Neutral Citation Number: [2024] EWHC 2128 (Admin)

Case No: AC-2024-LON-001067

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/08/2024

Before :

MRS JUSTICE LIEVEN

- -

Between :

THE KING
(on the application of)
DR ANDREW BOSWELL

Claimant

and

SECRETARY OF STATE FOR ENERGY SECURITY AND NET ZERO

Defendant

and

(1) NET ZERO TEESSIDE POWER LIMITED
(2) NET ZERO NORTH SEA STORAGE LIMITED

Interested Parties

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Ms Catherine Dobson, Ms Isabella Buono and Mr Alex Shattock (instructed by **Leigh Day Solicitors**) for the **Claimant**
Ms Rose Grogan (instructed by **Government Legal Department**) for the **Defendant**
Mr Hereward Phillpot KC and Ms Isabella Tafur (instructed by **Freshfields Bruckhaus Deringer LLP)** for the **Interested Parties**

Hearing dates: **23 and 24 July 2024**

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Approved Judgment

This judgment was handed down remotely at 10.30am on 14 August 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE LIEVEN

Mrs Justice Lieven DBE :

1. This is an application for judicial review of the decision of the Secretary of State ("SoS") dated 16 February 2024 to grant development consent for a new gas-fired electricity generating station with post combustion carbon capture at Teesside ("the Scheme"). Sir Duncan Ouseley ordered a rolled-up hearing.

2. The Claimant was represented by Catherine Dobson, Isabella Buono and Alex Shattock, the Defendant was represented by Rose Grogan and the Interested Parties ("IPs") were represented by Hereward Phillpot KC and Isabella Tafur.

3. The Grounds of Claim have changed during the course of the Claim. Four Grounds have been advanced before the Court:

   (a) Ground One: The Decision Letter ("DL) does not give legally adequate reasons for the conclusion that the Development "will help deliver the Government's net zero commitment".

   (b) Ground Two(a): There is a demonstrable flaw in the reasoning which led to the Decision, in that: (i) the SoS assessed the Greenhouse Gas ("GHG") emissions from the Development as having "significant adverse effects" for the purposes of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (the "EIA Regulations") by reference to the Institute of Environmental Management and Assessment ("IEMA") Guidance; (ii) the Institute of Environmental Management and Assessment Guidance ("the IEMA Guidance") states that GHG emissions are considered to be "significant adverse" where a project "is locking in emissions and does not make a meaningful contribution to the UK's trajectory towards net zero" or "falls short of fully contributing to the UK's trajectory towards net zero"; (iii) the SoS nonetheless found that the Development "will help deliver the Government's net zero commitment".

   (c) Ground Two(b): If, as the SoS contends, the SoS purported to reach her conclusion on the significant effects of GHG emissions from the Development (the Scheme) on the environment by reference to EN-1 (2011) and EN-1 (2024), she misinterpreted those policies and so erred in law and/or failed to reach a reasoned conclusion for the purposes of regulation 21 of the EIA Regulations.

   (d) Ground Four: The SoS failed to reach her own view on the need for the Scheme and the weight to be given to need in the planning balance contrary to the requirements of para. 3.2.3 of EN-1 as interpreted by the Court of Appeal in *ClientEarth v SSBEIS* [2021] PTSR 1400. Alternatively, she failed to give legally adequate reasons for attaching substantial weight to the need for the Development.

The statutory scheme

4. The application was for development consent under s.114 of the Planning Act 2008 ("PA 2008"). Section 114 provides that the SoS must either grant the development

consent order ("DCO") or refuse consent. Section 116 requires a statement of reasons to be given. A detailed analysis of the regime under the PA 2008 was given in *ClientEarth*. It does not need to be repeated here.

5. Section 104 PA 2008 states that the SoS must decide an application for a DCO in accordance with the applicable National Policy Statement ("NPS"), unless she is satisfied that one of a number of factors applies, including that the adverse impact of the Proposed Development would outweigh its benefits (s.104(7)).

6. Part 2 of the PA 2008 makes provision for the creation and designation of NPSs dealing with national infrastructure, including their designation under s.5 PA 2008 after a specific process has been followed.

7. The relevant NPSs for the Scheme are NPS EN-1, EN-2, EN-4 and EN-5 adopted in 2011. Updated versions of these NPSs were published in 2023 and were designated on 16 January 2024. Pursuant to the relevant transitional provisions, the SoS determined the IP's application in accordance with the 2011 NPSs but had regard to the 2024 NPSs as important and relevant matters (see DL4.6). It is well-established that matters settled by a national policy statement should not be revised or re-opened in a development consent order process (see *R (Spurrier) v Secretary of State for Transport* [2019] EWHC 1070 at [103], [105] and [107]).

8. Regulation 4 of the EIA Regulations requires that development consent must not be granted without the EIA process being carried out.

9. Regulation 5 requires that the EIA process must identify, describe and assess the direct and indirect significant effects of the development on (inter alia) climate.

10. Regulation 14 requires that the Environmental Statement ("ES") must describe the likely significant effects of the project and particularly the relevant additional information from Schedule 4.

11. Schedule 4, para. 5 indicates that the cumulative effects of the scheme with "other existing and/or approved projects" may need to be considered.

