



Neutral Citation Number: [2023] EWHC 1526 (Admin)

Case No: CO/3147/2022

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**PLANNING COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 22/06/2023

**Before :**

**THE HON. MR. JUSTICE HOLGATE**

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**Between :**

**THE KING**

**on the application of**

**TOGETHER AGAINST SIZEWELL C LIMITED**

**Claimant**

**– and –**

**SECRETARY OF STATE FOR ENERGY  
SECURITY AND NET ZERO**

**Defendant**

**– and –**

**NNB GENERATION COMPANY (SZC) LIMITED**

**Interested  
Party**

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**David Wolfe KC, Ashley Bowes and Ruchi Parekh** (instructed by **Leigh Day Solicitors**) for  
the **Claimant**.

**James Strachan KC and Rose Grogan** (instructed by **Government Legal Department**) for  
the **Defendant**.

**Hereward Phillpot KC and Hugh Flanagan** (instructed by **Herbert Smith Freehills**) for the  
**Interested Party**.

Hearing dates: 22 and 23 March 2023  
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**APPROVED JUDGMENT**

**Mr Justice Holgate:**

**Introduction**

1. The claimant seeks to challenge by judicial review under s.118(1) of the Planning Act 2008 (“the 2008 Act”) the decision dated 20 July 2022 made under s.114 of that Act to make the Sizewell C (Nuclear Generating Station) Order 2022 (SI 2022 No. 853) (“the Order”) under s.114 of that Act. That decision was made by, and the proceedings were brought against, the Secretary of State for Business, Energy and Industrial Strategy. However, with effect from 3 May 2023 the relevant functions have been transferred to the Secretary of State for Energy Security and Net Zero and he has therefore been substituted as the defendant.
2. The Order grants development consent for the construction, operation, maintenance and decommissioning of a nuclear power station comprising two UK European Pressurised Reactors, each with a net electrical output of 1,670 MW, and a total capacity of 3,340 MW.
3. The claimant, Together Against Sizewell C Limited (“TASC”), is a private company. It was set up on 8 July 2022 by members of a local community group as a special purpose vehicle for the bringing of this claim and to receive public donations to that end. TASC was established in 2013 to oppose the project. It has had about 280 supporters. The group responded to pre-application consultations and participated in the statutory Examination of the draft order. It made written representations on a range of subjects and oral representations at “issue-specific hearings” (“ISHs”) held during the Examination.
4. The Order granted development consent to the interested party, NNB Generation Company (SZC) Limited (“SZC”).
5. The application for consent was made on 27 May 2020. The defendant appointed a panel of five inspectors (“the Panel”) to conduct the Examination of the application under Chapter 4 of Part 6 of the 2008 Act. The Examination took place between April and October 2021.
6. At the time of the Examination, SZC was unable to identify a permanent supply of potable water for the project, because this was to be decided as part of the preparation and publication by Northumbrian Water Limited (“NWL”) of a Water Resources Management Plan pursuant to s.37A of the Water Industry Act 1991 (“the 1991 Act”) for Essex and Suffolk over the period 2025 to 2050 (referred to as WRMP24).
7. SZC produced a Water Supply Strategy Report in September 2021 which identified the amounts of potable water required during the construction, commissioning and operational phases of Sizewell C. When the station is operating the peak demand will be up to 2,800 m<sup>3</sup>/day. This is an entirely separate issue from the cooling water needed in connection with electricity generation, which is obtained directly from the sea.

8. The Panel’s Report (“PR”) was submitted to the defendant on 25 February 2022. In its assessment of the benefits of the project as part of the overall planning balance the Panel relied upon the contribution of the power station to low-carbon energy production. It would meet the aim of Government policy to achieve delivery of major energy infrastructure including new nuclear electricity generation. They considered that “there is clearly an urgent need for development of the type proposed” and gave “very substantial weight” to the contribution that the scheme would make to meeting that need (PR 7.5.4).
9. Because the project is likely to have a significant effect on “European sites”, an “appropriate assessment” was required to be carried out under reg.63(1) of the Conservation of Habitats and Species Regulations 2017 (SI 2017 No. 1012) (“the Habitats Regulations”). The Panel concluded that an adverse effect on the integrity of the marsh harrier feature of the Minsmere-Walberswick SPA resulting from noise and visual disturbance during the construction phase could not be excluded (PR 6.4.598). Under reg.64 the Panel advised that there were no “alternative solutions” to the proposed development (PR 6.6.12) and the defendant could conclude that the project must be carried out for “imperative reasons of overriding public interest” (“the IROPI test”). The public interest reasons included the continuing growth in the demand for electricity, the retirement of existing generation capacity, the shortfall in generation of 95GW by 2035, the scale of the need for nuclear new build, the UK’s commitment to the net zero target for 2050, the continuity and reliability of supply delivered by nuclear energy as part of a diverse energy mix and the urgent need for new nuclear power stations (PR 6.7.4 and 6.7.9). The Panel also identified some additional areas where the information before them was insufficient for the purposes of the Habitats Regulations, but those matters do not give rise to any legal challenge.
10. However, there remained the outstanding issue about a permanent supply of potable water. The power station could not be licensed by the Office for Nuclear Regulation (“ONR”) under the Nuclear Installation Act 1965 (“the 1965 Act”) and could not be operated without such a supply. The Panel said that because an assured supply of potable water had not been identified, the cumulative environmental effects of the proposed development and that supply could not be assessed (PR 7.5.7) They stated that they could not recommend approval of the application without additional information and assurance on the provision of a permanent water supply. They regarded this “as an important matter of such magnitude that it should not be left unresolved to a future date” (PR 7.5.8). Subject to the permanent water supply issue, the Panel considered that the benefits of the proposal strongly outweighed the adverse impacts. But in view of that unresolved issue as at the close of the Examination, the Panel considered that the case for the grant of development consent had not yet been made out (PR 7.5.9 and 10.3.1)
11. On 18 March 2022 the defendant requested further information from SZC, the Environment Agency (“EA”), Natural England (“NE”) and the ONR. The defendant referred to a letter from NWL’s Solicitors of 23 February 2022 advising that the company was unable to meet the project’s long-term demand for water supply from existing resources and that a number of demand

management and supply side options were being appraised. The defendant asked SZC to explain the progress being made to secure a permanent solution so that he could reach a reasoned conclusion on the cumulative environmental effects of different permanent water supply solutions (see DL 4.29).

12. SZC responded to that request on 8 April 2022. In summary, they relied firstly upon the duty of NWL under the 1991 Act to identify through WRMP24 new water resources to meet the demand forecast for its region, including Sizewell C. NWL would carry out an integrated environmental assessment of the Plan, including strategic environmental assessment (“SEA”) under The Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004 No.1633) and a Habitats Regulations Assessment (“HRA”). These assessments would be completed before Sizewell could receive the new supply (DL 4.32). SZC submitted that the long-term planning of water supply was subject to the separate requirements of the 1991 Act and could not yet be identified for the power station (and other developments). Indeed, it could change again during the lifetime of the power station as the water undertaker manages its resources in response to *inter alia* changing demand. In accordance with national policy, the decision under the 2008 Act should be taken on the assumption that other statutory regimes will be properly applied (DL 4.33). SZC submitted that there was insufficient information on the permanent solutions that might come forward for any meaningful assessment to be made at that stage.
13. Secondly, SZC said that in the unlikely event of NWL being unable to provide a permanent supply for the power station, SZC could develop a permanent desalination plant. SZC considered that such a plant would be unlikely to generate any new or materially different significant environmental effects (DL 4.30 and 4.66).
14. On 25 April 2022 the defendant invited comments from interested parties on the responses he had received. TASC replied on 23 May 2022. They raised objections to a permanent desalination plant but offered no comments on the WRMP route. TASC maintained their position that the lack of a guaranteed water supply meant that not all significant environmental effects were being assessed at the development consent stage.
15. The defendant’s decision letter was issued on 20 July 2022. The briefing to the Secretary of State for his consideration of SZC’s application included the Panel’s Report of some 1500 pages, the final HRA for Sizewell C and the draft decision letter, which itself ran to nearly 190 pages.
16. The defendant addressed the potable water supply issue at some length in DL 4.43 to 4.69 (reproduced in the Annex to this judgment). He was satisfied with the tankering arrangements and the temporary desalination plant proposed for the construction period and the assessment of their impacts (DL 4.43). Those conclusions are not challenged in these proceedings.
17. The defendant concluded that the proposed development and NWL’s WRMP24 are separate “projects” (DL 4.49). On that basis there was no requirement for an assessment to be made of the permanent water supply solution as a part of the

power station project. He then went on to consider the Panel’s view that the cumulative impacts of that water supply should nonetheless be considered at the development consent stage for the power station. The defendant concluded firstly, that a long-term water supply for Sizewell C is viable. Secondly, any proposal for the supply of water by NWL will be properly assessed under the WRMP24 process and other relevant regulatory regimes. Thirdly, no further information was required on that subject for the application for development consent to be determined (DL 4.67). Disagreeing with the Panel, the defendant did not consider the present uncertainty over the permanent water supply strategy to be a barrier to granting development consent for the project (DL 4.68).

18. The remainder of this judgment is set out under the following headings:

<b>Heading</b>	<b>Paragraph Number</b>
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<b>Conclusions</b>	188-191
<b>Annex – paragraphs 4.43 – 4.69 of the Secretary of State’s decision letter</b>	

## The grounds of challenge

19. In summary the claimant seeks to advance the following grounds of challenge:

**Ground 1:** Contrary to reg.63(1) of the Habitats Regulations the defendant failed to assess the environmental impacts of the “project” (including the necessary permanent potable water supply solution).

**Ground 2:** In the alternative, contrary to reg.63(1), the defendant failed to assess cumulatively the environmental impacts of the power station together with those of the permanent potable water supply solution.

**Ground 3:** The defendant failed to supply lawfully adequate reasons for departing from the advice of NE that the permanent water supply should be considered to be a fundamental component of the “operation of the project” and its effects at this stage.

**Ground 4:** Contrary to reg.64(1) of the Habitats Regulations, the defendant also failed lawfully to consider “alternative solutions” to the power station before concluding that there were imperative reasons of overriding public interest justifying the environmental harm it would cause.

**Ground 5:** The defendant took into account a legally irrelevant consideration (because it was supported by no evidence), namely the contribution the power station might make to reducing greenhouse gas (“GHG”) emissions by 78% from 1990 levels by 2035.

**Ground 6:** The defendant also acted irrationally in concluding that the power station site would be clear of nuclear material by 2140 and/or failed to supply adequate reasons for rejecting the claimant’s case on that point.

**Ground 7:** The defendant also erred in law in concluding that the power station’s operational GHG emissions would not have a significant effect on the UK’s ability to meet its climate change obligations.

20. On 19 October 2022 Kerr J refused the claimant permission to apply for judicial review on the papers.

21. On the same day the claimant filed an application to amend its statement of facts and grounds to add a new ground 8. The claimant then renewed its application for permission on grounds 1 to 7.

22. On 14 December 2022 I refused permission for the claimant to add ground 8. Having regard to the parties’ submissions, I also ordered that the renewed

application for permission should be adjourned to a rolled-up hearing. On 10 January 2023 the claimant withdrew its renewed application for permission to argue ground 8.

23. Projects such as Sizewell C may attract both strong opposition and strong support. It is therefore necessary to reiterate what was said by the Divisional Court in *R (Rights: Community: Action) v Secretary of State for Housing, Communities and Local Government* [2021] PTSR 553 at [6]:

“6. It is important to emphasise at the outset what this case is and is not about. Judicial review is the means of ensuring that public bodies act within the limits of their legal powers and in accordance with the relevant procedures and legal principles governing the exercise of their decision-making functions. The role of the court in judicial review is concerned with resolving questions of law. The court is not responsible for making political, social, or economic choices. Those decisions, and those choices, are ones that Parliament has entrusted to ministers and other public bodies. The choices may be matters of legitimate public debate, but they are not matters for the court to determine. The court is only concerned with the legal issues raised by the claimant as to whether the defendant has acted unlawfully. The claimant contends that the changes made by the SIs are radical and have been the subject of controversy. But it is not the role of the court to assess the underlying merits of the proposals. Similarly, criticism has been made of the way in which, or the speed with which, these changes were made. Again, these are not matters for the court to determine save and in so far as they involve questions concerning whether or not the appropriate legal procedures for making the changes were followed.”

### Statutory framework

#### *The Planning Act 2008*

24. The 2008 Act provides a dedicated regime for applications to be made for the grant of development consent orders for “nationally significant infrastructure projects” (“NSIPs”). The framework of the Act has been set out in a number of authorities and need not be repeated in detail here. I refer in particular to the decision of the Supreme Court in *R (Friends of the Earth Limited) v Secretary of State for Transport* PTSR 190 at [19] to [37].
25. One of Parliament’s aims was to make the application of development control to NSIPs more efficient and to reduce delays in decision-making. Issues such as the need for different types of infrastructure and the policy of the Government on such development was to be settled in advance by National Policy Statements (“NPSs”). A draft version of a NPS is subject to SEA, HRA, consultation, public involvement and Parliamentary scrutiny before being designated by the relevant Minister by statutory instrument under s.5 of the 2008 Act.

26. Under s.104(2), when determining an application for development consent, the Secretary of State must have regard to any NPS which “has effect” in relation to development of the description to which that application relates (a “relevant NPS”). Under s.104(3) he must determine the application in accordance with that relevant NPS, save to the extent that one or more of the exceptions in s.104(4) to (8) applies. Section 105 applies in relation to an application for an order granting development consent if s.104 does not apply. Section 105(2) provides that in deciding the application the Secretary of State must have regard to *inter alia* any matters which he considers are both important and relevant to his decision. Section 106 enables the Secretary of State to disregard any representation (including evidence) which he considers *inter alia* relates to the merits of policy set out in a NPS. Section 106 applies whether an application is subject to s.104 or to s.105.
27. In the present case there were two relevant NPSs, the Overarching National Policy Statement for Energy (EN-1) and the National Policy Statement for Nuclear Power Generation (EN-6). Both documents were “designated” by the defendant in July 2011.
28. Paragraphs 3.1.1 to 3.1.4 of EN-1 set out the approach for deciding applications for development consent. The UK needs all the types of energy infrastructure covered by the NPS, which include nuclear power, in order to achieve energy security and reduce GHGs dramatically. Applications should be determined on the basis that the need for these types of infrastructure has been demonstrated in the NPS. There is an urgent need for new nuclear power generation which will play an increasingly important role (para 3.5.1). It is Government policy that new nuclear power should be able to contribute as much as possible to the UK’s need for new capacity (para. 3.5.2). New nuclear power stations will help to ensure a diverse mix of technology and fuel sources, increasing the resilience of the UK’s energy system (para. 3.5.3). New nuclear power forms one of the three key elements of the Government’s strategy for moving towards a decarbonised, diverse electricity sector by 2050 (para. 3.5.5). Given the urgent need for low carbon forms of electricity, it is important that new nuclear power stations are constructed and operational as soon as possible “and significantly earlier than 2025.” Accordingly, the sites identified in Part 4 of EN-6 were those considered to be capable of deployment by the end of 2025 (paras 3.5.9 and 3.5.10).
29. EN-6 contains similar policy statements (paras. 2.2.1 and 2.2.2). In Part 4 of EN-6 Sizewell was identified as a potentially suitable site for a new nuclear power station along with Hinkley Point and six other sites.
30. On 7 December 2017 the Government issued a Written Ministerial Statement announcing a consultation document on designating in a NPS potentially suitable sites for nuclear power stations expected to be deployed after 2025 and before the end of 2035. The Government stated that EN-6 only has effect for the purposes of s.104 of the 2008 Act in relation to a project expected to be deployed before the end of 2025, that is when a station first begins to feed electricity into the national grid. The statement says that s.105 of the 2008 Act applies to EN-6 in so far as s.104 does not. For projects due to be deployed beyond 2025 the Government continues to give its strong in principle support to proposals for



those sites listed in EN-6. Both EN-1 and EN-6 contain information, assessments and statements which continue to be important for projects being deployed after 2025.

