OFFSHORE WIND FARMS

EAST ANGLIA ONE NORTH

PINS Ref: EN010077

and

EAST ANGLIA TWO

PINS Ref: EN010078

SEAS response to the Secretary of State for Business, Energy and Industrial Strategy's request for further information

30 November 2021

SEAS (Suffolk Energy Action Solutions)

Unique Ref. No. EA1(N): 2002 4494 Unique Ref. No. EA2: 2002 4496

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SEAS response to the Secretary of State for Business, Energy and Industrial Strategy's request for further information

30 November 2021

Introduction

1. This submission responds to the request for submission issued by the Secretary of State for Business, Energy and Industrial Strategy (BEIS) on 2nd November 2021.

2. That request seeks information relating to a range of evidential matters affecting the suitability of the Friston site.

Context

3. We are compelled to put on record a serious objection to the manner in which this request has been made.

4. Over the course of the inquiry, Suffolk Energy Action Solutions (SEAS) and others have placed before the Secretary of State and of course the Examining Authority (ExA) itself, extensive evidence setting out how ScottishPower Renewables (SPR), using a system of secret payments, pressurised landowners into not participating in the investigation. These were all persons and organisations who otherwise would have had a powerful and direct interest in opposing SPR's application for consent.

5. As the Secretary of State is aware, not only have we drawn all of this to his attention in the past (see Appendix A) but we have also brought this material to the attention of the House of Commons Select Committee, the BEIS Offshore Transmission Network Review, the press, and the Solicitors Regulation Authority (SRA) who are presently investigating whether the involvement of lawyers in this system of secret payments designed to undermine a public planning process violates the SRA code for solicitors.

6. We have in all of our evidence provided chapter and verse explaining how and why SPR has succeeded in preventing the ExA from being able to collect full and fair evidence. We have also explained how the ExA, in a procedural decision,[1] set out that SPR's conduct raised a serious issue which could affect their conduct of the proceedings. However, again as we have fully explained, SPR then refused to provide any information and the position is thus left that the facts that SEAS have set out are unchallenged by SPR.

[1] The Procedural Decision on Negotiations with Affected Persons, Examining Authority, 22 February 2021. Link

7. One fact we have drawn to the attention of the Secretary of State is that under SPR's Heads of Terms, that it used to gag landowners and prevent them from participating in the inquiry, the restriction on giving evidence against SPR extended beyond the planning stage and covers also submissions to the Secretary of State – *such as are now sought by the present request for evidence*.

Serious Objection

8. Yet, even now, and even after the Rt Hon Therese Coffey MP intervened to write to the Minster classifying SPR's conduct as "*sharp*", the present request fails to even acknowledge that the entire process of evidence collection has been undermined by SPR.

9. SPR has, to date, successfully gagged and stifled what would inevitably have been pressing, powerful and well-resourced opposition from the most directly affected landowners. The present request will not be responded to by those landowners, for exactly the same reasons.

10. The request therefore perpetuates the deep unfairness that has tainted this planning process from start to finish. If the Secretary of State factors into the analysis evidence that is received by way of responses it will by its very nature be slanted unfairly in favour of SPR.

Conclusion

11. The decision the Secretary of State must take is fact and evidence intensive. If the Secretary of State takes a decision in favour of SPR and grants consent it will inevitably be upon the basis of a procedure that has been unfair from the very outset.

12. There will be a challenge by way of judicial review in which it will be contended that the Secretary of State, fully aware of the unfairness and the unethical behaviour of the developer, has nonetheless acted to condone that unethical conduct.

13. Recent polls consistently evidence the extraordinarily high percentage of people who consider that governmental decisions are being taken unethically (about 90%).

14. Planning procedures are intended to be fair, objective and transparent and taken in the public interest upon the basis of the fullest possible evidence. It cannot conceivably be right that a procedure overseen by the Secretary of State can be permitted to be suborned in this manner.

Appendix A

SUFFOLK ENERGY ACTION SOLUTIONS

Submission to the Secretary of State in relation to applications by ScottishPower Renewables (SPR) for consent on planning applications East Anglia One North (EA1N) and East Anglia Two (EA2)

7 October 2021

A. **Introduction and context**

Context

1. The Examining Authority (the Inspectors) are due to report to the Secretary of State in or about early October in relation to the applications by ScottishPower Renewables (SPR) for consent on applications East Anglia One North (EA1N) and East Anglia Two (EA2). The Secretary of State has three months thereafter in which to make a decision.

2. This submission addresses an issue of law and policy that the Secretary of State must address in light of the recommendations of the Inspectors. This submission is supplementary to those already made on the issue. It brings the analysis up to date.

3. The full documentation, which includes that submitted to the Inspectors by all affected parties (including therefore SPR), is linked.[1]

4. The applications for consent concern offshore wind turbines the power from which is, under the applications, due to be landed at the fragile and crumbling Sizewell cliffs and then run in a cable for about 9km through the Suffolk Coast and Heaths AONB (Area of Outstanding Natural Beauty), the Leiston-Aldeburgh SSSI (Site of Special Scientific Interest**),** the Sandlings SPA (Special Protected Area) and the villages of Thorpeness and Aldringham to end at substations, two and a half times

[1] Letter of Complaint to the Inspectors, SEAS, 14 February 2021 Link

An Additional Submission following Issue Specific Hearing 9, SEAS, 22 February 2021 Link

Main SEAS Submission, Negotiations with Affected Persons, SEAS Deadline 8, 25 March 2021 Link

SEAS Response to the submission of SPR at Deadline 8 on SEAS's complaint about gagging and non-opposition clauses, SEAS Deadline 10, May 2021 Link

SEAS's Response to the Applicants' Comments [REP10-031] on SEAS's complaint about gagging and non-participation and opposition clauses, SEAS Deadline 13, 5 July 2021 Link

The Applicants Response to SEAS Complaint, SPR, 4 March 2021 Link

The Applicants Written Summary of Oral Case, SPR, 19 March 2021 Link

The Applicants Response to SEAS Complaint, SPR, 15 April 2021 Link

The Applicants comments on SEAS NDA Complaint, SPR, 6 May 2021 Link

the size of Wembley Stadium, located in the heart of the ancient village of Friston in rural Suffolk.

5. The site cuts across medieval pilgrim paths which link Friston to adjacent villages and churches. The area is one of outstanding natural beauty. It is close to the famous Benjamin Britten Concert Hall at Snape and to the coastal resort of Aldeburgh.

6. There is no precedent for the placing of structures this vast and overwhelming in a residential setting surrounded by ancient farmland. The substation is planned to be one of the largest ever installed in Europe. The development will decimate the village of Friston and its local environment.

Widespread opposition from across the region to the applications

7. Not surprisingly the applications have engendered fierce opposition from a multitude of political, community and commercial groups from along the entire East Suffolk coastal region.

8. There is considerable enthusiasm for green energy projects. However, there is opposition to the implementation of an energy policy that causes destruction of the countryside in a wholly unnecessary manner.

9. There are alternative ways of landing wind turbine energy and connecting it to the grid which do not desolate the countryside and coastal communities.

SPR's strategy of neutralising opposition

10. Knowing that its applications would be controversial and opposed, SPR set out to neutralise opposition by those most directly affected. This included all those whose land SPR needed to acquire or gain access to. Given the scale of the development this amounts to a large number of landowners, and it includes certain local authorities.

