



1 **INTRODUCTION FROM NIPA BOARD MEMBER JAMES GOOD**

Welcome to the NIPA newsletter Autumn 2021 which endeavours to cover all relevant developments up until the start of November.

We hope this finds all members, their colleagues and families safe. Thankfully we seem to be slowly emerging from the pandemic with daily lives beginning to approach something that looks a bit more like normality even if there is some way to go and despite the fact there may be some bumps on the way as we go through the coming winter months.

Having had to hold our annual conference remotely in July we were delighted to be able to hold our Annual dinner again, after a missing a year in 2020, on 18 November.

A lot has happened since our last update for members and I hope you will find this newsletter insightful and entertaining. Thank you for taking the time to read what is quite a lengthy update. Before I move on I should thank colleagues at Bryan Cave Leighton Paisner who have assisted with pulling the newsletter together. My thanks are due to Planning Trainees Madeleine Lofchy and Charlie Austin, Associate Director James Parker and Knowledge Development lawyer Claire Eccles. Any omissions or errors however remain my responsibility!

Project Acceleration and the National Infrastructure Planning Reform Programme that is aimed at making the NSIP regime "*fairer, faster, greener*" is now up and running with the Government consultation on the existing system being completed in Phase 1 of the process (and end to end operational review of the existing system) closing on 17 December. NIPA will be responding to the Consultation in detail. The review is due to be completed by Autumn 2023 but we can expect to see details of the improvements and changes to the NSIP regime that the Programme will implement in the lead up to that date.

The review of the suite of Energy NPSs has been commenced further to Project Acceleration and revised drafts were out for consultation until 29 November – further details on that are set out below. The review of the National Networks NPS is also underway further to the commitment made in the Government's Transport Decarbonisation Plan. Other NPS reviews will follow. Although not yet the Airports NPS in which respect of which the Secretary of State has determined that there has been no change in circumstances that would justify a review of the Policy Statement (at this time!). Biodiversity net gain whilst not part of Project Acceleration is another important development going forward through the Environment Act 2021 with much detail to follow in secondary legislation which will be consulted upon over the coming months.

Ironically given the objectives of Project Acceleration a feature of the NSIP 2008 regime that has continued (and some would say got worse) over the last 12 months is delayed decisions on projects in a number of sectors notably highways and off shore wind. A further cause of delay in the system is the quashing of a number of DCOs for various legal reasons. Further details of both delays in the system and successful Judicial Reviews are set out below. There have also been the first application for material changes to DCOs which are also now going through the system – notably Hinkley Point 'C' and Able Marine.

In October Jan Bessell was elected Chair of the Board of NIPA replacing Angus Walker who had been in post for 6 years or two Chairperson election cycles. Congratulations to Jan on her appointment and to Angus for his achievements in his time as Chair. Angus has done so much good work in driving NIPA forward during that time making NIPA a better, more effective and resilient organisation. NIPA owes Angus a huge debt of thanks for all he has done over his time as Chair of the Board and we look forward to his continued involvement in the future success of NIPA. He has left an impressive legacy for Jan and the Board as a whole to build on.

As I said above I hope you enjoy the newsletter. If you have ideas for how it can be improved or any suggestions for future content please let us have them. The membership of NIPA is extremely diverse and talented and a real strength of the organisation, we would love to hear your ideas which can be submitted via the following email address info@nipa-org.co.uk.

Finally I am sure the whole of NIPA will want to pass on best wishes to Sarah Drljaca, NIPA Board member and the author of our previous newsletter (which was excellent), who went on maternity leave in mid-November.

Thanks you for reading and best wishes.

James Good

December 2021

2 **NIPA INITIATIVES AND NEWS**

2.1 **NIPA Bursary Programme**

As noted in the last newsletter, NIPA are piloting a Bursary Programme at University College London to establish a way in which we can support the development of early talent, and at the same time bring fresh perspectives and research to live issues in the regime.

The successful recipient of the bursary for the 2020/2021 academic year is Tom Haslam, studying for an MSc in Infrastructure Planning, Appraisal and Development. The working title of his dissertation is: '*Funding and delivering enabling infrastructure for strategic development sites: lessons from a comparative study of public development corporation vs private master developer models*'. It seeks to identify opportunities to improve the delivery and funding of enabling infrastructure for strategic development sites, utilising comparative case studies of two strategic development sites: Ebbsfleet Garden City and Alconbury Weald.

Tom is being supported during the bursary period by two NIPA contacts, Robbie Owen and Matthew Sharpe. Further details on the outputs of the NIPA bursary, and the future of the Bursary Programme will be provided in the next newsletter.

2.2 **NIPA events**

In addition to the Annual Dinner the following events have been or will be held by NIPA over the next few months:

- A Junior NIPA social was held on a virtual basis on 13 October from 4.30 to 5.30, on the topic of pitfalls and top tips for DCO applications, aimed at those in their first 10 years of practice (although anyone can attend). The event was coordinated by Sophie Reese at BDB Pitmans and Anna Coyle at Burges Salmon. Details of further future events will follow shortly.
- Following commencement of the consultation by the Department for Business, Energy and Industrial Strategy on the review of the Energy National Policy Statements EN-1 to EN-5 (EN-6 is not being reviewed by the Secretary of State at this time) NIPA held a series of workshops to gather members' views on the draft revised NPSs.
- Toby Gibbs of Logica will host a workshop on reform of the EIA system. The timing will be linked to when the Government publishes details of the reforms it proposes to make to the existing EIA Regime. Further details will follow in due course.
- There was a Partner Event with Waterfront Conferences entitled "Environmental Impact Assessment for Infrastructure Projects Masterclass 2021" on 2 December 2021. NIPA members were entitled to a 20% discount. Further detail can be found on the following link.

<https://www.nipa-uk.org/event/environmental-impact-assessment-for-infrastructure-projects-masterclass-2021>

- Climate change considerations: Nick Hilton, Head of EIA at Wood and a NIPA Council member will be hosting a workshop on Climate Change considerations in respect of NSIPs and the Environmental Impact

Assessment regime. Details of the time and date are to follow and will be notified to NIPA Members.

- NIPA will be holding a series of Workshops in H1, 2022 to contribute to DLUHC's National Infrastructure Planning Reform Programme (see further, section 3 below). The times and dates and Chairpersons for the Workshops are currently being identified and will then be published with NIPA members being able to register for the workshops in which they are interested in participating. It is likely that other professional bodies and organisations will be invited to participate in the workshops relevant to their areas.

2.3 **NIPA Council**

Angus Walker, immediate past NIPA Board Chair, reviewed the make-up of the NIPA Council in the early part of the year. Individuals who were either existing Council members or those wishing to become Council members were invited to apply to join the Council. The process resulted in a new Council being announced in April 2021.

The council now comprises: Steve Norris (Chair), Gideon Amos (AEC), Jan Bessell (Pinsent Masons)*, Andy Blaxland (Adams Hendry), Richard Blyth (RTPI), Vicky Bramhill (WSP), Ben Copithorne (Camargue), Viral Desai (Atkins), Phil Emison (Costain), Daniel Freiman (Heathrow), Alex Herbert (Giant Planning), Nick Hilton (Wood), Andy Hunt (Quod), Viki James (Arden), Sally Keith (National Highways), Wendy Lane (Gravesham Borough Council), James Maurici QC, Amanda Pownall (Pownall Associates), Andrew Prior (Lucent Energy), Vicki Redman (Womble Bond Dickinson) and Anna Sutherland-Bamber (Jacobs).

