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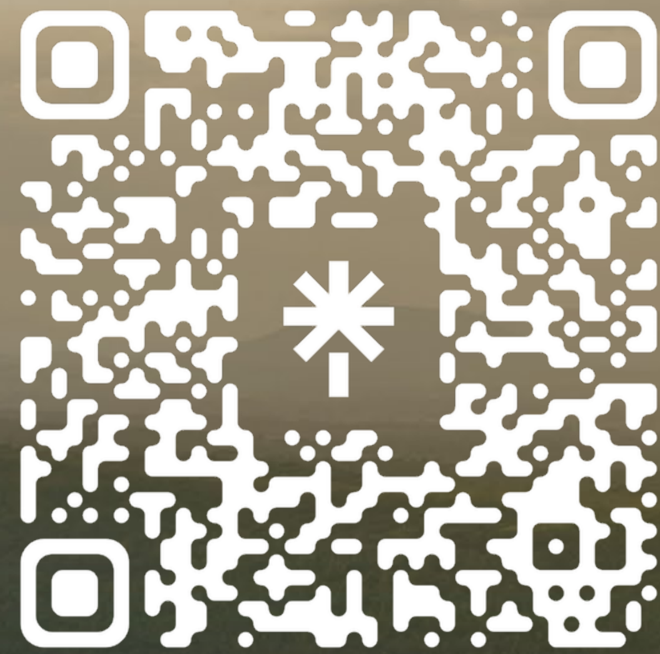

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Environment and Energy Seminar 2026

9.15am – 1pm • Thursday 5 March

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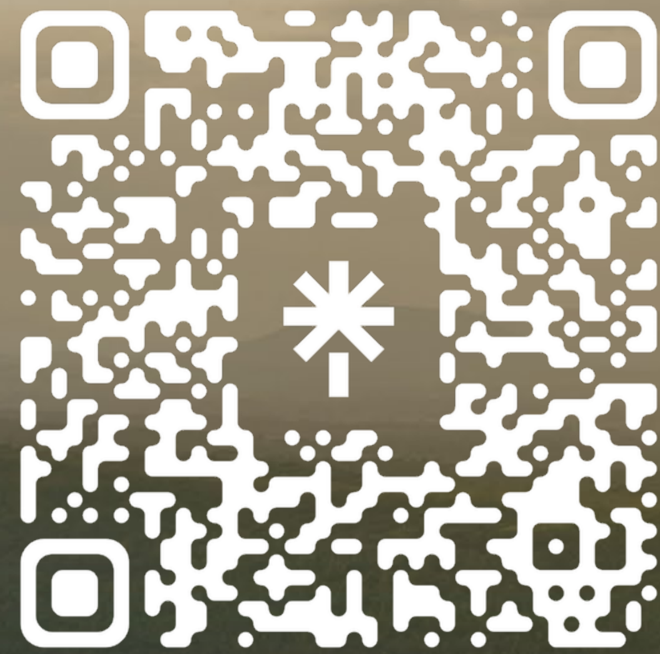

Nigel Pleming KC

Thomas Hill KC

Opening Remarks

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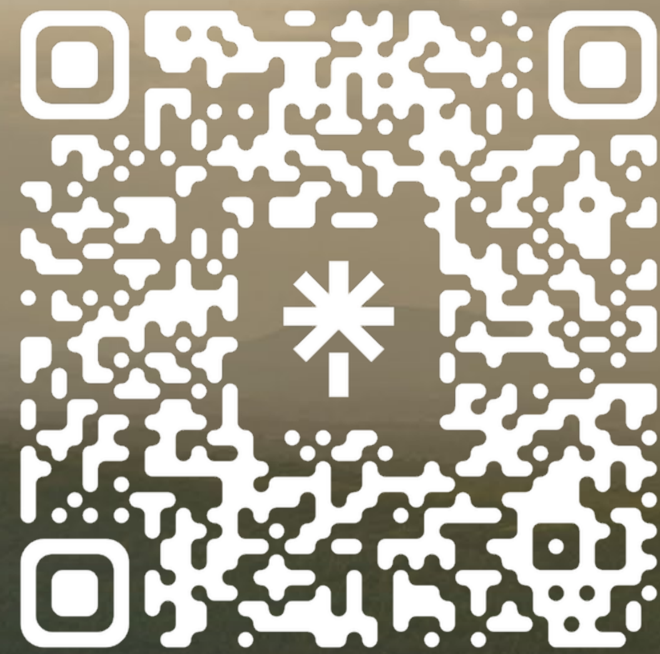

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Eleanor Leydon

Ella Grodzinski

Environmental Aspects of NPPF

NEW NPPF: KEY OVERARCHING POINTS

- Root and branch reform, to 'hardwire' new rules
- Pro-growth
- But also seeks to have tighter control over local planning through NDPs
- Consultation document, p.9:

*"…to hard-wire a set of **clear, more rules-based policies** into the Framework. Changes which are designed to make planning policy **easier to use**, underpin the development of **faster and simpler local plans**, and be more **directive of decision-making** in support of both appropriate housing and commercial development…"*

- Consultation closes 10 March
- Not yet final policy – for now, the policies are likely to be material considerations but attract limited weight

RE-WORKED STRUCTURE OF CHAPTERS

4. Achieving sustainable development

The objective of the policies in this chapter is to meet development needs through sustainable patterns of development, including by maximising the potential for growth on suitable land within settlements, enabling development which will support the rural economy, rural communities and the provision of infrastructure, and limiting development away from settlements to help safeguard the intrinsic character and beauty of the countryside.

Plan-making policies

S1: Positive plan-making

1. The development plan should plan positively for future growth and change by:

   a. Seeking to meet the development needs of their area as a minimum. For spatial development strategies, and for local plans where a spatial development strategy is not in place[22], this means providing for objectively assessed needs for housing and other uses (including supporting infrastructure), as well as any needs that cannot be met within neighbouring areas, unless:

      i. the application of the policies in this Framework that protect areas or assets of particular importance[23] provides a strong reason for restricting the overall scale, type or distribution of development in the plan area; or

      ii. any adverse impacts of doing so would substantially outweigh the benefits, when assessed against the policies in this Framework taken as a whole.

   b. Providing for new development, and improvement of the environment, in a way which promotes a sustainable pattern of growth and seeks to mitigate climate change and adapt to its effects.

S2: Producing a spatial strategy

1. The development plan should set out a spatial strategy setting clear expectations for the location of development and where land should be protected or enhanced for specific purposes, by identifying at an appropriate scale:

National decision-making policies

S3: Presumption in favour of sustainable development

1. Decisions on development proposals should apply a presumption in favour of sustainable development. This means:

   a. Policy S4 in this Framework should be applied when considering development proposals within settlements;

   b. Outside settlements, policy S5 should be applied; and

   c. In all locations, development proposals that accord with an up-to-date development plan and also the decision-making policies in this Framework should be approved without delay.

S4: Principle of development within settlements

1. Development proposals within settlements should be approved unless the benefits of doing so would be substantially outweighed by any adverse effects, when assessed against the national decision-making policies in this Framework.

2. In applying policy S4, the circumstances in which the benefits of approving development are likely to be substantially outweighed by adverse effects include (but are not restricted to) situations where the development proposal would:

   a. Have an unacceptable impact in relation to:

      i. the allocation or safeguarding of land for particular uses in the development plan, unless there is no reasonable prospect of an application coming forward for the

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RESTRUCTURING OF CHAPTERS ON KEY ENVIRONMENTAL ISSUES

- Chapter 5 – meeting the challenge of climate change
- Chapter 10 – securing clean energy and water
- Chapter 17 – pollution, public protection and security
- Chapter 18 - Managing flood risk and coastal change
- Chapter 19 - Conserving and enhancing the natural environment

CHAPTER 5 – MEETING THE CHALLENGE OF CLIMATE CHANGE

Objective: *The objective of the policies in this chapter is to support the transition to net zero by 2050 and to shape places in ways which are more resilient to the effects of climate change. It does this by setting out policies to shape places in ways that contribute to radical reductions in greenhouse gas emissions and adapt to the full range of current and potential impacts of climate change, by minimising vulnerability and improving resilience.*

CHAPTER 5 – MEETING THE CHALLENGE OF CLIMATE CHANGE

Plan-making policy – CC1 – planning for climate change

- 1.Development plans should take a **proactive approach** to **mitigating** climate change and supporting the transition to net zero30. They should also take a **proactive approach** to **adapting** to climate change, taking into account the implications of extreme weather and long-term climate trends including overheating, **wildfires**, drought, flood risk, coastal change, water supply, biodiversity and landscapes. **They should do this by:**
- a. Proposing development patterns through their spatial strategy and allocations which:
- i. can help contribute to radical reductions in greenhouse gas emissions (**which can be informed by an assessment of baseline carbon emissions and the potential effect of development options on future emissions and their mitigation**); and ii. avoid increased vulnerability and improve resilience to the effects of climate change (including through providing for necessary infrastructure improvements and the future relocation of homes and other uses where public safety would be at risk, for example as a consequence of coastal change);
- b. Addressing any specific risks from climate change in their proposed allocations for development, and necessary adaptations, both of which should be considered for the anticipated lifetime of the development;
- c. Setting **local water efficiency standards** for new development **where these are justified in accordance with policy PM13**; and
- d. Identifying **opportunities for green infrastructure provision** and **nature-based solutions which can safeguard and improve carbon storage, support nature recovery and resilience, and which take account of Local Nature Recovery Strategies in accordance with policy N1**.

CHAPTER 5 - NATIONAL DECISION-MAKING POLICIES

- **CC2**: **Mitigation of climate change**
- 1. In order to contribute to climate change mitigation and the transition to net zero, development proposals should, where relevant to the proposal:
- a. Be located where a genuine choice of sustainable transport modes exists, and improve opportunities for walking, wheeling, cycling and public transport, in accordance with policies TR3 and TR4;
- b. Support good access to facilities to limit the need to travel, whether through the development's location, through development densities which improve catchment populations for local services, or by incorporating community facilities and premises to support local employment opportunities;
- c. Use design approaches which conserve energy and other resources in accordance with policy DP3(1)(c);
- d. Take advantage of opportunities to re-use existing structures and materials, including by re-using non-contaminated excavated soil and hardcore within the site;
- e. Take advantage of opportunities to draw low carbon energy from decentralised networks (such as district heat networks), where these are available, and to co-locate energy and heat generators and users, especially to take advantage of suppliers of surplus heat and energy;
- f. Contribute to the creation or restoration of habitats which can act as carbon stores, such as through woodland planting and peatland restoration, while avoiding harm to habitats which can act as important carbon stores, including peatland and salt marsh; and
- g. **Not increase the extraction of fossil fuels unless it is in accordance with policy M5**.
- 2. **Substantial weight** should be given to the benefits of improving the energy efficiency of existing buildings and/or drawing energy from district heat networks, renewable and low carbon sources (including through the installation of heat pumps and solar panels where these do not already benefit from permitted development rights).

