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The role and relevance of climate change in planning decisions

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Applications relating to the use of fossil fuels

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Introduction

- The basics:
 - Impact on CC relates to use and development of land – thus a planning consideration
 - Materiality in any case depends on circumstances
 - Legislation and/or policy may mandate it be taken into account, especially for larger projects
- The more interesting issue is impact on CC as a RfR

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Legislative context (1)

- Mitigation of, and adaptation to, CC as a consideration when making planning policy
 - PCPA s. 19(1A) – Local Plans
 - PA 2008 ss. 5(7) and (8), 10 – National Policy Statements
 - CCA 2008 (see NPPG on climate change)

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Legislative context (2)

- EIA Regs. 2017 (same for equivalent regs for DCOs etc.)
 - Reg. 4(2) – assess significant effects on climate
 - Sch. 4(4) – factors incl. GHG emissions
 - Sch. 4(5) – LSE resulting from impact on climate
 - Reg. 26 – must examine Env. Info. when deciding
- SEA Regs. 2004
 - Sch. 2(6) significant effects on climatic factors

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Policy context (1)

- Under TCPA 1990
 - D Plan policy – but must align with NPPF
 - NPPF
 - [8] 3rd overarching objective incl. mitigating and adapting to CC, incl. moving to low carbon economy
 - [9] objectives are “*not criteria against which every decision can or should be judged*”
 - Section 14 – place shaping in ways that contribute to radical GHG reductions, but needs must be met

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Policy context (2)

- Under PA 2008 (examples):
 - Energy NPSs (2012) –
 - No test of acceptability based on level of GHG emissions (even within NPS EN-2 for fossil fuel generation)
 - GHG emissions not a reason to prohibit consenting of projects, carbon emissions fall primarily to be regulated by other mechanisms, and decision-maker does not need to assess individual applications in terms of carbon emissions against carbon budgets (NPS EN-1 [5.2.2]) (emphasis added)
 - Main focus on effects of CC and adaptation



Policy context (3)

- National Networks NPS (2014):
 - *“It is very unlikely that the impact of a road project will, in isolation, affect the ability of Government to meet its carbon reduction plan targets. However, for road projects applicants should provide evidence of the carbon impact of the project and an assessment against the Government’s carbon budgets” (emphasis added).*
 - See e.g. A585 Windy Harbour DCO (January 2020), ExAR 5.2.9; DL18 – climate “important and relevant” but “climate matters do not weigh heavily against the order being made”.



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Policy context (4)

- Airports NPS (2018)
 - Stringent requirements for reduction and mitigation
 - “Any increase in carbon emissions alone is not a reason to refuse development consent, unless the increase in carbon emissions resulting from the project is so significant that it would have a material impact on the ability of Government to meet its carbon reduction targets, including carbon budgets” (emphasis added).



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Cases

- ***R (Millstone) v. SSBEIS*** (CO/3447/2019)
- ***R (Plan B Earth) v. SST*** [2020] EWCA Civ 214
- ***R (ClientEarth) v. SSBEIS and Drax Power Ltd.*** [2020] EWHC 1303 (Admin)
- Forthcoming cases:
 - ***Energy NPSs JR***
 - ***Riverside DCO JR***



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Millstone v. SSBEIS (2019)

- Unsuccessful challenge to SoS decision not to revoke DCO for EfW facility in N London made in 2017
- Claimant invited SoS to revoke based, on, inter alia, change in circumstances: adoption of net zero target
- Refusal challenged on ***Wednesbury*** grounds, i.e. irrational not to regard this change as amounting to “*exceptional circumstances*” warranting revocation.

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- *“Properly understood, the net zero target has no necessary implications for individual development consents” SoS SGD [9]*
- *“Crucially, there is nothing in legislation or policy prescribing how that reduction of net [GHG] emissions is to be achieved in 31 years’ time. The Government has a wide discretion as to the steps it takes across the whole economy to achieve this future national goal. The obligation is programmatic i.e. it is for the UK to select the means to achieve the objective. The amendments to the [CCA] have no necessary implications for existing DCOs. In particular, operation of the [EfW] will not preclude the UK from meeting its 2050 target” SoS SGD [10]*

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R (Plan B Earth) v. SST (2020)

- Policy making not development control
- Specific statutory 'hook' for the CC grounds from ss. 5 and 10 PA 2008 which concern making/reviewing NPS
- Govt. commitment to Paris Agreement constitutes Govt. policy on climate change (and obviously material)
- Failure to take it into account also breach of SEA [246]



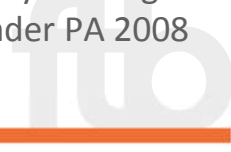
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R (Client Earth) v SSBEIS and Drax Power

- Challenge to DCO for 2 x gas-fired generating units, resulting in significant increase in GHG emissions
- Nine grounds, several relate to GHG and net-zero
- Judgment handed down 22.5.20, with all grounds dismissed
- Illustrates critical distinction between policy-making and decision taking for dealing with CC under PA 2008



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- Background facts:
 - Claimant persuaded ExA to revisit need (settled in NPS EN-1) taking account of CC, and that no need for this development.
 - SoS rejected ExA's approach, relying on NPS EN-1
 - CCA 2008 target nevertheless identified by SoS as a matter "*both important and relevant to the decision on whether to grant consent for the development*".



