle he could not place weight upon it. Mr Strachan submits that the ExA had concluded that the Claimant had done enough in respect of Mannington but the SoS disagreed. That is simply a question of putting different weight on an issue, and as such, this falls within the SoS's lawful area of judgement.

93. However, that analysis is to ignore the requirements of the policy and of the statutory scheme. If the SoS was going to rely upon the failure to properly consider an alternative, as he did here, then he had to do so applying the policy approach in EN-1 4.4.3; or explaining why he intended to depart from the policy. It is a trite proposition that an applicant for development consent is entitled to rely on policy, particularly in this statutory scheme, an NPS, and if the decision maker wishes to depart from it, he has to explain why.

94. The SoS also had to properly apply s.104, which depends on at least considering whether the proposal was "in accordance with" the NPS, see s.104(3).

95. EN-1 para 4.1.2 creates a presumption in favour an energy NSIP, and therefore in principle in favour of this project. The ExA had found that the "need" case was very strong, and the SoS did not disagree with that conclusion. The DL makes no reference to the presumption in para 4.1.2. Save for the reference in DL3.4 that "*The SoS has made his decision on the basis that making the Order would not be in accordance with his obligations under the Planning Act 2008",* he does not make clear whether he considers the proposal to accord with EN-1 or not. Reading the DL as a whole, and considering the lengthy section on Alternatives, it may be fair to the SoS to assume that he did not consider EN-1 to be met, because of *"the possibility that a connection point at Mannington Substation might potentially have resulted in less adverse impact"* (DL4.21). However, he has not addressed and therefore apparently either has not applied the presumption in para 4.1.2, or alternatively stated why it does not apply.

96. Further, in placing weight, indeed on the facts of the case determinative weight, on the possibility of Mannington as an alternative, he has not applied the policy in EN-1 para 4.4.3, in respect of the consideration of alternatives. DL4.2 does refer to this paragraph and quotes two of the bullet points. In some cases such a reference would be sufficient to satisfy the Court that proper regard had been had to the policy. However, there are two reasons in this case why such a reference is not sufficient. First is the carefully crafted policy in EN-1 to guide the decision maker as to how to approach alternatives. The policy requires a decision maker to engage with 4.4.3 if weight is going to be placed on potential alternatives. A promoter of development is entitled to rely on that exercise being undertaken. Secondly, the consideration of Mannington was the determinative issue in the case. It was not a side issue, or even merely "a" principal important controversial issue, it was in the SoS's decision the determinative issue. It was therefore vital that the SoS properly applied the policy in this regard.

97. However, the SoS does not address whether there was a realistic prospect of Mannington delivering the same capacity in the same timescale. NGESO had said in clear terms (letter 25 January 2021) that Mannington, and the other six substations, would require additional reinforcements to the west and potentially more environmental impact and more cost to consumers. The SoS does not refer to this view of NGESO (Ground 1(b)), but also critically does not apply this to the policy test in 4.4.3 (second bullet). It would have been open to the SoS to say he gave little weight to this issue, but he had to address it if he was going to apply the policy lawfully.

98. Similarly, in regard to 4.4.3 (sixth bullet) he had to address whether Mannington was commercially viable or physically suitable. It was open to him to say that he did not know, and therefore required further information, but he had to address the policy test. The DL fails to do so.

99. In respect of Ground Two, on the facts of this case I consider the SoS had to make clear whether he considered the proposal accorded with EN-1 or not, pursuant to s.104(3). It is important for the Court not to be too mechanistic in its approach to planning decisions, and not to require an obstacle course of analysis which then needlessly trips up decision makers. However, s.104 imposes a very clear structure on the decision-making process. The scheme of the Planning Act 2008 is to give a particular status in the decision-making process to a National Policy Statement. Part 2 of the Act sets out the process for adopting NPSs and s.9 establishes the Parliamentary requirements, which then give an NPS a particular status different from any other government statement of planning policy. Therefore, an NPS is not simply another policy document which is weighed in the planning balance and to which the SoS can give more or less weight. The amount of weight is a matter for him, but that is subject to the presumption in s.104(3) and the specific matters in subsections (4) to (7).