12. Regulation 21 requires that the SoS must examine the environmental information (which includes the ES), reach a reasoned conclusion on the environmental impacts, and integrate the conclusion into the decision on whether to grant development consent.

13. Regulation 30(2)(b)(i)(aa) requires the Decision to include a "reasoned conclusion" on the significant effects of the development on the environment, taking into account the results of the Examination.

14. There is no definition of "significant" in the EIA Regulations. In *R (Goesa) v Eastleigh Borough Council* [2022] PTSR 1473 at [100] Holgate J said:

> *"100. It is well established that issues as to whether an effect is significant and the adequacy of any assessment of significant effects are matters of judgment for the decision maker, in this case the local planning authority. Such judgments are only open to challenge in the courts applying the conventional Wednesbury standard (Associated*

> *Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223). In this regard, the parties cited R (Blewett) v Derbyshire County Council [2004] Env LR 29 and R (Friends of the Earth Ltd) v Secretary of State for Transport [2021] PTSR 190, paras 142-145.*
>
> *…*
>
> *102. In addition, the court should allow a substantial margin of appreciation to judgments based upon scientific, technical or predictive assessments by those with appropriate expertise (R (Mott) v Environment Agency [2016] 1 WLR 4338 and R (Plan B Earth v Secretary of State for Transport [2020] PTSR 1446, paras 176-177. There is no suggestion that the local authority lacked the appropriate expertise. They were advised by experienced senior officers who assessed the technical material provided by experts."*

15. In *R (Boswell) v Secretary of State for Transport* [2024] EWCA Civ 145 at [34] the Court of Appeal repeated some very well-known principles about challenges to an EIA process:

> *"The Judge then described the methodology used for the assessment of carbon emissions in the three Schemes, much of which I have already summarised: see [17] to [21] above. At [61], she rightly emphasised that EIA is a "process that starts, but does not end, with the environmental statement". She cited from the unanimous judgment of the Supreme Court in R (Friends of the Earth Ltd) v Secretary of State for Transport [2020] UKSC 52, [2021] PTSR 190, at [142] and [143] , where the Court endorsed the approach to judicial review in cases requiring an EIA laid down by Sullivan J in R (Blewett) v Derbyshire County Council [2004] Env. L.R. 29 , warning against the adoption of an "unduly legalistic approach", and holding that the EIA Regulations "do not impose a standard of perfection in relation to the contents of an environmental statement". As Sullivan J said in Blewett at [41] , the Regulations "should be interpreted as a whole and in a common-sense way". The requirement for an EIA "is not intended to obstruct such development", nor are the Regulations based on an unrealistic expectation of perfection. The provision made for publication and a process of consultation allows for any deficiencies in the EIA to be identified, so that the resulting "environmental information" provides the local planning authority with "as full a picture as possible". Sullivan J concluded by saying there will be cases where the document purporting to be an ES is so deficient that it could not reasonably be described as an ES as defined by the Regulations "but they are likely to be few and far between".*"

The Scheme

16. The Scheme in question comprises a full chain Carbon Capture Utilization and Storage ("CCUS") project comprising a number of elements including:

> (1) A new gas-fired electricity generating station (with an electrical output of up to 860 megawatts) with post combustion carbon capture plant; gas, electricity and water connections (for the electricity generating station);
>
> (2) A carbon dioxide (CO_2) pipeline network (a 'gathering network') for gathering CO_2 from a cluster of local industries on Teesside; and
>
> (3) A high-pressure CO_2 compressor station and an offshore CO_2 export pipeline.

17. The power plant is described in the Examining Authorities' Report ("ExAR") as being "mid-merit", which means that it is capable of providing flexible generating capacity which can ramp up and down rapidly to meet demand. This allows the electricity grid to be stabilised and thus makes an important contribution to system operability and security of supply.

Planning and Climate Change policy

18. Ms Grogan took the Court through a series of policy documents showing consistent support for Carbon Capture and Storage ("CCS") projects in general, and this specific project in particular.

19. The Relevant Energy NPS EN-1 and EN-2 were published in July 2011. There are numerous references in EN-1 (2011) to the potential importance of CCS, the benefits in terms of GHG emissions and the approach to be taken to such applications. Paragraph 5.2.2 is but one example:

> *"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 the 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 as 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 CO2 emissions, but the policies set out in Section 2, including the EU ETS, apply to those 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."*

20. In respect of the need for large scale energy infrastructure projects, EN-1 (2011) at para 3.2.3 states:

> *"This Part of the NPS explains why the Government considers that, without significant amounts of new large-scale energy infrastructure, the objectives of its energy and climate change policy cannot be fulfilled.*

> *However, as noted in Section 1.7, it will not be possible to develop the necessary amounts of such infrastructure without some significant residual adverse impacts. This Part also shows why the Government considers that the need for such infrastructure will often be urgent. The IPC should therefore give substantial weight to considerations of need. The weight which is attributed to considerations of need in any given case should be proportionate to the anticipated extent of a project's actual contribution to satisfying the need for a particular type of infrastructure."*

21. The support for CCS schemes is then repeated and strengthened 11 years later in EN-1 (2024), which was in draft at the date of the ExAR but designated by the time of the DL. Paragraph 3.5.2 states: *"the Climate Change Committee states that CCS is a necessity not an option"*.

