



Francis Taylor Building

FTB Infrastructure Webinar

6 May 2020



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HIGHWAY DCOs: SOME CURRENT ISSUES

MICHAEL HUMPHRIES QC
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HIGHWAY DCOs: SOME CURRENT ISSUES



**TRAFFIC MODELLING
UNCERTAINTY**



**AIR QUALITY
EFFECTS**



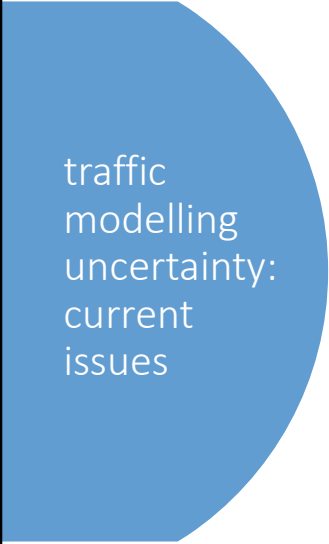
**LOCAL HIGHWAY
EFFECTS**



CLIMATE CHANGE

traffic
modelling
uncertainty

- case studies:
 - M4 SMART MOTORWAY (HE) [2016]
 - SILVERTOWN TUNNEL DCO (TfL) [2018]
 - M20 J10a (HE) [2019]

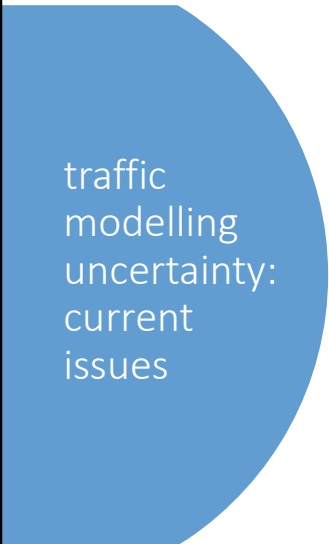
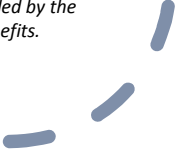


traffic
modelling
uncertainty:
current
issues

- **modelling methodology**

M20 J10a ER para 5.2.54:

With regard to traffic modelling and forecasting, I find that the Applicant has applied an appropriate and recognised methodology in accordance with the advice set out in the DMRB. As a result, it has achieved a reasonable assessment of future traffic flows to enable an assessment to be made of the additional capacity that would be provided by the Proposed Development and its likely benefits.



traffic
modelling
uncertainty:
current
issues

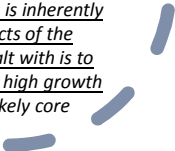
- **adopting a reasonable worse case**

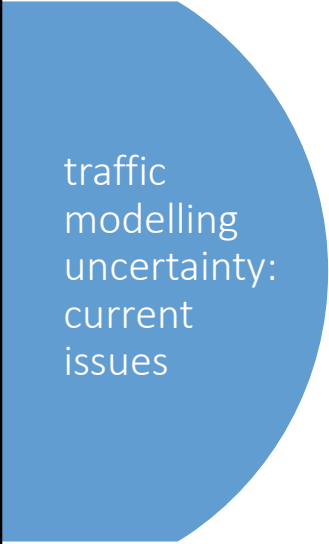
M20 J10a ER paras 5.2.23 and 5.2.25:

In the first round of hearings, I ask the Applicant to summarise and quantify the uncertainties in the traffic modelling, and to identify the worst case scenarios relative to the core scenario for the receptors most affected by the traffic volumes ...

...

The Applicant further states that forecasting is inherently subject to more uncertainty than other aspects of the modelling. The main way in which this is dealt with is to have scenarios that assume low growth and high growth either side of what is the expected or most likely core scenario.