11. SPR implemented a strategy of exploiting the enormous leverage that the compulsory purchase regime confers upon it. Under that regime SPR is entitled to purchase and obtain access to land that it needs to implement any consent given by the Secretary of State. Landowners have no real freedom of contact. They are not free to refuse to deal with SPR. The whip hand lies with SPR.

12. In the ordinary course, the use of compulsory purchase powers is conditional upon, and therefore subsequent to, the grant of development consent. It arises when the planning process has completed.

13. However, a practice has emerged of applicants for development seeking to enter agreements with landowners prior to consent. Developers are willing to pay a premium for these pre-consent agreements because it accelerates the development if consent is subsequently given. There is no objection in principle to developers seeking pre-agreement in this manner.

14. However, there is objection to developers using this statutory power as a device secretly to subvert and undermine the planning process.

15. The decision to grant or refuse consent is dictated by planning legislation and is governed by ordinary public law principles. These demand that planning decisions are objective, fair and transparent. Those affected by the proposed development have a statutory and common law right to give evidence to the Inspectors.

16. When Parliament enacted the compulsory purchase regime it was not contemplated for a moment that the system could be distorted by developers to undermine the planning process. Indeed at that point in time compulsory purchase processes were contemplated as occurring after the planning consent was given. The right to compulsory purchase a third person's land is conditional upon consent.

17. Parliament therefore assumed that the consent and approval process would be conducted in accordance with normal public law principles of fairness including the right of all affected persons to give unfettered submissions and evidence. Parliament operated upon the premise that a person might enter a compulsory purchase agreement even though that person had vigorously opposed the granting of consent in the earlier proceedings. Put another way – concluding a compulsory purchase agreement and opposing the grant of consent upon which the agreement is conditional are not mutually exclusive.

18. SPR set out, deliberately, to subvert the entire planning process. It did this by exploiting the existence of compulsory purchase powers to prohibit relevant landowners from *participating* in the planning process. Full details are set out below. This meant that directly affected parties could not submit written representations to the Inspectors, attend oral hearings and give evidence, or support and fund opposition groups. The SPR strategy extends beyond the proceedings before the Inspectors and covers subsequent submissions to the Secretary State and any resultant court proceedings.

19. SPR's strategy is a direct and unacceptable assault on a process governed by public law.

20. SPR's strategy of neutralising opponents was reinforced by the imposition of confidentiality and gagging bans on landowners. The entire process was always intended to be covert and secret. Indeed under SPR's terms, affected parties would have to lie and dissemble if asked about the reasons why they had not given evidence. It was never intended that the Inspectors, the Secretary of State, or even the courts should ever come to learn about this strategy.

21. All of this is incontrovertible. It flows out of documents drafted by lawyers for SPR and used in the course of these proceedings. It is set out in black and white terms.

22. It was by chance that over the course of the inquiry, these documents came to the attention of groups opposing the applications.

23. SPR's strategy was rigorously implemented by SPR, its land agents and its lawyers.

24. A complaint has been made to the Solicitors Regulation Authority (SRA) about the conduct of SPR's lawyers in devising, implementing and advancing this strategy in the course of the Inquiry. The SRA has indicated that the complaint meets the initial threshold for investigation and is now engaged in investigating.[2]

The failure of the Inspectors to grapple with the issue

25. As explained below, despite all of this being brought to the attention of the Inspectors, and despite the Inspectors issuing a formal decision expressing deep concern about attempts by SPR to undermine the ability of affected persons to give evidence, and despite the Inspectors saying that following full submissions by the parties they would take a definitive decision on the matter, and despite SPR then failing to make good on promises to provide the Inspectors with "full information", <u>the Inspectors did nothing</u>.

26. The Inspectors did not take any steps whatsoever to investigate or compel SPR to disclose relevant evidence and information. They took no steps at

[2] The following have been sent as a pdf in an email on 7 October 2021 with this Submission:

i) Supplementary Submission to the SRA concerning the involvement of solicitors in applications by ScottishPower Renewables (SPR) for consent on planning applications East Anglia One North and East Anglia Two, SEAS, 9 September 2021

ii) Submission to the SRA concerning the involvement of solicitors in applications by ScottishPower Renewables (SPR) for consent on planning applications East Anglia One North and East Anglia Two, SEAS, 17 June 2021

all to remedy the situation. They persisted in this passivity even after they were given a three month extension of the inquiry. Through this inaction the Inspectors have permitted SPR to proceed through the entire inquiry with the opposition having its arms tied behind its back.

27. The Inspectors have not explained why they have failed to take a decision on the complaint. The reason for this may well be that when this issue came to light the Inspectors were overwhelmed and could not cope, an extraordinary fact that they conveyed secretly to the Secretary of State but kept hidden from the parties. It only became public knowledge when SEAS sought information about the application made by the Inspectors to the Secretary of State in a FOIA request[3]. But for this, the state of disarray that the Inspectors found themselves in would have remained a concealed fact.

28. However, even when the extension was granted, the Inspectors failed to address this issue, despite now having an extra three months in which to investigate and despite SEAS now having been able to put chapter and verse before the Inspectors as set out in the Main SEAS Submission.[4]

29. The net effect of this is that the inquiry - from start to finish - proceeded with SPR successfully neutralising a class and category of affected person who, in normal circumstances, would be amongst the most directly and adversely affected of all persons and who could have been expected: to oppose the applications, to submit written and oral and expert evidence on issues directly relevant to the inquiry, and to support opposition groups by providing administrative and financial support etc.

30. The failure of the Inspectors to address this issue enabled SPR to tender evidence which has not been subjected to the same level of adverse scrutiny that it should have been subjected to and, at the same time, it has weakened the opposition to SPR by denying them financial and other support and resources.

31. SPR slanted and distorted the inquiry in its favour and it was able to persist with this strategy because the Inspectors failed to grapple with the issue having said that they would.

32. In law, it follows that any recommendation of the Inspectors which supports the applications is one that is riven through by unlawful procedural unfairness.

[3] Formal request to extend the Examinations for EA1N and EA2, Planning Inspectorate, 9 February 2021 Link
[4] Main SEAS Submission, Negotiations with Affected Persons, SEAS Deadline 8, 25 March 2021 Link

33. This has a further consequence. It is therefore not open in law for the Secretary of State to accept any such recommendation. Under well-established principles of public law any decision of the Secretary of State in favour of SPR will be set aside by the courts.

SPR's conduct after close of the Inquiry

34. SEAS must put down a marker.

35. After the end of the Inquiry SPR has continued to undertake extensive work on the proposed sites. It has carried out investigative work that it should have carried out before the Inquiry ended. This has included work on the proposed substation site, cable corridor and landfall site.

36. The assumption is that SPR will place this evidence before the Secretary of State in the hope that it will be accepted without challenge or test.

37. If SPR does this, it will serve only to compound the deep procedural unfairness that has already pervaded this Inquiry and process whereby SPR has sought to neutralise opposition to its evidence and applications. SEAS therefore reserves all rights in relation to any such attempt by SPR to introduce new evidence following the recommendations of the Inspectors.