Any changes to the Council (and also the NIPA Board) arising from the NIPA Board election (see further below) will be confirmed to members in due course.

2.4 **NIPA Board Chair**

This Autumn saw the holding of the three-yearly election of the Chair of the NIPA Board. An email was issued to members inviting applications and setting to the process for electing the new Chair the substantive content of which is quote below.

There were three candidates for the position existing Chair in post Angus Walker, Jan Bessell of Pinsent Masons and Neil Bromwich of Osborne Clarke.

The election process was completed on 18 November 2021 with Jan Bessell being confirmed as the new Chair of the NIPA Board for a term of three years. Congratulations to Jan on her election.

The election result brings to an end Angus Walkers 6 year tenure as Chair of the NIPA Board. During that time and under Angus' leadership NIPA has gone from strength to strength; membership has increased and the membership application process has been greatly improved; successful Annual Conferences, Annual Dinners and regular seminars have been held; and more generally NIPA has been put on an even stronger footing, notwithstanding the impact of the Covid pandemic. NIPA's relationships with Government Departments and PINs have also been significantly strengthened and improved with regular contacts now occurring as a matter of course.

The NIPA Board would like to acknowledge, thank and congratulate Angus for these achievements on behalf of the whole of the NIPA membership. Angus has worked

conscientiously and tirelessly for the organisation and his achievements leave a lasting and long legacy upon which NIPA can build and move forward.

3 **NATIONAL INFRASTRUCTURE PLANNING REFORM PROGRAMME**

NIPA continues to liaise closely with Government concerning reform to the NSIP regime first announced in the National Infrastructure Strategy in November 2020 with its ambitious aim "*to cut timescales by up to 50% for some projects entering the system from September 2023*", the target date by which the Programme is to be completed. (It is to be noted that the changes to the EIA, Habitats and Species regimes also announced in the November 2020 Strategy have yet to be published and consulted on).

On 21 June 2021 the Rt Hon Christopher Pincher MP, Minister of State at the Ministry of Housing, Communities and Local Government, wrote to NIPA members in advance of the NIPA Conference on 7 July 2021, announcing that the Government has established the National Infrastructure Planning Reform Board chaired by the MP and Lord Agnew to lead on various issues concerned with infrastructure delivery including Biodiversity Net Gain and the review of National Policy Statements.

The letter can be found on the following link ([https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/999405/Christopher Pincher letter to NIPA.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/999405/Christopher_Pincher_letter_to_NIPA.pdf)) and explains that the road map to completing the Reform Programme by September 2023 had three main strands:

- An operational review to look at Project Acceleration including testing ideas on live DCO applications and to identify and tackle underlying problems with the system (this is ongoing).
- The review of National Policy Statements (at the time the Energy Secretary had already announced the review of the Energy NPSs by the extremely ambitious date of the end of 2021– see further section 4.3 below)
- Reform of the EIA and SEA systems to deliver a quicker and simpler framework for assessing the effects of projects.

The Annex to the letter contained seven questions that NIPA members were asked to consider and which were intended to elicit ideas through feedback that can be used in the Reform Programme. The questions were:

- 1. What Government, its Arms-Length Bodies and other statutory bodies could do to accelerate the speed at which NSIP applications can be prepared and more generally to enhance the quality of submissions.*
- 2. Following submission, whether there are any aspects of the examination and decision process which might be enhanced, and how might these be improved.*
- 3. Where a development consent order has been made, what impediments there are to physically implement a project which could be removed.*
- 4. How digitalisation might support the wider improvements to the regime, for example are there any specific aspects that you feel could benefit from digital enhancements.*

5. What issues are affecting current NSIPs that you are working on that would benefit from enhanced cross-government co-ordination including Government Departments and Arms-Length Bodies.

6. Whether the NSIP regime successfully interacts with other consenting and regulatory processes and the wider context within which infrastructure projects operate.

7. Areas where limits in the capacity or capability of NSIP applicants, interested parties and other participants are resulting in either delays or adversely affecting outcomes.

The Minister's letter went on to set out a timetable for the programme. A programme update is due in Autumn 2021 (but has not yet been published), proposed changes to the regime will be consulted upon in Spring 2022 and in Autumn 2022 the Government want system users to understand how the system is changing and what is required of them so that schemes will benefit from the system improvements from September 2023. It is anticipated that improvements will be brought through in the guise of updated policy advice as well as changes to legislation although it is to be noted that wholesale change to the legislative system is not anticipated.

A NIPA survey on various aspects of the Planning Act 2008 regime was published in advance of the NIPA conference, the sole focus of which was the reform plan. Over 50 members of NIPA responded in advance and after the Conference. An interim report on the responses was provided to the Conference by Angus Walker and Robbie Owen and a full report on all response is being prepared and will be sent to the Department shortly, at which point the Report will be shared with members.

The first day of the conference was focussed on presentations from Christopher Pincher MP and representatives from the Planning Inspectorate, MHCLG, DfT, BEIS and Defra on the reform programme and other issues such as the review of NPSs. The second day was focussed on a series of workshops on how to speed up the regime, how to make better use of technology and digitalisation of the system and how to make it greener. There were then workshops on the lessons to be learned from offshore wind and highways projects that could improve the system. All of the feedback from the Conference will be combined with the feedback from the NIPA survey and reported to the Department as described above.

A little over a month after the Conference MHCLG, on the 12 August 2021, the Government launched a consultation on the National Infrastructure Planning Reform Programme. The Consultation can be found on this link <https://www.gov.uk/government/consultations/national-infrastructure-planning-reform-programme-stakeholder-survey/national-infrastructure-planning-reform-programme>.

The Consultation runs from 12 August 2021 to 17 December 2021. Beyond administrative details such as provision of names and addresses of consultee respondents the Consultation poses eight questions within the three main strands described above as revealed the Minister's 21 June 2021 letter. The questions are in all material respect identical to the questions posed to NIPA Members in the Annex to the 21 June letter as recorded above.

As described above NIPA will be holding series of Workshops to refine our response to the National Infrastructure Planning Reform Programme. The times and dates and Chair Persons for the Workshops are currently being identified and will then be

published with NIPA members being able to register for those workshops in which they are interested in participating.

At the same time NIPA Board members will continue with their regular monthly discussions with the Government concerning the Reform Programme including following up with them the various themes coming out of the Conference and continuing to input to the ongoing reform programme, including presenting the results of the NIPA Survey to the National Infrastructure Planning Reform Board. Members will be kept up to date with these discussions through the NIPA website and the Workshops that will inform NIPA's response to the Consultation on the Reform Programme.

4 **OTHER UK GOVERNMENT ANNOUNCEMENTS**

4.1 **Biodiversity Net Gain and DCOs**

A key part of the Environment Act 2021 is the introduction of a 10% Biodiversity Net Gain for development. Originally this only applied to Town and Country Planning Act applications with many questionings why the Net Gain requirements were not being applied to NSIPs. No clear explanation of that position ever really emerged from Government causing some to speculate that there was concern about delivery of large scale nationally important projects if the 10% requirement became mandatory. There was speculation that there may be some benefit in maintaining an approach whereby NPSs could call for net gain but not strictly quantify how much gain was required as a matter of policy - leaving the Secretary of State to judge acceptability of proposals in respect of the Net Gain they offered when determining whether the negative impacts of the NSIP in question outweighed its benefits.

