Development Consent Orders Half Day Seminar 7th July 2022

Chairs

Stephen Tromans QC

James Strachan QC

Speakers

Celina Colquhoun, Christiaan Zwart

Juan Lopez, Victoria Hutton,

& Gethin Thomas

Seminar Programme

- **13.00 - 13.10: Welcome from Chair** Chaired by Stephen Tromans QC
- **13.10 - 13.30: Talk 1** Preparing for ISHs: Stephen Tromans QC/Victoria Hutton
- **13.30 - 13.50: Talk 2** Appropriate Assessment Stephen Tromans QC/Victoria Hutton
- **13.50 - 14.10 Questions on Talks 1 & 2**
- **14.10 - 14.25: Tea break**
- **14.25 - 14.40: Talk 3** Local Authority Perspective Celina Colquhoun
- **14.40 - 15.00: Talk 4** Case Law Update: Perspectives Christiaan Zwart
- **15.00 - 15.10: Questions on Talks 3 & 4**
- **15.10 - 15.30: Talk 5** Environmental Impact Assessment (or, Environmental Outcome Reporting?) & Cumulative Impacts Juan Lopez
- **15.30 - 15.50: Talk 6** Ne(x)t Frontier: Biodiversity Net Gain & Net Zero Gethin Thomas
- **15.50 - 16.10: Questions on Talks 5 & 6**
- **16.10 - 16.30: Panel Discussion & Closing Remarks** Chaired by James Strachan QC
- **16.30: Drinks**

DCO Talk 1: Preparing for ISHs

Stephen Tromans QC

Victoria Hutton

Preparing for ISHs

- DCO applications are a front-loaded, paper intensive process
- BUT … issue specific hearings are important
- They should focus on the critical and possibly contentious issues
- For the promoter they offer an opportunity to gain the confidence of the Panel
- For objectors they offer the opportunity to do the opposite

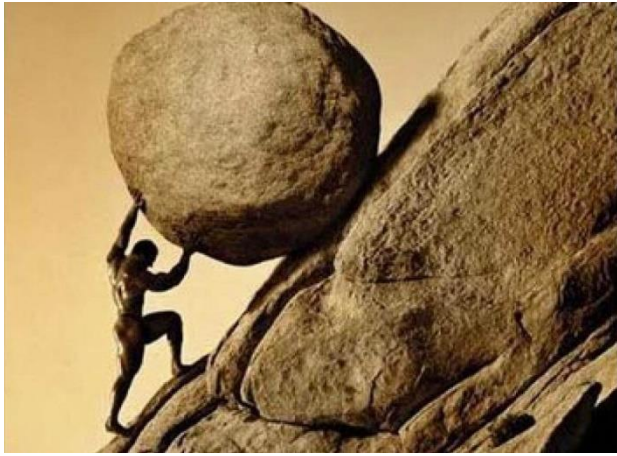
Lead up to ISH

- Application accepted (s. 55) and notices given
- SoS decides if Panel or Single Appointed Person
- Panel appointed by SoS – number varies: 2, 3, 4 or 5
- Lead member
- Panel dynamics
- Panel decides how to conduct examination (s. 88) with initial assessment and meeting
- Request by IPs for Open Floor Hearing
- Statutory time limits – 6 months to complete Examination from start day of initial meeting, 3 months to report

Role of Panel and purpose of ISH

- To examine the application and report on (a) findings and (b) recommendations (s. 74)
- Examination to take the form of consideration of written representations (s. 90)
- Panel may decide necessary to include consideration of oral reps about a particular issue to ensure (a) adequate examination; (b) Ips have fair chance to put case (s. 91)
- For ISH to control hearing and in particular whether to allow questioning, and allocation of time (s. 94)
- Questioning generally is by Panel (s. 94)
- Refusal to allow representations that are frivolous, repetitious, relate to NPS policy, or to compulsory purchase or rights over land

Timetabling of ISH

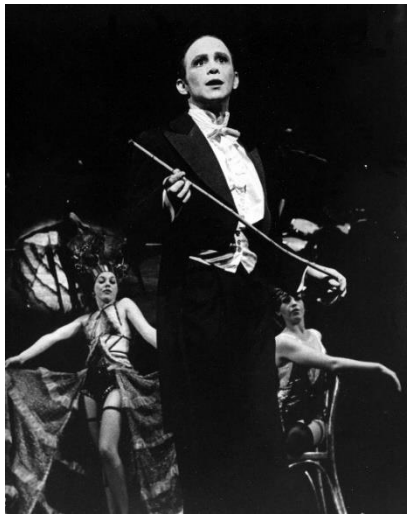


- There will be an examination timetable as to written reps required before and after ISH
- The topics and the names of parties who have been asked to speak will usually be set out in an agenda and published on National Infrastructure Planning website approximately one week before the hearing
- Persons other than IPs may be allowed to speak at discretion of ExA
- For a large DCO, it is a gruelling process!