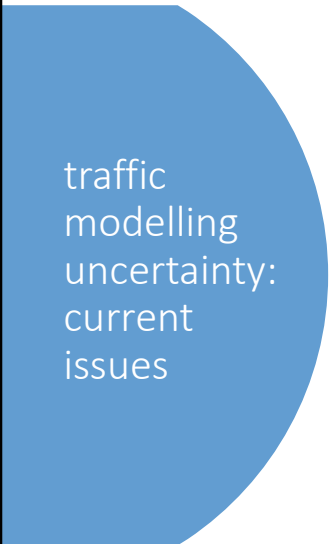
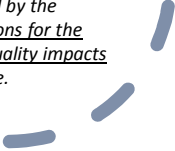


traffic
modelling
uncertainty:
current
issues

- **traffic modelling as an input to AQ modelling**


M4 Smart Motorway DL para 13:

[The SST] accepts that the applicant has applied appropriate and recognised methodology to traffic forecasting and has consequently produced a reasonable assessment of future traffic flows at the strategic level ... He accepts further that there are inevitably various sources of uncertainty in the traffic forecasting ... which were acknowledged by the applicant; and that these have implications for the reliability of the assessment of the air quality impacts which uses the traffic forecasts as a base.



traffic
modelling
uncertainty:
current
issues

- **take aways:**

- important, but not sufficient, to follow DMRB/ webTAG guidance on modelling
 - ExAs will expect applicants to explain modelling uncertainty where flows are close to thresholds (e.g. air quality / junction capacity)
 - modelling uncertainty can, however, be managed:
 - examine reliability of input data
 - adopt a reasonable worst case
 - monitor and manage effects (see next)
- 

air quality effects

- case studies:
 - M4 SMART MOTORWAY (HE) [2016]
 - SILVERTOWN TUNNEL DCO (TfL) [2018]
 - M20 J10a (HE) [2019]

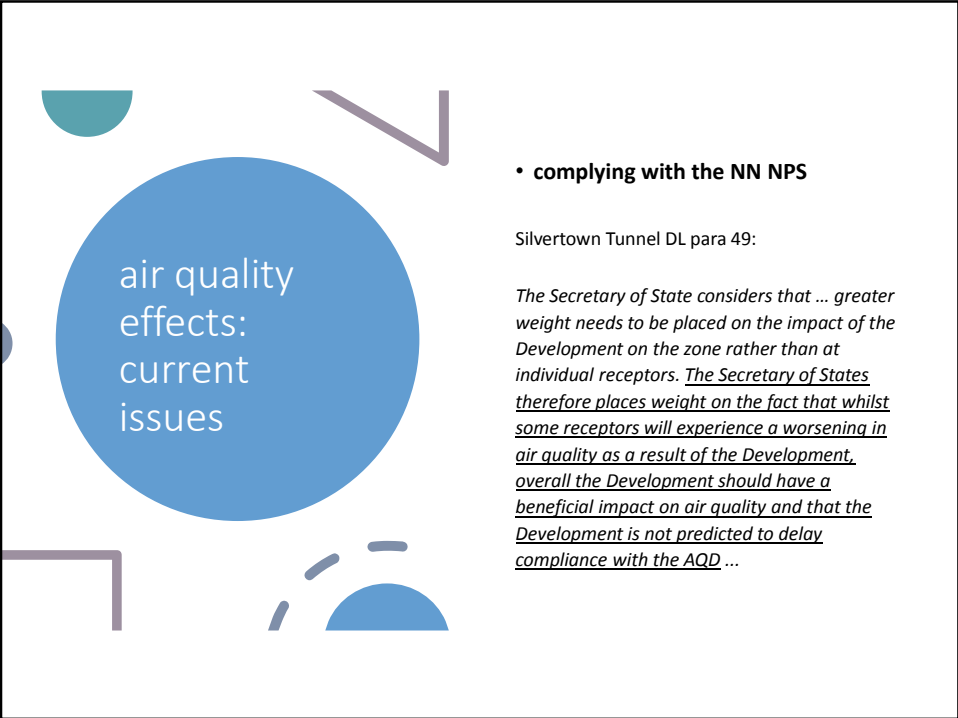
air quality effects: current issues

- **EU Directive 'limit values'**

National Networks NPS para 5.13:

The Secretary of State should refuse consent where, after taking into account mitigation, the air quality impacts of the scheme will:

- *result in a zone/agglomeration which is currently reported as being compliant with the Air Quality Directive becoming non-compliant; or*
- *affect the ability of a non-compliant area to achieve compliance within the most recent timescales reported to the European Commission at the time of the decision.*

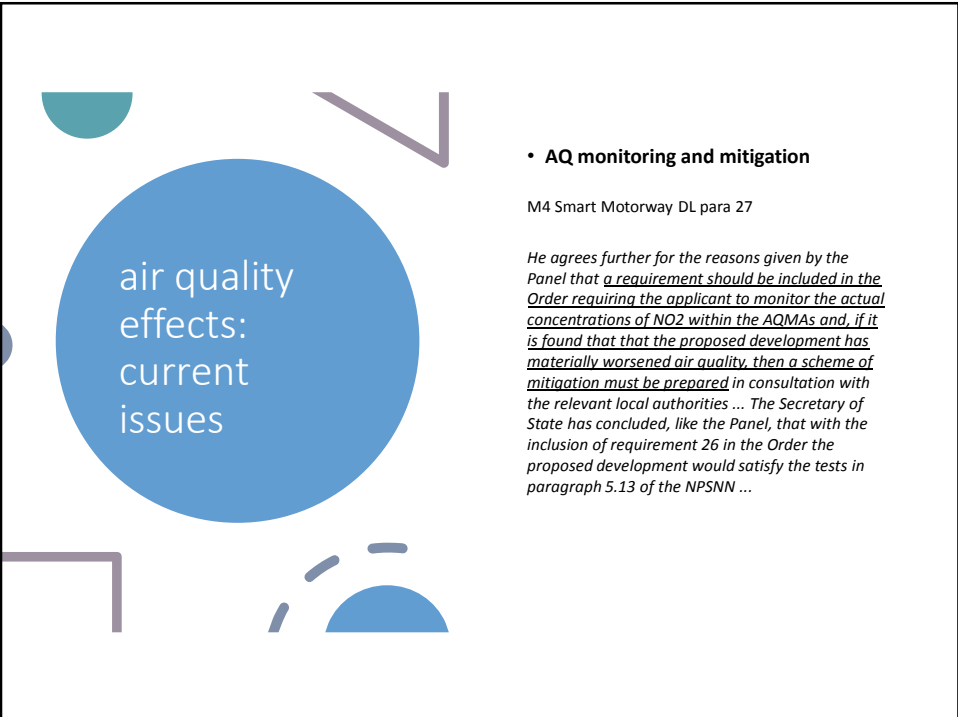


air quality
effects:
current
issues

- **complying with the NN NPS**

Silvertown Tunnel DL para 49:

The Secretary of State considers that ... greater weight needs to be placed on the impact of the Development on the zone rather than at individual receptors. The Secretary of States therefore places weight on the fact that whilst some receptors will experience a worsening in air quality as a result of the Development, overall the Development should have a beneficial impact on air quality and that the Development is not predicted to delay compliance with the AQD ...




air quality
effects:
current
issues

- **AQ monitoring and mitigation**

M4 Smart Motorway DL para 27

He agrees further for the reasons given by the Panel that a requirement should be included in the Order requiring the applicant to monitor the actual concentrations of NO2 within the AQMAs and, if it is found that that the proposed development has materially worsened air quality, then a scheme of mitigation must be prepared in consultation with the relevant local authorities ... The Secretary of State has concluded, like the Panel, that with the inclusion of requirement 26 in the Order the proposed development would satisfy the tests in paragraph 5.13 of the NPSNN ...



air quality effects: current issues

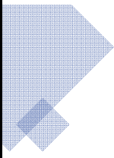
- **take aways:**

- the challenge to AQ modelling will often come through uncertainties in traffic modelling
- ExAs and the SST are increasingly (but not always) looking to 'requirements' that impose monitoring and mitigation
- it may be appropriate to look at the overall effect of a project on AQ, rather just the effect on individual receptors

local highway effects

- case study:

- A30 CHIVERTON TO CARLAND CROSS (HE) [2020]

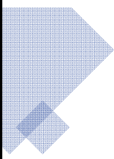
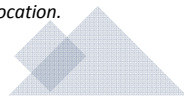


local highway effects:
current issues

- **proposed amendments to a strategic road network project to benefit the local highway network**

A30 CHIVERTON ER para 4.10.38


The crossing of the B3248 across the A30 by way of two staggered three-arm junctions, would be replaced by a grade separated junction with west-facing sliproads, resulting in an eastbound off-slip and a westbound on-slip ... As noted in the [Scheme Assessment Report] ... one of the main concerns expressed during public consultation was the lack of east-facing slips at Chybucca, as well as the alignment in this location.




local highway effects:
current issues

- A30 CHIVERTON DL para 18

... the ExA notes the contribution being made by the Applicant to the Designated Funds programme, which will address longstanding severance issues arising from the A30 and includes the design of Walking, Cycling and Horse Riding ("WCH") measures on the existing A30 once it is de-trunked ... While the ExA has some concern that the Designated Funds programme funding cannot be guaranteed at this time, the ExA is satisfied that the proposed funding through the DCO is sufficient to meet the Applicant's obligations in relation to the NNNPS ... and the Secretary of State sees no reason to disagree.

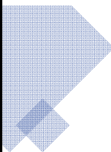





local highway effects:
current issues


- A30 CHIVERTON DL para 19

The Secretary of State notes the concerns raised regarding the lack of east-facing slips at Chybucca ... and the potential for driver frustration for users of the A30 travelling westbound wishing to access local communities, facilities and services around that junction ... The ExA notes that the data supports the decision not to include the east facing slips due to the low number of vehicles making the turning movements which they would provide for ... The Secretary of State agrees with the ExA that, having balanced the cost to the public purse with the advantages of the provision of the slips, it is reasonable to make the DCO without the addition of the east facing slips at Chybucca junction ...



local highway effects:
current issues

- **take aways:**
 - improvements to the SRN can have adverse effects on the LRN
 - whether changes should be made to the project to mitigate such effects will have to be evidence-led
 - traffic modelling evidence may also be important in arguments about 'who' should fund improvements to the LRN
 - there is a balance between benefit and cost to the public purse



climate change

- case study:
 - A585 WINDY HARBOUR TO SKIPPOOL (HE) [2020]

climate change: current issues

- **making an assessment**

A585 Windy Harbour ER para 5.2.9:

I consider that the Applicant has demonstrated that the ES has made a realistic assessment of the effects of the Proposed Development on climate. Furthermore, that the effects are anticipated to be Not Significant; and that these would not change for the amended emissions target.



climate change: current issues

- **assessment against carbon budgets**

A585 WINDY HARBOUR DL para 18:

The Secretary of State concurs with the ExA's conclusions that the ES sets out how the proposal will take account of the projected impacts on climate change, ... evidence is provided on the carbon impact of the project and an assessment against the Government's carbon budgets, and the mitigation measures relating to design and construction are viewed to be adequate. The Secretary of State is satisfied with the ExA's conclusion that climate matters do not weigh against the Order being made (ER 5.2.9).



climate change: current issues

- **legal challenge to the DfT's RIS2 by Transport Action Network**

- RIS2 (11 March 2020) sets out DfT £27.4bn plans for SRN during 2020-2025
- TAN Pre-Action Protocol Letter dated 9 April 2020 raises (i) climate change grounds, and (ii) air quality grounds



climate change: current issues

- **take aways:**

- climate change is becoming an increasingly prominent issue for many large projects, incl highways
- carbon emissions need to be assessed in the context of the UK's 5-yearly carbon budgets
- there may be legal challenges to highways (and other) policy documents based on the CA decision in FOE / Plan B v. SST



conclusions

- traffic modelling uncertainty is likely to become an important issue where air quality levels approach or exceed 'limit values' / 'critical loads', or where there are potential impacts on the LRN
- adaptive air quality monitoring and mitigation may be an appropriate solution to modelling uncertainty
- mitigation for potential local highway effects will need to be evidence-driven
- climate change is a 'global' issue and the potential effect of emissions from individual projects need to be seen in the context of UK Government carbon 'budgets'



