INTRODUCTION

Jonathan Darby

Welcome to this week's edition of our Planning, Environment and Property newsletter. It has again been a busy week, with our webinar series continuing apace, the publication of our second CIL bulletin (which looked at Reg 55, the new CIL deferral guidance, and how to keep open those options to ensure development fiscal flexibility), along with an update to our online summary of the key documents from the UK's planning and environmental regulators and government agencies regarding their responses to the COVID-19 pandemic[1] in light of the easing of certain relevant restrictions.

This week's edition comprises articles from Richard Wald QC and Gethin Thomas (the latest in our series of articles looking at various features of the Environment Bill); Stephen Tromans QC and Adam Boukraa (on a recent case that looks at the importance of adequate information to underpin screening decisions when considering planning applications for the development of contaminated land); and Celina Colquhoun (on the failure of ClientEarth's challenge to the Drax DCO).

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1 https://www.39essex.com/response-from-environmental-regulators-and-government-agencies-to-covid-19/

THE ENVIRONMENT BILL: A WASTED OPPORTUNITY?

Richard Wald QC and Gethin Thomas

Overview

The Government acknowledges that the sustainable use of material resources is now imperative. Its policy paper on the waste and resource management provisions of its Environment Bill ("the Bill") notes that:

> *Material resources are at the heart of our economy and we consume them in large quantities. They allow us to meet our basic human needs as well as generate economic growth and create social value. Our use of resources has become unsustainable however, which is causing harm to the natural environment and contributing to climate change. Economically, we are also at risk of fluctuating prices as a result of resource scarcity.*[2]

Moreover, in its 25-year plan, the Government has observed that:

> *…we must tread more lightly on our planet, using resources more wisely and radically reducing the waste we generate. Waste is choking our oceans and despoiling our landscapes as well as contributing to greenhouse gas emissions and scarring habitats.*[3]

In this short article we consider whether the Bill provides the 'radical' solution which is acknowledged here and elsewhere to be so urgently needed in order to set the UK on a course towards a so-called 'circular economy' in which resources are kept in beneficial use for as long as possible before they are recovered and regenerated.

Policy background, the scale of the challenge and the case for intervention

On 18 December 2018, the Department for Environment, Food & Rural Affairs ("DEFRA") issued its policy paper, 'Our waste, our resources: a strategy for England' ("the Strategy").[4] This was the first significant government statement in this area since the 2011 Waste Review and the subsequent Waste Prevention Programme 2013 for England. It set out to build on this earlier work, as well as to introduce new approaches to waste crime, and to problems such as packaging waste and plastic pollution. The Introduction of its Evidence Annex describes the scale of the challenge and the case for government intervention thus:

> *In England, latest estimates showed 41.3m tonnes of waste were sent to landfill in 2014. A further 27.7m tonnes goes to energy recovery, incineration or backfill. This wastes valuable resources, some of which cannot be replaced. Waste also imposes social costs such as environmental impacts. For example, landfilling of biodegradable material results in the generation of harmful greenhouse gases and transport of waste materials around the country causes local disamenity and atmospheric pollution.*

Recognising the importance of this problem, the Strategy set out the following five strategic ambitions:

(i) To work towards all plastic packaging placed on the market being recyclable, reusable or compostable by 2025;

(ii) To work towards eliminating food waste to landfill by 2030;

(iii) To eliminate avoidable plastic waste over the lifetime of the 25 Year Environment Plan;

(iv) To double resource productivity by 2050; and

(v) To eliminate avoidable waste of all kinds by 2050.

2 DEFRA, Policy paper: Waste and Resource efficiency factsheet (part 3) (13 March 2020), available online here: https://www.gov.uk/government/publications/environment-bill-2020/10-march-2020-waste-and-resource-efficiency-factsheet-part-3 (last accessed 26 May 2020).

3 DEFRA, 25-year Environment Plan (11 January 2018), available online here: https://www.gov.uk/government/publications/25-year-environment-plan.

4 Available online here: https://www.gov.uk/government/publications/resources-and-waste-strategy-for-england (last accessed 26 May 2020).

Draft provisions of the Bill relating to waste and resource management

Part 3 of the Bill contains draft provisions aimed at addressing the problem, arranged under four broad sections: (i) producer responsibility, (ii) resource efficiency, (iii) managing waste and (iv) waste enforcement and regulation, considered in turn below.

