

Is Climate Change the New Weapon of Choice in Environmental JR? Part 2



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Climate Change: Judicial View of the Evidence

The Divisional Court held in *Spurrier* [2020] PTSR 240 at §559:

“(i) concentration of GHGs in the earth’s atmosphere is directly linked to average global temperatures, (ii) the concentration of GHGs has been rising steadily—and, with it, mean global temperatures—since the start of the Industrial Revolution and (iii) the most abundant GHG, accounting for at least two thirds of all GHGs, is CO₂ which is largely the product of burning fossil fuels. The increase in global temperature has resulted in (amongst other things) sea level change; a decline in glaciers, the Antarctic ice sheet and Arctic sea ice; alterations to various ecosystems; and in some areas a threat to food and water supplies. It is potentially catastrophic.”

Some Planning Legislation on Climate Change

- Section 19(1A) of the Planning and Compulsory Purchase Act 2004 has for 12 years required local plans to contribute to the mitigation of climate change.
- Climate Change Act 2008 has committed to carbon budgets' established the committee on climate change; the Emissions Trading Scheme and other high-level policy interventions.
- Section 1 of the CCA 2008 set an emissions reductions target of 80% now increased to “netzero” : emissions of greenhouse gases being 100% lower than 1990 levels by 2050.
- Sections 5 and 10 of the Planning Act 2008- require NPSs to mitigate climate change.

Plan B Earth [2020] EWCA Civ 214
R (Packham) v SST [2020] EWCA Civ 1004

- See Part 1 (Andrew Byass' talk)
- <https://www.supremecourt.uk/cases/uksc-2020-0042.html>
- *R (Packham) v SST* [2020] EWCA Civ 1004

This claim alleged that the government, when conducting a review of whether to proceed with HS2 had failed to take proper account of the Paris Agreement. The CoA held on the facts the government had neither ignored nor misunderstood its obligations in relation to Climate Change. See Andrew Byass' talk

R (ClientEarth) v SSBEIS [2020] JPL 1438

ClientEarth applied under section 118 PA 2008 for judicial review of the decision by the Secretary of State to grant the application made by Drax Power Limited for a development consent order for a NSIP under the PA 2008 for the construction and operation of two gas-fired generating units situated at the existing Drax Power Station near Selby in North Yorkshire.

- SS had not erred in approach to a qualitative “need” for fossil fuels.
- Holgate J found that there was no possibility of challenging the merits of a NPS by way of a challenge to a development consent order under section 118 PA 2008.

R (Vince, Monbiot, Good Law Project) v SSBEIS

Challenge to Energy National Policy Statements. Irrational and frustrates statute not to exercise power to review the 2011 statements in light of

a. The amendment to section 1 to the Climate Change Act 2008 so that the UK's *net carbon account for the year 2050 is now* required to be 100% lower than the 1990 baseline rather than 80% lower, the target on which the Energy NPSs were premised on 27 June 2019,

b. Developments in the latest scientific understanding as to the urgency and scale of action needed on climate change; the UK's revised international commitments to the global effort to reduce temperature rises under the Paris Agreement; and

c. the unanimous parliamentary declaration of a “climate emergency” on 1 May 2019.

Rolled Up Hearing in January 2021

A next-door neighbour objected to an extension on grounds it would overshadow his solar panels, compromising his contribution to renewable energy and mitigating climate change. The planning officers advised that was not a material consideration because it was a purely private interest. Lane J quashed the planning permission holding that mitigation of climate change was a material planning consideration pursuant to the local plan; the NRPF and section 19(1A) of the Planning and Compulsory Purchase Act 2004 (which requires the local plan as a whole to contribute to the mitigation of climate change) and the failure to have regard to it was in fact irrational in the *Wednesbury* sense.

*R. (on the application of Stephenson) v Secretary of State for
Housing, Communities and Local Government* [\[2019\] P.T.S.R. 2209](#)

- Talk Fracking challenged the adoption of paragraph 209(a) of the NPPF
- Court held the government had failed to take into account scientific evidence put forward by the Claimant.
- Such evidence, submitted in relation to a consultation response was obviously material.