- Important preliminary points:
 - PA 2008 makes addressing requirements of CCA 2008 a policy-making task [36]-[46]
 - Critical role of systems *beyond planning control* to influence types of infrastructure coming forward [66]-[67]
 - S.104(3) PA 2008 prevents use of s.104(7) as a vehicle to challenge merits of NPS based on net zero [107]-[108]
 - Preclusive/presumptive effect of an NPS under s.104 depends on wording of policy and its proper interpretation [111]



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Grounds 1 and 2 (approach to need)

- Grounds 1 and 2 rejected as a “*barely disguised challenge to the merits of the policy*” on need in NPS [132]-[134]
- Evidence the C had adduced at examination relating to impact of move to low carbon generation since 2011 could not alter interpretation of the policy, which is a matter of law.



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Ground 3 – misinterpretation of NPS EN-1 [5.2.2] on assessment of GHG emissions

- C alleged SoS disregarded GHG emissions as a material consideration, but that was not consistent with NPS
- SoS did not treat GHG as irrelevant, or something to which no weight should be given [167]
- EN-1 makes clear GHG not a RfR in itself, which is not legally objectionable [169]-[170]
- Policy does not thereby treat GHG as irrelevant or a disbenefit to which no weight can be given [169]-[172]



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Ground 4 (s.104(7) balancing exercise)

- C alleged error in how SoS carried out s.104(7) balancing exercise when dealing with GHG emissions
- *“The NPS proceeds on the basis that there is no justification in land use planning terms for treating GHG emissions as a disbenefit which in itself is dispositive of an application for a DCO” [178] (emphasis added)*
- SoS did consider whether adverse effect on GHG emissions should be given greater weight in this case
- *“The NPS did not preclude that possibility, so long as GHG emissions were not treated as a freestanding reason for refusal” [179] (emphasis added)*

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Ground 7: No opportunity to make submissions on implications of adopting the net zero target

- Net zero target *“important and relevant”* to decision on DCO, but:
 - does not alter policy in NPS; and
 - is not incompatible with NPS because *“there are a range of potential pathways”* to achieving net zero (DL 5.7-5.9)
- C alleges unfair no opportunity to make submissions on this point post-examination and pre-decision.
- Rejected, as Ct found the submissions C would have made amounted to an impermissible challenge to merits of NPS (see s.106(1) [243]. S.6 review is only vehicle for such issues.

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Ground 8: failure correctly to consider net zero

- SoS reliance on other mechanisms outside the planning system, such as Electricity Market Reform or EU ETS a matter for her judgment and consistent with NPS



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Forthcoming cases

- ***Energy NPSs JR (Vince, Monbiot & Good Law Project)***
 - Pre-application correspondence between claimants and SSBEIS on review of Energy NPSs (March-April 2020)
 - Application for permission 18.5.20
 - Seeks permission to JR for not agreeing to review based on, inter alia, adoption of net zero target
 - Govt. PAPR:
 - already actively considering whether appropriate to review all or parts of the Energy NPSs
 - Premature to challenge until that decision is made



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- **Riverside DCO JR (Mayor of London)**

- MoL seeking permission to JR grant of DCO for Riverside Energy Park
- Project includes a large incinerator energy recovery facility
- MoL opposed grant, incl. on GHG emissions impacts
- Proposed grounds very similar in some cases to those pursued in **Drax**, but issued before Judgment handed down
- Statement of Facts and Grounds recognizes need to review those grounds once judgment in **Drax** available

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Conclusions

- Policy-making, not decision-taking, remains the main focus
 - Law and policy both evolving
 - More appropriate vehicle to tackle CC
- Significant obstacles to making GHG emissions a RfR in individual 'consumption of fossil fuel' cases
 - Policy
 - Scale and nature of the issue

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Thank you



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Applications relating to the extraction of fossil fuels

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Introduction

- Background thoughts
- Policy context for extraction cases
- Introduction to extraction cases
- Recent and current case law
 - *Preston New Road Action Group v SSCLG* (2017)
 - *H J Banks & Co Ltd v SSHCLG* (2018)
 - *R (Stephenson) v SSHCLG* (2019)
 - *Wressle-1 Wellsite appeal* (2019)
 - *R (Bennett) v Cumbria CC* (2020)
- Reflections



