

Energy Development and Climate Change



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Introduction

(1) Consider climate change aspects of National Policy Statements Review;

(2) Then do a round-up of recent cases relating to energy and climate change

PART I – CLIMATE CHANGE ASPECTS OF NPS REVIEW

National Policy Statements Review

R (Vince & Others) v SSBEIS (CO/1832/2020)

- JR claim against unlawful failure by SoS to review the Energy NPSs designated in 2011 in the light of changes in CC policy, including Net Zero.
- Settled prior to hearing due to announcement by SoS that it would consult on revised Energy NPSs.
- Govt. deny the JR led to review, say intended to review anyway.
- Consultation commenced on 6 September 2021 (and closed on 29 November 2021): <https://www.gov.uk/government/consultations/planning-for-new-energy-infrastructure-review-of-energy-national-policy-statements>.

Scrutiny by House of Commons Business, Energy, and Industrial Strategy Committee:

- (draft) EN-1 does not provide the “step change” needed to deliver the required scale of new NSIPs at a sufficiently rapid pace to deliver the Government’s net zero aims.
- This is largely due to ambiguity in the drafting about the relative weight of ‘climate change’ relative to local impacts to be taken into account in making planning decisions.

Committee recommended:

- that revised (draft) EN-1 be further amended to make the Government's commitment to net zero more explicit and to provide a clear and unambiguous direction to the Secretary of State to prioritise the importance of climate change in decision-making.
- that revised (draft) EN-1 provides clearer direction in favour of the presumption of the delivery of new energy infrastructure required to deliver net zero. Revised (draft) EN-1 should explicitly sets out that the NPS takes precedent over any other conflicting local or statutory bodies' planning policies.
- that the link between the Government's renewables targets and planning principles must be made explicit in respect of each technology or generation capacity, so that they are clearly understood by planning authorities and industry to facilitate the delivery of renewable energy infrastructure projects
- In order to properly take into account the rapid pace of technological change in the energy sector and the need for significant progress towards meeting our net zero target, the NPS must be reviewed more frequently, the Energy NPS should be reviewed every five years.
- More explicit recognition of role of onshore wind, carbon capture and hydrogen strategy.

PART II – ENERGY AND CLIMATE CHANGE CASE-LAW

Climate change: legislative and policy context

- **Legislative framework:**
- **The Climate Change Act 2008 (“the CCA 2008”):**
- S. 1:
 - Originally enacted target - reduction by 2050 to at least 80% below 1990 level
 - 2019 Order (12 June 2019): amends target to by 2050 to at least 100% below 1990 level (“net zero”)
- S. 4: duty to set carbon budgets for five-year periods; S.13: duty to prepare policies to achieve carbon budgets to 2050
- **The Carbon Budget Order 2021** (16 April 202)
 - Sixth carbon budget (covering 2033-2037) - Target: 78% reduction in emissions by 2035
 - This budget includes international aviation and shipping emissions for the first time
- **Policy updates:** UK’s Nationally-determined contribution (or “NDC”) (Dec 2020), Build Back Britain (March 2021), NPPF changes (July 2021, planning system should “*shape places in ways that contribute to radical reductions in greenhouse gas emissions*”), Jet Zero Consultation (July 2021), Decarbonising Transport: A Better, Greener Britain (July 2021), Net Zero Strategy: Build Back Greener (Oct 2021) and COP26 (Nov 2021)

Energy and Climate Change - Cases (1)

1. ***R (ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy*** [2020] EWHC 1303 (Admin) (HC, JR of Development Consent Order (“DCO”) granted under Planning Act 2008 (“the PA 2008”) for gas fired generating units at Drax Power Station);
2. ***R (Elliott-Smith) v Secretary of State for Business, Energy and Industrial Strategy*** [2021] EWHC 1633 (Admin) (HC, JR of decision to create the UK Emissions Trading System to replace the EU ETS).
3. ***R (Finch) v Surrey CC*** [2022] EWCA Civ 187 (CA, indirect emissions and EIA);