This has been much debated with many feelings this was a pragmatic approach that provided the opportunity to achieve Net Gain but not put up Net Gain standards for nationally significant projects that might be impossible or prohibitively expensive to meet and hence prevent nationally significant infrastructure being delivered. On the other side the Environment lobby and campaigners were busy pointing out that if it was good enough for very large scale TCPA applications (such as major housing schemes) it should be good for other large scale infrastructure projects.

All of this was clarified by two Government announcements. On 7 June Lord Goldsmith announced to the House of Lords, in response to questions raised by a number of Peers, as follows:

"On biodiversity net gain, I can tell my noble friends Lord Randall and Lord Blencathra and the noble Baroness, Lady Bennett—and, I hope, reassure them—that although nationally significant infrastructure projects remain out of the scope of the mandatory requirement for the Bill for the time being, the Government are exploring how a biodiversity net gain approach for big infrastructure projects could best be delivered, including what legislative levers could be used to support it. This is something that we are actively working on."

Then on 14 June 2021 the Government announced in its response to the Dasgupta Review on the Economics of Biodiversity that it would be amending the Environment Bill to apply Biodiversity Net Gain to NSIPs:

"New Nationally Significant Infrastructure Projects in England, such as future transport and energy projects, will as a result need to provide a net gain in

biodiversity and habitats for wildlife - through an amendment to be made to the Environment Bill."

The amendment emerged on 18 June 2021. First a new section in the Bill–

"Schedule (Biodiversity gain in nationally significant infrastructure projects) makes provision about biodiversity gain in relation to development consent for nationally significant infrastructure projects."

The Schedule referred to is a new Schedule 2A to the Planning Act 2008. The effects of all this are that where a NPS is in place in respect of a specific NSIP and requires Biodiversity Net Gain, then the application must be determined in line with that NPS and Biodiversity Net Gain of at least 10% must be provided. Further where an existing NPS does not provide for Biodiversity Net Gain it must do so when next reviewed (do not forget in the context of the Energy NPS review underway the Environment Bill is not yet binding legislation but it is slightly odd that the amended NPSs do not reflect this 10% requirement with more clarity).

Where an NPS does not require Biodiversity Net Gain or there is no applicable NPS the Government may issue a "biodiversity gain statement" (which must be consulted upon) requiring the Net Gain in respect of a particular project.

However, the door has not been completely slammed as regulations can be made to exclude projects or classes of project from the Net Gain requirement. Also, there are no sign of transitional provisions as yet – watch this space as there is plenty of room for manoeuvre and complexity as BNG is rolled out as a legislative requirement of applications and projects.

4.2 **Transport Decarbonisation Plan**

The Transport Decarbonisation Plan was published on 14 July 2021. Weighing in at an impressive 216 pages it is a weighty tome.

The Plan lists a large number of objectives across all transport sectors with varying target dates from 2030, 2035 and 2040 all with the aim of achieving net zero by 2050. However perhaps the headline message is that the Plan is not a negatively expressed position of doom and gloom that if we don't change we as a species and nation and the world are in for it! But rather a more positive message of don't worry carry on living and travelling pretty much as you want (but if you wouldn't mind please do change your behaviours as well where you can) technology will be the answer – it seems a second, new, greener industrial revolution from that experienced in the past is envisaged.

There is a huge amount of detail in the Plan and here is not the place to attempt to summarise it – other than to note a clear commitment to review the National Networks NPS (which is due to commence in later 2021 and finish by Spring 2023). The headline takeaway from the Plan is the intended technological solution focus to decarbonising transport. However it should be noted that there are some sticks alongside all the carrots and the reliance on new greener technology all of which will have to be developed very quickly. What flows from that, and is also clear from the impressive funding commitments the Plan makes, is that this is going to cost a lot and as ever there is very little on where the money will come from.

4.3 **Review of the Energy National Policy Statements, EN-1 to EN-5**

On Monday 6 September 2021, the Department for Business, Energy and Environmental Strategy (BEIS) published its much-anticipated draft revisions of the energy National Policy Statements. It is to be noted that these are not complete redrafts of the existing documents, they are amendments and updates to policy.

A consultation period ended on 29 November 2021 allowed interested parties to review and feedback to BEIS on the draft NPSs. It now seems impossible for the review to be completed by the end of the year which was the original target date, sometime in Spring or early Summer now seems more realistic. Whilst the review is ongoing the existing Energy NPS documents remain valid and apply to applications made before new NPSs are designated. That said emerging Government policy will clearly a material consideration to determination of these applications.

What follows is a high-level summary of some of the major policy development introduced by the draft NPSs.

EN-1: OVERARCHING ENERGY POLICY

EN-1 recognises the need for urgent and major action in the face of aggressive climate change, which it accepts will inevitably continue.

Continued use of natural gas

Just as climate change is inevitable, the draft paper resigns us to the continued use of fossil fuels and natural gas until 2050 and beyond. Ongoing gas infrastructure will continue to be required for decades to come but it will be required to carbon capture and storage compliant.

Hydrogen power

A mix of energy is championed as being essential to decarbonisation and lowering emissions and, for the first time in a NPS, hydrogen power, along with carbon capture storage (CCS) technology, is given considerable significance as a means of attaining the 2050 net zero target.

Nuclear power

Despite being described as “continuous, safe low-carbon power”, nuclear power takes a back seat in this consultation – EN6 is not included in the consultation: however, it will be the subject of a new national policy statement, to replace existing EN6, which will address nuclear infrastructure deployable after 2025. For the time being the existing EN6 continues to have the role set out in the Written Ministerial Statement of 7 December 2017 and it will continue to apply for new nuclear capacity to be deployed before 2025, and application to amend development consent for such generation. Save for amendments to existing DCOs it seems EN6 is downgraded to a material consideration in determining applications for new nuclear stations given the promotion and development time lines for them stretch beyond 2025.

Coal and oil phased out

Whilst a diverse mix of energy production technologies is proposed, the need for new coal and oil-fired electricity production has been phased out entirely, in contrast to natural gas.

Emphasis on carbon capture

One of the core, underlying themes of EN-1 is that “there do not appear to be any realistic alternatives to new CCS infrastructure for delivering net zero by 2050”. This is particularly important in the context of low carbon hydrogen production.

Historically, the main barrier to CCS has been a commercial, rather than a technological one. The government has therefore confirmed that it is developing plans to “incentivise the deployment of [CCS] facilities” in the United Kingdom.

Further, all biomass generating stations will need to be carbon capture ready and/or have carbon capture storage applied.

Onshore reinforcement works and increased connection

The draft NPS highlights the dual importance of connecting new electricity sources with each other (particularly with reference to offshore wind farms) and also of reinforcing the existing power network so that it is able to support the changing face of the UK’s energy supply. The expected sharp increase in North to South energy transfer is given as a key reason for the need to reinforce and upgrade.

Novel and developing technologies – avoiding a policy vacuum

EN-1 currently only has effect in tandem with the relevant technology-specific NPS for energy and this will continue where there is such an NPS: however, where there is no relevant NPS, EN-1 will have effect on its own. This will be the case for emerging technologies including CCS and hydrogen, and also novel, low-carbon technologies not yet envisaged by EN-1.

This is to avoid a policy vacuum that would hinder the progress of technologies able to play a part in helping the Government reach net zero.

Assessment principles

New sections have been provided to give weight to marine considerations and biodiversity enhancements in the assessment process.

EN-2: NPS FOR NATURAL GAS ELECTRICITY GENERATING INFRASTRUCTURE

EN-2 recognises the ongoing role of natural gas combustion power plants, particularly in the short term, to meet peak capacity where necessary. Coverage of coal and largescale oil-fired electricity generation is absent as these fossil fuels are in the process of being phased out entirely.

