Immingham Green Energy Terminal

9.61 Summary of Issue Specific Hearing 6 (ISH6)

Infrastructure Planning (Examination Procedure) Rules 2010

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R. (ON THE APPLICATION OF ARTHUR SCARISBRICK) V SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT V WHITEMOSS LANDFILL LTD

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1 ABOUT THIS DOCUMENT

1.1 Introduction

1.1.1 This document summarises the case put forward by Associated British Ports (the "Applicant"), at the Issue Specific Hearing ("ISH") 6 on 16 April 2024 focusing on landside and strategic matters for the Immingham Green Energy Terminal project (referred to as the "Project").

1.1.2 The hearing opened at 10:00 and closed at 14:05 on 16 April 2024. The agenda for the hearing [EV9-001] was published on the Planning Inspectorate's website on 3 April 2024.

1.1.3 In what follows, the Applicant's submissions on the points raised broadly follow the items set out in the Examining Authority's ("ExA") agenda.

1.2 Attendees on behalf of the Applicant

1.2.1 Hereward Phillpot KC, instructed jointly by Bryan Cave Leighton Paisner LLP (BCLP) on behalf of Associated British Ports, the Applicant and Charles Russell Speechlys (CRS) on behalf of Air Products (BR) Limited. Also appearing on behalf of the Applicant were William Barrett, Environmental Assessment Technical Lead at AECOM, Simon Tucker, Director at DTA Transport Consultants and Philip Rowell, Director at Adams Hendry Consulting Ltd

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2 APPLICANT'S SUMMARY OF CASE ON ITEM 3: STRATEGIC MATTERS INCLUDING BUT NOT LIMITED TO NATIONALLY SIGNIFICANT INFRASTRUCTURE PROJECT THRESHOLDS AND NEED ASSESSMENT

2.1 Item 3 (Strategic Matters including but not limited to Nationally Significant Infrastructure Project Thresholds and Need Assessment)

Issue Discussed	Summary Of Oral Case
Operative wording under s24(2) of the PA2008 and whether the Proposed Development has the handling capability to embark or disembark the relevant quantity of material. The ExA suggested that it was unclear whether the harbour facility as altered would have the handling capability to embark or disembark the relevant quantity of material per year and asked the Applicant to clarify how the proposed development as consented would satisfy s24(2)(b) of the Act and if it cannot, to provide details of the further infrastructure required under further separate consents to do so.	The Applicant's position on this issue is set out in three documents which are the Planning Statement [**APP-226**] at section 1.3, the Explanatory Memorandum [**REP1-004**] at paragraphs 2.13 to 2.15.4 and Response to Written Question 1.2.1.2 [**REP1-023**]. These matters were also addressed in oral submissions at ISH1 – although the relevant submissions were not captured in the summary provided at D1, and so it was explained that the summary would be supplemented at D3. A supplemental note summarising these submissions at ISH1 is provided in the Applicant's Response to the Examining Authority's Action Points from Issue Specific Hearing 6 [**TR30008/EXAM/9.55**]. The Applicant's position was explained as follows: The proposed alteration to the harbour facility comprises Work No. 1 in Schedule 1 to the dDCO, namely the jetty together with its integral landside access ramps and topside loading and unloading infrastructure, pipes, pipelines and utilities and associated works. This is referred to in the application documents as 'the Terminal'. The remainder, i.e. Works Nos. 2-10 are AD for the reasons explained during ISH1. That distinction between the NSIP and AD is consistent with the approach adopted in the Tilbury 2 case (see the ExAR at 4.2.47). The Terminal constitutes an NSIP under sections 14(1)(j), 24(2) and 24(3)(c) of the PA 2008. • S. 14(1)(j) – the construction or alteration of harbour facilities. • S. 24(2) – alteration of harbour facilities is within s.14(1)(j) only if: - The alteration will be wholly in England or in waters adjacent to England; and

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	- The effect of the alteration will be to increase by at least the relevant quantity the quantity of material the embarkation or disembarkation of which the facilities are capable of handling. • S. 24(3)(c) – this is a facility for cargo ships and thus the relevant quantity is 5m tonnes. The capacity of the jetty is in the order of 11 million tonnes of liquid bulk cargo, and therefore well in excess of the relevant quantity. The Planning Act 2008 is concerned with the capacity of the "harbour facilities" that are constructed or altered, i.e. in this case the capacity of the jetty. The Act sets a threshold which is intended to ensure that where such harbour facilities are constructed or altered such that the effect is expected to be to increase by at least the relevant quantity per year, the quantity of material the embarkation or disembarkation of which the harbour facilities are capable of handling, any application for approval of such development must be made under the PA 2008. The focus therefore is necessarily on the expected effect of the proposed alteration of the harbour facilities on the capacity of the harbour facilities to embark and disembark material. There is a decision of the High Court which provides some assistance on the approach to this issue, albeit it was concerned with an increase in the capacity of a different type of infrastructure, namely Airports. The case is ***R (Ross) v. Secretary of State for Transport [2020] EWHC 226 (Admin)*** and a copy of the Judgment is provided in the Applicant's Response to the Examining Authority's Action Points from Issue Specific Hearing 6 [**TR30008/EXAM/9.55**]. The case concerned a challenge to a decision on an application for planning permission for development at Stansted Airport which would have increased the capacity from 35mppa to 43mppa. The Claimant argued that the application should have been treated as an NSIP because it was said that it would be technically possible for the airport to handle an even greater number of passengers, thus exceeding the NSIP threshold. The Judge held that the Claimant's approach was wrong and rejected the challenge. For present purposes the key findings are in [101]: • Application of the threshold requires a judgment to be made by the decision-maker.

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	• That judgment is to be formed by asking what increase in capacity could realistically be achieved, not what might technically or arithmetically be possible. • It requires an analysis based on how the infrastructure is likely to perform and what is likely in practice. • The use of the word "expected" [which also appears in s.24(2)] imports the requirement for an assessment which is grounded in the reality of the capacity which might be achieved. Applying that approach to the facts of this case: • The issue is what increase in capacity might the jetty realistically be expected to achieve (during the course of its lifetime) on the evidence before the SoS. • Emphasis was placed on the words "the jetty" because that is the development which comprises the alteration of the harbour facilities and not the AD. It would plainly be wrong to seek to answer the question by reference to the AD being provided to support the use of the jetty by its first customer, rather than the capacity of the jetty itself – which is intended and expected to be a multi-user facility. That would be to look down the wrong end of the telescope and to consider the capacity of the AD (which is provided to meet the requirements of only the first user of the multi-user jetty) and not the expected capacity created by the new jetty itself. • That point was illustrated by examining a scenario in which ABP made a commercial decision to bring forward proposals for an identical jetty speculatively in advance of and separately from any AD to cater for a specific customer. • As the policy on need in section 3 of the National Policy Statement for Ports ("NPSfP") makes clear, creating capacity to cater for the demand port operators expect to arise [3.3.1] and [3.4.7] taking their own commercial view and their own commercial risks, in a market-led approach responding to changes that "may occur" [3.4.1], and creating spare capacity to assure resilience [3.4.15] and [3.4.9], is appropriate and important in the public interest. In other words, the capacity created by such a speculative development – rather than one that included the specific AD needed by a first customer - would in principle be supported by the NPSfP.

	• In that situation, i.e. without specific proposals for landside AD, it could not properly be argued that the jetty was not expected to give rise to any increase in the quantity of material the harbour facilities were capable of handling. • That would not only be wholly unrealistic, artificial and contrary to the clear expectations of the NPSfP, it would also suggest there was a substantial loophole in the legislation which simply does not exist. • In this case the decision-maker has evidence from the highly experienced port operator as to what is expected and what is realistic in terms of the additional capacity created by the new jetty and the topside infrastructure that forms part of it. That evidence shows that it is expected to add up to about 11 million tonnes per year. • The estimate is not precise, but it is more than double the 'relevant quantity' and the uncontroverted evidence of the applicant – the experienced port operator – is that this additional capacity is expected to be used during the jetty's lifetime. • For those reasons the evidence shows that the effect of the proposed alteration of harbour facilities is expected to increase by at least the relevant quantity per year the quantity of material the embarkation or disembarkation of which the facilities are capable of handling. • It is therefore a nationally significant infrastructure project. In response to a question from the ExA as to whether, in the hypothetical scenario described, delivering the landside infrastructure to enable the handling capabilities to embark or disembark more than 5 million tonnes would then in itself constitute the alteration of the harbour facilities and then be the NSIP for the purposes of the NSIP regime, the Applicant noted that such development would not be the creation or alteration of 'harbour facilities' for the purposes of the Planning Act 2008. The alteration of 'harbour facilities' only comprises the jetty, all of the landside development is associated development. If the Project came forward with only the jetty (without any associated development), and the question was asked, what additional capacity is the alteration of the harbour facilities (i.e. the Port of Immingham) *expected* to achieve, the expected capacity would not be assumed to be nil. To proceed on that basis would be totally artificial and unrealistic. The alteration of the harbour facilities and an assessment of the additional capacity this is expected to create over its lifetime defines the NSIP. The operation of the NSIP is then supported by associated development that can either be developed at the same time as the NSIP, or developed in stages over time (e.g. in response to

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	commercial demand), and facilitates the utilisation of the capacity created by the alteration to the harbour facilities. In this case, the Applicant is bringing forward the NSIP alongside the AD required to facilitate use by its first user, Air Products, who will utilise some of the capacity that would be created. But the remainder of the capacity that would be created cannot lawfully be ignored when applying section 24. In this case it is not only expected that the remaining capacity will be utilised in due course but (as explained in ISH1) the commercial decision of the Applicant to bring forward the Project at this time is also influenced by the commercial reality that a second user is expected to use the jetty. To ask the question that the legislation raises, i.e. what increase in capacity might be expected from the alteration to the harbour facilities, is to get the answer that it is expected to increase the capacity by at least the relevant quantity per year the quantity of material that the harbour facilities is capable of handling. Indeed, it is expected to be far more than the relevant quantity at approximately 11 million tonnes,. We know that because that is the commercial motivation of bringing the jetty forward, and the Act does not expect or indeed allow the decision maker to ignore that reality. That is why we emphasise the word "expect". It is particularly important, when looking at the capacity of the jetty to look at what would be expected *over its lifetime*. This is not a question which can be answered only by how it would or could be used on its first day of operation but what would be expected over the many decades (at least) of its operating life. That capacity is plainly well over the relevant quantity of 5 million tonnes on the evidence. That is reflected in design of the jetty and the topside infrastructure that forms part of it. All of that is geared towards providing the capacity for the jetty to cater for that level of throughput in terms of the liquid bulk that can be transported across it. Whilst the Applicant's estimate of 11 million tonnes is not precise it is clearly more than double the relevant quantity. The uncontroverted evidence of the Applicant, the experienced port operator, is that this additional capacity is expected to be used during the jetty's lifetime. The evidence shows that when you approach the question from the right legal perspective which is to look at the capacity of the jetty as the alteration of the harbour facilities it is expected to increase by at least the relevant quantity per year the quantity of material the embarkation or disembarkation the Port of Immingham is capable of handling. The evidence shows that there is a realistic expectation that all of the capacity or at the very least more than the relevant quantity of material will be used. As such, it is quite clear that this is precisely the sort of facility that the Planning Act is contemplating and seeking to bring within its regime, and the fact that the application has been made pursuant to the Planning Act 2008 is a reflection of that commercial and practical reality.

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	The ExA suggested that the Applicant's definition of 'harbour facilities' is important to the discussions on this issue and requested that in a post hearing note the Applicant should explain how this has been defined and why the harbour facility does not extend to the landside infrastructure. This explanation is provided at Appendix 1. The Applicant also explained that the approach adopted to the division in this case as between the harbour facilities and the AD is not unique to this application. It is also consistent with the way that that division was defined and ultimately accepted in the Tilbury 2 application where there was a distinction between the port elements (the harbour facilities) as the NSIP and the storage and processing which was the AD in that case. We took an action to provide relevant references to this case. A set of extracts of the Examining Panel's Report and CMAT Position Statement ([REP-016 of the Tilbury 2 Examination Library)] are provided in the Applicant's Response to the Examining Authority's Action Points from Issue Specific Hearing 6 [**TR30008/EXAM/9.55**].
ClientEarth and Scarisbrick judgements, and whether it is open to the ExA to exercise planning judgement about what weight should be given in favour of the Proposed Development depending on the nature and scale of its contribution to satisfying the national need for additional port capacity.	It was explained that the ***ClientEarth*** judgments (first instance and CA) are both provided in Appendix 2 to [**REP1-023**]. ***Scarisbrick*** is referred to in those judgments, and a copy of the Court of Appeal's Judgment in that case is provided as an appendix to this summary of oral submissions in Appendix 2. Whilst the existence of the need, and the public interest importance of meeting that need is determined by the NPS, the decision-maker may exercise planning judgment in determining what weight to give to the benefits of an individual project's contribution to meeting the need. That is the approach taken in ***ClientEarth*** and ***Scarisbrick***, and it is reflected in the application documents in this case which identify and explain the public interest benefits associated with the contribution that would be made by this development, so that they may be reflected in the weight attached to the benefits it would deliver. Some examples of this are in: • Planning Statement [**APP-226**] sections 5.3, 5.6 and 7.3 • Applicant's Responses to First Written Questions [REP1-023] Q1.2.1.14, Q1.2.1.16 and Q1.2.1.18 • Applicant's Response to Q1.3.2.12 [REP1-024] • Applicant's Response to Q1.6.1.3 [REP1-027] • Written Summary of the Applicant's Oral Case at Issue Specific Hearing 1 [REP1-064]

	• Written Summary of the Applicant's Oral Case at Issue Specific Hearing 3 [REP1-066] • Statement of Reasons, section 6 [AS-008] It is necessary, however, to set out some important matters that are relevant to understanding what is said in those two judgments and its implications for the assessment and determination of this application, and more generally to the exercise of planning judgment in respect of this matter. In addition, the panel was referred to the response given in REP1-023 to WQ1.1.1.14 for context. The Court has made clear that it would be inappropriate and indeed unlawful to seek to use the s.104(7) balancing exercise as a vehicle for questioning the need for the specific development proposed. That would be to question the merits of the NPS and/or to avoid the effect of the highly structured decision-making framework set by s.104 (see e.g. ***ClientEarth*** (first instance) at paragraph 107). The starting point in determining the weight to be attached must be the relevant NPS, and it is therefore necessary both to consider what is said in that NPS, and to be alive to the wording of the equivalent text in the different NPSs that were in issue in those two cases when reading them and contemplating their application to the position here. In ***ClientEarth*** the Court of Appeal was concerned with the former (2011) version of NPS EN-1 and in particular with what was said at paragraph 3.2.3: *"…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."* The text of that former policy is set out in the Court of Appeal's Judgment at [16] and its significance to the consideration of the issues by the Court can be seen at [64] to [74]. The Applicant drew particular attention to [69] of the judgment: *"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 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." That final point was a reference to the statement in [3.2.3] (see above). Note also that the new version of NPS EN-1 includes text at [3.2.8] that is plainly intended to address the implications of the Court's interpretation in the ***ClientEarth*** case of that part of the former policy which required the extent of the weight attributed to be proportionate to the anticipated extent of a project's actual contribution to satisfying the need for a particular type of infrastructure (see Judgment at [68]): *"3.2.7 In addition, the Secretary of State has determined that substantial weight should be given to this need when considering applications for development consent under the Planning Act 2008.* *3.2.8 The Secretary of State is not required to consider separately the specific contribution of any individual project to satisfying the need established in this NPS."* It is apparent from that change the Government does not consider that decision-makers ought to be considering the specific contribution of an individual project to satisfying the established need as a matter of course. The NPSfP contains no policy akin to that found in the former NPS EN-1 at [3.2.3] that the weight to be 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. Note that in ***ClientEarth*** where there was such a policy the Court of Appeal nevertheless found that the decision-maker was not obliged to adopt a quantitative approach to such an assessment (***ClientEarth*** (Court of Appeal) at [66] to [67]). The NPSfP does, however, mandate that the decision-maker should give *"substantial weight"* to the positive impacts associated with economic development [4.3.5]. It is of particular importance in this case to note that the NPSfP explains at [3.4.16] the need is *"compelling"* and at [3.5.2] provides the following guidance to the decision-maker on assessing the need for additional capacity:

	"Given the level and urgency of need for infrastructure of the types covered as set out above, the IPC should start with a presumption in favour of granting consent to applications for ports development" In other words, the public interest in meeting the need is such that in respect of any ports NSIP to which the NPS applies, the contribution it makes to meeting the need is of such importance in terms of public benefit that the starting presumption is that consent should be granted. The obvious implications of that statement of policy for the weight to be attached to considerations of need can be seen in what was said by the SoS and then by the Court of Appeal in the ***Scarisbrick*** case where the policy was expressed in very similar terms (see the text of [4.1.2] of the Hazardous Waste NPS in the Court Appeal's Judgment at [17]): *"In paragraph 4.18 the Examining Authority said they gave "considerable weight" to the need for the application project – by which, as is clear from the context, they meant the national need for such projects established in the NPS. In paragraph 12 of his decision letter the Secretary of State agreed. He was entitled to give that need the weight he did. This was a matter of planning judgment for him, subject only to challenge on public law grounds … To assess the weight to be given to the need for the project under the policy in section 3.1 of the NPS as "considerable" was not irrational. To give "considerable" weight to a need established in a statement of planning policy is not, on the face of it, a surprising planning judgment, let alone an unreasonable one. Indeed, it was consistent with the policy "presumption" in paragraph 4.1.2 of the NPS, the "presumption in favour of granting consent to applications for hazardous waste NSIPs, which clearly meet the need for such infrastructure in this NPS."*[62] Here, as there, the policy presumption applies to any project which contributes to meeting the need. That is unsurprising because any project to which the NPS applies will be providing a level of additional capacity that Parliament has deemed to be nationally significant. When regard is had to all that the NPSfP says about the public interest importance of meeting the *"compelling"* need for additional ports infrastructure to increase the UK's capacity to import and export, it is hardly surprising that any nationally significant contribution to meeting the need is considered to be of such public interest benefit that there should be a presumption in favour of granting consent. The weight to be attached to this factor by the decision-maker must take account of and reflect that policy context.

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	Here the Applicant has gone further than simply relying on that presumption and has adduced evidence as to the need for and benefits of this development, over and above what is already established by the NPSfP. That can only serve to increase the already substantial weight that should be attached to a development that makes a nationally significant contribution to meeting the established need. Finally, there are no factors that apply here that would justify any material reduction in the weight that should be attached to the benefits associated with that contribution.
Securing benefits, including but not necessarily limited to, the Applicant's contention that 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. The ExA also noted whether a requirement is appropriate to ensure the delivery of low carbon hydrogen in accordance with the relevant standards. Given the complexity of calculating and tracking carbon emissions through the supply chain, how would the local authority monitor compliance with the relevant standards.	It was explained that at ISH1 reference had been made to the ***Substation Action*** case, a copy of which was supplied at D1 in Appendix 2 to [**REP1-023**]. The Judge in that case noted at [161]: *"Furthermore, as a general principle, there is no legal requirement that all benefits which are given weight in a planning balance must be formally secured, in order to be treated as material considerations. In this case, the decision to give weight in the planning balance to the generating capacity was a matter of judgment for the defendant."* That is entirely orthodox, and is reflected in the approach taken to benefits associated with planning applications and DCO applications more generally. For example, significant weight is often attributed to the economic benefits associated with the job creation predicted to occur during the operational stage of a development - but there is no practice of (or need for) imposition of a planning condition or a requirement to ensure a minimum number of people are actually employed on site at all times. The same is true of economic benefits associated with additional visitors and spending thought likely to be drawn to an area as a result of a new development such as a visitor attraction. No condition or requirement is ever imposed to ensure a minimum number of people actually visit, or that they spend a certain amount if and when they do. That does not render those anticipated benefits immaterial considerations, nor does it prevent substantial weight being attributed to them. The position is therefore different to the taking into account of mitigation measures to address likely significant adverse effects in an EIA context, where a securing mechanism is needed. That, however, springs from the separate statutory and case law relating to the EIA process. It cannot simply be read

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	across to the quite different legal question of taking account of benefits as a material planning consideration. As a matter of law, there is no need to 'secure' a benefit in order for it to be taken into account and given such weight as the decision-maker sees fit. If, on the evidence, a particular benefit is judged as being likely to arise, the decision-maker may reasonably and lawfully take account of that matter in deciding what weight it ought to attract in the planning balance. Furthermore, before imposing a requirement to seek to 'secure' a benefit, the decision-maker would need to be satisfied that it was necessary. In other words, absent that specific benefit and the weight it carries in the planning balance, would development consent be refused? In this case the planning balance would weigh heavily in favour of the grant of consent – and under the NPSfP there would be a presumption in favour of the grant of consent – even absent the specific benefits associated with the use by the first customer and the expected subsequent use of the jetty for CO2. Hence any such requirement would plainly fail the test of necessity, even leaving aside any issues as to compliance with the other tests. Responding to the query in relation to low carbon hydrogen standards and whether compliance with these should be secured, the Applicant noted that a detailed note to address this issue would be required. This provided in the Applicant's Response to the Examining Authority's Action Points from Issue Specific Hearing 6 [**TR30008/EXAM/9.55**]. However, by way of general overview, the Applicant has previously explained the functionality of the low carbon hydrogen standards and the Renewable Transport Fuel Obligations and how these create the market for low carbon hydrogen. It was noted that Air Products have their own commercial incentive which drives a requirement to comply with the standards also. Inherent within those two standards is the need to make the overall scheme commercially viable by complying with the standards. The Applicant emphasised, in response to the ExA's comment about whether it is satisfactory to let market forces drive the product that the development produces, that the ExA and the Secretary of State is entitled attach such weight as it is judged appropriate to the benefit of the import of the particular product without that being legally secured, as a matter of principle. It is not necessary to have a securing mechanism in order to underpin any particular planning judgement about where weight is pitched. It is a pure matter of planning judgment, not a legal requirement.

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	If having heard the evidence as to what is likely, and in the absence of any evidence that suggest future market incentives or other incentives available to the government are likely to disincentivise the sort of matters which are currently anticipated to improve over time in terms of sustainability of this particular product, it would be entirely unsurprising to give weight to those matters and to treat those matters as significant when forming a planning judgement. That is a normal exercise of planning judgment, just as it would be if a decision-maker was faced with evidence of the anticipated spending patterns for visitors to a proposed visitor attraction. These matters would not need to be secured. It is the same principle. Another matter which needs to be taken into account here in terms of context and is addressed in the note referenced above, is the existence of any other mechanisms available to the government to regulate such matters. In terms of the ultimate judgment that would have to be applied in deciding whether or not to impose a requirement stipulating some particular standard or level of achievement of sustainability for a particular product, it would be necessary to go through each of the policy requirements for imposing a requirement. One of those is whether a requirement would be necessary. That would require a consideration of how the planning balance would be struck. In the absence of certainty as to that matter, there is nothing in policy which would support the refusal of development consent even if the product that was going to be imported did not have those characteristics, as it still provides a particular benefit. Unless the planning balance would favour refusal, there would be no necessity for imposing the requirement in the first place. Such a requirement would not likely be enforceable either.

3 APPLICANT'S SUMMARY OF CASE ON ITEM 5: CLIMATE CHANGE

3.1 Item 5 (Climate Change)

Issue Discussed	**Summary Of Oral Case**
Discussion about how downstream and upstream effects should be treated in the application.	Starting with downstream effects, in response to Q1.3.1.2 the Applicant sought to summarise the case law in terms of the downstream position and the implications of ***Finch*** for the examination of this application. The judgment of the Court of Appeal in ***Finch*** was provided as Appendix 1 of the Applicant's Responses to Q1.3 (Climate Change) [REP1-024].

	The main points made in that response is that judgment is required as to whether "indirect" downstream effects are truly an effect of the proposed development. The proposed hydrogen production facility produces low carbon hydrogen for direct use by consumers, without any subsequent refinement or other intermediate processes. As such, the likely displacement of GHG emissions resulting from use of that product is therefore an identifiable effect of the Project and the likely facilitation of the storage of CO2 is also a likely significant beneficial effect of the Project. Looking at upstream effects, in response to Q1.3.2.5 the Applicant set out the application of ***Finch*** to the upstream effects of the proposed development. The main point made in that response is that upstream emissions are not an effect of the 'Project' for EIA purposes. The relevance of ***R (Together Against Sizewell C Ltd.) v. SSESNZ*** [2023] EWCA Civ 1517 is that the court was considering how you decide what is 'the project' and the approach to answering that question as well as the relevant factors that need to be considered. In this case, and the for the reasons we set out in the response to Q1.3.2.5, the production of green ammonia in Saudi Arabia is clearly a separate project. That production facility will serve a number of hydrogen production facilities and its continued development and operation is not dependent on this Project in any way. It has already been separately consented, there is no simultaneous determination, and it is in separate ownership. Further, any upstream emissions from the production of the ammonia form part of the baseline and there is no evidence that would allow it to be concluded that that project would generate any lesser amount of green ammonia if the proposed development does not go ahead. The facility in Saudi Arabia is intended to supply a number of facilities in various countries around the world so if none of the ammonia produced is used for the IGET scheme, the ammonia would simply be used elsewhere. The project, as its been appropriately defined in the application material, will have an effect on the downstream use of hydrogen which is an effect that needs to be taken into account. If hydrogen is not produced as part of this project it may be that another project will come forward but there is no certainty of this. For each future project, developers will need to account for their downstream effects. The downstream effects of this project could not lawfully be ignored or treated in some different way in the expectation that if this project does not proceed, another project might come forward to fill the gap. This would ignore a likely significant effect of this project, be contrary to the EIA regulations and unlawful as a matter of public law. This position is different when dealing with upstream effects in this case because those are effects of a separate project which has been consented. That project's consent or future operation is not dependant in any way on this particular facility so to take those effects into account would be to go wrong in law and treat the effects of a separate project as effects of this project. Conflating the two would fail to

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	apply the principles that have emerged from case law, which also reflect the practical reality on the ground. The facility in Saudi Arabia is going ahead, if the ammonia is not imported at IGET then it is likely to be imported elsewhere in Europe. There is no evidence that the production of Ammonia in Saudi Arabia will not operate at the expected capacity if the facility proposed in Immingham does not come forward. However, it is quite clear that if the facility at Immingham does come forward, the downstream effects are likely to occur so they are properly taken into account. This development will clearly give rise to downstream effects, but whether it comes forward or not, those upstream effects will happen. Those upstream effects are not effects of the project but effects of a separate project which is happening in any event. This is the distinction the court draws because otherwise the focus is not the environmental effects of the project for which the development consent is sought and as case law makes clear, EIA is project-centric. The information is meant to inform a decision about whether a particular project should go ahead and assess the effects of the particular development.
Whether the potential for other types of liquid bulk cargos is sufficiently restricted by the need for future consents or whether additional controls within the dDCO are necessary to achieve certainty about environmental effects. The ExA queries whether the proposed development could be retrofitted to handle other bulk cargoes in a manner that avoided the scope of the planning consent regime.	The need for future consents to facilitate the import/export of other liquid bulks means that any such requirement would, by definition, be unnecessary. Advice Note 15 (drafting DCOs) explains that requirements should be "precise, enforceable, necessary, relevant to the development, relevant to planning and reasonable in all other respects" (paragraph 15.2). In term of the approach, there is no legal or policy requirement to "achieve certainty about environmental effects". The legal requirements that spring from the ***Rochdale*** line of authority are not concerned with achieving certainty about environmental effects. The key principle emerging from those authorities is the need to ensure alignment between the parameters used to define the proposed development that is assessed in the EIA and the parameters used to define the scope of what is consented in the resulting decision document. That is needed to address the flexibility inherent in a consent that is in outline or equivalent and ensure that same degree of flexibility is taken into account in EIA. Advice Note 15 reflects those principle at paragraph 17.1. The actual environmental effects that occur in practice may or may not be the same in all respects as those predicted at the time the decision is made, not least because the receiving environment itself often changes over time, but neither law nor policy requires that they must be. It is only in those instances where exceedance of a specific level of effect would be such as to make the impacts of the development unacceptable that requirements are imposed to ensure that does not happen. An example might be a predicted noise level that, if exceeded, would be unacceptable. In those circumstances a control may be necessary on the level of noise to guard against that happening by

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	means of a requirement. But that is in response to an unacceptable likely significant effect, but in the absence of some particular justification such as that, it would not be necessary or appropriate to impose a requirement to ensure the effects of a development do not exceed those assessed. For example, if there is a predicted level of vehicular traffic on a road that is higher than assessed but it does not create an issue because the junction can manage it, a control would not be necessary. The assessment of the likely significant environmental effects of the use of the jetty has assumed a realistic worst case in terms of throughput and associated vessel traffic. Just as with the CO^2, use of the jetty for any other liquid bulk would require further consent(s), which would only be possible following an assessment of their likely significant environmental effects. If the assumptions used for the purposes of the current EIA are not the same as those identified as appropriate for use in the subsequent assessment, meaning that different effects are assessed as being likely at that stage, that is entirely unproblematic because consent for the development then proposed will only be forthcoming if those effects are assessed and found to be acceptable. Whichever route to consent applies at that stage, the relevant version of the EIA Regulations will ensure that if the development is likely to give rise to significant environmental effects it will be subject to assessment and the outcome of that assessment will be taken into account in decision-making. If the necessary development would otherwise be permitted development, the use of permitted development rights is constrained by reference to environmental impact assessment. With certain very limited exceptions which are not considered to be engaged here, Schedule 1 or Schedule 2 development is not permitted development (Art. 3(10) of the GPDO). The Applicant took an action to provide a note on whether the proposed development could be retrofitted outside of the express planning consent regime. This is provided in the Applicant's Response to the Examining Authority's Action Points from Issue Specific Hearing 6 [**TR30008/EXAM/9.55**].
The potential for carbon dioxide imports and CCS are given positive weight in the ES despite the need for additional consents. As such, in the interests of consistency, should the potential for other types of liquid bulk cargo also be given appropriate weight in the ES, despite the need for additional consents?	The Applicant made two important preliminary points. Firstly, there is a distinction between the ES and documents such as the Planning Statement in terms of the issue of weight. The ES is an impartial and objective assessment of effects, and not an assessment of the weight to be given to material considerations (positive or negative). Secondly, in the Climate Change Chapter of the ES the quantification of the significant beneficial effect of the scheme in terms of GHG emissions is based solely on the hydrogen produced by the Project replacing the use of fossil fuels.