Energy and Climate Change - Cases (2)

4. ***Greenpeace Ltd v. Advocate General*** [2021] CSIH 53 (OGA consent for off-shore oil and gas exploitation, indirect emissions and EIA)
5. ***R (oao Cox) v. Oil and Gas Authority*** [2022] EWHC 75 (Admin) (JR of changes made to oil and gas economic recovery strategy)
6. ***R. (Friends of the Earth Ltd) v Secretary of State for International Trade/Export Credits Guarantee Department (UK Export Finance)*** [2022] EWHC 568 (Admin) (HC, JR of decision to provide export finance and support in relation to a liquefied natural gas (“LNG”) project in Mozambique).
7. ***R (GOESA Limited) v. Eastleigh BC and Southampton Internation Airport*** [2022] EWHC 1221 (Admin) (JR of airport extension on basis of alleged failure to assess cumulation of GHG effects with other projects)

Energy and Climate change cases

(1) *R (ClientEarth) v SSBEIS* [2021] PTSR 1400

- HC held:
 - Decision to grant DCO under PA 2008 for two gas-fired generating units at an existing power station was based on a lawful interpretation of the Overarching National Policy Statement for Energy (“EN-1”) as not requiring a quantitative assessment of need.
 - The weight to give to greenhouse gas (“GHG”) emissions impact is a matter for the decision-maker, and SoS was entitled to regard it as not being determinative in the balancing exercise.

Energy and Climate change cases

(2) *R (Elliott-Smith) v SSBEIS* [2021] EWHC 1633 (Admin)

- The UK Emissions Trading Scheme (“ETS”), which replaced the EU ETS after Brexit, HC held:
 - (1) SoS did not unlawfully fail to take account of the Paris Agreement (albeit not expressly referencing it), and
 - (2) The ETS served the statutory purpose in CCA 2008, s.44 of “*limiting or encouraging the limitation of activities*” causing GHG emissions.

Energy and Climate change cases: *Finch 1*

(3) *R (Finch) v Surrey CC* [2022] EWCA Civ 187

- JR of commercial extraction of oil at Horse Hill in Surrey.
- The main issue: should EIA have included assessment of the downstream refinement, distribution and sale of the oil in terms of GHG emissions?
- Holgate J dismissed the application for JR against the LPA's decision, finding that the GHG emissions from future combustion of the refined oil products were "*as a matter of law, incapable of falling within the scope of the [requisite] EIA*" [126].
- Holgate J also held that the "*true legal test*" of whether an effect constitutes an indirect likely significant effect of the development on the environment "*is whether an effect on the environment is an effect of the development for which planning permission is sought*" [101].
- C appealed. Appeal failed: 2:1 in CA

Energy and Climate change cases: *Finch 2*

- At [15] of the judgment Lindblom LJ in CA , identified the following relevant principles:
 - (1) While a broad and purposive approach to the interpretation of EU legislation is appropriate, it must always respect the words actually used;
 - (2) The legislation for EIA is directed at a project of development. The concept of a "*project*" is one to which a broad interpretation should be applied;
 - (3) An assessment of the LSE "*of the project on the environment*" under the EIA Directive extends to the effects of the use of the works as well as their construction;
 - (4) An EIA must address the particular development under consideration, not some further or different project;
 - (5) The existence and nature of "*indirect*", "*secondary*" or "*cumulative*" effects will always depend on the particular facts and circumstances of the development under consideration;
 - (6) Where an EIA has to address the "*indirect*" effects of a proposed development, it must include a sufficient assessment of such effects;
 - (7) Establishing what information should be included in an environmental statement, and whether that information is adequate, is for the relevant planning authority, subject to the court's jurisdiction on conventional public law grounds e.g. ***Wednesbury***.