Otherwise, there is little to report on the changes to EN-2 with the obvious exception that it has had a makeover in terms of its title to move away from its predecessor, which was the NPS on Fossil Fuel Electricity Generating Infrastructure.

EN-3: NPS FOR RENEWABLE ENERGY INFRASTRUCTURE

EN-3 sets out the policy on renewable energy which is amended to address the impacts that are specific to the different types of renewable energy. It no longer provides specific information on onshore wind as this was removed from the NSIP regime and now falls within the remit of the Town and Country Planning Act 1990. New sections on environmental compensation, marine planning and co-ordination of

onshore transmission are included and there is new guidance on solar PV and tidal stream energy.

Energy from biomass and/or waste

This section provides few substantive changes. The most significant change is that biomass power stations will need to be carbon capture ready and/or have carbon capture storage technology applied.

Wording to incorporate the latest legislation relevant to air quality, specifically the Waste Incineration Best Available Techniques is included.

Further, there is more information on the "*pollutants of concern arising from the combustion of waste and biomass*", however where the proposed combustion station utilises the best available practices to low pollutants, then they will be considered compliant regardless.

Offshore wind

Offshore wind receives strong policy support with the target of 40GW for offshore capacity (including 1GW of floating offshore wind) by 2030 explicitly referenced.

There are substantial changes made to this section of EN-3 including significant guidance regarding the Crown Estate cable route protocol, marine planning, co-ordinated offshore transmission (as also covered by EN-1), environmental considerations (compensation and net-gain) and the importance of multi-purpose interconnectors.

Pumped hydro storage

Pumped Hydro Schemes (PHSs) are referred to in place of hydroelectric power generation.

It is recognised pumped hydro storage is "*not a net generator of electricity*" as "*any power generation must subsequently be balanced by consumption to return the water to the upper reservoir*". However, pumped hydro's storage capability is useful to the electricity grid to "correct for imbalances in electricity supply and demand".

There are new sections covering noise and vibration, water quality and resources, biodiversity and recreation.

Solar photovoltaic

The 2011 EN-3 contained very little substantive policy in relation to solar generation; this is no longer the case. Policy is now provided to cover site selection, technical considerations and environmental considerations / assessment associated with new solar schemes.

Large-scale solar is recognised as being "*viable in some cases to deploy subsidy free and at no extra cost to the consumer*". This is a marked contrast from the inhibitive expense associated with solar generation when the 2011 NPSs were published.

Capacity thresholds for solar projects are clarified as being calculated on an AC, not DC, basis.

Tidal stream

This new section covers the affects of tidal stream infrastructure on the environment, with biodiversity and ecological conservation examined.

It is noted that there is only limited knowledge of the environmental consequences of tidal stream projects (e.g. to seabed habitats and distribution of marine species).

Tidal lagoons or barrages are not considered under EN-3.

The technology is nascent and, as such, it is likely that tidal stream projects above 100MW will only come forward for planning consent in the next 5-6 years.

EN-4: GAS SUPPLY INFRASTRUCTURE & GAS AND OIL PIPELINES

EN-4 deals with gas supply infrastructure and oil and gas pipelines which will still be required over the coming decades as a secure, reliable, and affordable energy supply during the decarbonisation of the energy system. The revisions address specific impacts and considerations for the import, storage, and transmission of gas and oil products. There is little else to report as EN-4 remains largely in line with its predecessor.

EN-5: NPS FOR ELECTRICITY NETWORKS INFRASTRUCTURE

EN-5 has been updated *"to reflect the importance of building electricity network infrastructure that not only connect new generation with flexibility solutions and centres of demand, but also guarantees system robustness and security of supply even as the energy system grows increasingly complex."*

Land rights

A new section has been added to encourage developers to seek secure permanent land rights where possible as opposed to relying on wayleaves, with the purpose of ensuring that electricity networks are more reliable and more stable.

Formal recognition of the 'Horlock Rules'

The industry standard 'Horlock Rules' on the design and siting of substations and similar assets are formally incorporated into the Secretary of State's decision making process.

Undergrounding of new electricity lines

The most substantive change in policy is the introduction of a *"strong starting presumption"* that new electricity lines in AONB's and National Parks should be undergrounded unless the harm caused outweighs the benefit of doing so.

Onshore / offshore transmission coordination

A further new section has been included that elaborates on the need, identified in EN-1, to have a coordinated approach to transmission to multiple offshore windfarms. Expect benefits of this to include *"a reduced number of landing sites and landfall impacts associated with bringing offshore transmission onshore"*.

4.4 Review of the Airports National Policy Statement

On 6 September 2021 the Secretary of State ("SoS") published his decision that no review of the Airport National Policy Statement ("ANPS") was appropriate at this time

despite a number of requests that he do so. In line with his obligations under Planning Act 2008 S.6(3) and S.6(4) and considering the importance of sustainable development, the SoS analysed the below factors and found that changes in them (if any), regardless of whether anticipated contemporaneously with the making of the ANPS, would not have made a material difference in any of the ANPS's policies.

A link to the decision can be found here - https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1015207/decision-on-requests-to-review-the-anps.pdf

The main reasons for the decision not to review the ANPS can be summarised as follows:

- **Climate change:** Although the SoS found the Government's and Climate Council Committee's position to be a significant and unforeseen shift from circumstances anticipated at the time of ANPS designation the SoS did not find that this would have made a material difference in the ANPS policy made at its designation. Specifically, long-term aviation demand predictions and Government policies yet to be elaborated concerning the level of permitted emissions from the aviation sector and future cost of flying will influence whether the policy at the time of designation would have been materially different and by implication whether it would be appropriate to review the ANPS at a later date:
- **COVID-19 pandemic:** The SoS considered that it was not appropriate to review the ANPS at this time as it was too soon to consider the effect of the pandemic on medium to long-term aviation demand. The impact of Covid will continue to be monitored and medium and long term forecasts will be produced as and when the data is available and the outlook is more certain. This will require stability within the sector and will also rely on analysis of whether the previous relationship between aviation demand and its drivers remains valid or has changed as a result of Covid;
- **Noise:** The SoS does not consider there to be any relevant change in circumstances relating to noise policy or legislation from the basis on which ANPS policy was decided; no noise policy or legislation upon which the ANPS was based had changed since it was designated. The use of Performance Based Navigation was relevant to air space modernisation but its benefits are not considered to significantly affect the ANPS. The evidence presented by those requesting the review of the ANPS pre-dated designation and the noise assessment completed and consulted on for the ANPS.
- **Air quality:** The SoS found no significant change in circumstances from ANPS policy with regard to air quality. Again reliance was placed on there being no change to the policy or legislation in place at the same time the ANPS was designated. The main evidence presented in favour of reviewing the ANPS pre-dated ANPS designation and the air quality assessment carried out for and consulted on for ANPS designation. The effect of future new air quality targets on ANPS policy cannot realistically be evaluated until specifics of the targets are known.
- **Scheme cost:** The SoS does not consider scheme cost discrepancies referred to in some requests for review of the ANPS to represent a significant change in circumstances from which the ANPS's policy was decided. The costs of £32bn highlighted in review requests were not comparable to the costs used for the

ANPS (£14-18bn). The Civil Aviation Authority regulates the costs of the scheme, testing for efficiency and financial viability.

