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Nationally Significant Infrastructure Projects – recent legal challenges

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Introduction

- *EFW Group Limited v Secretary of State for Business, Energy and Industrial Strategy* [2021] EWHC 2697 (Admin)
- *Tidal Lagoon (Swansea Bay) plc v Secretary of State for Business, Energy and Industrial Strategy* [2021] EWHC 3170 (Admin)

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(1) EfW Group

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EfW Group – s.35

"35 (1) The Secretary of State may give a direction for development to be treated as development for which development consent is required. This is subject to the following provisions of this section and section 35ZA.

(2) The Secretary of State may give a direction under subsection (1) only if –

(a) the development is or forms part of –

(i) a project (or proposed project) in the field of energy, transport, water, water waste or waste, or

(ii) a business or commercial project (or proposed project) of a prescribed description,

(b) the development will (when completed) be wholly in one or more of the areas specified in subsection (3), and

(c) the Secretary of State thinks the project (or proposed project) is of national significance, either by itself or when considered with –

(i) in a case within paragraph (a)(i), one or more other projects (or proposed projects) in the same field;

(ii) in a case within paragraph (a)(ii), one or more other business or commercial projects (or proposed projects) of a description prescribed under paragraph (a)(ii)."

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EfW Group – s.104

"104(1) This section applies in relation to an application for an order granting development consent if a national policy statement has effect in relation to development of the description to which the application relates.

(2) In deciding the application the Secretary of State must have regard to –

(a) any national policy statement which has effect in relation to development of the description to which the application relates (a "relevant national policy statement"),

...

(d) any other matters which the Secretary of State thinks are both important and relevant to the Secretary of State's decision.

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

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

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EfW Group – s.105

"105(1) This section applies in relation to an application for an order granting development consent (if section 104 does not apply in relation to the application).

(2) In deciding the application the Secretary of State must have regard to –

(a) any local impact report (within the meaning given by section 60(3) submitted to the Secretary of State before the deadline specified in a notice under section 60(2),

(b) any matters prescribed in relation to development of the description to which the application relates, and

(c) any other matters which the Secretary of State thinks are both important and relevant to the Secretary of State's decision. ."

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EfW Group – key arguments

- Claimant:
  - Sections 104 and 105 are mutually exclusive:
    - See language used, both refer to those sections applying "in relation to an application for an order granting development consent".
    - The Secretary of State was seeking to reads words into section 104 by treating it as if it included words to apply the provision to part only of an application.
  - Section 35: a direction "to treat the development proposed as development for which development consent is required" means what it says. I Treat as, we said, means what it says.

- Secretary of State:
  - Starting point is to examine the terms of the NPS itself. NPS EN-1 states that it applies to development over the s.15 threshold of 50MW. WKN did not meet that threshold. To apply section 104 would effectively expand the intended application of the NPS.
  - Section 105(1) should be read more broadly as including "where" or "to the extent that" section 104 does not apply to the proposal.
  - Section 35 is procedural only and merely directs a project into the 2008 Act Regime.

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EfW Group – judgement

"58. To suggest that by incorporating a project in respect of which the NPS has no effect within an application for a separate free-standing project which does fall within the scope of an NPS it is possible effectively to enlarge the scope of the NPS so as to include a project to which it was not designed to apply would clearly run contrary to the overall statutory scheme. That overall statutory scheme places the NPS at the heart of the decision-making process, and prescribes specific procedures, including endorsement by Parliament, prior to its designation. The contents of the NPS cannot be questioned in the decision-making process: so much is made clear in sections such as section 106(1) which applies in the decision-making context, and which entitles the defendant to disregard representations which "relate to the merits of policy set out in a national policy statement". Similar provisions are contained in section 87(3) respecting like representations to the ExA, and section 94(8) in relation to like representations made at hearings. It would be inconsistent with the centrality of the NPS within the statutory decision-making framework for its scope to be enlarged and its provisions bypassed by the manner in which an application has been formulated."

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EfW Group – judgement

"59. Whilst specific circumstances of the kind presented by the application in the present case may not have been directly foreseen by those framing the 2008 Act, it is clear that the overarching approach of the legislation is that decisions should be reached in relation to proposals for development in respect of which an NPS has effect deploying the framework within section 104 of the 2008 Act, whereas proposals for development within the statutory framework's decision-making process for which there is no applicable NPS having effect are to be decided pursuant to the framework provided by section 105 of the 2008 Act. Such an approach clearly reflects the language of section 104(1) which refers to an NPS having effect "in relation to development of the description to which the application relates". It is less consistent with a literal reading of section 105(1), but when that text is placed in the context of the purpose and structure of the legislation as a whole, it is clear that section 105(1) should be interpreted as applying to those discrete elements of an application which comprise proposals for development for which no NPS which has effect. I accept the submission of the defendant that section 105 of the 2008 Act should be interpreted as applying to free-standing parts of an application to the extent that "section 104 does not apply in relation to the application". Such an approach reflects the purpose and intent of the legislation without unduly disturbing the effect of the statutory language. Thus, the ExA was correct to take the approach which he did."