Energy and Climate change cases: *Finch 3*

- All three Lord Justices held that:
 - (1) The question of whether an environmental impact was an effect of the development for which planning permission was sought was not a "*true legal test*" ([41], [95] and [141]).
 - (2) Rather, consideration needs to be given to the degree of connection between the development and its putative effects.
 - (3) Holgate J wrong to hold that the GHG emissions from future combustion of the refined oil products were, as a matter of law, incapable of falling within the scope of EIA ([43]).
 - (4) Instead the question of whether the emissions of the oil extraction needed to be assessed was one of fact and evaluative judgment for the planning authority ([57]).
 - (5) The downstream emissions of hydrocarbon development might properly be regarded as indirect environmental effects, depending on the specifics of the project ([67]).
- In the particular circumstances of this case, Lindblom LJ held (Lewison LJ agreed), the Council's decision to exclude downstream GHG emissions from the EIA was lawful.
- Moylan LJ dissented.

Energy and Climate change cases

- **(4) *Greenpeace Ltd v. Advocate General***
 - Scottish JR of OGA consent for off-shore oil and gas exploitation project in North Sea;
 - Alleged that Reg 3A of the Offshore Petroleum Production and Pipe-lines (Assessment of Environmental Effects) Regs 1999 required an assessment of the CHG emissions of use of extracted and refined oil and gas by end consumer;
 - Held, in reliance on HC decision in *Finch*, the consumption of the extracted and refined oil and gas by the end user was not a direct or indirect significant effect of the project so no requirement to assess.

Energy and Climate change cases

- **(5) *R (oao Cox) v. Oil and Gas Authority***

- JR to changes made by OGA to “The Maximising Recovery Strategy for the UK”;
- Were the changes irrational in light of S of S duties under the Climate Change Act 2008, s.1?

Challenge rejected:

- Amended strategy did not necessarily result in maximised extraction – instead it required maximisation of the expected net value of economically recoverable petroleum,
- Carbon costs had been brought within assessment of economic recovery;
- Balancing various objections a matter for the regulator, not the Court.

Energy and Climate change cases

- ***(6) Friends of the Earth (UK Export Finance)***
 - JR of decision to provide up to USD 1.15 billion in export finance and support in relation to a liquefied natural gas (“LNG”) project in Mozambique (“the Project”).
 - Alleged:
 - (i) The decision was based on an error of law or fact, namely that the Project and its funding was compatible with the UK’s commitments under the Paris Climate Change Agreement and/or assisted Mozambique to achieve its commitments under the Paris Agreement and/or
 - (ii) The decision was otherwise unlawful in so far as it was reached without regard to essential relevant considerations in reaching the view that funding the Project aligned with the UK and Mozambique’s obligations under the Paris Agreement.
 - Failed.

Energy and Climate change cases

- ***(7) R (GOESA Limited) v. Eastleigh BC and Southampton International Airport*** [2022] EWHC 1221 (Admin)

- JR (not of energy decision but very recent decision of relevance to energy projects)
- Challenge to EIA of airport expansion project on basis of failure to ensure cumulative project GHG emissions acceptable and in line with carbon budgeting;

Claim rejected:

- other airport expansion plans were taken into account in national figures;
- nothing unlawful in assessing project emissions as a percentage of national budget/target and taking a broad judgement as to acceptability.

And, one to watch: -

Friends of the Earth, ClientEarth and Good Law Project v. S of S BEIS

- JR of Government's Net Zero Strategy (which contains policies and proposals relating to energy development);
- Claim that NZS contained insufficient information and insufficient quantification to demonstrate that carbon budgets would be met, contrary to sections 13 and 14 CCA 2008;
- Revelation in Court that internal email showed that Government knew that policies and proposals in NZS would not meet targets - this was not clear on face of NZS and had not been made clear to Parliament;
- Hearing before Holgate J last week – Judgment awaited.

Thank you for listening

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