Cases in the Pipeline

- *Dunne v SSCLG* CO/ 2634 /2020
- This is an application under section 288 of the Town and Country Planning Act 1990 (“TCPA”) challenging the decision of the Secretary of State for Communities, Housing and Local Government, communicated by a decision letter dated 16th June 2020 (the “DL”), to grant planning permission for development described as: “the installation of a synchronous gas-powered standby generation facility”.
- Inspector found that there would be what he identified as harm from the development to mitigation of climate change, but he found that harm was expressly outweighed by for the sake of shorthand- the presumption in favour of fossil fuels in the NPSs.

Manston Airport DCO

- Claim brought by a Ms Dawes to a Development Consent Order.
- Inspectors recommended consent not be granted, but Minister overruled.
- Claim contends that the Secretary of State's analysis of the need for the development was flawed, and that, the Secretary of State failed to discharge his duty to ensure that the net UK carbon account for the year 2050 is at least 100% lower than the 1990 baseline ("Net Zero"), under section 1 of the Climate Change Act 2008.
- Detailed ground of Resistance due on 16 November 2020
- Looks as though a hearing has been set for 16-17 February 2021.

R (Finch) v Surrey County Council CO/4441/2019

- Due to be heard on 17 November 2020
- Claim seeking to quash the grant of planning permission to Horse Hill Developments Ltd for the retention and extension of a well site and the drilling of four new wells for the production of hydrocarbons. Friends of the Earth intervening.
- Claim concerns an apparently as yet unresolved point as to whether downstream GHG emissions from the oil produced by the development should be taken into account. The Claimant says that there was a patent defect in the Environmental Impact Assessment in failing to consider that. It relies- as to the materiality of these indirect effects on whether the effect is “*liable to result from the use and exploitation of the end product of works*”: *Abraham v Wallonia* [2008] Env LR 32 at §43; *Ecologistas ev Accion-CODA v Ayuntamiento de Madrid* [2009] PTSR 458 (“*Ecologistas*”) at §39 and *R (Squire) v Shropshire Council* [2019] Env LR 36 at §73ff.
- <http://www.wealdactiongroup.org.uk/2020/10/friends-of-the-earth-join-horse-hill-jr/#:~:text=by%20Sarah%20Finch,Friends%20of%20the%20Earth%20and%20Government%20minister%20to,in%20Horse%20Hill%20judicial%20review&text=Sarah%20argues%20that%20the%20Council,deciding%20to%20grant%20planning%20per%20mission>

Plan B Earth 2

- Proposes to bring a claim in the next few weeks which it is calling the "*Young People vs Government*" case.
- On behalf of three young co-claimants, Marina, Jerry and Ade, with family in Latin America, Ghana, Nigeria and the Caribbean, who will argue breaches of their rights under Article 2 & 8. They want the court to declare that what it calls a government *de facto* policy of disregarding its climate obligations in its financial interventions in response to COVID-19 is unlawful and commissions an actionable plan to comply with its obligations under the Human Rights Act 1998.
- A related case is the celebrated decision of the Supreme Court of the Netherlands which held that the state *is* responsible for excessive emissions, triggering positive emissions reduction obligations under ECHR articles 2 and 8 in *Urgenda v The State of the Netherlands* (20 December 2019)

Three More Pipeline Cases

Oil and Gas Authority's Maximising Economic Recovery UK Strategy

- Proposed Challenge on hold pending a review (not yet issued)
- Challenge to Road Investment Strategy 2: permission granted in August by Lieven J: Road Strategy not thought through with regard to the climate. (see Andrew Byass talk)
- Friends of the Earth Challenge against the Chancellor, Department for International Trade and UK Export Finance to their use of taxpayer money to part fund a new Liquid Natural Gas mega-project in Mozambique :
- <https://www.theguardian.com/business/2020/sep/07/legal-challenge-uk-1bn-grant-mozambique-gas-project> ;
- <https://www.energyvoice.com/oilandgas/africa/263818/mozambique-lng-uk-emissions/> ;
- <https://friendsoftheearth.uk/climate-change/your-money-funding-fossil-fuel-projects>

Thank you for listening

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