100. On the facts of this case, I consider there was a duty on the SoS to make clear whether he considered the application was or was not in accordance with the NPS for the purposes of s.104(3). Mr Strachan relied upon *Clientearth* and submitted that Lindblom LJ's reference to the "balancing exercise" in s.104(7) meant that in such cases there was a simple planning balance to be applied. However, Lindblom LJ did not suggest that it was unnecessary to go through the statutory steps, including the application of s.104(3). In fact, in *Clientearth* the SoS in the DL had referred to the policy presumption in EN-1 para 4.1.2 (see [36]) and had carried out the s.104(3) analysis (see [42]).

101. In the present case, the ExA had concluded that there was a strong need case, and that it clearly outweighed any harm. Therefore, for the purposes of s.104(3) there was, in the view of the ExA, clear accordance with EN-1. The SoS simply went to s.104(7) and appears to have carried out an unconstrained planning balance. That is not what the statute requires him to do.

102. I reject Mr Strachan's submission that the SoS was applying the common law and was therefore entitled to take the prospect of Mannington as an alternative into consideration. The error of law here is not that the SoS took into account Mannington as a possible alternative, it is that he did not apply the statutory process set out in s.104 and that he did not apply the policy in the NPS when evaluating Mannington and deciding what weight to give it.

103. For these reasons I find that Grounds Two and Three are made out.

Ground Four

104. Ground Four is that the SoS failed to seek further information on the feasibility of Mannington and thus breached his duty to take reasonable steps to inform himself pursuant to the principle set out in *Tameside*. The Claimant submits that the SoS in the Third Information Request confined himself to asking about the connection agreement with Navitus Bay and what further inquiries the Claimant had made, but did not make the relevant inquiries, to the degree that he did not already have the information, about the feasibility of Mannington.

105. The test as set out by Lord Diplock in *Tameside* was as follows:

> *"the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?"*

106. The correct approach to a *Tameside* challenge was considered by the Divisional Court in *R (Plantagenet Alliance) v Secretary of State for Justice* [2014] EWHC Civ 1662, where, following *R (Khatun) v Newham LBC* [2005] QB 37, it was held that the approach to any *Tameside* challenge was that of *Wednesbury* irrationality. It is not for the court to decide upon the manner or intensity of inquiry to be undertaken. The law was helpfully summarised by the Court of Appeal in *R (Balajigari) v Secretary of State for the Home Department* [2019] 1 WLR 4647 at [70]:

> *"The general principles on the Tameside duty were summarised by Haddon-Cave J in R (Plantagenet Alliance Ltd) v Secretary of State for Justice [2014] EWHC 1662 (Admin) at paras. 99-100. In that passage, having referred to the speech of Lord Diplock in Tameside , Haddon-Cave J summarised the relevant principles which are to be derived from authorities since Tameside itself as follows. First, the obligation on the decision-maker is only to take such steps to inform himself as are reasonable. Secondly, subject to a Wednesbury challenge, it is for the public body and not the court to decide upon the manner and intensity of enquiry to be undertaken: see R (Khatun) v Newham LBC [2004] EWCA Civ 55, [2005] QB 37 , at para. 35 (Laws LJ). Thirdly, the court should not intervene merely because it considers that further enquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the enquiries made that it possessed the information necessary for its decision. Fourthly, the court should establish what material was before the authority and should only strike down a decision not to make further enquiries if no reasonable authority possessed of that material could suppose that the enquiries they had made were sufficient. Fifthly, the principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant but rather from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion. Sixthly, the wider the discretion conferred on the Secretary of State, the more important it must be that he has all the relevant material to enable him properly to exercise it."*

107. Mr Bird submits that this case meets the high test of irrationality set out in the caselaw. He relies on the duty under s.104(3) PA and the need for the SoS to answer the statutory questions in s.104. If he did not accept the position of the Claimant and NGESO as to Mannington, then the SoS needed to make enquiries about the feasibility of Mannington given the information that was before him and the policy and statutory schemes. The policy in EN-1, in particular para 4.4.3, sets out specific questions the SoS needed to address, and therefore the inquiries that any reasonable SoS had to make if he considered that he did not already have the relevant information.

108. Mr Strachan submits that the Claimant was given every opportunity to provide the relevant information on Mannington, particularly through the Third Information Request. The SoS acted rationally in concluding that the Claimant should have reconsidered Mannington in late 2015, particularly as the scheme of the PA is heavily frontloaded and thus requires developers to have undertaken extensive preparations before lodging an application.

109. I accept Mr Bird's submissions on this Ground. There are a number of reasons why the SoS's decision to refuse the application without making further inquiries about the feasibility of Mannington was irrational and was in breach of his *Tameside* duty.