Key issues for ISH

- Sound written materials – be aware of Advice Notes and 8.4 6 on issues such as format, indexing, hyperlinks, etc.
- Key point is quality not quantity of written material
- Keeping on top of changes to SOCG, ES, AA, DCO, etc – “living documents”
- Close attention to Agenda
- Careful team work – who is covering what, briefing notes
- Balance between answering orally and providing written reps later
- Possibly difficulties of cooperation with public bodies (local authorities, NE, EA, etc)

Role of the advocate



- Not the same as at an inquiry!
- Primary spokesperson/lightning conductor
- Sets tone, hopefully secures ExA's trust and anticipates their concerns
- Compere/ringmaster of experts
- Handling virtual events: Advice Note 8.6
- Dealing with any legal issues on application or draft DCO
- Summarising role

DCO Talk 2:

Appropriate Assessment

Victoria Hutton

Stephen Tromans Q.C.

Legal Context

- Regulation 63
  - No consent unless, in light of the conclusions of the AA, the competent authority ascertains that the project will not adversely affect the integrity of the European Site or European Offshore Marine Site.
- Regulation 64
  - May consent if no alternative solutions and project must be carried out for imperative reasons of overriding public interest ('IROPI')
  - Compensation must be provided.

Legal Context

- Precautionary principle applies
- No need for certainty regarding every single factor (*Keir, Wyatt)* however conclusion must be beyond reasonable scientific doubt.
- Expect views of statutory consultees to be given significant weight (*Wealden*)
- Mitigation must be certain.

New Requirements on the Horizon?

- Levelling Up and Regeneration Bill
  - Part 5 – Environmental Outcomes Reports
  - Potential to replace the requirements of the Habitats Regulations (draft s.127)

Scheme Design

- Identify the key sites, habitats and species
- Identify potential adverse impacts
- Design out adverse impacts as far as possible
- Build in mitigation as far as possible
- Engage statutory consultees at an early stage

IROPI

- If there is potentially a need to run an IROPI case – work out how effective compensation can be provided and secured.

- Is there any mitigation/compensation which could come forward in advance of a DCO application?

Statutory Consultees

- NE, EA, MMO, RSPB, NT etc.
- Engage as early as possible.
- Engage continuously.
- Identify potential fault-lines as early as possible.
- SoCGs
- What compromises can be made? What additional mitigation secured?

sHRA

- Ensure as comprehensive as possible without unnecessary content.
- If new information becomes available it may be necessary to publish addenda dealing with discrete issues.

Securing Mechanisms

- Make measures relied upon as mitigation is effectively secured by:
  - Requirements
  - Deed of obligation
  - Management Plans

Experts

- Identify, early on, the experts who will be responsible for particular sites, species and impacts.
- But, beware of any silos – inter project and intra project effects must be taken into account and assessments must be consistent.
- Continuing dialogue with legal team where necessary.

ISHs on HRA

- Program should give a clear idea of what the Panel wish to discuss/ask.
- Develop team notes for how each point is going to be addressed and who is going to address.
- Discuss the interplay between advocate and expert.

ISH (cont.)

- Listen to specific question and respond effectively.
- Listen to other parties and respond effectively.
- If a matter can't be dealt with at the hearing then offer to address in writing.
- Is further assessment necessary?
- Is further mitigation necessary?

ISHs on HRA

- Subject matter can be complex/technical and often time is short.
- If necessary, stick to clear headline points with any added detail to follow in writing.
- Prepare thoroughly for any follow-up questions not on the programme.

DCO Talk 3

DCO Perspectives :
LOCAL AUTHORITIES and UPDATE

Celina Colquhoun

LA Roles and Status

- Pre App (s42 and 43) and Post App (s56 and s56A)
- DCO land is in their area (host)
- DCO land is in neighbouring lower tier/Uni LA or upper tier/County area
- Affected Person (s59) ie landowner subject to CA (**nb** highways HA and owner of land beneath highway)
- Interested Party s102 (**nb** not neighbouring LA

Pre Application and Application

- DCO Applications – 'front-loaded' *"emphasis of consultation…is designed to ensure a more transparent and efficient examination process"*
  [Planning Act 2008:Guidance on the pre-application process]
- PINs Guidance – must have regard (s50(3)) and follow s55(5A)(b) and 55(4)(c)
- PINs Advice Note 2 (non stat)
- S51 Advice by PINs - for everyone and published
- Early involvement b/w Apps and LAs see Pre App Guidance

Pre Application and Application

- Notification and Consultation under Infrastructure Planning (Environmental Impact Assessment) Regs 2017
- PPAs
- App Guidance [19] *"Without adequate consultation, the subsequent application will not be accepted when it is submitted*
- Statement of Community Consultation s47

Pre Application and Application

- Adequacy of Consultation Report by LA at application
- Whether complied with:
  - Duties under ss 42, 47 and 48 of the PA 2008 relating to consultation and publicity.
  - Duty to consult a relevant local authority about the preparation of SoCC (whether the applicant had regard to the local authority's comments on the draft SoCC),
  - Commitments in SoCC re pre-application consultation in compliance with stated consultation methodology.