(i) Producer responsibility

Clauses 47 to 48, and schedules 4 to 5, confer secondary legislation making powers on the Secretary of State (in England), the Welsh Ministers, the Scottish Ministers or, in relation to Northern Ireland, the Department of Agriculture, Environment and Rural Affairs (referred to as the 'relevant national authority'), in respect of 'producer responsibility obligations' (clause 47 and schedule 4), and 'producer responsibility for disposal costs' (clause 48 and schedule 5). Clauses 47 and 48 make broad overarching provision in summary terms, whereas the detailed permissible scope of the powers is prescribed in the respective schedules.

First, with regard to 'producer responsibility obligations', para 1 of schedule 4 provides a 'general power' that the relevant national authority may exercise to impose producer responsibility obligations on specified persons in respect of specified products or materials. The regulations may be made only for the purpose of: (i) preventing a product or material becoming waste, or reducing the amount of a product or material that becomes waste; (ii) sustaining a minimum level of, or promoting or securing an increase in, the re-use, redistribution, recovery or recycling of products or materials. For example, para 2 of schedule 4 regulations may make provision about targets to be achieved in relation to the proportion of products or materials (by weight, volume or otherwise) to be re-used, redistributed, recovered or recycled (either generally or in a specified way).

Moreover, under part 1 of schedule 4, the regulations may make provision authorising *or requiring* persons who are subject to a producer responsibility obligation to become members of a compliance scheme, under which producer responsibility obligations of scheme members are discharged by the scheme operator on their behalf.

Enforcement is addressed by part 2 of schedule 4. Regulations may include provision conferring functions on an enforcement authority, including the monitoring of compliance, as well as powers of entry, inspection, examination, search and seizure. Regulations may also provide for the imposition of civil and criminal sanctions.

However, the Bill's enforcement powers are not without limit. The relevant national authority **must** exercise the power to make regulations in the way it considers best calculated to secure that they: (a) do not restrict, distort or prevent competition, or (b) any such effect is no greater than is necessary for achieving the environmental or economic benefits. The proposed legislation therefore allows the imperative of resolving the problems of waste to be attenuated by the competing imperative of the very thing which gave rise to those problems in the first place, commerce.

Secondly, schedule 5 confers power on the relevant national authority to make regulations requiring the payment of sums in respect of the costs of disposing of products and materials. The regulations may be made only for the purpose of securing that those involved in manufacturing, processing, distributing or supplying products or materials meet, **or contribute to,** the disposal costs of the products or materials. There is potentially a real difference between *meeting* disposal costs and merely *contributing* to them. The eventual extent of these costs will have a determinative impact on whether, as the Government intends, producers will be incentivised to design their products with re-use and recycling in mind.

"Disposal" of products or materials includes their re-use, redistribution, recovery or recycling. "Disposal costs" means such costs incurred in connection with the disposal of the products or

materials, as may be specified in the regulations. The relevant national authority must consult persons appearing to it to represent the interests of those likely to be affected. It will be important that the weight of industry opinion does not push the Government towards setting the disposal costs at too low a level, thereby impeding the measure's potential effectiveness.

Part 2 of schedule 5 confers a similar power on the relevant national authority to make provision about enforcement as under schedule 4.

(ii) Resource efficiency

First, clause 49, and schedule 6, provide that a relevant national authority may by regulations make provision for the purposes of requiring specified persons, in specified circumstances, to provide specified information about the resource efficiency of specified products. The regulations may impose requirements to provide information in relation to a product on a person only if the person is a person connected with the manufacture, import, distribution, sale or supply of the product.

"Information about resource efficiency" is defined in para 2 to schedule 6. It is (i) information relevant to the product's impact on the natural environment, and (ii) within a number of prescribed categories.

The regulations may include provision, for example, about how information about a product is to be provided (for example, by affixing a label to the product). There are further similar provisions for the enforcement of such regulations, as set out above. Again, much will turn on the detail of the eventual regulations. However, assisting consumers to identify products that are more durable, repairable and recyclable will no doubt assist consumers who are eco-conscious. Studies suggest that effecting change in the behaviour of those without such concerns for the environment will be much harder to achieve.[5]

Secondly, clause 50 and schedule 7, provide that the relevant national authority may by regulations make provision for the purposes of requiring specified products, in specified circumstances, to meet specified resource efficiency requirements, with provisions as to the enforcement of those requirements.