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(2) Swansea Tidal Lagoon

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Swansea Tidal Bay – declarations

- The developer sought two declarations as follows:
  - That it has 'begun' the development for which the Order granted consent within the meaning of section 155 of the Planning Act 2008 during the period required by virtue of section 154 of the Planning Act 2008 (i.e. by 8 June 2020); and, if so
  - The Order being a development consent order that has not ceased to have effect, the Company is entitled to apply to change the wording of Requirement 2 in Part 3 of Schedule 1 to that order to extend the period within which the Article 2 thereof).

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Swansea Tidal Bay – the Order

- Article 2 of the Order includes the definitions. It does not define "begin" or begun". "Commence" is defined as follows: "*'Commence' means to begin to carry out any material operation as (as defined in section 56(4) of the 1990 Act) forming part of the authorised development other than operations consisting of site clearance, demolition work, investigations for the purpose of assessing ground conditions, the diversion and laying of services, the erection of any temporary means of enclosure and the temporary display of site notices or advertisements; and 'commencement' must be construed accordingly.*"

- Requirement 2 sets out the duration of the DCO. It provides: "*The authorised development must commence no later than the expiration of 5 years beginning with the date that the Order comes into effect.*"

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Swansea Tidal Bay – relevant parts of 2008 Act

Section 120(5):

"*(5) An order granting development consent may (a) apply, modify or exclude a statutory provision which relates to any matter for which provision may be made in the order*"

Section 154:

"*(1) Development for which development consent is granted must be begun before the end of (a) the prescribed period, or (b) such other period (whether longer or shorter than that prescribed) as is specified in the order granting the consent;*

(2) If the development is not begun before the end of the period applicable under subsection (1), the order granting development ceases to have effect at the end of that period."

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Swansea Tidal Bay – relevant parts of 2008 Act (cont.)

Section 155:

"*(1) For the purposes of this Act (except Part 11) development is taken to begin on the earliest date on which any material operation comprised in, or carried out for the purposes of, the development begins to be carried out.*

(2) "Material operation" means any operation except an operation of a prescribed description."

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Swansea Tidal Bay – judge's conclusions

- Accepted that the task before him was to construe the Order itself
- Agreed that the words 'begin' and 'commence' were synonyms
- The Article 2 definition equates these words to one another and that indicated no distinction in meaning, however, the carve out of certain works could point to a distinction in meaning
- The failure to indicate an intention to modify or exclude sections 154 or 155 or to exercise the power under section 120(5) was a factor in support of the developer's case but given there is no statutory requirement to make any such indication, not a strong one
- Noted that as a matter of good drafting any such intention ought to be indicated (which in this case may have avoided any argument)
- Accepted the Defendants' submissions that the purpose of Requirement 2 was to limit the life of the Order
- Found the Defendants submissions on the consequences of the rival contentions "compelling". In particular, the judge accepted that if the Order remains extant, then so too does the prospect of compulsory purchase
- Concluded that the outcome of the developer's contentions – that the Order is permanently alive and can be modified so that it can be commenced to be unsatisfactory
- The Defendants contentions did not lead to an unsatisfactory result and, indeed, involved a clarification of and no injustice to the language used whilst giving effect to its purpose

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NSIPs – Recent Legal Challenges

ClientEarth v SSBEIS [2021] EWCA Civ 43 (Drax Power)
Pearce v SSBEIS [2021] EWHC 326 (Admin) (Norfolk Vanguard)

Esther Drabkin-Reiter

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ClientEarth v SSBEIS [2021] EWCA Civ 43

- Challenge to DCO for gas-fired power station in North Yorkshire
- ExA recommended withholding consent:
  - No identified need for the development
  - Significant adverse effect in respect of GHG emissions
  - Development did not accord with energy NPSs
  - Adverse impacts outweighed the benefits
- SoS disagreed and granted consent:
  - Presumption in favour of fossil fuel generation
  - GHG emissions not a reason to withhold consent
  - Benefits outweighed adverse impacts

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ClientEarth v SSBEIS [2021] EWCA Civ 43

In the High Court:

- Claimant advanced 9 grounds of challenge concerning SoS interpretation of EN-1 on "need" for development, assessment of GHG emissions and carbon capture and SoS approach to s.104(7) of the Planning Act 2008, EIA and net zero
- All grounds dismissed
- Emphasis on DCO decisions operating in a "market-based" system and as "one of a number of vehicles for the delivery of energy and climate change policy"
- EN-1 did not require quantitative assessment of need for any individual application
- SoS dealt with GHG emissions lawfully

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ClientEarth v SSBEIS [2021] EWCA Civ 43

Grounds of Appeal in the Court of Appeal:

1) EN-1 requires quantitative assessment of contribution of project to need

Final sentence of para.3.2.3: "weight 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"

2) Policy on GHG emissions means these cannot be treated as irrelevant or having no weight
3) Balancing exercise under s.104(7) requires SoS to disregard considerations in NPSs

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ClientEarth v SSBEIS [2021] EWCA Civ 43

All grounds dismissed

On interpretation generally:

- Policy must be interpreted objectively, in context and having regard to its evident purpose (*Tesco Stores v Dundee*)
- Should be read in a way which renders it consistent with other provisions in the same policy

On need:

- No discernible requirement in EN-1 or EN-2 to carry out quantitative assessment of need
- Starting point is to give need "substantial weight"
- But this is not "immutably fixed"

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ClientEarth v SSBEIS [2021] EWCA Civ 43

On GHG emissions:

- CO2 emissions are not, of themselves, an automatic and insuperable obstacle to consent
- However, EN-1 does not prevent GHG emissions from being taken into account as a consideration attracting weight in a particular case

On s.104(7):

- Lawful to have regard to policy in NPSs when carrying out balancing act
- Cannot use s.104(7) as a collateral attack on merits of NPS

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ClientEarth v SSBEIS [2021] EWCA Civ 43

Points of interest

- Reminder of the importance of context and reading policy document as a whole when interpreting it
- Settles approach to need and GHG emissions in EN-1 and EN-2 – although energy NPSs currently under review
- Broad role for planning judgment

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Pearce v SSBEIS [2021] EWHC 326 (Admin)

- Challenge to DCO for proposed offshore wind farm
- Development closely related to a second wind farm project – onshore infrastructure for both projects would be co-located
- ES for Vanguard assessed cumulative impacts of both projects
- In assessment of onshore landscape and visual impacts, ExA and SoS decided to defer consideration of cumulative impact, because of the "*limited*" information available on Boreas

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Pearce v SSBEIS [2021] EWHC 326 (Admin)

Q for court: Can the evaluation of an environmental effect be deferred if the decision-maker or ES identifies effect as significant?

Two possible approaches to cumulative effects of separate but linked projects:

- ***Larkfleet***: consider cumulative effects in EIA scrutiny of first project, combined with subsequent EIA scrutiny of subsequent projects
- ***Littlewood***: where future development inchoate and no proposals formulated, no need to consider cumulative effects

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Pearce v SSBEIS [2021] EWHC 326 (Admin)

Court held that the present case more aligned with *Larkfleet*:

- Two projects closely linked, site selection based on a strategy of co-location and second project to follow shortly after the first
- Therefore failure to consider cumulative effects was in breach of the EIA Regs and unlawful:
    - SoS failed to satisfy himself that he had sufficient information to evaluate and weigh the likely significant effects of the proposal – and failed to undertake that evaluation
    - SoS also failed to give any properly reasoned conclusion on deferral of consideration of cumulative effects

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Pearce v SSBEIS [2021] EWHC 326 (Admin)

Reason for deferral – information "*limited*" – also irrational

- Internally inconsistent – same level of information provided for both projects
- SoS had power to ask for more information if he wished
- Whether Necton suitable as connection point for both projects had to be determined before granting consent for first project
- Vanguard a material consideration / precedent in DCO process for Boreas – applying duty of consistency underpins need to make some assessment of cumulative impact

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Pearce v SSBEIS [2021] EWHC 326 (Admin)

Relief:

- Discussion of relationship between s.31(2A) of Senior Courts Act 1981 and EU law test for refusal of relief
- High Court bound by EU retained case law to apply the "*more exacting*" EU law test where a challenge succeeds on a point of EU law
- In the present case, applying s.31(2A), relief should be granted – so no need to consider EU law test
- No indication of what SoS' view would have been if he had considered cumulative effects

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Pearce v SSBEIS [2021] EWHC 326 (Admin)