Post Application Acceptance

- Application accepted (s. 55) and Notices (s56 LAs and s59 APs)
- ExA panel appointed
- Rule 6 and 8
- Preliminary meeting
- Relevant Reps and Written Reps
- LIR – s60 invitation by SofS of s56A LAs


1596
767
1508
1763
1847
1573

Examination

- Primarily a written process – no ‘proofs’ required
- Resources and timetabling
- Get familiar with PINs website and referencing
- Keep to ExA’s timetable
- If in doubt submit and ask ExA to accept
- If in difficulty communicate through Prog Officer
- ‘Legals’ – commenting of draft Order; CA justification; s106;

During Examination

- Requirements (discuss as early as possible)
- SOCG (more than one) as well as LIR
- Difference between LIR and WR
- CA negotiation
- Politics
- Members of Public

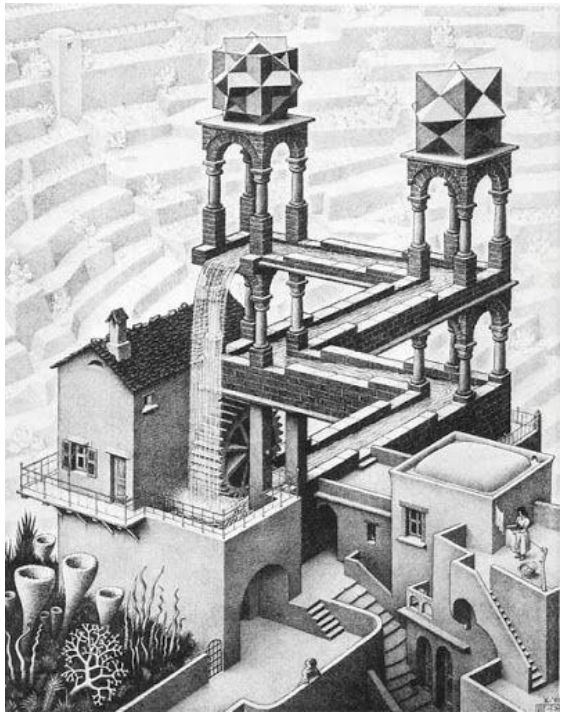
Post Examination/Pre SofS Decision

- 6 months to complete Examination
- 3 months to write ExA Report
- No public notification of ExA Report
- SofS consultation

CASE LAW & UPDATE

- Halite Energy [2014] ExA's role/nature of examination
- Trago Mills ltd [2016] Costs CA and Timing
- Blue-Green [2018] s118 challenge Timing
- Save Stonehenge WHS Ltd [2021] alternatives and assessing heritage harm
- Aquind [2022]
- East Anglia One North and East Anglia Two [2022]

DCO Talk 4:
Case Law Perspectives



Christiaan Zwart

Legal Context

- PA 2008 – "bespoke" & "freestanding from other statutory regimes of development control" & creating an SI: draft with care (as offence) ("*EFW*")
- "Development" same meaning in PA 2008 & TCPA 1990.
- Projects within the PA 2008 require DCO before implementation
- "The NPS is key to the 2008 Act's regime"
- 'Project' decisions may fall under: s.104 (NPS) or 105 (local policy) or both
- If under s.104, then a relevant NPS guidance presumption in favour of consent applies. e.g. EN-1 para 4.1.2; NN NPS para 4.2. (whereas, if s.105, then not).
- S.104(2)(d): "Important and relevant" (as CA observed in *ClientEarth*, TCPA "material considerations" law not part of PA 2008 provision concepts).
- S.105: regard to LIR; prescribed matters; & "important and relevant matters".
- S.120: Requirements & Provisions.
- S.122: CPO provisions.
- S.103: "The SoS has the function of deciding an application…"
- Ultimate audience is not the ExA but the SoS (*Save Stonehenge*).

Objector's & SoS Perspective: To Be or Not To Be: An NSIP

- *Ross v SoS Transport* [2020] EWHC 226 (Admin)
- Case about statutory interface between PA 2008 & TCPA 2008 at Stanstead Airport in Uttlesford District; & a Chapter in "Stop Stanstead" Saga.
- S.57 TCPA 1990 requires planning permission for development.
- S.31 PA 2008 requires DC "to extent" or forms part of an NSIP.
- PA 2008 can draw in potential NSIPs from TCPA or exclude. How so? Fact or Law?
- e.g. Swansea Tidal Bay DCO elements; Aquind DCO FOC.

- Planning application to UDC for “alterations” to airport’s taxiway links & 9 aircraft stands & raise cap on passenger throughput from 35mppa to 43mmpa – but not to increase flight movements or noise contour (bigger aircraft).
- Mr Ross claimed an NSIP arose because enough to show such “runway linkages” “capable” of “theoretically” increase of mppa so satisfying s.23(1)(b) “alteration” by an “expected” “effect” in (5)(a), being an increase of 10mppa the airport was “capable of providing”; or else an s.23(1)(c) “increase in permitted use” of 10mppa.
- Court rejected Claim: satisfaction of s23 NSIP gateway definition was a judgement because “expected” preceded “capable”; “expected” & “effects” requires a judgement & so for the decision maker to evaluate what is “realistically achievable” rather than “arithmetically or technically possible”. No requirement for capacity “maxima”
- Not an NSIP but development requiring planning permission.
- SoS later granted the same

Promoter's Perspective: NSIP: To Begin at The Beginning

- *Tidal Lagoon (Swansea Bay) plc v SoS Business & Industrial Strategy* [2021] EWHC 3170 (Admin)
- Case about interpretation of DCO Article & Requirement terms; & whether the DCO had 'begun' under s.155 PA 2008 notwithstanding DCO carve out of works from "commencement".
- Be careful what you initially draft for & the permutations of the Requirements Matrix drawn.
- (Unlike planning permission, under s.161 it is an offence to breach DCO terms).
- S.155 uses "begin" (undefined by DCO) & <u>encompassed</u> the carved out works as prescribed works.
- s.154(1)(b) enables a DCO to change when it is "begun".
- Outline DCO defined "commence" (to <u>exclude</u> ground investigation & survey works) & a Requirement concerned "commence" in line with s.154(1)(b).