Before making such regulations, the relevant national authority must – (a) consult any persons the authority considers appropriate, and (b) have regard to:

a. the extent to which the regulations are likely to reduce the product's environmental impact;
b. the environmental, social, economic or other costs of complying with the regulations;
c. whether exemptions should be given, or other special provision made, for smaller businesses.

The requirement to have regard to the 'economic or other costs' of complying with the regulations also introduces here, as noted above, a commercial counter-balance which risks diluting the beneficial impact of the regulations if too much weight is given to the economic or other costs of compliance.

Thirdly, under clause 51 and schedule 8, the relevant national authority may by regulations establish deposit schemes for: (a) sustaining, promoting or securing an increase in the recycling or reuse of materials; (b) reducing the incidence of littering or fly-tipping whereby a recoverable deposit is paid on relevant materials. Enforcement provisions may, as above, provide for civil and criminal sanctions.

Finally, clause 52 and schedule 9, confer regulation making power on the relevant authority to make regulations about charges for single use plastic items, in a similar manner as is currently in place for plastic carrier bags. Clause 53 amends

5 Gordon Robert Foxall (1995),"Environment-Impacting Consumer Behavior: an Operant Analysis", in NA - Advances in Consumer Research Volume 22, eds. Frank R. Kardes and Mita Sujan, Provo, UT : Association for Consumer Research, Pages: 262-268.

schedule 6 to the Climate Change Act 2008, which provides for the power to impose the carrier bag charge in England and Northern Ireland, so as to require sellers to pay fees in connection with the scheme.

(iii) Managing waste

Clauses 54 to 60 would, in short, amend the Environmental Protection Act 1990 to: (i) make provision for the separate collection of household waste, (ii) establish an electronic waste tracking system, (iii) make broad provision for the regulation of hazardous waste, and (iv) make provision for the regulation of the importation or exportation of waste, or the transit of waste for export, respectively.

Subject to the detail to be set out in the regulations, this is potentially a significant step forwards in terms of the modernisation of the process of the collection of waste data.

(iv) Waste enforcement and regulation

Clauses 61 and 62 make provision for powers to make charging schemes as a means of environmental regulators recovering costs incurred by them in performing functions in respect of producer responsibility obligations, pursuant to schedule 4 of the Bill. Clauses 63 to 68 and schedule 10 amend legislation regarding enforcement powers in relation to waste and other environmental matters.

A wasted opportunity or valuable resource?

Undoubtedly, the Bill contains some welcome signs of a more progressive approach to the problems of waste and resource management.

First, the introduction of a system of extended producer responsibility obligations could be transformative, if the Government keeps to its objective that producers are to *'bear the full net cost of managing their products at the end of their life, including impacts on the environment and society…'* This reflects the overarching 'polluter pays' principle, which in this context, aims to ensure that those who place on the market products which become waste to take greater responsibility for the costs of disposal.

Currently, producer responsibility regulation only govern packaging, electrical and electronic equipment (EEE), batteries and end of life vehicles (ELVs). The Government has identified five further categories of waste as priorities: (i) textiles, (ii) bulky waste (such as mattresses, furniture and carpets, (iii) certain materials in the construction and demolition sector, (iv) vehicle tyres and (v) fishing gear.[6] Construction, demolition and excavation (CD&E; including dredging) generated around three fifths (62%) of total UK waste in 2016,[7] and as such, whilst the sector's inclusion as one of the five priorities is welcome, the detail of the regulations is crucial. Moreover, it will be important that the process of consulting those affected by the regulations (as required by the Bill) does not result in a watering down of the latent ambition that is present in the producer responsibility provisions.

Secondly, the provision for obligations imposed on producers to meet specified resource efficiency requirements in respect of particular products, in specified circumstances could, if applied to its full potential across a broad range of products, have a significant impact. As the Government recognises, too many products are discarded before their useful life is over.[8] Minimum requirements for resource efficiency could result in a significant shift towards a circular economy, and a more sustainable use of resources. Again, it will be important to ensure that the paying polluter does not result in modest secondary legislation.