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	The quantified effect does not include anything from carbon, but the ES does appropriately note and take account of the potential for beneficial effects from import of CO2 on a qualitative basis. This is done on the basis that the evidence shows the use for CO2 is likely, and as a result there is sufficient information to allow for at least that qualitative assessment to be undertaken but this is not a quantitative assessment. This is because even with the knowledge of a particular project and its commercial likelihood, there is not seen to be enough information to allow for a reliable quantitative assessment of the *beneficial* effects. It does, however, include a quantitative assessment of the *adverse* effects from emissions from shipping associated with the full use of the remaining capacity of the jetty for import of CO2. The overall assessment is therefore highly conservative in that respect, accounting for the adverse effects in the quantitative assessment but not the likely beneficial effects. For other liquid bulks there is no equivalent evidence on which to draw as to a likely user for any other product that would allow for different evidence-based assumptions for the emissions from full use. Nor any evidence to allow for even the qualitative level of assessment of downstream effects (if indeed that would be appropriate for a particular product). The separate issue of the weight to be given to the potential for CO2 imports/exports in the planning balance has been addressed in the written responses to Q1.2 (Principle of Development) [REP1-023] within questions Q1.2.1.2, Q1.2.1.3, Q1.2.1.6, Q1.2.1.8 and Q1.2.1.10. The Applicant then addressed the issue of the appropriate weight to attach to the potential CO2 imports/exports and whether the same should be done for other potential liquid bulk cargoes. In terms of the weighting exercise under section 104(7) of the 2008 Act, namely considering whether the adverse impact of the proposed development would outweigh its benefits, in relation to carbon dioxide matters the Applicant’s position is that it is appropriate for substantial weight to be given to the benefits of the project in terms of its potential for the handling of carbon dioxide. The reasons for this are explained in the responses to written questions noted above. Substantial weight should be given to the benefits associated with the potential handling of carbon dioxide for the following reasons: • There is a very significant likelihood that this trade will happen. The Applicant explained at ISH1 [**REP1-064**] the position on commercial discussions around the carbon dioxide element of the project.

	• In this respect, having regard to the position expressed in the National Policy Statement for Ports (NPSfP) in terms of the importance the policy places on the commercial judgement of the ports industry, it is the clear view of the Applicant (who can in this case be taken to be the ports industry) that there is a significant likelihood that this trade will happen. The commercial view is such that it has, for example, contributed to the decision made by the Applicant to submit the consent application for the proposed development and bring forward the project. • There is very clear specific policy support for this type of carbon dioxide related development. Relevant policy explains that this type of development is, amongst other things, urgently needed. These matters have been further explained by the Applicant in respect of the recently designated Overarching National Policy Statement for Energy (EN-1) in its response to Q1.2.1.10 [**REP1-023**]. • Whilst further consents are required for appropriate landside infrastructure for carbon dioxide purposes, the Applicant's high-level analysis is that any such necessary consents for landside infrastructure needed for the handling of carbon dioxide would be achievable and that there is considered to be no likely impediment in this regard. This was explained at ISH1 in respect of Agenda matter 3, sub matter vi. In response to a question from the ExA on what actual additional landside infrastructure would be required for the Carbon Dioxide element the Applicant explained that at this stage we cannot be precise in that regard as there is currently no fixed project but in summary it is likely that there would need to be a storage facility for the Carbon Dioxide and some form of facility to transport the Carbon Dioxide onwards, for example, a pipeline connection. The Applicant took an action to provide a further note on this, which is provided in the Applicant's Response to the Examining Authority's Action Points from Issue Specific Hearing 6 [**TR30008/EXAM/9.55**]. In relation to the weighting exercise under section 104(7) of the 2008 Act for other potential liquid bulk cargoes, it is not currently anticipated by the Applicant that the jetty as applied for will be used for other liquid bulk cargoes in the short term. The remaining 'non liquid ammonia' capacity, for the reasons which have been explained, is expected to be taken up by carbon dioxide. This is the position that is, in part, driving the commercial considerations and judgement of the Applicant in respect of this project. To the extent, however, that carbon dioxide did not take up all the remaining 'non liquid ammonia' capacity, the ability for another liquid bulk product to take up any such remaining capacity would, having regard to the policy contained within the NPSfP on the need for additional port capacity, clearly be a benefit for which appropriate weight should be given.

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	The ability to use any such remaining spare capacity to handle another liquid bulk product would at the very least: • generate benefits in terms of effective competition within the ports industry, and • generate benefits in terms of a contribution to resilience and flexibility matters These are all key aspects of the compelling need for substantial additional port capacity which is identified and established within the NPSfP. The ability to use any such remaining spare capacity for another liquid bulk product is, therefore, clearly a benefit in the public interest to which appropriate weight should be given. Such an opportunity is clearly a factor which increases the overall weight to be attached to the benefits of the new capacity that would be created by the Project. In response to a query about how the greenhouse gas assessment would be impacted in the event that other potential liquid bulks do not have the low carbon credentials as currently assessed, the Applicant noted that there is a distinction between how this would be treated policy-wise as opposed to under the EIA. Insofar that the remaining capacity is not taken up by carbon CO2 import, or this happens to an extent that allows for some other liquid bulk to come in, this is a good thing in planning terms and is a benefit according to the NPS. In terms of the EIA, it is appropriate to consider not only with what is likely to happen, but also the constraints on what can realistically be assessed. The assessment has been based on the only other liquid bulk for which there is particular evidence on which it is possible to make some assumptions. It would be difficult to decide which other liquid bulks to assess without evidence of their likelihood, which would also make for a lack of meaningful assumptions that could be made about them. The best that can be done is to make an assessment that quantifies the adverse effects in a conservative way because it is unknown where other liquid bulks would come from in those circumstances.

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4 APPLICANT'S SUMMARY OF CASE ON ITEM 5: DECOMMISSIONING

4.1 Item 5 (Decommissioning)

Issue Discussed	Summary Of Oral Case
Discussion of Operating Life Technical Note [REP1-036, Appendix 1] including the implications for the Examination, in particular how the EIA process has taken those assumptions made in relation to operating life and integrated them into the assessment undertaken.	The Operating Life Technical Note [REP1-036 Appendix 1] was submitted at Deadline 1, together with responses to the Decommissioning Written Questions including confirmation of the decommissioning assessment undertaken in relation to a number of the environmental disciplines including Biodiversity (Q1.5.27), HRA (Q1.6.2.4), Climate (Q1.8.1.7) and Surface Water and Flood (Q1.8.1.7) for example. The operating life assessment scenarios and the conclusions on operational effects are extracted from the ES and presented within the Operating Life Technical Note such that the information is provided in a consolidated form for the purposes of review. The description of decommissioning activities, the basis of assessment and the conclusions for each of the environmental disciplines is provided within ES Chapter 2 [APP-044] and the discipline chapters of the Environmental Statement and within responses to the Written Questions referenced above. There is variation in terms of some of the assumptions but each discipline sets out the worst case scenario for the purposes of the assessment which will, understandably, differ depending on the discipline. Taking ecology as an example, the assumption is that after 25 years an assessment would be undertaken to report the effects of decommissioning of the various elements of the facility. Majority of the disciplines have wording in the ES which explains that the assessment has undertaken and the effects are no worse than the effects reported for the construction phase because similar activities are assessed. There are a number of other disciplines whereby an assessment of effects has been scoped out but this is more in relation to the permanent facilities and the jetty for example. Looking at the conclusions that are drawn in Section 4 of the Operational Life Technical Note, these are drawn from the topic by topic assessment which precedes it in the table that is contained in the note. Those conclusions identify on the basis of that assessment a series of points which, if accepted, would allow the examining authority to report to the Secretary of State the following: • the assessment is robust

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	• it has taken into account appropriate assumptions for each topic in order to identify a worst case scenario • the assumptions that have been made in terms of temporal scope for the individual topic are consistent with the assumptions relating to operating life • the conclusions in terms of significant effects and related mitigation measures respond to the worst case scenarios for each topic Within the operating life technical note, the Applicant has sought to explain why the environmental conclusions are appropriately drawn. If those conclusions are accepted, the Applicant would contend that those provide answers to the ExA's question about robustness of the assessment. The Applicant took an action away to provide a note on the topic area of terrestrial ecology and biodiversity focussing on the potential change in the ecological baseline when decommissioning occurs and whether this has been accounted for in the assessment. This is provided in the Applicant's Response to the Examining Authority's Action Points from Issue Specific Hearing 6 [**TR30008/EXAM/9.55**].
How decommissioning was dealt with in terms of the scoping request for the project and how the statutory consultees who commented on the scoping request were guided on the point of operating life	The Applicant took an action away to address this in detail in a note. This is provided in the Applicant's Response to the Examining Authority's Action Points from Issue Specific Hearing 6 [**TR30008/EXAM/9.55**]. By way of an initial response, the Applicant noted that the scoping report sets out the overall process in terms of construction, operational and decommissioning phase. The decommissioning phase was identified as part of the assessment that will be undertaken and statutory consultee feedback was being sought to understand what they would like to see in those assessments. It was noted that the Applicant is actively following up with NELC, the Environment Agency and Natural England with the view to obtaining written feedback from these consultees. The Applicant notes that scoping is the start of the EIA process but this process continues through the Examination. As such, insofar as any statutory consultee considers that, after having seen the operational life technical note, they have further comments to make or require further information then the examination process is well equipped to allow for those points to be made. Even if there was something in the scoping process that might otherwise be a cause of concern, which the Applicant does

	not think there to be, all that this would mean if that during the examination there would need to be an opportunity for Interested Parties to comment.
Discussion around what will happen to the Queens Road properties at the decommissioning stage	If decommissioning is anticipated to be 25 years or more in the future, by this stage the residential use of the properties would have had to come to an end (this must happen before operation could take place). Therefore, in the intervening decades, those properties would not be able to be brought into residential use. In the unlikely event that there is no intervening use for these properties, the question of their potential future use at that point in the future would have to be considered having regards to the absence of the facility and the surrounding circumstances at that time. The Applicant provides further detail in the note produce jointly with NELC in relation to the use of the Queens Road properties which is provided in the Applicant's Response to the Examining Authority's Action Points from Issue Specific Hearing 5 [**TR30008/EXAM/9.54**].

5 APPLICANT'S SUMMARY OF CASE ON ITEM 6: SOCIO-ECONOMIC EFFECTS

5.1 Item 6 (Socio-Economic Effects)

Issue Discussed	Summary Of Oral Case
What measures will the Applicant take to confirm their commitment of priority being given to local residents for any jobs created by the proposed development?	In respect of the Hydrogen Production Facility, the Applicant noted by way of background that Air Products through its existing facility here in Stallingborough, has been a local employer for over 40 years. Air Products is a member of Catch (the training and development organisation in Immingham) and run an active apprenticeship scheme with over 15 current apprentices in training through Catch and another 7 elsewhere in the country. Air Products intends engaging with Catch and local employment organisations to ensure that, as far as possible, local people can learn the skills required to obtain the jobs which will be created by the project (operational and during construction). During construction and we will require our main contractors to do the same. The final CEMP, when submitted for approval, will include a commitment to develop and implement a Training and Employment Plan for the later stages of the project when the employment numbers grow. An updated outline CEMP, submitted at Deadline 3, will reflect this. To facilitate this, it was confirmed that Air Products will development an overarching plan including a commitment to securing contractual requirements from its main contractors to demonstrate tangible

	plans for training and local employment which are to be implemented throughout the construction phase of the project. It was further confirmed that Air Products intends employing a Training and Social sustainability manager from the region who will develop the overarching plan and coordinate these plans with contractors. The application process is currently underway for this position. Following comments from NELC suggesting that such training and employment plan required its own standalone Requirement, rather than reference only in the Outline CEMP, the Applicant confirmed that the by including it in the Outline CEMP means it is in essence secured in the Requirements (in relation to the landside development) and in the Deemed Marine Licence (in relation to the marine development) which is just as effective a means as if there was a separate, standalone Requirement. The Outline CEMP plays an important part in ensuring contractors undertake construction in a manner that aligns with the way the Project has been examined.
Has the Applicant conducted an impact assessment on the homeless in the region when construction is at its peak. With many workers requiring accommodation in nearby hotels, does this have the potential to affect the homeless, who may otherwise rely on this type of shelter?	The Applicant has engaged with NELC on this matter. During discussions, NELC have explained that as the area is a seaside resort, a strong and long-standing hospitality sector has developed. This has evolved over time to the point where a number of guest houses, which specifically cater for the borough's homeless community, are underpinned as businesses by their contract with NELC. These businesses make provision for homeless in the region. The overall conclusion of the discussion was that it is considered unlikely that these businesses would switch from an existing long-term business model to preferring to let rooms out to a transient, and temporary, cohort of construction workers. A summary of the NELC discussions is provided in the Applicant's Response to the Examining Authority's Action Points from Issue Specific Hearing 6 [**TR30008/EXAM/9.55**]. In relation to the approach adopted in the ES, due to the fact that the ES concludes that in the peak construction scenario there is capacity within the private rented homes sector, the ES does not consider hotel and B&B accommodation within the modelling. The decision to undertake an assessment of impacts on the private rented homes sector only was based on two primary considerations. Firstly, the Scoping Opinion provided by UK Health Security Agency indicates that the influx of construction workers could foreseeably have an impact on the local availability of affordable housing including people in receipt of housing benefit / low paid employment. It referenced that the Council's Housing Needs Assessment had identified the private rented sector as being important in meeting demand for such housing. Secondly, demand for accommodation from workers was considered to be best represented by the private rented homes sector given that the relatively long duration of the construction period, totalling 5

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	years in total, necessitates accommodation which can be readily used for longer periods of time, such as this housing. This point aligns with the NELC observation above regarding provision of accommodation on a short term basis. The assessment concluded that there would be no significant effects on the capacity of local private rented accommodation facilities. On this basis, an assessment of the potential demand on hotel accommodation from construction workers was not undertaken. This is justified on the basis of the above, most pertinently that demand could be met from the private rented sector and as such no assessment of impacts on other sources of accommodation was necessary. In response to a question about whether the assessment on socio-economic effects on not just private sector housing but also hotels and hostels has taken into account IERRT as well as Viking, the Applicant submitted that a note on this is intended to be submitted at Deadline 4. The Applicant also took an action to provide a note on the loss of the Queens Road properties on the local housing stock. This is provided in the Applicant's Response to the Examining Authority's Action Points from Issue Specific Hearing 6 [**TR30008/EXAM/9.55**].
Article 14 (1) of the draft Development Consent Order states "The undertaker may use any private road within the Order limits", which private roads is the Applicant referring to.	In order to provide the ExA with the information sought, the Applicant's land agent, Gately Hamer, has prepared a set of plans showing the private roads located within the Order Limits, together with a Schedule of ownership. These are provided, along with a short explanatory note, in the Applicant's Response to the Examining Authority's Action Points from Issue Specific Hearing 6 [**TR30008/EXAM/9.55**]. In brief, the plans show six private roads within the Order Limits. Five are owned by ABP, and one is owned by Elba Securities Ltd. The purpose of Article 14 is to authorise the temporary passage of persons or vehicles along private roads within the Order Limits for the purposes of constructing the project, and avoids the need to take an easement over that land. It is therefore a more proportionate alternative to more extensive use of compulsory acquisition powers.