22. EN-1 (2024) provides specific support for the Scheme, see para 4.9.5:

> *"4.9.5. The government has made its ambitions for CCS clear – committing to providing funding to support the establishment of CCS in at least four industrial clusters by 2030 and supporting, using consumer subsidies, at least one privately financed gas CCS power station in the mid-2020s. In October 2021, the government published its Net Zero Strategy which reaffirmed the importance of deploying CCUS to reaching our 2050 net zero target and also outlines our ambition to capture 20-30Mt of CO_2 per year by 2030."*

23. There are also a raft of non-planning policies which give support to CCS. These are summarised in the ExAR at Section 3.6. It should be noted that beyond the general support for CCS, there is specific reference to Teesside being identified as a key location for CCUS in the Clean Growth - the UK Carbon capture Usage and Storage Deployment Pathway – Action Plan (2018), see ExAR 3.614.

24. In December 2020 the Climate Change Committee published its recommendation that the UK set a sixth carbon budget.

25. The Net Zero Strategy: Build Back Greener (October 2021), which set out the Government's proposals and policies for meeting Carbon Budgets is summarised in ExAR 3.6.33 as follows:

> *"3.6.33. The Strategy states that it will deliver four CCUS clusters, capturing 20-30Mt CO_2 across the economy, including 6Mt CO_2 of industrial emissions, per year by 2030. This will be done by supporting industry to switch to cleaner fuels, such as low carbon hydrogen alongside renewable energy and CCUS. These clusters, including the East Coast Cluster, which includes Teesside, could have the opportunity to access support under the Government's CCUS programme. The Government has also set up the Industrial Decarbonisation and Hydrogen Revenue Support Scheme, to fund new hydrogen and industrial carbon capture business models."*

26. On 30 March 2023 the Government presented to Parliament the Carbon Budget Delivery Plan. Table 5 in the Quantified Proposals and Policies contains the Scheme at line 25:

#	**Sector**	**Policy Name**	**Policy Description**	**Timescale from which the policy takes effect**
25	Power	Power Carbon Capture, Usage and Storage (CCUS)	The government has announced the project negotiating list for Track 1 carbon capture, usage and storage (CCUS) clusters. The negotiating list contains one power CCUS project. The government will provide up to £20 billion funding for early deployment of CCUS across all sectors. Further projects will be able to enter a selection process for Track 1 expansion launching this year, and 2 additional clusters will be selected through a Track 2 process.	Late CB4/Early CB5 subject to project negotiations, cluster negotiations, linked project delivery

The Application process

27. On 19 July 2021 the IPs submitted the application for development consent for the Scheme.

28. In February 2022 the IEMA published the second edition of the IEMA Guidance 'Assessing Greenhouse Gas Emissions and Evaluating their Significance'. This is central to Grounds One and Two and is referred to further below.

29. On 10 May 2022 Examination of the IPs' application opened. On 9 June the Claimant (through the consultancy Climate Emergency Policy and Planning ("CEPP")) made submissions as part of the Examination. The submission covers the quantification and assessment of GHG emissions.

30. In August 2022 there was a revised Environmental Statement: Cumulative GHG Onshore and Offshore Assessment. CEPP made submissions on this document.

31. On 10 February 2023 the ExAR was submitted to the SoS recommending consent is granted.

32. There were then a series of further requests for information, and further submissions. On 6 September 2023 CEPP wrote to the SoS regarding GHG emissions. The written and oral submissions make extensive reference to these communications and the various exchanges that took place over the calculations of GHG emissions. However, the detail of this material does not, in my view go to the outcome of the case.

33. On 17 January 2024 revised Energy NPSs were designated by Parliament.

34. On 16 February 2024 the decision was published.

35. On 28 March 2024 the Claimant issued the claim.

The IEMA Guidance

36. At the heart of the case is the Claimant's argument that the SoS assessed the significance of the environmental impacts of GHG emissions from the Scheme in accordance with the IEMA Guide (2nd edition) February 2022. The aim of the Guide is to assist GHG practitioners in assessing GHG emissions. It states at page 6 that assessing significance and contextualizing GHG emissions is an increasingly challenging exercise, given the complexity of the factors involved:

> *"6.3 Significance principles and criteria*
>
> *Figure 5 illustrates how to determine significance depending on the project's whole life GHG emissions and how these align with the UK's net zero compatible trajectory. The following section provides further explanation on the different levels of significance and should be read in conjunction with Figure 5.*
>
> *A project that follows a 'business-as-usual' or 'do minimum' approach and is not compatible with the UK's net zero trajectory, or accepted aligned practice or area-based transition targets, results in a **significant adverse** effect. It is down to the practitioner to differentiate between the 'level' of significant adverse effects e.g. '**moderate**' or '**major**' adverse effects …*
>
> *A project that is compatible with the budgeted, science-based 1.5°C trajectory (in terms of rate of emissions reduction) and which complies with up-to-date policy and 'good practice' reduction measures to achieve that has a **minor adverse** effect that is **not significant**. It may have residual emissions but is going enough to align with and contribute to the relevant transition scenario, keeping the UK on track towards net zero by 2050 with at least a 78% reduction by 2035 and thereby potentially avoiding significant adverse effects.*
>
> *A project that achieves emissions mitigation that goes substantially beyond the reduction trajectory, or substantially beyond existing and emerging policy compatible with that trajectory, and has minimal residual emissions, is assessed as having a **negligible** effect that is **not significant**. This project is playing a part in achieving the rate of transition required by nationally set policy commitments.*
>
> *A project that causes GHG emissions to be avoided or removed from the atmosphere has a **beneficial** effect that is **significant**. Only projects that actively reverse (rather than only reduce) the risk of severe climate change can be judged as having a beneficial effect."*

