Objections to DCOs

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Landmark Chambers

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Challenge Upstream

- The Planning Act 2008 was designed to put questions of policy and principle “upstream” in the process: into a sphere of political debate whose outcome is then manifested through legislation and National Policy Statements.
- The impetus for this was deliberately to avoid the type of five-year long inquiry that preceded the approval of Heathrow Terminal 5, an inquiry in which much time was taken on questions of the need for the Terminal and other policy issues.
- Consequently an individual or organisation that wishes to resist a Nationally Significant Infrastructure Project is well advised to start upstream at the political level, where issues of principle can be addressed.

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Consider Extinction Rebellion

- Its principal demand is to “reduce greenhouse gas emissions to net zero by 2025”.
- Clearly, this will require considerable infrastructure planning to halt GHG emitting development and promote alternatives.
- The opening line of EN-2 says this:

  > “Fossil fuel generating stations play a vital role in providing reliable electricity supplies and a secure and diverse energy mix as the UK makes the transition to a low carbon economy”

- And paragraph 2.2.1 of EN-1 commits to an 80% cut in greenhouse gas emissions compared to 1990 levels by 2050.
- Suppose XR wants to object to more coal-fired power stations.

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Global, National and Local Pressure

- A principled objection to a NPS or to a NSIP needs to be supported by a constituency of political opinion capable of changing the political opinion.

- Opposition at a global level may help…

- But fortunately, the national level is probably sufficient - through involvement with the NPS process.

Sections 104-6 Planning Act 2008

Section 104 of the Planning Act 2008 constrains the Secretary of State when determining an application for a DCO for development in relation to which an NPS has effect:

- "(2) In deciding the application the Secretary of State must have regard to—
- (a) any [NPS] which has effect in relation to development of the description to which the application relates (a 'relevant [NPS]')

Section 104 is complemented by section 106 which, under the heading "Matters which may be disregarded when determining an application", provides (so far as relevant to these claims):

"(1) In deciding an application for an order granting development consent, the Secretary of State may disregard representations if the Secretary of State considers that the representations—

(a) …

(b) relate to the merits of policy set out in [an NPS]…".

(2) In this section 'representation' includes evidence."

Arguments about the Merits of Policy

Arguments about the merits of national policy are precluded at examination stage of a DCO. The Planning Act 2008 does make provision for such arguments at the policy stage. As explained by the divisional court in *Spurrier at* paragraph 30:

> "Briefly, the Secretary of State produces a draft NPS, which is subject to (i) an appraisal of sustainability ("AoS") (section 5(3)), (ii) public consultation and publicity (section 7), and (iii) Parliamentary scrutiny (sections 5(4) and 9). In addition, there is a requirement to carry out a strategic environmental assessment ("SEA") under Directive 2001/42/EC of the European Parliament and of the Council on the assessment of the effects of certain plans and programmes on the environment ("the SEA Directive") as transposed by the Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004 No 1633) ("the SEA Regulations") (see regulation 5(2) of the SEA Regulations).
>
> 31. The consultation and publicity requirements are set out in section 7"

Energy National Policy Statements

- The six energy NPSs are all from 2011 and on the issue of Climate Change reflect targets from the Climate Change Act 2008.

- The six NPSs on energy, EN1 through to EN 6 will not ensure that the UK achieves net zero carbon by 2025, nor even that it meets the new targets as set out in the Paris Agreement to limit temperature rise to 1.5 degrees or well below 2 degrees above 1990 levels by 2050.

- XR's submissions on the impacts of a fossil fuel development on climate change grounds in an individual case is highly restrained by the structure of the Planning Act 2008 which puts policy questions in the realm of international and national political judgment, not planning judgment. It is therefore necessary for this objector to campaign at the level of political principle.

- National Policy Statements are themselves amenable to judicial review: *Spurrier at 88-9*

Political Judgment

Spurrier at para 611

As we have explained, the assessment of any change to the [emissions] target – in terms of percentage and/or date – is a matter for political judgment, taking into consideration not only the evolving information and analysis in respect of climate change, but also the economic and social consequences of any change, and the position in other states with regard to proposals for their own, national actions to reduce the carbon burden.