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Background thoughts (1)

- Climate Change Act 2008: a limited role (so far?)
 - 2050 target, budgeting, Committee on Climate Change
 - ‘Embedded’ legislation – s.2(4)
 - Policed by reports to Parliament and proposals for dealing with budget excess
 - Budget 2020: *“government is allocating an additional £10 million in 2020-21 to support the design and delivery of net zero policies and programmes”*

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Background thoughts (2)

- Declarations of climate emergency: potentially relevant
 - Scotland (28 April 2019), Wales (29 April), UK (1 May), NI (February 2020)
 - 281 local authorities: see <https://www.climateemergency.uk/blog/list-of-councils/>
 - Pond Farm, North Norfolk (APP/Y2620/W/15/3134132) (3 February 2020)

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Background thoughts (3)

- The courts: increasing recognition of materiality (even “obvious materiality”) of climate change
 - Volume of cases
 - *R (McLennan) v Medway Council* [2019] EWHC 1738 (Admin)
 - International/comparative perspective:
<http://climatecasechart.com/>
 - *Gloucester Resources Ltd v Minister for Planning* [2019] NSWLEC 7

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Policy context (1)

- Fossil fuel transport, storage and combustion (for energy) fossil fuels are all recognised as NSIPs (PA 2008 ss.15-21), but not extraction
- NPS EN-1 and EN-2 not cover directly
- Fall back on:
 - Local plans
 - National Planning Policy Framework
 - Written Ministerial Statements
 - Other reports (e.g. CCC)

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Policy context (2)

- NPPF (Section 17) para.205: “great weight should be given to the benefits of mineral extraction, including to the economy” – no reference to climate change (though see footnote 65 re coal)
- NPPG: only reference to climate change in relation to peat extraction
- WMSs: variable – see 4 November 2019 moratorium on fracking
- So specific policy on climate change and extraction mainly from:
 - Local plans
 - CCC reports (and Government responses) – see esp. 7 July 2016 re onshore petroleum

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Extraction cases: issues

- Appropriate level at which to address climate change: policy or decision-making?
- Limitations of planning: difficulty (or impossibility) of understanding nature of impacts in wider societal context
- Measuring indirect impacts
 - TCP (EIA) Regs 2017 Sch.4 para.5(f) and need to cover “indirect, secondary, cumulative, transboundary, short-term, medium-term and long-term, permanent and temporary, positive and negative effects of the development”

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Preston New Road Action Group v SSCLG [2017] EWHC 808 (Admin)



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Preston New Road Action Group

- Approach of Inspector and Secretary of State
 - “the issues raised ... as to how shale gas relates to the obligations such as those set out in the Paris Agreement, and the Intergovernmental Panel on Climate Change (IPCC) carbon budgets, are a matter for future national policy and not for these appeals” (IR 12.677)
 - Project itself “a very small percentage of the total emissions” and not impact policy objectives (IR 12.682)
 - Project “consistent with the NPPF aim to support the transition to a low carbon future in a changing climate” (IR 12.809)

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Preston New Road Action Group

- Argument that ES defective as omitted impact of GHG emissions from the period of extended flow testing (when gas wells will be connected to the grid)
- Dove J “It is in my judgment a perfectly sensible assumption, on the basis of the evidence that was before the decision-taker and, for that matter, the Court that any gas provided to the grid during the extended flow phase will simply replace gas that would otherwise be consumed by residential and industrial users supplied by the grid, and thus there is no evidence that there would actually be any increase in gas usage and or greenhouse gas emissions.” (para.128)
- Position analogous to *R (Frack Free Ryedale) v North Yorkshire CC* [2016] EWHC 3303 (Admin)
- Approach upheld by the Court of Appeal [2018] EWCA Civ 9 as “plainly correct”

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***H J Banks & Co Ltd v SSHCLG* [2018] EWHC 3141 (Admin)**



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H J Banks & Co Ltd

- Inspector identified effect of GHG emissions/climate change as a main issue:
 - Concluded demand for coal and need (if narrowing window)
 - If coal “transported ... by ship that would be likely to result in overall higher carbon emissions than using indigenous coal” (IR 113)
 - But “some uncertainty” about that vs. “much more certainty” about emissions from Highthorn coal
 - Adverse effect from GHG emissions should be given “considerable weight in the planning balance”
 - But given need and policy support permission should be granted

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- Secretary of State agreed with Inspector’s conclusions, but considered
 - The proposal would not be compliant with the NPPF “taken as a whole”
 - “Very considerable weight in the planning balance” should be given to GHG emissions
 - Refused permission