31. The Panel considered that the application for Sizewell C should be assessed under s.105 and that EN-1 and EN-6 were important considerations. There have been no relevant changes in circumstances reducing the weight to be given to those policies. The acceptability of the proposal in terms of planning policy should be assessed primarily against the nuclear-specific policies in the NPSs. The defendant agreed with the Panel (DL 4.4 and 4.5).
32. The defendant also agreed with the Panel's assessment of the need for nuclear power projects, to which he attached substantial weight. Thus, there is an urgent need for new nuclear energy generating infrastructure of the kind proposed at Sizewell. The contribution that the development would make to the delivery of low carbon energy would assist in the decarbonisation of the UK economy in line with the UK's obligations under the Paris Agreement (DL 4.5 to DL 4.11).
33. The main consequence of s.105 of the 2008 Act applying to the determination of SZC's application was that the presumption in s.104(3) did not apply. Thus, the defendant did not have to decide the application in accordance with the NPS unless one or more of the exceptions in s.104(4) to (8) applied. Nevertheless, it is relevant to note that where s.104 is engaged, the balancing exercise described in s.104(7) may not be used to circumvent s.106(1)(b), which has the effect of preventing challenges to the merits of policy in a NPS in an Examination or before the Secretary of State. So, for example, changes of circumstance after the designation of a NPS are to be addressed instead through the process under s.6 for a formal review of a NPS (*R (ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy* [2021] PTSR 1400 at [105]; *R (Spurrier) v Secretary of State for Transport* [2020] PTSR 240 at [106] to [110]).
34. There is no dispute that the NPSs were material considerations for the defendant to take into account under s.105 when determining SZC's application. Section 106 applies to a determination by the Secretary of State under s.105 just as it does to a decision under s.104. Accordingly, the provisions in the 2008 Act preventing challenges to the merits of policy in a NPS were applicable. Although a review of EN-6 under s.6 of the 2008 Act is being carried out, the defendant has decided not to exercise the power in s.11 to suspend either EN-1 or EN-6 pending the completion of that review.

#### *Water Industry Act 1991*

35. Section 37(1) lays down a general duty on every water undertaker in the following terms:

“(1) It shall be the duty of every water undertaker to develop and maintain an efficient and economical system of water supply within its area and to ensure that all such arrangements have been made—

(a) for providing supplies of water to premises in that area and for making such supplies available to persons who demand them; and

(b) for maintaining, improving and extending the water undertaker's water mains and other pipes,

as are necessary for securing that the undertaker is and continues to be able to meet its obligations under this Part.”

This primary duty is enforceable by the Secretary of State or OFWAT under s.18 of the 1991 Act.

36. Water undertakers are legally obliged to plan to meet demand within their area through a Water Resource Management Plan. Section 37A provides so far as material:

“(1) It shall be the duty of each water undertaker to prepare, publish and maintain a water resources management plan.

(2) A water resources management plan is a plan for how the water undertaker will manage and develop water resources so as to be able, and continue to be able, to meet its obligations under this Part.

(3) A water resources management plan shall address in particular—

(a) the water undertaker's estimate of the quantities of water required to meet those obligations;

(b) the measures which the water undertaker intends to take or continue for the purpose set out in subsection (2) above (also taking into account for that purpose the introduction of water into the undertaker's supply system by or on behalf of water supply licensees);

(c) the likely sequence and timing for implementing those measures; and

(d) such other matters as the Secretary of State may specify in directions (and see also section 37AA).

(4) The procedure for preparing and publishing a water resources management plan (including a revised plan) is set out in section 37B below.

(5) Before each anniversary of the date when its plan (or revised plan) was last published, the water undertaker shall —

(a) review its plan; and

(b) send a statement of the conclusions of its review to the Secretary of State.

(6) The water undertaker shall prepare and publish a revised plan in each of the following cases—

(a) following conclusion of its annual review, if the review indicated a material change of circumstances;

(b) if directed to do so by the Secretary of State;

(c) in any event, not later than the end of the period of five years beginning with the date when the plan (or revised plan) was last published,

and shall follow the procedure in section 37B below (whether or not the revised plan prepared by the undertaker includes any proposed alterations to the previous plan).

(7) ....”

37. Under s.37AA(8) before preparing its WRMP the water undertaker must consult *inter alia* the EA, OFWAT and the Secretary of State.
38. Section 37B lays down the procedure for the preparation and publication of a WRMP. The undertaker is obliged to publish a draft of the plan so that representations may be made on its proposals to the Secretary of State (s.37B(3)). The WRMP must be sent to *inter alia* OFWAT, the EA, NE and Historic England so that they too may make representations (see reg.2 of The Water Resources Management Plan Regulations 2007 (SI 2007 No.727)). The undertaker may then comment on those representations (s.37B(4)). The Secretary of State may cause a public inquiry or hearing to be held to consider any issues arising (s.37B(5) and reg.5 of the 2007 Regulations). The Secretary of State has the power to direct that the WRMP must differ from the draft sent to him and the undertaker must then comply with that direction (s.37B(7)). The undertaker must publish the final version of the plan (s.37B(9)).
39. The duties of a water undertaker under s.37A and s.37B are enforceable by the Secretary of State under s.18.
40. Where the owner or occupier of premises in the area of a water undertaker requests a supply of water for non-domestic purposes it is the undertaker’s duty, in accordance with terms and conditions determined under s.56, to take steps to provide that supply. Those terms and conditions are to be determined by agreement between the parties or, in default, by OFWAT according to what appears to it to be reasonable. Section 55(3) qualifies the duty under s.55:

“A water undertaker shall not be required by virtue of this section to provide a new supply to any premises, or to take any steps to enable it to provide such a supply, if the provision of that supply or the taking of those steps would—

(a) require the undertaker, in order to meet all its existing obligations to supply water for domestic or other purposes, together with its probable future obligations to supply buildings and parts of buildings with water for domestic purposes, to incur unreasonable expenditure in carrying out works; or

(b) otherwise put at risk the ability of the undertaker to meet any of the existing or probable future obligations mentioned in paragraph (a) above.”

Any dispute arising under s.55(3) is determined by OFWAT (s.56(2)).

*The Nuclear Installations Act 1965*

41. The use of a site for the installation and operation of a nuclear reactor is prohibited unless authorised by a nuclear site licence by the “appropriate national authority”, the ONR (ss. 1 and 3). When granting a licence the ONR must attach such conditions as it considers necessary or desirable in the interests of safety and may also attach conditions to the licence at any time (s.4(1)). Conditions may be attached providing for *inter alia* the design, construction, operation, siting or modification of any plant or other installation on the site (s.4(3)(b)).

*The Conservation of Habitats and Species Regulations 2017*

42. The defendant is a “competent authority” for the purposes of the Habitats Regulations. Regulations 63 and 64 apply in relation to the making of an order granting development consent under the 2008 Act (regs. 62(1) and 84(1)).
43. In so far as is material, reg.63 provides:

“(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which—

(a) is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects), and

(b) is not directly connected with or necessary to the management of that site,

must make an appropriate assessment of the implications of the plan or project for that site in view of that site’s conservation objectives.

(2) A person applying for any such consent, permission or other authorisation must provide such information as the competent authority may reasonably require for the purposes of the assessment or to enable it to determine whether an appropriate assessment is required.

(3) The competent authority must for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority specifies.

(4) It must also, if it considers it appropriate, take the opinion of the general public, and if it does so, it must take such steps for that purpose as it considers appropriate.

(5) In the light of the conclusions of the assessment, and subject to regulation 64, the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marine site (as the case may be).

(6) In considering whether a plan or project will adversely affect the integrity of the site, the competent authority must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which it proposes that the consent, permission or other authorisation should be given.

...”

The “appropriate nature conservation” body in this case was NE (reg.5(1)).

44. Regulation 64(1) provides:

“(1) If the competent authority is satisfied that, there being no alternative solutions, the plan or project must be carried out for imperative reasons of overriding public interest (which, subject to paragraph (2), may be of a social or economic nature), it may agree to the plan or project notwithstanding a negative assessment of the implications for the European site or the European offshore marine site (as the case may be).”

It is not suggested that reg.64(2) was engaged in this case.

45. In relation to the application of regs.63 and 64 to the development consent procedure, reg.84(2) provides:

“(2) Where those provisions apply, the competent authority may, if it considers that any adverse effects of the plan or project on the integrity of a European site or a European offshore marine site would be avoided if the order granting development consent included requirements under section 120 of the Planning Act 2008 (what may be included in order granting development consent), make an order subject to those requirements.”

*The Infrastructure Planning (Environmental Impact Assessment) Regulations 2017*

46. Regulation 4 of the Infrastructure Planning (Environmental Impact Assessment Regulations 2017 (SI 2017 No. 572) (“the EIA Regulations”) prohibits the Secretary of State from making an order granting development consent for “EIA development” under the 2008 Act unless EIA has been carried out (reg.4). Sizewell C constituted EIA development. By reg.5 “EIA” is a process consisting of the preparation of an “environmental statement” (“ES”), the carrying out of consultation under the EIA Regulations and compliance by the defendant with reg.21. Regulation 21 required the defendant when deciding whether to make the development consent order, to examine the environmental information and, taking that into account, to reach a reasoned conclusion on the significant effects of the development on the environment to integrate that conclusion into the decision on whether to grant the order, and to consider whether it was appropriate to impose monitoring measures. Environmental information “means the ES and the representations made by statutory consultees and other persons about the environmental effects of the development” (reg.3(1)).
47. Regulation 5(2) and (3) of the EIA Regulations provides:
- “(2) The EIA must identify, describe and assess in an appropriate manner, in light of each individual case, the direct and indirect significant effects of the proposed development on the following factors—
- (a) population and human health;
  - (b) biodiversity, with particular attention to species and habitats protected under Directive 92/43/EEC and Directive 2009/147/EC;
  - (c) land, soil, water, air and climate;
  - (d) material assets, cultural heritage and the landscape;
  - (e) the interaction between the factors referred to in subparagraphs (a) to (d).
- (3) The effects referred to in paragraph (2) on the factors set out in that paragraph must include the operational effects of the proposed development, where the proposed development will have operational effects.”
48. Regulation 14 prescribes the contents of an ES. It must include a description of “the likely significant effects of the proposed development on the environment” (reg.14(2)(b)). By reg.14(2)(f) the ES must contain any additional information specified in sched. 4 relevant to “the specific characteristics of the particular development or type of development and to the environmental features likely to be significantly affected”. Paragraph 5 of sched. 4 refers to:
- “A description of the likely significant effects of the development on the environment resulting from, *inter alia* –

...

(e) the cumulation of effects with other existing and/or approved projects, taking into account any existing environmental problems relating to areas of particular environmental importance likely to be affected or the use of natural resources;

...”

49. Regulation 14(3) provides (so far as is relevant):

“The environmental statement referred to in paragraph (1) must—

(a) ...

(b) include the information reasonably required for reaching a reasoned conclusion on the significant effects of the development on the environment, taking into account current knowledge and methods of assessment; and

(c) ... ”

## **Ground 1**

### *A summary of the claimant’s submissions*

50. The claimant submits that in breach of reg.63 of the Habitats Regulations the defendant failed to make an appropriate assessment of the implications of the “project” for European sites because he wrongly excluded from that project the permanent potable water supply solution without which the project is incomplete and cannot function. As at the date of the decision to make the order, that solution would potentially give rise to further impacts on protected areas which have not been assessed and could not be ruled out.
51. The permanent potable water supply was a fundamental component of the operation of the power station according to NE (para. 2.1.2. of representations in October 2021). The defendant agreed with the ONR that in order to satisfy the conditions of any nuclear site licence for the project, SZC will have to put in place a reliable supply of water before any nuclear safety related activities can take place that are dependent on such a supply.
52. The nuclear power station is functionally interdependent with the permanent water supply solution (*R (Wingfield) v Canterbury City Council* [2020] J.P.L 154 at [64]).
53. The reasons advanced by the defendant as to why the permanent water supply did not form part of the power station project are irrelevant. The claimant relies in particular upon *R (Ashchurch Parish Council) v Tewksbury Borough Council* [2023] EWCA Civ 101.

*NWL's position on water supply*

54. SZC's Water Supply Strategy Report (September 2021) summarised NWL's position as at that stage. The local "water resource zone" Blyth WRZ would be unable to supply water to meet the needs of the power station. NWL had identified the possibility of a connection being made to the Northern/Central WRZ which might have sufficient capacity in the River Waveney, subject to completion of NWL's part of the Water Industry National Environment Programme ("WINEP") study led by the EA. This would require the construction of a new transfer main from Barsham Water Treatment Works to Saxmundham, a distance of 28km, and other water network enhancements. The proposed transfer main would connect into the local Blyth distribution network at Saxmundham Water Tower and at other locations. "These local connections have the potential to provide significant legacy benefit by increasing capacity and resilience of the distribution network" (para 3.2.3 and DL 4.53). The main would benefit consumers in the local area and not simply Sizewell. There were issues affecting the availability of a sustainable supply across the whole of the East of England, which, if confirmed, would require a strategic response by NWL so that it could discharge its duties under the 1991 Act. Accordingly, longer term plans would need to be put in place by NWL "to serve the region and its committed growth."
55. In the decision letter the defendant noted that the transfer main from Barsham to Saxmundham did not form part of SZC's application for development consent (DL 4.59). But SZC had been able to provide information on the environmental impact of that pipeline and concluded that this would not give rise to any new or different significant cumulative impacts (DL 4.65). The defendant agreed (DL 4.51 to 4.52).
56. On 14 September 2021 the Panel held Issue Specific Hearing 11 ("ISH 11"), which covered water supply issues (DL 4.18). SZC provided a written note on issues arising out of that hearing, including the legal framework for WRMPs and the legal obligations of NWL.
57. On 5 October 2021 the Panel held ISH 15. A statement of common ground was agreed between NWL and SZC on 8 October 2021. In that statement NWL said that it would confirm whether it would be able to meet Sizewell C's long-term needs from the Northern/Central WRZ following completion of the WINEP modelling. If it could not, then NWL would have to develop new supply schemes through WRMP24, but that would not meet Sizewell C's long-term needs until the late 2020s at the earliest. The parties agreed 2032 as the backstop date for this long-term supply to be fully available.
58. NWL was represented by counsel at ISH 15 and agreed with SZC's position at the hearing. SZC pointed out that the Water Resources Planning Guidelines state that water undertakers must ensure that their planned property and population forecasts and resulting supply "must not constrain planned growth". Accordingly, even if NWL could not at that stage identify a water supply for Sizewell C, it was obliged to do so. NWL confirmed that that was the case.