110. Firstly, the ExA had found a strong need case in favour of the development which clearly outweighed the harm found. The consequence of this was that in the ExA's view there was a significant public interest in the development. It should be noted that the Claimant contended, and the ExA accepted, that the development could meet 4-5% of the UK's electricity need with the obvious public benefits that would follow. The level of this public benefit meant that any reasonable SoS would have inquired into the feasibility and viability of Mannington before rejecting the development on the purely speculative basis that it might provide an alternative to Lovedean.

111. The SoS refused development consent on the sole ground that there might be an alternative sub-station location. He expressly accepted at DL4.21 that the Claimant might have found that Mannington was not feasible. Given the scale of the public benefits that the ExA accepted, it is in my view irrational on this point alone for the SoS not to have made further inquiries.

112. Secondly, the consequence of that finding was that there was very clear policy support, in the NPS, for the development. I have already addressed the ways in which the SoS failed to apply the relevant policies in a lawful manner.

113. Thirdly, the SoS had the quite clear statement from NGESO that there were difficulties, albeit unquantified ones, with using Mannington as the substation. Although NGESO do not say in terms that Mannington was not feasible, any fair reading of their letter alerts the reader to the significant difficulties of proceeding with that site. If the SoS thought, despite this letter, that Mannington should not be ruled out pursuant to the policy in EN-1 para 4.4.3, then it was again irrational not to make further inquiries so that the SoS could make his decision on a properly informed basis. The highly speculative nature of Mannington being a realistic alternative again points strongly in favour of any rational SoS seeking further information.

114. Fourthly, Mr Strachan characterises the SoS's position as being that the Claimant had been given full opportunity to explain the position in respect of Mannington, and that

the Response to the Third Information Request did not state in terms that Mannington was not feasible. However, even if this was correct, the submission ignores the public interest which lies at the heart of the policy support for the project in EN-1. On the very stark facts of this case, the SoS should not be able to rely on the fact that the Response to the TIR could have been more clearly worded to reject a proposal which had the potential to make a very significant contribution to the UK's energy supply.

115. None of these factors mean that the SoS would have been obliged to allow the development if Mannington was not a feasible option. He was entitled to place weight on the harm from the development, subject only to Wednesbury irrationality principles. However, he was obliged, on the facts of this case, to ensure that he had the necessary information as to whether Mannington was indeed a feasible and viable alternative. It is important to note that the issue for any rational decision maker was not why the Claimant had rejected Mannington in 2016, and whether it should have re-evaluated the position after the Navitus Bay contract ended, but rather whether Mannington was in fact a feasible alternative in 2022.

116. In reaching this conclusion I take into account Ms Colquhoun's submissions on behalf of PCC as to the harm within Portsmouth and the surrounding area from connecting to the grid at Lovedean. The weight to be attached to that harm was a matter for the SoS, subject again only to rationality. However, whatever the weight given to the harm, the SoS still had to act rationally in his approach to any possible alternative sub-station.

Ground Five

117. The Claimant submits that the decision was procedurally unfair because the SoS did not give the Claimant a reasonable opportunity to respond to any unspoken view that Mannington was a potential feasible alternative. The TIR did not relate to the feasibility of Mannington and Claimant could not have reasonably anticipated that the SoS might require further information on that, given the information that had been provided both by the Claimant and by NGESO.

118. Mr Bird applied to amend his claim to add a ground that the SoS had breached regulation 19(3) of the Infrastructure Planning (Examination Procedure) Rules 2010. Regulation 19 (3) states:

> "**Procedure after completion of examination**
>
> 19. …
>
> (3) If after the completion of the Examining authority's examination, the decision-maker—
>
> (a) differs from the Examining authority on any matter of fact mentioned in, or appearing to the decision-maker 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 decision-maker shall not come to a decision which is at variance with that recommendation without—

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

119. Mr Bird submits that the issue around the Navitus Bay connection impacting on Mannington was a new matter not raised before the ExA. As such, pursuant to reg 19, the SoS should have notified all the parties and given them an opportunity to make further representations.

120. Mr Strachan relies on the TIR and submits this was an opportunity for the Claimant to explain why Mannington was not an appropriate alternative. He also points to the fact that other interested parties responded to the request, understanding that they could refer to Mannington as a feasible alternative.