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Towards a new Nuclear NPS

Hereward Phillpot QC



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Introduction

1. The existing policy context
2. The emerging NPS
3. The National Infrastructure Commission (NIC), the National Infrastructure Assessment (NIA) and the National Infrastructure Strategy (NIS)
4. Decision-making in the interim



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The existing policy context

- NPS EN-1 and EN-6
 - The important role of EN-1 for new nuclear
 - New nuclear one of three “*key elements*” of the Govt’s strategy for 2050 in EN-1
 - 8 sites listed in EN-6 (not alternatives)
- Slow progress (1 DCO so far), but due to funding not lack of NPS support
- Separate Govt consultation on funding via RAB model

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The emerging NPS

- Consultation on process and criteria for designating sites in 2017, Response July 2018, draft NPS expected 2020
 - To cover schemes of 1 GW+ capable of deployment 2026-2035
 - Focus will be on the remaining sites in EN-6
 - New NPS will be freestanding and outside the suite of existing Energy NPSs

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- Key points
 - Assessment of need supporting EN-1 remains valuable and relevant
 - Need for new nuclear remains significant
 - Ahead of designation, sites listed in EN-6 continue to be considered appropriate sites and retain strong Government support
 - Applications for those sites can be made under s.105 in the interim



- July 2018 response to feedback:
 - Nuclear has a key role to play
 - Govt will facilitate by designating new NPS
 - Right to focus on sites able to meet need soonest
- Response to calls for review of EN-1
 - *“This analysis remains valid. Government does not intend to review EN-1 at the present time”*
 - Drax Re-Power decision and JR
 - EN-1 Review JR



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The NIC, NIA and NIS

- NIA July 2018 recommendation that Govt should “*Not agree support for more than one nuclear power station beyond [HPC] before 2025*”
- NIC framework document: endorsement of recommendation will be a statement of Govt policy
- Govt interim response October 2018
- Queen’s Speech December 2019 and the NIS

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- Issues arising for the NIS:
 - Relationship with the statutory process for preparing and designating a new Nuclear NPS
 - Implications for EN-1
 - Implications for the Govt consultation on the RAB model

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Decision-making in the interim

- EN-1 and EN-6 information, assessments and statements *“will continue to be important and relevant”* in s.105 decisions. *“Where there is no relevant change in circumstances it is likely that significant weight would be given to the policy in EN-1 and EN-6”* [3.11]
 - Wylfa examination – any relevant changes?
- Draft NPS *“... an important and relevant consideration ... before the new NPS is designated”* [3.12]

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- Sizewell B relocated facilities JR
 - Planning permission to relocate SZB facilities to make way for SZC
 - Existing policy a key factor in establishing ‘exceptional circumstances’ for development in AONB
 - Application for JR alleges such reliance unlawful
 - Permission refused on papers by Waksman J
 - Renewal application to be heard on 3.6.20

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Issues to watch:

- The freestanding assessment of need, and its implications for EN-1
- The relationship between the NPS designation process and a National Infrastructure Strategy
- Interpretation and application of the interim policy guidance in the Wylfa decision
- Implications of current and threatened Judicial Reviews

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Thank you

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NET ZERO – where are we?

Mark Westmoreland Smith



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Climate change - the problem



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Climate change – the problem (cont.)