59. After the Examination had closed on 14 October 2021, NWL’s solicitors wrote to the defendant on 23 February 2022 to provide an update on the permanent supply of potable water. They said that the WINEP modelling showed that NWL would “not be able to supply all forecast household and non-household demand, including the Project’s long-term demand, from existing water resources”. “NWL will therefore need to identify new water resources to meet the forecast demand”. NWL had included SZC’s demand figures from 2032 in its WRMP24 demand forecast for the Suffolk supply area.
60. NWL stated that in addition to demand management options (e.g. reduction in leakage from networks and compulsory metering of households), it was appraising options which included:
- (i) Imports from Anglian water (subject to exporting water from the Essex WRZ);
  - (ii) Nitrate removal at Barsham water treatment works to reduce raw sewage outages;
  - (iii) Effluent re-use and desalination;
  - (iv) Winter reservoirs post-2035.

The options in the WRMP24, due for submission to Defra by October 2022, would depend on the final WINEP modelling of abstraction in the River Waveney.

61. NWL reiterated its commitment to providing a long-term supply for Sizewell C, although it was unlikely to be available before the late 2020s at the earliest. This was dependent on finalising and funding new supply schemes to meet future demands in Suffolk, including the power station.
62. On 8 April 2022 SZC provided its response to the defendant’s request dated 18 March 2022 for further information. The document summarised the submissions and information already supplied and stated that there was no difference between the positions of SZC and NWL. SZC summarised the range of options being considered by NWL, which included water transfer. It emphasised that WRMP24 would be subject to SEA and HRA. NWL had said that after submitting its plan for consultation it would work with SZC to negotiate an agreement under s.55 of the 1991 Act. Paragraphs 2.1.16 and 2.1.17 read as follows:

“2.1.16 It is because the long-term planning of water supply is the subject of separate statutory provisions and processes that the identification of the source of Sizewell’s long-term supply cannot be known at this stage. Indeed, the source may well change during the lifetime of the power station as the undertaker develops and manages its water resources in response to changing demand and other considerations. For the same reasons, and because on the evidence the source of supply is unlikely to be a constraint to the construction and operation of

the new power station, the source does not need to be known for the purposes of the DCO.

2.1.17 NPS EN-1 is clear that that the DCO decision maker should work on the assumption that other regimes and regulatory processes will be properly applied and enforced so that decisions on DCO applications should complement but not seek to duplicate other processes (NPS EN-1 paragraph 4.10.3). That same principle is clear from paragraph 188 of the NPPF, i.e. planning decisions should assume that regimes will operate effectively.”

SZC stated that it had put in place plans for a temporary desalination unit which would cover the project’s water requirements up to the commissioning of unit 1 of the power station. That would give NWL 10 years to plan for and deliver a permanent water supply.

63. TASC sent to the defendant representations in response by letters dated 8 April 2022 and 23 May 2022. The first made criticisms of the proposal for a temporary desalination plant and said nothing about WRMP24. The second objected to a possible location for a permanent desalination plant and again said nothing about WRMP24. They made a general point to the effect that SZC had failed to assess impacts on receptors in relation to a permanent water supply solution, relying on the views of NE.
64. On 16 June 2022 SZC responded to the defendant’s request for further information about any progress made with NWL. They said that NWL had confirmed that draft WRMP24 would make full provision for the long-term demand from Sizewell C and that, subject to the necessary approvals from Defra and OFWAT, it is likely to be possible to deliver the necessary infrastructure. NWL and SZC had agreed to begin negotiations under the 1991 Act in October 2022 for funding the design and delivery of infrastructure specific to Sizewell C, so as to be ready to sign an agreement once NWL’s Business Plan had been approved by OFWAT, most likely in early 2024. SZC said that there was no reason to think that a new water supply scheme for a “critical NSIP” would not be approved in the 2024 Price Review and every reason to expect that NWL, using reasonable endeavours, would be able to deliver the necessary infrastructure for the permanent water supply connection before the end of construction of Sizewell C (see also DL 4.42).

*The decision letter*

65. This material on NWL’s position regarding a permanent water supply was well summarised in the defendant’s decision letter at DL 4.12 to 4.42. At DL 4.44 the defendant considered that the options identified by NWL were potentially viable solutions, as was the “fall back” of SZC providing a permanent desalination plant. He concluded that if development consent were to be granted for the power station, there was a “reasonable level of certainty” that a permanent solution could be found before the commissioning of the first reactor. Plainly in arriving at that conclusion the defendant would have taken into account his further conclusions about the need for environmental impacts to be

assessed and considered. The defendant's confidence that a permanent solution would be provided before operation of the power station was a matter for his judgment.

66. The defendant also noted that if, and only if, the WRMP process fails to provide a solution, SZC will have to consider providing its own permanent desalination plant (DL 4.60). He noted the objections which had been raised to this possible option and said that a detailed assessment of the impacts would be required if it were to be pursued. The defendant had not asked for an assessment at this stage because (a) this option did not form part of the proposed development and (b) SZC's position was that it was unlikely to be required (DL 4.61).
67. The defendant dealt with environmental assessment in relation to a mains link to Barsham water treatment works, the WRMP process and the possible fallback of a permanent desalination scheme between DL 4.43 to DL 4.69 in some detail. That section needs to be read as a whole.
68. Part 6 of Sched.19 to the Order contains provisions for the protection of NWL. Paragraph 70 states that subject to either condition 1 or condition 2 being satisfied, and subject to the terms of any agreement made under s.55 or determination made by OFWAT under s.56 of the 1991 Act, NWL will use its reasonable endeavours to supply Sizewell C with the quantities of water required for its operational phase as soon as reasonably practicable. Condition 1 is that the EA confirms the new annual licensed quantities which may be abstracted from the River Waveney and NWL confirms to SZC that there is a sufficient resource in the Northern/Central WRZ to meet forecast demand from its existing and future customers, including demand for Sizewell C (paras.71 to 72). Condition 2 is satisfied if there are new supply schemes in WRMP24, the Secretary of State for Environment, Food and Rural Affairs approves the publication of the final version of WRMP24 and OFWAT approves "the required supply schemes" from the approved WRMP24 in its Final Determination for the 2024 Price Review (paras. 73 to 75).

### *Discussion*

69. Neither the Habitats Regulations nor the EIA Regulations define a "project". It is common ground in this case that principles in the case law on the EIA Regulations are applicable when considering the scope of a project under the Habitats Regulations.
70. The question of what is the project in any particular case is a matter of judgment for the decision-maker, here the Secretary of State. That judgment may only be challenged in this court on *Wednesbury* principles (*Bowen-West v Secretary of State for Communities and Local Government* [2012] Env.L.R. 22 at [39] to [42]; *Smyth v Secretary of State for Communities and Local Government* [2015] PTSR 1417; *Wingfield* at [63] and *Ashchurch* at [81], [83], [100] and [105].) In the present case the issue is whether the defendant took into account a consideration which was legally irrelevant and, if not, whether his judgment was otherwise irrational. The threshold for irrationality in the making of such a judgment is a difficult obstacle to surmount (see e.g. *Newsmith Stainless Limited*

*v Secretary of State for the Environment, Transport and the Regions* [2017] PTSR 1126).

71. The courts have been astute to detect “salami-slicing”, that is the device of splitting a project into smaller components that fall below the threshold for “EIA development” so as to avoid the requirement to carry out EIA altogether (*R v Swale Borough Council ex parte RSPB* [1991] 1 PLR 6 at [16]; *Preston New Road Action Group v Secretary of State for Communities and Local Government* [2018] Env.L.R 18 at [69]).
72. In *R (Larkfleet Limited) v South Kesteven District Council* [2016] Env.L.R. 4 stated at [36] that it is clear from the legislation that the mere fact that two sets of proposed works have a cumulative effect on the environment does not make them a single project. Instead, they may constitute two projects but with cumulative effects which need to be assessed. The court went on to discuss a second type of salami-slicing ([37]-[38]). It acknowledged that the scrutiny of cumulative effects between two projects may involve less information than if the two sets of works are treated together as one project. Accordingly, a planning authority should be astute to ensure that a developer has not sliced up what is in reality one project in order to try to make it easier to obtain planning permission for the first part of the project and thereby gain a foot in the door in relation to the remainder. But the Directives and jurisprudence of the European Court of Justice recognise that it is legitimate for different development proposals to be brought forward at different times, even though they may have a degree of interaction, if they are different “projects”. The Directives apply in such a way as to ensure appropriate scrutiny to protect the environment, whilst avoiding undue delay in the operation of the planning control system. Undue delay would be likely if all the environmental effects of every related set of works had to be definitively examined before any of those works could be allowed to proceed. Where two or more linked sets of works are in contemplation, which are properly to be regarded as distinct “projects”, the objective of environmental protection is sufficiently secured under the Directives by consideration of their cumulative effects, so far as that is reasonably possible, when permission for the first project is sought, combined with the requirement for subsequent scrutiny under the Directives for the second and each subsequent project.
73. In *Wingfield* at [64] Lang J indicated some factors which *may* be taken into account in determining the extent of a project:
- “64. Relevant factors may include:
- i) Common ownership – where two sites are owned or promoted by the same person, this may indicate that they constitute a single project (*Larkfleet* at [60])
  - ii) Simultaneous determinations – where two applications are considered and determined by the same committee on the same day and subject to reports which cross refer to one another, this may indicate that they constitute a single project (*Burridge* at [41] and [79]);

iii) Functional interdependence – where one part of a development could not function without another, this may indicate that they constitute a single project (*Burridge* at [32], [42] and [78]);

iv) Stand-alone projects – where a development is justified on its own merits and would be pursued independently of another development, this may indicate that it constitutes a single individual project that is not an integral part of a more substantial scheme (*Bowen-West* at [24 – 25])”

The judge made it clear that these factors were not exhaustive. The weight to be given to them will depend upon the circumstances of each case and is a matter for the decision maker.

74. Interdependence would normally mean that *each* part of the development is dependent on the other, as, for example, in *Burridge v Breckland District Council* [2013] JPL 1308 at [32] and [42].
75. At DL 4.46 the defendant referred to para 5.15.6 of EN-1 which requires the decision-maker to take into account the interaction of a proposed project with WRMPs (DL 4.46). He had regard to SZC’s analysis of the obligations of NWL under the 1991 Act to prepare WRMP24 and to supply water (e.g. DL 4.47, 4.49 to 4.50, 4.55 to 4.60, 4.64 to 4.65 and 4.67). He accepted the key components of that analysis.
76. The defendant’s conclusions included the following:
- (i) SZC’s preferred solution was a link to Barsham *provided by NWL*. SZC’s cumulative assessment stated that the pipeline would follow existing roads and boundaries wherever possible. Cut and fill would progress quickly and would impact upon a single receptor for a small number of days at most. Given the footprint and locations of the works ecological impacts “would be minimal and avoidable or mitigable”. There would be no significant cumulative effects. The defendant agreed. (DL 4.50 to DL 4.52 and 4.58);
  - (ii) If NWL’s solution for the permanent supply of potable water should require a change to that pipeline connection, that would be subject to its own environmental assessment, including HRA. This would be for NWL to assess (DL 4.56 and 4.58);
  - (iii) WRMP24 will need to identify new water resources to meet long-term demand in Suffolk, both household and non-household demand. Those new supplies are not limited to meeting the demand for Sizewell C (DL 4.55);
  - (iv) Sizewell C and the WRMP24 process for identifying new water sources are separate or standalone projects, given that NWL has a duty to undertake WRMP24 regardless of whether Sizewell C proceeds. These two projects have separate “ownership” and “are subject to distinct and

asynchronous determination processes”. The WRMP process is carried out by NWL and is not something that SZC can dictate (DL 4.49 and 4.60);

- (v) Assessment of potential environmental impacts associated with the permanent water supply to be provided by NWL could not be carried out because of the stage reached in the WRMP24 process and the fact that the preferred solution was unknown (DL 4.50 and 4.59);
- (vi) Any pipeline or connection needed for the solution adopted by NWL will be the subject of a separate application by that company. That infrastructure does not form part of the current application (DL 4.57 and 4.59);
- (vii) The defendant was satisfied with the control that will be exercised by the ONR through the conditions of the nuclear site licence, which will require a reliable supply of potable water to be in place before any nuclear safety-related activities can take place. The cumulative or in-combination environmental effects will be assessed under NWL’s WRMP24 process, including a HRA, before operation can commence (DL 4.64);
- (viii) The provision of a permanent water supply is not an integral part of the Sizewell C proposal (DL 4.65).

77. Plainly this is not a case where the promoter of a project has sliced up the development in order to make it easier to obtain consent for the first part of a larger project. Sizewell C was initially promoted on the basis that NWL would meet its obligations under the 1991 Act by providing a permanent water supply at Barsham and a transfer main to Saxmundham. Accordingly, the provision of that infrastructure by NWL was not included in SZC’s application for development consent. The present uncertainty about what form the long term supply will take only emerged subsequently. In the circumstances, it is inappropriate for the claimant to say that SZC has caused uncertainty by “keeping its options open”. SZC has had to react to the changing circumstances of the WINEP modelling and NWL’s evolving response to that assessment. SZC has made it plain that it wishes to rely upon the solution that NWL says it will be able to deliver through the WRMP24 process and not upon permanent desalination on-site. On the other hand the defendant’s decision recognises that in the unlikely event of NWL being unable to provide a solution, SZC would seek to provide a desalination plant (DL 4.66).

78. In summary, the claimant submits that the defendant took into account the following irrelevant considerations:

- (i) The current uncertainty as to the final source of the water supply was irrelevant. The lack of definition of that supply cannot “of itself” provide the answer to the question whether that supply forms part of the project;
- (ii) The infrastructure for the potable water supply did not form part of the application for development consent;

- (iii) The potable water supply would be subject to a separate and asynchronous decision process;
  - (iv) Separate ownership.
79. The claimant seeks to base these criticisms upon *Ashchurch*. That case concerned the grant of planning permission for a bridge over a railway line. This is sometimes referred to as “the bridge to nowhere”, because when viewed in isolation it served no purpose. It did not connect to any existing road or development. It was a bridge in the middle of a field. It would only begin to be used if and when housebuilders obtained planning permission for and developed a link road and housing site. The claim for judicial review had to succeed in any event because the officer’s report wrongly directed the defendant’s planning committee that they could take into account the benefits which would arise from the housing development anticipated but not any of the harm that that development would cause. The benefits of the additional development could not be realised without the concomitant harms. So the decision involved a failure to take into account an obviously material consideration and was irrational (grounds 1 and 2 at [32] to [69]).
80. The claimant relies upon the later part of the judgment of Andrews LJ which dealt with ground 3 at [70] to [104] and the defendant’s decision that the bridge should be treated as a single project for the purposes of the EIA Directive. She held that the identification of a project is a fact-specific matter. Consequently, other cases, decided on different facts, are only relevant to the limited extent that they indicate the type of factors which might assist in determining whether a proposed development forms an integral part of a wider project.
81. Andrews LJ referred to the principle under the EIA Regulations that where EIA is required, it should generally be carried out as early as possible. As Lang J said in her second judgment in *Wingfield* [2019] EWHC 1974 (Admin) at [72]-[77] there is no objective in the Habitats Directive (92/43/EEC) requiring appropriate assessment at the earliest possible stage. Instead, the Directive focuses on the end result of avoiding damage to a European site. In the case of a “multi-stage consent” (or a multi-consent) it may be a subsequent rather than the first consent which authorises the implementation of the project (see also *No Adastral New Town Limited v Suffolk Coastal District Council* [2015] Env.L.R.28 and *R (Swire) v Canterbury City Council* [2022] J.P.L. 1026 at [94] to [95]).
82. The central flaw in the Council’s decision in *Ashchurch* was its failure even to consider whether the bridge formed an integral part of a wider project for the purposes of the EIA Regulations ([82] to [84] and [96]). The court rejected the notion that in a case where the specific development for which permission is sought clearly forms an integral part of an envisaged wider future scheme, without which that development would never take place, there *can only* be a single project if the wider scheme has reached the stage where it could be the subject of an application for planning permission ([88] and see also [101]).
83. The Court then stated that the mere “difficulty” of carrying out any assessment of the impacts of a larger future project which is lacking in detail, is irrelevant

to the question whether the application under consideration forms an integral part of that larger project ([90]). *Ashchurch* was a case where it was possible to carry out some assessment of the future scheme. It was not a case where that was impossible ([91] to [92]).