121. In my view, this Ground takes the Claimant's case no further forward. It was apparent in the TIR that the SoS was considering the relevance of Mannington as an alternative to Lovedean. He could only have been doing this on the basis that he was considering refusing the proposal on the ground of a possible alternative substation at Mannington and the Claimant's failure to reconsider it after Navitus Bay had fallen away. Otherwise, the SoS's interest in Mannington, and his reference to the Navitus Bay refusal makes no sense. I note Ms Colquhoun's submission that the LPAs, including PCC, had all understood the thrust of the SoS's questions about Mannington and Navitus Bay, and responded accordingly.

122. Therefore, the Claimant was given the opportunity to provide the SoS with information about why Mannington was not a feasible alternative. It is the essence of the Claimant's Ground 1(b) that it had provided the SoS with that information, in particular through the views of NGESO. This is therefore not a case which turns on any procedural unfairness, but rather with the SoS's failure to properly consider the information that he had been given.

Ground Six

123. The Claimant submits that the SoS failed to give proper and adequate reasons in the DL. The test for reasons in this context is set out in *South Bucks v Porter* [2004] UKHL 33 at [36]:

> *"The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable*

> *disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."*

124. Mr Bird submits that the DL failed to explain how the s.104 PA duty was discharged and whether the proposal accorded with EN-1.

125. I agree with Mr Strachan that these grounds do not materially add to the substantive Grounds dealt with above. As I have set out, the SoS erred in law in his approach to both the s.104 duty and compliance with EN-1. It therefore necessarily follows that he did not properly explain his reasoning in the DL. However, there are no separate issues that arise under the reasons Ground.

Appendix 3 – Guidance on associated development applications for major infrastructure projects

Department for Communities and Local Government

Planning Act 2008

Guidance on associated development applications for major infrastructure projects

April 2013
Department for Communities and Local Government

This document/publication is also available on our website at www.gov.uk/dclg

Any enquiries regarding this document/publication should be sent to us at:

Department for Communities and Local Government
Eland House
Bressenden Place
London
SW1E 5DU
Telephone: 030 3444 0000

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Contents

Introduction

1. The Planning Act 2008 ("the Planning Act") created a new development consent regime for major infrastructure projects in the fields of energy, transport, water, waste water, and waste. These projects are commonly referred to as major infrastructure projects and will be throughout this document. Through the Localism Act 2011, the Government made significant changes to the regime by abolishing the Infrastructure Planning Commission and transferring decision making to the Secretary of State[1].

2. Section 115 of the Planning Act provides that, in addition to the development for which development consent is required under Part 3 of the Act ("the principal development"), consent may also be granted for associated development.

3. Associated development is defined in the Planning Act as development which is associated with the principal development. Sub-sections (2) to (4) of 115 of the Planning Act set out other requirements relating to associated development. Associated development can include development in England and in waters adjacent to England. It includes development in the field of energy in a Renewable Energy Zone, but not in any part of a Renewable Energy Zone in relation to which the Scottish Ministers have functions. Associated development may not include dwellings (see paragraph 7, below), or development in Scotland, or in waters adjacent to Scotland. It may not include development in Wales, except for surface works, boreholes or pipes associated with underground gas storage by a gas transporter in natural porous strata[2].

4. This guidance is designed to help those who intend to make an application for development consent under the Planning Act to determine how the provisions of the Planning Act in respect of associated development apply to their proposals. The guidance is also intended to inform others with an interest in such applications.

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1 'Secretary of State' in this document should be read as 'the Secretary of State with responsibility for the relevant policy area'. Applications relating to energy projects will be decided by the Secretary of State for Energy and Climate Change; those relating to transport by the Secretary of State for Transport; hazardous waste by the Secretary of State for Communities and Local Government and those for waste water and water supply will be a joint decision by the Secretary of State for Communities and Local Government and the Secretary of State for the Environment, Food and Rural Affairs.

2 This guidance will therefore be of limited relevance in Wales.

Associated development principles

5. It is for the Secretary of State to decide on a case by case basis whether or not development should be treated as associated development. In making this decision the Secretary of State will take into account the following core principles:

(i) The definition of associated development, as set out in paragraph 3 above, requires a direct relationship between associated development and the principal development. Associated development should therefore either support the construction or operation of the principal development, or help address its impacts.

(ii) Associated development should not be an aim in itself but should be subordinate to the principal development.

(iii) Development should not be treated as associated development if it is only necessary as a source of additional revenue for the applicant, in order to cross-subsidise the cost of the principal development. This does not mean that the applicant cannot cross-subsidise, but if part of a proposal is only necessary as a means of cross-subsidising the principal development then that part should not be treated as associated development.