B. **The facts**

The first complaint made to the Inspectors

38. It was chance that brought SPR's strategy to light. It emerged because at an early point during the proceedings a landowner whose land SPR wished to obtain access to, objected to SPR's attempt to gag him and prevent him from giving evidence hostile to SPR during the inquiry. Dr Alexander Gimson is a trustee of an important local charity, the Wardens Trust, which is situated on top of the cliffs at Sizewell and is literally metres from where SPR intended to land the cable from the turbines. The Wardens Trust provides respite care and other services to those with physical and mental disabilities. It is a collection of buildings that do not however have an independent water supply. It relies upon being able to access water from the aquifers that run under the ground here. The unequivocal evidence of Dr Gimson is that if the cables are landed as planned it will radically damage the underground aquifers and that in any event the development will represent an existential threat to the entire charity, the defining feature of which is a peaceful haven for those who visit. SPR needed access to his land in order to conduct underground

tests. They sent him a copy of their standard form agreement. This contained the full array of clauses prohibiting him from giving evidence to the Inquiry and gagging him. They offered over £50,000 to induce him to agree to these clauses. He refused to agree. He then made public the draft agreements. He drew the SPR documentation to the attention of the opposition groups and to the Inspectors.

39. This led Suffolk Energy Action Solutions (SEAS) to make a complaint on 14th February 2021, based upon this relatively limited evidence, in which it was alleged that SPR was using agreements to require landowners to refrain from assisting the Inspectors or objecting to the applications.[5]

SPR's application to have evidence of its alleged misconduct removed from the record upon the basis that it was "vexatious" and misleading

40. In light of the SEAS complaint SPR emphatically denied that it had any such policy.[6] It went public with its denial and procured an article in the national press (The Telegraph) in which it repeated the denials.[7]

25. Before the Inspectors, SPR's legal team personally attacked those who said that such a strategy existed, including Dr Gimson.

26. The SPR legal team (Shepherd & Wedderburn) then made a formal application to have the evidence of the alleged misconduct of SPR removed from the record upon the basis that, under the procedural governing rules, the evidence was "*vexatious*" and misleading. If the application succeeded the effect would be that the Inspectors would in effect expunge the evidence from the record.[8]

27. SPR's lawyers, in their oral submissions, stated to the Inspectors that when they had the "*full facts*", they would reject the complaint. The legal team represented that they would be providing the "*full facts*" i.e. full and comprehensive evidence to refute the complaint of misconduct by SPR.[9]

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[5] Letter of Complaint to the Inspectors, SEAS, 14 February 2021 [redacted]

[6] As recorded at page A2 in the Procedural Decision on Negotiations with Affected Persons, Examining Authority, 22 February 2021 [redacted]

[7] On 28th February 2021, journalist Rachel Millard wrote an article in the Telegraph about the SEAS complaint. A spokesperson for SPR denied both that SPR had entered into any agreements of the sort complained about or that it would ever seek to undermine a planning process. [redacted]

[8] The Applicants' Response to SEAS Complaint, SPR, 4 March 2021 [redacted]

[9] At Issue Specific Hearing 9 Session One on 19 February 2021, SPR indignantly stated that once the Examining Authority had seen the "full facts" and all the "material" it would reach a very different conclusion on SEAS "supposed complaint". Colin Innes, the solicitor leading for SPR stated: : "All I would say is that again it should be based on full facts of the particular circumstances that have been alleged. And in my submission, once you

28. As became clear when this representation was made, SPR's legal team must have known that the complaints against SPR were justified and that denials on its behalf were false. It is reasonable to infer that when they made this submission, they had no intention of providing the relevant evidence.

29. The Rt Hon Dr Therese Coffey MP and local councillors gave evidence before the Inspectors emphasising the critical importance of ensuring fair and open processes. Dr Coffey has expressed the view to the Secretary of State that in her view the SPR's strategy involved "*sharp*" practice.[10]

30. At a hearing on Friday 19th February the solicitor for SPR, Mr Colin Innes, attacked SEAS's complaint (of 14th February) as inaccurate and bordering on vexatious. Speaking on behalf of SEAS, Mr. Fincham, a retired City solicitor, rejected that argument. However, he properly made clear that SEAS would reconsider its position in the light of any submission and evidence which would be made by SPR in response to the SEAS complaint, especially since the SPR legal team had represented that it would provide the "*full facts*". Mr Fincham pointed out that Dr Gimson had given evidence that he was offered a sum in excess of £50,000 to withdraw his evidence.

31. SEAS then set out what evidence it thought SPR should provide: (1) a statement detailing all payments agreed or offered to interested or affected parties, charities, local authorities or other bodies or individuals; and (2) disclosure of all relevant material including concluded agreements, draft agreements or other documents containing or evidencing offers, and emails sent or received by SPR, or those acting for it, relevant to payments agreed or offered.[11]

32. SPR's lawyers were on notice as to exactly the sort of evidence that they should provide to support their application that those opposing SPR were formally "*vexatious*", within the procedural rules.

The Inspectors decision 22nd February 2021

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have read that material, I believe that you will reach a very different conclusion from that which has been submitted to you by SEAS in terms of their supposed complaint." Transcript Link Recording Link

[10] Transcript of The Rt Hon Dr Therese Coffey MP's NDA Submission [redacted]

[11] An Additional Submission following Issue Specific Hearing 9, SEAS, 22 February 2021 Link

41. On 22nd February 2021 the Inspectors issued a decision (the Decision) on the application made by SPR's lawyers to exclude the complaint by SEAS and others.[12]

42. The Inspectors rejected SPR's application and held that the complaints would be retained on the record.[13] The Inspectors rejected the submission that the complaint by SEAS and others was vexatious. They added that SPR would be given a full chance to respond to the complaint.[14]

43. In the Decision the Inspectors recorded the facts including that SPR had denied using agreements to gag opponents and prevent participation in the planning inquiry. It also noted that SPR had challenged those who had made allegations against SPR as "*vexatious*". It recorded the submission of the Rt Hon Dr Therese Coffey and others about the importance of fair and open proceedings.

44. The Inspectors made the following points:

45. First, they recognised that no one should take steps to "*raise any reasonable apprehension in the minds of affected persons that they are to be prevented from enjoying their statutory rights of participation in these Examinations or that their related human rights are not being responded to*".[15]

46. Secondly, they observed that "*Allegations of misconduct should not be made unless they can be clearly substantiated*".[16]

47. Thirdly, they made the following observations about the critical importance of affected persons having a full and fair right to make representations: "*It is not in the public interest that there should be an enduring apprehension on the part of an Affected Person that they might*

[12] The Procedural Decision on Negotiations with Affected Persons, Examining Authority, 22 February 2021 Link

[13] As recorded at pages A3 and A5 in the Procedural Decision on Negotiations with Affected Persons, Examining Authority, 22 February 2021 Link

[14] As recorded at page A3 in the Procedural Decision on Negotiations with Affected Persons, Examining Authority, 22 February 2021 Link

[15] As recorded at page A3 in the Procedural Decision on Negotiations with Affected Persons, Examining Authority, 22 February 2021 Link

[16] As recorded at page A3 in the Procedural Decision on Negotiations with Affected Persons, Examining Authority, 22 February 2021 Link

be prevented from participating in these Examinations to raise their outstanding planning merits objections".[17]

48. The Inspectors also observed that evidence had come to light that SPR was using contract terms to gag potential objectors and prevent them from participating in the inquiry.

49. The Inspectors stated of the complaints "*They raise a general point of public interest*".

50. Having decided that they would not reject the SEAS complaint and that of others about SPR it also stated that it would not take a "*concluded position*" on the substantive merits of the complaint until SPR had made its submission and submitted relevant evidence (as it had promised to do).[18]

51. The Inspectors reminded everyone that they should "*diligently review factual material*" and confine remarks to facts "*which they know to be verifiably true*" and to "*provide evidence where necessary*".