Environmental Impact Assessment process

37. It is accepted that the IPs when drawing up the ES used the IEMA Guidance, at that date the 2017 edition, see para 21.1.5 of the ES. The original ES significantly underestimated the total GHG emissions that would be generated by the Scheme. The Claimant, through CEPP, made a number of submissions on errors in the ES and

updates were produced. The details of this process are not in my view relevant to the merits of the challenge, save that it is agreed that various iterations and representations all proceed on the basis of using the IEMA Guidance.

38. The Examining Authority ("ExA") assessed the development as having at least +16,000,000 tCO_2e GHG emissions over its lifetime (ExAR5.3.57), based on the assessment of total onshore emissions included in the revised ES at Table 3-4. The ExA rejected the IP's assessment of the GHG emissions from the development for the purposes of the EIA Regulations as being both significant and beneficial. It accepted the Claimant's submission that it was not appropriate to use a "similar CCGT operating without CC" as a baseline (ExAR5.3.45). The ExA concluded that the GHG emissions from the development would have a significant adverse effect for the purposes of the EIA Regulations (ExAR5.3.57) carrying moderate weight in the planning balance (ExAR5.3.59).

39. Following the ExAR, the Claimant submitted a letter noting that there was a large double counting error in the revised ES assessment of whole life GHG emissions from the Scheme, in that the IPs had subtracted the carbon captured from the project twice. The submission is explained at DL4.48. The IPs refuted the claim that it had double counted carbon removals (DL4.49-DL4.57). The SoS adopted the Claimant's final GHG emissions as +20,450,719 tCO2e for the development and offshore elements (DL4.56). As set out below, the SoS concluded that the whole-life GHG emissions are a significant adverse effect, carrying significant negative weight in the planning balance (DL4.58).

The Examining Authorities' Report (ExAR)

40. Section 5 sets out the conclusions on planning issues, dealing firstly with need.

> a. 5.2.103: The scheme would contribute towards the urgent need and would reduce the carbon intensity of the overall future energy mix in the UK;
>
> b. 5.2.104-105: The scheme is supported by EN-1 and Government's wider policy statements;
>
> c. 5.2.108: Specifically addressed the Claimant's objection on need:
>
> > *"Whether or not CEPP is right that CCS technology is the best way to decarbonise the UK energy system, there is considerable NPS policy and wider energy support for the Proposed Development. While aspects of the Net Zero Strategy have been challenged in the High Court, the judgment does not affect the merits of the Strategy or how it should be considered in terms of this application."*

41. Section 5.3 deals with climate change conclusions. The crucial paragraphs are at 5.3.44-5.3.48:

"5.3.44. In the absence of any widely accepted guidance on assessing the significance of the impact from GHG emissions, the IEMA Guidance, including the updates to this since the assessment …, was referenced by the Applicants. It is not disputed by Ops that this is a suitable approach, and we are content that the guidance is appropriate for addressing the requirements of the ES. As part of the update, the Applicants accepted that the assessment should include the upstream and downstream emissions associated with the supply of gas. Their assessment demonstrated that there would be a significant increase in GHG emissions once upstream and downstream emissions were included and they provided an estimate of this on both an annual and lifecycle basis. We are satisfied that this assessment is appropriate.

5.3.45. We have noted the Applicants' revised assessment … of the effects of GHG emissions from the Proposed Development as being both significant and beneficial. This is on the basis that the project baseline could be a similar CCGT operating without CCS and that the Proposed Development represents a significant improvement on this. EN-1 requires that all commercial scale combustion power stations must be constructed Carbon Capture Ready. On this basis, we do not consider it viable to use unmitigated emissions as a baseline any longer.

5.3.46. It is of note that the draft EN-1 describes the inevitable emissions that cannot be avoided from some energy infrastructure as a significant adverse impact. EN-1 does not provide policy on this matter. We also note that the IEMA is quoted as saying that "all GHG emissions are classed as having the potential to be significant as all emissions contribute to climate change". Given there would be approximately 70MtCO_2e emitted even with 90% capture, we conclude that this would be a significant adverse effect. In coming to this conclusion, we have had regard to the Applicants' use of the UK's Carbon Budget in section 21.3 of ES Chapter 21 to put these emissions in context and accept that they would be a very small part of this.