- **Health and regional inequalities:** The SoS does not see any significant change in circumstances in health and regional inequalities from those on the basis of which ANPS policy was decided. The SoS is of the opinion that the Heathrow expansion is not in conflict with the Government's levelling-up plans (particularly as the ANPS concluded that regional airports would continue to see passenger growth), nor can data concerning the effect of the pandemic on communities around Heathrow be adequately assessed at this stage.
- **Scheme disbenefits:** HAL's Airport Expansion Consultation does not, in the view of the SoS, contain new evidence about benefits/disbenefits of the scheme, and how it aligned with the parameters and boundaries in the ANPS, that are significant changes in circumstances from when the ANPS was designated. Neither employment data, which is likely to change, nor construction timetable, are considered to be significant changes. Further, consideration of a scheme promoter's interpretation of the ANPS's parameters is a matter for PINS and the relevant ministers at the time of a promoter's application for a Development Consent Order.
- **Cumulative impact of expansion of other airports:** The growth of other airports was anticipated at the time of ANPS policy decision. The Airport Commission noted that other Airports in the South East would need to be used more intensively and this was now supported by separate Government Policy. Further, the cumulative impact of later airport development must, under the ANPS, be considered at the expansion application stage. Cumulative airport expansion effects therefore are not, in the view of the SoS, significantly changed from the basis of ANPS policy decision.

There were no other matters which caused the SoS to think that review were necessary at the current time. The SoS would continue to monitor whether review was necessary given the importance of having up to date NPS document as part of the integrity of the Planning Act 2008 regime.

4.5 **The Rt Hon Michael Gove MP becomes Secretary of State at MHCLG**

Michael Gove was appointed as Secretary of State for Ministry of Housing, Communities and Local Government on 15 September 2021.

On 19 September the Government announced that the Ministry would be renamed the Department for Levelling Up, Housing and Communities (DLUHC) with Michael Gove as Secretary of State with a new Levelling Up Taskforce being established to drive efforts in that respect.

"The taskforce has been jointly established by the Prime Minister and the Secretary of State for Levelling Up, Michael Gove MP.

The Secretary of State will drive cross-Whitehall efforts to deliver a programme of tangible improvements in every part of the UK as we build back better from the pandemic, and deliver on the people's priorities.

The Secretary of State will have responsibility for United Kingdom governance and elections. He will therefore also take on the additional title of Minister for Intergovernmental Relations, working closely with the Territorial Offices and leading coordination with the devolved administrations on the Prime Minister's behalf.

He will be supported in the department by new Minister of State Kemi Badenoch MP and Neil O'Brien MP, who has been appointed Parliamentary Under Secretary of State.

Reappointed to the department are Ministers of State the Rt Hon Christopher Pincher MP and Lord Greenhalgh, and Parliamentary Under Secretary of State Eddie Hughes MP."

Andy Haldane will be seconded from the Royal Society of Arts, Manufactures and Commerce (RSA) for 6 months to join as a permanent secretary in the Cabinet Office. He will head up the Levelling Up Taskforce that will report jointly to the Prime Minister and the Secretary of State for Levelling Up, Housing and Communities.

At around the same time as Michael Gove's appointment various newspapers were reporting that the proposed reforms to the Town and Country Planning Act system announced in the controversial Planning White Paper from August 2020 have been 'paused'. The new Secretary of State plans to conduct a review into how the proposals can be improved in consultation with Tory backbenchers and industry stakeholders. There is no official Government announcement yet but this undoubtedly reflects the fact that what the Prime Minister announced in August 2020 "*a whole new planning system for England*" is highly controversial with many Tory MPs and has been subject of wider criticism as well, with a feeling for many that it isn't the current system that is failing per se but the failure to properly resource it that is at the route of many of the problems and issues with the current system that the Prime Minister described as a system that "*simply does not work*". The Conservative loss at the Chesham and Amersham by-election may also have been a contributing factor.

5 **DEVELOPMENT CONSENT ORDERS UPDATE**

5.1 **Hornsea Three Offshore Windfarm**

The Hornsea Three Offshore Windfarm was granted development consent on 31 December 2020 (some 15 months late) with Order coming into force on 22 January 2021. This was the ninth decision to be issued by the Secretary of State against the recommendation of the Examining Authority.

As appears to be increasingly common with offshore windfarms the decision was significantly delayed due to concerns about protected Habitats. In this case it was the effect on Kittiwake mortality in the Flamborough and Filey Coast Special Protection Area in combination with other projects. The project only has been able to receive consent due to a finding on the part of the Secretary of State that there were imperative reasons of overriding public importance in the project proceeding and that adequate compensation would be secured in the form of a "Kittiwake Implantation and Monitoring Plan.

This is another decision that demonstrates that the assessment of a project's effect on habitats appears to be an increasingly difficult issue for promoters to deal with at the project level with a number of well-informed commentators suggesting that the Crown Estate (which licenses the development of offshore wind farms), developers, nature conservation bodies and government need to look at the issues on a coordinated strategic basis.

5.2 **A38 Derby Junctions**

The A38 Derby Junctions DCO was approved on 8 January 2021. The Examining Authority and the Secretary of State both considered that development consent should be granted however the Secretary of State's decision was subsequently quashed by the High Court on 8 July 2021. Please see further in section 6.4 below.

The Examination of the application was extended from 6 to 9 months – the first examination extended as a result of the pandemic. The subsequent steps in the decision making process – delivery of the Examination Authority report and the Secretary of State's decision - were completed on time with the decision being issued exactly six months after the close of the Examination.

Key issues in respect of the application included the effect on the Derwent Valley Mills World Heritage Site, climate change considerations and the suitability and delivery of the necessary environmental mitigation. Replacement open space was provided to address the loss of existing open space lost to the project.

5.3 **A1 Birtley to Coal House**

Development consent for the A1 Birtley to Coal House project (which involves widening of the A1 south of Gateshead) was issued on 19 January 2021, with the DCO coming into force on 9 February 2021.

The Examining Authority Report was issued on time with the Secretary of State's decision issued 2 days before the deadline for the decision. Both the Examining Authority and the Secretary of State considered the project should be approved.

The project is located in the green belt with very special circumstances allowing the project to proceed. Sir Anthony Gormley objected to the project because of the visual impact on his iconic sculpture the Angel of the North. Further mitigation was provided to make the project acceptable. This was however the first project in which Covid led to questions as to the continued accuracy of the transport modelling. Climate change considerations were also relevant with the decision leaning heavily on similar arguments about climate change in the Derby Junctions decision.

The Environment Agency was an affected land owner but ultimately the Secretary of State considered their infrastructure would be adequately protected. Network Rail won a debate about the adequacy of the indemnity in their protective provisions.

5.4 **A303 Sparkford to Ilchester**

Having issued a "minded to refuse" letter on 21 July 2020 the Secretary of State approved the application for development consent for the A303 Sparkford to Ilchester Dualling project on 29 January 2021.

The Examining Authority Report on the application was delivered on time, but the deadline for issuing the Secretary of State's decision was extended from 12 December 2019 due to the General Election. The decision date was extended again to 17 July 2020 on 29 April 2020 to allow for further work on the application decision. There then followed the "minded to refuse" letter on 21 July 2020. On 12 November 2020 the deadline was extended again to 29 January 2021 – the final decision date. In all the Secretary of State's decision took sixteen and a half months, or to put it another way it was 13.5 months late!

The Examining Authority recommended the application should be refused and on the back of that the Secretary of State identified 6 issues that needed to be overcome to secure the development consent. Highways England conceded two points (the need for a Unilateral Undertaking to address the risk of aircraft bird strike and accepting responsibility for maintaining detrunked highway) and persuaded the Secretary of State that its case was correct in respect of the 4 other issues (stopping up for non-motorway users, loss of a bridleway, underbridge lighting and permanent rights for turning heads).