- The global average surface temperature over the 2006-2015 decade was 0.87 warmer than the 1850-1900 period (used as an approximation for pre-industrial levels by the IPCC) and was the hottest decade recorded since modern records began.
- September arctic sea-ice extent has declined by around 13% per decade since 1979.
- Global sea-level has risen by about 20cm since the start of the 20th century and the oceans have increased in acidity. These ocean conditions are unprecedented in at least the last 65 million years.
- The heat stored in the planet's oceans continues to rise. Temperatures are rising in the deep ocean (below 2 km depth) with more than 90% of the extra energy trapped by GHGs ending up in the oceans.



Climate change – the response

- CCA needs to be understood as part of the global response to climate change.
- Early international commitment to keep global temperature rise to 2 degrees C above pre-industrial levels in 2050.
- CCA was the UK's response to that commitment.
- Effects of global warming manifested more quickly than anticipated.
- The result was the Paris Agreement and its commitment to restrict the increase in the global average temperature to "*well below 2 degrees C above pre-industrial levels*", but also to "*pursue efforts to limit the temperature increase to 1.5 degrees celsius above pre-industrial levels*" and an aspiration to achieve net-zero greenhouse gas emissions during the second half of the 21 century.

Climate change – the response. (cont.)

- CCC recommended:
- *“The UK should set and vigorously pursue an ambitious target to reduce greenhouse gas emissions to ‘net-zero’ by 2050, ending the UK’s contribution to global warming within 30 years.”*
- *“A net-zero GHG target for 2050 will deliver on the commitment that the UK made by signing the Paris Agreement. It is achievable with known technologies, alongside improvements in people’s lives, and within the expected economic cost that parliament accepted when it legislated the existing 2050 target for an 80% reduction from 1990.”*



Climate change – the response. (cont.)

- Led to the amendment Climate Change Act 2008 (2050 Target Amendment) Order made in June 2019.
- Amends section 1 of the CCA to read: *“It is the duty of the secretary of state to ensure that the net UK carbon account for the year 2050 is at least 100% lower than the 1990 baseline.”*
- The 1990 baseline was 778 million tonnes of CO₂.
- 80% target was to reduce emissions to 155.6 million tonnes by 2050.
- Now zero.

Draft Order laid before Parliament under sections 2(1) and 9(1) of the Climate Change Act 2008, for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2019 No.

CLIMATE CHANGE

The Climate Change Act 2008 (2050 Target Amendment) Order 2019

Made
Coming into force in accordance with article 1

A draft of this instrument was laid before and approved by a resolution of each House of Parliament, in accordance with sections 2(6) and 9(1) of the Climate Change Act 2008 (“the Act”).

Before the draft was laid, the Secretary of State—
(a) obtained and took into account the advice of the Committee on Climate Change, in accordance with section 3(1)(a) of the Act, and
(b) took into account representations made by the Scottish Ministers, the Welsh Ministers and the Department of Agriculture, Environment and Rural Affairs in Northern Ireland in accordance with section 3(1)(b) of the Act.

The Secretary of State considers that since the Act was passed, there have been significant developments in scientific knowledge about climate change that make it appropriate to amend the percentage specified in section 1(1) of the Act.

Accordingly, the Secretary of State, in exercise of the power conferred by section 2(1)(a) of the Act, makes the following Order:

Citation and commencement

This Order may be cited as the Climate Change Act 2008 (2050 Target Amendment) Order 2019 and comes into force on the day after the day on which it is made.

© 2019, 127
In accordance with Part 9 of the Act for definitions of “national authority” and “relevant Northern Ireland Department”.



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The scale of the task

- The CCC identify a range of options to reduce emissions from current levels and split these into 'core', 'further ambition', and 'speculative' options.
- The core option would cut emissions by over 300 mtCO₂e from 2017 levels, to 193 mtCO₂e in 2050. This is 77% below 1990 levels.
- Together the combination of core and further ambition options would cut emissions by 96% from 1990 levels, to 35 mtCO₂e in 2050. This is 93% below 2017 levels.
- What is arresting is that we have to rely on the speculative options to get to Net Zero: *"achieving net-zero GHG emissions for the UK will rely on a range of speculative options that currently have very low levels of technology readiness, very high costs, and/or significant barriers to public acceptability. It is very unlikely they would all become available by 2050 but some contribution from speculative options is likely and will be required in order to reach net-zero GHG emissions domestically."*

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Implications for infrastructure - opportunity

- Some of the sectors that can make the biggest difference are those that rely heavily on infrastructure - electricity generation, heat, and surface transport.
- Extensive electrification, particularly of transport and heating, will be required.
- This will need to be supported by a major expansion of renewable and other low-carbon power generation.
- CCC envisage a doubling of electricity demand, with all power produced from low-carbon sources.
- Carbon capture and storage is a necessity not an option.