5.3.47. We regard use of the BEIS/Defra emissions factor, which represents the national average carbon intensity for the fuel in commercial use, is a reasonable approach and we are satisfied that this represents the best data and understanding available at the current time. We acknowledge the considerable uncertainty over the future source of natural gas and that the well-to-tank emissions could be higher for imported fuel. However, we also recognise a concerted international effort to reduce methane emissions, including leakage, which could lead to reduction in carbon intensities. Based on this, we do not consider it necessary or reasonable to require annual projections for the lifetime of the Proposed Development to meet the requirements of the EIA Regulations.

5.3.48. We do not consider it necessary to insert a requirement into the dDCO that requires the CCGT to operate only when the carbon intensity is below the International Energy Agency projections, as recommended by CEPP. EN-1 is clear that the ETS forms the cornerstone of UK action

> *to reduce emissions. The draft EN-1 updates this to include the 'key' mechanism of Contracts for Difference, and business models to incentivise CCUS, Carbon Price Support and the Emissions Performance Standard. These regulatory and financial controls outlined work together to control and encourage reduction of GHG emissions and it would not be appropriate for us to seek further control of this via the dDCO."*

42. Note that it is accepted that the reference in 5.3.46 to 70Mt should be a reference to 16Mt.

43. The conclusion on GHG emissions is at 5.3.57 where they say:

> *"5.3.57. Conservatively allowing for 90% capture during operation, the total onshore GHG emissions would be over 16MtCO_2e over the lifetime of the Proposed Development. Based on the policy in the draft EN-1, we conclude that these emissions would have a significant, adverse effect on carbon emissions, even with deployment of CCS technology. …"*

44. In its ultimate conclusions on the planning balance the ExAR gave the emission of significant volumes of GHG moderate adverse weight, but this was countered by the substantial weight given to the need for the project, see 7.3.10.

The Decision Letter

45. There are two parts of the DL which are relevant for the purposes of this application. Firstly, that relating to the assessment of significance of GHG emissions for the purpose of the EIA Regulations; and secondly, as to the need for the Scheme (Ground Four).

46. Climate change is considered at DL4.31-DL4.58. The DL sets out the history of the changes to the assessment which had occurred through the course of the application. It refers to the use of the IEMA Guidance by the IPs (referred to as the Applicants) and the changes to the level of emissions that had been accepted by the IPs, in part after submissions by the Claimant.

47. In respect of the IPs use of IEMA Guidance, in the middle of DL4.34 it states: *"In respect of GHG emissions, the Applicants again referenced the IEMA Guidance. The ExA noted that it is not disputed by the IPs that this is a suitable approach and was content that the guidance is appropriate for addressing the requirements of the ES."*

48. At DL4.35 it states:

> *"… The Secretary of State agrees, noting that the Proposed Development would emit approximately +20 MTCO2e during its operational life …, and concludes that an unmitigated emissions estimate would not be an appropriate comparator. The Secretary of State notes in this regard that designated EN-1, both 2021 and 2023 drafts and designated 2024 NPSs state that operational GHG emissions are a significant adverse impact from some types of energy*

> *infrastructure which cannot be totally avoided (even with full deployment of CCS technology)).”*

49. At DL4.41 it states that allowing for 90% capture the total onshore GHG emissions would be over +16MtCO2e over the lifetime of the project.

50. The SoS reached her conclusion on climate change at DL4.58:

> *“The Secretary of State has considered the ExA’s report and consultation responses received. She considers that the Proposed Development would support the UK transition towards a low carbon economy. The Secretary of State has considered the potential benefits which the wider NZT Project would bring in reducing emissions but accepts the ExA’s conclusions that over the lifetime of the Proposed Development, emissions would have a significant adverse effect. She does not, however, agree that this matter carries only moderate negative weight in the planning balance as GHG emissions are stated as having a significant adverse impact in both the 2011 and 2024 designated NPSs and draft 2021 and 2023 NPSs. Taking into account the post-examination inclusion of T&S unavailability emissions and the consequent increase in GHG emissions, the Secretary of State concludes that the cumulative whole life GHG emissions will be in the region of +20,808,127 tCO_2e. Also, the Secretary of State notes the resultant increase in the contribution of the Proposed Development to the power sector carbon budgets. She agrees with the ExA in giving more weight to the 2024 NPS’s than a comparison with the UK carbon budgets for the assessment of significance but has taken this increase into account. Overall, she considers that cumulative whole-life GHG emissions are a significant adverse effect, carrying significant negative weight in the planning balance.”*

51. The SoS’s conclusions on need are at DL4.11 and DL4.30:

> *“4.11. The ExA considered that the Proposed Development would address the urgent need for new electricity capacity as set out in EN-1, the use of natural gas for energy generation (EN-1 and EN-4) and the urgent need for gas-fired electricity generation with CCS (Carbon Capture Storage) infrastructure as set out in the draft 2021 EN1. The Secretary of State notes that this urgent need is also set out in the draft 2023 and 2024 EN-1 and that the Proposed Development would help deliver the Government’s net zero commitment by 2050. The ExA consider that by providing CCS the Proposed Development would be in line with Government’s wider policy statements on energy and climate change, including those listed in section 3.6 of the ExA report, which constitute important and relevant matters. The UK Marine Policy Statement and the North East Marine Plan are supportive of the deployment of CCS/CCS in the UK Marine Area and local RCBC and STDC policies support the move to a low carbon economy and a CCUS network in the area. The Secretary of State notes that designated 2024 EN-1 further strengthens the support for the Proposed Development by making nationally significant low carbon infrastructure, including*