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6 APPLICANT'S SUMMARY OF CASE ON ITEM 7: TRAFFIC AND TRANSPORT

6.1 Item 7 (Traffic and Transport)

Issue Discussed	Summary Of Oral Case
A number of options exist for the installation of a culvert, utilities connections and other works on Laporte Road. How will the Applicant ensure traffic impacts associated with these works, will form part of the assessment to decide on the most appropriate option and how will this option be secured in the draft Development Consent Order?	As explained during discussion of Art. 9 of the dDCO during ISH5 (Item 7), the next version of the dDCO submitted at Deadline 3 will include an amendment to Requirement 8 which will add a further obligation in relation to the underground culvert forming part of Work No. 4. Before construction of that work commences, details of design and construction methodology must be submitted to and approved by the local planning authority following consultation with the highway authority. The effect of this is that before any particular design or construction methodology is approved, the local authority will take the views of the highway authority into account, looking at the implications of the design and methodology. In terms of the mechanism, this ensures that those considerations are taken into account by an independent decision maker before anything can go ahead. Whilst minimizing road traffic disruption is a clear consideration in selecting the construction methodology, importantly, the design must eliminate, reduce or control foreseeable construction risk. Under the CDM Regulations 2015, the principal designer has a statutory duty when preparing designs to eliminate, reduce or control foreseeable risks that may arise during construction. That is also a clear consideration to take account of, as well as road traffic disruption. It must also be practical and deliverable and otherwise satisfy the requirements of the Local Highways Authority. When the design is submitted to the Local Highways Authority, the Applicant will consider the traffic impacts in preparing the construction design and methodology and the Examining Authority can be satisfied that the Local Highway Authority will need to be satisfied that those impacts are justified when considering the application under Requirement 8.
Does NELC envisage traffic build up on Laporte Road during the construction phase of the proposed development? If yes what measures would you be seeking in the Travel Management Plan, to reduce this impact.	Overall levels of traffic using Laporte Road will be low (Only 21% of construction worker movements (Table A-3 of REP1-006) will use Laporte Road (to travel to / from Grimsby), so including all works that is around 320 trips per day (see Row 10 of Table 11.24 of ES (APP-053). In the peak hour, movements from east site towards A1173 are around 45 – 50 cars per hour so the amount of traffic form a capacity perspective to the east of the site is very low. At the Western end of Laporte Road by the Queens Road junction, it is anticipated that flows will be a bit higher because they also accommodate movements of lorries to access Work No.s 3, 5 and 9. At the

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	peak hour it is anticipated that an extra 80 or 90 vehicles will be travelling through this junction. Additional modelling for these junctions has been provided at this Deadline. The historic assessments in relation to IERRT and the assessments that have been provided at Deadline 3 show the junction operating at around 65% of capacity and the addition of construction traffic makes very little difference to that overall operation. As such, these assessments demonstrate that there is no material impact in terms of junction operation and therefore capacity. As such, the Applicant's position is that there not be any traffic build up on Laporte Road during the construction phase. In terms of mitigation, the mitigation measures outlined by NELC in their submissions are already covered in the Construction Traffic Management Plan [REP1-006]. These include: • Measures to prevent HGVs using Laporte Road (Section 2.5 and 2.7) • Signage and advance warning of road works (Section 2.9) • Consultation (Section 6). • Staff mitigation including a number of initiatives including the promotion of car sharing, works mini-buses, promotion of cycle use and staggering shift patterns. As such, if there was a cumulative impact arising then these management processes are already implicit in the documentation.
The NELC Local Impact Report states their Highways team have raised some concerns, what are these concerns?	Discussions are ongoing with NELC to close out the issues raised in the draft local impact report and agree what is needed for that purpose. In the Deadline 2 cover letter sent in paragraph 5.1 [**REP2-001**] it was explained that amendments to some plans would be submitted at Deadline 3 showing minor adjustments requested by NELC. Although these would be minor, they would nevertheless be changes to the application for which it would be necessary to apply. The outcome of the discussions with NELC are provided in [X-REFERENCE TO DOC], which identifies the changes needed as a result and set out a proposed timetable and process for applying for those changes. This timetable demonstrates that there is no difficulty in accommodating those changes within the examination period, allowing for consultation on a precautionary basis. The Applicant is confident that these changes can be dealt with within the remaining time left for the examination.

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<td>Has the Applicant modelled traffic impacts, in the event offsite evacuation is required? This may be due to an emergency response required for an incident at their own site, or at a neighbouring facility.</td>
<td>The Applicant confirmed that no modelling of traffic impacts caused by offsite evacuation has been conducted as it is not considered necessary to do so as if there is an incident on site or offsite, the emergency response will be to either meet at a muster point or shelter in place. Taking the operational and construction phases in turn:

During the operational phase:

• Typically, Air Products will only have 60 people on site during any shift, so in the event of an evacuation there is no impact on local roads; this would be no different to a normal end of shift level of impact.

• Within the facility, for a toxic or hydrogen leak the emergency response will be to shelter in place and not evacuate off site.

• In another scenario where site evacuation is required (for example in the event of a fire), everyone will gather at the muster point to ensure everyone is accounted for and further movements will be controlled by the evacuation coordinator. In that scenario there will not be any mass uncontrolled vehicle exit from the site premises onto the road network.

During the construction phase,

• Air Products will have emergency plans in place, as is required by CDM Regulations 2015.

• In the event of site evacuation, everyone will gather at the nominated muster point(s) to ensure everyone is accounted for and further movements will be controlled by the evacuation coordinator. Similarly, there will not be any mass uncontrolled evacuation onto the road network.

During construction, there will be no ammonia, hydrogen or hydrocarbons on site and so the risks associated with these are not present.</td>
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APPENDIX 1:

DEFINITION OF 'HARBOUR FACILITIES'

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Applicant's response to questions raised by the Examination Authority ("ExA") at Issue Specific Hearing 6 (ISH6) in respect of Item 3(i) relating to s24(2) Planning Act 2008 (PA2008) for Immingham Green Energy Terminal

1 PURPOSE OF NOTE

1.1 At Issue Specific Hearing ("ISH") 6, commencing at 10:00 on 16 April 2024 concerning "Landside Issues and Strategic Matters including draft Development Consent Order", in relation to Agenda Item 3 ("Strategic Matters including but not limited to Nationally Significant Infrastructure Project Thresholds and Need Assessment") sub-issue (i) ("operative wording under s24(2) of the Planning Act ("PA 2008") and whether the proposed development has the handling capability to embark or disembark the relevant quantity of material"), the ExA requested that the summary of oral submissions for ISH6 be supplemented with a note that outlines the approach taken by the Applicant to the "harbour facilities" and provides the relevant references to where this has been defined as well as where the division of the NSIP and Associated Development ("AD") has been explained.

1.2 This note has been prepared to supplement the Applicant's submissions on Item 3(i) at ISH6 as requested by the ExA. This note should be read alongside:

(a) the summary of oral submissions for ISH6 to which this note is appended;

(b) the extracts from Tilbury 2 provided in response to action point 3 on the ExA's list of actions from ISH6 - to provide relevant extracts from the Tilbury 2 Application that illustrates the distinction between the port development and the associated development; and

(c) the supplemental note summarising the oral submissions from ISH1 on s. 24 PA 2008 which were omitted from [**REP1-064**] submitted at Deadline 1.

2 HARBOUR FACILITIES

2.1 There is no definition in the PA 2008 of "harbour facilities" or of "alteration" as it applies to such facilities.

2.2 Whilst s. 24 of the PA 2008 stipulates that 'harbour facilities' the construction or alteration of which may constitute an NSIP must be wholly or partly in England or in waters adjacent to England and capable of handling at least the relevant quantity of cargo, 'harbour facility' itself is not defined. Had there been an intention to define what constituted a 'harbour facility' for the purposes of the NSIP it would have been so prescribed in the PA 2008, but it has not been.

2.3 "Harbour" is defined by reference to s. 57 of the Harbours Act 1964 (s. 235 of PA 2008) and therefore means "any harbour, whether natural or artificial, and any port …".

2.4 The Port of Immingham is therefore a "harbour" comprising a range of harbour facilities.

2.5 The provision of the Terminal (i.e. the multi user jetty) constitutes an alteration of the harbour facility that is the Port of Immingham. As explained at ISH1, for present purposes nothing turns on whether the jetty works are properly to be regarded as the construction of harbour facilities under section 24(1) or the alteration of harbour facilities under subsection (2). The criteria and thresholds are the same in either case (see the Applicant's supplemental note of its submissions at Issue Specific Hearing 1 provided within the Applicant's response to the ExA's Action Points from Issue Specific Hearing 6 at paragraphs 2.1.6 – 2.1.7).

2.6 As explained in oral submissions for ISH6, the approach which has been taken by the Applicant in respect of this Project is in short that:

(a) Work No. 1, the construction of the jetty and its topside infrastructure, constitutes the NSIP for the purposes of the PA 2008 as it is the alteration of the harbour facilities (i.e.

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the existing Port of Immingham) and satisfies the requirements of s. 24 PA 2008, as it would be:

- located wholly in England or in waters adjacent to England (s.24(2)(a)(i)); and
- capable of handling the embarkation or disembarkation of at least the relevant quantity of material per year (s. 24(2)(b)) which in relation to cargo ships is at least 5 million tonnes (s. 24(3)(c)).

(b) The landside works (i.e. Work No's 2-10) constitute AD.

2.7 A list of the relevant references to where the Applicant has explained the split of NSIP and AD elements of the Project is summarised below:

- Chapter 2 (The Project) of the Environmental Statement [**APP-044**];
- Paragraphs 2.13 – 2.21 of Explanatory Memorandum [**REP1-004**];
- Responses to the Examining Authority's First Written Questions 1.2.2.1 – 1.2.2.9 [**REP1-023**];
- Applicant's written summary of oral submissions at ISH1 [**REP1-064**];
- Supplementary note to summary of oral submissions at ISH1 submitted at Deadline 3;
- Applicant's written summary of oral submissions for ISH6 submitted at Deadline 3.

2.8 As explained at ISH1 and ISH6 and at para 2.21 of the Explanatory Memorandum [**REP1-004**], in relation to another application for development consent for a harbour facility NSIP (the Tilbury2 DCO application (Planning Inspectorate Ref: TR030003) the same approach to the split of the NSIP and AD has been taken and accepted. The applicant for the Tilbury 2 application submitted in response to the ExA's first written questions that 'harbour facilities' were:

> '*simply facilities that provide or enhance a harbour and allow for its fundamental nature as a harbour – essentially things such as docks, wharves, quay-walls, surfacing, jetties, etc. the facilities that allow vessels to moor and load and off-load goods and/or passengers'* (see paragraphs 2.5 and 2.6 of Appendix B of the Response to the Examining Authority's First Written Questions (POTLL/T2/EX/49)/[REP1-016]))

2.9 Copies of the following extracts from the Tilbury 2 Application have been provided in response to Action Point 3 within the Applicant's Response to the Examining Authority's Action Points from Issue Specific Hearing 6:

(a) Extract of Decision Letter from the Examining Authority's Report dated 20 November 2018 (paragraph 4.2.47)

(b) CMAT Position Statement [REP1-016 of the Tilbury 2 Examination Library] (paragraphs 2.1 to 2.45)

2.10 The full extent of the AD to serve future customers of the jetty does not need to be applied for in the dDCO for the Terminal to constitute an NSIP. Likewise it would not be correct as a matter of law to say that the Terminal (i.e. jetty) did not constitute an NSIP just because the dDCO authorising its construction and use did not include all the AD required for future customers. As explained in oral submissions during ISH6, the jetty would still be expected to have the handling

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capability to embark or disembark the relevant quantity of material. To take such an approach would allow applicants to bypass the statutory requirements of the PA 2008 altogether for developments in respect of which an application for development consent is mandatory where the relevant thresholds in s.24 are met.

2.11 Irrespective of whether the dDCO includes consent for the AD needed for both intended users of the jetty (i.e. the Carbon Dioxide and Ammonia) or for just one, the alteration to the "harbour facility" (i.e. the new jetty) is still expected to be capable of handling at least the relevant quantity of cargo per year.

2.12 As explained at ISH6 (see summary of oral submissions for ISH6 to which this note is appended), the Judge in ***Ross*** at [101] held that it is ultimately for the decision-maker to judge what the effect of the alteration is "expected" to be, on the basis of an assessment "grounded in the reality of the capacity which might be achieved". However this exercise of judgment must be based on the available evidence and in this case the best evidence as to what is "expected" and what "might be achieved" in terms of throughput is from the Applicant, as the highly experienced port operator. That evidence is entirely uncontroversial, and no-one has suggested that its expectations are in any way unrealistic.

2.13 Not all of the facilities authorised under a DCO for a harbour facility NSIP will be "harbour facilities". As has been explained (in particular in response to the ExA's first written questions [**REP1-023**]), the landside development in Work No's 2-10 constitutes AD. It is clear that logically whatever is determined to constitute AD for a harbour facility NSIP cannot itself constitute a harbour facility for the purposes of that particular project.

2.14 There is no hard and fast rule as to where to draw the line between what part of the Project constitutes the NSIP and what part of the Project constitutes the AD. The fact that the term 'harbour facility' is not defined in the PA2008 and in relation to it, what works automatically constitute its AD, mean that there is a degree of judgment as to what parts of an application for development consent constitute the NSIP, and what parts constitute the AD, to be considered on a case by case basis. However, the division adopted by the Applicant in this case is entirely logical and reasonable, consistent in terms of approach with precedent and wholly in accordance with the requirements of the PA 2008 and relevant guidance.

3 SUMMARY

3.1 In summary therefore:

(a) There is no definition in the PA 2008 of "harbour facilities".

(b) The 'working' definition that was offered by the Applicant for Tilbury 2 was '*facilities that provide or enhance a harbour and allow for its fundamental nature as a harbour – essentially things such as docks, wharves, quay-walls, surfacing, jetties, etc. the facilities that allow vessels to moor and load and off-load goods and/or passengers'* (and reflected in the division between NSIP and AD in the decision in that case) is consistent with the approach taken by the Applicant in this case.

(c) Not all facilities whose construction is authorised under the DCO are 'harbour facilities' merely by virtue of being authorised under a DCO granting consent for the alteration of harbour facilities.