52. The Decision is important since it made clear the Inspectors views and, in particular, that they considered the issue to be of general public importance and that it was incumbent upon the SPR legal team now to diligently review the factual material and provide the relevant documentation.

The response of the SPR legal team

53. Various submissions were subsequently made by SPR and also by affected persons. These included what is now the Main SEAS Submission. This drew together all of the facts and evidence relating to SPR's strategy and set out a detailed legal analysis. It also provided references to the extensive evidence of opposition to SPR on this issue from residents all over the region.[19]

54. In the light of this SPR's legal team did not submit <u>any</u> evidence about SPR's agreements, about its negotiations with landowners, about the

[17] As recorded at page A4 in the Procedural Decision on Negotiations with Affected Persons, Examining Authority, 22 February 2021 Link

[18] As recorded at page A4 in the Procedural Decision on Negotiations with Affected Persons, Examining Authority, 22 February 2021 Link

[19] Main SEAS Submission, SEAS written submission for ISH14, Negotiations with Affected Persons Deadline 8, 25 March 2021 Link

payments made to affected persons to prevent them from participating and to buy their silence, etc.

55. The SPR team adopted a minimalist strategy lacking any semblance of transparency, and failing to proffer the "*full facts*" that it had informed the Inspectors it would disclose.

56. SRR's solicitors adopted this stance even though the Inspectors had held that SPR should provide relevant evidence and that this was an issue of real public importance.

57. SPR's legal responses were confined to short observations which seemed to suggest that the use of such a strategy was just normal commercial practice. The legal tactic was to stonewall.

58. In one extraordinary later legal submission, the lead solicitor acting for SPR, Mr Colin Innes, during a hearing relating to issues concerning compulsory purchase, sought explicitly to rely upon the *absence* of opposition from landowners as evidence that they all supported SPRs applications.[20] In making this submission Mr Innes did not remind the Inspectors that SPR had gagged and shackled all of the landowners. It reflects a position taken by SPR and its legal team that they should continue to seek to rely upon the malign effects of their gagging and non-opposition strategy to obtain material forensic advantage during the planning process. Details are set out at paragraph 8 of the SEAS Main Submission dated 25 March 2021[21]

The extension of time for completion of the Inquiry

59. The Secretary of State is already aware of the anger felt by affected persons flowing out of the decision of the Secretary of State to extend the time permitted for the inquiry.[22] All rights are reserved in relation to that episode.

60. When the Inspectors made the application for an extension, they did this upon the basis that they were overwhelmed and could not cope. The Inspectors did not intend that their inability to cope would become public knowledge.

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[20] Details are set out in Compulsory Acquisition Hearing 3, Session 4, 18 March 2021 Transcript Link (page 7) Recording Link (17.5 minutes in)

[21] Main SEAS Submission, SEAS written submission for ISH14, Negotiations with Affected Persons Deadline 8, 25 March 2021 Link

[22] Objection to Extension of the Examinations, SEAS, April 2021 Link

61. When the extension was granted, the Inspectors did not however take the opportunity afforded by the extra time to investigate SPR's conduct or take the decision that they had earlier indicated they would take.

62. Their failure to do so led to the procedural unfairness being yet further compounded. At this stage, as affected persons explicitly told the inspectors, those opposing SPR had more or less run out of funds and depleted their resources. SPR of course remained with its unlimited deep pockets. It submitted a raft of new evidence on onshore effects and the ability of those opposing to counter that evidence was severely undermined and compounded by the prolonged suppression of evidence from landowners.

63. The failure of the Inspectors to use the extra time to grapple with this issue has meant that when the proceedings finally came to an end, SPR had been afforded extended opportunities to present its version of events and its evidence and the ability of affected persons to oppose that evidence had been repeatedly and systemically undermined.

64. At one point the Inspectors suggested that they might address this issue in their recommendations. It is not known whether the Inspectors will in fact do this or what their conclusions will be. But addressing the issue in recommendations is far too late. It means that the chance to remedy any procedural unfairness has been irretrievably lost. The only option for the Inspectors, having failed to ensure procedural fairness, is to conclude against SPR and recommend accordingly.

The position in relation to the Sizewell C inquiry

65. Inquiries have established that EDF, the applicant for consent at Sizewell C for the construction of a new nuclear power generating plant, does NOT use comparable or equivalent gagging and non-participating clauses in its dealing with landowners in relation to the ongoing enquiry into Sizewell C. The Sizewell inquiry is comparable in that it concerns a development which will be very close in terms of proximity to the present cable route and substation and involves many of the same affected persons and some of the same types of argument (e.g. about the cumulative impact of multiple energy projects in the region). The use of such tactics as SPR and its legal team deploys are not part of normal planning processes conducted fairly and transparently, in good faith and in the public interest.

C. **Details of the SPR strategy**

The core facts are incontrovertible

66. The basic facts relied upon are incontrovertible. They flow from documents emanating from SPR. The prohibitions are set out in black and white. There can be no scope for any argument or debate about their existence. The agreements are formal legal documents drafted by SPR's solicitors or are documents drafted by SPR's legal team and submitted to the Inquiry (e.g. in relation to Incentive Payments).

67. SPR's lawyers have prepared a series of formal legal agreements: (i) a Heads of Terms and (ii) an Option Agreement. The basic facts are as follows.

The use of pressure by SPR to obtain agreement

68. The "*full facts*", to use the expression used by SPR's lead solicitor in evidence during the inquiry, have not been easy to unearth. Affected persons have wished to remain anonymous because they fear reprisals from SPR. A number took legal advice and were advised that their agreements prevented them from speaking to SEAS or the Inspectors. They were told that they could not speak to anyone about anything. Nonetheless, a sufficient number of affected persons did come forward and provide evidence including relevant agreements and email exchanges between themselves and SPR and its agents.[23]

69. The Heads of Terms are intended to be used until such time as consent is given at which point it folds into the Option Agreement. The Heads of Terms contain two very different components. First, it contains the terms that SPR will agree with the landowner when consent is given. This part of the Heads of Terms is therefore forward looking and conditional upon consent. The second part is that which prohibits landowners from participating in the inquiry and which imposes upon them absolute secrecy. This part of the agreement is not prospective or conditional upon consent, but bites immediately and is designed to help SPR to obtain consent.

70. There is an enforcement mechanism in the agreement which involves the mediation of "*claims*". That can only be read as referring to "*claims*" for breach of contract and, in practice, can only realistically apply to the non-participation and gagging obligations since those are the only parts of the agreement which have immediate effect and are not conditional.

[23] SPR took steps to identify those assisting opposing groups and strenuously remonstrated with such persons: See Main SEAS Submission, SEAS written submission for ISH14, Negotiations with Affected Persons Deadline 8, 25 March 2021 Link

71. For at least 9 months before the Examination commenced SPR set out to use the leverage it held through the compulsory purchase legislation to sign up all landowners whose land SPR might either need to purchase or obtain access to. Its aim was to sign up as many landowners as it could before the planning inquiry commenced.

72. SPR, by itself and through its agents, imposed pressure upon the affected landowners to sign the Heads of Terms. They told landowners that under the Development Consent Order (DCO) statutory process, grant of approval was inevitable given the statutory presumption in favour of development. Further, they emphasised that if landowners did not sign up now SPR would force them to later, once development consent was granted, and SPR would then offer them much worse terms.