> *natural gas fired electricity generation which is CCR, a critical national priority. The Secretary of State also acknowledges that the full chain CCUS nature of the Proposed Development elevates it considerably above other CCR projects as it will be required to capture a minimum of 90% carbon when operating at full load throughout it's operation, and will seek to achieve a capture rate of at least 95%. … This further contributes to the strong positive weight accorded to the need for the Proposed Development.*
>
> *…*
>
> *4.30. The Secretary of State agrees with the ExA's assessment of need for this type of energy infrastructure and has taken into account that the Proposed Development, as CCGT with CCS, attracts strong policy support and would support the UK's transition towards the net zero target. The Secretary of State agrees with the ExA that weight should be given to the benefit of the creation of a CO2 gathering network and ascribes this moderate positive weight. The Secretary of State agrees that the Proposed Development is CCR, that an appropriate approach has been taken in respect of the Offshore Elements and that the issue of alternatives has been appropriately addressed. She agrees with the ExA's position that appropriate controls would be in place through Requirement 31 and the necessary Environment Permits for the CCGT and carbon capture plant. In accordance with paragraph 3.2.3 of EN-1 and paragraphs 3.1.1-3.1.2 of the draft 2021, draft 2023 and designated 2024 NPSs the Secretary of State attributes substantial positive weight to the contribution that the Proposed Development would make towards meeting the national need."*

Submissions

52. Grounds One and Two(a) turn on the Claimant's submission that the SoS, when assessing that the GHG emissions would have a significant adverse effect at DL4.58, must have been reaching that conclusion applying the IEMA Guidance. The Claimant then argues that there is a significant tension between the finding of significant adverse effect based on IEMA, and the conclusion that the Scheme "will help deliver the Government's net zero commitment" in DL4.11. This tension arises because the IEMA Guidance states that GHG emissions are considered to be significant adverse where a project "is locking in emissions and does not make a meaningful contribution to the UK's trajectory towards net zero" or "falls short of fully contributing to the UK's trajectory towards net zero".

53. The SoS's position is that her conclusions on significance were not made on the basis of the IEMA Guidance. This is apparent from the terms of the DL, and DL4.58 in particular.

54. Mr Phillpot refers to DL4.37 where the SoS expressly found that the IPs had taken all reasonable steps to reduce GHG emissions, in accordance with the then emerging revised EN-1. It is clear from that finding that the Scheme did mitigate GHG impacts and was not "business as usual", so a finding of significance under the IEMA Guidance would not be consistent with those conclusions.

55. The Claimant submits that the history of the matter strongly indicates that the SoS must have relied on the IEMA Guidance. Firstly, it is not in dispute that the IPs used the IEMA Guidance and Significance Criteria to assess GHG emissions, both in the original ES and the revised ES.

56. Secondly, the ExA endorsed the IPs' use of the IEMA Guidance to assess significance, see ExAR5.3.46 and 5.3.57, noting the express reference to IEMA. It is therefore clear that the ExAR was itself relying on the IEMA Guidance.

57. Thirdly, at DL4.34 the SoS expressly agreed with the ExA's conclusions on significance. At no point did the SoS say she was departing from the ExA's approach, or explain what different approach she was taking. The only guidance or criteria for assessing the significance of GHG emissions was the IEMA Guidance.

58. The Claimant submits that it follows from the above, that the SoS must have based her assessment on the IEMA Guidance. It then follows that the SoS has failed to make clear how she can have reached such inconsistent conclusions on the impact on the trajectory to net zero.

59. Under Ground Two(a) the Claimant submits that the SoS has failed to give adequate, or any, reasons for the inconsistency set out above. It is not rational to assess significant adverse effects on the basis of the IEMA Guidance and yet conclude that the Scheme meets the net zero commitment. Therefore the Claimant says that there is a demonstrable flaw in the reasoning on the basis of *R (Law Society) v Lord Chancellor* [2019] 1WLR 1649 at [98]:

> *"A decision may be challenged on the basis that there is a demonstrable flaw in the reasoning which led to it – for example, that significant reliance was placed on an irrelevant consideration, or that there was no evidence to support an important step in the reasoning, or that the reasoning involved a serious logical or methodological error. …"*

60. Further it is submitted that the SoS failed to give adequate reasons for concluding the Scheme would help deliver the net zero commitment when she had found that (a) the whole life emissions would be 20.4mTCO2e which was significantly more than the IPs' assessment and (b) would be significantly adverse.

61. The SoS submits that the significance of GHG emissions was assessed against EN-1. DL4.58 does not refer to the IEMA Guidance and it is clear from the DL as a whole that the SoS was not relying on that Guidance for her conclusion on significance. The reason for finding significant adverse effect is clear from the paragraph, it is the amount of GHG generated and the reference back to EN-1. The DL sets out the policy framework behind the conclusion that the Scheme contributed to the net zero commitment, see references to policy set out above. In these policies the Government sets out the reasons why fossil fuel generating with CCUS assists in decarbonising the energy sector and achieving net zero. Therefore the overall reasoning is clear.