- **CC3**: **Adaptation to climate change**
- Development proposals should **take into account** the **current and potential impacts of climate change over the lifetime of the scheme**, and in order to minimise vulnerability to these impacts should, where relevant to the proposal:
- a. Be located where the risk of flooding is minimised, or can be managed and the development made safe without increasing risk elsewhere, in accordance with policies F4, F5, F6, F7 and F8;
- B. Comply with policy F9 where development would be located in an area vulnerable to coastal change;
- C. incorporate sustainable drainage systems to manage surface water flow rates and reduce volumes of runoff in accordance with policy F8;
- D. Use design approaches which minimise risks from overheating in accordance with policy DP3(1)(c), and include green infrastructure and suitable tree planting in accordance with policies DP3(1)(d) and N3; and
- E. Where development is, or is likely to be, at heightened risk from wildfires – such as where it is located adjacent to land used for agriculture, heathland or woodland – proposals should incorporate suitable mitigation measures, where possible, to reduce fuel loads and create defendable spaces (for example avoiding fire pathways such as fences, and incorporating firebreaks into development layouts and planting schemes).

CHAPTER 19 – CONSERVING AND ENHANCING THE NATURAL ENVIRONMENT

- **Objective**: *The objective of the policies in this chapter is to influence the design and location of new development to help drive nature's recovery and contribute to wider environmental outcomes, safeguarding our most important habitats, species and landscapes and recognising the centrality of natural capital to delivering sustainable growth*

- ***ConDoc****:* The chapter has been revised to incorporate new legal requirements within the planning system and align with current approaches to working with nature, including a stronger focus on green infrastructure and nature-based solutions

- 1x plan-making policy, 5x national decision-making policies

CH19 – PLAN-MAKING – N1: IDENTIFYING ENVIRONMENTAL OPPORTUNITIES AND SAFEGUARDS

- 1. plans should safeguard and enhance the natural environment, and reflect the wider benefits from natural capital and ecosystem services, **by using Local Nature Recovery Strategies, Protected Landscape Management Plans, River Basin Management Plans, National Forest Strategies, Community Forest Plans and other relevant evidence** at the most appropriate level to:
- a. Set out the **hierarchy of international, national and locally designated sites** and areas of importance for their landscape, geological (including soil) or biodiversity value in the plan area, and identify other features which require particular consideration in managing development due to their environmental value such as chalk streams;
- b. Identify opportunities for the conservation, enhancement and recovery of landscapes, sensitive waterbodies, habitats and species of principal importance, including through habitat restoration, the use of **nature-based solutions**, and the **creation and strengthening of ecological networks** that are more resilient to current and future pressures (**including opportunities which exist at a catchment or landscape scale across plan boundaries**);
- c. Steer the location of development, including through site allocations, in ways which utilise land of least environmental value where that would be consistent with other policies in the NPPF. This should include limiting the scale and extent of development within protected landscapes, avoiding the use of higher quality agricultural land where land of poorer quality is available and avoiding and minimising harm to designated sites of importance for nature. Areas which could become of particular importance for nature identified in LNRSs should be taken into account as opportunities to integrate development with environmental restoration, but should not necessarily preclude the allocation of land for development; and
- d. Set out **standards for green infrastructure provision**, in a way which complements/incorporates those for recreational land (as set out in policy HC1)
- 2. BNG: Development plans should only set local standards for BNG which are in excess of the statutory net gain requirement where this is for **specific site allocations**, and is **fully justified and deliverable**. Any such requirements should not extend to categories of development which are exempt from statutory BNG.

CHAPTER 19 – NATIONAL DECISION-MAKING POLICIES

- **N2**: **Improving the natural environment**
- (1) sets out what proposals 'should' do to contribute positively to the natural environment and support nature's recovery
  - As specified In (a)-(g)
- 1(c) Builds on existing policies, and evolves, e.g. 'Take suitable opportunities to connect to and strengthen ecological networks that extend beyond the site, drawing on the measures proposed by Local Nature Recovery Strategies, National Forest Strategies and Community Forest Plans, where present, and other relevant assessments'
- **(1)(f) New requirement for proposals to incorporate swift bricks / 'integrated nest boxes':** Minimise impacts on biodiversity and include features for species which support priority or threatened species such as swifts, bats and hedgehogs. Development proposals should incorporate integrated nest boxes (commonly known as swift bricks) into their construction unless there are compelling technical reasons which prevent their use, or would make them ineffective

- **(2)** If significant harm to biodiversity resulting from a development cannot be avoided (through locating on an alternative site with less harmful impacts), adequately mitigated or, as a last resort, compensated for, then the development should be refused.

CHAPTER 19 – NATIONAL DECISION-MAKING POLICIES

- **N3: Trees in new development**
  - Similar to para 136 of the 2024 NPPF – moved into Chapter 19 from 'achieving well designed places'
  - Now expressly recognises the benefits of trees for **biodiversity**, as well as climate change and the character and quality of the built environment
  - Make new trees street-lined; incorporate trees in other suitable locations; seek suitable arboricultural advice; provide for long-term maintenance of both existing and new trees

- **N4**: **Protected Landscapes**
  - Revision of 189-190 of the 2024 NPPF
  - (1) proposals within PLs should be **limited in scale and extent** and sensitively located and designed to avoid harm to their statutory purposes and special qualities. **Substantial weight** should be placed on the importance of conserving and enhancing the natural beauty of these areas, and to C & E wildlife and cultural heritage in National Parks and the Broads.
  - 2. Proposals for major development within PLs should only be supported in exceptional circumstances[70] where it can be demonstrated that the development is in the public interest […]
  - 3. Where, exceptionally, proposals for major development are approved within PLs, steps should be taken to **mitigate** potential adverse impacts on their special qualities and statutory purposes[71], including on features like tranquillity & dark skies.
  - 4. Development proposals within the setting of protected landscapes should be sensitively located and designed to avoid or minimise adverse impacts on the designated areas.

N5: **Maintaining the character of the coast**

- About maintaining the character of **undeveloped** areas of coast, while improving public access to it where appropriate.
- Consolidates paras 187(c) & 191, and cross-references relevant policies on coastal change / flood risk to provide a coherent approach

- **N6: Areas of particular importance for biodiversity -** 1. To support the conservation of important habitats, development proposals affecting:
- a. A site of **international importance**, which for the purpose of this policy is a habitats site, should be refused unless:
- i. an appropriate assessment has concluded that the proposal will not adversely affect the integrity of the site (either individually or in combination with other developments), or that there are imperative reasons of overriding public importance; and/or ii. the impact of development on the relevant protected feature of the protected site is being addressed through an Environmental Delivery Plan which has been made and the developer has committed to paying the nature restoration levy.
- b. A site of **national importance**, which for the purpose of this policy is one designated as an **SSSI**, should only be supported if:
- i. there would be no adverse effect (either individually or in combination with other developments) on the features of special scientific interest of the SSSI; or
- ii. the benefits of the development in the location proposed clearly outweigh both the likely impact on the features of special scientific interest, and any broader impact on the national network of SSSIs; or
- iii. the impact of development on the relevant protected feature of the protected site is being addressed through an EDP which has been made **and** the developer has committed to paying the nature restoration levy.
- c. A site of **local importance**, which for the purpose of this policy is one designated as a Local Nature Reserve or identified as a local wildlife site, local geological site or equivalent in the development plan, should only be supported if:
- i. there would not be a significant adverse effect on the integrity of the site; or ii. the benefits of development in the location proposed clearly outweigh the likely impact on the features which make the site valuable for nature conservation.
- **2. Irrespective of a site's status in nature conservation terms, development proposals which would entail the loss or deterioration of irreplaceable habitats (such as ancient woodlands and ancient and veteran trees) should be refused, unless there are wholly exceptional reasons72 and a suitable compensation strategy exists**.

CH 10 SECURING CLEAN ENERGY AND WATER

- The **objective**:

  The objective of the policies in this chapter is to support the development and operation of energy and water infrastructure in ways which align with wider development, clean power and net zero objectives (including the delivery of clean power by 2030).

- W3 – 'substantial weight' to the benefits of low-carbon energy development and electricity network infrastructure

- W3-W4 – new focus on electricity network infrastructure and water infrastructure

CH 17 POLLUTION, PUBLIC PROTECTION AND SECURITY

- The **objective**:

  The objective of the policies in this chapter is to ensure that new development is appropriate for its location taking into account risks posed by pollution and other hazards; that any impacts which development might have are taken into account; and that sufficient provision is made for development required for public safety and security.

- P1 – P2: **Planning for clean and safe places, ground conditions – familiar provision for contaminated land**

- P3: **Living conditions and pollution**

CH 18 FLOOD RISK AND COASTAL CHANGE

- The **objective**:

The objective of the policies in this chapter is to minimise risks to development arising from all sources of flooding and coastal change, taking into account the impacts of climate change, by steering development away from areas of risk, ensuring that development will be safe for its lifetime without increasing flood risk elsewhere, and incorporating sustainable drainage systems where appropriate.

CHAPTER 18 – FLOOD RISK AND COASTAL CHANGE

- Plan-making policies:

  - **F1**: **Assessing flood risk for plan-making**

    1. In order to manage development in ways which minimise the risk of flooding to people and property, development plans should:

    a. Be informed by an up-to-date strategic flood risk assessment which considers current ***and future flood risk*** *from all sources, including cumulative impacts in, or affecting, areas susceptible to flooding; and*

    b. Take account of advice from the Environment Agency and other relevant flood risk management authorities, such as lead local flood authorities and internal drainage boards, about levels of risk, options for mitigation, and the implications for development in the plan area.

  - **F2**: **Planning for effective flood risk management**

  - **F3: Managing coastal change**

CONCLUSION: WILL IT WORK?

Consultation document, p.10 (emphasis added):

"Taken together, these reforms represent a truly ***seismic regearing*** *of the system – in support of growth, and through growth of hope and opportunity. We have pursued them at speed because they are a necessary condition for success. But while necessary, reform alone is not sufficient. If we are to achieve our goals, the system we have moved so rapidly to regear* ***must enter a period of stability over the second half of this Parliament and beyond****. One in which* ***every actor*** *– from government to local authorities to applicants – must seize the benefits of change by bringing* ***a laser like focus to delivery****."*

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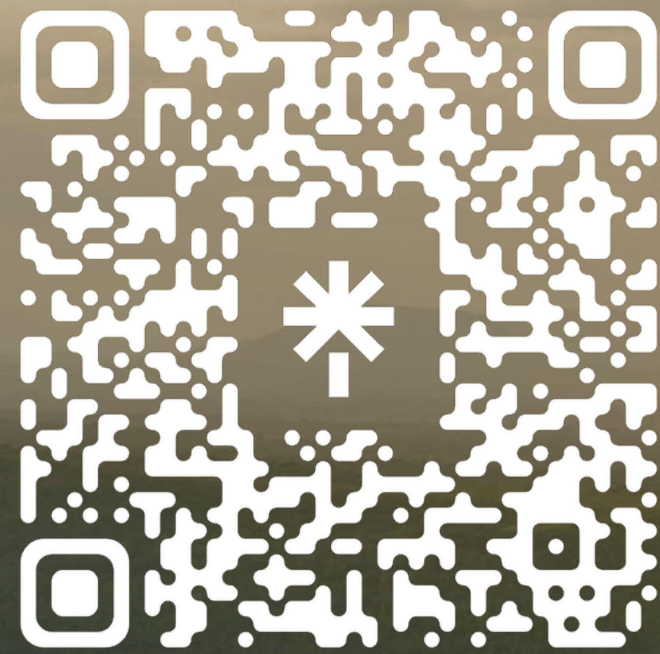