73. A number of individuals submitted evidence to the Inspectors evidencing the pressure exerted by SPR. This is recorded in the SEAS Main Submission and in other evidence contained on the Examining Authority website.[24] That evidence was to the effect that those who had signed the Heads of Terms felt compelled to do so by virtue of the fact that this was a compulsory purchase procedure and that they had no option, and that this was an DCO process and therefore a forgone conclusion, in SPR's favour. One example, which was put before the Inspectors and was referred to in SEAS's submissions, and which is characteristic of other evidence given to SEAS and to the Inspectors, was in the following terms:

> "As for the matter of "negotiating" the SPR Terms of Agreement - what rubbish. We were very forcefully told at a Zoom meeting with our agent, SPR's agent and SPR's representative way back in 2020, that if we did not accept their Agreement, they would employ Compulsory Powers, and we would be entitled to only a minimum amount of compensation - we felt it was intimidation. The SPR comment that "no such agreements had actually been entered into" (The Telegraph) is a blatant lie. I know for definite two people who have told me they are tied up in Non-Disclosure Agreements and are barred from commentating on anything to do with SPR's applications. Regarding their so-called "proven track record of

[24] Main SEAS Submission, SEAS written submission for ISH14, Negotiations with Affected Persons Deadline 8, 25 March 2021 Link National Infrastructure Planning Website, Link

positive community engagement", I am still waiting for my first communication from SPR."[25]

74. Another affected person who gave evidence to the Inspectors said as follows:

> "With regards to the purchase of lands required for the above-mentioned projects you should be aware of the intimidating tactics employed by SPR from the outset. At one of our meetings in our village hall, Friston, during the consultation period, a family living along the proposed cable corridor was brought to tears describing how SPR had been treating them. The home that they had lived in for years was under threat as SPR wanted to purchase some of their land for the cable corridor. SPR told the home owner that if they didn't agree to sell, that the land would nonetheless be compulsory purchased and the amount that they would subsequently receive would be a lot less than what they were being offered. They didn't want to sell but in essence were being bullied. It was horrible how SPR was threatening them and at such an early stage in the procedure.
>
> Now we have learned that should you agree to sell your property you have to also agree to a gagging order. I strongly object to such unjustifiable tactics being employed in a public procedure."

75. The Chair of the Aldeburgh Society gave the following evidence to the Inspectors:

> "… We write to express our disquiet about Scottish Power's alleged use of non-disclosure agreements within these Option Agreements.
>
> These non-disclosure agreements risk undermining the integrity of the statutory application procedure, preventing as they might the expression of honest and genuine opposition to SPR's application.
>
> The use of financial incentives is particularly worrying as is the requirement that signatories to the Option Agreements withdraw previously expressed objections to SPR's plans.

[25] See paragraph 100 of Main SEAS Submission, written submission for ISH14, Negotiations with Affected Persons Deadline 8, SEAS, 25 March 2021 Link (the full evidence from the individual concerned is on the National Infrastructure Planning Website)

The rule of law requires and provides a right of free speech. The DCO process is being undermined by these attempts to curtail that right and the resulting shift in the balance of power in favour of the developers with greater resources further disadvantages the local communities affected by the application.

The Examining Authority has a responsibility to address this very serious issue and we support SEAS in bringing this matter to your attention. We invite you to disregard any enforced changes of position by residents who have signed these Option Agreements and ask you to abide by their original and transparently honest expressions of concern about SPR's plans."

76. The following quote is from the Main SEAS Submission. It summarised the topics which were the subject matter of the evidence submitted to the Inspectors by affected parties:[26]

"- the real anger felt by residents as to the harmful effect on free speech and the integrity of the planning process;

- the pressure imposed by SPR;

- the absence of free negotiation and the use by SPR and its agents of the threat of compulsory powers to secure agreements;

- the impression conveyed that NSIP processes are stacked in favour of applicants and that this is used in negotiations to secure agreements;

- the improper linkage of compulsory purchase powers to the suppression of evidence to the inquiry;

- the impact of the loss of relevant evidence collected in the inquiry;

- the propriety of lawyers advising on the use of such gagging clauses in the context of planning inquiries;

- the fact that in other local planning processes, such as in relation to Sizewell, the applicant is not seeking to impose equivalent gagging and non-opposition clauses;

[26]See paragraph 102, Main SEAS Submission, written submission for ISH14, Negotiations with Affected Persons Deadline 8, SEAS, 25 March 2021 Link

- the harm being done by policies such as that used by SPR to democracy and confidence in public decision making."

77. All of this evidence was submitted during the inquiry and SPR's legal team were therefore fully aware of it. Yet, at no time did the lawyers consider that, as the evidence mounted, it was the right and proper thing to do to come clean and lay before the Inspectors the relevant documents so that the truth could be laid bare**.**

The Heads of Terms

78. SPR uses variants of its Heads of Terms. There are some very slight differences in terminology, but these are not material. These variations were placed before the Inspectors. The basic system is the same throughout. For ease of reference we identify the objectionable clauses used by SPR as A, B and C.

79. Clause A sets out the Incentive Payments to be paid by SPR to the landowner. These payments are made:

> "for signing Heads of Terms payable on completion of the Options Agreement".

80. Clause B prohibits objections from the landowner:

> "Planning Matters
>
> The Grantor will not object to the Developer's application for Development Consent nor any other planning application(s) associated with the Projects."

81. Clause C imposes the gagging obligation:

> "Confidentiality
>
> These Heads of Terms are confidential to the parties named whether or not the matter proceeds to completion save that reference to them having been entered into may be referred to with the Planning Inspectorate".

82. The Incentive Payment is a payment made only upon entering the Option Agreement demonstrating the linked nature of the two agreements. It may

not be paid if the landowner breaches the agreement and participates in the inquiry or does not observe total secrecy about the terms of the agreement or fails to comply with the terms of the agreement.

83. Clause B prohibits the landowner from objecting. This covers any activity such as: putting in representations against SPR; supporting any campaigning group such as SEAS who will make representations on the landowner's behalf; funding SEAS or any other opposing body or group to make representations on the landowner's behalf.

84. The words "*nor any other planning application(s) associated with the Projects*" expand the prohibition to "*associated*" applications. The word "*associated*" is not defined but by definition extends beyond the applications in issue. It ensures that the prohibition upon opposition is comprehensive. It would include a prohibition on adducing objection in relation to other projects which would be relevant, for instance, to an assessment of cumulative impact.

85. The prohibition covers *every* aspect of the application for which consent is being sought and goes beyond limited objections that might relate to the landowners own parcel of land.

86. Clause C prohibits any reference to the Heads of Terms and prevents them being shown to any third party. This prohibition operates even if the matters do not proceed to completion. Once the Heads of Terms have been entered, they prevent the landowner from admitting that he had been gagged or prohibited from objecting *even if* SPR has no lasting interest in the land in question.

87. The expression in clause C "*save that reference to them having been entered into may be referred to with the Planning Inspectorate*" highlights its objectionable nature. If the Inspectors ask a landowner for details of agreements entered into or whether they have been gagged or prevented from submitting evidence the landowner must either refuse to respond or at best admit only the bare fact that Heads of Terms have been entered into. The landowner must dissemble and be uncooperative.