5.5 **Wylfa nuclear Power station**

On 18 December 2020 applicant Horizon wrote to the Secretary of State to request a deferral of the decision on the application for development consent for the new Power Station to 31 March 2021. This was requested in order to allow further discussion with third parties expressing an interest in providing the new power station following Hitachi's prior withdrawal from the project. The Secretary of State deferred the decision to 30 April 2021.

That followed an earlier deferral (which Horizon applied for on 22 September 2020) to 31 December 2020 following Hitachi's announcement on 16 September 2020 that it was ceasing nuclear development activities in the UK.

On 27 January 2021 Horizon withdrew their application for development consent and on 4 February 2021 "in the interest of openness and transparency" the Planning Inspectorate published the Examining Authority Report into the application. Perhaps the most interesting finding of the Examining Authority was that because National Policy Statement EN-6 is time limited to 2025 and the project would be delivered after that date the application would be determined under section 105 of the Planning Act 2008, not section 104 as it would have been if the NPS had applied to the project. The main reasons for the Examining Authority's recommendation for refusal was the effect on the Arctic tern and Sandwich tern populations and on tourism from workers taking up accommodation. A further point of note is the approach to the funding and CPO with DCO articles preventing the project from proceeding until funding was in place and a finding that there was a compelling case in the public interest for the project.

5.6 **Wheelabrator Kemsley K3 and North Facilities**

The Wheelabrator Kemsley K3 and North Facilities DCO (located in Sittingbourne, Kent) was approved on 19 February 2021 with the DCO coming into force on 15 March 2021. The Examining Authority Report and the Secretary of State's decision letter were both issued on time.

The new build element of the project (a new generating station with a capacity of 42MW) was not permitted (in line the Examining Inspectors recommendation) due to its conflict with the Kent County Councils policy for a waste hierarchy consistent with the Renewable Energy NPS. Section 35 of the Planning Act 2008 was utilised to bring this element of the project into the DCO regime. The Secretary of State determined the application under section 104 of the Planning Act 2008, i.e. in accordance with the National Policy Statement, despite the fact that the Examining Inspector concluded it should be determined under section 105 (no NPS being in place).

The second element of the application concerned removing the permitted generating limit of 49.9MW on a 70 MW facility. That part of the application was approved.

5.7 **East Anglia One North and East Anglia Two windfarms**

On 30 March 2021 the Secretary of State extended the period for the Examination of both projects by three months from 6 April to 6 July 2021 (the application by the Planning Inspectorate had actually been for a four month extension). Three reasons were given for the application for the extension. Firstly the impact of Covid on the ability of parties to take part in the Examination. Secondly the impact of Covid on the Planning Inspectorate's ability to handle the Examination. Thirdly the difficulties of holding the two related examinations at the same time.

The 6 July 2021 deadline was complied with in respect of both projects. The Examining Authority reporting deadlines or the Secretary of State's decision making deadlines have not (yet!) been extended. The Examining Authority Report is due to be with the Secretary of State on 6 October 2021 and the decision is due on 6 January 2022.

5.8 **Norfolk Boreas Windfarm**

The Norfolk Boreas Wind farm decision was due on 12 April 2021. However on that day the Secretary of State indicated he was extending the timeframe for issuing the decision and a month later on 12 May he duly extended the deadline by nearly 8 months to 10 December 2021.

On the 28 April 2021 the first of a series of four requests for further information was published by the Secretary of State. These requests were addressed to various specified Parties including the Applicant (Norfolk Boreas Limited), National Grid, Network Rail, The Environment Agency, Norfolk Vanguard (promoter of another windfarm that connects to the Grid in the same location as Boreas) and Interested Parties.

The reason given for the extension and the focus of the requests for information is to allow an opportunity for further information in respect of cumulative impacts of the onshore substation and of offshore environmental effects to be provided and considered. This all stems from the decision of the High Court to quash the DCO for the Norfolk Vanguard Windfarm on the basis that the decision did not take account of the cumulative effects of connecting Vanguard and Boreas to the National Grid at the same location in Norfolk (see further paragraph 6.2). Once Vanguard was quashed it was inevitable that Boreas, that was proceeding through its application phase behind Vanguard, would have to be delayed as the implications the Vanguard quashing were worked through.

5.9 **M25 Junction 10/A3 Wisley Interchange**

This is another decision to be delayed - again to allow further consideration of environmental issues.

The Examining Authority reported on time on 12 October 2020, but the decision deadline of 12 January 2021 was missed and on that day was extended to 12 May 2021 to consult further on the application including on the question of appropriate provision of replacement land to compensate for the proposed special category land to be compulsorily purchased under the DCO. The deadline was subsequently extended on 12 May 2021 to 12 November 2021, 10 months after the original deadline. In contrast to Norfolk Boreas (where the extension of time was retrospective) in this case the extensions were confirmed on the day the decision would otherwise have been due.

The matters that have driven the time extensions have led to several rounds of consultation by the Secretary of State with the latest deadline for responses to consultation being 6 September 2021.

5.10 **Material Changes to DCOs**

Able (UK) Ltd has become the first project to submit an application for a material change to a DCO project – the proposed change being to adjust the quay design in that project. The application was submitted on 25 June 2021. EDF have proposed a material change at Hinkley 'C' Nuclear Power Stations but that application has yet to be submitted. The change at Hinkley concerns the removal of the requirement to install Acoustic Fish Deterrent system (associated with cooling water intake heads) and at first glance seems to be more controversial than the Able Marine change.

These application are bound to be watched closely to see how smoothly the material DCO change process runs and whether the applicable time frames can be met by those charged with Examining and reporting on the application and the Secretary of State in determining it. If the process can be seen to work well it may well encourage others to follow suit, and it could conceivably lead promoters to potentially limit the flexibility they build into orders if the cost and time etc. of seeking an amendment can be seen to be comparable to the e.g. increased design, EIA, consultation, land referencing, general application and programme costs at the application stage. That would be a welcome outcome if it were to come about, however it is likely that the material change process itself may need tweaking and simplifying for that to happen. It is worth noting that well-informed observers of the system have been saying for a very long time that the material change process needs looking at and simplifying.

However, if it is not seen to work well then promoters will probably soldier on as I suspect they do at present. That is to seek work-arounds to the problem giving rise to the potential material change and live with that outcome. This is the alternative to taking on the material change process, which many perceive to be overly complex and uncertain in its outcome with all the intendant risk that is perceived to represent, particularly when projects are already in the ground and running to programme. A particular problem here is the absence of a formal mechanism to ascertain whether a change application is material or non-material and hence inform a decision at the outset as to which process should apply, nor a fixed timetable for non-material change applications. In the case of Able Marine and Hinkley the materiality of the change seems clear and obvious but on other schemes that is not the case and having a method to resolve that from the outset through screening would benefit all interested parties.

A non-material amendment for the Able Marine Energy Park was approved on 13 May 2021.

6 **NSIP REGIME JUDICIAL REVIEWS / QUASHED DEVELOPMENT CONSENT ORDERS**

6.1 **Drax Repower**

<https://www.bailii.org/ew/cases/EWCA/Civ/2021/43.html>

On 21 January 2021 the Court of Appeal upheld the Secretary of State decision to grant DCO for the Drax Repower project, a decision made on 4 October 2019. The challenge was dismissed in the High Court on 22 May 2020.

