Outer Dowsing Offshore Wind

The Applicant's Position on Natural England's Engagement in the Outer Dowsing Offshore Wind Examination

Deadline 4a

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1 Introduction

1. At Issue Specific Hearing ("ISH") 5 on 12th February 2025 counsel for the Applicant drew attention to certain submissions made on behalf of Natural England ("NE") at Deadline 4 as to the nature and extent of its participation in the examination process and the approach it invited the decision-maker to take towards its advice.
2. A summary of the points made on behalf of the Applicant at that hearing is set out in the Summary of Oral Submissions provided at Deadline 4a (Agenda Item 3.4). In short, the Applicant raised two related concerns:
    a. NE's absence from inquisitorial hearings at which the evidence of all participants is to be probed and tested necessarily creates an imbalance in the inquisitorial process.
    b. That concern is exacerbated by what NE has said in its Deadline 4 submissions as to the approach to be taken towards the testing of its advice and the relevant evidence in the examination process more generally.
3. NE did not attend ISH5 (or ISH6) and so the Applicant undertook to provide a more detailed written response on these matters at Deadline 4a alongside its response to the other points that were made by NE at Deadline 4.
4. The Applicant notes that Natural England submitted a response to the ExA's Rule 8(3) and 9 letter on 20th February 2024 (AS-033) stating that at Deadline 4a it only intended to respond to four documents submitted by the Applicant. The documents NE stated it will provide advice on being the Outline Landscape and Ecological Management Strategy (OLEMS) (REP3-030) submitted at Deadline 3 on Friday 19th December 2024, and the Outline Landscape and Ecological Management Strategy (OLEMS) (REP4-072), Outline Marine Mammal Mitigation Protocol for Piling Activities (REP4-085) and In-Principle Southern North Sea Special Area of Conservation Site Integrity Plan (REP4-085) submitted at Deadline 4. It should be noted that all four documents include minor updates to existing application documents provided in track change format to aid the review process.

2 NE's stated approach to participation in the examination

2.1 The response to the Rule 6 Letter [PD1-108]

5. In its response dated 19 September 2024 to the Rule 6 letter issued by the Examining Authority ("ExA") **[PD1-108]**, NE stated that because of workload pressures its approach to the examination would be as follows:
    a. Only attending ISHs "*by exception*" and focussing its engagement where there is the greatest prospect of significant environmental risks being resolved.
    b. Having "*a narrower focus on documents tracking issue resolution via Principal Areas of Disagreement Summary Statements (PADSS) and our Risk & Issues Log*."
6. NE also expressed concern about the implications of "*submission of substantial new evidence*" during the examination process putting further pressure on its staff.
7. It added that NE "*does not intend to comment on any direct responses by the Applicant or other IPs on our relevant and written representations*".

2.2 Attendance at ISHs

8. NE has not attended any ISH held during the examination, including those which the ExA has arranged to consider, amongst other things, the issues that are outstanding between NE and the Applicant.
9. The ExA wrote to NE on 10th December 2024 to ask it to attend one of the ISHs scheduled for February. The exchange of correspondence is part of the examination library at **(AS-031)**.
10. In its request the ExA noted what NE had said in response to the Rule 6 letter but explained that it was "*of the opinion that NE's presence would be beneficial at the February hearings, and we ask that NE considers if they would be available to attend an ISH that week for the reasons set out below*".
11. The ExA's reasoning noted the significant areas of disagreement remaining between NE and the Applicant, reflected in the Risk and Issues Log, and its wish to see evidence of progress being made towards agreement on currently unresolved issues. It continued as follows:

> *"The ExA therefore requests NE's attendance at a hearing in order to test the evidence in the most time-efficient manner available to it"* (emphasis added).

12. That request, and the reasoning behind it, reflects the requirements of section 91 of the Planning Act 2008 ("PA 2008"). Pursuant to subsection (1), subsection (2) of section 91 applies

> *"where the Examining authority decides that it is necessary for the Examining authority's examination of the application to include the consideration of oral representations about a particular issue made at a hearing in order to ensure (a)*

adequate examination of the issue, or (b) that an interested party has a fair chance to put the party's case" (emphasis added)

13. Subsection (2) provides that the ExA "*must*" cause a hearing to be held for the purpose of receiving oral representations about the issue.

14. As the MHCLG Guidance on examinations explains at para. 014, such hearings enable

> *"probing, testing and assessing [of] the evidence" by the ExA "through direct questioning of persons making oral representations."*

15. Despite the ExA's decision to hold an ISH and its reasoned request to NE to attend so that the relevant evidence could be tested, NE responded to say that it would not attend either of the February ISHs. NE considered nothing had changed since its response to the Rule 6 letter. It added that so far as matters were in dispute between the Applicant and NE:

> *"… while we are willing to work with the Applicant, it is for the Applicant to set out how they plan to address our concerns through submission of updated plans and documents, that are secured by the DCO and can be relied upon post consent"* (emphasis added).

16. NE's letter did not appear to contemplate the possibility that the Applicant might legitimately seek to persuade it (and the ExA) that some of those concerns might not be justified by reference to the scientific evidence, or that it might assist the ExA if it engaged with and responded to any such submissions about the evidence.

2.3 NE's Deadline 4 Submissions

17. NE's Deadline 4 Submissions were accompanied by a covering letter dated 3rd February **(REP4-135)**. Under the heading "*Natural England's Engagement through Examination*" NE made the following points:

> *"Natural England continues to highlight to the Examining Authority (ExA) and the Applicant that the focus of our engagement during Examination will be on reviewing relevant updated Environmental Statement (ES) chapters/technical documents/outline plans or thematic clarification notes. Therefore, we have not responded to commentary on our submissions, other interested parties' representations/submissions or to comments from the Applicants or other stakeholders on the Risk and Issues Log, unless the ExA questions have directed us to do so."*
> *"Natural England welcomes the resolutions* [sic] *of issues so far. However, we are keen to see the Applicant making further substantial progress earlier in Examination, rather than pushing back on aspects of our advice, which will leave outstanding issues unresolved until later in Examination"* (emphasis added).

18. In other words, the only route to the resolution of issues that NE appeared willing to contemplate was via the Applicant accepting NE's stated views and doing as NE asked.

19. This theme was developed a step further in Appendix F3 to NE's Deadline 4 submission **(REP4-139)**, in which it was said that:

> *"… as stated within previous discussions for other wind farms, Natural England are of the opinion that the examination phase of a planning application is not an appropriate forum for constructive discussions on the interpretation of the evidence base and its application in best practice for impact assessment. The Natural England/Statutory Nature Conservation Bodies (SNCB) approach to impact assessment is one which takes account of the evidence-poor, high-uncertainty environment within which the assessments are carried out, as well as the requirements of the Habitats Regulations to adopt a precautionary approach. Ultimately this is a matter of ecological judgment and given Natural England's role as the appropriate national conservation body, considerable weight ought to be given to its advice and there should be cogent and compelling reasons for departing from it"* (emphasis added).

20. A footnote was inserted after that last point, referring to the case of ***Akester*** [2010] EWHC 232 (Admin) at para. 112.