6 DEFRA, *Our waste, our resources: a strategy for England* (18 December 2018), available online here: https://www.gov.uk/government/publications/resources-and-waste-strategy-for-england (last accessed 26 May 2020).

7 DEFRA and Government Statistical Service, UK Statistics on Waste (19 March 2020), available online here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/874265/UK_Statistics_on_Waste_statistical_notice_March_2020_accessible_FINAL_rev_v0.5.pdf.

8 DEFRA, *Our waste, our resources: a strategy for England* (18 December 2018), p 30 available online here: https://www.gov.uk/government/publications/resources-and-waste-strategy-for-england (last accessed 26 May 2020).

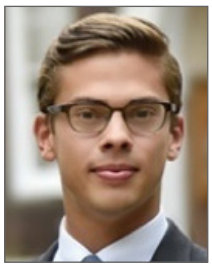
However, whether these provisions prove capable of addressing the urgent challenges of waste and resource management hinges on the extent to which the commercial counter-balances built into them stand in the way of their effectiveness. The requirements that (i) the costs of compliance be considered in respect of resource efficiency requirements, and (ii) producer responsibility obligations avoid the restriction, distortion or prevention of competition (referred to above), could well temper the Government's stated ambition. The key issue is that, despite the short or medium-term cost to the economy, fundamental changes to both production and management of materials at the end of their life, are required. This is not addressed head-on in the Bill.

Furthermore, the provisions on plastic waste are limited, and a cause for disappointment. The Government has pledged, in its 25 Year Environment Plan, to eliminate avoidable plastic waste over the lifetime of the plan and the UK Plastics Pact, led by the charity WRAP, a coalition whose members cover the entire plastics value chain, has committed to eliminating problematic or unnecessary single-use packaging by 2025.[9] The Bill could have provided a vehicle to introduce a ban on single use plastics, rather than making provision for a charging scheme. This is too slow a place to achieve the Government's own target of the elimination of avoidable plastic waste by 2042.[10]

The reality is that here as with many of the Bill's provisions, the true scale of the Government's ambition will not be known until the various draft regulations, empowered by the Bill, are promulgated. That crucial detail is unknown, and as such, whether or not the Bill proves to be a wasted opportunity for a necessary revolution in waste and resource management regulation towards a circular economy is yet to be determined. Like the Bill as a whole, the efficacy of its waste and resource management provisions may be jeopardized by the extent of discretion left to the relevant national authorities, and therefore the vagaries of political preferences at a given point in time.

Conclusion

The Bill falls short of providing the radical solution to the urgent challenges of waste and resource management, but does provide for secondary legislation which, with the requisite level of ambition, could make progress towards tackling the problem, and carrying the UK towards that ever elusive circular economy.



ENVIRONMENTAL IMPACT ASSESSMENT AND CONTAMINATION: SCREENING

Stephen Tromans QC and Adam Boukraa

The High Court decision in *R (Swire) v Secretary of State for Housing, Communities and Local Government* [2020] EWHC 1298 (Admin) provides a useful example of the importance of adequate information to underpin screening decisions when considering planning applications for the development of contaminated land. Here the developer applied for outline planning permission for residential development of a site used as a saw-mill and later as an animal rendering plant. During the 1990s, it had been one of four sites in the UK licensed by DEFRA to dispose of cattle infected with bovine spongiform encephalopathy, which resulted in the outbreak of Creutzfeldt-Jakob disease (CJD) in humans. It had been disused for more than ten years. However, its permit for animal carcass rendering was still in force.