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Ruth Keating

Monty Fynn

Assessing Climate Impacts of Projects

ASSESSING CLIMATE IMPACTS OF PROJECTS

- Two years on from *Finch.*
- New questions:
  - Inevitability in different contexts and projects.
  - How *Finch* applies to other regimes, if at all.
- Four cases:
  - *Oceana UK v Secretary of State for Energy Security and Net Zero* [2025] EWHC 3146 (Admin)
  - *Alternative A5 Alliance v Northern Ireland Department for Infrastructure* [2025] NIKB 42
  - *R (Luton and District Association for the Control of Aircraft Noise) v Secretary of State for Transport* [2025] EWHC 3206 (Admin)
  - *C G Fry & Son Limited v Secretary of State for Housing, Communities and Local Government* [2025] UKSC 35

OCEANA UK V SECRETARY OF STATE FOR ENERGY SECURITY AND NET ZERO [2025] EWHC 3146 (ADMIN)

- The Claimants – Oceana UK – challenged the appropriate assessments for the 33rd oil and gas licensing round.
- A challenge under regulation 5(1) of the Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001:

  "*The Secretary of State shall* [before granting, consenting, authorising etc shall consider] *anything that might be done or any activity which might be carried on pursuant to such a licence, consent, authorisation or approval is likely to have a significant effect on a relevant site, whether individually or in combination with any other plan or project, including but not limited to any other relevant project, make an appropriate assessment of the implications for the site in view of the site's conservation objectives.*" (emphasis added)
- (i) Initial Term (exploration); (ii) Second Term (appraisal and field development planning); and (iii) the Third Term (development and production).
- Three AAs were carried out: (i) the Southern North Sea and Mid North Sea High; (ii) the West of Shetland and Central North Sea; and (iii) the Eastern Irish Sea.

OCEANA UK V SECRETARY OF STATE FOR ENERGY SECURITY AND NET ZERO [2025] EWHC 3146 (ADMIN)

- The Joint Nature Conservation Committee and Natural England responses.
- Grounds: accidents, climate change, cumulative and in-combination impact and insufficient reasons.
- Paragraph 183:

  "There is no corresponding requirement under the 2001 Regulations to widen the scope of assessment so as to embrace the indirect effects of oil and gas activities on climate. The scope of assessment under regulation 5 of the 2001 Regulations is quite differently defined to the scope of environmental impact assessment under the EIA Regulations. <u>Under regulation 5, the assessment is focused on a particular and defined component of the natural environment, namely an MPA</u>. It is the effects of proposed activities on the designated site or sites that is the object of the inquiry." (emphasis added)

OCEANA UK V SECRETARY OF STATE FOR ENERGY SECURITY AND NET ZERO [2025] EWHC 3146 (ADMIN)

- Paragraph 245:

  “In conclusion, however, I would emphasise the corollary of the First Defendant's principal argument in defence of this claim. As the Claimant rightly points out, the First Defendant has founded his defence on the proposition that appropriate assessment of the Licences is but the first stage in a multi stage consenting process which governs oil and gas activities carried out pursuant to the exclusive rights conferred by the grant of Licences."

- Paragraph 247:

  “The assessment is to be updated with increasing specificity in subsequent stages of the procedure. In effect, that is the approach to which the First Defendant has committed himself in section 2.2.2 of the AA reports, in OPRED's response to the JNCC, and in his evidence and submissions to this court. It is an approach which is of particular importance in the assessment of in-combination effects, given the overall scale of activity within the marine environment of the UKCS as evidenced by chapter 5 of the AA reports and the advice of the JNCC; and the dynamic character of that environment, potentially rendered increasingly so due to the impact of climate change. I have no doubt that the Claimant will be astute in holding the First Defendant to that commitment, as it has good reason to, in the light of the response which the First Defendant has made to this claim."

ALTERNATIVE A5 ALLIANCE V NORTHERN IRELAND DEPARTMENT FOR INFRASTRUCTURE [2025] NIKB 42

- A5 – a 58-mile road project.
- Failure to comply with section 52 of the Climate Change (Northern Ireland) Act 2022:

"Duties to ensure that targets etc are met

(1) The duties mentioned in sections 1, 3 to 5 and 24 on the Northern Ireland departments (namely, to ensure that the net Northern Ireland emissions account is below a certain amount and that the net Northern Ireland emissions account for carbon dioxide for 2050 is below a certain amount) are duties on each of them—

(a) to exercise its own functions, so far as is possible to do so, in a manner that is consistent with the achievement of that objective,

(b) so far as is consistent with the proper exercise of its own functions, to co-operate with each of the other departments in the performance by the other department of the other department's duty under paragraph (a), and

(c) to draw up and implement such plans, policies and strategies as may be appropriate for the purpose of performing its duties under paragraphs (a) and (b).

(2) The Northern Ireland departments should, as far as reasonably practicable, align such plans, policies and strategies to those of the Republic of Ireland.

(3) Subsection (1) is in addition to (and does not limit) the duties under other sections of this Act ."

ALTERNATIVE A5 ALLIANCE V NORTHERN IRELAND DEPARTMENT FOR INFRASTRUCTURE [2025] NIKB 42

- Paragraph 194:

  "Section 52 does not prevent a major infrastructure project which is a source of significant greenhouse gas emissions being devised, promoted, constructed and put into operation. <u>But what it does clearly rule out is the construction and operation of such a major project in the absence of robust planning, synchronisation and co-ordination</u> between all NI government departments to ensure that the project fits into the plans, strategies and policies which map out a realistic and achievable pathway to achieving net zero by 2050." (emphasis added)

- Paragraph 199:

  "I accept the bona fides of the DfI when it asserts that in respect of the transport sector, it will do its bit to ensure that the transport sector is almost fully decarbonised by 2050, and that the TEM gives it confidence that this ultimate goal can largely be achieved. However, there is a complete absence of evidence as to the overall Northern Ireland position in the DfI statement."

LUTON AIRPORT CHALLENGE

- **Citation:** *R (Luton and District Association for the Control of Aircraft Noise) v Secretary of State for Transport* [2025] EWHC 3206 (Admin)

- **Outcome**: The High Court (Mrs Justice Lang) dismissed a judicial review claim challenging the Government's decision to grant development consent for the expansion of London Luton Airport.

- **Relation to *Finch*:** *Finch* was concerned with whether certain emissions were 'effects' of a project for an EIA, *Luton* is concerned with the assessment of those effects.

LUTON AIRPORT CHALLENGE: LEGISLATIVE FRAMEWORK

- **Legislation:** Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 ("**the 2017 Regulations**")
  - Unlike *Oceana,* these are materially the same as the EIA Regs in *Finch.*
  - They are the EIA Regulations for the PA 2008, rather than TCPA 1990.

- **Key provision:** Reg 14(2)(b) – The applicant must include an environmental statement with a "*description of the* ***likely significant*** *effects of the proposed development on the environment".*
  - *Finch* was about whether scope 3 emissions were 'effects'.
  - *Luton* is about whether the relevant emissions were 'likely' and/or 'significant'.

LUTON AIRPORT CHALLENGE: GROUNDS

- The challenge was brought on five grounds. We are interested in Grounds 1 and 3.
  - **Ground 1**: The exclusion from the EIA of emissions from inbound flights was contrary to *Finch*.
  - **Ground 3:** The exclusion from the EIA of the likely significant impacts of non-CO_2 emissions was contrary to *Finch*.

GROUND 1 – INBOUND FLIGHTS

- **Background**
  - The SoS and applicant did not consider emissions from inbound flights in the EIA.
  - They relied on three reasons for their approach: (1) double counting; (2) the effects not being capable of meaningful assessment; and (3) the additional impacts not being significant on their own.

- **Claimant's submissions -** These reasons are wrong:

  (1) No 'in principle' difficulty with double counting: see *Finch* at [125].

  (2) and (3) Lord Leggatt's reference in *Finch* at [167] to the ability to undertake a meaningful assessment only applied to the causal link between a project and its impacts.

GROUND 1 – INBOUND FLIGHTS

- **Lang J rejected Claimant's submissions ([60]-[85]):**

1. Lord Leggatt in *Finch* at [167] said "only effects which evidence shows are likely to occur and which are capable of meaningful assessment must be assessed".
2. This applies to the assessment of significance, in addition to the causal link between a project and its impacts ([70]).
3. The SoS was entitled to find that inbound flights were not capable of meaningful assessment as there was no benchmark to measure them against given that the UK carbon budgets did not include inbound flights ([68]).
4. Alternatively, the SoS was entitled to find that emissions from both outbound and inbound flights were not significant, being less than 1% of the carbon budget ([78])
5. These were both matters of planning judgment for the SoS ([85]).

GROUND 1 – INBOUND FLIGHTS

- **Lord Leggatt *Finch* at [74]:**

"74. Whatever the precise meaning of the term, **to determine that a potential effect is "likely" requires evidence on which to base such a determination.** If evidence is lacking so that a possible future occurrence is a matter of speculation or conjecture, then a rational person would not feel able to judge that it is "likely". Such agnosticism is not the same as judging the event to be unlikely. It reflects a belief that there is too little knowledge on which to base a judgment.

[…]

78. There is here **an area of evaluative judgment** involved in determining the scope of an EIA. Judging **whether a possible effect of a project is likely and capable of assessment** may, depending on the circumstances, be a matter on which different decision-makers, each acting rationally, may take different views."

- Lang J in *Luton Airport* at [70]: this applies to the assessment of significance.

GROUND 1 – KEY TAKEAWAYS

- *Finch* only requires climate impacts to be included in an EIA if their significance is capable of meaningful assessment.

- Whether something is capable of meaningful assessment may depend on whether there is an appropriate benchmark.

- If emissions are capable of assessment, then that assessment is a matter of planning judgment and is only unlawful on traditional public grounds.

GROUND 3 – NON-CO_2 EMISSIONS

- **Claimant's submissions ([102]-[112]):**

1. The SoS and applicant had failed to undertake <u>any</u> assessment of the non-CO_2 emissions.
2. There are well-established methodologies for assessing non-CO_2 emissions.
3. The SoS and applicant were therefore wrong to say it was not possible to undertake a quantitative assessment of non-CO_2 emissions because of scientific uncertainty.
4. The correct approach following *Finch* was to apply a precautionary approach and assess the emissions.

GROUND 3 – NON-CO_2 EMISSIONS

- **Lang J rejected Claimant's submissions ([113]-[129])**:

1. Unlike *Finch*, here the SoS and the applicant accepted that aviation causes non-CO_2 effects.
2. The SoS and the applicant did <u>not</u> exclude non-CO_2 effects, but rather they were only taken into account on a <u>qualitative</u> basis rather than precisely <u>quantified</u>.
3. This was "because of significant scientific uncertainty about the scale of their effects, and the lack of any relevant benchmark against which to contextualise their effect" [125].
4. There was no legal obligation to attempt to quantify non-CO_2 effects because how to assess significance is a matter of planning judgment and evaluation: see *Finch* at [58].
5. The precautionary principle makes no difference: see *Bristol Airport* at [10].