3 Legal context

21. The PA 2008 created an inquisitorial examination process, led by the ExA. This process and its key characteristics were helpfully summarised by the Court of Appeal in ***R (Suffolk Energy Action Solutions Spv Ltd.) v. Secretary of State for Energy Security and Net Zero*** [2024] EWCA Civ 277 at paras. 14 to 24 (attached as Appendix 1). The Applicant draws attention to the following points which are of relevance here:
22. The manner and intensity of any inquiry into any matter which the ExA or the Secretary of State considers to be material is a matter for them, subject only to the supervisory jurisdiction of the court. So too is the weight they decide to attach to any particular factor (para. 21).
23. The examination process is inquisitorial, not adversarial. Whilst the inquisitorial nature of the process means that objections and disagreement are not fundamental, it is incumbent on the ExA to ensure that a fair procedure is followed and that their report is "*fully informed*". In this context "*fully informed*" means "*sufficiently informed to make the recommendation*" (para. 23).
24. In ***R (Together Against Sizewell C Ltd.) v. Secretary of State for Energy Security and Net Zero*** [2023] EWHC 1526 (Admin) (attached as Appendix 2) the High Court (Holgate J, as he then was) addressed the approach to be taken by the decision-maker to advice from NE in the context of an examination.
25. The issue in that case arose in response to the Claimant's third ground of challenge, summarised in paras. 19 and 106 of the Judgment as an alleged failure by the Secretary of State to give significant weight to the views of NE and to supply adequate reasons for departing from the advice of NE in that case (relying on the case of ***Akester*** (above)).
26. Rejecting this ground of challenge, Holgate J emphasised the following points:
    a. The Secretary of State (and therefore the ExA) is entitled to disagree with NE's advice (para. 106).
    b. Where a decision-maker disagrees with the views of a body such as NE, it should give its reasons for doing so. In assessing the adequacy of those reasons, no heightened standard of reasoning applies. The relevant standard remains that set out in ***South Bucks DC v. Porter (No. 2)*** [2004] 1 WLR 257 at para. 36 (para. 107).

c. The basis for the deference given to the decision of an expert body such as NE in proceedings to review their own decisions was explained more fully by Beatson LJ in ***R (Mott) v. Environment Agency*** [2016] 1 WLR 4338 at paras. 69 to 77. He also stated at para. 64 that the court may insist upon being provided with a sufficiently clear and full explanation of the reasons for that decision as *a quid pro quo* for that deference. Similar considerations apply where a decision-maker is expected to show deference to the advice of an expert body. The level of reasoning which the law expects of a decision-maker disagreeing with the view of an expert body may depend upon whether that view is an unreasoned statement or assertion, or a conclusion which is supported by an explanation and/or evidence. It may also depend on the subject matter. Some advice may not call for reasoning and/or supporting evidence, other advice may do (para. 108).

d. On the facts of that particular case NE's advice on the issue in question was held by the court to be "*not so much advice as assertions without any reasoning or supporting evidence*" (para. 111).

e. Holgate J added "*I also note that, notwithstanding the national importance of the proposed project, SZC found it necessary to complain about the "unfairness" of NE having failed to attend Examination hearings to which they had been specifically invited, so that their views could be clarified and tested, in the same way as those of experts relied upon by SZC and other participants (see para. 1.3.1 of SZC's written summary of oral submissions made at ISH 15 held on 5 October 2021).*" (para. 112)

f. "*The present case illustrates the inappropriateness of relying on the Akester line of authority as a mantra, rather than looking properly at the materials in any given case in context*" (para. 114).

27. For completeness, and so the ExA can see the context for what was said at para. 112 of the Judgment, the relevant extract from the summary of oral submissions referred to there is attached as Appendix 3.

28. The following additional points of relevance in the context of an appropriate assessment for the purposes of the Habitats Regulations can be gleaned from the summary of the law on appropriate assessment in ***R (Wyatt) v. Fareham BC*** [2022] EWCA Civ 983 (attached as Appendix 4):

    a. Whether a project will adversely affect the integrity of a European protected site is a matter of judgment for the competent authority.

    b. The application of the "precautionary principle" requires a high standard of investigation.

29. An appropriate assessment must be based on the best scientific evidence in the field, and such knowledge must be both up to date and not merely an expert's bare assertion.

4 Implications for this examination

30. The Applicant will continue to work proactively with NE to seek to resolve its outstanding concerns and thereby reach an agreed position on as many issues as possible by the end of the Examination.
31. If necessary, the Applicant will continue to work with NE during the Recommendation and Decision period. The Applicant appreciates, however, that the ExA will need to make a recommendation in relation to any outstanding EIA and HRA issues in its Recommendation Report taking account of the respective parties' views and supporting evidence as they stand at the close of the examination.
32. If issues remain in dispute at the end of the examination, the ExA will need to form a judgment as to the relative merits of the Applicant's and NE's position based on the expert evidence and analysis with which it has been provided.
33. Following the ***SZC*** case, it is clearly wrong for NE to suggest that in forming that judgment the ExA should automatically defer to NE's advice by reference to ***Akester***. Further, NE cannot properly seek to rely on such deference as a reason not to provide sufficient evidence and analysis to explain and justify its advice where that advice is disputed by the Applicant by reference to its own expert evidence and analysis.
34. It is also clearly wrong for NE to suggest the ExA should proceed on the basis that the examination that it is conducting is not an appropriate forum for discussion on the interpretation of the evidence base and its application in impact assessment. No such limitation exists on the proper role and scope of an examination under the PA 2008. The manner and intensity of any inquiry into any matter which the ExA considers to be material is a matter for them. The examination process is inquisitorial, but it is incumbent on the ExA to ensure that a fair procedure is followed and that their report is sufficiently informed to make the recommendation (see the ***SEAS*** case, above).
35. Where the ExA's recommendation depends on the resolution of a dispute or disputes between NE and the Applicant that turns on the interpretation of the evidence base and its application in impact assessment, the ExA is entitled to use the examination to probe and test the parties' positions on those matters. Indeed, it is hard to see how it could take steps to ensure its report is fully informed if it did not do so.
36. That applies to hearings as well as to written submissions.
37. In deciding whether it agrees with NE's advice on any issue the ExA may have regard to the extent to which that advice is consistent with and supported by the expert scientific evidence before the examination.
38. The weight to attach to individual items of evidence and analysis is a matter of judgment for the ExA (and in due course the Secretary of State).

39. In forming its judgment, the ExA may take account of submissions made by the Applicant and the evidence of its expert witnesses in respect of NE's advice and how it relates to the underlying evidence base. It may also take account any response, or lack of response, by NE to such submissions and evidence and the extent to which the parties have made their experts available for direct questioning at the hearings arranged by the ExA to enable the evidence to be tested.
40. To the extent that in making submissions in respect of NE's advice and how it relates to the underlying evidence base (and providing expert evidence on those matters) the Applicant is "*pushing back on aspects of* [NE's] *advice*" that is an entirely legitimate exercise. Where there is no agreement reached it then becomes necessary for the ExA to form its own view on that advice and whether it is well-founded.
41. If NE chooses neither to respond in writing to what the Applicant and its expert witnesses have said on such matters (as set out in its Deadline 4 covering letter), nor to attend hearings at which its position can be clarified and tested, it cannot reasonably expect the decision-maker nevertheless simply to defer to its advice because it is NE. For the decision-maker to adopt such an approach would be inappropriate in light of the authorities summarised above, inconsistent with the inquisitorial nature and purpose of the examination process and clearly risks creating procedural unfairness as a result.
42. Finally, the Applicant notes that NE's approach to this examination is said to be influenced by limits on its resources and exacerbated by submission of significant additional evidence to the examination. There are three points to be made in that respect.
43. The rigour of the ExA's examination of the application and approach to the evaluation of the evidence could not properly be limited (let alone limited to the detriment of the Applicant) by NE's resourcing issues.
44. In line with standard practice for NSIP projects, the Applicant has funded all relevant non-statutory advice from Natural England through a Discretionary Advice Service agreement since the pre-application phase of the project. The Applicant is also funding Natural England's statutory input into the examination following the commencement of charging by Natural England pursuant to The Infrastructure Planning (Fees) (Amendment) Regulations 2024.