The challenge was brought by ClientEarth. There were three grounds of challenge:

- should the Secretary of State have considered how much need for electricity generation had been used up by previous projects?
- was the weight given to greenhouse gas emissions rational?
- had the Secretary of State unlawfully tied the balance between benefits and adverse effects to the policies in the NPSs?

The first ground failed on the basis that EN-1, the Overarching Energy National Policy Statement does not set targets for electricity generation overall or for particular technologies that would then get used up by projects. It was clearly the intention of the Government that the NPS did not set out to perform that role.

The second ground also failed. The Secretary of State had found that the adverse impacts of emissions did not outweigh the benefits of the project. Whilst it was possible that GHG emissions could lead to refusal on their own in this case the Secretary of State was entitled to reach the conclusion that development consent should not be refused because of the impacts of greenhouse gas emissions.

In respect of the third ground, the Court of Appeal found that the Secretary of State had not acted unlawfully. The Secretary of State carried out the balancing exercise required, taking into account the considerations relevant to it. Six detailed reasons were given for the Court of Appeal's finding on this ground.

As a footnote it is worth recording that Drax subsequently announced that it would not be proceeding with Repower project.

6.2 **Manston Airport**

The Manston Airport DCO, approved on 9 July 2020, was quashed by the High Court on 15 February 2021. The challenge was brought by a local resident on a number of grounds. There was no hearing in the High Court and hence no Judgement was handed down as the Secretary of State chose not to defend the claim in respect of the ground that he had given insufficient reasons for the decision to grant development consent against the recommendation of the Examining Authority. The hearing of the claim had been due to take place on 16 February 2021.

The Secretary of State must now re-determine the application. On the 11 June 2021 the Secretary of State issued a Statement of Matters, where he invited further representations from Interested Parties on a number of matters. These included the extent to which national and local policies (including the reinstated Airports National Policy Statement) informed the need for the project and its benefits, whether the need had changed since the original DCO decision, the extent to which the Secretary of State should have regard to the sixth carbon budget which includes emissions from aviation, and any other matters arising since the time of the original decision. The applicant was requested to confirm the currency of the environmental information in respect of the application and to submit updated environmental information as necessary. Further confirmatory information was requested from various Government Departments and the Met Office in respect of the compulsory acquisition of land.

Responses to all Matters were required by 9 July 2021. An application to extend this deadline was refused.

The letter also confirmed that the Secretary of State had appointed an independent aviation adviser to advise him on the need for the development. The assessor's report and the other responses from Interested Parties and the Applicant would be made available for comment after which the application would be redetermined. The responses were made available for comment on 30 July; the assessor's report was published on 21 October 2021 with a deadline for responses of 19 November 2021. The headline from the assessors is they conclude that the Examining Authority was correct in its finding that there was no need for the proposed development at Manston.

6.3 **Norfolk Vanguard Offshore Windfarm**
(<https://www.bailii.org/ew/cases/EWHC/Admin/2021/326.pdf>)

This decision, issued on 1 July 2020, was quashed on 18 February 2021 following High Court hearings on 20 and 21 January 2021.

The challenge was brought by a resident local to the point where the onshore cables from Vanguard and the Boreas Windfarm (subject of a separate DCO application) were to join into the National Grid at Necton in Suffolk. The Hornsea Three onshore connection would cross the Vanguard Connection at the same point. The cumulative effect of firstly providing the Vanguard connection at Necton and later adding Boreas connection to the Grid at Necton was a controversial issue in the Examination of the Vanguard DCO application. The claimant challenged the development consent on the basis that the way these cumulative effects of the two projects was dealt with by the Secretary of State in his decision on the Vanguard application was unlawful.

The Environmental Statement of the Vanguard project had considered the cumulative effect of providing the Boreas connection in addition to the Vanguard connection. It found the effects of this would be significant. The problem was that in the Examining Authority report the Examining Authority indicated that whilst the Vanguard ES had reported on the cumulative effects of Vanguard and Boreas both being provided, the Examining Authority indicated that they had not considered those cumulative effects in making their recommendation "*due to the limited amounts of detail available*". The Examining Authority indicated that it considered that the cumulative effects of adding Boreas to Vanguard at Necton should be considered in the Boreas examination. This approach was not considered during the Examination. The Secretary of State adopted the same approach when reaching his decision to approve the DCO for Vanguard despite the fact that both the Examining Authority and the Secretary of State had found the environmental information submitted with the Vanguard application was adequate i.e. not limited or inadequate.

The High Court found that approach (i.e. treating the submitted information on the cumulative effects of the two projects at Necton was limited and deferring consideration of the effects to the later Boreas decision) was "*illogical and irrational*" and quashed the decision on that basis. It was not acceptable as a legal approach to decision making to leave over the cumulative effects of adding the Boreas project to the effects of Vanguard to the later decision on Boreas. To allow such an approach would allow the Vanguard project to be approved (without consideration of whether Necton was an appropriate location for its grid connection when considered cumulatively with Boreas) and provided a precedent effect making it easier for Boreas to be consented in the future; the Vanguard decision gave Boreas a foot in the door. That was irrational and unlawful.

The irony of this is that had the Vanguard Environmental Statement contained less information on the cumulative effects of adding Boreas the approach may have been acceptable; however the judgement does specifically give authority to that

proposition and it should certainly not be assumed that such an approach would have avoided the problems the Vanguard decision ran into when challenged.

The decision is now back with the Secretary of State for redetermination. The Secretary of State invited comments on the proposals to provide the Vanguard and Boreas connections at Necton on 30 April 2021. Those response were published on 4 June 2021 and further information was requested from the applicant (with a much wider scope than the reason the decision was quashed) on 5 July 2021 and 11 August 2021. That information has been provided and the decision of the Secretary of State is awaited.

6.4 **A38 Derby Junctions**

The Secretary of State consented to the quashing of the A38 Derby Junctions DCO (granted on 8 January 2021 – see further above) on 8 July 2021.

Climate change impacts were a significant issue at the DCO examination and the Examining Authority were unable to reach a conclusion on a number of important points which they left for the Secretary of State in determining the application. Firstly they were unable to conclude whether the project would lead to the UK being in breach of the Paris Agreement on Climate Change contrary to section 104(4) of the Planning Act 2008 (that presents decisions that would lead to the UK being in breach of such an obligation). They were also unable to reach a conclusion of the cumulative effects of carbon emissions from the project and other developments on a consistent geographic scale e.g. the effect of Road Investment Strategy ("RIS 1" and "RIS 2") programmes against UK carbon budgets (the project is in RIS2). Lastly they could not reach a conclusion on whether the project would affect the ability of the UK to meet the Net Zero Carbon target by 2050.

In that context the DCO decision was challenged by a local resident, an actively involved interested party to the DCO examination who contended that the decision was unlawful on the basis that in making his decision the Secretary of State had:

- breached the EIA Regulations by failing to (a) consider the cumulative climate change effects of the project and (b) provide a reasoned conclusion on the environmental effects of the project;
- failed to provide legally adequate reasons for his decision more generally;
- reached an inadequate conclusion regarding the developments impact on meeting the Governments Net Zero Target for carbon generation in the application of the National Networks National Policy Statement;
- failed to consider Net Zero Target when considering greenhouse gas emissions as part of considering whether the adverse effects of the project outweighed its benefits; and
- failed to consider and / or apply the policy in the National Networks National Policy Statement on air quality impacts.