GROUND 3 – NON-CO_2 EMISSIONS

- ***Finch*** **at [58] – What is 'significant' is a value judgment:**

"The term "substantial" is intrinsically vague because, in the absence of some further, more precise criterion, there will be cases in which the question whether the term applies has no answer on which reasonable people who understand the meaning of the term could all be expected to agree. The same is true of the term "significant" which is used in article 3(1) and other provisions of the EIA Directive. **Deciding whether an effect of a project on the environment is "significant" clearly requires a value judgment** and carries the potential for cases to arise in which different decision-makers may legitimately reach different conclusions without it being possible to say that any of them has made an error in interpreting or applying the term."

GROUND 3 – NON-CO_2 EMISSIONS

- **Precautionary principle -** Andrews LJ refusal of permission in *Bristol Airport* [2023] PTSR 853 at [10]

> "10...... The underlying issue in *Friends of the Earth* [[2020] UKSC 52] was whether the Secretary of State had acted irrationally in not addressing the effects of non-CO_2 emissions in the ANPS. The Supreme Court said that the precautionary principle added nothing to the argument as to whether it was rational to exclude those effects. As the Judge explains at para 228 and following, the precautionary principle likewise added nothing in the present context, where the issue was very similar – whether the decision-maker had rationally concluded that the issue of the impact of non-CO_2 emissions should be left over for future consideration."

GROUND 3 – KEY TAKEAWAYS

- So long as a decision-maker takes all the relevant effects into account how they assess them is a matter of planning judgment.
  - *Comment/Query*: what if, unlike the non-CO_2 effects in this case, the effects are very large but are only assessed qualitatively: is this really just subject to irrationality challenge?
- Scientific uncertainty about the *specific* climate impacts of a project may be fatal to many claims given the absence of the precautionary principle.
  - The problem is that science clearly demonstrates on a <u>macro</u> scale that emissions result in certain effects but showing that the <u>specific</u> emissions of a <u>specific</u> project will result in <u>specific</u> effects is scientifically difficult.
  - Is it right in principle that this kind of uncertainty should provide a basis for a project to proceed?

LUTON AIRPORT – PRECURSOR TO *GATWICK*?

- The rolled-up hearing for the judicial review challenge to the grant of development consent for a second runway at Gatwick Airport took place from 20 to 23 January 2026.
- The grounds include:
  - Flawed approach to calculating the significance of greenhouse gas emissions and/or failure to provide adequate reasons.
  - Error of law in the treatment of greenhouse gas emissions from international inbound flights.
  - Error of law in the treatment of non-carbon dioxide emissions.
- It will be interesting to see how the Court approaches the decision in *Luton Airport* (it is just a High Court authority!).

CG FRY AND CLIMATE IMPACTS

- **Citation:** *C G Fry & Son Limited v Secretary of State for Housing, Communities and Local Government* [2025] UKSC 35
- **Two issues in appeal, only Issue 1 is of interest for us:** Does regulation 63 of the Habitats Regulations require an "appropriate assessment" to be undertaken before a local planning authority decides to discharge conditions requiring the approval of reserved matters in a grant of outline planning permission?
- **Relationship to climate impacts?** – Reg 63 is in materially the same terms as regulation 5(1) of the Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001 considered in *Oceana*.
  - Appropriate Assessment required for projects "*likely to have a significant effect on a European site*" (Reg 63(1)(a)).
  - Issues may arise in future as to whether newly discovered climate impacts have to be assessed at the reserved matters stage.

CG FRY – BACKGROUND

- The appellant was a property developer.
- In December 2015, the Council granted outline planning permission for a large residential development on land near a Ramsar site (a wetland of international importance under the Ramsar Convention).
- Ramsar sites are not part of the Habitats Regulations, but the NPPF says they should be treated as if they are.
- No appropriate assessment under the Habitats Regulations was made before granting outline permission.
- On 17 August 2020, Natural England published new scientific advice in relation to the protection of the Ramsar site, noting the risk of eutrophication from development.
- In light of the advice, the Council refused to discharge conditions at the reserved matter stage until an appropriate assessment had been carried out.

CG FRY – DECISION ON ISSUE 1

- Court decided the appeal on Issue 2 but addressed Issue 1 on the Habitats Regulations.
- **Court's answer on Issue 1**: The Habitats Regulations require an appropriate assessment to be conducted at reserved matters stage.

> "56. It is clear that the protective purpose of the Habitats Regulations and the precautionary principle would be defeated, rather than promoted and respected, if the Regulations are read as precluding any opportunity for an appropriate assessment to be carried out at a later stage in a multi-stage planning process, such as that in issue in the present proceedings, where the planning authority has for any reason (eg by oversight, misinterpretation of the law or being ignorant of relevant science or misunderstanding that science) failed to carry one out at the stage of assessing whether to grant outline planning permission."

CG FRY – TAKEAWAYS FOR CLIMATE IMPACTS?

- If in a case, unlike *Oceana,* there were climate impacts from the project on a protected site then an appropriate assessment would be required, no matter at what stage the impacts became clear.
  - This may become important given the constantly evolving state of scientific knowledge in relation to climate change.

- It is the developer's risk to proceed knowing that scientific knowledge may develop and an appropriate assessment becomes required at a later stage.

CONCLUSION – KEY TAKEAWAYS

- Know the cost.
- *"Words, words, words"* – Hamlet.

ANY QUESTIONS?

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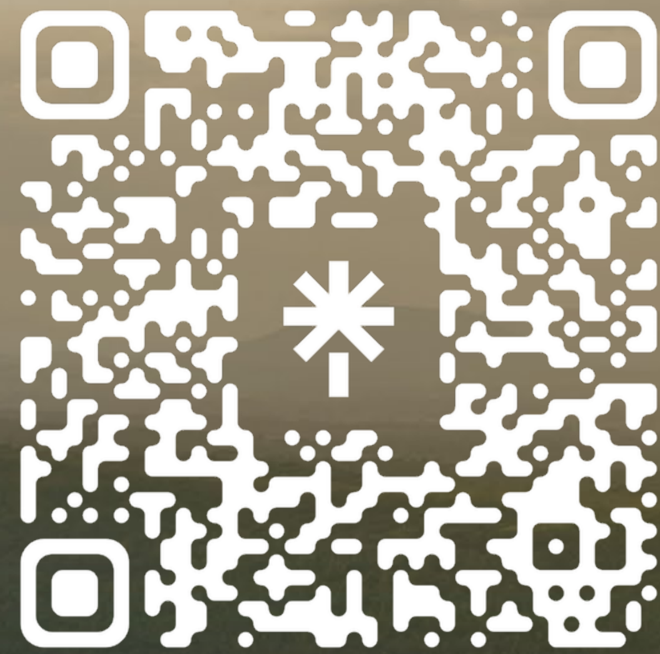

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Coffee Break

See you at 11am.

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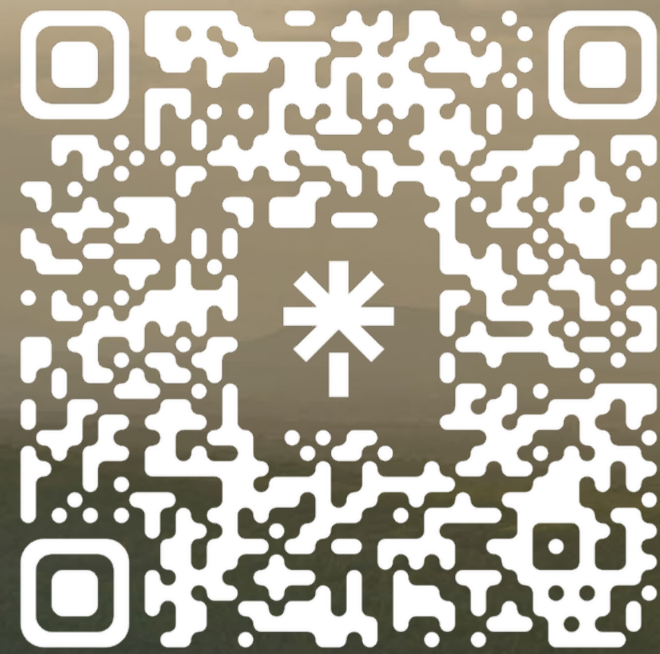

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Daniel Kozelko

Jake Thorold

Aarhus Costs Caps: *Global Feedback* and beyond

AARHUS IN A NUTSHELL

- Article 9(3) of the Aarhus Convention requires party states to ensure that members of the public “”have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which **contravene provisions of its national law relating to the environment**.“

- Article 9(4) states that those procedures must not be “prohibitively expensive".

- Given effect domestically in section IX of CPR Part 46
  - Standard caps: (i) £5,000 for individual claimants; (ii) £10,000 for group claimants; (iii) £35,000 for Defendants;
  - Can be varied or even removed altogether (CPR 46.27)

THE PRE-*GLOBAL FEEDBACK* POSITION

- From experience, both parties and the courts took a fairly liberal approach to the scope of Aarhus claims – rare to see disputes in planning cases.

- Commonly relied upon case of *Venn v Secretary of State for Communities and Local Government* [2015] 1 WLR 2328 at [17]: "the UK's combination of statute and policy, with the former requiring that the latter be prepared, taken into account and in some instances followed, is properly characterised as national law relating to the environment".

HM TREASURY & SECRETARY OF STATE FOR BUSINESS AND TRADE V GLOBAL FEEDBACK LTD [2025] EWCA CIV 624 – THE FACTS

- JR brought by Global Feedback Ltd ("GFL") against decision to make regulations giving effect to a Free Trade Agreement agreed between the UK and Australia in 2021

- GFL argued that the Regulations would lead to a substantial increase in greenhouse gases essentially by stimulating higher production in Australia (where beef production measures produce more emissions than in the UK).

- Grounds of challenge: (i) this impact was not lawfully assessed (irrationality / pre-determination); and (ii) that there was a failure to take account of relevant international obligations (UN Framework Convention on Climate Change / Paris Agreement) as required by s.28 the enabling act: the Taxation (Cross-Border Trade) Act 2018 ("the 2018 Act").

GLOBAL FEEDBACK – THE ESSENTIAL QUESTION

In short, were the relevant provisions of the 2018 Act and the public law principles on which the Claimant relied "national law relating to the environment", meaning that a challenge based on a contravention of those provisions / principles came within the scope of Aarhus?

GLOBAL FEEDBACK – THE HIGH COURT

- Lang J said yes.
- S.28 of the 2018 Act "arguably" required the Defendants to have regard to international obligations directly concerned with the environment when making the regulations.
- This was sufficient to make s.28 "national law relating to the environment", adopting a "broad purposive approach" and taking into account "the nature of the contravention alleged".

GLOBAL FEEDBACK – ENTER LORD JUSTICE HOLGATE…

- 152 paragraphs of pure Aarhus goodness…

- Holgate LJ focused on words "relating to", and concluded that to come within Article 9(3) "the subject of a legal provision must be environmental or its purpose must be to protect or otherwise regulate the environment"

- Following detailed scrutiny of the *travaux préparatoires* to the Convention, Holgate LJ concluded that (at [96]):

"nothing in Art. 9 or the Convention read as a whole to indicate that the ambit of Art.9(3) extends to any decision in breach of any national law so long as that decision has an effect or impact on the environment. Instead, Art.9(3) only applies to a contravention of a legal provision which concerns, or is to do with, the environment, its protection or regulation"

GLOBAL FEEDBACK – ENTER LORD JUSTICE HOLGATE…

- By extension, public law principles do not <u>themselves</u> constitute "national law relating to the environment" (at [132]):

  "Public law principles regulate the legality of the administrative actions of public authorities exercising a wide range of functions in many areas of public service, not simply environmental protection and regulation. Public law principles do not form part of our law relating to the environment. Their purpose is not to protect or regulate the environment."