62. Under Ground Two(b) the Claimant argues that EN-1 does not set out criteria for assessing significance of GHG emissions for the purpose of environmental assessment. If the SoS really was relying on EN-1 then there is no basis for doing so, given that EN-1 gives no guidance on that issue.

63. Ground Two(b) is an amended Ground, which the SoS and the IP object to on the basis that the amendment was sought late and without adequate justification. Ms Dobson submits that it was only at the point of the SoS's Detailed Grounds of Defence that it became clear to the Claimant that the SoS was arguing that her assessment of significance was based on EN-1. Therefore the amendment was sought as soon as was reasonably possible.

64. Ms Dobson submits that para 5.2.2 of EN-1 is addressed to the substantive determination stage of the process only. The SoS has conflated the EIA stage of the process with the second stage of determining the substantive application and thus misinterpreted EN-1.

65. Ms Dobson referred to *R (Finch) v Surrey CC* [2024] UKSC 20, at [151]- [152] where it was said:

> *"… It is also necessary to recall that the aim of the EIA is to establish general principles for assessing environmental effects. UK national policy is clearly relevant to the substantive decision whether to grant development consent. But it is irrelevant to the scope of EIA. For reasons discussed earlier, the fact (if and in so far as it is a fact) that a decision to grant development consent for a particular project is dictated by national policy does not dispense with the obligation to conduct an EIA; nor does it justify limiting the scope of the EIA.*
>
> *152. The second, related flaw is also fundamental. The argument made is a version of the claim that, if information about environmental impacts would make no difference to the decision whether to grant development consent (or on what conditions), it is not legally necessary to obtain and assess such information in the EIA process. Such a contention was resoundingly rejected by the House of Lords in Berkeley . It misunderstands the procedural nature of the EIA. The fact (if it be the fact) that information will have no influence on whether the project is permitted to proceed does not make it pointless to obtain and assess the information. It remains essential to ensure that a project which is likely to have significant adverse effects on the environment is authorised with full knowledge of these consequences."*

66. However, it is not clear to me how this is said to be relevant to Ground Two(b). This is not a case where an environmental impact, GHG emissions, were not fully assessed for the purposes of EIA. Nor is it suggested that those impacts were not considered and weighed in the ultimate planning balance. Both stages of the process were undertaken, and the SoS weighed up the significant adverse impact of GHG emissions, in the ultimate planning balance. Therefore the case is analytically quite different from *Finch* and the dicta of Lord Leggatt does not impact on the alleged error of law here.

67. Ms Grogan and Mr Phillpot submit that there is no arguable error in respect of the interpretation of EN-1. The reliance on EN-1 paragraph 5.2.2 falls well within the scope of the words and therefore there is no misinterpretation of the policy. Mr Phillpot submitted that the submission really goes to misapplication rather than

misinterpretation, but in my view this introduces a level of complexity into the argument that is not necessary on the facts of this case.

68. Ground Four is that the SoS failed to reach a lawful assessment of need for the Scheme. The Claimant relies on para 3.2.3 of EN-1:

> *"This Part of the NPS explains why the Government considers that, without significant amounts of new large-scale energy infrastructure, the objectives of its energy and climate change policy cannot be fulfilled. However, as noted in Section 1.7, it will not be possible to develop the necessary amounts of such infrastructure without some significant residual adverse impacts. This Part also shows why the Government considers that the need for such infrastructure will often be urgent. The IPC should therefore give substantial weight to considerations of need. The weight which is attributed to considerations of need in any given case should be proportionate to the anticipated extent of a project's actual contribution to satisfying the need for a particular type of infrastructure."* [emphasis added]

69. The Claimant relies on *ClientEarth* at [66] and [68]:

> *"66. It is with this point firmly established – "substantial weight" should be given to "considerations of need" – that one comes to the final sentence of the paragraph, which concerns decision-making "in any given case". From the sentence itself three things are clear. First, while the starting point is that "substantial weight" is to be given to "considerations of need", the weight due to those considerations in a particular case is not immutably fixed. It should be "proportionate to the anticipated extent of [the] project's actual contribution to satisfying the need" for the relevant "type of infrastructure". To this extent, the decision-maker – formerly the IPC and now the Secretary of State – may determine whether there are reasons in the particular case for departing from the fundamental policy that "substantial weight" is accorded to "considerations of need". Secondly, the decision-maker must consider this question by judging what weight would be "proportionate" to the "anticipated extent" of the development's "actual contribution" to satisfying the need for infrastructure of that type. These are matters of planning judgment, which involve looking into the future. Thirdly, beyond the description of the decision-maker's task in those terms, there is no single, prescribed way of performing that task, and there are no specified considerations to be taken into account, or excluded. It is not stated that the issue of what is "proportionate" to the proposal's "actual contribution" must, or should normally, be approached on a "quantitative" rather than a "qualitative" basis.*
>
> *…*
>
> *68. Properly understood, paragraph 3.2.3 is not in tension with the other policies. It supports them. Based, as it is, on the fundamental policy that "substantial weight" is to be given to the contribution made by projects towards satisfying the established need for energy*

> *infrastructure development of the types covered by EN-1, including CCR fossil fuel generation infrastructure, it ensures that the decision-maker takes a realistic, and not an exaggerated, view of the weight to be given to "considerations of need" in the particular case before him, which should be "proportionate to" the "actual contribution" the project is likely to make to "satisfying the need" for infrastructure of that type. That is its function."*

70. The Claimant submits that the SoS failed to consider the extent to which the Scheme contributed to the need for a fossil fuel generating station with CCS, before determining the weight to be given to need. He relies upon the last sentence of [66] in *ClientEarth* and the alleged requirement to find an "actual contribution" to meeting need.