The Secretary of State consented to the quashing of his decision on the basis that he had failed to provide reach a reasoned conclusion on the significant effects of the proposed development on the environment and had failed to include a reasoned conclusion in his decision letter. This failure was in the context of the climate change issues raised at Examination including those on which the Examining Authority felt it could not reach a conclusion as described above.

The Secretary of State has to redetermine the application. On 2 August 2021 the Secretary of State issued a Statement of Matters reflecting the grounds of claim and the matters in respect of which the Examining Authority was unable to reach a conclusion as described above. The applicant's response was published on 8 September 2021.

On 23 September 2021 the SoS invited Interested Parties to submit their comments with the advantage of the applicant's response to the Statement of Matters having been published – the deadline comments being 26 October 2021.

6.5 **A303 Stonehenge**

<https://www.bailii.org/ew/cases/EWHC/Admin/2021/2161.pdf>).

The DCO decision issued on 12 November 2020 (see the NIPA Newsletter from Autumn/Winter 2020 here - <https://www.nipa-uk.org/news/nipa-autumn-and-winter-2020-newsletter>) was quashed by the High Court on 30 July 2021, following hearings in the High Court on 23, 24 and 25 June 2021. This was a rolled up hearing considering whether permission to apply for judicial review should be granted and the substance of the claim (normally the permission is a preliminary stage prior to substantive hearing of the grounds in respect of which permission to apply is granted).

The claim was submitted by Save Stonehenge World Heritage Site Limited, an umbrella campaign group that co-ordinated the objections of its member and supporters at the DCO examination. There are five main grounds of challenge with numerous sub-grounds in respect of Grounds 1 and 5. All the grounds are described in detail at Paragraph 25 of the High Court Judgement.

Ultimately the decision was quashed further to two grounds which, although sub-grounds with Grounds 1 and 5, were found to be freestanding grounds in their own right:

- Ground 1(iv) – whether the Secretary of State took into account the impacts on all heritage assets impacted by the project; and
- Ground 5(iii) – alternatives to the western cutting and portals.

Permission to apply for judicial review was refused on all other grounds on the basis that they are unarguable.

Ground 1(iv)

In respect of Ground 1(iv) the Court found that the Secretary of State had not taken into account all of the impacts on heritage assets affected by the proposals.

The critical factor here was that whilst the Secretary of State was not expected to read the whole ES (it might be said no one person should ever really be given that task in the interest of their sanity!), he was required by the EIA Regulations to take account of the environmental information submitted with an application. The error in this case was that the Secretary of State was not provided with a precis of all the environmental effects of the proposals on heritage assets. This was important. The Examining Authority had reported on the heritage assets it felt were affected by the project but it did not report on those assets in respect of which the Examining Authority accepted the applicant's heritage impact assessment. The absence of the precis on the impacts the Examining Authority did not report on meant the Secretary of State could not have taken those effects into account as the EIA Regulations

required him to do so. It was accepted that the A303 Stonehenge application was atypical in its size and hence the scale of the task the legal duty required – however it was not complied with hence the decision was unlawful.

There are comparisons here with the A38 Derby Junctions quashing although there are differences in as much as the A303 Stonehenge judgement related to a failure to take account of all environmental information whereas the A38 related to the need to provide a reasoned decision. In respect of A303 Stonehenge, the officials failed to meet the requirements to give the Secretary of State the information which was the basis on which he ultimately took his decision; it might be said that the decision is harsh given the scale and complexity of the heritage impact but the rules are the rules and the Secretary of State fell foul of them on this occasion. This is a process failure and there is plenty in the judgement that suggests that if the process is got right on this point then the process error can be corrected. If that is the case this could be a pyrrhic victory for objectors however this remains a very controversial project in respect of heritage and even if the errors that occurred are corrected it seems inevitable that this will go back to the High Court if the project is redetermined in favour of the promoter (assuming they overcome the other ground of quashing see further below).

Ground 5 (iii)

In respect of this Ground the Court found that the Secretary of State should have taken alternatives for the western cutting forming part of the project into account. The alternatives extended the tunnel (either by an additional length of cut and cover tunnel or an additional length of bored tunnel) some 800 metres to the west to take the tunnel portal outside the World Heritage Site for which Stonehenge is so famous.

The applicant Highways England concluded that extending the tunnel would cost an additional £264M (cut and cover option) or £578M (bored tunnel) and would have limited heritage benefit in either construction scenario. That position was predicated on Highways England's conclusion that the heritage impact of the scheme would not cause substantial harm to designated heritage assets and that there would be beneficial to some aspects of the designated World Heritage Site. Further the Examining Authority also found that a full options appraisal had been done when selecting the scheme in the Road Investment Strategy (RIS) and relied on Historic England advice that the EIA of the project had addressed alternatives.

The Examining Authority and subsequently the Secretary of State concluded that alternatives did not need to be considered as paragraph 4.27 of the National Networks National Policy Statement advised

"4.27 All projects should be subject to an options appraisal. The appraisal should consider viable modal alternatives and may also consider other options (in light of the paragraphs 3.23 to 3.27 of this NPS). Where projects have been subject to full options appraisal in achieving their status within Road or Rail Investment Strategies or other appropriate policies or investment plans, option testing need not be considered by the examining authority or the decision maker. For national road and rail schemes, proportionate option consideration of alternatives will have been undertaken as part of the investment decision making process. It is not necessary for the Examining Authority and the decision maker to reconsider this process, but they should be satisfied that this assessment has been undertaken."

However the Court held that paragraph 4.27 of the National Policy Statement did not exempt the promoter from complying with paragraph 4.26 of the National Policy Statement the opening words of which advise:

"Applicants should comply with all legal requirements and any policy requirements set out in this NPS on the assessment of alternatives."

The Court also noted the RIS is an investment decision making process and that the current RIS *"explains that the document makes a commitment to the projects listed on the assumption that they can 'secure the necessary planning consents'". 'Nothing in the RIS interferes with the normal planning consent process' ".* The Court proceeded to give three examples of why that was the case (see paragraph 261 to 263 of the Judgement).

Ultimately the Court confirmed that the Secretary of State was not entitled to stop the consideration of alternatives based on the guidance at paragraph 4.27 of the National Policy Statement. The circumstances of the case were exceptional given the substantial harm that the Examining Authority found and the Secretary of State accepted to the heritage assets (mostly scheduled ancient monuments) affected by the western cutting and portal. The relative merits of the alternative tunnel options *"were an obviously material consideration which the [Secretary of State] was required to assess. It was irrational not to do so. This was not merely a relevant consideration which the [Secretary of State] could choose whether or not to take into account"*.

An impressive nine reasons were given for this conclusion *"the cumulative effect of which [the Court] judge to be overwhelming"* (i.e. don't even think of appealing this!). The nine reasons are to be found at paragraphs 278 to 288 of the Judgement and relate to the international designation and importance of the World Heritage Site, the harm that would be caused to the heritage assets, the permanent and irreversible nature of that harm, the strong criticism the western cutting received at Examination, the acceptability of the scheme despite the harm it would cause was predicated on the need for the new road, it was accepted in the National Policy Statement that alternatives should be looked at (see paragraph 4.26), the alternatives could be provided within the DCO site and compliance with reporting on alternatives considered in the EIA did not exempt the project from the legal duty to consider alternatives established in case law.

Having upheld Grounds 1(iv) and 5(iii) the decision to grant the DCO was duly quashed and returned to the Secretary of State for redetermination. The Planning Inspectorate project page for A303 Stonehenge records to quashing decision on 30 July 2021 and advises *"Further details on the re-determination process will be published here in due course"*.