- S.28 also not covered: "Parliament has not given any indication that a purpose of s.28… is to protect or regulate the environment" [145].

“[i]t would be wrong for a judge simply to ask whether a *claim* or *ground of challenge* is to do with the protection of the environment or with the effect of a decision or legal provision on the environment…. Put in a nutshell, what matters is whether the purpose of the national law that has allegedly been contravened is to protect or regulate the environment, not, whether the decision being challenged has an effect on, or some connection with, the environment”

[151]

GLOBAL FEEDBACK – RAMIFICATIONS

- Claims "related to the environment" won't automatically come within the scope of Aarhus – it is necessary for Claimants to identify a specific provision of domestic law relating to the environment which is said to be contravened.
  - Claims solely based on public law principles, even if *subject matter* is obviously environmental, are unlikely to attract Aarhus protection.

- Likely to spark further litigation – very little comment on how the Court should determine "whether the purpose of the national law… is to protect of regulate the environment".

GLOBAL FEEDBACK – RAMIFICATIONS

- Notably, though, Court upheld the position in *Venn* that, in the planning context, Aarhus can apply to challenges based on <u>policy</u>, if the relevant policy relates to the environment
  - "a claim that a decision-maker had failed to comply with a legal provision requiring him to take into account or apply a policy for the protection of the environment falls within Art.9(3)" [103].

- BUT arguing that a decision-maker has failed to take account of a material consideration (i.e. under s.70(2) TCPA 1990) will not itself mean that Aarhus will apply. Must be in relation to a policy concerning environmental protection.

- Tension here with conclusion on s.28 of 2018 Act?

GREEN LANE ASSOCIATION LTD V CENTRAL BEDFORDSIRE COUNCIL [2025] EWHC 2251 (ADMIN)

- Case concerned a challenge to the making of an Experimental Traffic Regulation Order (ETRO) under the Road Traffic Regulation Act 1984.

- Key to making an ETRO is compliance with the s.122 RTRA 1984 duty:
  – Must "secure the expeditious, convenient and safe movement" of essentially all traffic.
  – One factor s.122 requires the consideration of is "amenity of any locality affected". Another is consideration of "the national air quality strategy".

- Judge concluded the Aarhus cap applied as:
  – S.122 itself takes specified environmental considerations and s.80 EA 1995.
  – The statement of reasons for the ETRO addressed environmental matters.

R (BADGER TRUST AND WILD JUSTICE) V NATURAL ENGLAND [2025] EWHC 2761 – THE FACTS & LAW

- Claim against a decision by Natural England to renew 26 supplementary badger cull licenses authorising farmers to kill badgers in the period from June 2024-November 2024.

- Natural England applied to increase the costs caps which the claimants would need to pay if they lost.

- Relevant rules in CPR 46.26-46.27. CPR 46.27 states that the relevant test is whether, if the cap was increased, "the costs of the proceedings would not be prohibitively expensive for the Claimant"
  - Two ways in which can be "prohibitively expensive": (1) likely costs "exceed the financial resources of the claimant"; or (2) likely costs are "objectively unreasonable".

BADGER TRUST – THE JUDGMENT

- The CPR 46.26 caps "supply the initial answer in every Aarhus case, unless and until a Court identifies an appropriate variation based on assessing what would avoid the proceedings being prohibitively expensive" [26].

- First limb is "about real-world affordability of the actual case for the actual claimant, in light of the money which the claimant has or can access" [30]. Not just about having the figure in a bank account: "[t]he money in the bank may be needed to put food on the table for the children" [31].

- Second limb is "a second way to protect a claimant for whom the proceedings are real-world affordable…. notwithstanding that the costs are within the claimant's real-world affordability, they are still assessed as objectively unreasonable" [35].

BADGER TRUST – THE JUDGMENT

"I was left feeling that it would not be a good thing for access to environmental justice if this sort of exercise were to become an established feature; still less a new norm. The court room during this hearing would, I think, have been a chilling place for responsible environmental NGOs, contemplating viable environmental protection judicial review claims. As I see it, the whole point of Rule 26 Caps is to have a degree of appropriate prospective reassurance. The idea of spiralling costs from satellite litigation, introducing uncertainty and costs risk, for the purpose of this kind of exercise, could clearly stand as a practical disincentive. And it could be hard for responsible lawyers to offer environmental NGO clients real, practical comfort. And so, all in all, I was left feeling that it was particularly appropriate that the Court should respond as robustly, straightforwardly and clearly as it legitimately could. I have tried to do that." [61]

BADGER TRUST – THE RAMIFICATIONS

- Think very hard before applying to vary the Aarhus costs caps – it will not be enough to simply rely on the financial resources available to a claimant.

- Important factors will include: (i) the intentions of the claimants – are there other interests at play?; (ii) the wider ramifications of the case – i.e. the "importance for the environment"; (iii) the prospects of success; (iv) the ongoing ability of a claimant to bring further environmental challenges.

- NE response: "We have never looked to use the procedure in the Civil Procedure Rules to increase a costs cap before and we might never make this sort of application again" (https://naturalengland.blog.gov.uk/2025/10/20/natural-england-response-to-badger-trust-and-wild-justice-judicial-review-decision/)

R (BARCLAY) V SECRETARY OF STATE FOR TRANSPORT

- Ongoing judicial review of the DCO for the expansion of Gatwick Airport. At the CMC there was a dispute whether Mr Barclay attracted the £5k cap, or £10k cap as the chairman of the campaign group GACC.

- Arguments in a nutshell were:
  - Mr Barclay said he was independent to GACC, had made his own submissions at the examination, and should not be elided with an unincorporated association.
  - SST said Mr Barclay could not separate himself from GACC given his conduct.

- Having regard to the context, including evidence of what Mr Barclay and GACC had said online, court ordered the £10k cap.

ANY QUESTIONS?

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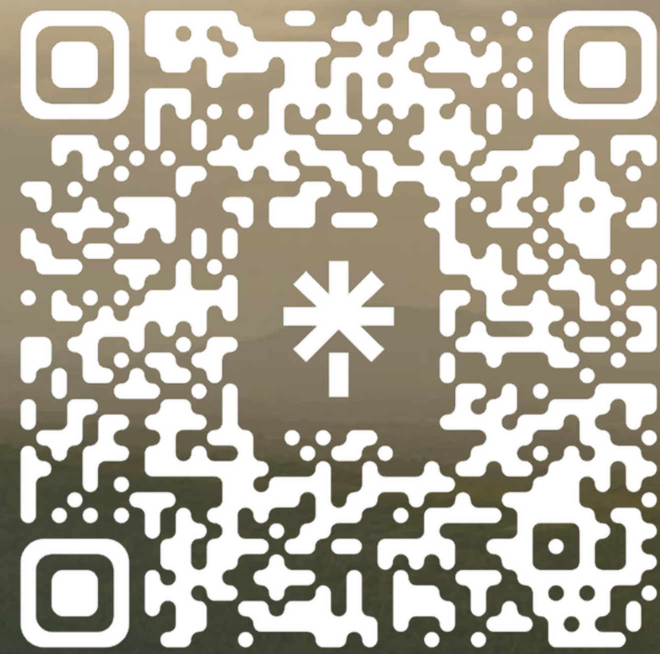

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Katherine Barnes

Recent Developments on Article 1 of Protocol 1 in Light of R (ARC Time Freehold Income Authorised Fund v SSHCLG)

AGENDA

Article 1 of Protocol 1

- Review of A1P1 principles
- Reliance on A1P1 in the energy regulation context

KEY A1P1 PRINCIPLES

1. Meaning of “possessions”
2. Interference
3. Justification
4. Remedies

1. *Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
2. *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*

MEANING OF "POSSESSIONS"

- "Possessions" an autonomous Convention concept – independent from formal classification in domestic law (*Breyer* [2015] EWCA Civ 408)
- Widely interpreted (tangible and intangible).
- Examples relevant to energy regulation context
  - Subsidies due under legislation (Infinis [2013] EWCA Civ 70)
  - Concluded contracts (Breyer [2014] EWHC 2257)
  - Contractual rights (Mellacher [1990] 12 EHRR 391)
  - Marketable goodwill in a business (but not loss of future profits/income) (Breyer [2015] EWCA Civ 408; ALR [2025] EWHC 1467 (Admin)
  - Legitimate expectation of obtaining a contract (Elliott v London Metal Exchange [2024] EWCA Civ 1168; or property right (Stretch (2004) 38 EHRR12)
  - Licences (Tre Traktörer [1989] 13 EHRR 309)
  - Interests in land (Chassagnou [1999] 29 EHRR 615)
  - Welfare benefits under legislation providing for their payment as of right, whether contributory of non-contributory (Stec [2005] 41 EHRR SE18)

MEANING OF "POSSESSIONS"

- Not enough to identify a "thing" which is covered by A1P1 – must also show some degree of "ownership" by the applicant.
- The underlying question is whether the circumstances of the case have conferred on the applicant "title to a substantive interest" protected by A1P1 (*Saghinzadze* (2014) 59 EHRR 24)

INTERFERENCE

3 Rules within A1P1 (For summary see *ARC Time Freehold Income Authorised Fund* [2025] EWHC 2751 (Admin) at [80]-[81])

- Overarching, general principle - Rule 1: Principle of peaceful enjoyment of property
- Instances of interference with the right to peaceful enjoyment of property: Rule 2 and Rule 3
- Rule 2: Prohibition on unlawful deprivation of property (save in the public interest and subject to certain conditions)
- Rule 3: Entitlement of the State to control the use of property in the general interest
- An interference which does not cause the owner to lose all meaningful use of the possession is likely to be treated as a control of use rather than a deprivation (*R (British American Tobacco UK Limited) v Secretary of State for Health* [2016] EWCA Civ 1182; [2018] QB 144)
- Often, little concern with whether interference falls under Rule 2 or Rule 3 (relevance is that it is only in exceptional cases that a deprivation of property (ie Rule 2 interference) without compensation will be proportionate) (compensation to full market value not necessarily required: *L1T Holdings v Chancellor of the Duchy of Lancaster* [2025] EWCA Civ 1528)

INTERFERENCE

Identifying an "interference" more generally

- Need to identify a real world impact on the relevant possession
- Eg *Breyer* [2015] EWCA Civ 408: Government consultation resulted in an interference with possessions protected by A1P1 "because as a matter of fact it did in a real and practical sense interfere with the claimants' businesses"
- *Elliott v London Metal Exchange* [2024] EWCA Civ 1168: no interference when LME Exchange cancelled nickel trades in circumstances where the sales were always subject to the LME's power to cancel trades (the LME's Rules being incorporated into its contract with participants)

JUSTIFICATION

- A1P1 a qualified right
- For an interference with A1P1 to be lawful it must be:
  - Prescribed by law
  - Pursue a legitimate aim
  - Proportionate
- Assessing proportionality requires the following four stage test (Shvidler [2025] 3 WLR 346 at [118]:
  - (i) is the aim sufficiently important to justify interference with a fundamental right?
  - (ii) is there a rational connection between the means chosen and the aim in view?
  - (iii) was there a less intrusive measure which could have been used without compromising the achievement of that aim?
  - (iv) has a fair balance been struck between the rights of the individual and the general interest of the community?