Lang J quashed the permission on the basis of a defective screening process. Applying the principles established in the case law, she held

9 Available online here: http://www.wrap.org.uk/content/the-uk-plastics-pact

10 DEFRA, 25-year Environment Plan (11 January 2018), available online here: https://www.gov.uk/government/publications/25-year-environment-plan

that a screening authority must have sufficient evidence of the potential adverse environmental impacts and the availability and effectiveness of the proposed remedial measures, to make an informed judgment that the development would not be likely to have significant effects on the environment, and that therefore no EIA is required. In this case she noted that there was very limited evidence as to the presence and nature of contamination from BSE-infected carcasses at the site; as to the hazards which any such contamination might present for the homes and gardens to be constructed on the site; and as to any safe and effective methods of detecting, managing and eliminating any such contamination and hazards. The developer had commissioned risk assessment and remediation reports which were submitted to the local authority in support of the application for planning permission. However, none of these reports made any reference to the site's former use for BSE-infected animal carcass disposal from 1998, nor any risk of contamination from such use. Indeed, the authors of the reports were not even aware of this former use. The judge said:

> *"In my view, the reports were very inadequate in this regard. The information was available in the public domain, the BSE crisis had occurred within living memory, and it was well-known in the locality, as demonstrated by the objections made by the Claimant and others to the planning application."*

The judge also noted that the absence of evidence of BSE-related contamination in the Ground Investigation and Generic Risk Assessment undertaken for the developer "was far from conclusive". It was a "basic, initial document" which itself acknowledged that it "is by no means exhaustive and has been devised to provide an initial indication of potential ground contamination". The summary in the report said that "a comprehensive site investigation and risk assessment would ultimately be required". The entire property was more than 7 acres in size, and only 8 trial pits were assessed. Moreover, it was not confirmed that BSE-related contamination could or would have been identified by the tests which were carried out for the other contamination risks which the reports had identified. The Council's screening opinion accepted the potential risk of BSE-related contamination of the site, both for workers during the construction process and future residents. It stated that "[s] pecialist advice will be sought to consider the remediation of Prions associated with CJD/ BSE". The Council's approach was to impose a series of stringent environmental conditions to ensure that development would not begin until a scheme to deal with contamination of land and groundwater had been submitted and approved by the local planning authority and until measures approved in the scheme had been implemented. Although the Defendant Secretary of State had correctly recognised that the issue of BSE-related contamination required further investigation, assessment, and remediation of any contamination found, he then applied the wrong legal test and thus committed the errors identified in *Gillespie v First Secretary of State* [2002] EWCA Civ 400, at [41] and [46]. See per Laws LJ at para. 46 in that case:

> *"46. …..Where the Secretary of State is contemplating an application for planning permission for development which, but for remedial measures, may or will have significant environmental effects, I do not say that he must inevitably cause an EIA to be conducted. Prospective remedial measures may have been put before him whose nature, availability and effectiveness are already plainly established and plainly uncontroversial; though I should have thought there is little likelihood of such a state of affairs in relation to a development of any complexity. But if prospective remedial measures are not plainly established and not plainly uncontroversial, then as it seems to me the case calls for an EIA. If then the Secretary of State were to decline to conduct an EIA, as it seems to me he would pre-empt the very form of enquiry contemplated by the Directive and Regulations; and to that extent he would frustrate the purpose of the legislation."*

As Lang J stated (para. 106):

> *"There was a lack of any expert evidence and risk assessment on the nature of any BSE-related contamination at the Site, and any hazards it might present to human health. The measures which might be required to remediate any such contamination and hazards had not been identified. This was a difficult and novel problem for all parties to address. It was acknowledged by the Council in its screening opinion, acting on the advice of the Environmental Health Practitioner, that specialist advice would be needed to consider the remediation of prions associated with CJD/BSE. Therefore condition 21 merely referred to the requirement that a written method statement for the remediation of land and/or groundwater would have to be agreed by the Council without any party knowing what the remediation for BSE-related infection might comprise. The Defendant adopted the Council's approach in his screening opinion. But because of the lack of expert evidence, the Defendant was simply not in a position to make an "informed judgment" (per Dyson LJ in **Jones**, at [39]) as to whether, or to what extent, any proposed remedial measures could or would remediate any BSE-related contamination. It follows that when the Defendant concluded that "he was satisfied that the proposed measures would satisfactorily safeguard and address potential problems of contamination" and that "the proposed measures would safeguard the health of prospective residents of the development", he was making an assumption that any measures proposed under condition 21 would be successful, without sufficient information to support that assumption. As Pill LJ said in **Gillespie**, at [41], "the test applied was not the correct one. The error was in the assumption that the investigations and works contemplated in condition VI could be treated, at the time of the screening decision, as having had a successful outcome". Whilst "not all uncertainties have to be resolved" (per Dyson LJ in **Jones** at [39]), on the facts this case was not one "where the likely effectiveness of conditions or proposed remedial or ameliorative measures can be predicted with confidence" (per Pill LJ at [34]). As the Site was proposed for residential housing, a higher standard of remediation would be required than if it were intended to adapt it for an industrial use, or merely to decontaminate it and return it to woodland (some sites will never be suitable for residential housing, because of industrial contamination)."*