(d) It would not be right as a matter of law to conclude that the jetty did not constitute an NSIP just because the dDCO did not from the outset include all the AD required for future customers wishing to utilise the additional capacity it creates. To take such an approach would be to seek to bypass the statutory requirements of the PA 2008 altogether for

which an application for development consent is mandatory where the relevant thresholds in s.24 are met.

(e) The Applicant has taken the position in this case that the split between the NSIP and the AD is broadly at the point where the jetty makes landfall and consequently the extent of the harbour facility alteration is predominantly those works which fall within the UK Marine Area (i.e. the jetty - Work No.1). The landside hydrogen production facilities constitute AD.

(f) If facilities are appropriately classed as AD, they cannot simultaneously be 'harbour facilities'. For the reasons articulated at ISH1 all of the development described as AD in this case is appropriately treated as such having regard to the law and guidance.

(g) The Applicant, who has significant experience in promoting and delivering port development, has concluded that the alteration of the harbour facility is the jetty and that this is expected to be capable of handling in the order of 11 million tonnes of cargo which is significantly in excess of the relevant threshold in the PA 2008. As outlined above there is precedent for this approach.

3.2 The Terminal (i.e. Work No. 1) therefore constitutes the NSIP and the alteration of the "harbour facility" under the PA 2008.

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APPENDIX 2:

R. (ON THE APPLICATION OF ARTHUR SCARISBRICK) V SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT V WHITEMOSS LANDFILL LTD

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Neutral Citation Number: [2017] EWCA Civ 787

Case No: C1/2016/0761

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
MR JUSTICE CRANSTON
CO/3070/2015

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 June 2017

Before:

The Senior President of Tribunals
Lord Justice Lindblom
and
Lord Justice Irwin

- - - - - - - - - - - - - - - - - - - -

Between:

R. (on the application of Arthur Scarisbrick)	**Claimant**
- and -	
Secretary of State for Communities and Local Government	**Defendant**
- and -	
Whitemoss Landfill Ltd.	**Interested Party**

Mr David Wolfe Q.C. (instructed by **Leigh Day Solicitors**) for the **Claimant**
Ms Nathalie Lieven Q.C. (instructed by **the Government Legal Department**) for the **Defendant**
Mr James Pereira Q.C. (instructed by **Nabarro LLP**) for the **Interested Party**

Hearing date: 2 March 2017

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Judgment Approved by the court for handing down (subject to editorial corrections)

Lord Justice Lindblom:

Introduction

1. In this claim for judicial review we must decide whether the Government's policy for "nationally significant hazardous waste infrastructure" was properly interpreted and lawfully applied in the making of a development consent order under section 114 of the Planning Act 2008.

2. The claimant, Mr Arthur Scarisbrick, has permission to apply for judicial review of the decision of the defendant, the Secretary of State for Communities and Local Government, on 19 May 2015, to make the White Moss Landfill Order. The order granted consent for the construction of a hazardous waste landfill facility with a capacity of 150,000 tonnes per annum, and the continuation of filling with hazardous waste of the adjacent landfill site, known as Whitemoss Landfill, at White Moss Lane South in Skelmersdale. When making it, the Secretary of State confirmed the requisite powers for the compulsory acquisition of land under sections 122 and 123 of the 2008 Act. The applicant for the order was the interested party, Whitemoss Landfill Ltd., the operator of the existing landfill site. The Secretary of State's decision to make it was in accordance with the recommendation made to him in the report, dated 21 February 2015, of the Examining Authority (Ms Wendy Burden, Mr Philip Asquith and Mr Robert Macey), after an examination undertaken between 21 May and 21 November 2014.

3. Mr Scarisbrick owns land next to the site of the proposed development, and lives nearby. With a number of other local residents, who had formed a group called Action to Reduce and Recycle Our Waste ("ARROW"), he objected to the draft order and took part in the examination. His claim challenging the development consent order was issued on 30 June 2015. Permission to apply for judicial review was initially refused in the Planning Court. But at a hearing on 5 October 2016 I granted permission, on a single ground. Because of the possible wider importance of the issue raised, which concerns government policy in the "National Policy Statement for Hazardous Waste: A framework document for planning decisions on nationally significant hazardous waste infrastructure" ("the NPS"), published by the Department for Environment, Food and Rural Affairs in June 2013, I ordered that the claim was to be heard in this court.

The issue in the claim

4. The issue raised in the single ground on which Mr Scarisbrick has permission to apply for judicial review is whether, in making the development consent order, the Secretary of State erred in his approach to the assessment of the need for the project by misconstruing and misapplying the policy in section 3.1 of the NPS, which says that relevant applications will be assessed "on the basis that need has been demonstrated".

The 2008 Act

5. In Parts 3, 4 and 5 of the 2008 Act, provision is made for the granting of development consent for a "nationally significant infrastructure project" – defined in section 14 as including "the construction or alteration of a hazardous waste facility" (subsection (1)(p)). Under section 30 a "hazardous waste facility" is within section 14(1)(p) only if it will be in England (subsection (1)(a)), and, "in the case of the disposal of hazardous waste by landfill or in a deep storage facility", its capacity is "more than 100,000 tonnes per year" (subsections (1)(c) and (2)(a)). Section 37 provides for the making of an application for a development consent order.

6. Section 5, "National Policy Statements", provides that the Secretary of State may issue a national policy statement that "sets out national policy in relation to one or more specified descriptions of development" (subsection (1)(b)). Section 5(5) provides that a national policy statement may, 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 criteria to be applied in deciding whether a location is suitable (or potentially suitable) for a specified description of development" (subsection (5)(b)); "identify one or more locations as suitable (or potentially suitable) or unsuitable for a specified description of development" (subsection (5)(d)). Section 5(7) provides that "[a] national policy statement must give reasons for the policy set out in the statement". Section 6(1) requires the Secretary of State to "review each national policy statement whenever [he] thinks it appropriate to do so", and, if there has been "a significant change in any circumstances …" (section 6(3)(d)). Section 9 requires a proposed national policy statement to be laid before Parliament before it is designated and takes effect. Section 13, "Legal challenges relating to national policy statements", provides for "proceedings for questioning a national policy statement …" to be brought by a claim for judicial review within six weeks of its designation or, if later, its publication (subsection (1)).

7. In Part 6, "Deciding Applications for Orders Granting Development Consent", section 103 provides that the Secretary of State "has the function of deciding an application for an order granting development consent". Section 104, "Decisions in cases where national policy statement has effect", applies 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" (subsection (1)). It provides, in subsection (2), that "[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") …". Subsection (3) states 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". Subsection (7) applies "if the Secretary of State is satisfied that the adverse impact of the proposed development would outweigh its benefits". Under section 114(1) the Secretary of State must either make the order granting development consent or refuse it. Section 118 requires a challenge to a development consent order to be made by a claim for judicial review.

8. In Part 7, "Orders Granting Development Consent", section 122, "Purpose for which compulsory acquisition may be authorised", provides that an order granting development

consent "may include provision authorising the compulsory acquisition of land only if the Secretary of State is satisfied that the conditions in subsections (2) and (3) are met" (subsection (1)). The conditions in subsections (2) and (3) are that the land "(a) is required for the development to which the development consent relates", "(b) is required to facilitate or is incidental to that development", or "(c) is replacement land which is to be given in exchange for the order land …" (subsection (2)), and "… that there is a compelling case in the public interest for the land to be acquired compulsorily" (subsection (3)). Under section 123(1) and (2) an order granting development consent may include provision authorizing compulsory acquisition of land if the Secretary of State is satisfied that the application for the order included a request for compulsory acquisition of that land.

The application for a development consent order

9. Whitemoss Landfill is in the Green Belt, beside the M58 motorway on the southern side of Skelmersdale. A planning permission granted in October 2011 approved the disposal of hazardous waste on the site until 31 December 2018. The environmental permit restricts the disposal of hazardous waste to 149,500 tonnes per annum. But the annual throughput of waste has always been much less than that – at its highest 76,000 tonnes in 2013, and as low as 22,654 tonnes in 2011.

10. In June 2013 the inspector who conducted the examination into the Lancashire Site Allocation and Development Management Policies Local Plan – for the administrative areas of Lancashire County Council, Blackburn with Darwen Council and Blackpool Council – concluded that "there will be a continuing need to find a location for the disposal of perhaps up to 17,000 tonnes per annum throughout the plan period" (paragraph 155 of his report). The three authorities had concluded that there was "no need to specifically identify a new site or an extension to an existing site in this [local plan]", and that the originally proposed allocation for a hazardous waste landfill at Whitemoss Landfill should be deleted (paragraph 156). Instead, they now proposed "to include a criteria-based policy which would support permission for a new site, or an extension to an existing site, where there is a demonstrable need" (paragraph 157).

11. The application for the development consent order was submitted by Whitemoss Landfill Ltd. on 20 December 2013. The application site extends to about 25 hectares, comprising the existing landfill site of about 8.5 hectares and additional land, some 16 hectares, for its extension to the west and north-west. The application was accepted for examination on 17 January 2014.

The NPS

12. Part 1 of the NPS is its "Introduction". In section 1.1, "Background", paragraph 1.1.4 says the NPS "will be kept under review by the Secretary of State, in accordance with the requirements of [the 2008 Act], in order to ensure it remains appropriate for decision making", and that "[it] is expected that the Secretary of State would review the NPS approximately every five years

…". In section 1.2, "Infrastructure covered by this NPS", paragraph 1.2.1 confirms that the scope of the NPS includes the construction of facilities in England where the main purpose of the facility is expected to be the final disposal or recovery of hazardous waste and the capacity is expected to be "in the case of the disposal of hazardous waste by landfill …, more than 100,000 tonnes per year". In section 1.4, "The Appraisal of Sustainability", paragraph 1.4.1 says the NPS "has been subject to Appraisal of Sustainability … , incorporating the requirements for Strategic Environmental Assessment …". Paragraph 1.4.5 acknowledges, however, that "[it] will be for project applicants to set out in detail how they will meet the policy and requirements set out in the NPS".

13. Part 2 sets out "Government Policy on Hazardous Waste". Section 2.1, "Summary of Government Policy", identifies the four "main objectives of Government policy on hazardous waste", one of which is "(c) Self-sufficiency and proximity – to ensure that sufficient disposal facilities are provided in the country as a whole to match expected arisings of all hazardous wastes, … and to enable hazardous waste to be disposed of in one of the nearest appropriate installations". It goes on to refer to "A Strategy for Hazardous Waste Management in England", published by the Department for Environment Food and Rural Affairs in March 2010, which was "based on six high level principles intended to drive the management of hazardous waste up the waste hierarchy". One of these principles, it says, is "that the Government looks to the market to provide the infrastructure needed to implement the Strategy as it is industry that has the expertise required to consider where facilities are needed and the appropriate technologies to use". It adds that "Government believes its role is to provide a clear steer on the types of new facility that are needed and provide the framework (including legislative safeguards on human health and the environment) within which the infrastructure is to be provided".

14. Under the heading "Implementation of the waste hierarchy", paragraph 2.3.2 refers to the "waste hierarchy" in the Waste Framework Directive, and the "five steps which must be applied in waste prevention and management legislation and policy". The fifth step is "Disposal (of which landfill is considered to be at the bottom)". Paragraph 2.3.3 emphasizes that "[of] the disposal options available, landfilling of hazardous waste should only be used as a last resort". In section 2.4, "Government strategy for hazardous waste management", paragraph 2.4.1 refers to the five principles in the March 2010 strategy which are "of particular relevance to the need for new infrastructure". The second of these five principles, it says, "requires a reduction in reliance on landfill, with landfill only being used where, overall, there is no better recovery or disposal option". Paragraph 2.4.2 emphasizes that, under Principle 2 in the 2010 strategy, "Government looks to the market to provide the infrastructure to implement the Strategy", and "Government's role is to provide the right framework and encouragement to the private sector to bring the necessary infrastructure forward". Under the heading "Identification of suitable or unsuitable locations for infrastructure", paragraph 2.5.6 confirms that it is "not … Government policy to prescribe exactly where new hazardous waste infrastructure should be provided".

15. Part 3 of the NPS deals with the "Need for Large Scale Hazardous Waste Infrastructure". The policy of particular relevance in this case is in section 3.1, which states:

> "3.1 Summary of Need

Hazardous waste management infrastructure is essential for public health and a clean environment. There will be a demand for new and improved large scale hazardous waste infrastructure, because of the following main drivers:

Trends in hazardous waste arisings:

- Measures have been implemented to prevent and minimize the production of hazardous waste. Nevertheless, arisings have remained significant despite the economic downturn. This is because the introduction of measures to further improve the environmentally sound management of waste has increased the types of waste that must be removed from the municipal waste stream and be managed separately as hazardous waste.
- Changes to the list of hazardous properties in the revised Waste Framework Directive and forthcoming changes to the European Waste List, are expected to lead to further increases in the amount of waste that must be managed as "hazardous".
- There is a need to substantially reduce the relatively large amounts of hazardous waste continuing to be sent to landfill and increase that sent for recycling and reuse.

The need to meet legislative requirements:

- To apply the waste hierarchy – as set out in the revised Waste Framework Directive. New improved facilities will be required to optimise the extent to which the management of hazardous waste can be moved up the waste hierarchy.
- To treat hazardous waste that can no longer be sent to landfill following the phase out of the practice of relying on higher Landfill Directive Waste acceptance criteria.
- To comply with the "proximity principle" of adequate provision of hazardous waste facilities within each EU Member State.

'*A Strategy of Hazardous Waste Management in England (2010)*' established the need for new hazardous waste facilities and set out the types of facility required. Of the facilities identified, the Strategy determined that the following generic types would be likely to include nationally significant infrastructure facilities:

- Waste electrical and electronic equipment plants
- Oil regeneration plant
- Treatment plant for air pollution control residues
- Facilities to treat oily wastes and oily sludges
- Bioremediation / soil washing to treat contaminated soil diverted from landfill
- Hazardous waste landfill

The UK Ship Recycling Strategy encourages the development of Ship Recycling Facilities, some of which will need to be nationally significant infrastructure.

> The Secretary of State will assess applications for infrastructure covered by this NPS on the basis that need has been demonstrated."

16. In a passage headed "The total amounts of hazardous waste remain significant and are expected to increase", paragraph 3.2.2 says that "[despite] measures to prevent and minimise hazardous waste and the economic downturn, arisings have not declined particularly significantly with around 3.3m tonnes of hazardous waste being consigned in England in 2010", and "[arisings] are expected to increase as the economy improves". In section 3.4, "What types of NSIP [nationally significant infrastructure project] will be needed?", paragraph 3.4.1 says "[the] need for new facilities to manage hazardous waste was established" in the March 2010 strategy, which identified seven "generic categories of nationally significant infrastructure projects … likely to be needed", one of which was "[hazardous] waste landfill". Paragraph 3.4.13 confirms that "[landfill] is at the bottom of the waste hierarchy", but goes on to acknowledge that "there will remain some waste streams for which landfill is the best overall environmental outcome" and that "there may be future applications for development consent for nationally significant hazardous waste landfill". Paragraph 3.4.14 states:

> "Government has therefore concluded that there is a need for these hazardous waste infrastructure facilities. The Examining Authority should examine applications for infrastructure covered by this NPS on the basis that need has been demonstrated."