JUSTIFICATION

- **Margin of appreciation/deference**
- See *Shvidler* [2025] 3 WLR 346 at [120]-[125]:
  - Court has to "make its own assessment whether a measure is proportionate to a legitimate aim"; "the court's function is not the conventional one in public law or reviewing the process by which a public authority reached its decision" [120]
  - BUT the court does not become the primary decision-maker (public authority decides on action to be taken and court considers whether it is lawful) [121]
  - There is room for appropriate respect and weight to be given to the views of the executive or the legislature as to how the balance between the interests of the individual and of the general community should be struck, depending on the nature of those respective interests [123]
  - The context relevant to determining the measure of respect to the balance of rights and interests struck by a public authority will include the importance of the right, the degree of interference and the extent to which the courts are more or less well placed to adjudicate, on grounds of relative institutional expertise and democratic accountability [124] (The court must attach special weight to the judgments and assessments of a primary decision-maker with special institutional competence [123])

REMEDIES

Challenges to decision

- Usual judicial review remedies including:
  - Quashing order
  - Declaration

REMEDIES

Damages

8.— Judicial remedies.

(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

(2) [...]

(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including—

(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and

(b) the consequences of any decision (of that or any other court) in respect of that act,

the court is satisfied that the award is necessary to afford **just satisfaction** to the person in whose favour it is made.

(4) In determining—

(a) whether to award damages, or

(b) the amount of an award,

the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention.

REMEDIES

- Compensation under the HRA supposed to be "of secondary, if any, importance" (*Anufrijeva* [2003] EWCA Civ 1406). Declaratory relief may provide "just satisfaction"
- BUT damages typically awarded where there has been significant financial loss caused by the breach of a Convention right.
- Significant authority that in such circumstances, damages are to be avoided on a restitutio in integrum basis (i.e. restitution to the original position)
  - *Infinis* [2013] EWCA Civ 70: Damages for refusal to grant accreditations based on company's actual loss
  - *Breyer* [2015] EWCA Civ 408: Damages available with regards to a deadline being brought forward for tariffs for installing solar panels
  - *Bank Mellat* [2015] EWHC 1258 (Admin): Bank could claim damages for all its losses that had resulted from A1P1 breach

REMEDIES

- Causation: loss must have been "demonstrably and directly" caused by the A1P1 breach (*Breyer* [2015] EWCA Civ 408). Evidence required to show the loss claimed
- Mitigation: Applicant expected to mitigate loss (*Infinis* [2011] EWHC 1873 (Admin)
- Difficulties in assessment do not prevent award of damages (*Breyer* [2015] EWCA Civ 408)

REMEDIES

Challenges to legislation

- See *R (ARC Time Freehold Income Authorised Fund)* [2025] EWHC 2751 (Admin) as recent example of primary legislation challenged on A1P1 grounds. Useful summary of principles.
- Section 3 HRA

  3.— Interpretation of legislation.

  (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
- Section 4 HRA Declaration of incompatibility

EXAMPLES (1)

Gas and Electricity Markets Authority v Infinis Plc [2013] EWCA Civ 70

- Challenge to refusal to grant accreditation for Renewables Obligation Certificates (ROCs) for two power stations
- Consequence of ROCs would have been avoidance of a charge
- The Authority's position was that the relevant stations fell within an exclusion for accreditation under the statutory scheme
- Court found that the exclusion relied on by the Authority did not apply. Refusal therefore unlawful
- Legitimate expectation of the right to accreditation arising under a statutory scheme was an possession for A1P1 purposes
- Damages based on restitutio in integrum principle "manifestly appropriate" given Infinis wrongly deprived of pecuniary benefit to which it was entitled by statute and the "lost" benefit readily calculable

EXAMPLES (1)

Gas and Electricity Markets Authority v Infinis Plc [2013] EWCA Civ 70

- Important factor: case not concerned with an administrative discretion but with a statutory entitlement
- So example of A1P1 Rule 2 (deprivation of possession)

EXAMPLE (2)

R (Drax Power Ltd) v HM Treasury [2016] EWHC 228 (Admin)

- Challenge to removal of the renewable source energy exemption from the climate change levy (with 24 days' notice)
- Main argument that there was a legitimate expectation of a two year lead in time (LE not made out - evidence did not show Gov had consistently operated on basis of two year lead in)
- Secondary argument was that the 24 days' notice was disproportionate under EU law and A1P1. Rejected by the court:
  - Claimants' private economic interests fell within the margin of appreciation
  - Affected private economic interests considered but found to be outweighed by the public interest
  - Sound reasons given

EXAMPLE (3)

Npower Direct Ltd v Gas and Electricity Markets Authority [2018] EWHC 3576 (Admin)

- Challenge to direction from Ofgem that the claimant company conduct a trial with 100,000 of its customers which involved the claimant informing them that they could potentially save money by switching to another provider
- One argument was that the direction was an unlawful interference with the claimant's A1P1 rights
- Wide margin of discretion in context of Ofgem's functions
- Fair balance struck between rights of the supplier and the interests of the community given need identified by Ofgem to address lack of consumer engagement in switching suppliers

EXAMPLE (4)

R (Wood Boilers) v Gas and Electricity Markets Authority [2020] EWHC 1578 (permission decision)

- Challenge to decision by Ofgem to stop paying type of subsidy
- Claimants were two renewable energy companies. Had developed a model for the installation and maintenance of renewable boilers in domestic homes through which they received subsidies from Ofgem. Ofgem approved the model as compliant with the regulatory scheme and paid the subsidies for several years
- Ofgem subsequently changed its position. It stopped paying the subsidies on the basis the model did not in fact comply in full with the regulatory scheme. It considered it did not have the power to pay the subsidies to the Claimants as it had been doing
- Case concerned with position where giving effect to a legitimate expectation would be ultra vires

EXAMPLE (4)

R (Wood Boilers) v Gas and Electricity Markets Authority [2020] EWHC 1578 (permission decision)

- One argument was that the legitimate expectation of continued receipt of the subsidies (even if ultra vires) was a possession for A1P1 purposes. It had been interfered with by the refusal to give effect to the legitimate expectation (ie the Claimants' were deprived of their possessions in that regard). With reliance on Rowland [2003] EWCA Civ 1885; Stretch (2004) 38 EHRR 12
- Claimants' argued s.3 HRA required the statute to be "read down" so as to avoid the breach and/or that they were entitled to damages for the breach of A1P1
- Accepted by Fordham J as arguable

EXAMPLE (5)

R (Gravis Solar 1 Ltd) v Gas and Electricity Markets Authority [2021] EWHC 490 (Admin)

- Challenge to Ofgem's decision to withdraw the accreditation of a small solar photovoltaic electricity generating station
- Main argument: Deprivation of possession in the form of the accreditation was disproportionate and therefore amounted to a breach of A1P1
- Accreditation obtained on basis of false information by former owner. Ownership then passed to an innocent purchaser for value. Issue was therefore whether proportionality required accreditation to continue or to continue for a grace period in such circumstances
- Court's conclusion: Ofgem's decision not disproportionate. The integrity of the relevant subsidies system and the public acceptance of the cost meant acceptable to take a zero tolerance approach to fraud

CONCLUSIONS ON A1P1

- A1P1 capable of providing a powerful remedy (both in financial terms but also in terms of the reading down of legislation) in cases where it can be shown there is a clear entitlement to a financial benefit which is blocked by the action of a public body
- BUT where there is not a clear entitlement, difficult to establish that an interference with A1P1 rights is disproportionate (and, if so, likely to depend on circumstances whether damages on the restitutio in integrum principle are appropriate)

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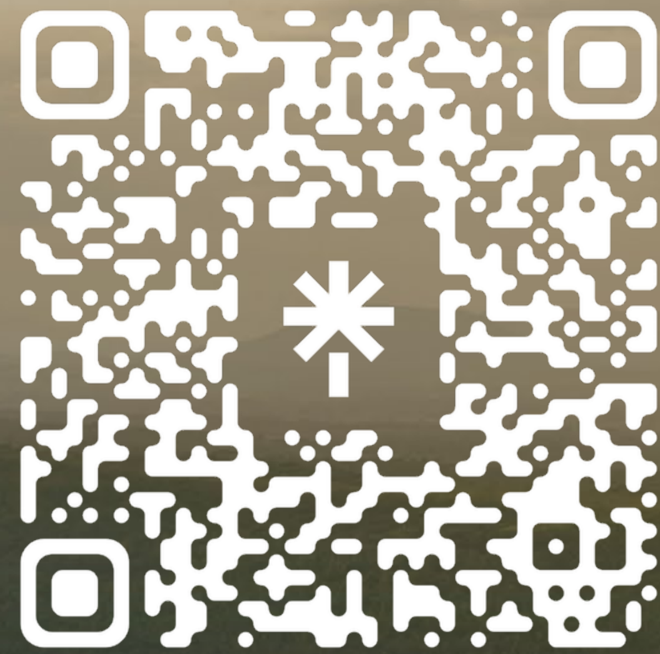


Daniel Stedman Jones

Steph David

Renewable Energy Update

RENEWABLE ENERGY: POLICY UPDATE

- Focus on 2 aspects of the Government's Growth Agenda for Renewable Energy:
  - NPPF Reform
  - Grid Connections Reform

CLEAN POWER 2030

CONTEXT: CLEAN ENERGY 2030

- December 2024, updated in April 2025.
- Decarbonise electricity by 2030 – 95% generation from renewables and nuclear
- Infrastructure upgrade, planning reform, increased capacity

> *"We have high ambition. That means 43-50 GW of offshore wind, 27-29 GW of onshore wind, and 45-47 GW of solar power, significantly reducing our fossil-fuel dependency. These will be complemented by flexible capacity, including 23-27 GW of battery capacity, 4-6 GW of long-duration energy storage, and development of flexibility technologies including gas carbon capture utilisation & storage, hydrogen, and substantial opportunity for consumer-led flexibility"*

1. NPPF REFORM

1. PLANNING REFORM: NPPF

- The new NPPF Consultation Draft was published in December
- The Government's growth agenda is planning-centred – housing and renewable energy are the two main engines
- The Consultation Draft proposes a new Energy Chapter and updated energy policy to drive both economic growth and the the Clean Power 2030 ambitions