In conclusion, Lang J considered that the Defendant had made the same error as in the *Gillespie* case, and thus his decision that EIA was not required was vitiated by a legal error. The Defendant's decision in this case had important consequences – it is not merely a technical or procedural error – and therefore it had to be quashed.

CLIENTEARTH CHALLENGE TO DRAX DCO FAILS

Celina Colquhoun

Case Summary

On 22 May the Hon Mr Justice Holgate handed down (remotely) his judgment in the challenge by ClientEarth to the Secretary of State's decision to grant Drax Power Ltd's application for a DCO for two gas fired generating units at an existing power station in North Yorks: see *R(oao ClientEarth) v SofS BEIS and Drax Power Ltd* [2020] EWHC 1303.

Case Analysis

The DCO decision was taken contrary to the recommendation of the Examining Authority (the ExA) or the panel which had recommended refusal.

It is clearly not the first time that a Secretary of State has disagreed with the assessment of the appointed ExA. Whilst the focus in respect of the challenge to the refusal of the Preesall DCO in *R (oao Halite Energy Group Ltd) v Secretary of State for Climate Change and Energy* [2014] EWHC 17 (Admin)) was on the nature of the examination itself, the ExA's recommendation had been to grant the DCO, but the SofS disagreed and refused the DCO.

There are a number of specific issues that are striking about the challenge brought under s.118 of the Planning Act 2008.

These issues may be summarised as follows:

(i) The main focus of the Claimant's 9 grounds of challenge involved about the interpretation and effect of EN-1 Overarching Energy NPS for Energy and EN 2 the Fossil Fuel Electricity Generating Infrastructure NPS which had been designated in 2011.

(ii) The Claimant contended that the SofS had not properly understood those NPSs in respect of the need for infrastructure of the type proposed and whether such need had been established on a qualitative or quantitative basis

(iii) The claim concerned the correct approach under the NPSs to a finding that the facility would have significant adverse impacts in respect of Green House Gas ("GHG") emissions in light of climate change issues, including the question of any need for additional monitoring requirements in light of the GHG permitting regime

(iv) The correct approach to Carbon Capture Readiness ("CCR")

(v) Whether the SofS had correctly dealt with amendment to the Climate Change Act 2008 in June 2019 that occurred after the examination had ended and which introduced the Net Zero target.

On the first issue, Holgate J drew on the decision of the Divisional Court (Hickinbottom LJ and Holgate J) in the Heathrow runway NPS challenge under s.13 of PA 08 in *R(oao Spurrier) v SofS Transport* [2020] P.T.S.R. 240 to the effect that the *"2008 Act proceeds on the legal principle that significant changes in circumstances affecting the basis for, or content of, a policy may only be taken into account through the statutory process of review under s.6* [of PA 08]"(Spurrier at [108]). Once designated, the ExA and the SofS can disregard representations in respect of an application for a DCO which are considered to *"relate to the merits of policy set out in a national policy statement"* (see sections 87(3), 94(8) and 106(1) PA 08).

The Court noted that sections104 (2) and (3) mean the SofS must not only "have regard to (inter alia) a relevant NPS" but *"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"*. S.104(7) provides for the weighing of *"the adverse impact of the proposed development"* against *"its benefits"* and where that impact does outweigh the benefits, then the exception to s.104(3) is met.

The decision emphasises the differences between the statutory provisions in the PA 2008 with the different statutory mechanism under the Town and Country Planning Act 1990 regime and the role of the NPPF as a material consideration, with frequent and familiar debates about whether or not a planning policy is 'up to date' and whether that has an impact upon the weight to give to that policy. The question of whether an NPS is considered to be up to date does not apply under the PA 2008. The judgment is consistent with earlier rulings in *R(Thames Blue Green Economy Limited) v Secretary of State for Communities and Local Government* [2015] EWHC 727 (Admin); [2015] EWCA Civ 876; [2016] J.P.L. 157; *R(Scarisbrick) v Secretary of State for Communities and Local Government* [2017] EWCA Civ 787; and *Spurrier itself* that there is no room for that sort of debate within the decision making process of the PA 2008 regime.