17. In Part 4, "Assessment Principles", paragraph 4.1.2 states:

> "4.1.2 Subject to any more detailed policies set out in the Hazardous Waste NPSs and the legal constraints set out in [the 2008 Act], there should be a presumption in favour of granting consent to applications for hazardous waste NSIPs, which clearly meet the need for such infrastructure established in this NPS."

Paragraph 4.1.3 says this:

> "4.1.3 In considering any proposed development, and in particular when weighing its adverse impacts against its benefits, the Examining Authority and the Secretary of State (as decision maker) should take into account:
>
> - its potential benefits including its contribution to meeting the need for hazardous waste infrastructure, job creation and any long-term or wider benefits; and
> - its potential adverse impacts, including any longer-term and cumulative adverse impacts, as well as any measures to avoid, reduce or compensate for any adverse impacts."

Paragraph 4.4.3 says that "[whilst] this NPS and supporting [Appraisal of Sustainability] have shown that there is no alternative, at a strategic level, to meeting the need for new hazardous waste infrastructure, it must not be assumed that there will be no alternatives for individual projects".

18. Part 5, "Generic Impacts", acknowledges in paragraph 5.1.1 that "[some] impacts will be relevant to any hazardous waste infrastructure, whatever the type". It indicates the approach to decision-making in cases where such impacts are relevant – specifically, for example, in section 5.2, "Air Quality and Emissions"; in section 5.3, "Biodiversity and Geological Conservation"; in section 5.7, "Flood Risk"; in section 5.8, "The Historic Environment"; in section 5.9, "Landscape and Visual Impacts"; and in section 5.10, "Land Use Including Open Space, Green Infrastructure and Green Belt". The policy for decision-making on proposals for hazardous waste infrastructure in the Green Belt is set out, in familiar terms, in paragraph 5.10.15:

> "5.10.15 When located in the Green Belt hazardous waste infrastructure projects may comprise inappropriate development. Inappropriate development [Here a footnote refers to the policies in paragraphs 79 to 92 of the National Planning Policy Framework ("the NPPF")] is by definition harmful to the Green Belt and there is a presumption against it except in very special circumstances. The Secretary of State will need to assess whether there are very special circumstances to justify inappropriate development. Very special circumstances will not exist unless the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations. In view of the presumption against inappropriate development, the Secretary of State will attach substantial weight to the harm to the Green Belt, when considering any application for such development."

What does the policy in section 3.1 of the NPS mean?

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.

20. It is common ground that the policy section 3.1 of the NPS is policy of a general kind, in the sense that it is not specific to any particular site or location or for a particular type of

development. This is not the kind of policy contemplated in section 5(5)(d) of the 2008 Act. Nor does it set out any criteria to be applied in deciding whether a particular location or locations are suitable, or might be suitable, for development of the type to which it relates. It is not, therefore, the kind of policy contemplated in section 5(5)(b).

21. Mr David Wolfe Q.C., for Mr Scarisbrick, submitted that the policy in section 3.1 merely requires it to be assumed that there is a "strategic" need, or a need in principle, for some large hazardous waste landfill facilities in England. So it is not appropriate for an Examining Authority, or the Secretary of State, when dealing with an application for a development consent order, to discuss the broad principle of having hazardous waste landfill as part of the mix of facilities. The policy means no more than that there is, in principle, a need for developments of this kind, and that the decision-maker should not debate whether hazardous waste landfill proposals should be rejected outright. But – as Mr Wolfe put it in his skeleton argument (at paragraph 35) – the policy "should not be understood as prescribing a need for any (i.e. each and every) proposed hazardous waste facility however large (the sky seems to be the limit) at any location in England …". It cannot mean, he submitted, that in making a decision on an application for a development consent order the Secretary of State must, or may, act on the unquestionable assumption that there is a need for the facility the developer has proposed – of whatever scale and capacity, in whichever location, and no matter whether the site is in the Green Belt or powers are being sought for the compulsory acquisition of third party land.

22. For the Secretary of State, Ms Nathalie Lieven Q.C. submitted that the policy in section 3.1 of the NPS makes it clear that the starting point in the making of a decision on a relevant project is that need is established, and that the applicant for a development consent order does not have to prove need for the type of development proposed. If the site on which the development is proposed is subject to constraints of the kind referred to in Part 5 of the NPS ("Generic Impacts"), such as being in the Green Belt or in an area at risk of flooding, the Secretary of State will have to carry out the appropriate planning balance. The approach indicated in the NPS, is in this sense perfectly conventional. The NPS establishes a national need for hazardous waste infrastructure of the relevant types, confirms that it is in the public interest that such need is met by the provision of new facilities and that there is a presumption in favour of consent being granted for such facilities, but recognizes that, inevitably, in the determination of particular applications, the meeting of the need, in the public interest, must be set against other material planning considerations. This will necessarily involve considering the weight to be attached to the need for the development. The NPS accepts that the market is likely to assess the level of need, and the most appropriate locations for development. But it also accepts, for example, that if the site is in the Green Belt, the Secretary of State will have to consider whether there are "very special circumstances" to justify the project in hand, and this will require him to evaluate the need for it, including any regional or local need that may be demonstrated.

23. On behalf of Whitemoss Landfill Ltd., Mr James Pereira Q.C. made submissions similar to Ms Lieven's. He argued that the NPS clearly does identify a need for hazardous waste infrastructure of the specified types. It is wrong, he submitted, to use such concepts as "strategic need" and "need in principle", in contradistinction to concepts such as "specific

need" and the "need for a particular project", to qualify the policy in section 3.1. The policy identifies a need for hazardous waste landfill infrastructure with a capacity sufficient to make it a nationally significant infrastructure project. As paragraph 3.4.14 makes plain, the need relates to a "application for infrastructure …", and must be taken into account in decision-making on particular projects. Because the NPS does not identify particular locations for the infrastructure it deals with, the need identified in the policy applies to relevant infrastructure wherever it is proposed. This does not mean, however, that the identified need will automatically determine the outcome of an application for a development consent order. The location of the proposed development, and its design, must be appropriate in environmental terms when judged against relevant policy. And any need for powers of compulsory acquisition must be justified with a compelling case, to which the policy need may be relevant but, again, not necessarily decisive.

24. In my view, the policy in the final sentence of section 3.1 of the NPS, read in its proper context, identifies and establishes the need for nationally significant infrastructure facilities of the "generic types" to which section 3.1 refers, which include facilities for "Hazardous waste landfill". It applies to all nationally significant infrastructure projects falling within those "generic types", not just to some. The need it identifies is a general need. It establishes what might be described as a "qualitative" need for hazardous waste infrastructure of the relevant types. It does not define a "quantitative" need for such development, by setting for each relevant type of infrastructure an upper limit to the number or capacity of the facilities required. It does not descend at all into the question of capacity, in the sense of the requirement for a given level of throughput of hazardous waste in infrastructure of the relevant types. It creates, at the level of national policy, a general assumption of need for such facilities. The need is not explicitly for an individual project of any particular scale or capacity or in any particular location. But the policy does not exclude any project of a relevant type. It applies 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 development consent order is entitled to proceed on that basis.

25. In framing the policy in section 3.1, the Government chose not to identify particular locations suitable or unsuitable for such development, and not to set down criteria as to suitable or potentially suitable locations. It leaves with "the market" the initiative in bringing forward development (section 2.1 and paragraph 2.4.2 of the NPS). And it is not limited in time, save to the extent that it must be read together with the statutory requirement, in section 6 of the 2008 Act, that a national policy statement be kept under review, and the indication in paragraph 1.1.4 that the NPS is expected to be reviewed "approximately every five years".

26. The comprehensive nature of the need is confirmed in paragraph 3.4.1 of the NPS, which refers to the 2010 strategy as having identified certain "generic categories" of nationally significant infrastructure projects that were "likely to be needed", and in paragraph 3.4.14, which records the Government's conclusion that "there is a need for these hazardous waste infrastructure facilities". Paragraph 3.4.13 does not deny the need for "hazardous waste landfill", but it does provide the specific context for the application of the policy in section 3.1 in cases where the Secretary of State has before him a proposal for a facility of this particular kind.

27. It is also clear that the policy in section 3.1 was deliberately included in the NPS not merely to identify the relevant national need, but also to guide the assessment of applications for development consent orders. Its explicit purpose is to ensure that when "applications for infrastructure covered by this NPS" come to be determined, the Secretary of State "will assess" such proposals on the basis that need has been demonstrated. To implement the policy selectively in relevant decision-making – by applying it to some of the projects embraced within it but not to others – would be to ignore its plain meaning and purpose as a policy intended to influence decisions on all proposals properly within its scope. The policy enables an Examining Authority, and the Secretary of State, to start with the assumption that a national need for such projects is established.

28. The policy in section 3.1 must be read together with the related passages in Part 4, "Assessment Principles" and Part 5, "Generic Impact". These include the "presumption" stated in paragraph 4.1.2 – the presumption in favour of granting consent to applications "for hazardous waste NSIPs, which clearly meet the need for such infrastructure established in this NPS". This "presumption" is applicable to all such projects within the "generic types" referred to in the policy in section 3.1, including "Hazardous waste landfill". It is, however, only a "presumption". It is not automatically conclusive of the outcome of a particular application for a development consent order. This is confirmed by the policy in paragraph 4.1.3, which envisages a balancing exercise for a particular proposal, "weighing its adverse impacts against its benefits", one potential benefit being the proposal's "contribution to meeting the need for hazardous waste infrastructure, …".

29. Likewise, the policies for the treatment of "Generic Impacts" in Part 5, including the policy for the consideration of proposals for development in the Green Belt in section 5.10, require a project-specific and site-specific evaluation of the factors for and against a particular proposal in a particular location, applying the relevant policy principles. It follows for example, as Ms Lieven submitted, that the policy for development in the Green Belt, in paragraph 5.10.15, must be applied in the way described. Whether the "harm by reason of inappropriateness, and any other harm" is outweighed by the "need" for relevant hazardous waste infrastructure identified in section 3.1 and the "presumption" in favour of relevant proposals in paragraph 4.1.2, together with any other considerations weighing in favour of the project, so that "very special circumstances" exist, will be a matter for the Secretary of State to consider. In such a case the "need" identified in section 3.1 of the NPS may prove to be an important consideration in establishing "very special circumstances"; or it may not.

30. When determining an application for a development consent order, the Secretary of State must proceed as section 104 of the 2008 Act requires. The considerations bearing on his decision will include the policy need established in the NPS, any specific regional or local need for the development, any planning benefits, and the likely effects of the development on the environment. Where the development is proposed in the Green Belt, as in this case, the making of the decision must be approached as the relevant policy in the NPS requires.

31. Implicit in all this is that the weight to be given to particular considerations, including the need identified in the policy in section 3.1 of the NPS, will always be a matter for the exercise of the Secretary of State's planning judgment in the particular circumstances of the case. The need

identified and established in the policy must be given appropriate weight in the making of a decision on an application for a development consent order, but it will not necessarily carry decisive or even significant weight when the planning balance is struck. The weight to be given to that need, case by case, is not prescribed, either in the policy in section 3.1 or elsewhere in the NPS. It will not necessarily increase with the scale or capacity of a particular proposal. The policy does not place a "trump card" or a "blank cheque" in the hands of a developer. Nor does it provide the Secretary of State with "carte blanche" to grant consent, without carrying out a proper balancing exercise in which the need identified and established in the policy is given the weight it is due in the decision on the project in hand, no more and no less. The need identified in section 3.1 will always be a material factor in a case where the policy applies. It will only be met, and can only be met, by individual developments of the relevant types. In this sense it is truly a need for an individual project of a relevant type, and will count in favour of any such project when the decision is made. But the policy does not mean that the bigger the project, the greater is the need for it – or, as Mr Wolfe put it (in paragraph 35 of his skeleton argument), "the sky seems to be the limit". That is not what the policy says, and not how it should be understood.

The Examining Authority's report

32. The Examining Authority held a preliminary meeting on 21 May 2014. On 30 May 2014 they sent a letter to the parties, setting out their procedural decisions (in Annex A to their letter). On "the issue of need for a facility of the scale proposed", which had been raised by Lancashire County Council and CPRE Lancashire, they said they would be "inviting debate" during the examination as to "whether the need identified in the NPS (para 3.1) constitutes need at a strategic level, or whether it prescribes a need for any proposed hazardous waste facility, including a landfill facility of the scale and in the location of the Whitemoss proposal". In their observations on "Policy matters" in Annex A to their letter, they "[put] forward the view that the strategic need for hazardous waste infrastructure identified in the NPS should not be interpreted as an accepted need for a hazardous waste landfill facility at the application site", and that "[not] all applications for hazardous waste NSIPs will necessarily "clearly meet the need for infrastructure established in the NPS" (para 4.1.2) having regard to the policy objectives set out in the NPS in 2.1 and 2.3". They invited "[submissions] on the issue of whether or not there is a need for this particular facility in the location proposed …". However, they also said that they did "not consider that such submissions would relate to the merits of Government policy set out in the NPS, which is not a topic for debate during the examination".

33. The examination was conducted on the basis of written evidence and evidence given at hearings held between 17 July and 23 October 2014.

34. In paragraph 4.3 of their report of 21 February 2015, the Examining Authority identified the "issues of importance to interested parties". One of these was "(i) [whether] National Policy should be interpreted as stating that the need for nationally significant hazardous waste landfill sites has been demonstrated". ARROW, together with Lancashire County Council, West Lancashire Borough Council, CPRE Lancashire and others, had "questioned the need for the application scheme", pointing out that the existing landfill facility had an environmental permit

to deposit approximately 150,000 tonnes per annum of hazardous waste, but that since 2006, less than 100,000 tonnes per annum of waste had been taken for disposal (paragraph 4.13, in a section of the report headed "Conformity with NPSs and other key policy statements").

35. Having acknowledged that "[the] issue of need is addressed in the NPS and summarised in [section] 3.1" (paragraph 4.14), the Examining Authority went on to say (in paragraph 4.16):

> "4.16 It is stated in NPS [section] 3.1 that the [Secretary of State] *"will assess applications for infrastructure covered by this NPS on the basis that need has been demonstrated"*. Need is therefore to be taken as established for the application project regardless of the past history of the existing landfill site."

and (in paragraph 4.18):

> "4.18 In view of the importance of hazardous waste infrastructure to support economic activities and public services, and the requirement for England to be self-sufficient in disposal facilities, we give considerable weight to the need for the application project."

36. They also considered whether there was, specifically, a need for hazardous waste facilities in the North West region. They acknowledged that "the North West is itself a major generator of hazardous waste"; that "[the] existing provision for hazardous waste landfill in the region includes Minosus in Cheshire, the Ineos Chlor Randle Island Landfill in Runcorn, and the current Whitemoss Landfill site" (paragraph 4.26); but that there were "limitations as to the types of waste which can be deposited at Minosus, and evidence was submitted to the effect that the Ineos site had no remaining constructed void space available", and that "[in] these circumstances, there is a realistic prospect that the application project would provide for regionally-generated hazardous waste arisings" (paragraph 4.27).