Political Judgment

Spurrier *at 615*

The UK policy in this regard, now and at all relevant times, is and has been based on a national carbon cap. The cap is as set out the CCA 2008 . It is based upon the 2°C temperature limit. For the reasons we have given, that policy is "entrenched" and can only be changed through the statutory process. Despite the fact that Government policy could of course be outside any statutory provisions – and despite Mr Crosland's submissions that that, in some way, the CCA 2008 cap has to be read with the Paris Agreement (see, e.g., Transcript, day 7 pages 112 and 116) – neither policy nor international agreement can override a statute. Neither Government policy (in whatever form) nor the Paris Agreement can override or undermine the policy as set out in the CCA 2008 .

Summary on XR: Global resistance helps influence policy formation, but engagement at national level is key. Networks of local communities often achieve this most successfully: consider fracking.

Moving Downstream- DCOs

Spurrier *at paragraph 31:*

33. An NPS is not the end of the process. It simply sets the policy framework within which any application for a DCO must be determined. Section 31 provides that, even where a relevant NPS has been designated, "development consent" under the PA 2008 is required for development "to the extent that the development is or forms part of a nationally significant infrastructure project". Such applications must be made to the relevant Secretary of State (section 37).

DCO Consultation

Spurrier at paragraph 34:

34. Chapter 2 of Part 5 of the Act makes provision for a pre-application procedure. This provides for a duty to consult pre-application, which extends to consulting relevant local authorities and, where the land to be developed is in London, the GLA (section 42). There are also duties to consult the local community, and to publicise and to take account of responses to consultation and publicity (sections 47-49 ; and see also regulation 12 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017 No 572), which makes provision for publication of and consultation on preliminary environmental information). Any application for a DCO must be accompanied by a consultation report (section 37(3)(c)); and adequacy of consultation is one of the criteria for acceptance of the application (section 55(3) and (4)(a)).

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DCO Objections

United Valleys Action Group and Brig y Cwm Energy from Waste project

- This was the first application made for a Development Consent Order. It attracted the most objections of any such application. A petition was signed by more than 13,000 residents of Merthyr Tydfil and around 10,000 objections were made. The Infrastructure Planning Commission hired the local sports hall to seat up to a thousand objectors.
- The IPC- as it then was- was evidently daunted by the scale of management of objectors, so was pleased to discover that almost all of the objectors had spent days in advance in the Blast Furnace public house and the local Rugby Club consolidating and organising 13 discrete representatives to present on each issue, coordinated in that case by Friends of the Earth, represented by a barrister.
- Application had to be withdrawn after amendments proved necessary and were argued by objectors to be material: the IPC agreed.

Objection Strategy

- Challenge designation as a NSIP if possible.
- Over 100 DCO applications have been made since the PA 2008
- 73 have been granted
- 7 have been not accepted as DCOs or withdrawn
- 4 DCOs have been specifically not confirmed
- Rest are in process

- Chances of successful objection are- on this limited sample- around 5%.
- Greater chance of the DCO being not accepted or withdrawn.

Objection Strategy

- Advocate for Issue Specific Oral hearings to amplify any matter relevant to non-confirmation of the order

  (Unlikely that the Examining Authority would recommend non-confirmation of a DCO on any matter that is not sufficiently controversial to merit an issue-specific hearing)

- Reassure the Examining Authority that the objectors are organised and will not duplicate;
- Prepare Running Orders and specific issues for each speaker.
- Be astute to procedural issues as well as points on the merits- e.g. as to material changes (Brig y Cwm)

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Prepare for JR

- Judicial Reviews of DCO decisions rarely succeed.
- One example: *R (Hailte Energy Group) v SSCCE* [2014] EWHC 17
- Grounds – Unfair to take decision on a matter of expert opinion which differed to a joint expert view expressed in evidence where no opportunity given to challenge the alternative view.
- SS failed to give adequate reasons for differences with the Examining Authority
- But this was a successful challenge quashing a decision to refuse a Development Consent Order!