45. Examples of where Natural England have raised issues and/or requests post submission which have required the submission of further evidence include (but are not limited to) the fact that the ornithological assessments submitted as part of the DCO application by the Applicant were prepared on the basis of the Applicant's understanding of Natural England's position following over two years of pre-application engagement. This included the Evidence Plan Process as set out in the Applicant's Consultation Report Appendix 15 Evidence Plan Process Consultation (APP-052). Natural England then submitted their advice at the Relevant Representation stage (RR-045) on 13*th* June 2024 which departed from that pre-application advice in a number of respects, and the Applicant responded to this within the submission of the Environmental Report for the Offshore Restricted Build Area and Revision to the Offshore Export Cable Corridor (PD1-081) and Habitats Regulations Assessment for the Offshore Restricted Build Area and Revision to the Offshore Export Cable Corridor (PD1-091) at Procedural Deadline 1 on 19*th* September 2024. Natural England provided their advice on these documents at Deadline 3 on 13*th* December 2024, but issues remain noted as unresolved by Natural England until that same information is incorporated in to updated versions of the Report to Information Appropriate Assessment at Deadline 4 (REP4-031), updated ES Chapter 12 Chapter 12 Offshore and Intertidal Ornithology (document reference 6.1.12 submitted at Deadline 4a).
46. These submissions should be read in conjunction with the Applicant's Comments on Deadline 4 Submissions (document reference 22.3 submitted at Deadline 4a), the Applicant's Comments on Responses to ExA WQ 2 (document reference 22.2 submitted at Deadline 4a).

Appendix 1 - *R (Suffolk Energy Action Solutions Spv Ltd.) v. Secretary of State for Energy Security and Net Zero* [2024] EWCA Civ 277

Court of Appeal

Rex (Suffolk Energy Action Solutions SPV Ltd) *v* Secretary of State for Energy Security and Net Zero

[2024] EWCA Civ 277

2024 Feb 14, 15; March 22

Sir Keith Lindblom SPT, Dingemans, Andrews LJJ

Planning — Development — Planning permission — Secretary of State making development consent orders for offshore windfarms and associated onshore development — Orders authorising compulsory purchase of land from landowners — Applicants negotiating non-objection clauses with landowners — Whether non-objection clauses precluding or stifling objections to proposed development — Whether non-objection clauses unlawful — Planning Act 2008 (c 29), ss 104(2), 114(1) — Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/572)

The interested parties ("East Anglia"), subsidiaries of Scottish Power Renewables, applied for development consent for nationally significant infrastructure projects, namely the construction of two offshore windfarms off the Suffolk coast and their associated onshore development. In determining the applications the Secretary of State was required to have regard to the matters set out in section 104(2) of the Planning Act 2008[1]. The Secretary of State appointed a panel of five inspectors as the examining authority which undertook a statutory examination of the two applications and also carried out environmental impact assessments. On their recommendation and pursuant to section 114 of the Act the Secretary of State made two development consent orders in the terms proposed. Among other things, the orders authorised the compulsory purchase of land needed for the onshore works, potentially from 55 different landowners. The claimant, a special purpose vehicle incorporated by a local residents' group, brought judicial review proceedings complaining that the process was unfairly distorted and impeded the carrying out of a proper inquiry as to whether or not the proposed development was in the public interest. The complaint centred around certain provisions in the heads of terms and option agreements which were negotiated between East Anglia and most of the private landowners whose land was potentially subject to compulsory purchase. It was contended that those provisions ("the non-objection clauses") were unlawful because they precluded, or, if they were not legally binding, had a tendency to dissuade, the landowners from raising any objections to the proposed development, even those wholly unrelated to the impact on their own land; that in addition, the option agreements expressly required the landowners to withdraw any objections they had already articulated; and that the problem caused by the non-objection clauses was compounded by the fact that the heads of terms/option agreements also contained confidentiality provisions. In essence the claimant contended that the Secretary of State had acted unlawfully in dealing with its complaint that East Anglia had "stifled" or "neutralised" the ability of landowners facing possible compulsory

[1] Planning Act 2008, s 104(2): see post, para 16.
S 114(1): "When the Secretary of State has decided an application for an order granting development consent, the Secretary of State must either— (a) make an order granting development consent, or (b) refuse development consent."

purchase to present objections to and information about the scheme for which East Anglia was seeking consent. The judge dismissed the claim.

On the claimant's appeal—

Held, dismissing the appeal, that the use of non-objection clauses when a party had obtained an interest in land, or an interest in land conditional on the grant of planning permission, was lawfully permissible for two main reasons: (i) an applicant who owned land and sought planning permission for a relevant use of that land was unlikely to object to that application, a fact which had not of itself been considered to undermine the integrity of the process for the granting of planning permission, and (ii) the planning process was inquisitorial in nature such that it was for the decision-maker to ensure that there was sufficient information to enable an informed and lawful decision to be made on the application for planning permission; that whether the effect of a non-objection clause had in fact meant that there was insufficient information to enable a planning decision to be made had always to be a fact-specific inquiry; that in addition to the inquisitorial nature of the process leading to the grant of development consent for nationally significant infrastructure projects, the Secretary of State had to have regard to the matters set out in section 104(2) of the Planning Act 2008; that furthermore, the environmental impact of a scheme which was an environmental impact assessment development was addressed by the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017; that the inquisitorial nature of the process, and the relevant statutory provisions, meant that in general, non-objection and confidentiality clauses ought not to prevent the decision-maker from becoming aware of all the relevant planning and environmental considerations, albeit whether that was so in an individual case would always depend on the particular facts; that in circumstances where a developer was acquiring an interest in land, and that land, together with other land, formed part of the scheme and the non-objection clause applied to the scheme as a whole, the developer was entitled to require a person whose land was being acquired not to object to the scheme, even if the scheme involved other land; that here the heads of terms, which contained the non-objection clause and confidentiality clause, were not contractually binding and the non-objection clause became legally binding only when the option agreements were exercised; that the fact that 39 out of 55 landowners who had signed the heads of terms did object to the scheme showed that landowners were not, in practice, "stifled" or "neutralised" when it came to objecting to the scheme and that was so notwithstanding the fact that only two of those landowners gave evidence to the examining authority; and that in those circumstances there was no conduct interfering with the administration of justice and the use of non-objection clauses by East Anglia and Scottish Power Renewables was legitimate in the circumstances of the particular scheme (post, paras 61–66, 70, 71).

Fulham Football Club v Cabra Estates plc (1993) 65 P & CR 284, CA considered.

Decision of Holgate J [2023] EWHC 1796 (Admin) affirmed.

The following cases are referred to in the judgment of the court:

Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223; [1947] 2 All ER 680, CA

Bushell v Secretary of State for the Environment [1981] AC 75; [1980] 3 WLR 22; [1980] 2 All ER 608; 78 LGR 269, HL(E)

Fulham Football Club v Cabra Estates plc (1993) 65 P & CR 284, CA

R v North Yorkshire County Council, Ex p Brown [2000] 1 AC 397; [1999] 2 WLR 452; [1999] 1 All ER 969, HL(E)

R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23; [2003] 2 AC 295; [2001] 2 WLR 1389; [2001] 2 All ER 929, HL(E)

R (Balajigari) v Secretary of State for the Home Department [2019] EWCA Civ 673; [2019] 1 WLR 4647; [2019] 4 All ER 998, CA
R (Blewett) v Derbyshire County Council [2003] EWHC 2775 (Admin); [2004] Env LR 29
R (Friends of the Earth Ltd) v Secretary of State for Transport [2020] UKSC 52; [2021] PTSR 190; [2021] 2 All ER 967, SC(E)
R (Halite Energy Group Ltd) v Secretary of State for Energy and Climate Change [2014] EWHC 17 (Admin)
Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014; [1976] 3 WLR 641; [1976] 3 All ER 665, CA and HL(E)
Taylor v Chichester and Midhurst Railway Co (1870) LR 4 HL 628, HL(E)

The following additional cases were cited in argument or referred to in the skeleton arguments:

An Taisce and Sweetman v An Bord Pleanala [2020] IESC 39, SC (Ireland)
Fage UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5; [2014] FSR 29, CA
Fairchild v Glenhaven Funeral Services Ltd [2002] UKHL 22; [2003] 1 AC 32; [2002] 3 WLR 89; [2002] ICR 798; [2002] 3 All ER 305, HL(E)
R (Ashchurch Rural Parish Council) v Tewkesbury Borough Council [2023] EWCA Civ 101; [2023] PTSR 1377, CA
R (Buckinghamshire County Council) v Secretary of State for Transport [2014] UKSC 3; [2014] PTSR 182; [2014] 1 WLR 324; [2014] 2 All ER 109, SC(E)
R (ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy [2020] EWHC 1303 (Admin); [2020] PTSR 1709
R (Jayes) v Flintshire County Council [2018] EWCA Civ 1089; [2018] ELR 416, CA
R (Khatun) v Newham London Borough Council [2004] EWCA Civ 55; [2005] QB 37; [2004] 3 WLR 417; [2004] LGR 696, CA
R (Roche Registration Ltd) v Secretary of State for Health [2015] EWCA Civ 1311; [2016] 4 WLR 46, CA
R (Save Stonehenge World Heritage Site Ltd) v Secretary of State for Transport [2021] EWHC 2161 (Admin); [2022] PTSR 74
R (Smech Properties Ltd) v Runnymede Borough Council [2016] EWCA Civ 42; [2016] JPL 677, CA
South Bucks District Council v Porter (No 2) [2004] UKHL 33; [2004] 1 WLR 1953; [2004] 4 All ER 775, HL(E)
Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759; [1995] 2 All ER 636; 93 LGR 403, HL(E)
Volpi v Volpi [2022] EWCA Civ 464; [2022] 4 WLR 48, CA

APPEAL from Holgate J

By applications submitted on 15 October 2019 East Anglia One North Ltd and East Anglia Two Ltd, the interested parties, which were subsidiaries of Scottish Power Renewables, applied for two development consent orders under the Planning Act 2008 for the construction of the East Anglia One North and East Anglia Two Offshore Wind Farms with associated onshore and offshore development. Examinations for each application were held in parallel between 7 October 2020 and 6 July 2021. The examining authority, which comprised the same panel members for both examinations, submitted a report dated 6 October 2021 on findings and conclusions and recommendation to the Secretary of State for Business, Energy and Industrial Strategy in respect of each application which recommended that he should make the orders. By a decision dated 31 March 2022 the Secretary of State for Business, Energy and Industrial Strategy made

the orders. On 3 May 2023 his relevant functions were transferred to the Secretary of State for Energy Security and Net Zero.

By a claim form the claimant, Suffolk Energy Action Solutions SPV Ltd, sought judicial review of the grant of development consent. By a decision dated 14 July 2023 Holgate J [2023] EWHC 1796 (Admin) dismissed the claim.

By an appellant's notice dated 7 August 2023 and with permission of the Court of Appeal (Singh LJ) granted on 12 October 2023, the claimant appealed on the following grounds 1–4 and 6 (permission to appeal on ground 5 having been refused): (1) The judge had erred in finding that the sums payable by the interested parties to landowners under the non-objection clauses in the heads and option agreements were not to buy silence, but were for the grant of options and the purchase of property rights. (2) The judge had been wrong to find that the examining authority had addressed and rejected the claimant's complaint. (3) The non-objection clauses did not accord with statutory codes and the Royal Institute of Chartered Surveyors' guidance "*Negotiating options and leases for renewable energy schemes*", 2nd ed (2018). (4) The judge had been wrong to find that the non-objection clauses, and the associated obligation of confidentiality, were "normal". (6) The judge had been wrong to find that there was no wider public interest created by the use of such clauses. It was contrary to the public interest to permit a developer to enter into a blanket agreement restricting a landowner's right to object to a planning application.

By a respondent's notice dated 25 October 2023 the Secretary of State sought to uphold the decision for additional reasons.

By a respondent's notice dated 26 October 2023 the interested parties sought to uphold the decision for additional reasons.

The facts are stated in the judgment of the court, post, paras 36–46.

Tim Buley KC (instructed by *Leigh Day*) for the claimant.

Mark Westmoreland Smith KC and *Jonathan Welch* (instructed by *Treasury Solicitor*) for the Secretary of State.

Hereward Phillpot KC and *Hugh Flanagan* (instructed by *Shepherd and Wedderburn LLP*) for the interested parties.

22 March 2024. **SIR KEITH LINDBLOM SPT**, **DINGEMANS LJ** and **ANDREWS LJ** handed down the following judgment of the court.

Introduction

1 Did the Secretary of State for Business, Energy and Industrial Strategy act unlawfully in dealing with a complaint by the appellant, Suffolk Energy Action Solutions SPV Ltd ("Suffolk Energy Action"), that the interested parties, East Anglia One North Ltd and East Anglia Two Ltd ("East Anglia"), had "stifled" or "neutralised" the ability of landowners facing possible compulsory purchase to present objections to and information about a scheme for which East Anglia were seeking development consent? That is the question at the heart of this appeal.

2 The appeal is against the order of Holgate J dismissing Suffolk Energy Action's claim for judicial review of the Secretary of State's decision to make two Development Consent Orders under section 114 of the Planning Act 2008 ("the 2008 Act"), granting development consent for the

construction of two offshore windfarms off the Suffolk coast, and for their associated onshore development.

3 The relevant functions of the Secretary of State for Business, Energy and Industrial Strategy were transferred to the respondent, the Secretary of State for Energy Security and Net Zero, with effect from 3 May 2023. For ease of reference, we shall simply refer to the decision-maker in this judgment as "the Secretary of State".

4 East Anglia are subsidiaries of Scottish Power Renewables. The onshore works for each development are similar, and involve the laying of underground cables for exporting the electricity generated by the windfarms from a landfall north of Thorpeness to a new substation at Friston, and to a new National Grid substation. One of the onshore cable routes affects an Area of Outstanding Natural Beauty. Among other things, the Development Consent Orders authorise the compulsory purchase of land needed for the onshore works, potentially from 55 different landowners.

5 Suffolk Energy Action is a special purpose vehicle incorporated in 2022 by a local residents' group, Suffolk Energy Action Solutions ("SEAS"), which was set up in 2019. Its object is to protect the coast and countryside affected by the scheme. SEAS supports the offshore windfarms, but opposes the onshore works on the grounds that they will have a deleterious impact on people, the countryside and the environment. It considers that better solutions are available for bringing the electricity generated by the windfarms onshore.

6 The Secretary of State's decision to grant the Development Consent Orders was of a purely administrative character, taken in the overarching public interest. He was not adjudicating upon any issue between East Anglia or Scottish Power Renewables and SEAS or any other objectors to the development (see, for example, *Bushell v Secretary of State for the Environment* [1981] AC 75, per Lord Diplock at p 297G–H, and *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295 per Lord Hoffmann at paras 74 and 75). The decision was made on 23 March 2022, following a statutory Examination of the two applications by a Panel of five Inspectors appointed by the Secretary of State under Chapter 4 of Part 6 of the 2008 Act.

7 The Examination began on 6 October 2020 and was completed on 6 July 2021. The extensive nature of that process is described at para 50 of Holgate J's judgment. As he said, "this was a process of collecting and analysing information on a massive scale which fed into the very substantial Reports produced by the Panel". Because the proposals involved "EIA development" for the purposes of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/572) ("the EIA Regulations"), the Panel also carried out an Environmental Impact Assessment ("EIA") in respect of each development.

8 The Panel's Reports on the two applications were submitted to the Secretary of State on 6 October 2021, about three months after the completion of the Examination. Much of the content of those Reports was common to both applications.