84. At [102] and [104] Andrews LJ held that the fact that the EIA Regulations would require EIA to be carried out on the future wider scheme could not be conclusive on the issue of whether the earlier phase, the bridge, should be treated as a standalone project. But the Court did not suggest that this factor was altogether irrelevant and therefore must be disregarded. For example, it could be relevant to an assessment of whether the procedure being followed would have the effect of avoiding the requirements of the legislation, as in a salami-slicing case.
85. In the present case, unlike *Ashchurch*, the defendant considered whether the provision of a permanent water supply formed an integral part of the Sizewell C development and concluded that it did not. In reaching that conclusion the defendant did not take into account any irrelevant considerations.
86. The defendant did not rely upon the mere “difficulty” of carrying out an assessment of the water supply solution or the mere lack of detail on any option. Rather, WRMP24 had yet to be published in draft. NWL’s solution to the water supply issue for Suffolk was unknown and would remain so until that process was completed. There was no option to assess. In any event, the defendant did not treat this factor as conclusive. Instead, it was one of a number of matters to which he had regard in the exercise of his judgment.
87. The defendant was entitled to take into account the fact that the permanent water supply had not formed part of the application for development consent and would be dealt with under a subsequent, separate process and subject to an integrated environmental assessment. He did not treat those matters as conclusive. His approach was lawful in accordance with *Wingfield* at [64] and *Ashchurch*.
88. I understand that “separate ownership” in DL 4.49, read in context, to be a reference to the separate responsibilities of SZC, for Sizewell C, and NWL, for WRMP24 and the supply of water. As the defendant noted, NWL is under a statutory duty to prepare and publish WRMP24 and SZC has no control over that process. Undoubtedly this was a relevant factor which the defendant was entitled to take into account.
89. The claimant alleges that there is functional interdependence between the Sizewell C scheme and the provision of a permanent water supply. This argument relies upon the assertion that “the need for the permanent potable water supply arose from the power station development.” The implication would appear to be that there would be no such need in the absence of that development and so there is interdependence. This was not an argument which appears to have been pursued before the Panel during the Examination or subsequently before the Secretary of State. The claimant has not identified any evidence to support its assertion. Rather NWL stated that they would need to make additional water supplies available to meet the forecast demand and not just the demand from Sizewell C. The defendant had regard to NWL’s



obligation to undertake WRMP24 so as to be able to meet its duties under the 1991 Act. Beyond that the defendant took into account the requirement for the permanent water supply to be available before Sizewell C can operate under a nuclear site licence.

90. I have already summarised the considerations to which the defendant had regard in deciding that the provision by NWL of additional water sources for Suffolk is not part of the Sizewell C project. There is no basis upon which the defendant's evaluative judgment can be said to be irrational.
91. The claimant's argument has much wider implications. The need for the supply of utilities such as water is common to many, if not all, forms of development. A utility company's need to make additional provision so as to be able to supply existing and new customers in the future does not mean that that provision (or its method of delivery) is to be treated as forming part of each new development which will depend upon that supply. The consequence would be that where a new supply has yet to be identified by the relevant utility company, decisions on those development projects would have to be delayed until the company is able to define and decide upon a proposal. That approach would lead to sclerosis in the planning system which it is the objective of the legislation and case law to avoid (*R (Forest of Dean (Friends of the Earth)) v Forest of Dean District Council* [2015] PTSR 1460 at [18]).
92. Lastly, in his reply Mr. Wolfe chose to focus more on the complaint that a permanent desalination plant was not treated as forming part of the Sizewell C project. He submits that SZC could have put forward a design for assessment. He claims that the absence of that information and an assessment was unlawful by virtue of *Ashchurch* at [90] and [92]. I disagree. In *Ashchurch* the bridge was only going to be constructed in order to serve the wider development in the Masterplan area. As Andrews LJ said, although it was a matter for the local authority to address on a redetermination, it was difficult to see how the bridge could not be treated as an integral part of the wider project ([100]). The unassessed wider project was a real proposal. But there is no obligation to assess a hypothetical scheme (*Preston New Road* at [75]). Here SZC considered that a permanent desalination plant was unlikely to be necessary and was not currently proposing that option. The defendant's decision that such a desalination plant was not an integral part of the Sizewell C project cannot be faulted.
93. For all these reasons ground 1 must be rejected.

## **Ground 2**

94. On the assumption that the defendant was entitled to treat Sizewell C and the provision of a permanent water supply as separate projects, the claimant argues that the defendant acted in breach of reg.63 of the Habitats Regulations by failing to assess the cumulative impacts of both. The defendant relies upon the Panel's conclusion that even if the water supply did not form part of the project, nevertheless those cumulative effects should be assessed at the development consent stage (PR 5.11.284 to 5.11.287 and 7.5.7).

95. The claimant accepts that the adequacy of the information in an assessment is a matter for the judgment of the competent authority, the defendant, subject to a legal challenge on *Wednesbury* principles, whether under the Habitats Regulations or the EIA Regulations (*R (Champion) v North Norfolk District Council* [2015] 1 WLR 3710 at [41]; *Wingfield* at [97]; *R (Friends of the Earth Limited) v Secretary of State for Transport* [2021] PTSR 190 at [142] to [148]). The claimant submits that the defendant exercised his judgment irrationally and in breach of the principle stated in *Ashchurch* at [90] and [92] (see above). It is also suggested that the approach taken by the defendant is inconsistent with the decision in *R v Rochdale Metropolitan Borough Council ex parte Milne* [2001] Env.L.R. 22 (referred to by Andrews LJ in *Ashchurch* at [76] and [88]).
96. In this case the grant of development consent depended upon the IROPI test being satisfied. Mr. Wolfe submits that if assessment of the cumulative effects of power station and water supply are left to a subsequent decision, the IROPI test cannot be applied properly at that stage. By that he means that it cannot be applied in the same way as if the cumulative impacts were being assessed before the decision on whether to grant the development consent order was made. He suggests that the prior grant of the Order under the 2008 Act will make it easier for the public interest in Sizewell C going ahead to override cumulative harm or, indeed, that that would “automatically” be the outcome.

#### Discussion

97. It is well-established that a decision-maker may rationally reach the conclusion that the consideration of cumulative impacts from a subsequent development which is inchoate may be deferred to a later consent stage (e.g. *R (Littlewood) v Bassetlaw District Council* [2009] Env.L.R. 21; *Larkfleet* at [37]-[38]; *Forest of Dean* at [13] to [18]; *R (Khan) v Sutton London Borough Council* [2014] EWHC 3663 (Admin) at [121] – [134] approved in *Preston New Road* at [67] and *R (Finch) v Surrey County Council* [2022] PTSR 958 at [15(4)]).
98. In the present case the defendant referred to the possibility that new sources of water might enable a connection to be made by NWL providing a tunnel to Barsham. He accepted the assessment that that option would not give rise to additional cumulative impacts (e.g. DL 4.52). Beyond that, he decided that the new sources of water and any consequential need for a different connection were simply unknown and could not be assessed at the development consent stage. He agreed that they would instead be appropriately assessed under the WRMP process. Those judgments cannot be faulted as irrational.
99. Ground 2 is predicated upon ground 1 having failed. In other words the provision of the permanent water supply does not form part of the Sizewell C project for the purposes of the decision under challenge. On that basis the claimant’s suggestion that the insufficiency of detail could have been addressed by the defendant assessing a “*Rochdale* envelope” is misconceived. *Rochdale* was concerned with the grant of outline planning permission for a project which *included* uncertain components. In any event, the claimant did not develop this submission so as to show how an “envelope” could even be defined (and then assessed) covering possible options for additional water supplies and the

connections that could be necessary, all of which would be outside the development site at Sizewell C. The suggestion was wholly unrealistic.

100. The defendant's conclusion that an assessment of the permanent water supply could not be carried out does not conflict with *Ashchurch* at [90] and [92]. Those paragraphs were concerned with whether subsequent works formed part of the current project (i.e. ground 1 of this challenge). They do not detract from the principles in the case law referred to in [97] above.
101. Mr. Wolfe made a faint attempt to rely upon the decision in *Pearce v Secretary of State for Business, Energy and Industrial Strategy* [2022] Env. L.R. 4 as requiring cumulative impacts of the permanent water supply to be assessed in the decision on whether to make the Order. The decision in *Pearce* turned on its own special facts (see e.g. [118] to [119]). The circumstances of the present case are completely different. Furthermore, in *Pearce* the promoter had been able to produce a cumulative impact assessment and the reasons given by the decision-maker for deferring consideration of that material were legally flawed. Here options for providing a permanent water supply were unknown at the time of the decision.
102. I do not think there is any merit in Mr. Wolfe's IROPI point. If a future assessment should show that the water supply option chosen would adversely affect the integrity of a European site, whether by itself or in combination with Sizewell C, IROPI would have to be applied according to the language of the Habitats Regulations and the relevant principles in the case law. It would not be appropriate to take into account the overall *benefits* of Sizewell C without also taking into account the overall *harms* of that project. The court has not been shown any authority in which deferral of the consideration of the cumulative impacts to a subsequent consent stage has caused the application of the IROPI test to be distorted or biased or watered down in some way. I note that in *Forest of Dean Sales LJ* (as he then was) stated at [19] that the earlier grants of planning permission for the original project in that case created no presumption and added no force to the contention that planning permission should subsequently be granted for the spine road that connected the two sites. The earlier permissions had not been granted on the footing that the development of those two sites was dependent upon the spine road.
103. True enough, in this case Sizewell C cannot be operated without a permanent water supply. But although the development consent has been granted in the knowledge that the power station is dependent on the future provision of a water supply, (a) it is not dependent on the provision of any particular form of supply and that is currently unknown and (b) the cumulative impact will have to be assessed properly in accordance with the legislation without any bias or distortion. The benefits of Sizewell C could not be taken into account in that future IROPI assessment without also taking into account the disbenefits. I understood Mr. Strachan KC for the defendant and Mr. Phillpot KC for SZC to adopt this analysis. They both submitted that the defendant's decision has not allowed SZC to have a "foot in the door".
104. I also note that, according to the evidence before the defendant, NWL and SZC expect a s.55 agreement to be signed in early 2024 following the WRMP process

in which the integrated environment assessment will have been carried out. It is also expected that the water supply scheme will be approved in the 2024 Price Review. Paragraph 75 of sched.19 to the Order under the 2008 Act has been drafted on that basis (see [68] above).

105. Accordingly, ground 2 must be rejected.

### Ground 3

106. NE is the “nature conservation body” for the purposes of the Habitats Regulations. In this case it performed the role of providing specialist advice within its remit to the defendant as the competent authority. There is no dispute that the defendant is entitled to disagree with NE. But the claimant complains that when the defendant did so in the present case he failed to comply with the line of authority which indicates that the decision-maker is expected to give significant weight to the views of an expert body such as NE and to give “cogent reasons” for disagreeing with their views (see e.g. *R (Akester) v Department for Environment, Food and Rural Affairs* [2010] Env.L.R. 33 at [112] and *R (Wyatt) v Fareham Borough Council* [2023] Env.L.R. 14 at [9(4)]).

107. But it is important to note two additional points. First, this issue arises in the context of s.116 of the 2008 Act by which the defendant is obliged to prepare a statement of his reasons for deciding to make an order granting development consent. Even when disagreeing with the expert views of a body such as NE, the relevant standard to apply in assessing the adequacy of the reasons given is that set out in *Save Britain’s Heritage v Number 1 Poultry Limited* [1991] 1 WLR 153 and *South Bucks District Council v Porter (No.2)* [2004] 1 WLR 257 (see Sales LJ in *Mordue v Secretary of State for Communities and Local Government* [2016] 1 WLR 2682 at [26] and Sir Keith Lindblom SPT in *East Quayside 12 LLP v Newcastle upon Tyne City Council* [2023] EWCA Civ 359 at [51], drawing also a parallel with *R (Mott) v Environment Agency* [2016] 1 WLR 4338 at [69] to [77]).

108. Second, the basis for the deference given to the decision of an expert body such as NE in proceedings to review their own decisions was explained more fully by Beatson LJ in *Mott* at [69] to [77]. He also stated at [64] that the court may insist upon being provided with a sufficiently clear and full explanation of the reasons for that decision as a *quid pro quo* for that deference. In my judgement similar considerations apply where a decision-maker is expected to show deference to the advice of an expert body. The level of reasoning which the law expects of a decision-maker disagreeing with the view of an expert body may depend upon whether that view is an unreasoned statement or assertion, or a conclusion which is supported by an explanation and/or evidence. It may also depend upon the nature of the subject-matter. Some advice may not call for reasoning and/or supporting evidence, other advice may do.

109. The views of NE shown to the court were sent in a submission dated 12 October 2021. They provided comments to the defendant on a Report by the Panel on the implications of the proposed development for European protected sites and species which had been submitted to the defendant. The claimant has not relied upon any other document from NE. In paragraphs 2.1.1. and 2.1.2. NE said:

“2.1.1. It is Natural England’s advice that pushing any Habitats Regulations Assessment (HRA) conclusions for integral and inextricably linked elements of the project down the line into other consenting regimes beyond the Development Consent Order (DCO) raises the likelihood that cumulative and ‘in combination’ impacts in these regards may get missed/ downplayed, and we wish to draw the Examining Authority’s attention to this point.

2.1.2. For example, the current Water Supply Strategy proposes a mains pipeline to the site from the central/ northern Suffolk Water Resource Zone (WRZ). The environmental impacts of this pipeline have not yet been fully assessed through the HRA process. Neither have the interim solutions of a desalination plant as proposed through Change 19 [PD-050] (not considered within the RIES) and tankered water supply. Currently, the Applicant’s position is ‘no likely significant effects (LSE)’ to any European sites from water use as stated in [REP7 -073] and summarised in paragraph 3.2.55 of the REIS. Clearly, such works could lead to a LSE on those European sites already scoped into the HRA or European sites further afield through the pipeline works, abstraction of this magnitude and other associated works to facilitate it. The water supply is a fundamental component of the eventual operation of the project, and the potential impacts of its construction should be clearly assessed in accordance with sections 4.2 and 5.15 of National Policy Statement EN-1 (NPS EN-1), sections 3.7 and 3.9 of NPS EN-6 and paragraph 3.3.9 of the Planning Inspectorate’s Scoping Opinion for the Proposed Sizewell C Nuclear Development (July 2019) [APP-169]...”

110. In essence NE said no more than:

- (i) The water supply is a fundamental component of the eventual operation of the project and potential impacts of its construction should be assessed with Sizewell C;
- (ii) Pushing any HRA for integral and inextricably linked elements of the project down the line into other consenting regimes beyond the development consent order raises the likelihood that cumulative and in combination impacts may be missed or downplayed.

In relation to NE’s comments on the pipeline connection to Barsham and the temporary desalination plant, the defendant has explained why he is satisfied with the assessment of the impacts from those elements. There is no legal challenge to that part of his decision.