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Implications for infrastructure - policy

- The CCC is clear that a robust policy framework is necessary.
- *“In committing to a net-zero GHG target, parliament must understand that, while many of the policy foundations are in place, a major ramp-up in policy effort is now required.”*
- *“A net-zero GHG target is not credible unless policy is ramped up significantly.”*



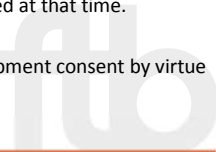
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The roles of NPSs

- Policy is key to the 2008 Act regime. NPSs are at the heart of the statutory scheme and fundamental to how a decision maker determines an application.
- Part 2 of the 2008 Act makes specific provision for the production of NPSs to set the policy framework within which any application for development consent applications are to be determined.
- Section 6: in deciding when to carry out a review of an NPS, the Secretary of State must consider whether, since the time when the NPS was first published or last reviewed, *“there has been a significant change in any circumstances on the basis of which any of the policy set out in the Statement or relevant part was decided”* and that change was not anticipated at that time.
- A relevant NPS is central to the determination of any application for development consent by virtue of section 104 of the 2008 Act.



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The role of NPSs (cont.)

- Section 104(2) provides that, in deciding 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 the application relates.
- Section 104(3): the secretary of state must decide the application in accordance with any relevant national policy statement, except to the extent that it would:
 - Sub-section (4): lead the UK to be in breach of any of its international obligations;
 - Sub-section (5): lead the Secretary of State to be in breach of any duty imposed under statute;
 - Sub-section (6): it would be unlawful; and
 - Sub-section (7) the Secretary of State is satisfied that the adverse impact of the proposed development would outweigh its benefits.

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Current issues – the Drax/ ClientEarth case



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The facts

- Grant of development consent for energy NSIP
- Construction and operation of two gas-fired generating units (combined capacity of 3,800MW)
- Drax estimated net increase in GHGs = +90%
- Increase in generation of 173%
- Development would be CCR
- First unit to be constructed by 2022/2023; second by 2027
- Designed to operate for 25 years



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The net zero issue

- Manifested itself in 3 ways:
 - C argued in relation to net zero *“the defendant needed to fully consider, and grapple with, the impact of the development on achieving net zero by 2050 and whether current NPS policy concerning unabated fossil fuel generation was consistent with the new target”*;
 - The inter-relationship between the NPSs and section 104(7); and
 - Fairness.



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The net zero issues (cont.)

- To what extent were GHG emissions material in the section 104(7) balance given EN-1, § 5.2.2:

“CO2 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 ..., government has determined that CO2 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 nps (e.g. The CCR and, for coal, CCS requirements). Any ES on air emissions will include an assessment of CO2 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 CO2 emissions or any emissions performance standard that may apply to plant.”



NPSs – a review?

- Recent letter before action served on Government and as I understand it claim about to be or has just been made.
- The essence of the claim is that since the suite of energy NPS were designated in 2011, there have been a number of changes of circumstance related to the basis on which that policy was decided that are obviously significant. Such changes were not anticipated in 2011 and if they had been, policy would have been framed materially differently.
- Sets out a chronology of relevant events including the amendment to the CCA.
- Asks Government to review the energy NPSs.
- Await Government response.