As to the differing interpretations of the NPSs by the ExA and the SofS on need, Holgate J concluded that the interpretation of the SoS and Drax was correct. ClientEarth's case before the examination was that there was no need for the proposal (or indeed any new-build large gas power capacity in order for the UK *"to achieve energy security"*) and this was based upon, inter alia, considering more recent Updated Energy and Emissions' projections ("UEP") than those used at the time EN1 and 2 were designated.

The SofS concluded that the ExA panel which had been wrong to consider the case for need for individual energy projects such as the Drax proposal on a quantitative basis and had misunderstood the NPS which established the need for such development. Holgate J held that the SofS's interpretation was correct.

Reading EN-1 as a whole it was plain in the learned judge's view *"that the NPS… does not require need to be assessed in quantitative terms for any individual application"* [129] but that a more qualitative approach to need was contained within it. There was therefore *"no justification for the Panel to have regard to the 2017 UEP projections in order to assess the contribution of the Drax proposal to meeting the qualitative need identified in the NPS. Likewise, an analysis of the consents for gas-fuelled power stations was irrelevant for that purpose. Moreover, the Panel's assessment was benchmarked against the 2017 UEP projections, which self-evidently do not form the basis for the policy contained in EN-1"[130].* Holgate J ultimately concluded that the *"case advanced by ClientEarth was a barely disguised challenge to the merits of the policy"* and should therefore be rejected.

In addition, ClientEarth had argued that in light of the differing interpretations given to the NPS by the panel as compared with those of the SofS, this gave rise to a *"heightened obligation to give fuller reasons"* for her decision to grant the application contrary to the panel's recommendation. Holgate J concluded that the reasons were legally adequate based on the normal approach.

Turning then to the third main issue, the conclusions with regard to the need case had in effect allowed the SofS to give substantial weight to the benefits of the facility in accordance with the NPS.

The panel had taken a different approach to need as noted and then weighed that with certain negative landscape and climate change impacts, including in particular a significant adverse impact from a significant increase in GHG emissions. The Claimant argued that the SofS, when it came to consider the latter, had also misinterpreted the NPS and had treated the impact as 'irrelevant' or of no weight.

Holgate J rejected this as a matter of fact but went further noting that *"the policy in the NPSs makes it clear that GHG emissions are "not a matter which should displace the presumption in favour of granting development."[171].* The judge had noted that the *"rationale for that statement is that such emissions are adequately addressed by the regimes described in section 2.2 of EN-1"* [169] and there had *"been no challenge to the legality of that part of EN-1)"*. The learned judge then went on to refer to *"established case law on the significance of alternative systems of control (see e.g.* ***Gateshead Metropolitan Borough Council v Secretary of State for the Environment*** *(1996) 71 P & CR 350) and, to some extent, by Regulation 21(3)(c) of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017 No. 572)".*

This again is familiar ground in respect of decisions under the 1990 Act, as reflected in para 183 of the NPPF i.e. avoiding the duplication of controls in planning decision and the point was returned to in respect of Ground 6.

This related to the absence of the imposition of a requirement on the DCO in respect of monitoring GHG (and other) emissions which the Claimant argued was required to comply with the 2017 Regulations which requires consideration be given to such measures before deciding a DCO application.

The point was pursued despite the absence of such a submission to the ExA and in face of the fact that Drax would be required to obtain Greenhouse Gas Permit from the Environmental Agency under the **Greenhouse Gas Emissions Trading Scheme Regulations 2012** (SI 2012 No. 3038) to deal with GHG emissions from the proposed development in any event, which requires an applicant to show the EA that it will be able to monitor and report and have a plan to do so under the Permit.