(iv) Associated development should be proportionate to the nature and scale of the principal development. However, this core principle should not be read as excluding associated infrastructure development (such as a network connection) that is on a larger scale than is necessary to serve the principal development if that associated infrastructure provides capacity that is likely to be required for another proposed major infrastructure project.[3] When deciding whether it is appropriate for infrastructure which is on a larger scale than is necessary to serve a project to be treated as associated development, each application will have to be assessed on its own merits. For example, the Secretary of State will have regard to all relevant matters including whether a future application is proposed to be made by the same or related developer as the current application, the degree of physical proximity of the proposed application to the current application, and the time period in which a future application is proposed to be submitted.

[3] For example, in the case of an application for an offshore generating station, the Secretary of State may consider it appropriate for a degree of overcapacity to be provided in respect of the associated transmission infrastructure, so that the impacts of one or more other planned future projects which could make use of that infrastructure would be reduced by taking advantage of it. Applications that include elements designed for the basis of overcapacity would be expected to demonstrate the need for the overcapacity as well as fully assessing the environmental effects.

6. It is expected that associated development will, in most cases, be typical of development brought forward alongside the relevant type of principal development or of a kind that is usually necessary to support a particular type of project, for example (where consistent with the core principles above), a grid connection for a commercial power station.

Dwellings

7. The Planning Act specifically excludes the construction or extension of one or more dwellings from the definition of associated development. In *R (on the application of Innovia Cellophane Ltd) v Infrastructure Planning Commission (2011)*[4] the Court held that the dwellings exclusion did not preclude a proposal involving temporary accommodation for workers. In principle, therefore, temporary accommodation for workers engaged in the construction or operation of infrastructure may be applied for as associated development if consistent with the core principles.

Single application

8. It is for applicants to decide whether to include something that could be considered as associated development in an application for development consent or whether to apply for consent for it via other routes. However, where an applicant does wish to apply for consent for associated development, it should be included in the application for the principal development. The Secretary of State can only consider associated development in conjunction with the principal development and has no power to consider a separate application unless the development requires development consent under the Planning Act in its own right.

9. A single application can cover more than one project requiring development consent under the Planning Act. Applicants are encouraged, as far as is possible, to make a single application where developments are clearly linked.

10. As far as practicable, applicants should explain in their explanatory memorandum which parts (if any) of their proposal are associated development and why.

11. The applicant must ensure that the impacts of all relevant development are assessed, including any associated development. The applicant should also ensure that there is sufficient information to deal with any

[4] *R (on the application of Innovia Cellophane Ltd) v. Infrastructure Planning Commission* [2011] EWHC 2883 (Admin*).*

relevant European environmental requirements[5], which includes ensuring that any associated development is included in any request to the Secretary of State for screening and scoping opinions.

Examples of associated development

12. Annexes A and B provide examples of the type of development that may qualify as associated development. These annexes are illustrative only. In particular the following should be noted:

- These annexes are not intended to be exhaustive. For example, technological progress may mean that some types of associated development could not have been foreseen when this guidance was written.

- These annexes should not be read as a statement that the development listed in them should be treated as associated development as matter of course; these lists should be read together with the core principles.

- These annexes should not be treated as an indication that the development listed in them cannot in its own right constitute a project, or an integral part of a project, for which obtaining development consent is mandatory under the Planning Act.

[5] Principally under the Environmental Impact Assessment Directive (85/337/EC), the Habitats Directive (92/43/EEC) and the legislation transposing the requirements of those directives. Relevant Advice Notes have been produced by the Planning Inspectorate and can be found on the Infrastructure Planning Portal at http://infrastructure.planningportal.gov.uk/legislation-and-advice/advice-note

Annex A

Examples of general types of associated development

Access arrangements

- Formation of new or improved vehicular or pedestrian access (to stations, work sites etc), whether temporary or permanent
- Alteration or construction of roads, footpaths and bridleways
- Diversion or realignment of watercourses
- Construction of new rail, road or foot bridges, viaducts or tunnels, and works to reconstruct, alter or replace existing ones
- Railway works and associated works (including freight sidings, passing loops, level crossings, gauge clearance and railway lines for moving aggregates during construction)
- Jetties e.g. for unloading raw materials arriving from sea
- Highway and rail route/junction improvements (which may provide some benefit to third-party network users as well as users of the principal development)
- Other highway-related works, e.g. to facilitate demand management measures or to provide lorry parking or service facilities
- Parking spaces for workers and users of the principal development
- Public transport infrastructure and services
- Temporary haul roads, vehicle-marshalling facilities and lay down areas