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Summary

- The Government is under pressure by the scale of the problem and the demands of its own ambition to address it.
- It is under pressure because of the difficulties decision makers are currently finding in reconciling new realities and demands with a policy suite that is now old.
- It is under pressure from the public (including though environmental groups using the courts to scrutinise decisions).
- All of this provides great opportunities for the infrastructure sector but such is the structure of the the 2008 Act regime that there is a real need now to make sure that there are policies in place that will enable the delivery of net zero.

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Funding for mitigation and community benefits

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Introduction

- Relevance of financial contributions to DCO decisions:
 - Community benefits
 - Mitigation
- Given the relatively small number of DCOs which are refused, the focus of the ExA is often on securing maximum mitigation and/or benefits for the affected community, which may be in the form of financial contributions. Those contributions must satisfy the relevant tests in order to constitute material considerations.

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Financial contributions as material considerations

- Ss.104 & 105 PA2008: SofS must have regard to certain prescribed matters and to any other matters he considers “important and relevant”
- To constitute a material (or relevant) consideration, any factor, including a financial contribution must satisfy the “Newbury Criteria” (Newbury DC v Environment Secretary [1981] AC 578):
 - It must be for a planning purpose; and
 - It must fairly and reasonably relate to the development permitted
- The tests serve the public interest by precluding the buying and selling of planning permissions

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Financial contributions secured through s.106 obligations

- If the contribution is secured through a s.106 obligation, it must satisfy additional tests, equivalent to those in CIL Reg.122 . Each NSP (excluding the Ports NPS) includes a policy requirement that ‘development consent obligations’ must be:
 - **necessary to make the development acceptable in planning terms;**
 - directly related to the development; and
 - fairly and reasonably related in scale and kind to the development



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Examples of immaterial contributions

- Wright v Forest of Dean [2019] UKSC 53 (Nov.2019): wind turbine to be run by a community benefit society with annual donation of 4% of turnover to local community fund to be spent on whatever a panel of local people decided would be of benefit to the community.
 - Fact something is desirable does not make it material
 - Planning policy cannot convert something immaterial into a material consideration
- Good Energy Generation v SSCLG [2018] EWHC 1270 (Admin) (May 2018): wind turbines with community investment scheme open to local residents. C argued that any factor that furthered the achievement of planning policy goals was a material consideration.



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Examples of immaterial contributions in DCOs

- Northampton Gateway Strategic Rail Interchange DCO (Oct 2019): s.106 included provision for community fund of £300K to the LPA to be used for projects which would improve the physical realm, enhance nature conservation interests or improve the physical environment where the LPA considered they were directly related to the dvp and likely to assist in addressing adverse impacts arising from it.
- Developer argued it was a mechanism to address unforeseen impacts.
- ExA: No impact is identified to which the contribution relates. Not necessary. Impossible to tell whether it is adequate to address any impact or whether it is fair and reasonable in scale and kind.

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Examples of material contributions in DCOs

- Drax Power Station (Oct 2019): s.106 contribution of £388K to spend on landscape projects within 3km of the project, including resurfacing of trails and bridleways and any other works to restore existing landscape character weaknesses and contribute to green infrastructure. Would scheme have been unacceptable in planning terms without this contribution?
- Abergelli power station (Sept 2019): s.106 contribution to production of teacher's resource pack to support teachers in explaining the project and its role in the provision of energy for the UK. Would scheme have been unacceptable in planning terms without this contribution?

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Examples of material contributions in DCOs

- Tilbury 2 Port Terminal DCO (Feb 2019): s.106 included heritage contribution of c.140K to be paid to Thurrock Council. Gravesend BC and English Heritage were to nominate projects to enhance the interpretation of heritage assets or to realise tourism and heritage benefits. No specific projects were identified. SofS treated the contributions as a material consideration. Was the payment of monies to unspecified projects necessary, and fairly and reasonably related in scale and kind to the development?



Issues arising

- NSIPs are always likely to result in some significant residual effects. Is the financial contribution really necessary to make the development acceptable in planning terms?
- Must be some real connection between the development and the contribution
- Quantifying the contribution
- Policy encouragement Vs legal tests
- s.111 Vs s.106 agreements





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