37. Dealing with the relationship of the application project to policy for development in the Green Belt in the NPPF, the Examining Authority concluded that "… [during] its construction and its operational phase the project would … be inappropriate development in the [Green Belt]" (paragraph 4.52); that "by raising the ground level of a significant area [of generally open and relatively low-lying countryside south of the motorway] there would be an intrusion into the openness of the wider countryside which … would interfere with and have an impact on the openness of the [Green Belt]" (paragraph 4.56); but that, "… the overall impact on openness in the long term would be mitigated to some degree through the proposals for the restoration of the site" (paragraph 4.57).

38. When dealing with the policies of the development plan, they noted that the inspector in the MWLP [the Joint Lancashire Minerals and Waste Local Plan Site Allocation and Development Management Policies] process "considered there would be a continuing need for a location that would provide capacity for the landfilling of hazardous waste of up to 17,000 tpa generated from within the plan area only" (paragraph 4.68). They repeated their conclusion that "the need for the application project is established in the NPS" (paragraph 4.70), and reminded themselves that "the NPS takes priority over the development plan in the determination of this application", and that "[as] a result there is no requirement for [Whitemoss Landfill Ltd.] to

demonstrate a specific local or regional need for the proposal" (paragraph 4.76). They concluded that "the application project would clearly meet the need identified in the MWLP", and that although it "would provide well in excess of the capacity identified in the MWLP, … it is not the intention of the NPS to limit provision to that which would meet the locally-generated demand" (paragraph 4.77). The project "would contribute to self-sufficiency as required by the MWCS [the Joint Lancashire Minerals and Waste Local Development Framework Core Strategy], and fulfil the need identified in the MWLP". Though there "may be some areas of conflict with other development plan policies", these were "not so significant as to weigh heavily against the application project" (paragraph 4.78).

39. The Examining Authority also noted that there had been "a relatively recent review of potential hazardous waste sites through the Development Plan process, where no alternatives to Whitemoss Landfill were identified", and that "no alternative site was put forward as a result of the consultation process on the [environmental statement]" (in paragraph 4.85).

40. In their "Conclusions on the main issues and whether very special circumstances exist", the Examining Authority directed themselves that under section 104(3) of the 2008 Act "the application must be decided in accordance with the NPS, subject to certain exceptions", and concluded that it "[did] not fall within any of the exceptions" (paragraph 4.316). They said it was "[fundamental] to [their] consideration of the White Moss project" that "the location of the application site [is] within the Green Belt" (paragraph 4.317).

41. Under the heading "Considerations which weigh in favour of the application", they said (in paragraphs 4.331 to 4.337):

> "4.331 There is no target level of provision, or limit to the capacity or location of new facilities set within the NPS. It is left for operators to use their judgement as to the location and capacity of new facilities [4.23]. The importance of providing for all types of hazardous waste infrastructure, including landfill, is clear from the wide range of activities which rely on the availability of such infrastructure [4.17]. With growth in the economy, the level of arisings is expected to increase [4.15]. The availability of suitable facilities within England to meet the demands resulting from economic growth is essential to comply with the principles of self-sufficiency and proximity in the revised Waste Framework Directive [4.17].
>
> 4.332 Hazardous waste infrastructure of national significance is necessary to meet a national rather than a regional or local need [4.28]. Nevertheless, in this case the project would be located in the North West region which is a national hub for treating and processing hazardous waste, and with its industrial legacy and the regeneration of the Liverpool/Merseyside and Manchester conurbations, the region is itself a major generator of hazardous waste [4.26]. The application project would be well located to serve this market.
>
> 4.333 Existing provision for hazardous waste landfill in the North West is limited [4.27]; the examination into the … MWCS identified a need for some 17,000 tpa of hazardous

waste generated from within its plan area; and Policy LF3 provides support for new provision subject to certain criteria.

4.334 We have noted the arguments as to whether there is a need for a facility of the capacity proposed at White Moss. In view of the provisions of the NPS, we do not question the level of need. We do, however, recognise that there could be environmental consequences if the rate of deposits is not sufficient to fill the capacity of the voids, and address this through [requirement] 32 in the recommended [development consent order] [4.140].

4.335 We find that in addition to the national need for hazardous waste landfill identified in the NPS, the application project would be well located to meet a regional need for such a facility. Without the application project, the existing Whitemoss Landfill would have no capacity beyond 2015, and the need identified in the examination of the MWCS would not be met [4.68].

…

4.337 … No alternative site has been put forward for hazardous waste landfill and the relatively recent review of hazardous waste sites through the Development Plan process did not identify any alternatives [4.85].

… ."

42. In their "Balance and conclusions", having acknowledged again (in paragraph 4.341) that the "application project would constitute inappropriate development which in itself is harmful to the [Green Belt]", they said this:

"4.341 … In summary, we find the harm to the [Green Belt] and any other harm to comprise:

- During the 20 years of construction and operation, an adverse impact on openness and conflict with a purpose of the [Green Belt] to protect the countryside from encroachment.
- Following restoration, there would be some impact on openness but the restoration proposals would restore the rural character of the site such that there would no longer be encroachment.
- A limited degree of harm to the character and appearance of the countryside during the 20 years of construction and operation.
- The perception of a risk to health within the local community to which we attribute limited weight."

As for the considerations on the other side of the balance, they said (in paragraph 4.342):

"4.342 In relation to the "other considerations" which fall to be weighed against harm to the [Green Belt] and any other harm, in summary we find as follows:

- The presumption in favour of granting consent to applications for hazardous waste NSIPs, which clearly meet the need for such infrastructure established in the NPS. The application project would meet that need.
- As a project which accords with the policy and requirements of the NPS, it would constitute sustainable development which attracts the presumption in favour of sustainable development set out in the NPPF.
- The project would contribute towards meeting the principles of national self-sufficiency and of proximity in the revised Waste Framework Directive.
- The importance of the facility to meet the need for hazardous waste disposal within the North-West of England.
- The locational benefits of the landfill facility at White Moss, reflecting its proximity to the national motorway network, with consequently no significant adverse transport impacts and being easy to reach by businesses looking to manage waste.
- The ability to make use of current infrastructure, reducing the environmental footprint of creating new facilities.
- The limited life-span of the landfill operations and its consequent impacts.
- The long-term benefits to biodiversity from the restoration proposals, replace an ecologically poor site with a more habitat and species-rich environment.
- The other long-term benefits in terms of restoration of Grade 2 agricultural land, visual amenity and recreation."

Their "overall conclusion" (in paragraph 4.343) was that "these "other considerations" are of such importance that they clearly outweigh the harm to the [Green Belt] and the limited other harm that [they had] identified". And "[looking] at the case as a whole", they concluded that "very special circumstances exist which justify the making of the White Moss Landfill [development consent order]."

43. In section 6 of their report, which dealt with the request for powers of compulsory acquisition, the Examining Authority directed themselves on the requirements of sections 122 and 123 of the 2008 Act (paragraphs 6.1 to 6.15) and a number of "general considerations", including the need for the decision-maker to explore "[all] reasonable alternatives to compulsory acquisition", and to "be satisfied that the purposes stated for the acquisition are legitimate and sufficient to justify the inevitable interference with the human rights of those affected" (paragraph 6.15). They concluded (in paragraph 6.38):

> "6.38 In Section 4 we concluded that there are very special circumstances which clearly outweigh the harm to the [Green Belt] and any other harm from the application project. On the basis of this conclusion we find that there is a compelling case in the public interest for the development as a whole and there is a compelling case in the public interest for the acquisition of Plot 18B. Compulsory acquisition would therefore be compliant with [section] 122 of [the 2008 Act] as a whole."

44. They addressed "Human Rights Act 1998 considerations" (in paragraphs 6.52 to 6.56), concluding (in paragraph 6.52):

> "6.52 In the event that [compulsory acquisition] rights are granted, Article 1 of the First Protocol [to the Human Rights Convention] is engaged. Article 8 is also engaged in relation to Plots 4 and 8A … . … [Development] could not take place in the manner proposed without this land. The other land to be acquired is necessary for the development to proceed in the manner intended. No objections have been raised by affected persons other than in respect of the WLBC-owned land, Plot 18B. Those affected would be entitled to compensation and … there is, in principle, the ability for this to be available. Interference with private rights in order to carry out the development would be both proportionate and justified in the public interest."

45. In their conclusions on the request for compulsory acquisition powers, they said "the case for [compulsory acquisition] must be dependent on and consistent with the view that the [development consent order] as a whole should be made" (paragraph 6.58), and (in paragraph 6.59):

> "6.59 The [Examining Authority] has shown in the conclusions to Section 4 that it has reached the view that development consent should be granted. Having regard to all the particular circumstances in this case for compulsory acquisition, in the event that the Secretary of State decides to give consent and make the Order, there would be a compelling case in the public interest for acquisition. There is no disproportionate or unjustified interference with human rights so as to conflict with the provisions of the Human Rights Act 1998."

46. In their "Overall conclusion and recommendation on the DCO", the Examining Authority said "that the recommended DCO provides the appropriate balance between the need to facilitate the development with the requirements necessary to mitigate potentially adverse consequences" (paragraph 7.22). And they confirmed their conclusion "that the potential harm to the [Green Belt] together with the limited other harm is clearly outweighed by the need for national hazardous waste infrastructure set out in the NPS, combined with the other benefits of the project including its location, the use of existing infrastructure, and the benefits following restoration", and that "[as] a result the very special circumstances exist to justify making the White Moss DCO" (paragraph 8.11).

The Secretary of State's decision letter

47. The Secretary of State's conclusions in his decision letter mirror the Examining Authority's in their report. In considering "Conformity with National Policy Statements and other key policy statements", he said (in paragraph 12):

> "12. The Secretary of State agrees with the ExA that, in accordance with [section] 104(3) of the 2008 Act, the Application falls to be considered against the National Policy Statement for Hazardous Waste June 2013 (NPS) (ER 4.9), and that the NPS is the primary basis for decision-making on nationally significant infrastructure projects (NSIP) for hazardous waste (ER 4.12). He notes that, for the reasons set out in paragraph 3.1 of the NPS, need is to be taken as established for the Application regardless of the

> past history of the existing landfill site (ER 4.16). In view of the importance of hazardous waste infrastructure to support economic activities and public services, and the requirement for England to be self-sufficient in disposal facilities, the Secretary of State, like the ExA, gives considerable weight to the need for the Application (ER 4.18)."

48. As for "Development Plan Policies", he said (in paragraph 15):

> "15. … Whilst he agrees with the ExA that there is no requirement for the Applicant to demonstrate a specific local or regional need for the proposal (ER 4.76), he notes that the development plan includes a number of policies against which it is appropriate to assess the project, and that many of the matters covered are also raised in the NPS (ER 4.76). Overall, he agrees with the ExA that the Development would contribute to self-sufficiency as required by the MWCS, and fulfill the need identified in the MWLP, and that while there may be some areas of conflict with other development plan policies, these are not so significant as to weigh heavily against the Development (ER 4.78)."

49. When considering the "Green Belt balance", the Secretary of State agreed (in paragraphs 58 to 62) with the relevant conclusions of the Examining Authority, including their assessment, in paragraphs 4.330 to 4.340 of their report, of the "other considerations" weighing in favour of the development, to be set against the harm to the Green Belt and any other harm (paragraph 61). He specifically agreed (also in paragraph 61) with the Examining Authority's summary in paragraph 4.342 of their report. Of the nine considerations to which he referred in the corresponding summary of his own, the first and fourth were these:

> "
>
> - the presumption in favour of granting consent to applications for hazardous waste NSIPs which clearly meet the need for such infrastructure is established in the NPS; and the Development would meet that need;
>
> …
>
> - the importance of the facility to meet the need for hazardous waste disposal within the North-West of England;
>
> …".

He agreed with the Examining Authority's conclusion in paragraph 4.343 of their report that, as he put it (in paragraph 62), "the other considerations are of such importance that they clearly outweigh the harm to the Green Belt and the limited other harm that has been identified …", and that "very special circumstances exist which justify the making of the Order".

50. The Secretary of State also agreed with the Examining Authority, in paragraph 6.59 of their report, that there was "a compelling case in the public interest for [compulsory acquisition]" and "no disproportionate or unjustified interference with human rights so as to conflict with the provisions of the Human Rights Act 1998". He concluded too that there was a "compelling case in the public interest for the creation and acquisition of … new rights", and that "granting this power would also not give rise to any disproportionate or unjustified interference with human

rights so as to conflict with the provisions of the Human Rights Act 1998" (paragraph 77 of the decision letter).

51. Drawing his conclusions together, he said that he considered "the harm to the Green Belt together with the limited other harm he [had] identified" was "clearly outweighed by the need for national hazardous waste infrastructure set out in the NPS, together with the other benefits of the project … ; and that as a result very special circumstances exist to justify making the [development consent order]" (paragraph 88); and that "the requests for compulsory acquisition powers meet the tests in [sections] 122 and 123 of the 2008 Act, with a compelling case in the public interest for the land to be acquired compulsorily" (paragraph 89).

52. The development consent order included, in Schedule 2, a number of conditions, one of which provided for the "Review of void consumption", as recommended in the Examining Authority's requirement 32, to which they had referred in paragraph 4.334 of their report.

Did the Secretary of State misinterpret or misapply policy in the NPS?

53. Mr Wolfe submitted that the Secretary of State misdirected himself in his understanding and application of the policy in section 3.1 of the NPS – as had the Examining Authority in their report. He thought – wrongly – that the policy required him to assume a need for a hazardous waste landfill facility on the application site with a capacity of 150,000 tonnes per annum. He thought – again, wrongly – that the policy compelled him to assume a need for a facility of whatever size a developer might choose to propose, and therefore that he must not evaluate competing evidence and submissions as to the extent of the real need, if any. He prevented himself from considering whether a facility of the particular size proposed was actually needed. This made it impossible for him to deal as he should with at least three basic issues: first, whether there truly was a need for this proposed development, and "very special circumstances" justifying its approval as "inappropriate development" in the Green Belt; secondly, whether there was a "compelling case in the public interest" for Whitemoss Landfill Ltd. to be given powers of compulsory acquisition over third party land; and thirdly, whether the development itself, and the compulsory acquisition of land, would be a proportionate interference with the landowners' human rights under the European Convention on Human Rights, including their right to property under Article 1 of the First Protocol – and, in particular, whether a less intrusive measure could have been used and whether a fair balance had been struck between Convention rights and the public interest (see the judgment of Lord Sumption in *Bank Mellat v Her Majesty's Treasury (No. 2)* [2014] A.C. 700, at paragraph 20). If a hazardous waste landfill facility was shown to be needed, but not of the size proposed, should development consent be granted, and powers of compulsory acquisition given, for a facility as large as this? The answer, Mr Wolfe submitted, must be "No". And if the need for a facility of a capacity of more than 100,000 tonnes per annum was not demonstrated, the Secretary of State would have had no power to make a development consent order for the scheme required.