9 Suffolk Energy Action's case, in a nutshell, is that the process was unfairly distorted, and that this impeded the carrying out of a proper enquiry as to whether or not the proposed development was in the public interest. The complaint centres around certain provisions in the Heads of Terms and

A Option Agreements which were negotiated between East Anglia and most of the private landowners whose land was potentially subject to compulsory purchase. It is contended that these provisions ("the non-objection clauses") were unlawful because they precluded, or, if they were not legally binding, had a tendency to dissuade, the landowners from raising any objections to the proposed development, even those wholly unrelated to the impact on their own land. In addition, the Option Agreements expressly required B the landowners to withdraw any objections they had already articulated. As Suffolk Energy Action's counsel, Mr Tim Buley KC, put it, "even if [an agreement of this nature] is now orthodox, it is not legitimate because it has a tendency to suppress evidence on something which affects the public interest".

10 Suffolk Energy Action contends that the problem caused by the C non-objection clauses was compounded by the fact that the Heads of Terms/Option Agreements also contained confidentiality provisions. In consequence, it claims, any landowners who signed up to them would be precluded from telling the Panel or the Secretary of State, or, indeed, SEAS, what, if any, objections they might otherwise have raised. It followed that the Panel would not be in a position to ascertain whether those objections D duplicated others, and if not, whether they would have made a difference to their recommendations.

11 Accordingly, the first matter of substance to be addressed is whether the use of the non-objection clauses in this context was legitimate. Suffolk Energy Action's case is that the Secretary of State failed to address that "in-principle" issue before making the decision under challenge. Despite the fact that the complaint was made by SEAS to the Panel and was the subject of E written and oral representations before the Examination concluded, Suffolk Energy Action claimed it had not been properly taken into account by the Panel when preparing its Reports. The issue of inhibition on complaints was a serious one, and the Secretary of State failed to deal with that concern in a lawful manner, because he did not address the right question —namely, whether there was a real risk that the process had been unfairly F distorted. He was therefore in no position to reach a lawful decision that the information before him was sufficient to enable him to decide whether to grant the applications.

12 When Mr Buley was asked whether, as a matter of logic, his submissions led inexorably to the conclusion that the Secretary of State had no choice but to refuse development consent, he demurred. He submitted it would have been open to the Secretary of State to have told East Anglia G that he could not fairly make a decision, which could have led to them going back to the landowners and waiving or varying the non-objection clauses to enable the landowners to articulate any concerns they may have had about the wider development, or to provide further information. Alternatively, the Secretary of State might have required further investigations to be carried out. Mr Buley did not explain how those hypothetical investigations might H have resolved the situation, if the confidentiality clauses truly operated to preclude the discovery of any further relevant evidence.

13 Before addressing these arguments, it is necessary to set out in more detail the legal framework in which they arise.

The legal framework

14 The 2008 Act establishes the statutory framework for deciding applications for development consent for "nationally significant infrastructure projects", as defined by section 14(1). A comprehensive description of this framework was given by Lord Hodge DPSC and Lord Sales JSC in *R (Friends of the Earth Ltd) v Secretary of State for Transport* [2021] PTSR 190 at paras 19 to 38.

15 Section 103 of the 2008 Act provides:

> "The Secretary of State has the function of deciding an application for an order granting development consent."

16 Section 104 applies to decisions, such as this one, where a "national policy statement has effect" (104(1))[1*]. Section 104(2) provides that in deciding such an application the Secretary of State must have regard to—

> "(a) any national policy statement which has effect in relation to development of the description to which the application relates (a 'relevant national policy statement'), (aa) the appropriate marine policy documents (if any), determined in accordance with section 59 of the Marine and Coastal Access Act 2009, (b) any local impact report (within the meaning given by section 60(3)) submitted to the Secretary of State before the deadline specified in a notice under section 60(2), (c) any matters prescribed in relation to development of the description to which the application relates, and (d) any other matters which the Secretary of State thinks are both important and relevant to the Secretary of State's decision."

17 It is clear from sub-paragraph (d) that, apart from those matters which the Secretary of State is obliged by statute to consider, the decision about whether any other matter is (a) important and (b) relevant to the decision whether to grant or refuse development consent, and thus material, is solely one for the Secretary of State. As the Supreme Court confirmed in *Friends of the Earth*, at paras 116 to 119, that decision is only susceptible of challenge on *Wednesbury* principles. (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223).

18 Under section 61 of the 2008 Act, the Secretary of State must decide whether to appoint a "Panel" or a single person to "handle" the application, undertaking the role of "the Examining Authority" ("the ExA"). Where, as in this case, a Panel is appointed, section 74(2) provides:

> "The Panel has the functions of— (a) examining the application, and (b) making a report to the Secretary of State on the application setting out— (i) the Panel's findings and conclusions in respect of the application, and (ii) the Panel's recommendation as to the decision to be made on the application."

19 Section 74(3) provides:

> "The Panel's functions under this section are to be carried out in accordance with Chapter 4."

[*] *Reporter's note*. The superior figure in the text refers to the note at the end of the judgment, on p 865.

Chapter 4 makes provision for, among other matters, "Written representations" (section 90); "Hearings about specific issues" (section 91), "Compulsory acquisition hearings" (section 92), and "Open-floor hearings" (section 93).

20 The Examination is also governed by the Infrastructure Planning (Examination Procedure) Rules 2010, which make provision for "Site inspections" (rule 16).

21 The manner and intensity of any inquiry into any matter which the Panel, or the Secretary of State, considers to be material is a matter for them, subject only to the supervisory jurisdiction of the court. So too is the weight they decide to attach to any particular factor. Any decision made by the Panel, or by the Secretary of State, about whether they have sufficient information on which to make a recommendation, or to make a decision to grant or refuse development consent (as the case may be), is only open to challenge on the basis that no reasonable authority could have been satisfied on the basis of the enquiries made that it possessed the information necessary for the making of the decision.

22 Holgate J accurately set out the law on the *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 ("*Tameside*") duty to make enquiries, at paras 65 to 69 of his judgment. He correctly concluded, on the basis of the authorities he cited, including *R (Balajigari) v Secretary of State for the Home Department* [2019] 1 WLR 4647 and *Friends of the Earth*, that a challenge based on a complaint that the decision-maker failed to take an allegedly relevant consideration into account will only succeed if the omitted matter was "so obviously material" that, in the circumstances of the case, it was irrational to leave it out of consideration.

23 As Holgate J acknowledged at para 43, the examination process is inquisitorial, not adversarial. It does not involve cross-examination at hearings or on written submissions in response to the ExA's questions. Whilst the inquisitorial nature of the process means that objections and disagreement are not fundamental, it is incumbent on the ExA (here, the Panel) to ensure that a fair procedure is followed and that their report is "fully informed". In this context "fully informed" means "sufficiently informed to make the recommendation" (see the discussion at paras 59 and 60 of the judgment below, which specifically concerns the EIA but articulates a principle that applies equally to other aspects of the Panel's Reports).

24 In *R (Halite Energy Group Ltd) v Secretary of State for Energy and Climate Change* [2014] EWHC 17 (Admin), Patterson J described the process in these terms, at para 79:

> "The … examination process is both inquisitorial, iterative and learning. The purpose of the examination process is to enable the ExA to be able to compile a fully informed report with a recommendation to the Secretary of State on the NSIP before it. The ExA decide on and lead the examination process to be followed. The Infrastructure Planning (Examination Procedure) Rules 2010 provide the legal framework whereby that can happen. Further information can be sought by the ExA at any time before the completion of its examination. It is critical, though, that the examination process is undertaken in a way that achieves the objective of the ExA but is fair to all parties throughout."

The EIA Regulations

25 The EIA Regulations establish the process by which the environmental impact of a proposed project which is "EIA development" should be treated by the Secretary of State when considering an application for development consent. The aim is to ensure that planning decisions which may affect the environment are made on the basis of "full information" (Lord Hoffmann in *R v North Yorkshire County Council, Ex p Brown* [2000] 1 AC 397, 404D). Consequently, the EIA Regulations strictly prescribe both the process for how information should be gathered, and the standard of information required when conducting an EIA.