Connections to national, regional or local networks

- Electricity networks
- Water/waste water networks
- Fuel and pipe-line networks

- Telecommunications networks

Development undertaken for the purpose of addressing impacts

- Hard and soft landscaping
- Flood defences and flood mitigation measures
- Measures to prevent coastal erosion
- Creation of compensatory habitats or replacement green space
- Noise barriers
- Works to mitigate impacts on sites or features of the historic environment

Other works

- Relocation of apparatus of statutory undertakers' equipment (mains, sewers, drains, pipes, cables, pylons etc)
- Alteration of canals, railways and watercourses
- Maintenance sites
- Temporary accommodation for staff based on site (including floating accommodation modules) to enable the construction, operation or maintenance of the principal development
- Emergency response facilities
- Security measures
- Fuel depots
- Working sites , site offices and laydown areas
- Settlement lagoons and surface water balancing facilities
- Telemetry and monitoring apparatus
- Temporary and support structures

Annex B

Examples of associated development specific to individual types of major infrastructure projects

Onshore generating stations

- Offsite[6] fuel storage
- Overhead/underground lines
- Substations
- Jointing pits
- Sealing end compounds
- Waste storage facilities
- Ash processing plants for coal-fired and biomass stations
- Plant and pipework to supply waste heat to the boundary of the site
- Gas pipelines and pressure reduction stations

Offshore generating stations

- Onshore substations
- Harmonic filter compounds
- Overhead/underground lines
- Jointing pits
- Sealing end compounds
- Sea/land cable interface buildings and structures

[6] "Off-site" here means physically separate from the site of the principal development. As noted in paragraph 9 above, any associated development must be included in the same application as the principal development.

- Converter stations and associated storage
- Facilities for additional sub-sea cables to offshore platforms
- Additional circuit breakers or circuit breaker bays on offshore platform

Underground gas storage facilities

- Surface works such as pumping/compressor stations
- Boreholes and pipelines to storage facilities

Electric lines

- Substations
- Distribution lines
- Control buildings
- Sealing end compounds
- Diversion of other overhead lines
- Converter stations

Gas transporter pipe-lines

- Above ground installations such as pumping/booster stations, compressor and/or regulator stations
- Works to support and/or protect pipelines from damage

Oil pipelines

- Pumping equipment
- Oil processing plants to manage and control oil in the pipeline
- Storage tanks
- Road handling facilities

Cross-country pipelines

- Above ground installations such as pumping/booster stations, compressor and/or regulator stations
- Works to support and/or protect pipelines from damage

Highways

- Replacement roadside facilities where this becomes necessary due to the elimination of an existing facility by highway improvement
- Infrastructure associated with cycle/pedestrian access
- Off-site landscaping, habitat creation and other environmental works
- Off-site drainage works
- Alteration/diversion/stopping up of local roads, accesses and other rights of way
- Off-site diversion of statutory undertakers equipment

Airports

- Freight distribution centre, including freight forwarding and temporary storage facilities

Harbours

- Lights on tidal works during construction
- Supplementary harbour works for the benefit of third parties or to assist the Environment Agency
- Off-site facilities for vehicle safety or security controls
- Provision of compensatory facilities for commercial or leisure fishing
- Development required for the use or disposal on land of dredged arisings

Railways

- Construction of new railway stations, and improvements, alterations and extensions to existing stations (new footbridges, platform extensions, ticket halls etc.)
- Construction/alteration of maintenance depots and marshalling yards
- Provision of pressure relief or ventilation shafts and access to them

Dams/reservoirs

- Water transfer system, e.g. pumping station, water transfer tunnels, pipelines
- Recreational amenities where the reservoir is required to serve as a public amenity

Waste water treatment plants

- Water transfer system, e.g. pumping station, water transfer tunnels, pipelines
- Waste water transfer systems
- Storage facilities (such as for sludge, grit, etc.)
- Sludge handling facilities, including incineration
- Power generation/distribution plant

Transfer and storage of waste water facilities

- Surface works such as ventilation structures and control kiosks

Hazardous waste facilities

- Vehicle parking for heavy goods vehicles transporting hazardous waste to the site
- Bulk storage tanks
- Leachate storage tanks
- Gas flares

- Monitoring boreholes