The Option Agreement

88. For payment to be made the landowner must enter the Option Agreement and become a grantor of rights. The prohibitions now become even tighter. The three clauses of greatest interest are as follows:

"**Permissions**

The Grantor shall not make a representation regarding the EA1N DCO Application nor the EA2 DCO Application (and shall forthwith withdraw any representation made prior to the date of this Agreement and forthwith provide the Grantee with a copy of its withdrawal) nor any other Permission associated with the EA1N Development or the EA2 Development and shall take reasonable steps (Provided that any assistance is kept confidential) to assist the Grantee to obtain all permissions and consents for the EA1N Works and the EA2 Works on the Option Area (the Grantee paying the reasonable and proper professional fees incurred by the Grantor in connection with the preparation and completion of such permissions and consents).”

“Confidentiality

The terms of this Agreement shall be confidential to the parties both before and after completion of the Deed(s) of Grant and neither party shall make or permit or suffer the making of any announcement or publication of such terms (either in whole or in part) nor any comment or statement relating thereto without the prior consent of the other or unless such disclosure is required by the rules of any recognised Stock Exchange on which shares of that party or any parent company are quoted or pursuant to any duty imposed by law on that party or disclosure is required by the Grantee in connection with or in order to obtain the EA1N DCO or the EA2 DCO or any other planning application associated with the EA1N Development or the EA2 Development or any Permission.”

“No misrepresentation

This Agreement incorporates the entire contract between the parties and the parties acknowledge that they have not entered into this agreement in reliance on any statements or representations made by or on behalf of one party to the other save those written statements contained in the written replies made by the Grantor's solicitors to enquiries raised by the Grantee's solicitors.”

89. As to the Permissions clause. This states that the Grantor shall not "*make a representation regarding the EA1N DCO Application nor the EA2 DCO Application"*. This is a direct contractual obligation prohibiting a grantor from assisting the Inspectors with evidence collection. It has nothing to do with normal planning considerations which might properly be the subject of an option agreement. The Grantor cannot by itself or by using a representative body or association, submit <u>any</u> evidence or make <u>any</u> representation of any sort during the Inquiry.

90. Further, the Grantor "*shall forthwith withdraw any representation made prior to the date of this Agreement*". This compels any person who has already objected to withdraw that objection. The object is to ensure that any evidence unhelpful to SPR is not taken into account by the Inspectors. By way of example Dr Gimson made a series of detailed written and oral submissions to the Inspectors on a wide range of matters including medical and health related issues. If he had felt compelled to sign the SPR agreements he would then have been forced to withdraw all of his prior evidence and that would have prevented the Inspectors from taking it into account.

91. The Grantor will "*forthwith provide the Grantee with a copy of its withdrawal*". This is part of SPR's enforcement mechanism to ensure that SPR can be certain that the Inspectors are deprived of relevant evidence.

92. As to the expression that the Grantor "*shall not make a representation regarding ... any other Permission associated with the EA1N Development or the EA2 Development*, this prevents the Grantor from objecting to any other part of the application to the cable. (See the Definition of Permission and its linkage to the Cable as defined in the Grant). So, for instance, in the case of Dr Gimson, since the cable is due to be landed very close to his property, he would be prevented from complaining to the Inspectors about the impact upon his own property but he would also be prevented from objecting to other matters of concern to him.

93. As to the expression the Grantor shall "*take reasonable steps to assist the Grantee to obtain all permissions and consents for the EA1N Works and the EA2 Works on the Option Area*", since permission and consent for the Option Area is contingent upon the application <u>as a whole</u> going ahead this would extend to compelling Grantors to assist SPR generally, even if they profoundly objected to it, i.e. it forces them to give evidence and support contrary to their true position.

94. In relation to the Confidentiality clause and the expression: *"The terms of this Agreement shall be confidential to the parties both before and after completion of the Deed(s) of Grant*", this is a classic gagging clause; any disclosure of the agreement or its terms is a breach of confidence. The duty to preserve confidence post completion of the Deed of Grant is not limited in time. It would extend to cover any subsequent applications for example for applications to add to the Friston site - the cumulative impact point.

95. As to the expression: "*neither party shall make or permit or suffer the making of any announcement or publication of such terms (either in whole or in part)*, this speaks for itself: A Grantor under a gagging order cannot use third parties to circumvent the gag. It prohibits not just disclosure of the agreements but also from commenting upon it, for example to SEAS or other opposition groups.

96. As to the expression that neither party shall make or permit to make or suffer to be made "*any comment or statement relating thereto without the prior consent of the other*", this is part of the SPR enforcement mechanism whereby it controls who can say what and to whom. If a Grantor wished to speak to SEAS or to the Inspectors it must seek and obtain SPR's prior consent.

97. As to the fact that disclosure is allowed pursuant to any duty "*imposed by law*" on that party, a Grantor would be permitted to give evidence to the Inspectors but only if the Inspectors imposed a legal duty upon that person to do so. There is no right voluntarily to proffer evidence. And because the agreements were strictly secret it was SPR's intent and object that the Inspectors should never learn about the suppression of evidence and therefore never come to even contemplate using any powers that they might have to compel production of evidence.

98. Disclosure can be made by the Grantee (ie SPR) "*in connection with or in order to obtain the EA1N DCO or the EA2 DCO or any other planning application associated with the EA1N Development or the EA2 Development or any Permission*." SPR can selectively disclose the terms of the agreement and, importantly, parts of it if it helps its case. But under the agreement it is under no obligation to disclose the whole of the agreement since this would allow sunlight to fall upon the gagging and non-opposition clause.

99. The "*No misrepresentations*" clause creates a fiction that SPR has not made any representations about incentives or other inducements to agree

to the gagging and non-opposition clauses in order to induce the entering of the Option Agreement.

The role played by Incentive Payments

100. SPR uses Incentive Payments to induce landowners to enter gagging and non-opposition obligations.

101. In two documents entitled "Funding Statement" dated 7 June 2021 (on each EA project) SPR recognises the existence of "*Incentive Payments*". These documents were authored and submitted to the Inspectors by Shepherd & Wedderburn, SPR's lawyers.[27]

102. They set out details of the payments made and anticipated to be made to landowners and they record the payments made in relation to *each* of the applications which adds up to £16.4m. It would appear that the cumulative sums paid out and anticipated to be paid out, as of June 2021, was therefore c. £32.8m.

103. On page twelve SPR sets out the general assumptions it has used. The third is of significance (in bold below):

i. **"General Assumptions**

- The estimate has been prepared on the basis of Current Market Value which would be payable in the event of the Applicant acquiring land and rights under the terms of the DCO rather than by voluntary agreement. Associated disturbance is included. The costs associated with surveys which will be undertaken on a voluntary basis and compensated prior to the DCO being confirmed are excluded from this assessment.
- The estimate relies on assessments of buildings from vantage points, and internal property inspections have not been undertaken. In addition, further research has been completed via the internet, media, aerial and ground photography and from investigations into comparable local valuation evidence.

[27] Funding Statement EA1N, Annex 3 Property Cost Estimate Statement from Dalcour Maclaren, 7 June 2021 Link Funding Statement EA2, Annex 3 Property Cost Estimate Statement from Dalcour Maclaren, 7 June 2021 Link

- ***No allowance has been made for any Incentive Payments which would otherwise be payable for voluntary agreements (subject to meeting various criteria).***"

104. The Incentive Payments are subject to "*various criteria*" which are nowhere set out. It is clear from the Heads of Terms that they are or at least include payments to induce landowners and others to enter into agreements containing gagging and non-opposition clauses. SPR decided not to disclose these criteria in any response submitted to the Inspectors even though it was obvious that this information was important and relevant to the issue being raised before the Inspectors.