54. I cannot accept that argument. On a fair reading of the Examining Authority's report and the Secretary of State's decision letter, I do not think it can be said that either betrays any

misunderstanding or a misapplication of the relevant policies in the NPS – including the policy in section 3.1.

55. These proceedings do not – and could not – attack the NPS itself as unlawful. Such a challenge could only have been brought under section 13 of the 2008 Act. There has been none. Nor can it be said that the Secretary of State's decision is invalidated by his reliance on a policy which exceeded his power to issue a national policy statement under section 5 of the 2008 Act. Such an argument would be misconceived. The issue for us is not whether the NPS is lawful, but whether, in this case, it was lawfully construed and applied.

56. Neither the Examining Authority nor the Secretary of State misled themselves as to what the policy in section 3.1 says. The Examining Authority quoted it, accurately, in paragraph 4.16 of their report – which the Secretary of State noted in paragraph 12 of his decision letter. They also referred to some of the salient passages in the text of the NPS, which explain the policy in section 3.1.

57. What did the Examining Authority mean when they said in paragraph 4.16 of their report that "[need] is … taken to be established for the application project …", and when they referred in paragraph 4.18 to "the need for the application project" – with the Secretary of State's agreement in paragraph 12 of his decision letter? In my view, they were doing what the policy in section 3.1 required of them. They were acknowledging that the application project, because it fell within the scope of the policy in section 3.1 of the NPS and would contribute to the meeting of that need, was one of those projects for which a national need was established by the policy. Like any other infrastructure project of a relevant type and of the requisite scale, this one engaged the policy in the final sentence of section 3.1. Under that policy, therefore, there was a need for "the application project". As the policy is explicitly intended to guide decision-making on applications for development consent, this proposed development, like any other relevant proposal, had therefore to be assessed "on the basis that need had been demonstrated". In this sense, and to this extent, need was established for it by national policy.

58. The Examining Authority did not read more into the policy than is actually there. They were not saying that the need established by the policy in section 3.1 of the NPS was a specific requirement for a facility of a particular capacity – whether 150,000 tonnes per annum or any other capacity above 100,000 tonnes per annum – or in a particular location – whether on this application site or any other. Rather, they were acknowledging, rightly, that this particular project was one to which the general policy in the final sentence of section 3.1 of the NPS applied, and for which, therefore, a national need was deemed by government policy to exist – and that the existence of this need for the project did not depend on the scale, capacity and location of the development proposed, or on the planning history of the existing landfill site. They clearly understood that. And so did the Secretary of State.

59. The Examining Authority's other conclusions referring to NPS policy as it relates to the need for the project are all consistent with the correct interpretation of that policy. In paragraph 4.77 of their report they recognized, rightly, that national policy in the NPS does not intend to limit the provision of new hazardous waste facilities to the meeting of "locally-generated demand"; in paragraph 4.331, that the NPS does not set any "target level of provision, or limit to the

capacity or location of new facilities", leaving it to "operators to use their judgement as to the location and capacity of new facilities"; in paragraph 4.332, that hazardous waste infrastructure "of national significance" is necessary to meet "a national rather than a regional or local need"; in paragraph 4.334, that, in view of the provisions of the NPS, "the level of need" was not to be questioned; in paragraph 4.342, that there is a "presumption in favour of granting consent to applications for hazardous waste NSIPs, which clearly meet the need for such infrastructure established in the NPS", and that the "application project would meet that need". All of this shows a sound understanding of NPS policy, including the policy in section 3.1. The same may be said of the Secretary of State's relevant conclusions, in paragraph 61 of his decision letter.

60. In view of the requirement in section 104(2) of the 2008 Act that the Secretary of State "must have regard to" any relevant national policy statement, and the requirement in section 104(3) that he must decide the application "in accordance with" any such national policy statement unless one of the relevant exceptions apply, he would have been at fault if he had not taken into account the national need established in section 3.1 of the NPS, and the presumption in paragraph 4.1.2.

61. In this case the Secretary of State found himself able to make his decision in accordance with the NPS, and did.

62. In paragraph 4.18 the Examining Authority said they gave "considerable weight" to the need for the application project – by which, as is clear from the context, they meant the national need for such projects established in the NPS. In paragraph 12 of his decision letter the Secretary of State agreed. He was entitled to give that need the weight he did. This was a matter of planning judgment for him, subject only to challenge on public law grounds (see the speech of Lord Hoffmann in *Tesco Stores Ltd. v Secretary of State for the Environment* [1995] 1 W.L.R. 759, at p.780). To assess the weight to be given to the need for the project under the policy in section 3.1 of the NPS as "considerable" was not irrational. To give "considerable" weight to a need established in a statement of national planning policy is not, on the face of it, a surprising planning judgment, let alone an unreasonable one. Indeed, it was consistent with the policy "presumption" in paragraph 4.1.2 of the NPS, the "presumption in favour of granting consent to applications for hazardous waste NSIPs, which clearly meet the need for such infrastructure in this NPS".

63. Neither the Examining Authority nor the Secretary of State concluded that the need for the project under NPS policy was itself greater, or the weight to be given to it increased, by the fact that the proposed facility would have a capacity of 150,000 tonnes per annum, rather than, say, 100,001 tonnes per annum, or some other level of capacity in between. The Secretary of State simply gave the need "considerable weight". But he did not leap from that to the conclusion that the development must be approved. Important as it was, he did not treat the policy need for the development as the single decisive factor in his assessment of the planning merits.

64. Mr Wolfe criticized the Examining Authority's observation in paragraph 4.334 of their report that "[in] view of the provisions of the NPS", they did "not question the level of need". I do not think that criticism is justified. Contrary to Mr Wolfe's submission, the Examining Authority were not, without scrutiny or question, equating "the level of need" under NPS policy with the

capacity of the facility proposed in Whitemoss Landfill Ltd.'s application. They were simply acknowledging, correctly, that the policy in section 3.1 of the NPS does not set any maximum or minimum "level of need" for the facilities to which it relates, or make the need for any particular proposal depend on its scale or capacity. And in paragraph 61 of his decision letter the Secretary of State agreed. The Examining Authority were alive to the possibility that the "rate of deposits" might not turn out to be "sufficient to fill the capacity of the voids", and dealt with this possibility by providing for the "Review of void consumption" in requirement 32, which was incorporated in Schedule 2 to the development consent order.

65. There were, it should be remembered, two further needs to be considered in this case, both of which played an important part in the Examining Authority's assessment of the project. As well as the national need for the project arising from the NPS, they found both a regional need – a need for additional hazardous waste infrastructure in the North-West region, and also a local need – for additional capacity in the MWLP area.

66. The regional need arose from the "limitations as to the types of waste that can be deposited at [the] Minosus [landfill site]" and the lack of further "void space" at the Ineos site (paragraph 4.27 of the report). The existing provision for hazardous waste landfill in the region was "limited" (paragraph 4.333). The Examining Authority concluded that this development could meet that regional need (paragraphs 4.26 and 4.27), and that it "would be well located" to do so (paragraphs 4.332 and 4.335). They attached "importance" to this consideration (paragraph 4.342). And the Secretary of State agreed (in paragraph 12 of his decision letter).

67. The local need was identified in the MWLP. At that tier of planning for the provision of hazardous waste infrastructure, as the Examining Authority acknowledged, the application site had itself been "identified in an early iteration of the MWLP as suitable for hazardous waste landfill". The "need identified in the MWLP for additional capacity [had] not been fulfilled in the development of any other site". This project "would clearly meet the need identified in the MWLP" (paragraph 4.77). It would "contribute to self-sufficiency as required by the MWCS", and would "fulfil the need identified in the MWLP" (paragraph 4.78). The Secretary of State agreed (in paragraph 15 of his decision letter). Without it, "the need identified in the examination of the MWCS would not be met" (paragraph 4.335). The fact that the proposed development would provide "well in excess of the capacity identified in the MWLP" did not negate those conclusions on the ability of the development to meet a local need, because – as the Examining Authority said – it was "not the intention of the NPS to limit provision to that which would meet the locally-generated demand" (paragraph 4.77).

68. This was not a case in which the Secretary of State had to determine, at the same time, two or more applications for development in a particular area, each promoted as nationally significant infrastructure projects under the 2008 Act, each capable of meeting an identified regional or local need for new hazardous waste facilities of a particular type within the scope of the policy in section 3.1 of the NPS. When that happens, the Secretary of State may find it necessary to assess the comparative merits of the proposals as competing or alternative schemes, or to consider their potential cumulative effects, and perhaps to grant development consent only for one. He may find, in the circumstances, that the weight to be given to the national need under

NPS policy is not enough to outbalance the planning objections to one or more of the proposals before him.

69. The task facing the Secretary of State here was more straightforward. Only one application had to be determined. There was no rival scheme to compare with Whitemoss Landfill Ltd.'s project. To discharge the requirements of section 104 of the 2008 Act, the Secretary of State had to undertake an appropriate balance of considerations weighing for and against this particular proposal, giving NPS policy the statutory priority it was due. He also had to be satisfied, under the provisions of sections 122 and 123, that there was a compelling case in the public interest for the compulsory acquisition of land, and that both the development itself and that compulsory acquisition of land would be a proportionate interference with the landowners' human rights.

70. In my view, in all these respects the Secretary of State determined the application lawfully, complying with the requirements of the statutory scheme. Whether the outcome would have been different if the proposal for the site had been a hazardous waste landfill facility of greater capacity than 150,000 tonnes per annum, or less, is immaterial.

71. I do not accept that the Secretary of State went wrong in his approach to the justification for the project as inappropriate development in the Green Belt. He did exactly what paragraph 5.10.15 of the NPS says he should. In paragraph 4.341 of their report the Examining Authority referred to the four main considerations constituting "harm to the [Green Belt] and any other harm". In paragraph 4.342 they referred to the considerations, nine in all, which in their view had to be weighed against the harm. Two of those nine considerations related to the need for the project: the fact that it enjoyed "the presumption [in the NPS] in favour of granting consent to applications for hazardous waste NSIPs, which clearly meet the need for such infrastructure established in the NPS", and "[the] importance of the facility to meet the need for hazardous waste disposal within the North-West of England". The other seven were particular attributes and benefits of the proposal: its compliance with the "the policy and requirements of the NPS" and the finding that it was "sustainable development"; its contribution to "meeting the principles of national self-sufficiency and … proximity in the … Waste Framework Directive"; its "locational benefits … reflecting its proximity to the national motorway network …"; its "ability to make use of current infrastructure …"; the "limited life-span of the landfill operations and its consequent impacts"; the "long-term benefits to biodiversity from the restoration proposals …"; and "[the] other long-term benefits in terms of restoration of Grade 2 agricultural land, visual amenity and recreation". The Examining Authority were able to conclude, in paragraph 4.343, that these "other considerations", taken together, "clearly [outweighed] the harm to the [Green Belt] and the limited other harm", and that "very special circumstances" existed to justify the making of the development consent order. They repeated that conclusion at the end of their report, in paragraph 8.11. And the Secretary of State agreed with it (in paragraph 62 of his decision letter).

72. It is plain therefore that neither the Examining Authority nor the Secretary of State regarded the national need under the policy in section 3.1 of the NPS as an automatically overriding factor in the planning balance that had to be struck for this particular project. They did not treat it as decisive, on its own, of the Green Belt issues, or of any other issue. It did not displace any other

relevant factor, on either side of the balance. It was only one of several considerations, which, in combination, were found to be sufficiently strong to enable consent for the project to be granted. The ability of the development to address the regional need was a separate and additional factor. So were each of the attributes and benefits to which the Examining Authority referred to in paragraph 4.342 of their report. The weight given to those considerations, both individually and together, was ultimately for the Secretary of State's planning judgment, which in my view he exercised lawfully. The "considerable" weight he gave to the national need for the project under NPS policy was, as I have said, within the range of reasonable planning judgment. It does not indicate any misinterpretation or misapplication of NPS policy.

73. Similar conclusions apply to the Secretary of State's consideration of the evidence and arguments on the need for the development consent order to include provision authorizing the compulsory acquisition of land under sections 122 and 123 of the 2008 Act, and on the question of whether the development itself, and the compulsory acquisition of land, would be a proportionate interference with the landowners' human rights. Again, I do not accept that either the Examining Authority or the Secretary of State fell into error.

74. As one would expect, the Examining Authority based their conclusions on the need for powers of compulsory acquisition squarely upon their assessment of and conclusions on the planning merits of the proposed development. Having concluded that the case for approving the project was secure – on the basis that the "other considerations" they had identified were "of such importance that they clearly outweigh the harm to the [Green Belt] and the limited other harm", so that there were "very special circumstances … which justify the making of the [development consent order]" (paragraph 4.343 of their report) – they went on to consider the evidence and representations for and against the granting of the powers of compulsory acquisition required to enable the project to go ahead. As they said, the case for compulsory acquisition depended on the view that the development consent order "as a whole" should be made (paragraph 6.58). Their conclusion that if the development consent order were made there would be a "compelling case in the public interest for acquisition" was founded on the conclusion in section 4 of their report that development consent should be granted (paragraph 6.59) – and the Secretary of State agreed (in paragraph 77 of his decision letter). Underpinning that conclusion were the nine "other considerations" set out in paragraph 4.342 of the report.

75. Two things follow. First, if, as I have concluded, the Examining Authority and the Secretary of State neither misinterpreted nor misapplied NPS policy in their assessment of the planning merits, they made no such error in concluding that powers of compulsory acquisition ought to be included in the development consent order under sections 122 and 123. And second, the national need for the project under the policy in section 3.1 of the NPS did not play any greater role than it lawfully could in the assessment of the factors weighing in favour of compulsory acquisition powers being granted. It was, again, only one of several considerations in that assessment.

76. The same goes for the Examining Authority's and the Secretary of State's consideration of the landowners' human rights, under article 1 of the First Protocol and article 8. The conclusion again was clear, and based on a proper consideration of the planning merits and of the need for powers of compulsory acquisition to be included in the development consent order. Both the

Examining Authority and the Secretary of State were satisfied that "[interference] with private rights in order to carry out the development would be both proportionate and justified in the public interest" (paragraph 6.52 of the Examining Authority's report and paragraph 77 of the Secretary of State's decision letter). And in the light of their view that development consent for the project should be granted, and that, if it were granted, "there would be a compelling case in the public interest for acquisition", they were also satisfied that there was "no disproportionate or unjustified interference with human rights so as to conflict with the provisions of the Human Rights Act 1998" (paragraph 6.59 of the report and paragraph 77 of the decision letter). I do not think that conclusion can be faulted. It discloses no misinterpretation or misapplication of national policy in the NPS. It is both lawful and sound.

77. In my view, therefore, the Secretary of State neither misinterpreted nor misapplied any policy of the NPS in making the development consent order – nor did he otherwise err in law.

Conclusion

78. For those reasons I would dismiss the claim for judicial review.

Lord Justice Irwin

79. I agree.

The Senior President of Tribunals

80. I also agree.