26 It is not in issue that each of the windfarms in this case constitutes an "EIA development" under regulation 3 and paragraph 3(i) of Schedule 2 to the EIA Regulations. Regulation 4 of the EIA Regulations prohibits the Secretary of State from granting development consent on an application for an EIA development unless "an EIA has been carried out in respect of that application".

27 Regulation 5(1) sets out the three stages of the EIA process. First, an environmental statement is prepared by the applicant. Next, the necessary consultations, publications, and notifications are carried out. Finally, the steps prescribed by regulation 21 are undertaken by the Secretary of State. Regulation 21(1) requires the Secretary of State to examine the environmental information (including information gathered after the environmental statement is prepared), to reach a reasoned conclusion on the likely significant effects of the proposed development, and to integrate that conclusion into the decision as to whether a Development Consent Order should be granted.

28 Regulations 12 and 13 of the EIA Regulations establish the applicant's duty, before their environmental statement is approved, to lay the groundwork for consulting the local community and affected individuals. Consultation with the local community on the environmental impact of the project is facilitated by the applicant's duty to prepare a consultation statement (under section 47 of the 2008 Act) which sets out whether the proposed development is EIA development, and, if so, "how the applicant intends to publicise and consult on" the information referred to in regulation 14(2) as qualified by regulation 12(2) (regulation 12).

29 Regulation 13 sets out the content of the applicant's duty to publicise the proposed application (under section 48 of the 2008 Act). Under regulation 11(1)(c), the Secretary of State must provide an applicant with a list of particular persons who he considers are likely to be affected by or have an interest in the proposed development and are unlikely to otherwise be aware of the application, to whom regulation 13 mandates the applicant to send a copy of the notice of the proposed application. As well as the local community, consultation is also carried out with, among others, the relevant statutory bodies concerned with environmental protection.

30 Regulation 14(2) to (4) establishes a minimum standard which an environmental statement must meet:

> "(2) An environmental statement is a statement which includes at least— (a) a description of the proposed development comprising information on the site, design, size and other relevant features of the

development; (b) a description of the likely significant effects of the proposed development on the environment; (c) a description of any features of the proposed development, or measures envisaged in order to avoid, prevent or reduce and, if possible, offset likely significant adverse effects on the environment; (d) a description of the reasonable alternatives studied by the applicant, which are relevant to the proposed development and its specific characteristics, and an indication of the main reasons for the option chosen, taking into account the effects of the development on the environment; (e) a non-technical summary of the information referred to in sub-paragraphs (a) to (d); and (f) any additional information specified in Schedule 4 relevant to the specific characteristics of the particular development or type of development and to the environmental features likely to be significantly affected.

"(3) The environmental statement referred to in paragraph (1) must — (a) where a scoping opinion has been adopted, be based on the most recent scoping opinion adopted (so far as the proposed development remains materially the same as the proposed development which was subject to that opinion); (b) include the information reasonably required for reaching a reasoned conclusion on the significant effects of the development on the environment, taking into account current knowledge and methods of assessment; and (c) be prepared, taking into account the results of any relevant UK environmental assessment, which is reasonably available to the applicant with a view to avoiding duplication of assessment.

"(4) In order to ensure the completeness and quality of the environmental statement— (a) the applicant must ensure that the environmental statement is prepared by competent experts; and (b) the environmental statement must be accompanied by a statement from the applicant outlining the relevant expertise or qualifications of such experts."

31 If the Secretary of State considers that it is necessary for an environmental statement submitted with an application to contain further information, the Secretary of State must issue a written statement giving reasons for that conclusion, send a copy to the applicant, and suspend consideration of the application until the applicant has provided the further information required (regulations 15(7) and (8)). The ExA has the same duty when conducting an Examination (regulations 20(1) and (2)).

32 As Holgate J explained at para 59, the EIA Regulations recognise that an environmental statement may be deficient, and therefore make provision for publicity and consultation to enable such deficiencies to be identified and addressed. It is for the ExA to undertake both an investigation and an analysis to reach as complete an assessment as possible of the direct and indirect effects of the proposed development. The information must be sufficient to enable the main or the likely significant effects on the environment to be assessed. The adequacy of the information contained within the environmental statement is a matter of judgment for the Secretary of State or the ExA, subject to challenge on *Wednesbury* grounds (*R (Blewett) v Derbyshire County Council* [2004] Env LR 29, paras 32 and 33).

33 The EIA process as a whole must itself comply with the standards established by regulations 5(2), (3), and (5):

"(2) The EIA must identify, describe and assess in an appropriate manner, in light of each individual case, the direct and indirect significant effects of the proposed development on the following factors— (a) population and human health; (b) biodiversity, with particular attention to species and habitats protected under any law that implemented Directive 92/43/EEC2 and Directive 2009/147/EC3; (c) land, soil, water, air and climate; (d) material assets, cultural heritage and the landscape; (e) the interaction between the factors referred to in sub-paragraphs (a) to (d).

"(3) The effects referred to in paragraph (2) on the factors set out in that paragraph must include the operational effects of the proposed development, where the proposed development will have operational effects."

"(5) The Secretary of State or relevant authority, as the case may be, must ensure that they have, or have access as necessary to, sufficient expertise to examine the environmental statement or updated environmental statement, as appropriate."

34 Although it appears to have been argued in the court below that the environmental information was insufficient, so as to involve a breach of the EIA Regulations (see para 186 of the judgment), that submission, which Holgate J rejected, was not pursued in this appeal.

The Departmental guidance on the compulsory acquisition of land

35 In September 2013, the then Department for Communities and Local Government issued "*Planning Act 2008: Guidance related to procedures for the compulsory acquisition of land*". Paragraphs 25 and 26 of that guidance state:

"25. Applicants should seek to acquire land by negotiation wherever practicable. As a general rule, authority to acquire land compulsorily should only be sought as part of an order granting development consent if attempts to acquire by agreement fail. Where proposals would entail the compulsory acquisition of many separate plots of land (such as for long, linear schemes) it may not always be practicable to acquire by agreement each plot of land. Where this is the case it is reasonable to include provision authorising compulsory acquisition covering all the land required at the outset.

26. Applicants should consider at what point the land they are seeking to acquire will be needed and, as a contingency measure, should plan for compulsory acquisition at the same time as conducting negotiations. Making clear during pre-application consultation that compulsory acquisition will, if necessary, be sought in an order will help to make the seriousness of the applicant's intentions clear from the outset, which in turn might encourage those whose land is affected to enter more readily into meaningful negotiations."

The essential facts

36 It appears from the judgment that there were a number of contentious factual issues which Holgate J was required to, and did, resolve after reviewing the evidence in detail. For the purposes of this appeal it is only

necessary to set out the matters relevant to Suffolk Energy Action's complaint that the Examination process was unfairly distorted.

37 In April 2018 East Anglia and Scottish Power Renewables appointed land agents to negotiate the grant of access rights and sales by the 55 landowners whose land would be affected by the onshore works. Most of the landowners instructed independent land agents to act on their behalf. From mid-2019 to January 2020 negotiations took place on a generic draft of the Heads of Terms. All of the relevant landowners were legally represented. An independent solicitor reviewed the draft on their behalf, and negotiated alterations.

38 The evidence included one example of the Heads of Terms, signed by Dr Alexander Gimson on behalf of his mother, who was the relevant landowner. That document, which is dated 13 January 2020, is headed "Without Prejudice, Confidential subject to Planning & Contract." If that were not clear enough, the last page states:

> "None of the contents of this document are intended to form part of any contract that is binding on any Scottish Power Group Company.
>
> "The above Heads of Terms represent the main terms for Options/ Deeds of Grant of Easement, but are not supposed to be fully inclusive and are subject to additions to or amendments by the Grantor, the Grantee and their respective solicitors."