111. The two bare points set out in [110] above were not so much advice as assertions without any reasoning or supporting evidence. There was no explanation as to why the water supply should be considered part of, or integral to, the project, nor any application of considerations of the kind indicated in *Wingfield*. Why

should relevant impacts be altogether missed in a subsequent assessment, any more than if assessed as part of the power station project? The same statutory regime will be applicable and NE will scrutinise the environmental information provided by NWL. Why should those impacts be downplayed without any consultee noticing, or downplayed by the decision-maker? It should not be forgotten that the water supply solution is to address a regional issue. On any view, it will be a project in its own right and the normal standards of assessment will apply to the proposal as a whole, including any connection to Saxmundham. Why should any cumulative impact of NWL's proposal not take into account cumulative impacts with Sizewell C? None of these points were addressed by NE to justify their apparent concerns.

112. I also note that, notwithstanding the national importance of the proposed project, SZC found it necessary to complain about the "unfairness" of NE having failed to attend Examination hearings to which they had been specifically invited, so that their views could be clarified and tested, in the same way as those of experts relied upon by SZC and other participants (see para. 1.3.1 of SZC's written summary of oral submissions made at ISH 15 held on 5 October 2021).
113. NE's views were summarised by the Panel in PR 5.11.284. No complaint is made about the adequacy of that summary, nor could there be. To the limited extent that NE expressed any views on this subject, they were before the defendant.
114. In my judgment the defendant did adequately explain in DL 4.65 why he disagreed with the bare assertions of NE, all the more so when that paragraph is read properly in the context of the other parts of the decision letter dealing with the same subject. The present case illustrates the inappropriateness of relying upon statements in the *Akester* line of authority as a mantra, rather than looking properly at the materials in any given case in context. Ground 3 should never have been raised by the claimant.

#### **Ground 4**

115. The defendant concluded that the project would have an adverse effect upon the integrity of the breeding marsh harrier feature of the Minsmere – Walberswick SPA arising from noise and disturbance during the construction phase (DL 5.20). Accordingly, under reg.64(1) of the Habitats Regulations the defendant had to be satisfied that there were no "alternative solutions" to the project. At DL 5.33 he did so conclude, in agreement with the Panel.
116. The claimant made representations in the Examination that there were alternative means of achieving the objective of generating electricity compatibly with the Climate Change Act 2008 which do not involve the use of nuclear power. It submits that the defendant failed to comply with the requirement in reg.64(1) to consider alternative solutions by failing to consider how that objective could be met without relying upon new nuclear power. In so far as nuclear power is considered to have particular benefits, those matters ought to have been assessed as part of a wider consideration of alternative methods of generating electricity and their respective benefits. The defendant acted unlawfully by basing his conclusion on too narrow a policy objective, namely

to provide additional nuclear power. However, if the defendant was legally entitled to adopt that approach, the claimant does not contend that he failed to assess “alternative solutions” lawfully.

117. The claimant submits that the decision-maker must consider alternative solutions which fulfil the “core policy objectives” or the “central policy objective”, these being legal terms of art. They are not simply factual descriptions of a decision-maker’s policy position. They fall to be identified not by the “mere election of the decision-maker”, but with reference to the purpose of reg.64(1) and case law. The central policy objective should not be drawn so narrowly as to curtail the ability of the Habitats Regulations to inhibit unnecessarily harmful development in favour of less harmful alternatives. Furthermore, the phrase “alternative solutions” means that the “central policy objective” must comprise, or closely relate to, a problem “capable of solutions”.
118. The claimant submits that the policy goal of providing nuclear power is “artificially limiting”, to the extent that it “cannot logically be characterised as ‘central’”. The claimant says that, by contrast, the provision of comparatively clean energy does qualify as a central policy objective because that goes to the heart of what is sought to be achieved. Relying on its submission that the “solutions” referred to in the Habitats Regulations correspond to problems, the claimant asserts that a lack of nuclear energy is not a problem. Instead, a lack of clean energy is a problem capable of a range of alternative solutions, and so it is the provision of clean energy which qualifies as a central policy objective.
119. Lastly, the claimant suggests that the defendant erred in law by treating NPS EN-6 as determinative in deciding what were the appropriate policy objectives and alternative solutions.

### *Discussion*

120. That last point can be rejected immediately. There is no basis for suggesting that the defendant in his decision treated the NPSs, or either of them, as conclusive on the issue of what could be considered to be relevant objectives or alternative solutions. Plainly, they were treated as “important” considerations (see e.g. DL 4.9), about which no complaint could possibly be made.
121. NPS EN-1 and EN-6 treat the need for nuclear power generation as having been demonstrated as part of the national strategy for achieving the net zero target in 2050 and ensuring diversity of supply and energy security. The Government’s Energy White Paper, “Powering our Net Zero Future” (published in December 2020), announced a review of the suite of the energy NPSs but confirmed that they would not be suspended under s.11 of the 2008 Act in the meantime (DL 4.9). The White Paper includes as a “key commitment” the aim to bring at least one large-scale nuclear project to the point of Final Investment Decision by the end of the current Parliament (pp.16 and 48). The British Energy Security Supply Strategy (April 2022) states that the Government’s aim is that by 2050 up to 25% of the electricity consumed in Great Britain will be generated by nuclear power, a deployment of up to 24GW (see p.197 of the defendant’s HRA and DL 4.656 and 8.10).

122. The Panel accepted SZC's case that there is an urgent need for new nuclear energy generating infrastructure of the kind proposed for Sizewell C, the proposed development responds directly to that need and would make a significant contribution to low-carbon electricity generation. Furthermore, that need case accords with Government policy (see e.g. PR 5.19.1 to 5.19.18, 5.19.90 to 5.19.110, 5.19.129 to 5.19.138, 5.19.261 to 5.19.266, 6.6.4 to 6.6.5, 6.7.4, 6.7.8, 7.2.1. to 7.2.4, 7.5.4, 7.5.9 and 10.2.19).
123. The defendant's conclusions on need in the HRA and in his decision letter were based upon the Panel's assessment (see e.g. HRA at pp.189 to 190 and 196 to 201 and DL 4.1 to 4.11, 4.242, 7.1 to 7.4 and 7.13 to 7.15). The need for new nuclear power was seen as an integral part of the strategy for tackling climate change by achieving the net zero target.
124. In the same vein, the Panel rejected submissions by the claimant and others that alternative technologies should be considered and that the approach taken by SZC was too narrow (see e.g. PR 5.4.106 to 5.4.108 and 6.6). The defendant accepted those conclusions (DL 4.133 and 4.148 to 4.152 and 4.155).
125. The claimant seeks to base its approach to the identification of objectives and alternative solutions upon the judgments of the Divisional Court and the Court of Appeal in the legal challenge to the "Airports National Policy Statement" designated in June 2018 (*Spurrier and R (Plan B Earth) v Secretary of State for Transport* [2020] PTSR 1446).<sup>1</sup> But they lend no support to the claimant's case.
126. The Court of Appeal held that the standard of review in relation to both art.6(3) and art.6(4) of the Habitats Directive, and therefore reg.64 of the Habitats Regulations, is the *Wednesbury* standard ([77] to [79]). Subject to those principles, it is a matter for the decision-maker to determine the relevant objectives which need to be met and which alternative solutions would or would not meet that need.
127. At [92] and [93] the Court of Appeal addressed the problem of when objectives are defined in an unlawfully narrow manner. It endorsed the approach of the Divisional Court that an option that does not meet the core objectives of a policy statement is not an alternative solution for the purposes of reg.64(1). Such objectives must be both "genuine and critical", in the sense that a development which failed to meet those objectives would have no policy support. But it would clearly be insufficient to exclude an option simply because, in the decision-maker's view, it would meet those policy objectives to a lesser degree than the proposed or preferred option. The extent to which an option meets those policy objectives is different from an option failing to meet them at all. The judgments of the Divisional Court and the Court of Appeal provide no support for any of the additional glosses which the claimant now seeks to place on reg.64.
128. In *Plan B Earth* the objectives of the NPS under challenge were to increase airport capacity in the south east *and* to maintain the international "hub status" of the UK. The NPS rejected the option of a second runway at Gatwick as an

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<sup>1</sup> I mention for completeness that this issue was not before the Supreme Court.



“alternative solution” to a north west runway at Heathrow because expansion at Gatwick would not enhance, rather it would threaten, the UK’s hub status ([64] to [65]). The Court of Appeal held that the Secretary of State had been legally entitled to reach that conclusion ([87] to [93]). The “hub objective” had been one of the “central”, or “essential”, or “genuine and critical”, objectives of the policy. That objective had not been constructed with deliberate and unlawful narrowness so as to exclude other options improperly.

129. The objectives of EN-1 and EN-6 include the generation of clean energy but the central or essential objectives of those policies is not limited to that aim. They also include diversity of methods of generation and security of supply. The Government sees new nuclear power as an essential component of those objectives, just as wind and solar power. That has remained the Government’s policy in its recent statements (see also [28] to [32] above). Accordingly, there can be no legal challenge to the approach taken by the Panel and by the defendant which excluded alternative technologies as alternative solutions. In the light of the Court of Appeal’s decision in *Plan B Earth* the legal position is crystal clear.
130. The claimant’s argument depends upon an illegitimate attempt to rewrite the Government’s policy aims by pretending that the central policy objective is at a higher level of abstraction, namely to produce clean energy, without any regard to diversity of energy sources and security of supply. But it is not the role of a claimant, or of the court, to rewrite Government policy, or to airbrush objectives of that policy which are plainly of “central” or “core” or “essential” importance.
131. The absurdity of the claimant’s argument was well-demonstrated by Mr. Strachan KC and by Mr. Phillpot KC for the defendant and SZC respectively. The implication of ground 4 would be that a decision-maker dealing with a proposal for a solar farm or wind turbine array, obliged to comply with reg.64(1), would have to consider as alternative solutions nuclear power and, as the case may be, wind power or solar power options, But in my judgment there is nothing artificial or unlawfully limiting about a Government policy which identifies as core objectives the need to provide a mix of new electricity generation technologies, comprising solar, wind and nuclear power. Indeed, in para. 9.1.1 of the HRA the defendant noted a decision of the CJEU that the objective of ensuring security of supply may constitute IROPI.
132. For these reasons, ground 4 must be rejected. In my order providing for a rolled up hearing, I directed the claimant to review the legal merits of its various grounds, taking as an example its failure to address (a) the content of the Government’s policy on nuclear power as part of a mix of energy sources and (b) the decision in *Plan B Earth*. The claimant should have abandoned ground 4, but chose instead, in effect, to try to continue its challenge to the merits of Government policy through the means of judicial review. The use of the court’s process in that way is wholly inappropriate.

## Ground 5

133. The claimant submits that when the defendant carried out his IROPI assessment he took into account a legally irrelevant consideration and/or one which was

“unevidenced”, namely that the project would contribute to achieving the objective of reducing GHG emissions by 78% by 2035 from the UK’s 1990 baseline (para. 74 of skeleton).

134. I interpose to make one point straight away. The claimant’s two propositions cannot both be correct. Either a consideration is irrelevant or it is not. If it is, then it does not matter whether any evidence was before the decision-maker on the point. Not surprisingly, it turns out that the claimant does not really contend that this consideration is incapable of being relevant. Instead, the complaint is that the defendant drew a conclusion which was unsupported, or “insufficiently” supported, by evidence (skeleton paras. 76 and 80 to 81).
135. The claimant points out that, according to SZC’s Construction Method Statement, it is expected that the first of the two reactors would be operational at the end of 2033 and the second by mid-2034. But that depends upon a number of assumptions, including the provision of a permanent potable water supply before the power station can be operated. The claimant submits that there was no evidence that that water supply would be implemented before 2035. It is said that SZC’s expectation does not take into account uncertainty and delay in resolving that issue (paras. 75 to 76 of skeleton). The claimant complains about the absence of a timeline for the provision of the water supply and of evidence as to the degree of contribution Sizewell C would make to “the 2035 target”. These are said to have been “obviously material considerations”, applying the irrationality test laid down by the Supreme Court in the *Friends of the Earth* case. But ultimately, the criticism that the contribution to reducing GHG emissions by 2035 was not estimated comes down to an allegation that the timescale for determining and providing a permanent potable water solution was unclear (para. 85 of skeleton).
136. The claimant also submits that the defendant could not maintain that there was insufficient information about the eventual water supply to assess its environmental impacts (under ground 2) and at the same time rely upon the environmental benefits of Sizewell C where its operation is dependent upon that supply.

### *Discussion*

137. A reduction in GHG emissions by 78% by 2035 relates to the Sixth Carbon Budget (“CB6”) which was set under the Climate Change Act 2008 by the Carbon Budget Order 2021 (SI 2021 No. 750). It requires the UK’s net carbon account not to exceed 965 Mt CO<sub>2e</sub> over the period 2033-2037 (see *R (Friends of the Earth Limited) v Secretary of State for Business, Energy and Industrial Strategy* [2023] 1 WLR 225 at [2] to [12]). This is said to equate to a reduction in GHG emissions from the 1990 baseline by 78% by 2035.
138. Initially the claimant’s argument was a little difficult to follow because the main sources upon which it relied in the Statement of Facts and Ground and its skeleton do not address the 78% target. Instead, it referred to the IROPI case for Sizewell C, which was based upon the national importance and urgent need for new nuclear power generation, including:

- (i) The continuing growth in the UK's electricity demand, the retirement of existing electricity capacity and "a generation shortfall of 95GW by 2035".
- (ii) The UK's commitment to reducing GHG emissions to net zero by 2050 (page 195 of the defendant's HRA and see also paras. 8.1, 8.3.4 and 8.3.5).

Similarly, the HRA rejected alternatives which would involve a significant delay to the construction programme, because Sizewell C would not contribute to addressing the shortfall in generation capacity of 95GW in 2035.

139. Likewise, the Panel had referred in its Report to the 95GW shortfall in 2035 and the contribution which Sizewell C could make (PR 6.6.4 and 6.7.4). But Mr Bowes showed how that issue was linked to the CB6 target, relying upon PR 5.19.137. That explained that in a report by the Climate Change Committee making recommendations for the sixth carbon budget, the "Balanced Net Zero Pathway", which they treated as a central scenario, assumed that it would be necessary for the power sector to reach zero emissions by 2035, or to decarbonise completely.
140. The defendant and SZC sought to argue that the focus of the decision letter was on the net zero target for 2050 rather than any 2035 target along the way. But I do not agree. The Panel's conclusions took into account the contribution that Sizewell C could make to meeting a shortfall in generating capacity by 2035 and not simply the net zero target for 2050. Although one part of the decision letter referred in broad terms to the contribution of Sizewell C to limiting climate change in accordance with the objectives of the Paris Agreement (DL 5.35), other parts rely upon the Panel's Report at PR 7.5.4 (i.e. DL 7.3). PR 7.5.4 was based in turn upon the detailed assessment in PR 5.19. That section of the Report relied upon the urgent need for new nuclear power to contribute to electricity generation by 2035 (see e.g. PR 5.19.78, 5.19.136 to 5.19.137 and 5.19.163).
141. Furthermore, the defendant's decision also took into account his HRA. In that document he decided that the IROPI test was satisfied, basing himself upon the policy context for the project, its benefits as presented by SZC and the UK's commitment to decarbonising the electricity sector by 2035 (pp.195-6). In his overall conclusion on IROPI the defendant also relied upon section 6.7 of the Panel's Report which, as we have seen, was based upon section 5.19 of that document. Accordingly, it cannot be said that the project's claimed contribution to addressing the shortfall in 2035 in electricity generation did not materially influence the defendant's decision on the application of the Habitats Regulations as well as his decision to grant development consent. That leaves the gravamen of the claimant's complaint, namely the claimed lack of evidential support for the Secretary of State's view that the project would make such a contribution by 2035.
142. I have previously summarised under ground 1 much of the material before the Examination and the defendant on the steps which NWL and SZC stated would

be followed in relation to WRMP24 so that NWL will comply with its duties under ss. 37, 37A and 37B.