- Agreed early survey & ground investigation works carried out sufficient for s. 155 but not for the DCO itself.
- Requirements seemed to impede further works being done.
- Developer sought declarations to save the DCO lagoon project from lapsing.
- Question: on the extensive review of interpretation case law, were the works done sufficient for both s.155 “begin” & also the DCO definition of “commence”.
- Answer: Applying planning law case law, no. In the DCO, “commence” = “begin”. The DCO drafted carve out of certain works from “material operation” was intended & not intended to qualify as works to “begin” the DCO under s.155.
- Trigger for DCO commencement can be different to “begin/begun” under the legislation
- “Appeal outstanding”. Permission to Appeal appears to have been granted.
- Silver Town Tunnel DCO ‘complexities’ resulting from its initial drafting?

Promoter's & LA Perspective: ExA & SoS Disagreement 1: s.104 or 105?

- *EFW Group Limited v SoS Business, Energy & Industrial Strategy* [2021] EWHC 2697 (Admin)
- Case about whether s.104 or 105 or both applied to an NSIP & an s.35 project in single DCO application.
- Difference related to NPS presumption & need.
- Two energy from waste projects:
  - "K3" (s.15 NSIP)
  - "WKN" (s.35, an increased capacity project).
- LA Kent County Council disputed "need" for capacity: role of LA?

- ExA & SoS disagreement on PA 2008 approach
- ExA & SoS agreement on result:
  - grant DCO for NSIP but
  - refuse the s.35 project.
- ExA applied s.104 to NSIP & s.105 to project in the single DCO application.
- SoS applied s.104 to both NSIP & s.35 project
- However, on the Claim agreed with ExA that lawful to apply s.104 & s.105 separately to each part of application.
- But Court refused relief grant as outcome not different as adverse effects of WKN outweighed benefits still.
- A sterile Claim? Importance of s.31(2A) SCA 1981
- Case highlights important difference in approaches under s.104 & 105 & how local concerns may impact national projects.

Objector's & SoS Perspective: ExA & SoS Disagreement 2: Need

- *R (oao ClientEarth) v SoS Business, Energy & Industrial Strategy* [2021] EWCA Civ 43
- ExA recommended refusal of Drax DCO: gas-fired generating units "X" & "Y".
- SoS disagreed with ExA & granted DCO.
- On the subsequent Claim, ClientEarth put in issue
  - EN-1 itself &
  - legal scope of "need" in that guidance.
- ClientEarth contended "need" required both quantitative "need" & qualitative "need" to be demonstrated by in the DCO application process for each type of project falling within EN-1.

- Court held:

  > "the absence of any quantitative definition of relevant need is striking…No attempt is made to describe in quantitative terms need either the general need for types of generating capacity … or a specific need. This is deliberate and explicit".
  >
  > It was for the market to evaluate need.

- Scope of EN-1 "need" not <u>require</u> "quantitative" assessment
- EN-1 "need" encompassed a wide range of projects & "basic concept" of EN-1 that need has been demonstrated for the type of projects EN-1 covers: for the market.
- On weight, (like gravity) "assessment of weight must be grounded I reality".
- S.104(7) purpose is to establish, by a balance, if exception should be made to the s.104(3) requirement to decide application in line with NPS (& not a gateway to an NPS challenge).
- "Material considerations" law inapplicable in PA 2008.

Regulator's & Promoter's Perspective: ExA & SoS Disagreement 3: AA

- *R (oao Mynnyd Y Gwynt) v SoS Business, Energy & Industrial Strategy* [2018] EWCA Civ 231
- Case about absence of appropriate assessment for a 27 turbine site proposed next to an SPA in (so-called) "Valley of the Winds" (via DCO to avoid TANS) & collision mortality risk to Red Kite ("connectivity").
- Evidence of Red Kites toing & froing from nearby SPA & collision risk to less than 1 pair per year either alone or in combination with other turbine sites.
- NRW (appropriate nature conversation body) objected on landscape, historic & environment grounds including as NRW unable to exclude of risk to Red Kite.
- NRW stuck to its evidential guns.

- Developer refused to purchase from third party up to date survey “information” of Red Kite sites to enable “collision risk modelling” between Kites & turbines.
- NRW had seen copies (but not as its “information”) of survey data & could not advise (as required) “no risk” of no likely significant effect to protected species.
- Not be proven that Kites using the development site not come from the SPA.
- ExA considered sufficient (“reasonable degree of certainty”) surveys even if not up to date & asserted no appropriate assessment necessary.
- SoS disagreed - “information” included all available data
- SoS accepted NRW advice.
- Without the surveys, SoS evaluated that she was not in a position to know whether risk of harm to protected species could be excluded
- Two important social objectives balanced: renewable energy vs species protection.
- DCO refused because risk to protected could not be excluded.
- Developer’s choice to whether to provide information or not. Claim dismissed.