39 Holgate J found, correctly, that the Heads of Terms were of no binding effect, and that the affected landowners, who were all legally represented, should have been so advised by their solicitors: para 78. Those findings have not been challenged in this appeal. The judge also found that in February 2021, when SEAS first expressed their concerns to the Panel about the non-objection clauses, and repeatedly thereafter, East Anglia made that position publicly clear: paras 82, 100, 110(iv), 111, 113, 128 and 140. SEAS did nothing to put this to the test by contacting the 16 private landowners who had not raised objections to the applications for development consent, or by asking the Panel to do so: paras 82 and 110(v) and (vi).

40 The Heads of Terms envisaged that in due course an Option Agreement would be entered into which would enable the Grantee, Scottish Power Renewables, to call for up to two easements, one for each of the two interested parties, to be granted over all or part of the option land. The proposed terms of the Option Agreement and the Deeds of Easement were set out in numbered paragraphs. Paragraph 7 of the proposed terms of the Option Agreement provided for an "incentive payment" to be made by Scottish Power Renewables to the landowner for signing the Heads of Terms by 27 January 2020, but this sum would only be payable on completion of the Option Agreement. It also provided for additional financial incentives to be made to encourage the landowner to agree to the Option Agreement within 20 weeks. Again, none of these payments would fall due until the contractual terms for the Option Agreement were agreed, signed and exchanged.

41 Paragraph 31 of the Heads of Terms envisaged the following term being included in the Option Agreement:

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

Paragraph 61 proposed that a similar clause be included in the Deeds of Easement.

42 Paragraph 38 of the Heads of Terms states:

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

As Holgate J found at para 83, even though there was no binding contract, Scottish Power Renewables would probably have been able to bring a claim for breach of confidence for the disclosure of the content of the Heads of Terms (for example, revealing the amount of any incentive payment). However, the interested parties could not have relied on that provision to prevent a landowner objecting to their project or supplying information to SEAS or the Panel which was adverse to the Development Consent Order applications (paras 83 and 110(i)). Again, those findings are not challenged in this appeal.

43 By January 2022, 80% of the private landowners had signed a final version of the Heads of Terms. None had signed formal Option Agreements, but negotiations on the Option Agreements were at an advanced stage (para 127). Of the 55 affected persons, 39 private landowners or their representatives, including Dr Gimson, had made objections. All of those objections, which were recorded in writing, were maintained to the end of the Examination and were addressed in the Panel's Report (paras 110(iii) and 140). By the time the Secretary of State issued the decision letter, only two Option Agreements had been completed, on 2 March 2022, three weeks earlier.

44 The Option Agreements contained the following clauses:

> "16. **Permissions**
>
> "The Grantor shall not make a representation regarding the [two DCO applications] (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 developments] and 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 …
>
> "26. **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 [DCOs] or any other planning application associated with the EA1N Development or the EA2 Development or any Permission."

45 Dr Gimson had not understood the Heads of Terms to preclude him from giving evidence to the Examination. He did provide information to

A the Panel on the risk of damage to aquifers on his mother's land and on property belonging to the Wardens Trust, in support of his objection to the proposal. When his land agent informed the interested parties' land agent that Dr Gimson wished to maintain that objection, the interested parties proposed that the non-objection clause in the draft Option Agreement be modified to allow him to do so (para 100). The interested parties and Scottish
B Power Renewables made no suggestion to the Panel that landowners who had signed the Heads of Terms and who had made representations to the Examination opposing the Development Consent Order applications were in breach of the Heads of Terms (para 111).

46 The Panel found that all those affected by the proposals had had various opportunities to be heard and to make representations in the Examination, and that there had been no interference with their rights
C to a fair and public hearing under article 6 of the European Convention on Human Rights (paras 115 and 135). The advice given by officials to the Secretary of State was that even if some landowners may have felt constrained from taking part in the Examination, they had not in fact been prevented from doing so. The conclusion in paragraph 6.115 of the ministerial submission was that "the ExA was satisfied that all affected
D persons had had the opportunity to be heard." (paras 133 and 135).

The decision

47 Section 26 of each of the decision letters addressed "compulsory acquisition and related matters". This section considered the use of non-disclosure agreements in paragraphs 26.29 to 26.32:

E "26.29. This issue has been cited by the ExA in the objection of Dr Alexander Gimson and Tessa Wojtczak, but the ExA provides no further detail in its Report [ER 29.5.11].

"26.30. A submission was made to the Secretary of State by SEAS on 30 November 2021 setting out detailed concerns. The Applicant responded to these concerns on 31 January 2022 as part
F of its representation to the Secretary of State's second round of post-examination consultation.

"26.31 In brief, concerns were raised that parties entering into an agreement with Scottish Power Renewables for the voluntary acquisition of land or rights in it were being required to sign Non-Disclosure Agreements that prevented these parties from participating in the examination and that consequently the ExA was not getting a clear
G picture of the strength of objection to the two Proposed Developments.

"26.32. The Secretary of State has considered the representations of both SEAS and the Applicant carefully due to the important issues that they raise about the conduct of the Examination and the rights of all affected parties to have a fair hearing. Having also reviewed the totality of the ExA's Report the Secretary of State considers that all relevant
H issues were raised and explored in the Examination and that he has the necessary information to enable him to make a decision."

48 Holgate J found, at para 139, that this conclusion involved the rejection of SEAS's allegation that affected landowners had been "stifled" or "neutralised" by the interested parties' conduct so that they did not make representations that they would otherwise have wanted to make. He added

at para 140 that this was the conclusion that he had reached, and that there was ample material to support it. Mr Buley took issue with those findings. He submitted that this was not a matter for the judge to decide, and therefore he should not have made the findings of fact that he did.

Issues

49 We are very grateful to Mr Buley, to Mr Mark Westmoreland Smith KC, who appeared with Mr Jonathan Welch for the Secretary of State, and to Mr Hereward Phillpot KC, who appeared with Mr Hugh Flanagan for the interested parties, for their helpful written and oral submissions. By the conclusion of the hearing, it was apparent that the following matters were in issue: (1) whether the use of non-objection clauses by Scottish Power Renewables was legitimate; and (2) whether the Secretary of State failed to address the complaints about the use of non-objection clauses by Scottish Power Renewables.

Non-objection clauses in a planning context

50 The first consideration of non-objection clauses in a planning context appears to have been in *Taylor v Chichester and Midhurst Railway Co* (1870) LR 4 HL 628. In that case the railway company proposed to run a branch line over land owned by the claimant landowner, and sought an Act of Parliament to authorise the construction of that branch line. The claimant proposed to object to the construction of the branch line, but the railway company agreed to pay him £2,000 to induce him to withdraw his opposition and not oppose the Bill, and to compensate him for the inconvenience, disturbance, damage and loss that he would suffer. In the event the branch line was not constructed, and the railway company attempted to avoid payment of the £2,000, raising a number of objections. The House of Lords held that the contract was valid and enforceable, even though it contained a provision that the claimant would withdraw his opposition to the Bill. As Mr Westmoreland Smith pointed out, the Bill encompassed land that belonged to other landowners besides the claimant.

51 Both parties referred to, and relied on, the decision of the Court of Appeal in *Fulham Football Club v Cabra Estates plc* (1993) 65 P & CR 284 ("*Fulham*"). Given the focus of the parties' submissions on the decision in that case, it is necessary to set out some of the factual background. Vicenza, a subsidiary of Cabra, the freehold owner of Craven Cottage, which was leased to Fulham Football Club, applied for planning permission to develop the site for housing. Hammersmith and Fulham London Borough Council applied for planning permission for an alternative development and then made a compulsory purchase order. It did not determine the application made by Vicenza. Vicenza appealed against the refusal to determine the application for planning permission and the making of the compulsory purchase order. A public inquiry was held.

52 In the interim the club, and its shareholders and directors, entered into an agreement with Cabra and its subsidiary by which the club and the shareholders and directors covenanted that, for seven years, the club would do nothing to prevent or discourage the withdrawal of the compulsory purchase order, and would not support compulsory acquisition. The agreement also provided that, if called upon to do so, the club would support Cabra's (ie Vicenza's) proposal.