105. SPR says in the document that they are not accounted for as part of the statutory compensation rules. The amounts paid and the criteria for grant are concealed and opaque.

106. Incentive Payments are integral to securing agreement of landowners to the gagging and non-opposition clauses. The facts relating to Dr Gimson are illustrative. Dr Gimson is clear that Incentive Payments (exceeding £50,000) were offered to him for his silence and to enable SPR to control what evidence he gave to the investigation.

107. By exploiting the compulsory purchase regime and by the calculated use of its deep pockets, SPR deprived the Inspectors of relevant evidence and simultaneously weakened the opposition who comprise community interest groups who are strapped for cash and supporters and who have to fund any legal representatives and experts from their own pockets.

108. SPR has never challenged or sought to refute any of the above evidence or analysis. To do this it would have to disclose key documents and this is something that SPR's lawyers have never countenanced.

D. <u>The law</u>

A detailed analysis is set out in paragraphs [81] – [96] of the Main SEAS Submission. Please refer for details.[28]

109. The relevant principles have been set out in innumerable decisions of the House of Lords, Supreme Court, Court of Appeal and High Court and have been settled for a very long time. There is no room for arguments about the scope of these rules.

[28] Main SEAS Submission, written submission for ISH14, Negotiations with Affected Persons Deadline 8, SEAS, 25 March 2021 <u>Link</u>

110. There are two main sets of legal implications.

111. First, there are the rules relating to procedural fairness. These impose a duty on decision makers to guarantee a fair, objective and transparent procedure. This includes, as a paradigm example, the duty of the decision maker to obtain full and comprehensive evidence and to ensure that all affected persons have a fair opportunity to submit evidence.

112. Secondly, there are the implications of the rules on procedural fairness on the weight and value to be attached to (a) SPR's evidence, and (b) the evidence of those opposing the application.

The test is objective: procedural unfairness can arise even if the decision maker is not at fault

113. The test for procedural fairness is objective. It arises even if the decision maker is not at fault: see e.g. R v CICB [1999] 2 AC 330 page 345. A decision maker cannot act in a way which approves of a process which is procedurally unfair in law. Whatever view is taken of the conduct of SPR the failure of the Inspectors to grapple with the issue and ensure a fair hearing lies squarely with the Inspectors and it is no answer to say that it was SPR that set out, covertly, to undermine the planning process.

114. A paradigm example of an unfair procedure is one where the decision maker fails to ensure that all affected persons have a fair and unfettered right to make submissions. A fundamental component of the duty to ensure procedural fairness is that the decision maker must ensure that all relevant persons have a right to be heard and are not silenced. The duty lies on the Inspectors to take steps to inform themselves of the relevant facts (eg Wokingham BC v SSCLG [2017] EWHC 1863).

115. However, in this case: (i) evidence that SPR had a systematic strategy of neutralising potential opponents was brought to the attention of the Inspectors at a relatively early stage; (ii) in a formal decision they acknowledged the public and legal importance of the issue and stated their intention to address the issue following receipt of submissions and relevant evidence, in particular from SPR; (iii) the Inspectors were furnished with very full evidence and analysis by SEAS which has never been refuted by SPR; (iv) the Inspectors nonetheless failed to investigate or address the issue; (v) they persisted in this failure even after they were granted an extension by the Secretary of State.

116. The law, which is long established in this area, establishes that when a procedure is unfair the resultant decision will be set aside by the courts.

117. Any recommendation in favour of SPR will therefore have been tainted by procedural unfairness. It cannot be accepted by the Secretary of State

Duty to guarantee a fair, transparent and objective procedure.

118. The normal principles of procedural fairness apply to planning decisions just as they do to all decisions taken by public bodies. In Hopkins Developments Ltd v Secretary of State for Communities and Local Government [2014] EWCA Civ 470 the Court of Appeal held that the requirements of fairness as they applied in a case were "*acutely fact sensitive*" [para 93]. The duty of an Inspector was to conduct proceedings so that each party had a reasonable opportunity to submit evidence and make submissions on the material issues, whether identified at the outset or emerging during the course of the inquiry.

119. In this case in its Decision the Inspectors acknowledged the correctness of these principles (see above). This makes their failure to act the more surprising.

Procedural unfairness does not involve proof of prejudice

120. Procedural unfairness does NOT depend on prejudice being proven. This has been established for nearly 80 years. In GMC v Spackman [1943] AC 627 pages 644, 645 the House of Lords held that if principles of natural justice are violated it is "*immaterial whether the same decision would have been arrived at in the absence of the departure for the essential principles of justice*". This is because procedural unfairness in a public process "*strikes at the roots of justice*": R v Leicester City Justices [1991] 2 QB 260 at page 290.

121. However, in this case SEAS and others have put in extensive evidence of the substantial prejudice that SPR's strategy exerted upon the process of evidence collection. The facts of Dr Gimson and the Wardens Trust Charity are dramatic and illustrative of the sort of evidence that SPR set out to suppress. The case of Dr Gimson is set out fully in the Main SEAS Submission.[29] Standing back SPR would not have engaged in such a covert strategy which involved the making of substantial secret payments, unless it thought that it would have a material impact upon the outcome of the planning process.

If procedural unfairness exists a resultant decision will be set aside

[29] See paragraphs 82 – 99 and to the witness statement of Dr Gimson at page 28. Main SEAS Submission, written submission for ISH14, Negotiations with Affected Persons Deadline 8, SEAS, 25 March 2021 Link

122. It is very long established that if procedural unfairness is established then any resultant decision will be set aside. If there is procedural unfairness which prejudices a party to a planning inquiry that is grounds for quashing the Inspectors decision (Hopkins para [62]). In this case there has been procedural unfairness.

Procedural defects cannot be cured

123. Once procedural unfairness exists it cannot be cured. The courts have rejected the argument that because the unfairness occurred at an earlier stage in a process it can be cured at a later stage of the proceedings: R(Citizens UK) v SSHD [2018] EWCA Civ at paragraph 94. This has been applied on a number of occasions in the planning context eg in relation to cumulative impact: See e.g. R(Brown) v Carlisle City Council [2010] EWCA Civ 523 at paragraph 40 where it was held that a failure to consider cumulative impact could not be cured by an assurance that it would be considered at a later stage. This was followed recently in the Vanguard judicial review.

124. This inquiry involves a great deal of very complex evidence concerning onshore effects. The failure of the Inspectors to address and fully remedy the issue at an early stage means that there is no possibility in law of the situation being retrieved now. There is no way in which the failure of the Inspectors can be remedied after the event. Any decision by the Secretary of State which approves consent will be based upon a deep, enduring and unremedied procedural unfairness and would be set aside by the Courts.

There is no right to second chances

125. As for SPR, if an applicant does not cooperate or take the chance given to it to set out its case, then there is no unfairness in the Inspectors proceeding to find against an applicant on that issue. In Ecotricity Ltd v Secretary of State for Communities and Local Government [2015] EWHC 801 (Admin), concerning a wind turbine proposal, an issue arose as to the "*intensification of risk to aviation*" which had been raised in a letter of objection from a flying club. The Inspectors considered that the risk was relevant. The Developer challenged the refusal of consent. The challenge failed because the applicant had been put sufficiently on notice and therefore should have addressed the issue. The Court held that it had "*only itself to blame for not dealing with the matter head on*". There is no principle that entitles applicants to second bites at the cherry.