Everyone's Perspectives
ExA & SoS Disagreement 4: Alternatives

- *R(Save Stonehenge World Heritage Site Limited) v SoS Transport* [2021] EWHC 2161 (Admin)
- Case about a part tunnel/cutting across World Heritage Site comprised of a landscape containing monuments & shows risk of oral submissions developing in open Court inviting judicial intervention.
- (As at South Hook CHP DCO) 'outline' DCO (derived from a detailed scheme) in a protected WHS landscape.
- ExA found "permanent & irreversible" "substantial harm" from scheme to WHS & recommended refusal.
- SoS disagreed on degree of harm due to <u>his</u> evaluation of all assets.
- Of many bullets on the Claim, two hit home:
  - SoS <u>himself</u> had no heritage "precis" on additional assets not summarised by ExA. A gap. & so he unlawfully disagreed with the ExA on heritage balancing exercise that "less than substantial harm";
  - para 4.27 could not override para 4.26 not exclude the common law on obviously material considerations.

- Bullet 1: Minister has PA 2008 function to decide but himself had no precis of all asset heritage information on which to disagree with ExA on all assets but was himself required to take account of the significance of impact on each.
- Bullet 2: NH had submitted that only need to consider NN NPS paragraph 4.26 & 4.27: "alternatives" of: Options Appraisal; EIA (main alternatives); CPO.
- ExA & SoS accepted NH advice. Court held ExA & SoS in error as SoS not entitled to not go further as "obviously material" to consider alternatives when he had evaluated net harm to WHS.
- By s.104(3) & NN NPS, scope of para 4.26 "all legal requirements … on the assessment of alternatives. In particular: …" not closed.
- Para 4.27 not override para 4.26 nor could guidance exclude common law on "obviously material considerations".
- SoS acceptance of "net harm" resulted in logical inconsistency to treat NH options appraisal as making it unnecessary for him to consider relative merits of alternatives of tunnel options along same route.
- *Trust House Forte* case applied.
- EIA compliance not a proxy for addressing "specific obligation" to compare such relative merits.

ExA & SoS Disagreement 5: CPO (or, FOC: To be or not To be an NSIP)

- Aquind DCO. An interesting case. First ‘pure’ hope value DCO?
- Case about an outline s.35 project for a cross-channel electricity cable through Portsmouth & private land by an opaquely financed private limited company seeking CPO along the (wide) cable path to a new connector building.
- & about Company seeking to shoehorn private FOC cable to s.35 (Netflix?) & PA 2008.
- Company contended that for third parties to show alternatives to CPO.
- ExA recommended grant in face of PCC & Objector resistance to CPO.

- Between ExA Report & Decision stages, Written Representations invited by SoS as:
  - SoS prior Navitus Bay DCO refusal had freed up an alternative site;
  - Aq. developer included some information in its EIA on that alternative but had not excluded that alternative site in CPO context except 'expensive';
  - CPO tests evaluated by SoS who was not satisfied on the facts, & HRA incomplete.
- PCC & Objectors fully engaged with that post-examination process.
- SoS disagreed with ExA, agreed with Objectors & LA, & refused DCO, carefully, on classic CPO grounds: no *need* for CPO because another site not ruled out by developer.
- S.122(2)(a): 'required' not able to be satisfied by developer on the facts.
- Company's judicial review (based on disputed facts/merits) recently permitted to be brought as "arguable".
- Watch this space.

Case Law Perspectives: Practical Points

- Each DCO process Participant has unique perspective, resources, agenda, desired outcome & risks itself/others: promoter; regulator; objector; ExA; decision taker.
- Consider satisfying different agendas to reduce/increase risks & increase success
- Examples: EA; HE; LA; Objector; Promoter; ExA; SoS.
- Different Risks (National or Local):Environmental? Financial? Reputational? Political?
- Ever increasing focus on ExA as (only) recommender vs SoS as statutorily nominated decision taker.
- Recent increasing Court appetite to quash DCOs on classic legal error grounds.
- Win on the facts – at what stage? Or Risk Legal Challenge & related Risks?
- Increasing use of period between Hearing & Decision for invited "post-hearing" Written Representations for/against projects: extended 'hearing' process?
- Increasing mismatch between ExA views & (ultimately) the Minister's decision.
- Response to Increasing Risks? Tool Up Early to Reduce Risk to Client(s) & Monitor.