143. In a statement of common ground between NWL and SZC dated 8 October 2021, NWL acknowledged that 2032 had been identified by SZC in discussion as “the backstop date” for the permanent water supply to be “fully available”. The Panel referred to this date in its Report (PR 5.11.283).
144. In its letter to the defendant dated 23 February 2022 NWL confirmed that the water demand figures for the operational phase of Sizewell C had been included in WRMP24 from 2032 and that new schemes would be required in that Plan to meet all the forecast demand in the Suffolk supply area, including that of the project. NWL reiterated its commitment to providing the supply required for Sizewell C. That would be reliant upon the finalisation of new supply schemes and their identification in WRMP24, the completion of a s.55 agreement under the 1991 Act and “the costs approval process”. The defendant was informed that the draft WRMP would be submitted to Defra by October 2022.
145. The position of both NWL and SZC was that after the submission of the draft WRMP for statutory consultation, they would work together from October 2022 to negotiate an agreement under s.55, which would include funding for the design and delivery of any infrastructure specific to Sizewell C.
146. SZC pointed out that the WRMP24 would be subject to a fully integrated environmental appraisal, including SEA and, where necessary, HRA. That would involve consultation with *inter alia* NE. The final version of the plan would have to be compliant with the Habitats Regulations and by definition that would have to precede the installation of a permanent water supply. I also note that the defendant has already stated in his decision letter that he is satisfied with the assessment of the Barsham transfer pipeline if that connection should be chosen.
147. The provision of a *temporary* supply by SZC (which has been assessed in the process under the 2008 Act and is not itself the subject of legal challenge) gives NWL 10 years within which to provide a permanent solution. In addition, SZC indicated (in para. 2.2.5 of its response dated 8 April 2022) that, subject to detailed assessment, the lifespan of the temporary desalination plant could be extended for a short period after the end of the construction phase, if necessary.
148. Subsequently, SZC informed the defendant that an agreement with NWL under s.55 and/or s.56 of the 1991 Act would be likely to be ready to be signed once NWL’s Business Plan had been approved by OFWAT most likely in 2024. There was no reason to suppose that a new water supply scheme for a critical NSIP would not be approved in the 2024 Price Review.
149. This material was carefully summarised in the decision letter (DL 4.12 to 4.42). The weight to be given to it was a matter for the defendant. He concluded that there was a reasonable level of certainty that a permanent water supply solution can be found before the first reactor is commissioned (DL 4.44). He was satisfied on the basis of the information supplied on the WRMP process under

the 1991 Act that “there is a requisite degree of confidence that a long-term solution is deliverable” (DL 4.64).

150. In my judgment the material before the defendant was legally adequate to entitle him to reach those conclusions. It is impossible to say that his judgment on such an evaluative subject looking into the future was irrational. Once that position is reached, there is no legal reason why the defendant could not take into account the contribution which Sizewell C is expected to make to reducing the shortfall in electricity generation in 2035 (or to the target for reducing GHGs).
151. Lastly, there is no internal contradiction in the decision letter between the approach taken by the defendant to the assessment of cumulative effects arising from the permanent water supply for Sizewell C and his reliance upon environmental benefits which are dependent upon the provision of that supply. As to the former, the defendant decided that there was no option under the WRMP24 process which could be assessed at the stage when the decision letter was issued. As to the latter, the defendant was sufficiently confident that a solution would be found through the WRMP24 process (after having been subject to environmental assessment) and then completed before the operation of the power station is expected to begin in 2033. It is therefore apparent from the decision letter that there is no inconsistency in the defendant’s reasoning or lack of coherence. The two conclusions are self-evidently compatible.
152. For all these reasons, ground 5 must be rejected.

#### **Ground 6**

153. The claimant submits that the defendant acted irrationally in concluding that the Sizewell C site would be clear of nuclear material by 2140 and/or failed to give legally adequate reasons for rejecting the claimant’s case on this subject. Inadequacy of reasoning depends upon the claimant showing a lacuna in the decision raising a substantial doubt as to whether it was tainted by a public law error (see *Save and South Bucks*).
154. The Panel noted that it is a requirement of Government policy that spent fuel be stored on a new nuclear site such as Sizewell C until a UK Geological Disposal Facility (“GDF”) becomes available (PR 5.20.57 and 5.20.97). NPS EN-6 states that the key factors in determining the duration of on-site storage are the availability of a GDF and the time needed for spent fuel to cool sufficiently for disposal in a GDF (PR 5.20.96.).
155. The claimant submits that the defendant was aware of an estimate provided by SZC that a GDF would not be available to accept spent fuel from a new build project until 2145. Furthermore, during the Examination the claimant had relied upon information provided by the ONR in relation to Hinkley Point C which, according to the claimant, suggested that spent fuel would need to be kept at the Sizewell C site until about 2165.
156. The claimant submits that it was irrational for the defendant to proceed on the basis that spent fuel would be removed from the site by 2140. The modelling of future sea levels, storm events and the adequacy of the coastal defences only ran

to 2140. It was irrational for the defendant not to engage with the risk of the site being flooded from the sea while spent fuel remains on site after 2140 and before the site is decontaminated.

### Discussion

157. It is well-established that an enhanced margin of appreciation is to be afforded to a decision-maker relying on scientific, technical and predictive assessments (*Mott* at [69] to [78]). Plainly that principle is engaged when dealing with the evaluation of predictions far into the future about such matters as the effects of climate change on sea levels, the availability of a GDF and the life span and decommissioning of a project such as Sizewell C. It is also clear that a decision-maker deciding whether to grant development consent for such a project does so in the context of a range of statutory regimes which address changes in circumstance (and predictions) as they occur during the remainder of this century and well into the next. Those regimes are obviously material considerations.
158. SZC stated in the Examination that for the purposes of the EIA of the project it is assumed that the operation of the power station will end in the 2090s and by 2140 the interim spent fuel store will have been decommissioned (PR 5.20.19 to 5.20.20). Under its nuclear site licence SZC is required to demonstrate that the on-site facilities for interim storage of spent fuel can be designed, operated and decommissioned in a safe manner that ensures any risks to *inter alia* the environment are suitably and sufficiently controlled, including risks from flooding (PR 5.20.55). At PR 5.20.104 the Panel noted that Suffolk County Council and East Suffolk Council had raised no concerns regarding radioactive waste and said that that was to be expected because ONR would regulate on-site radioactive waste management and the EA would regulate gaseous and aqueous emissions.
159. The Panel summarised objections to the modelling work made by the claimant (e.g. at PR 5.20.59).
160. The Panel referred to the Government's firm policy commitment to the GDF for the long-term storage of high-level radioactive waste, in order to meet the UK's international obligations (PR 5.20.123 to 5.20.125). SZC's assumptions regarding on-site storage of spent fuel had been based upon there being a GDF available for transfer in the long term. The Panel considered that to be a reasonable assumption (PR 5.20.130), although it acknowledged that there was a degree of uncertainty in relation to the timing of the GDF (PR 5.20.131). The Panel reached the judgment that there was sufficient evidence to be able to conclude that the policy tests for the handling of the waste were met, taking into account SZC's statement that spent fuel would be removed from Sizewell C by 2140 (PR 5.20.133 to 5.20.134). They said that this issue should not weigh against the making of the Order (PR 7.4.195 to 7.4.202).
161. On 7 August 2020 the ONR had provided information in an email which responded to questions sent to them by the claimant on 15 June 2020. Those questions covered a range of issues. One question asked ONR whether, in the light of a comment made by the Nuclear Decommissioning Agency (NDA), the

spent fuel from Sizewell C would not be accepted at the GDF until about 140 years from the end of operations, and so would have to remain on site for about 200 years from start up. ONR responded that they did not have information on this subject in relation to Sizewell C. But for Hinkley Point C their understanding was that:

- (i) The cooling period was dependent upon the burn-up rate assumed for the fuel used in a reactor. The NDA had used a maximum peak burn-up rate and had not taken into account a number of aspects of the strategy for Hinkley Point C. The average burn-up for spent fuel at that power station would be lower than the NDA had assumed and would therefore have a lower heat output;
- (ii) The thermal output of a dry disposal canister containing four spent fuel assemblies is dependent upon a mixing strategy which combines high and low burn-up fuel assemblies within a single cannister;
- (iii) An analysis had shown that a storage period of 55-60 years after the end of operation would be needed to meet the assumed GDF thermal limits for disposal for all fuel assemblies, using the strategy for Hinkley Point C;
- (iv) Accordingly, on the assumption that generation at Hinkley Point C begins in 2025 and ends in 2085, that fuel would be sufficiently cool to transfer to the GDF in 2140-2145. Assuming that it takes just over 9 years to remove fuel to the GDF, all fuel would be transferred from Hinkley Point C by between 2150 and 2155, which would determine the end of use of the fuel stores at that site.

The ONR also stated that the “assumed availability date for the GDF” to accept fuel from new reactors is around 2130, which is earlier than the date relied upon by the claimant taken from a document produced by SZC (see [155] above).

- 162. The ONR’s response also stated that if there were to be a subsequent acceleration in the effects of climate change, so that the impacts were greater or more rapid than currently predicted, that would involve timescales of several decades, so that monitoring would be able to inform decisions under the conditions of the nuclear site licence on the protective measures required. “Managed adaptive options”, such as an increase in the height of a coastal defence, with trigger points, would ensure that the site remains safe under the terms of the nuclear site licence.
- 163. In its representations to the Panel dated 24 September 2021 the claimant relied upon the email from the ONR and submitted that, assuming Sizewell C begins operation in 2035 and ceases to operate in 2095, a 60-year cooling period would end in 2155 and the removal of spent fuel off site would take until 2165.
- 164. In its representations to the Panel in September 2021 after ISH 11, SZC stated that the Fourth Addendum to the Environmental Statement for the project assumed that Sizewell C would cease to operate in the 2090s, the fuel store will have been decommissioned by “the 2140s” and 2190 was “the theoretical

maximum site lifetime”. An EIA for decommissioning would be required in the years leading up to the end of electricity generation (paras. 1.11.1 to 1.11.2 on p.14).

165. An Addendum to the Flood Risk Assessment for the main development site, produced by SZC in January 2021, had increased the height of the proposed “hard coastal defence feature” to 14.6m above Ordnance Datum. Updated modelling was said to show that this would be sufficient to protect the site against events up to 2190 under reasonably foreseeable climate change scenarios. More extreme events are to be dealt with in SZC’s safety case which will be assessed by the ONR (para. 1.36 of the Flood Risk Assessment and the Panel’s Report at PR 5.8.91).
166. The issues concerning the adequacy of coastal defence proposals and long-term flood risks impact not only on-site radiological waste management but also a number of other subjects. The issues were considered by the Panel in some detail in a number of sections of their report, such as sections 5.7, 5.8 and 5.20. The Panel’s Report has an interlocking structure and needs to be read as whole. The Panel was well aware of the objections on this point raised by the claimant and by other participants, such as Professor Blowers. The Report provided a good summary of the material submitted, including that provided by SZC (e.g. PR 5.7.35 to 5.7.40, 5.8.252 and 5.8.259 to 5.8.260, 5.8.276, 5.8.295 to 5.8.296, 5.20.6, 5.20.18 to 5.20.20, 5.20.59 and 5.20.98). In several places in its Report the Panel expressed satisfaction with *inter alia* the “adaptive design” for the proposed coastal defences, the monitoring of future sea levels through the Coastal Processes Monitoring and Mitigation Plan (“CPMMP”) and future modifications of the design through the controls exercisable by the ONR and EA (e.g. 5.8.97, 5.8.99, 5.8.231, 5.8.239, 5.8.259 to 5.8.260, 5.8.299, 5.8.315 to 5.8.320, 5.20.98 to 5.20.102). At PR 5.8.313 the Panel noted that the design parameters of the sea defences would be secured by Requirement 19 of the development consent.
167. Participants continued to make representations after the close of the Examination. For example, a Mr. Parker returned to the subject of the lifetime and adequacy of the sea defences at Sizewell C. The EA and ONR provided a joint response dated 7 June 2022 which was forwarded to the defendant. At DL 4.366 the Secretary of State relied upon this response which he had summarised at DL 4.365:

“4.365 The Secretary of State notes the post-Examination representations submitted by IPs related to flood risk, including Mr Bill Parker who raised concerns regarding the protection from flooding during operation, decommissioning and the residual time spent fuel is stored on site. The Secretary of State notes the EA’s letter to Mr Bill Parker of 7 June 2022 which confirmed that the FRA extended to 2190, and that for the Reasonably Foreseeable actual risk up to 2190, there would be no inundation of the main platform or SSSI crossing from overtopping of the HCDF or the remaining lower northern and southern sand dunes/shingle defences in all events up to the 0.1% annual probability flood events in 2019. The EA’s letter also



included a subsection titled ‘ONR’ response, confirming that during the operation of a nuclear licenced site, it is a regulatory expectation for the licensee to periodically review the validity of the safety case for all facilities on site against external hazards, to ensure the site remains protected, including the dry fuel store and taking updated climate change projections into account for coastal flood hazard.”

The ONR specifically said that the design of the sea defences had been based upon the period running up to 2140, but if the life-time of the station extended beyond that year, SZC would need to demonstrate that the sea defences will continue to protect the site adequately, and if not provide additional protection.

168. In DL 4.250 the defendant agreed with the conclusions of the Panel summarised in DL 4.244 to DL 4.248. In DL 4.295 he expressed satisfaction with the modelling of sea level rises to 2140 for reasonably foreseeable events, including up to the 1 in 10,000 year event and in DL 4.246 with the adaptive design to provide a feasible means of increasing the crest height of the Hard Coastal Defence Feature to cope with a “credible maximum sea level rise”. The defendant also relied upon further work carried out by SZC and the EA after the close of the Examination which had resolved all of the Agency’s outstanding concerns at that stage. The defendant was also satisfied that matters such as the monitoring of climate change and adaptive measures would be adequately addressed by the ONR through the nuclear site licensing regime (DL 4.235 to DL 4.241, 4.247 and 4.250).
169. The defendant returned to these issues at DL 4.279 which summarised the Panel’s views as follows:

“4.279 The ExA considers [ER 5.8.232 et seq.] the adequacy of the proposed climate change adaptation measures and the resilience of the Proposed Development to ongoing and potential future coastal change during its operational life and any decommissioning period including the scope for the HCDF to undergo design adaptation to maintain nuclear safety against predicted sea level rises. The Sizewell Coastal Defences Design Report [REP8-096] provides a design description of the HCDF Adaptive Design at section 3.11 and is designed to protect the Proposed Development from a 1 in 10,000 year storm event with reasonably foreseeable (“RF”) climate change effects up to the end of its design life in 2140. The ExA consider that the Applicant recognises that, given the inherently uncertain nature of climate change, the RF climate change scenario may be exceeded. ONR and EA guidance requires that the sea defence be capable of adaptation to a credible maximum sea level rise [ER 5.8.252]. The sea defences have therefore been designed to allow for future adaptation to accommodate the credible maximum scenario, should it develop. The Adaptive Design would provide a simple means of increasing the crest height of the HCDF to reach a crest level of 16.4m OD [ER 5.8.252]. The implementation of measures to enact the Adaptive Design would

be driven by progressively observed effects of climate change, specifically mean sea level rise. The MDS FRA [AS-018] confirms that the impacts of climate change on sea level rise would be monitored and assessed at set intervals to determine the trajectory of the projections, and consider whether there is any change from either the current considered projections or the climate change guidance as applied in the application [ER 5.8.253]. A number of issues were raised by IPs in relation to Adaptive design and its implementation [ER 5.8.254 et seq.]. Having considered the submissions and responses from the Applicant [ER 5.8.252 et seq.] the ExA takes the view that as indicated in relation to the SMP, and having regard to the details and explanation provided by the Applicant, that the HCDF, including the Adapted Design, would be positioned as landward as possible. In addition, the requirement 19 in the Order would provide a means whereby the design details of various aspects of the HCDF would require ESC approval in consultation with the MMO and the EA before commencement of that work. The ExA considers that this would provide an appropriate safeguard at detailed design stage in relation to matters relating to layout, scale and external appearance of the HCDF, and its integration with other marine infrastructure [ER 5.8.256].”