126. As already observed, if SPR seeks to adduce additional and new evidence to the Secretary of State this will compound the procedural unfairness that already exists.

Relationship to compulsory purchase laws

127. The issue at the heart of this review must be analysed from first principles. In the event that planning consent is granted then a person in possession of such consent is entitled to use compulsory purchase powers. This is an after the event power, where the event is the consent. In the ordinary course the use of compulsory purchase powers is hence conditional upon, and therefore subsequent to, the grant of development consent. It arises only when the planning process has completed.

128. Under the statutory regime a consent holder is entitled to purchase and obtain access to land that it needs to implement the consent given by the decision maker even where the landowner is implacably hostile to the grant of consent and being compelled to sell. In such cases landowners have no freedom of contract. They are not free to refuse to deal with the developer.

129. However, over time a practice emerged of applicants for development seeking to enter agreements with landowners prior to consent. Developers are willing to pay a premium for these pre-consent agreements because it accelerates the development *if* (but only if) consent is subsequently given.

130. The system, by its very nature, imposes a pressure upon landowners to enter the pre-consent conditional agreements. Developers have leverage to pressurise landowners to enter pre-consent arrangements. The leverage arises from the fact that the right of the developers is mandated by Statute and is non-negotiable.

131. That leverage is reinforced by a number of considerations. First, landowners view consent as a more or less inevitable event and this impression is reinforced by agents instructed by developers. Secondly, in the case of major infrastructure projects there is a statutory presumption in favour of consent such that the planning process is significantly weighted in favour of the developer. Thirdly, there is the fact that developers have deep pockets and will offer premium payments to landowners if they sign up early. The premiums offered might be significant.

132. There is no objection in principle to developers seeking pre-agreement in this manner. These pre-agreements set out the terms and conditions that will apply if and when consent is given. To this extent they are

future looking and contingent upon approval. They do not govern the present.

133. The reasons why these pre-agreements are not in principle objectionable is that the "*event*" upon which the sale is contingent i.e. the planning approval, is one arrived at by a fair, objective and transparent procedure conducted in the public interest.

134. However, there is fundamental objection to developers such as SPR using the leverage which this statutory power confers as a device to subvert and undermine the planning process by the imposition of collateral restrictions and prohibition targeted at undermining the planning decision making process and, artificially, increasing the chances of planning consent being given.

135. None of the restrictions imposed and enforced by SPR are connected to compulsory purchase. They are quite different and involve an attack, invariably covert and secret, on the integrity of the planning process.

136. It is relevant that our enquiries have indicated that EDF, in relation to the Sizewell C ongoing planning inquiry, do NOT use any of the above sorts of clauses or restrictions in their compulsory purchase negotiations with affected landowners who are, thereby, perfectly free to object during the inquiry, even though if consent is given, those landowners might then be compelled to enter a compulsory purchase agreement.

Conclusion / ways forward: The position of the Secretary of State

The wider public interest

137. This case raises serious issues of public policy and ethics and concerns whether the Secretary of State will endorse a decision procured by a developer by unethical and covert means and where the adverse effects were then compounded by inactivity on the part of the Inspectors.

138. On 18th January 2021 Clive Betts MP, Chair of the Housing Communities and Local Government Committee of the House of Commons wrote to The Rt Hon Robert Jenrick, Secretary of State for MHCLG concerning the inclusion in cladding funding, agreement of prohibitions on recipients speaking to the press, journalists or broadcaster. The housing minister responded by saying that we live in a free country - "*let them speak "*.

139. The Secretary of State will be aware that the use of gagging and non-participation clauses in Nationally Significant Infrastructure Projects is being reviewed by the Secretary of State for the Department for Levelling Up, Housing & Communities (The Rt Hon Michael Gove) and a team at DLUHC. At their invitation SEAS is making submissions to that exercise on the topic. SEAS will provide this submission and the submission it is making to the SRA, as part of its response to that Review Team.

140. The Secretary of State should be aware that SEAS has also raised this issue with the Green party, local conservative politicians in Suffolk and Norfolk; House of Commons Select Committees, and the national and local press.

141. The Secretary of State also knows that the Rt Hon Dr Therese Coffey considers the conduct of SPR as "*sharp*".[30]

142. In a different context Clive Betts MP aired his concern at the use of gagging clauses by developers of new housing. The BBC (13th March 2021) reported an interview he had with the Money Box programme in which Mr Betts said that the practice was "*appalling*". The Home Builders Federation denied that the use of NDAs was widespread. Though the former CEO of the Chartered Institute for Building said that they were "*quite common*". He said that the clauses are used to silence people and it is a "*despicable practice.*" The restrictions imposed by SPR in its agreements go way beyond anything that developers of new homes are using.

The importance of ethical decision making

143. It cannot be argued that for a developer to seek to offer secret payments to landowners to prevent them from participating in a public inquiry represents acceptable behaviour which the Secretary of State can condone.

144. It also cannot be argued that the use of such tactics and strategies is sanctioned or part of any legitimate use of compulsory purchase powers.

145. However, if the Secretary of State grants consent to these applications this will amount to an endorsement of SPR's conduct.

146. There is, with respect, no scope for the Secretary of State, in law, to seek to plug gaps in the evidence. The issue has raised deep concern and anger amongst the residents of Suffolk and Norfolk. If decisions are

[30] Transcript of The Rt Hon Dr Therese Coffey MP's NDA Submission [redacted]

taken upon the basis of a planning process which developers are permitted to undermine, with Ministerial approval, then this will profoundly damage the confidence of the public in the planning process.

147. The Government should be fearless champions of open, fair and transparent planning processes. It is only if decisions are taken in such a way that the public will trust planning decisions. We would invite the Secretary of State to condemn SPR's conduct and make it clear that in the Government's vision for clean energy, ethical decision making is fundamental.

The "in flight argument" – These applications are not even on the runway

148. SPR has sought to argue that it is all now too late for its project to be stalled.

149. The SPR applications remain at an early stage; they are not "*in flight*". The strategy adopted by SPR was decided upon by them and their lawyers from the very earliest point in time. Landowners were being pressured to sign up from at least early 2020 and possibly during 2019, many months before the Inquiry started.

150. At this point SPR was not even in sight of the airport, never mind not being on the runway, or cleared for take-off, and most certainly not in flight.

151. SPR has taken a calculated gamble that its strategy would remain secret, that it could be used successfully to shift and slant the Inquiry in its favour, that it would get consent, and no one would be any the wiser.

152. It is not open to the Secretary of State therefore to say that this is an ongoing infrastructure project to which some special rule or policy should apply. It is not.

Offshore and onshore – severability

153. This submission makes no representations about the offshore element of the applications. SEAS's concerns lie only with the onshore element. It is for the Secretary of State to consider whether the decision can be split so as to sever the offshore from the onshore elements of the applications.

154. However, if the conclusion of the Secretary of State is that the onshore <u>cannot</u> be severed from the offshore and addressed separately then in law

the applications must be rejected in their entirety. It is not open in law for the Minister to say that, in some way, the public interest necessitates overall consent and that unacceptable conduct by the applicant and developer in relation to the onshore elements of the applications can be swept under the carpet.

Conclusion

155. For all the legal reasons already given it is not open to the Secretary of State to adopt a decision approving the onshore element of the applications since any decision to that effect will have been taken upon the basis of manifestly unfair procedure. It would be set aside by the Courts.