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H J Banks & Co Ltd

- Reasons challenge
- Common ground (for purposes of claim) that GHG emissions from burning coal for power “capable of being a material consideration even though the generation took place off-site and at a power station that would be subject to other controls” (para.69)
- Ouseley J: having accepted need, “what the Secretary of State had to explain ... was how a proposal needed for the country's energy could be refused on the basis of the adverse impact of GHG, unless the gap was filled by renewables or low carbon sources” (para.96)
- Decision quashed

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R (Stephenson) v SSHCLG [2019] EWHC 519 ***(Admin)***



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Stephenson

- Challenge to 2018 NPPF para.209(a) (that reflected approach in the 2015 WMS) (i.e. recognise benefits of development for security of supply etc. “including unconventional hydrocarbons”)
- Followed non-statutory consultation, including Q37
“Do you have any comments on the changes of policy in Chapter 17, or on any other aspects of the text in this chapter?”
- Talk Fracking provided detailed consultation response including developments in policy (Paris Agreement, CCC report) and science since 2015 WMS
- Challenged on four grounds (1: failure to have regard to MCs, 2: failure to give effect to policy in CCA 2008, 3: SEA, 4: unlawful consultation)
- SoS evidence that regard not given to new policy/science and para.209(a) “purely and simply an exercise of copying across, or cutting and pasting the 2015 WMS into the Framework”

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Stephenson

- Dove J: consultation unlawful (paras.43, 51)
- But would have been lawful to ignore CC in consultation if explained (para.49)
- Ground 1: Paris Agreement “obviously material” in that context
- Ground 2: unarguable; CCA 2008 targets and CCC ‘tests’ unaffected by policy; para.73:

“I therefore accept Mr Warren's submission that in individual decisions on plans or applications the in principle support for unconventional hydrocarbon extraction, provided by paragraph 209(a) of the Framework, will have to be considered alongside any objections and evidence produced relating to the impact of shale gas extraction on climate change. These are conflicting issues which the decision-maker will have to resolve.”

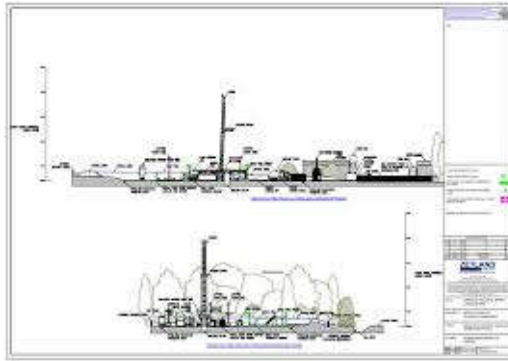
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Wressle-1 Wellsite (PINS reference APP/Y2003/W/19/3221694)



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Wressle

Decision letter

- Para.33 “there is no policy which provides that a net zero carbon economy in 2050 would be hydrocarbon-free”
- Para.34 “domestic supply has obvious security advantages and reduces the need for imported gas and oil”
- Para.35 “There is no suggestion that this proposal would increase the use of hydrocarbons, and the evidence demonstrates that the effect would be simply to transfer production to a more local source” and “a local supply has obvious transportation and sustainability benefits”

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R (Bennett) v Cumbria County Council (CO/4880/2019)



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Bennett

- Key claim made by applicant that coking coal would substitute coal imported from US and Australia, and lead to “savings”
- OR: savings weighed against carbon emissions from development itself => “broadly carbon neutral”
- Grounds include:
 - Failed to assess GHG emissions from the mine
 - Failed to assess GHG emissions of “middlings coal”
 - Failed properly to consider Net Zero target
 - Failed to comply with EIA Regs

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Bennett

- Cumbria CC has confirmed do not intend to rely upon the resolution
- New planning application submitted
- Continues to rely upon “GHG savings”
- Planning statement para.4.2.23

“Whilst compliance with the duty under the 2008 Act is a matter for the Secretary of State, the extent to which a development may cause significant additional GHG emissions and therefore affect the steps required to ensure compliance with this duty may still be a relevant material consideration in the determination of a planning application by a local planning authority. Albeit, the weight given to such a consideration must necessarily reflect the level of uncertainty involved in such judgements and the limited control which the applicant and local planning authority can have on GHG reduction outside the scope of the proposal.”

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Reflections (1)

1. No clear overarching policy makes decision-making more difficult
2. Uncertainty as to the extent to which decision-makers will ‘enter into the arena’ of climate change
3. Real challenge of proper assessment and what are appropriate assumptions (see *Gloucester Resources Ltd*)
 - Market substitution
 - Carbon leakage

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Reflections (2)

4. Burden upon applicant to justify position, or burden upon objectors to raise concerns?
5. Need to take “hard look” at indirect and cumulative effects?

(see *Montana Environmental Information Centre v US Office of Mining* 274 F Supp 3d 1074 (D Mont, 2017))



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