DCO Talk 5:

Environmental Impact Assessment (or Environmental Outcome Reporting?) & Cumulative Impacts

Juan Lopez

Pearce v BEIS [2021] EWHC 326

- S.118(1) PA 2008 (JR) of BEIS decision (1.7.20 [App: 8.6.18; Exam closed 10.6.19]) to make North Vanguard [**V**] Offshore Wind Farm DCO [**V-DCO**]
- NSIP "*closely related*" to second wind farm, Norfolk Boreas [**B**] (decision: 10.12.21 [Application: 11.6.19; Exam closed 12.10.20]), immediately to NE of Vanguard offshore Vanguard array
- Co-location (dictating site-selection); shared grid connection + cabling corridors; 60Km underground HV cable route, linking landfall to (Necton) new substation bdgs. [**NS**]
- Land acquisition under V-DCO included land enabling "*sister-project*" B infrastructure connections

Pearce (2)

- V-ES CIA of V + B (L&VIs of NS = significant adverse) equally, and embedded mitigations for V + B (but projects additionally assessed, solus)
- V + B projects within 'Rochdale envelope' = V-DCO App. parameters
- Criticism of SS (and ExA) decision that CIA (L&VIs) of V + B projects be *deferred* to any B-DCO Exam
- Issues: (i) was BEIS obliged to CIA V + B (L&VIs) as part of V-DCO Exam; meaning SS deferral to any B-DCO, was unlawful? [(ii) reasons legally inadequate for deferral? (iii) quashing appropriate?]

CIA/Project Scenarios

- (i) Environmental implications of a single project + conditioned CIA deferral (e.g. R v Cornwall CC ex p. Hardy [2001] Env. LR 473): deferral unlawful [J111]
- (ii) Whether associated works form an integral part of a single project (e.g. R (Brown) v Carlisle CC [2011] Env. LR 71; Preston New Road Action Group v SSCLG [2018] Env. LR 440): deferral unlawful [J112]
- (iii) Single project, but deferral of CIA is not "*so straightforward*" (e.g. R v Rochdale MBC ex. P. Tew [2000] Env. LR 1): deferral *possibly* unlawful [J113]

Framework (bitesize)

- S.104(2)(a): SS must have regard to any relevant NPS
- IP(EIA) Regs. 2009 / Directive 2011/92/EU (but, no substantial difference to 2017 Regs. / Directive 2014/52/EU) [Note: V-ES prepared under 2017 Regs. 'by consent')
- Reg. 3(2) [4(2)]: "Environmental Information" [**EI**] is a 'must' consideration
- Reg. 2(1) [3(1)]: EI includes *"...the environmental effects of the development and of any associated development*"
- Sch.4: EI for ES purposes, includes: "...*description of the likely significant effects...cumulative (short, medium and long-term, permanent and temporary*..." <u>and</u> (Overarching National Policy Statement for Energy) EN-1 §4.2.5 - 4.2.8

NPS Imperatives

- Established and urgent need for new, low carbon energy NSIPs (EN-1; § 3.3.15);
- EN-1 § 4.2.5 - 4.2.8:
- "*4.2.5 When considering cumulative effects, the ES should provide information on how the effects of the applicant's proposal would combine and interact with the effects of other development (including projects for which consent has been sought or granted, as well as those already in existence) ...*
- *4.2.6 ...how the accumulation of, and interrelationship between, effects might affect the environment...as a whole, even though they may be acceptable when considered on an individual basis with mitigation...*
- *4.2.8 Where some details* [of the project] *are still be to be finalised, the ES should set out, to the best of the applicant's knowledge, what the maximum extent of the proposed development may be...and assess on that basis, the effects which the project could have to ensure that the impacts of the project...have been properly assessed*."

Pearce: Approach

- DL/ExAR CIA of V + (third project) Hornsea; *some* CIA of V + B EEs
- DL/ExAR found V (solus) L&VIs, significant adverse, but acceptable
- DL/ExAR did not find CIs (L&VIs) insignificant or acceptable
- DL/ExAR (incompatibly) declined assessment of CIs (L&VIs) until any B-DCO Exam due to "*limited information*" on B (not canvassed during Exam) = Regs. breach / failure to determine accordingly with NPSs (an obviously material consideration)

Pearce: Approach (2)

- No ES inadequacy (but…alternatives of solus & CIs, presented by V)
- No V reliance on [then] para 23, Sch. 4, 2009 Regs. [App. deferral request; difficulty in compiling EI] (but…)
- [Reg. 23(3) Suspension: if either SS / ExA considers ES to be "*not adequate to assess*" EEs
- R.17 IP(Exam Procedure) Rules 2010: IP may be requested to supply further EI (ExA considers ES is adequate)]

Caution #1: Project 'Salami-Slicing' (revived)

- R (Larkfleet) v South Kesteven DC [2016] Env. LR 76 (link road outside of urban extension)
- If 2+ projects (but linked), objectively, EIA objective is met by CIA of Project 1 (so far as reasonably practicable – knowledge and methodology contingent)
- Existence of CIs is not determinative of 'single project/not' question

Caution #2: ES Adequacy [J115]

- J115: Ex p. Milne [2001] Env. LR: "*EIA legislation plainly envisages*" that DCO decision-maker will consider EI (and ES) adequacy
- FoE [2020] UKSC 52
- E.g. significant adverse residual effects, post-embedded mitigations
- E.g. Parameters of project-wide assessment and baselines (e.g. climate change EEs / (t)CO2e values)

DCO Talk 6:

Ne(x)t Frontier: Biodiversity Net Gain & Net Zero

Gethin Thomas

What is biodiversity net gain?