71. Ms Grogan and Mr Phillpot submit that this is an example of taking one sentence (here in EN-1) out of context and trying to turn it into a legal test, without seeing the wider picture. The need for the project is entirely clear from the policy background, the ExAR (5.2.16 as but one example) and the DL.

Conclusions

72. Grounds One and Two(a) fail, essentially for the reasons given by the Defendant. Although the IPs used the IEMA Guidance, and this was relied upon by the ExA, if the DL is read sensibly and as a whole it seems to me clear that the SoS at the end of DL4.58 was not relying on IEMA for her conclusion on significance.

73. First is the very simple point that she does not refer to the IEMA Guidance in that paragraph, nor does she refer to the analysis which is set out in that Guidance. She does, on the other hand, refer to the NPS, i.e. EN-1, and the reference therein to significant adverse effects of GHG emissions. I agree with Ms Grogan that if the SoS had been relying on IEMA then it could reasonably be expected that she would have said so, either in this paragraph or earlier in the DL.

74. Second, and most importantly in my view, the paragraph makes perfectly good sense if the SoS is assessing significance on the simple basis of EN-1 and EN-2, and through the clear, if perhaps a little simplistic, approach that 20,450,719 tCO2e is a very large quantum of GHG emissions. That related back to what had been said at DL4.41 and in that context is itself clear.

75. Third, if the Claimant is right on the use of IEMA then it would be correct to say that DL4.58 makes little sense because the Defendant has found in the DL that the Scheme supports the transition to net zero. I do not think this shows that the SoS is muddling the two stages of analysis, but rather that she is applying the more absolute analysis of significance at the EIA stage, and then weighing that against the broader policy context of transition to net zero at the substantive stage. If the reasons are read in that way, they make perfectly good sense.

76. Fourth, I agree with Mr Phillpot that the Claimant is wilfully choosing to ignore what is said in national policy about the net zero trajectory and the need for CCS/CCUS. The Claimant plainly disagrees with the SoS's approach, and indeed that of the Climate Change Committee, in their support for this project. He is seeking to use this

case as a method of challenging the policy support for the Scheme by trying to find an inconsistency in the SoS's analysis where none actually exists. However, the basis of SoS's approach is clear both from the policy documents and the ExAR and DL in this case.

77. On this basis Ground Two falls away because there is no logical flaw in the reasoning. The SoS is not relying on IEMA and so there is no inconsistency in DL4.58.

78. Finally, on these Grounds I remain unconvinced that even if the SoS had been relying on IEMA it could have made any difference to the ultimate conclusion. The development was strongly supported in national policy, both planning and energy policy. It is entirely clear to any fair reader of the ExAR and the DL why the SoS supported the Scheme despite the level of emissions. The Claimant may disagree with the analysis and the weight given to different factors, but the reasoning behind the conclusions are both clear and lawful.

79. In respect of Ground Two(b) the first issue is whether I should give permission to amend well outside the statutory challenge timetable. Ms Dobson submits that it was only when the Claimant received the Detailed Grounds of Defence that it was realised that the SoS was arguing that the assessment of significance rested on EN-1. I can see that there was some potential confusion over the use of IEMA Guidance given the reliance that the IPs had placed on it. There is no prejudice to the Defendant and the IPs by the Court dealing with the Ground, and in my view it is more proportionate for me to deal with it.

80. The Claimant has in my view erected a bright line distinction between matters that go to EIA and those that go to determination, which is both unjustified but also thoroughly unhelpful. As was said by Sullivan LJ in *R v (Blewett) v Derbyshire County Council* [2004] Env LR 29, EIA is not supposed to be an obstacle course for decision makers to trip over. The purpose of EIA is inter alia to improve environmental decision making, so the idea that the significance of an impact for assessment purposes is legally distinct from that for determination purposes creates precisely such an obstacle course and is therefore very unlikely to be correct.

81. In my view the language and guidance of EN-1 para 5.2.2 comfortably encapsulates both assessment of impacts for the purposes of EIA and for the consideration of weight to be attached in the determination stage.

82. For these reasons I reject Grounds One and Two, but consider them arguable so will grant permission in respect of them.

83. Ground Four is in my view unarguable, and I refuse permission upon it. It is impossible to fairly read the DL and ExAR without it being entirely clear why there is a need for the project. The Claimant's approach is a wilful misreading of EN-1 and the DL. The policy background, which is extensively referred to in the DL, sets out the basis for the need for projects such as the development, as well as the development itself. There is no legal requirement for the SoS to set out further reasons in this regard.