The defendant agreed (DL 4.293) (and see also DL 4.280, 4.284, 4.285 and DL 4.290).

170. DL 4.261 referred to the Fourth Addendum to the Environmental Statement (see [164] above) and additional modelling work carried out during the Examination. DL 4.266 referred to the suitability of the CPMMP to provide controls in the future for coastal defence. Certain extreme events are to be left to regulation by the ONR (DL 4.267).
171. The decision letter began to deal with radiological issues at DL 4.583 and in that context it returned to the subject of climate change, sea levels and the safe storage of fuel rods. The defendant summarised the views of the Panel at DL 4.589 to DL 4.597. At DL 4.598 the defendant agreed with the Panel’s conclusions and referred to the further information on coastal defence modelling and the requirement for a nuclear site licence.
172. The claimant relied upon DL 4.590 which states:

“The issues of coastal defences, and the impact of climate change on the modelling for the safety of those defences, were considered by the ExA in section 5.8 and section 5.7 of the ExA Report respectively. The ExA considers [ER 5.20.101] that the coastal defences have been designed so they can be modified if it is necessary to do so, with the monitoring of the sea levels secured through the CPMMP, and this is further reinforced by the obligations required by the NSL regime regulated by the ONR and the permits regulated by the EA. The ExA is persuaded [ER 5.20.102] that the Applicant’s conclusions are predicated on

the basis that the site will be clear of nuclear material by 2140, the period which has been modelled for coastal defences, and under these circumstances the ExA consider the tests set out in paragraph 2.11.5 of NPS EN-6 would be met.”

The claimant places a good deal of emphasis on the last sentence, and also upon DL 4.245. These paragraphs refer to an assumption that spent fuel will be removed from Sizewell C by 2140, which is also the year to which the modelling for predicted extreme sea levels runs.

173. The claimant complained that the defendant failed to give reasons addressing its reliance upon the ONR’s email dated 7 August 2020. In my judgment he was under no legal obligation to do so. The limitations of that material produced in 2020 were obvious on the face of the document itself, without there being any need for the Panel or the defendant to spell that out by simply repeating them. The comments by the ONR related to the Hinkley Point C project in the absence of information on Sizewell C. They were not of any real significance. Naturally the Panel and the defendant would focus on later material produced in 2022 which specifically related to the Sizewell C project (see e.g. [167] above). An application for a nuclear site licence for that scheme had yet to be submitted. SZC said to the Examination that the fuel store would be decommissioned by the 2140s, that is not necessarily by 2140 (DL 4.252). Although the ONR had estimated in 2020 that the GDF would be available by 2130, the claimant relies upon an alternative prediction, 2145, emanating from SZC. The Panel stated that it was reasonable to assume that storage would be available in a GDF in the long term, but added, not surprisingly, that there is a degree of uncertainty (PR 5.20.131), referring no doubt to timing.
174. It is obvious that the issue of how far into the next century spent fuel will need to remain at Sizewell C is subject to uncertainty. But that is not the only uncertainty about the future. The ONR, EA, SZC and others have addressed the possibility that climate change may cause sea levels to increase more quickly. Estimates about the availability of facilities and projections are having to be made an unusually long way into the future. On any fair reading of the Panel’s Report and the decision letter, that uncertainty was recognised. I agree with counsel for the defendant and for SZC that what matters is how that subject was addressed.
175. The claimant’s ground 6 is a classic example of a failure to read the decision letter fairly and as a whole. It is plain that in DL 4.590 the defendant also relied upon the adaptive nature of the design for the coastal defences, the monitoring of sea levels through the CPMMP and the controls which will be applied by the ONR and the EA through their respective regulatory regimes. That paragraph has to be read in the context of the many passages in the Panel’s Report and in the decision letter where those matters were explained and relied upon. The suggestion by the claimant’s counsel that the defendant did not rely upon those matters when addressing the future adequacy of coastal defences in relation to the storage of spent fuel is wholly untenable. The point was made clear in relation to the ONR and the nuclear site licence, for example in DL 4.365. The defendant relied, as he was entitled to do, upon the normal assumption that those

other regulatory regimes will be operated properly. The defendant's reasoning cannot be treated as irrational or legally inadequate.

176. In addition, Requirement 19 of the development consent requires details of coastal defence features to be submitted and approved by the local planning authority, before construction of those works may commence, which must include a monitoring and adaptive sea defence plan that sets out periodic monitoring proposals and the trigger point for when the crest height of the sea defence would need to be increased to 16.9m above Ordnance Datum.
177. Accordingly, ground 6 must be rejected. In reaching that conclusion, I have not found it necessary to consider the application of s.31(2A) or (3C) and (3D) of the Senior Courts Act 1981.

### Ground 7

178. This ground is concerned with GHG emissions from the operation of Sizewell C. The claimant refers to DL 4.248 and DL 4.250 in which the defendant agreed with the Panel that "emissions of the magnitude demonstrated would not have a significant effect on the UK's ability to meet its carbon budget commitments or the ability of the Government to meet the UK's obligations under the Paris Agreement". The claimant then says that that conclusion is inconsistent with this part of DL 8.9:

"Operational emissions will be addressed in a managed, economy-wide manner, to ensure consistency with carbon budgets, net zero and our international climate commitments. The Secretary of State does not, therefore need to assess individual applications for planning consent against operational carbon emissions and their contribution to carbon budgets, net zero and our international climate commitments."

179. The claimant submits firstly, that DL 8.9 should be read as meaning that the defendant has made no assessment of the contribution of *operational* GHG emissions to the carbon budgets and secondly, there was no evidential basis upon which he could conclude in DL 4.248 and DL 4.250 that operational emissions from Sizewell C would not have a significant effect on the UK's ability to meet its climate change obligations (skeleton paras. 106 to 110).

### Discussion

180. DL 8.9 appears in section 8 of the decision letter which is entitled "Other Matters". Under that heading DL 8.8 to DL 8.9 refer to the Climate Change Act 2008 and the Net Zero Target in broad terms. The context for the part of DL 8.9 which the claimant quotes is set by the opening two sentences to which it did not refer. Thus, the context is the continuing significance of the NPSs and the need for nuclear generation of the kind represented by Sizewell C in accordance with those policy statements.
181. EN-1 states that carbon emissions from a new nuclear power station are likely to be much less than from a fossil fuelled plant (para. 3.5.5.). New nuclear power

forms one of the three key elements of the Government's strategy for moving towards a decarbonised, diverse electricity sector by 2050, along with *inter alia* renewable electricity generation (para. 3.5.6 and see also para 3.5.10). I agree with the defendant and SZC that the part of DL 8.9 which the claimant seeks to criticise is entirely consistent with para 5.2.2 of EN-1 which states:

“5.2.2. CO<sub>2</sub> emissions are a significant adverse impact from some types of energy infrastructure which cannot be totally avoided (even with full deployment of CCS technology). However, given the characteristics of these and other technologies, as noted in Part 3 of this NPS, and the range of non-planning policies aimed at decarbonising electricity generation such as EU ETS (see Section 2.2 above), Government has determined that CO<sub>2</sub> emissions are not reasons to prohibit the consenting of projects which use these technologies or to impose more restrictions on them in the planning policy framework than are set out in the energy NPSs (e.g. the CCR and, for coal, CCS requirements). Any ES on air emissions will include an assessment of CO<sub>2</sub> emissions, but the policies set out in Section 2, including the EU ETS, apply to these emissions. The IPC does not, therefore need to assess individual applications in terms of carbon emissions against carbon budgets and this section does not address CO<sub>2</sub> emissions or any Emissions Performance Standard that may apply to plant.”

182. Section 4 of the decision letter is entitled “Matters considered by the ExA [the Panel] during the Examination.” DL 4.232 to DL 4.250 dealt with climate change and resilience. Within that part DL 4.242 to DL 4.243 addressed GHG emissions and the carbon footprint. DL 4.244 to DL 4.250 summarised the Panel's overall conclusions on various climate change issues and stated that the defendant agreed with the Panel on those matters.
183. DL 4.242 and DL 4.248 referred back to the parts of the Panel's Report which summarised the quantitative analysis before the Examination, the responses of other parties to that material, and the Panel's conclusions at PR 5.7.56 to PR 5.7.100. That summary covered the quantitative analysis in the ES and in the subsequent Life Cycle Analysis carried out for SZC.
184. At PR 5.7.90 the Panel concluded:

“The ExA concludes that the ES [APP-342], as updated by [AS-181, REP2-110], and [REP10-152], demonstrates that construction emissions from the Proposed Development would be less than 1% of the UK Government's carbon budget for the relevant period, and would not be significant in accordance with the criteria as described in Chapter 26 [APP-342]. The ExA is therefore content that those emissions would not materially affect the ability of the Government to meet the UK's obligations under the Paris Agreement. Similarly, the gross emissions associated with the operational phase have been found to be less than 1% of relevant periods in which they arise. The ExA also

recognises the support provided by national policy for low carbon power generation projects such as the Proposed Development, and that the importance for the UK's carbon budgets should also be considered from the perspective of the carbon emissions that would otherwise be produced by other sources, if they were not generating. The national policy support for such low carbon generation projects has been considered in detail in section 5.19 of this Report.”

That conclusion was then carried forward to PR 5.7.100. It is also relevant to note the reference here to the policy support for new nuclear power generation because of the contribution it makes to reducing GHGs that would otherwise be produced from other sources (as opposed to the “gross” emissions from a nuclear power station taken in isolation).

185. The defendant's decision letter accepted both PR 5.7.90 and PR 5.7.100. There was therefore ample quantitative material to support the conclusions of the Panel and, in turn, the Secretary of State. Mr. Wolfe KC relies once again upon a dictum in *R (Association of Independent Meat Suppliers) v Food Standards Agency* [2019] PTSR 1443 at [8]. But for the reasons set out in *R (Goesa Limited) v Eastleigh Borough Council* [2022] PTSR 1473 at [19] that passage does not alter the well-known *Wednesbury* principles applied by the Courts (see also *R (Law Society) v Lord Chancellor* [2019] 1 WLR 1649 at 98]).
186. The claimant then complains that there is no evidence that the defendant personally considered the quantitative assessment carried out for SZC, whether in the ES or the Life Cycle Assessment. This is yet another attempt to rely upon part of the judgment of Sedley LJ in *R (National Association of Health Stores) v Secretary of State for Health* [2005] EWCA Civ 154 without reading the relevant passages as a whole. The High Court has analysed the principles in *R (Transport Action Network Limited) v Secretary of State for Transport* [2022] PTSR 31 at [60] to [73] and *R (Save Stonehenge World Heritage Site Limited) v Secretary of State for Transport* [2020] PTSR 74 at [62] to [66] and [178]. A Minister is entitled to rely upon a summary prepared by his officials of the material which his department has received. The issue is therefore the narrower one of whether there are any grounds for criticising the legal adequacy of that summary in the context of ministerial decision-making. In my judgment the Secretary of State was not required himself to delve into the ES or the Life Cycle Assessment in the way the claimant suggests. The summary provided in the Panel's Report and in the draft decision letter, both of which were provided to the defendant for him to consider, were as, a matter of law, perfectly adequate.
187. Ground 7 is utterly hopeless and must be rejected.

## Conclusions

188. The court is faced with a similar situation to that which arose in the Heathrow litigation where, having heard full submissions in a rolled-up hearing (in that case dealing with five different claims), it had to decide whether permission to apply for judicial review should be granted on each ground (*Spurrier* at [667]). In the present case as in *Spurrier*, the mere fact that the court has had to consider

in a rolled-up hearing, and in a judgment, a substantial amount of material and legal submissions, does not mean that the grounds raised pass the threshold for arguability.

189. I consider that each of grounds 3 to 7 is totally without merit (CPR 23.12). Accordingly, permission must be refused in relation to those grounds.
190. In relation to grounds 1 and 2 I conclude that both are unarguable and permission should be refused.
191. The application for permission to apply for judicial review is dismissed.

## **Annex: Paragraphs 4.43 – 4.69 of the Secretary of State’s Decision Letter**

### *The Secretary of State’s Consideration of Water Supply*

- 4.43 The Secretary of State has considered the supply of water during the construction period. He is satisfied with the Applicant’s assurance that potable water will be supplied via a combination of tankers and a temporary desalination plant. The Secretary of State notes that the Applicant reaffirmed its commitments in the Water Supply Strategy for supply of non-potable water throughout the construction period. The Secretary of State is satisfied that there will be an adequate supply of both potable and non-potable water during the construction period and that the impacts of the water supply during the construction period have been properly assessed as part of this application and where relevant are considered elsewhere in this letter.
- 4.44 The Secretary of State has considered the Applicant’s response to his questions on the matter of long-term water supply, as well as the comments submitted by IPs on this matter in light of the ExA’s report. The Secretary of State notes that paragraph 8 of the letter from Walker Morris on behalf of NWL, of 23 February 2022, provides that, in addition to demand management options, NWL is also appraising other options that include (but are not limited to): an import from Anglian Water; nitrate removal at Barsham WTWs; effluent reuse and desalination; and longer term (post-2035) winter storage reservoirs. The Secretary of State considers that these represent potentially viable solutions for the water supply strategy as would the fall back of the Applicant’s own permanent desalination plant if those solutions cannot be used. The Secretary of State is therefore content that if consent is granted for the development, there is a reasonable level of certainty that a permanent water supply solution can be found before the first reactor is commissioned.
- 4.45 With regard to the Applicant’s case that the permanent water supply to be supplied by Essex & Suffolk Water/NWL will be assessed as part of the separate regulatory processes associated with WRMP24, the Secretary of State has considered the relevant policy. Paragraph 4.10.3 of NPS EN-1 (EN-1), states that the decision-maker ‘should work on the assumption that the relevant pollution control regime and other environmental regulatory regimes, including those on land drainage, water abstraction and biodiversity, will be properly applied and enforced by the relevant regulator. It should act to complement but not seek to duplicate them.’ This text is carried forward in paragraph 4.11.5 of the draft revision of EN-1.
- 4.46 Paragraph 5.15.4 of EN-1 states ‘The considerations set out in Section 4.10 on the interface between planning and pollution control therefore apply. These considerations will also apply in an analogous way to the abstraction licensing regime regulating activities that take water from the water environment, and to the control regimes relating to works to, and structures in, on, or under controlled water.’ This text is carried forward to paragraph 5.16.6 of the draft revision of EN-1. Paragraph 5.15.6 states that the decision-maker ‘should also consider the interactions of the proposed project with other plans such as Water Resources Management Plans’. This text is carried forward to paragraph 5.16.9 of the draft revision of EN-1.