- Current state of UK biodiversity: '*…[t]he abundance and distribution of the UK's species has, on average, declined since 1970 and many metrics suggest this decline has continued in the most recent decade. There has been no let-up in the net loss of nature in the UK' (*'State of Nature' Report, 2019)
- What does biodiversity net gain require?: *'Achieving biodiversity net gain means that natural habitats will be extended or improved as part of a development or project*.' (Defra, January 2022)
- What is the overarching policy objective?: '*The current planning system does not provide a level-playing field for developers to deliver 'net gain', defined as an overall increase in habitat area or quality following a new development. While there is some adoption of net gain approaches, it is not sufficient to deliver net gain at a national level. This leads to overall loss and damage of habitat, biodiversity and other environmental goods. Current government ambitions on house building and infrastructure is likely to accelerate land use change, with implications for habitat and the wider environment*.' (Defra, 2022)

When is biodiversity net gain relevant to a DCO application?

- Part 6 of, and schedules 14 & 15 to, the Environment Act 2021 make provision in respect of biodiversity gain, including in respect of planning permissions under the 1990 Act in England.
- Section 99 and schedule 15 make provision about biodiversity gain in relation to development consent for nationally significant infrastructure projects in England.
- Due to come into force by November 2025.

Environment Act 2021

CHAPTER 30

ENVIRONMENT ACT 2021

Decisions where a national policy statement has effect (Section 104) #1

New subsection 104(3):

(3) The Secretary of State must decide the application in accordance with any relevant national policy statement.

(3A) In particular, if a relevant national policy statement contains a biodiversity gain statement under Schedule 2A in relation to development of the description to which the application relates, the Secretary of State may not grant the application unless satisfied that the biodiversity gain objective contained in the statement is met in relation to the development to which the application relates.

(3B) Subsections (3) and (3A) do not apply to the extent that one or more of subsections (4) to (8) applies.

Decisions where a national policy statement has effect (Section 104) #2

- Biodiversity gain statement: A biodiversity gain statement is a statement of government policy in relation to the biodiversity gain to be achieved. These biodiversity gain statements will set out the biodiversity net gain requirement for all types of NSIPs, including the date from which the objective is expected to be achieved, and the stage of project design to which commencement threshold applies.
- Biodiversity gain objective: A biodiversity gain objective is an objective that the biodiversity value attributable to development to which a biodiversity gain statement relates exceeds the pre-development biodiversity value of the onsite habitat by a percentage specified in the statement. The percentage specified must be at least 10%. The minimum percentage may be amended by secondary legislation.

Decisions where a national policy statement has effect (Section 104) #3

- For development already covered by an existing national policy statement:
  - On the first review of the existing national policy statement under section 6 after the coming into force of this Schedule, the Secretary of State must amend the statement under section 6(5)(a) so as to include a biodiversity gain statement for development of that description. A separate biodiversity gain statement is for the purposes of section 104(2) to (9) to be regarded as contained in the existing national policy statement.
  - The Secretary of State may issue a separate biodiversity gain statement (a "separate biodiversity gain statement") having effect for any period before that for which the statement included in the existing national policy statement under sub-paragraph (2) has effect.
  - The Secretary of State must keep a separate biodiversity gain statement under review and may amend it at any time.
  - The Secretary of State must lay a separate biodiversity gain statement before Parliament, and publish it in such manner as the Secretary of State considers appropriate.

Decisions where no national policy statement has effect (Section 105)

- The Secretary of State has a discretion to issue a biodiversity gain statement.
- If the Secretary of State decides to do so, then she or he may not grant the application unless satisfied that the biodiversity gain objective contained in the statement is met in relation to the development to which the application relates.
- Although, not if the Secretary of State is satisfied that deciding the application in that way would have an effect referred to in 104(4), (5), (6) or (7).

How will biodiversity net gain fit into the DCO process?

Proposed biodiversity net gain process for Nationally Significant Infrastructure Projects (indicative process only – not representative of all routes to permission)

Scheme conception and promotion

In line with the mitigation hierarchy, **avoid or minimise habitat loss by considering biodiversity in site selection and site design.**

Pre-application

Establish what the biodiversity net gain requirement is for the development, if one applies: check exemptions and transition arrangements set out in the relevant biodiversity gain statement. Discuss biodiversity net gain expectations with relevant statutory consultees and the Examining Authority.

Use the **biodiversity metric** to calculate the indicative biodiversity value of the development site before and after development. These assessments and calculations should be transparently shared in full to enable informed and constructive responses at consultation. **Include clear biodiversity net gain intentions and a draft requirement in any pre-application discussions** with the Examining Authority and relevant statutory consultees.

Prepare **biodiversity gain information and requirement**. This should detail pre-development biodiversity value, steps taken to minimise adverse biodiversity impacts, and proposed approaches to enhancing biodiversity on and off site.

If biodiversity net gain is achieved on site, it is not necessary to look for off-site enhancements.

If biodiversity net gain cannot be achieved on site, **identify off-site opportunities for biodiversity enhancement.**

If biodiversity net gain cannot be achieved through a combination of on-site and off-site proposals, **arrange to buy statutory biodiversity credits from government as a last resort.**

Pre-application engagement and acceptance

Submit biodiversity gain information alongside application for development consent. This must fulfil minimum requirements for biodiversity gain information, and may include further information towards a complete biodiversity gain plan should such information be available at this stage. .If it is intended that biodiversity gain will be secured through a Requirement in the development consent order, this must be proposed when submitting the application.