NPPF: ENERGY

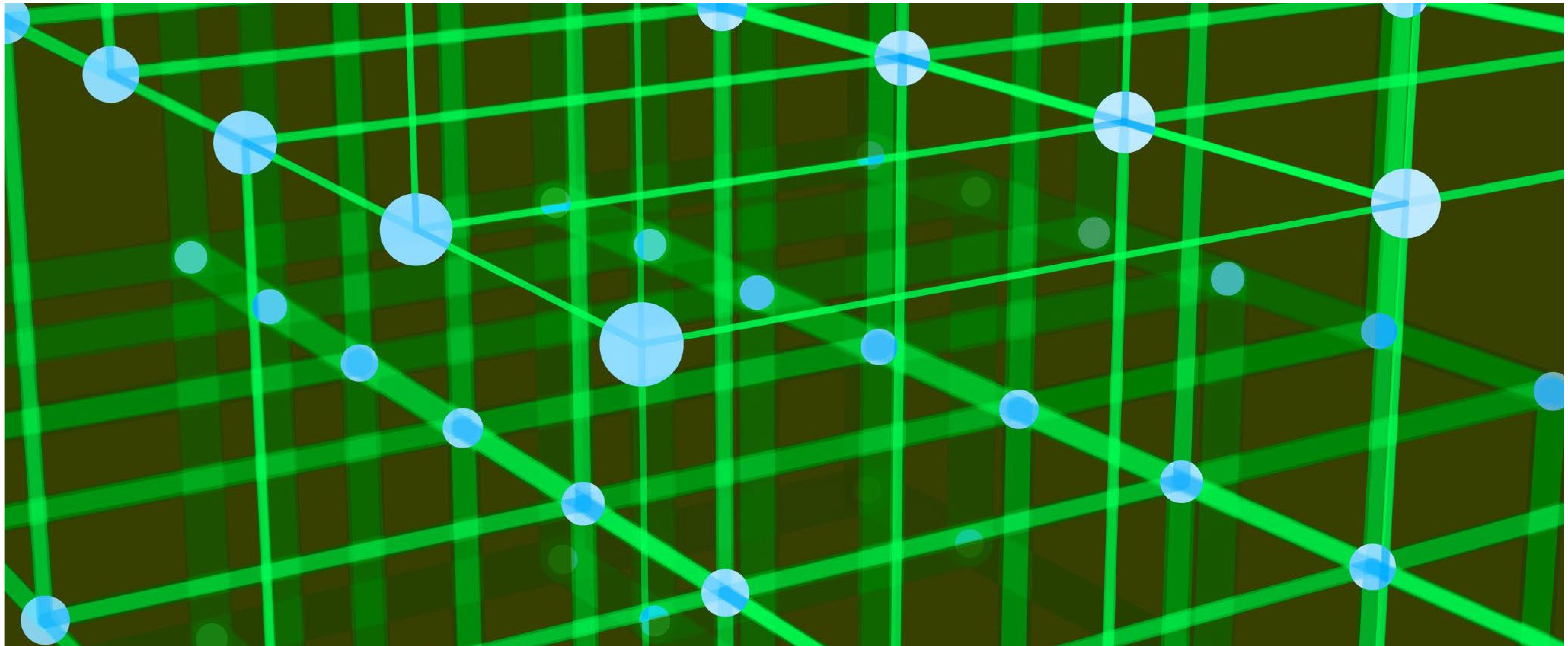
- So, what is proposed? Key proposals are:
  - new Chapters 5, 10 and 18 – including updating existing polices (paras 165-168); Gov aim to ensure “appropriate coverage” for energy (and water)
  - new plan-making policies (W1 and W2) and decision-making policies (W3 and W4) reflecting clearer distinction between the roles and functions of each in terms of energy
  - to be read with Chapter 5 policies for combatting climate change – CC1-CC3

NPPF: ENERGY

- Policies W1 and W2 seek to embed the provision of renewable energy and network infrastructure within plan-making processes so that evidence-base work is front-loaded, including:
  - engagement with key energy stakeholders – regulators, network operators and utility providers
  - taking account of "the impacts of planned growth, changing consumption patterns and climate change, as well as relevant infrastructure plans" (Policy W1 1.)
  - co-location of projects with energy supply systems (Policy W2 1. b))

- Policy W3 increases weighting for renewable energy and energy projects in planning decision-making – from "significant" to "substantial" – and proposes that off-plan devpt be assessed against national policy.

1. GRID CONNECTION REFORM



GRID CONNECTION REFORM

- Clean Power 2030 – grid connection reform requires projects to be in alignment with clean power strategy and demonstrate readiness:

  > “by removing unviable projects, re-ordering the queue, and accelerating connection timescales for projects we need most”

- Reform process driven by NESO and requiring approval of changes to Connection and Use of System Code and System Operator-Transmission Owner Code by Ofgem (approved in April 2025)

- What does this mean for renewables?

GRID CONNECTION REFORM

- Clean Power 2030, 'Connections reform annex (updated)':

> "For solar, batteries, and onshore wind, we need to ensure that ready projects can progress while delivering a balanced energy system for 2030. Regional breakdowns are needed to give network companies greater control over capacity allocation for these technologies because they are characterised by a larger number of smaller projects, are geographically dispersed and, in the case of solar and batteries, are oversubscribed nationally in our current connection queue. For these technologies, using pathways limited to GB-level would create significant risks of sub-optimal network design and could limit the ability to connect strategically important demand projects." (p. 6)

2 GATES

GRID CONNECTION REFORM

- Gate 2 to Whole Queue (G2TWQ) process overseen by NESO - Dec 2025 – Queue reordering announcements and new Agreements to Vary(ATVs)/firm offers made. 2 Gates System:
  - Gate 1 – (not yet ready or needed as not strategically aligned) so no offer by ATV (agreement to vary) – opportunity to join queue in future windows when formal offer made subject to space becoming available
  - Gate 2 – (new project pipeline) formal offer subject to progression criteria
- Gate 2 projects will require planning consent and to achieve progression milestones (planning, land rights, design/construction, finance/commitment)

GRID CONNECTION REFORM

- NESO – published a new Grid Connection Customer Handbook for guidance on what the offers mean

- Ofgem – 6 February Letter – No relief from compliance with "elements of the Connections Methodologies" as part of G2tWQ for certain protected projects

- Potential for challenges?

  – Ofgem dispute resolution – but only where "objective" error identified
  – JR of Ofgem decisions

THANK YOU

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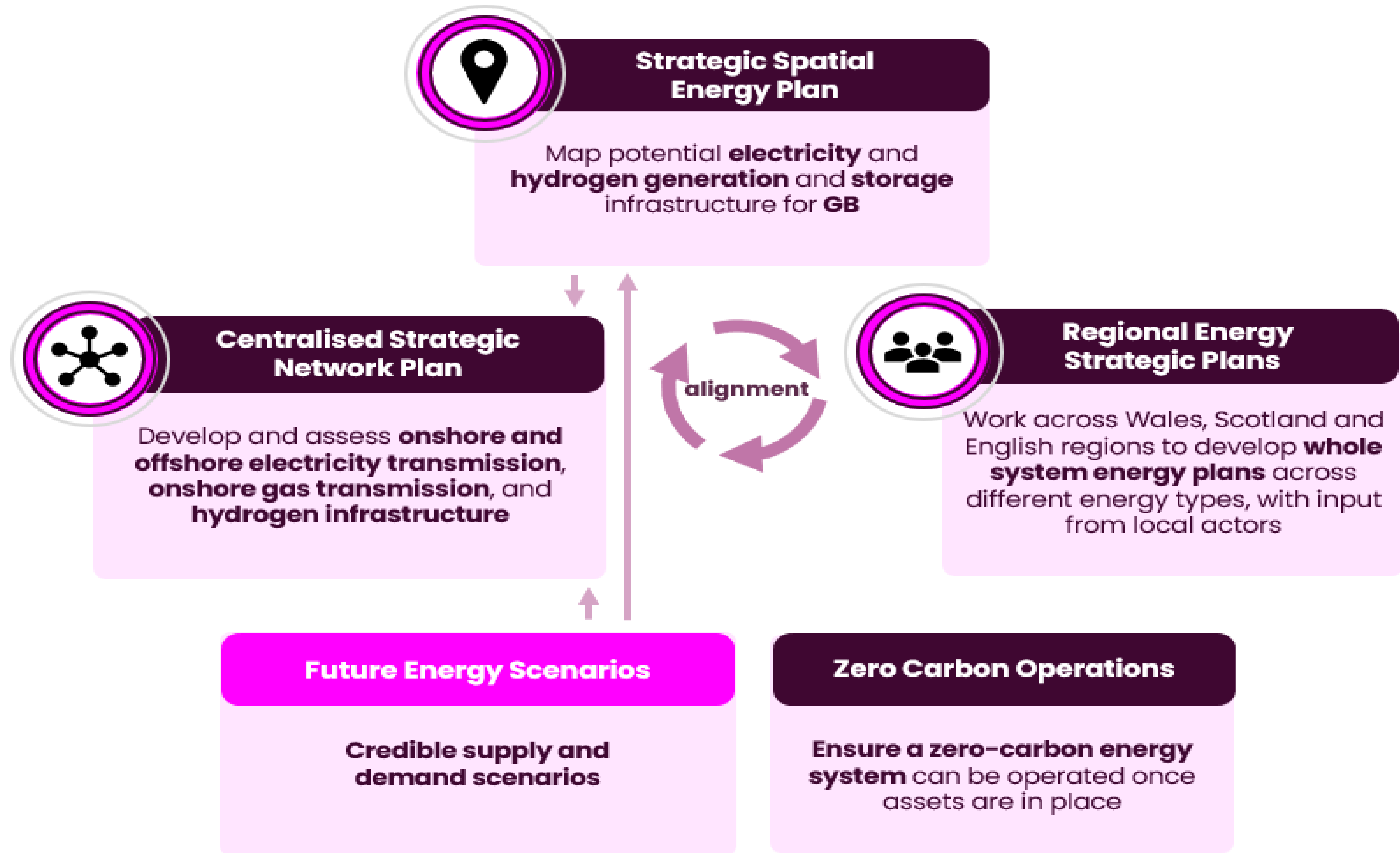
STRATEGIC ENERGY PLANNING: STRATEGIC SPATIAL ENERGY PLAN

STRATEGIC SPATIAL ENERGY PLAN: BACKGROUND

- Recommendation of the Electricity Networks Commissioner (June 2023)
  - Forecast the supply and demand characteristics and their likely whereabouts
- Transmission Acceleration Action Plan (Nov 2023)
- Joint commission to the National Energy System Operator ("NESO") on 22 October 2024
- Clean Power 2030 Action Plan (Dec 2024)
  - SSEP: "build from the 2030 capacity range to offer a longer-term spatial plan for the energy system beyond 2030" – WHY?
    - Strategic coherence between short-term action 2030 and longer-term spatial planning
    - Long-term decarbonisation and energy security
- Considered alongside: Centralised Strategic Network Plan andRegional Energy Strategic Plans



Strategic Spatial Energy Plan
Map potential electricity and hydrogen generation and storage infrastructure for GB
Centralised Strategic Network Plan
Develop and assess onshore and offshore electricity transmission, onshore gas transmission, and hydrogen infrastructure
alignment
Regional Energy Strategic Plans
Work across Wales, Scotland and English regions to develop whole system energy plans across different energy types, with input from local actors
Future Energy Scenarios
Credible supply and demand scenarios
Zero Carbon Operations
Ensure a zero-carbon energy system can be operated once assets are in place

STRATEGIC SPATIAL ENERGY PLAN: COMMISSION TO NESO (1)

- SSEP energy system - land and sea. Greater clarity to industry, investors, consumers and the public
- Focus: electricity generation and storage (including hydrogen assets) [future updates – include other energy such as natural gas]
- GOVERNANCE STRUCTURE – METHODOLOGY – PATHWAY OPTIONS (HOW THE ENERGY SYSTEM COULD LOOK) – ONE SELECTED FOR HABITATS REG ASSESSMENT AND STRATEGIC ENVIRONMENTAL ASSESSMENT
- SSEP will feed into Centralised Strategic Network Plan – plan for transmission network infrastructure