Points of interest

- Requirement to consider cumulative effects *as a matter of law* where identified as significant
- cf *Drax* and *Finch* where legal "test" formulated by HC rejected and issue treated as a matter of planning judgment
- Urgency identified in energy NPSs for renewable energy projects not a justification for non-compliance with EIA
- Procedure where DCO quashed – further hearing may be required

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Stonehenge

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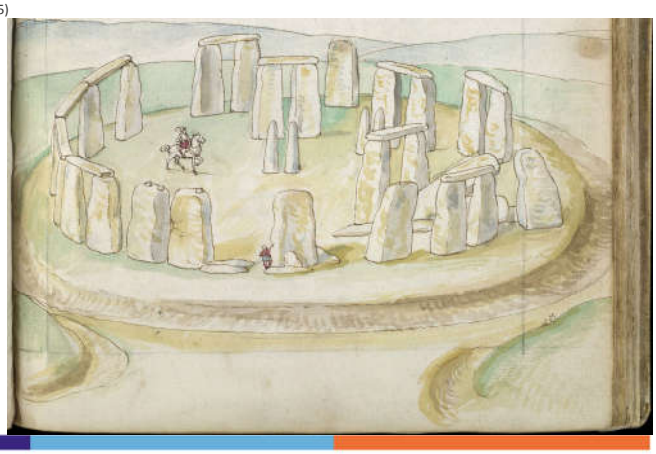
R. (On the application of Save Stonehenge World Heritage Site Limited) v. SofST & others [2021] EWHC 2161

Watercolour – Lucas de Heere (c.1573-1575)



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Stonehenge application

- DCO application was for the construction of a new route – 13km long for the A303 between Amesbury and Berwick Down (replacing the existing surface route).
- New route would have a dual instead of single carriageway & would run in tunnel through the Stonehenge part of the Stonehenge, Avebury and Associated Sites World Heritage Site.
- The proposals included a western cutting, western tunnel portals and "the Longbarrow junction", all of which attracted much opposition.

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Particular issues

- World Heritage Committee – concerned about section of exposed dual carriageway at the western cutting. It suggested that the tunnel section be extended from 3.3km to approximately 5km, "so that the western portal is located outside the World Heritage Site".
- During the examination, an alternative to the 3.3km tunnel (a 4.5km tunnel) was considered.
- In its report, the Panel said the western cutting would "introduce a greater change to the Stonehenge landscape than has occurred in its 6,000 years as a place of widely acknowledged human significance. Moreover, the change would be permanent and irreversible."

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Panel recommendation

- Concluded that **substantial** heritage harm arose.
- Recommended refusal.
  - Disagreed with the applicant's assessment of overall impact.
  - Disagreed with the advice of Historic England as to the overall impact of the scheme.
- Did not provide any precis or summary of the submitted Heritage Impact Assessment or Environmental Statement in relation to the significance of or impact on heritage assets where the Panel agreed those assessments.
- Concluded that the "options appraisal" work was sufficient.

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Secretary of State's decision

- Disagreed with the Panel & found that overall, **less than substantial** heritage harm would be caused.
- Did not receive any separate briefing/precis dealing with the significance of or impact on the individual heritage assets in relation to which the Panel had simply accepted the content of the Heritage Impact Assessment/Environmental Statement.
- Accepted what the Panel had said re "options appraisal" work.

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Why was the decision quashed?

- The SofS was obliged (in terms of policy and law) to take account the impact on the significance of all designated heritage assets affected so that they were weighed. Was not provided information which was legally sufficient for that purpose.
- Furthermore, there was an alternative scheme (the 4.5km tunnel). The relative merit of the alternative was an obviously material consideration, which the SofS was obliged to assess; and it was irrational to have failed to do so. The options appraisal work was simply not the same thing.

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Any learning points?

- Note: submission material assessing individual heritage assets not at fault.
  - Requirement to weigh the impacts on significance of designated heritage assets, e.g. *City and Country Bramshill Limited v. Secretary of State and others* [2021] EWCA Civ 320, see [71-81].
- Adequacy of alternatives comparison?
  - Circumstances in which there are clear planning objections to development on a particular site – may well be relevant & necessary to consider whether there is a more appropriate site elsewhere, see *Trusthouse Forte v. Secretary of State for the Environment* (1987) 53 P&CR 293 at 299-300
- Need for methodical, meticulous approach to heritage assessment.

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For the time being…

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Stonehenge: postscript for the neutral observer

Note Appendix 1 to the judgment "legal principles agreed between the parties":

- Policy interpretation/application
- Reading decision letters
- Reasons
- Material considerations
- Regulation 3 of the 2010 regulations/section 66
- Case law relevant to "preservation"

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The end

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