If further information is required, the following may need to be considered before the biodiversity gain plan is submitted for approval:

- any necessary changes to information, proposals or proposed requirements
- any off-site biodiversity gains are secured (or will be secured by requirements in the development consent order or, if appropriate, a covenant)
- any statutory biodiversity credits are purchased (or conditionally secured).

Pre-examination and examination, Recommendation and decision

The biodiversity gain plan is considered as part of the wider application by the Examining Authority. If the biodiversity objective is deemed met (or the Examining Authority is satisfied it will be met through, for example, requirements included in the Development Consent Order or by conservation covenants) then the Examining Authority will state this in their recommendation to the relevant Secretary of State. Consent may then be granted, subject to the wider application being acceptable.

If a further change is required (e.g. as a result of publication of new policy or ongoing negotiations between an applicant and other Interested Parties) this should be addressed through examination and, if necessary, a material change.

Commencement and management

Development can commence, provided that any pre-commencement requirements are discharged and any other necessary permissions are in place.

Ongoing management, monitoring, reporting and appropriate enforcement of biodiversity gains continues for at least the agreed maintenance period.

How is biodiversity net gain calculated?

PRE-intervention biodiversity calculation (the baseline)

Size of habitat parcel	x	Distinctiveness	x	Condition	x	Strategic Significance	=	Biodiversity units
10 (ha)	x	6 (high)	x	1 (poor)	x	1.15 (high)	=	69 units

POST-intervention biodiversity calculation (for newly created habitat)

Size of habitat parcel	x	Distinctiveness	x	Condition	x	Strategic Significance	x					
10 (ha)	x	6 (high)	x	3 (good)	x	1.15 (high)	x					
		Difficulty	x	Time to target condition	x	Spatial risk	=	Biodiversity units
		0.67 (med)	x	0.837 (5 yrs)	x	1 (local)	=	116 units

Calculation of gains or losses

POST units	-	PRE units	=	Net change
116 units	-	69 units	=	+47 units

Habitat parcel	Risk factor
Measure of biodiversity quality	Value in biodiversity units

How is biodiversity net gain achieved?

- In order to achieve biodiversity net gain, developers are expected to:

(1) aim to avoid or reduce biodiversity impacts through site selection and layout;

(2) enhance and restore biodiversity on-site;

(3) create or enhance off-site habitats, either on their own land or by purchasing biodiversity units on the market, and;

(4) as a last resort to prevent undue delays, purchase statutory biodiversity credits from the UK Government where they can demonstrate that they are unable to achieve biodiversity net gain through the available on-site and off-site options.

Recent examples #1

- *Redwood (South West) Ltd v Waverley BC* [2022] P.A.D. 18:

124… The Environment Act 2021 requires a biodiversity net gain of 10%. The ecological report prepared by the Appellant, which includes a metricated assessment, suggests the site would achieve a net gain of over 20%. This figure is disputed by representors who suggest the development would result in a negative net gain in the region of -44%.

125. It appears that one of the main differences relates to the assessment of woodland condition. The baseline affects the level of enhancement that can be achieved and therefore the overall net gain. I take account of the fact that third parties have not had the opportunity to go onto the site and undertake detailed site surveys. Furthermore, the Appellant's assessment has been scrutinised independently and found to be sound. I also note that there is the opportunity for further enhancement on the adjacent land in the Appellant's ownership, which is to be used for the permissive path and circular walk. Whilst there may be differences in judgments, I have no reason to conclude that the metricated assessment undertaken by the Appellant is unreliable.

Recent examples #2

- *Bloor Homes South West Ltd v Wiltshire Council* [2022] P.A.D. 12:

41. Full on-site mitigation is not achievable. Compensation for residual harm is therefore required. In this regard, although The Environment Act 2021 has now passed, secondary legislation is required for it to be implemented. Therefore, the 10% biodiversity net gain requirement set out in the Act is not yet law and is not applicable to these appeals. Policy CP50 of the CS, and Paragraph 174 of the Framework, both seek a net gain in biodiversity without identifying a specific percentage. A net gain of just 1% would be policy compliant in these circumstances. This could be secured by a planning obligation."

What are the implications for major infrastructure projects?

- WSP, 'Financial & Economic Appraisal for Major Infrastructure Projects'.(March 2020):
  - *'The predicted costs of achieving 5%, 10% or 20% BNG outcomes for six major infrastructure projects is equivalent to around 1% of the capital costs of these schemes.'*
  - *'It should be noted that the type of major infrastructure project, its location, and the stage at which BNG is addressed within the scheme design, all impact on BNG costs. For example, for one of the schemes (a transmission scheme with comparatively low capital costs, affecting woodland habitat over a large geographical area), achieving 20% BNG was predicted to cost as much as 15% of the overall capital costs for the scheme.'*

Net Zero

- *R. (on the application of ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy* [2020] EWHC 1303 (Admin)
- *R. (on the application of Goesa Ltd) v Eastleigh BC* [2022] EWHC 1221 (Admin)
- *R. (on the application of Packham) v Secretary of State for Transport* [2020] EWCA Civ 1004

Discussion & Net Gain?