STRATEGIC SPATIAL ENERGY PLAN: COMMISSION TO NESO (2)

- Optimal locations, quantities and types of energy infrastructure (electricity and hydrogen)
  - What does "optimal locations" mean? Clear – no site specific recommendations; will not prescribe or authorise projects; "offer a guide to their spatial characteristics"; take into account competing demands on land but not prioritise energy over other demands
- Across a range of "plausible" futures (i.e. those that could be reasonably expected to occur and exclude extreme unexpected events
- Economic modelling – 25 year time horizon
- Updated regularly (needs flexibility to reflect uncertainty regarding energy systems transformation) – **does that undermine the broader purpose of SSEP?**
- Need to consider devolved/reserved matters (Scotland and Wales - energy policy = reserved; planning = devolved)
- Environment: incorporate environmental datasets; SEA; EPPS

COMMISSION – SSEP STRATEGIC FRAMEWORK

SSEP Strategic Framework	
Goal: to help accelerate and optimise Great Britain's energy transition	
Objectives	
O1	Increase industry and investor confidence to pursue new low carbon energy generation, demand and storage projects.
O2	Streamline planning and consenting processes for new energy generation and storage, respecting devolved competencies.
O3	Generate public engagement with spatial planning for the energy transition.
O4	Align the SSEP, CSNP and regional energy plans with each other and with national, regional and marine spatial planning.
Deliverables	
D1	A SSEP report including maps of a spatial energy pathway, showing projected optimal locations for future energy generation and storage. It will be consistent with a transition to a future energy system that: - Delivers decarbonisation and energy security - Takes account of communities and protects the environment - Is economic, efficient, deliverable and operable
D2	A forecast of locations of future energy demand, storage and supply that will facilitate network modelling and the production of the Centralised Strategic Network Plan (CSNP).

SSEP METHODOLOGY (MAY 2025)

- SSEP: spatial plan adopting "zonal approach" (not identifying specific projects); cf. Review of Electricity Market Arrangements concerned with "zonal pricing" and reforming the electricity

- Goals SSEP:
  - Pathway for electricity and hydrogen generation and storage types – **model high-level electricity and hydrogen transmission network requirements not specific projects/routing**
  - Provide the UK, Scottish and Welsh Govts and Ofgem with a plan they can endorse – (i) consistent approach to spatial planning (ii) alongside govt policy and respond to future policy decisions (iii) enable specific network solutions to be developed
  - Set context for nation's energy requirements – "increase certainty and confidence for industry and investors" – a plan that "considers societal and community voices and interdependencies earlier in the infrastructure development process"

SSEP METHODOLOGY (2)

- Consultation:
  - Interaction with other plans and policies
  - Marine Conservation Zones – confirmed undertake a MCZ assessment
  - Data centres –"*spatially optimize a small volume of data centres in different demand scenarios" (1-2 GW); use different demand projections to incorporate range of views on data centre growth*
  - "co-located sites" – *matrix to consider most likely technology pairings; geospatial modelling*
  - "Offshore Hybrid Assets" (generally out of scope but sensitivity analysis)

- In scope technologies (bioenergy with carbon capture and storage; data centres; hydrogen; interconnectors; long and short-duration storage; nuclear; offshore wind; onshore wind; carbon capture utilisation and storage; solar (ground mount); unabated gas

- Out of scope technologies (energy from waste; large-scale demand; new flexible demand (EV storage); Nuclear – AMR; solar – rooftop; tidal stream; tidal wave)

SSEP METHODOLOGY (3)

- SSEP pillars (economic, societal, environmental, technical engineering design requirements, other spatial uses);

- Consider: NPS; NPPF; Marine Policy Statement

- Economic land zones – 17 across GB - used to inform the economic modelling (used electrical transmission network boundaries and Grid Supply Points); offshore – connected to the land zone

SSEP METHODOLOGY DOC

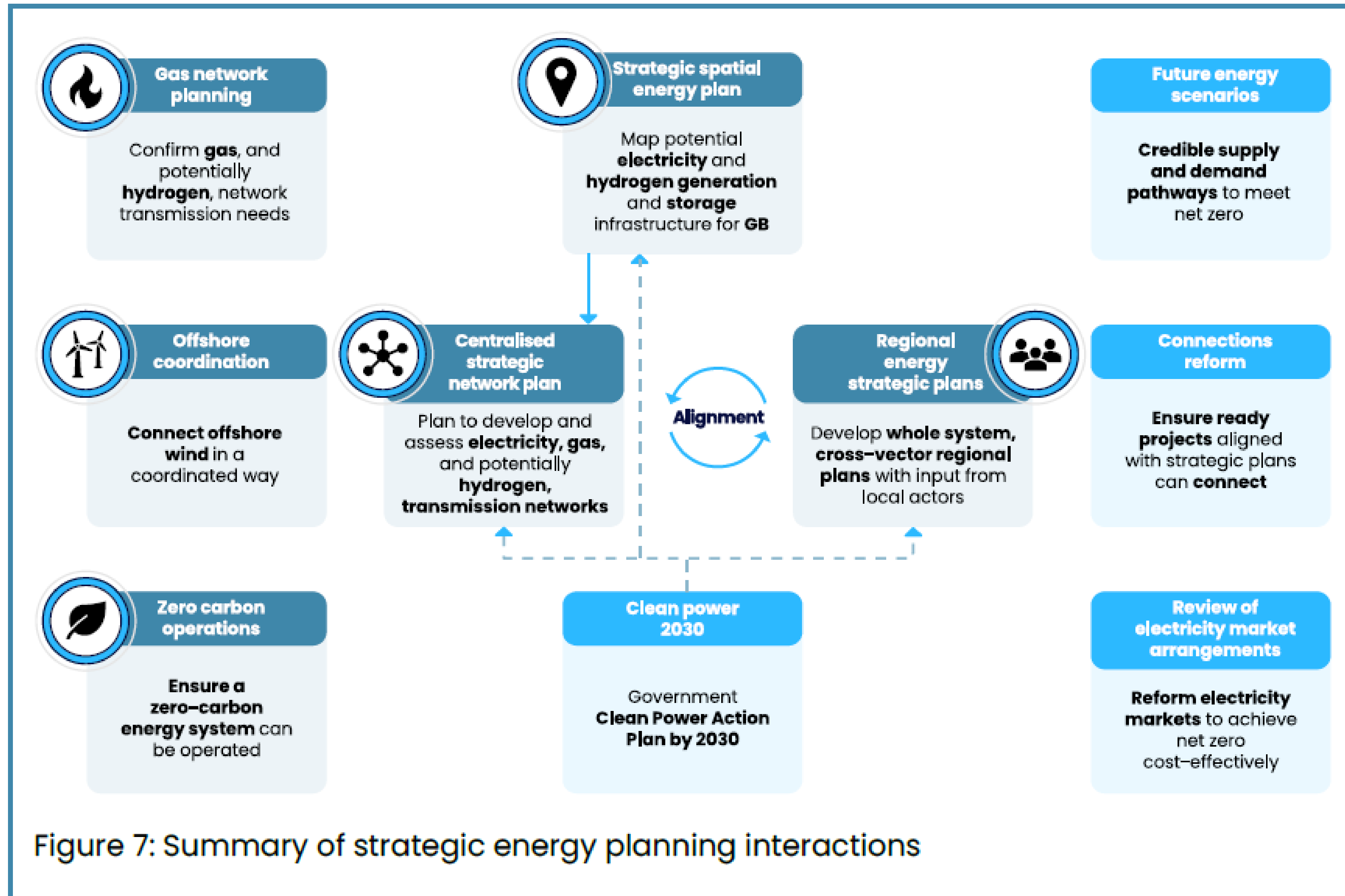


Figure 7: Summary of strategic energy planning interactions

POSSIBLE STATUS OF SSEP?

- Electricity Networks Commissioner – SSEP “useful backdrop to allow the introduction of regular updates to the NPS” (along with the 5-year review of NPS; Planning and Infrastructure Act 2025)

- Commission to NESO:
  - “complementary” to future government policy and market-let interventions ; “strategic approach to spatial planning”; “become part of the framework of the planning system.
  - **Look to incorporate SSEP or its spatial outputs into NPS** (subject to processes in the Planning Act 2008

- Methodology doc – interactions with other energy planning docs; connections reform process; interactions with proposed markets reform; planning and consenting process – “intended the SSEP will become part of the framework of planning systems”

QUESTIONS?

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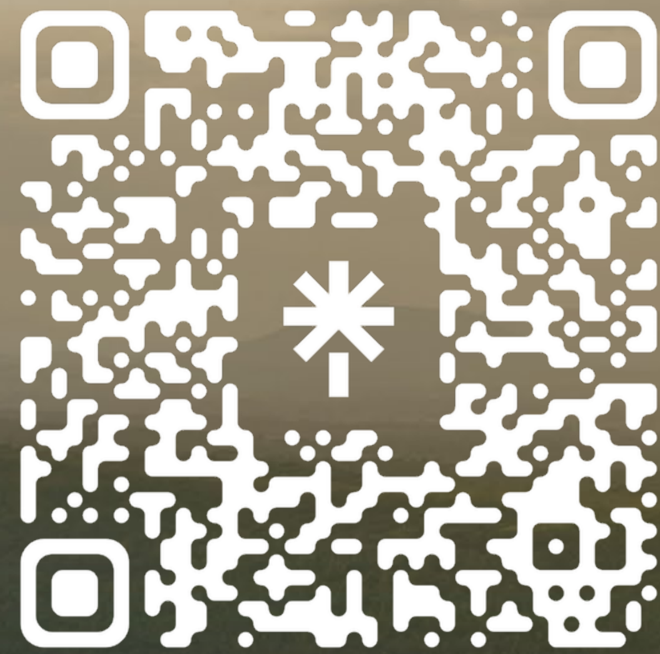

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Panel Discussion

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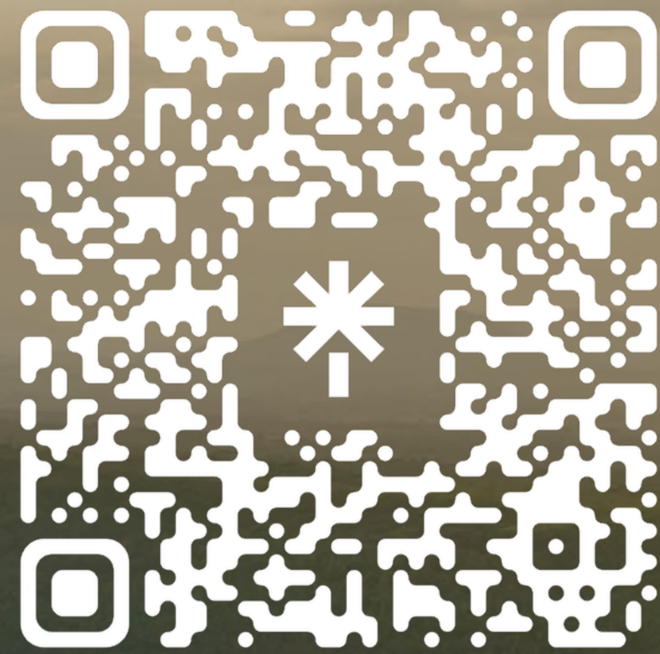

Environment and Energy Seminar 2026

Thank you for attending!