- 4.47 The Secretary of State notes the EA's water resources planning guideline, updated on 4 April 2022<sup>7</sup>, which states that water companies in England or Wales must prepare and maintain a WRMP that sets out how a water company intends to achieve a secure supply of water for its customers and a protected and enhanced environment. This guideline notes that the duty to prepare and maintain a WRMP is set out in sections 37A to 37D of the WIA and that a water company must prepare a plan at least every 5 years and review it annually. Part 3.1 of this guideline details the legal requirements relevant to the preparation and publication of a WRMP, including the need to take account of relevant legislation including the Conservation of Habitats and Species Regulations 2017. Part 3.3.1 notes that statutory consultees for the WRMP process includes the EA, and also notes that if possible options affect a designated site in England then the water company must contact NE. Part 4.1.1 notes that a water company should carry out a HRA as part of the WRMP process, including an appropriate assessment, as set out in the Conservation of Habitats and Species Regulations 2017 (as amended), if a preferred plan would be likely to have a significant effect on a European site (either alone or in combination with other plans or projects).
- 4.48 The Secretary of State notes the policy in Section 4.2 of EN-1. Paragraph 4.2.7 acknowledges that 'In some instances, it may not be possible at the time of the application for development consent for all aspects of the proposal to have been settled in precise detail.' This text has been carried forward to paragraph 4.2.5 of the draft revision of EN-1.
- 4.49 The Secretary of State considers that the Proposed Development and the WRMP24 process for the sourcing of water are separate projects. This is evident from their separate ownership and because they are subject to distinct and asynchronous determination processes. The Secretary of State also considers that these projects are stand-alone, given that NWL has a duty to undertake its WRMP24 regardless of whether or not the Proposed Development proceeds
- 4.50 The Secretary of State has considered the ExA's view [ER 7.5.7] that, even if the Proposed Development and the water supply are considered to be two separate projects, the cumulative effects associated with it should be assessed at this stage. As set out below, the Secretary of State has considered the cumulative assessment of the proposed pipeline from the North/Central WRZ and agrees with the Applicant's assessment that the pipeline is not likely to give rise to new or significant effects to those already identified in the ES. In addition, the Secretary of State agrees with the Applicant that the detail of the potential environmental impacts (including cumulative impacts) associated with the proposed permanent water supply to be provided by NWL will be sufficiently assessed and that the WRMP24 process is the appropriate means of undertaking that assessment. The Secretary of State agrees that further detailed assessment cannot be undertaken by the Applicant at this stage as the preferred option for long-term supply is not yet known given the current status of the separate WRMP24 process, which falls to be considered as a separate plan or project. The Secretary of State considers that it is because the long-term planning of water supply is subject to separate statutory provisions and processes, including those set out in paragraph 4.47 above, that the identification of the source of the

Proposed Development's long-term water supply cannot be known by the Applicant at this stage.

- 4.51 The Applicant's original and preferred water supply connection was a direct link from Barsham and the Applicant provided information about this, the cumulative effects of its preferred water supply solution of in Table 1.1 of the ES Addendum, Volume 3, Chapter 2, Appendix 2.2.D Water Supply Strategy submitted in January 2021. This refers to potable water transfer options and envisages that a supply of potable water via a direct link from Barsham would be provided by Essex and Suffolk Water. Table 1.1 notes that the provision of this link does not form part of the Application, however it provides a cumulative assessment of the Proposed Development with this link at Chapter 10 of the ES Addendum at paragraphs 10.4.229-10.4.250. The cumulative assessment states that "it is proposed that the detailed route alignment of the pipeline will follow existing roads and boundaries where possible" and that "it is anticipated that the earthworks for the cut and fill, and the pipelaying task for the preferred water supply proposal will progress quickly along the route and works would only impact upon a single receptor for a small number of days at most". In relation to Terrestrial ecology and ornithology it finds that "Given the footprint of the works and the proposed locations for working, ecological impacts would be minimal and avoidable or mitigable" and for all the other impacts assessed concludes that "no significant cumulative effects are anticipated in relation to the preferred water supply proposal and there would be no change to the residual cumulative effects as presented in Volume 10, Chapter 4 of the ES".
- 4.52 The Secretary of State has seen no subsequent evidence to suggest that anything has changed in that regard. The Secretary of State is satisfied that, based on current knowledge, there are no additional cumulative impacts if the Barsham pipeline were to be pursued. The Secretary of State has considered the information provided by the Applicant on cumulative effects and does not agree with the ExA's criticisms and considers there is sufficient information on which he can base his conclusion.
- 4.53 Section 3.2.3. of the revised Water Supply Strategy submitted at Deadline 7 in September 2021 stated that 'there is some potential spare capacity in the WRZ at NWL's Barsham Water Treatment Works near Beccles which is located in their Northern /Central WRZ, from which water is proposed to be transferred to Sizewell via a 28km pipeline. This transfer will also require other water network enhancements, which NWL are currently investigating. The proposed transfer main would connect into the local Blyth distribution network at Saxmundham Water Tower, and at other locations subject to detailed design. These local connections have the potential to provide significant legacy benefit by increasing capacity and resilience of the distribution network.'
- 4.54 The Statement of Common Ground agreed between NWL and the Applicant records that the proposal to transfer water from Barsham relies on abstraction from the River Waveney and its associated Waveney Augmentation Groundwater Scheme (WAGS) operated by the EA. It further records that on 26 August 2021 the EA informed NWL that a sustainability reduction may be applied to NWL's abstraction licence for the River Waveney and WAGS abstraction licenses which could reduce NWL's allowable annual quantities of

abstraction by up to 60% and that further modelling work is being carried out by NWL to investigate this.

- 4.55 The Secretary of State further notes the letter from Walker Morris on behalf of NWL on 23 February 2022 states that NWL will not be able to supply all forecast household and non-household demand, including the Proposed Development's long-term demand, from existing water resources, and that NWL will need to identify new water resources to meet the forecast demand. The Secretary of State notes that the letter states that in addition to demand management options, NWL is appraising options including (but not limited to) nitrate removal at Barsham WTWs to reduce raw water quality driven water treatment works outage. While noting that the ultimate source of supply has yet to be identified by NWL, the Secretary of State considers that the information provided demonstrates sufficiently, in principle, the viability of a mains connection pipeline to the Proposed Development if some or all of the supply were able to come from that location.
- 4.56 The Secretary of State is satisfied that if NWL, through the regulatory processes associated with the WRMP24, put forwards a solution to the supply of potable water supply which requires a change to the pipeline connection to the Proposed Development (once it has established where it will source the water for the Proposed Development from) any such solution will be subject to its own environmental assessments, including those under the HRA. The Secretary of State has not seen any information at this stage to suggest that a different pipeline connection (if it were to be required) would not be viable or its impacts unacceptable. However, this will be for NWL to assess once the source of the permanent water supply is known.
- 4.57 The Secretary of State notes that any such pipeline or connection will be applied for separately to the Proposed Development once there is certainty around its route and specification.
- 4.58 As set out above, the Secretary of State does not have detailed information as to the route or specification of the pipeline that would convey water to the Proposed Development given that it is subject to the outcome of the WRMP24 process which has not yet been completed. However, the Secretary of State considers that he has sufficient information for the purposes of taking a decision on the Proposed Development to conclude that there is the potential for a viable connection to be provided in principle. The Secretary of State considers that if the pipeline connects to a supply at Barsham it is not likely to give rise to significant environmental effects additional to those already identified in the Environmental Statement, but this will also fall to be re-examined and be subject to assessment once any such pipeline connection is finalised. If a different solution is required, then any such different solution will need to be the subject of its own assessments in due course.
- 4.59 The Secretary of State notes that in light of the matters identified above it is not possible for the Applicant to provide more specific details regarding the route or specification of the pipeline, or other connection, that will provide the Proposed Development with a connection to the water main or water supply at this stage, and notes that such a pipeline or alternative connection does not form

part of the Application. This is due to the fact that the specific details of the route remain unknown until NWL identifies the source of the water that the pipeline will connect the Proposed Development to. The Secretary of State considers that such a pipeline or alternative connection cannot be subject to more detailed assessment as part of this Application given it is subject to the WRMP24. The Secretary of State notes that whilst the Water Supply Strategy submitted in January 2021 identified that the pipeline between Barsham and the Proposed Development did not form part of the Application, a cumulative assessment of the Proposed Development with that pipeline was undertaken, and that the Application was accepted on that basis. The Secretary of State agrees that in light of the present state of knowledge, it is not possible for the Applicant to conduct any meaningful assessment of any different solution to emerge from the WRMP24 process but that any such different solution will necessarily be subject to its own assessment before it can proceed.

- 4.60 The policy set out in NPS EN-1 is clear that a decision-maker should work on the assumption that relevant environmental regulatory regimes, including the abstraction licencing regime regulating activities that take water from the water environment, will be properly applied and enforced by the relevant regulator, and that a decision-maker should not seek to duplicate these regimes. The policy is also clear that the decision-maker should have regard to the interaction between the proposed project and other plans, and references Water Resource Management Plans as a specific example of such plans. The Secretary of State notes the acknowledgement in Section 4.2 of EN-1 that it is not always possible for all aspects of a proposal to be settled in precise detail. The fact that there is a lack of detailed information available regarding the source of a permanent water supply via NWL means that it is not possible for the Applicant to have assessed the effect, including the cumulative effects of all of the potential means of conveying water to the Proposed Development. The WRMP process is conducted by the water company and is not something that the Applicant can dictate. If (and only if) the WRMP process fails to provide a solution, the Applicant will have to consider its own permanent desalination plant.
- 4.61 The Secretary of State notes the concerns raised by IPs regarding the prospect of a permanent desalination plant. The Secretary of State agrees with the Applicant that further detailed assessment of the impacts associated with a permanent desalination plant would be required if the Applicant were ultimately to pursue this option as part of its water supply strategy which is not the current intention. The Secretary of State has not requested further detailed assessment from the Applicant of this option given that it does not form part of the Proposed Development and the Applicant's position is that a bespoke permanent desalination plant for the Proposed Development is unlikely to be required. The Secretary of State notes the Applicant's position that a permanent desalination plant is not likely to generate any materially new or materially different significant environmental effects on the marine environment (see paragraph 2.2.8 of the Applicant's response to the Secretary of State's letter of 18 March 2022) and on the terrestrial environment (see paragraph 2.2.10 of the Applicant's response to the Secretary of State's letter of 18 March 2022). The Secretary of State has also considered the concerns raised by IPs regarding the fact that the Applicant had previously discounted desalination from its water

supply options. The Secretary of State notes that the revision 1.0 of the Applicant's Water Supply Strategy produced in May 2020 noted that benefits of desalination include potentially short lead times with equipment available for hire, and that it could be useful for temporary top-ups or in times of drought. The limitations of desalination were listed as 'desalinated water being aggressive in pipe network and may require remineralisation'.

- 4.62 The Secretary of State acknowledges (above) that the Applicant's conclusion in January 2021, in Appendix 2.2.D Water Supply Strategy of the ES Addendum Volume 3 Chapter 2, was to discount the installation of a modular desalination plant on the MDS and the abstraction of seawater for treatment and notes that the Applicant also stated in the same document that Essex and Suffolk Water had 'identified means to provide a viable supply of potable water to Sizewell C' with this option referred to as 'transfer of surplus potable water via a new pipeline from Barsham'. This reflected the Applicant's position that a new mains pipeline is preferable to a permanent desalination plant.
- 4.64 The Secretary of State notes that revision 2.0 of the Water Supply Strategy published in September 2021 sets out the important role that a temporary desalination plant would play in the overall strategy. The Secretary of State acknowledges that the Applicant's position on desalination has therefore changed between January 2021 and September 2021 as a result of new information becoming available to the Applicant regarding the preferred mains connection via NWL. The Secretary of State is content that it is reasonable for the Applicant to rely on revision 2.0 of the Water Supply Strategy submitted during the Planning Inspectorate's examination of the Proposed Development in light of the new information that became available via NWL in terms of the important role that a temporary desalination plant would play in the overall strategy. The Secretary of State considers that if, contrary to expectation, the Applicant were to seek to provide water from a permanent desalination plant, that would require its own consent and would be subject to further detailed assessment at that stage before it could proceed. Accordingly, for essentially the same reasons as identified above in respect of the other potential solutions to the supply water strategy, the Secretary of State does not consider it necessary for the effects of any such solution to be assessed in more detail as a permanent desalination plant does not form part of the Proposed Development and the Applicant is not relying on it as an integral part of the Proposed Development.
- 4.64 The Secretary of State notes and agrees with the position of the ONR that in order to fulfil the Licence Conditions of any nuclear site licence necessary to operate the power station, the Applicant will have to put in place a reliable source of water before any nuclear safety related activities can take place that are dependent on such a supply. Accordingly, the Secretary of State is satisfied that the issue of a sustainable water supply solution will be subject to control through the nuclear site licence application and a reliable source of water will need to be demonstrated before any nuclear safety related activities can take place. The Secretary of State notes that NWL has included the demand from the Proposed Development in its WRMP24 Demand Forecast and NWL remains committed to providing the Proposed Development with a long term water supply and is therefore satisfied that there is a requisite degree of confidence

that a long term solution is deliverable, that any such long term solution will be subject to its own environmental assessment, including any required under the Habitats Regulations, which will consider cumulative and incombination effects before it can proceed, and that the ability to deliver that solution will need to be demonstrated to fulfil the Licence Conditions of any nuclear site licence to enable the Proposed Development to generate power.

- 4.65 In relation to the Habitats Regulations, the Secretary of State does not agree with Natural England that the source of any permanent water supply is, in itself, integral to the application. There will need to be a permanent water supply solution and the Secretary of State is satisfied that such a solution can be found before the first reactor is commissioned. However, the Secretary of State does not consider that the source of that supply is an integral part of this application. There is no current certainty as to the final source of the permanent water supply, which does not need to be in place until the early 2030s. The Applicant has carried out a cumulative assessment of the potential pipeline route from Barsham/the North/Central WRZ which identifies that this will result in no new or different significant cumulative effects. However, it is not currently known whether this or some other means of connecting the development to the water supply network will be required and this is something that will only become known through the WINEP process. The Secretary of State agrees with the position of the Applicant that an assessment of the Habitats Regulations implications of the proposed permanent water supply solution will be undertaken by NWL. The Secretary of State does not agree with NE that any such assessment is likely to miss or underplay any effects of any kind, including any cumulative or in-combination effects.
- 4.66 In the unlikely event that NWL can find no solution, then the Applicant has confirmed that it would seek to take forward its own solution of the construction of a permanent desalination plant. As already noted, this in itself would require a further application, either to amend the DCO or for another form of planning consent and such an application would similarly trigger the requirement for the necessary environmental assessments including any required under the Habitats Regulations. Such assessment would consider the proposed permanent water supply solution in combination with the Proposed Development and address any cumulative effects

*Overall Conclusion on Water Supply*

- 4.67 The Secretary of State is satisfied that the Applicant has established an acceptable water supply strategy for the construction period. The Secretary of State is also satisfied that a long-term water supply is viable and that any proposed water supply solution to be supplied by NWL will be properly assessed under the WRMP24 process and/or other relevant regulatory regimes and considers that no further information is required regarding the proposed water supply solution for a decision to be taken on the Application.
- 4.68 The Secretary of State therefore disagrees with the ExA's conclusions on this matter and considers that the uncertainty over the permanent water supply strategy is not a barrier to granting consent to the Proposed Development

- 4.69 The Secretary of State considers that the matter of the water supply does not weigh for or against the Order being made, and attributes this matter neutral weight in the overall planning balance.