Preparing for JR

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- **Evidence and Argument at Examination is a crucial pre-requisite.**
- **Some funding considerations for individuals**:
    - **Legal Aid**-
        - Protection against paying any of the costs of the other side usually follows, but court can sometimes order payment of a reasonable amount of costs
        - Contributions from capital/income (not recovered unless opponent pays all the costs)
        - Statutory charge (e.g. in damages claims)
    - **Aarhus claim**- costs protection- Part 6 of JR claim form:
        - For environmental claims, caps adverse costs liability ordinarily at £5,000 for individuals and £10,000 for businesses and other legal persons see *R (RSPB) v SSJ* [2018] Env. L.R. 13
        - Note *CPRE Surrey v Waverley Borough Council* [2018] EWHC 2969 (Admin) (Lieven QC)- costs cap varied to £20,000 for CPRE on grounds of their history of fundraising. **NB for crowdfunding.**
    - **Pro Bono**
    - **Conditional Fee Agreement**
    - **JR Costs Capping Order** (public interest proceedings of general public importance)- application normally in, or accompanying, claim form. Decided at permission

Should objectors incorporate early on?

- Note the six week period for challenge: section 13 Planning Act 2008
- *R v Darlington BC and Darlington Transport Company ex p the Association of Darlington Taxi Drivers (*1994): Unincorporated body lacked legal capacity to litigate at all (Auld J)
- *Contrast R v Traffic Commissioner for the north Western Traffic Area ex p 'Brake'* [1996] Turner J.
- Local authorities may be claimants- e.g. *R (Luton Borough Council v Central Bedfordshire Council* [2015] EWCA Civ 537 (note Aarhus rules).
- NGOs- e.g. *R (Friends of the Earth Ltd) v Environment Agency* [2019] EWHC 25 (Admin).
- Incorporated Associations have general capacity to litigate and *locus standi: R (On the Application Of) Plantagenet Alliance Ltd v Secretary of State for Justice* [2014] EWHC 1662 at [81]); *R –v- Leicestershire County Council ex parte Blackfordby and Boothorpe Action Group Limited* [2001] Env LR 2 (Richards J); *Herefordshire Waste Watchers Limited –v- Hereford Council* [2005] EWHC 191 (Admin) (Elias J).

The Long March

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- Do promote a credible alternative from the outset: don’t merely object to what is on the table.

- Do continue to campaign: it is impossible to win every stage, so it is necessary to have the resolve to pursue an objection over a very lengthy timeframe.

The Long March (2)

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- ***R (Friends of the Earth) v Welsh Ministers*** [2015] EWHC 776 (Admin)
- This judicial review related to a DCO-scale scheme for an M4 relief road around Newport (because of the different regime in Wales was not in fact treated as a DCO specifically).
- The High Court challenge was to the selection of a preferred option.
- Grounds challenged (i) the Strategic Environmental Assessment process and in particular alleged a failure to properly appraise reasonable alternatives and (ii) failure to take proper account of the impact of the proposals on the "Gwent levels"- a series of four SSSIs. The focus of the allegation of a failure to investigate alternatives was that objectors to the scheme had promoted an alternative route to relieve congestion on the M4 around Newport which engendered no harm to the SSSIs. Objectors called this the "Blue Route".

Long March (3)

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- The High Court rejected the challenge saying that the consideration of reasonable alternatives was sound and that the SEA assessment had properly considered the potential ecological harm to the SSSIs and the available mitigation measures, and that the Welsh Ministers' "conclusion that the plan would give rise to minor negative harm overall was unassailable as a matter of law"

- So said the Court in 2015. The matter proceeded to the project application stage.
- And so said the Inspector in a 559 page report in September 2018 following an inquiry.

- But earlier this year, the scheme came forward for its final approval by the Welsh First Minister who decided that the ecological impacts of the development outweighed the harms!
- It was also rejected because funding was not in place so that the compulsory purchase could not be justified.
- The First Minister has directed that alternatives be investigated.
- The Blue Route continues to haunt the scheme.

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