Holgate J rejected this ground not only on anti-duplication grounds but also went further in his analysis (no doubt the given the significance of GHG emissions), and concluded that even if he had concluded that there had been a failure to consider a monitoring requirement, no real prejudice had been caused by the alleged breach of the 2017 Regulations (Reg 2); applying s.31(2A) of the Senior Courts Act 1981 he stated "[g]*iven the need for compliance with the GHG permitting regime and for the other reasons set out above" he was "satisfied that if the monitoring of GHG emissions under the DCO had been addressed during the examination or in the Secretary of State's consideration of it is highly likely that the outcome would not have been substantially different. The DCO would still have been granted and there is no reason to think, on the material before the court, that GHG monitoring would have been included as an additional requirement of the order. Nothing has been advanced which would justify the grant of relief in reliance upon s.31(2B)"* [219].

ClientEarth also highlighted the SofS's use of a particular phrase when deciding not to give greater weight to the GHG emissions point, namely she found there to be *"no compelling reason in this instance"*. It was submitted that this had improperly introduced a threshold test.

Holgate J rejected this contention as well on the basis that it was *"an overly legalistic approach to the reading of a decision letter"*.

In terms of CCR, it a policy requirement based upon Art 33 of the **Geological Storage of Carbon Dioxide** (Directive 2009/31/EC), transposed into domestic law by **the Carbon Capture Readiness (Electricity Generating Stations) Regulations 2013** (SI 2013 No. 2696) that the SofS may not make a DCO construction of a "combustion plant" (as defined) with a rated electrical output of 300 MW or more unless she has determined whether "the CCR conditions" are met in relation to that proposal. These include showing that *"sites suitable for the storage of carbon dioxide emissions from the plant are available, and that it is technically and "economically feasible" to retrofit the plant necessary to capture those emissions and to transport them to those storage sites"* [185].

ClientEarth complained that the evidence produced by Drax at the examination as to the economics of the scheme had not demonstrated that the scenarios were 'reasonable' and that this was crucial to the decision.

Holgate J rejected this ground stating it *"should not have been raised"* [197]. Amongst other things, the Claimant had not raised this matter before the ExA and in fact appeared to have commented favourably about the evidence from Drax as to *"detailed assessment of the future economics"*.

The final part of the judgment deals with grounds 7 and 8 (9 was withdrawn) and the change to the CCA and Net Zero Target which happened after the end of the examination and just before the panel's report was submitted. The panel stated that this was a matter wholly for the SofS as it had not formed part of their examination.

Drax had made submissions as a result of the change in a letter – but the SofS stated that she had not considered its contents and then concluded as follows with regard to the impact of Net Zero [226]:

> *"(i) The policy in the NPSs had not been altered by the amendment to the CCA 2008 and still remained the basis for decision-making under the 2008 Act;*
>
> *(ii) The UK's target of an 80% reduction in GHG emissions had been taken into account in the preparation of the energy NPSs;*
>
> *(iii) The net zero target was not in itself incompatible with those policies, given that there was a range of potential pathways that will bring about a minimum 100% reduction in GHG by 2050;*
>
> *(iv) Developments giving rise to GHG emissions are not precluded by the NPSs provided that they comply with any relevant NPS policy supporting decarbonisation of energy*

infrastructure, such as CCR requirements. Potential pathways may rely in future on other infrastructure or mechanisms outside the planning regime to offset or limit those emissions to help achieve net zero;

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

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

ClientEarth's complaints were not so much based on the substance of the decision in this regard but in respect of procedural fairness – in short ClientEarth argued that there should have been an opportunity granted to make submissions on this matter to the SofS; that her conclusions were wrong and that the advice given to her by her own advisers should have been made public.

These grounds too were rejected. In doing so Holgate J returned to the point that ClientEarth's case centred in reality upon what was set out in the NPSs. As noted, such a case challenging a NPS can only be run on the basis of a separate statutory challenge in respect of the need for a review or indeed at the point of designation of a NPS.

There is clearly a lot of significance in this judgment for those involved in DCOs and in particular the application of NPSs designated some time ago, but there are also some interesting parallels to draw with the 1990 Act planning regime and indeed the wider issues of climate change and future development.

Watch this space!

James Strachan QC of 39 Essex Chambers appeared for Drax in the High Court

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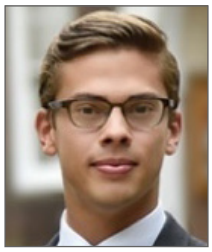

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