A **53** The first public inquiry neither supported the compulsory purchase order nor allowed the original application for planning permission. Vicenza made a further application for planning permission which was refused, and another public inquiry was held. By this time the club, its shareholders and directors decided that they would not support Vicenza's application and refused to provide a letter of support.

B **54** The club applied to the court for declarations that the undertakings were unenforceable because they conflicted with their fiduciary duties to act in the best interests of the club. The trial judge granted the declarations sought by the club, holding that to enforce the undertakings would be contrary to public policy. The Court of Appeal set aside the declarations, finding that there was no valid objection on the grounds of public policy.

C **55** The Court of Appeal identified three ways in which the argument on public policy was put on behalf of the club. First, it was common ground that section 2 of the Witnesses (Public Inquiries) Act 1892 applied to inquiries before planning inspectors. This made it an offence to threaten, punish or injure a person for having given evidence to an inquiry. Secondly, it was noted that witnesses enjoyed absolute immunity from suit for evidence given before courts or authorised inquiries, and that an enforceable contractual

D undertaking contravened that immunity. Thirdly, it was submitted that any contract inhibiting disclosure of relevant matters to a court was contrary to public policy and that "in a planning inquiry full disclosure is particularly important because the recommendations of the inspector will affect the community as a whole …" (p 295).

56 The court (Neill, Balcombe and Steyn LJJ) rejected those three submissions. Giving the judgment of the court, Neill LJ confirmed that no

E undertaking could lawfully require someone to give false evidence, but went on to say:

> "We can see no valid objection on grounds of public policy to a covenant whereby a party to a commercial transaction involving the disposition of land undertakes to support, and to refrain from opposing, planning applications by the other party for the development of the
>
> F land. Such covenants are commonplace. In the course of the argument we were referred to precedents in the Encyclopaedia of Forms and Precedents which include clauses designed to secure the support of, for example, the vendor of land. Such clauses have been in use at least since the fourth edition of the encyclopaedia was published in 1969. In addition, evidence was put before the court in the form of information
>
> G supplied by firms of solicitors in the City of London and elsewhere which showed that covenants of the kind set out in paragraph (r)(ii)(d) were regarded as a necessary form of protection for those acquiring land for development." (p 296).

57 The Court of Appeal confirmed that any court would prevent and, if necessary, punish conduct interfering with the administration of justice.

H The question was whether the conduct complained of had interfered with or would interfere with the administration of justice. The court stated that it was necessary to take a broad view of the public interest, and where necessary seek to achieve a balance between countervailing public policy considerations. In that case, the court held, "there [was] the public interest in allowing business to be transacted freely and in holding commercial men

to their bargains." (p 297). The court said it would "consider the facts of each case". It went on to say that:

> "where, as here, a commercial agreement relating to land has been entered into between parties at arm's length and one party agrees in return for a very substantial payment to support the other party's applications for planning permission we can see no rule of public policy which renders such an agreement illegal or unenforceable." (p 297).

Issue 1: Was the use of non-objection clauses by the interested parties and Scottish Power Renewables legitimate?

58 As we have said in para 35 above, Departmental guidance from the then Department for Communities and Local Government confirmed that applicants seeking to acquire land should do so by negotiation wherever practicable. Such guidance is sensible and reasonable, because it serves to reduce disputes over the use of compulsory powers. However, the guidance does not deal with the issue of non-objection clauses.

59 It is also common ground that no one can be required to give false evidence to a planning inspector or examiner. But the question in issue is whether a party who has sold or is proposing to sell an interest in land may agree contractual obligations not to object to the grant of planning permission. It is apparent from the precedents in the Encyclopaedia of Forms and Precedents referred to in *Fulham*, that it has been the practice for many years to use non-objection clauses in cases where an applicant for planning permission might use compulsory powers to acquire land or an interest in land. However, Mr Buley is right to point out that just because the use of non-objection clauses has become standard practice, it does not mean that their use is lawful.

60 Mr Buley referred to guidance issued by the Royal Institute of Chartered Surveyors (RICS) on "*Negotiating options and leases for renewable energy schemes*", 2nd ed (June 2018). The RICS guidance states that "land owners may be prevented from objecting to any planning applications in relation to their land but should not be obligated to overtly support the scheme as political issues may make this difficult" (p 21). As an alternative to his submission that all non-objection clauses were unlawful, Mr Buley drew a distinction between non-objection clauses that related to the land in which an interest was being acquired, and those that related to other land which might be involved in the scheme. Mr Buley submitted that the RICS guidance was either restricted to non-objection clauses relating to the specific land in which an interest was being acquired, or that it should be interpreted as being so restricted.

61 In our judgment, the use of non-objection clauses when a party has obtained an interest in land, or an interest in land conditional on the grant of planning permission, is permissible for two main reasons. First, an applicant who owns land and seeks planning permission for a relevant use of that land is unlikely to object to that application. That fact has not of itself been considered to undermine the integrity of the process for the granting of planning permission.

62 Secondly (and part of the reason why the integrity of the process for planning permission is not undermined by the fact that applicants owning land are unlikely to object to their own scheme), the planning process is

A inquisitorial in nature. The inquisitorial nature of the process means that it is for the decision-maker to ensure that there is sufficient information to enable an informed and lawful decision to be made on the application for planning permission. As was emphasised by this court in *Fulham*, whether the effect of a non-objection clause has in fact meant that there is insufficient information to enable a planning decision to be made, or "impermissibly distorted the picture" as Mr Buley put it, must always be a fact-specific inquiry.

B **63** In addition to the inquisitorial nature of the process leading to the grant of development consent for nationally significant infrastructure projects the Secretary of State must have regard to the matters set out in section 104(2) of the 2008 Act (see para 16 above). Furthermore, the environmental impact of a scheme which is an EIA development is addressed by the EIA Regulations. The inquisitorial nature of the process, and the C relevant statutory provisions, mean that in general, the non-objection and confidentiality clauses should not prevent the decision-maker from becoming aware of all the relevant planning and environmental considerations. Of course, whether this is so in an individual case will always depend on the particular facts.

64 We do not consider that the answer is altered in circumstances where a D developer is acquiring an interest in land, and that land, together with other land, forms part of the scheme and the non-objection clause applies to the scheme as a whole. There is only one scheme, and the developer is entitled to require a person whose land is being acquired not to object to the scheme, even if the scheme involves other land. This is for the two main reasons set out in paras 61 and 62 above, though—as we have said—the fact-specific nature of the decision must always be kept in mind. This conclusion makes E it unnecessary to determine exactly what is meant by the RICS guidance.

65 In this case the Heads of Terms, which contained the non-objection clause and confidentiality clause, were not contractually binding, for the reasons we have given in paras 39 and 40 above. It was only when the Option Agreements were exercised that the non-objection clause became legally binding. The phrase "subject to planning & contract" in the Heads F of Terms is not to be ignored. It should be remembered that the landowners had the benefit of legal advice, and it could reasonably be assumed that their legal advisers would have made it clear to them that the Heads of Terms were not legally binding. In any event, Scottish Power Renewables also made it clear that the Heads of Terms were not legally binding when SEAS raised issues about the non-objection and confidentiality clauses in the Heads of Terms. No Option Agreements had been signed before the completion of the G Examination by the five inspectors, and only two Option Agreements had been completed before the Secretary of State issued the decision letters.

66 The fact that 39 out of 55 landowners who had signed the Heads of Terms did object to the scheme (see para 43 above) shows that landowners were not, in practice, "stifled" or "neutralised" when it came to objecting to the scheme. This is so notwithstanding the fact that only two of those H landowners gave evidence to the ExA. In these circumstances there was, in our view, no conduct interfering with the administration of justice.

Issue 2: Did the Secretary of State properly address the use of non-objection clauses by Scottish Power Renewables?

67 Even though we have concluded for the reasons given above that the use of non-objection and non-disclosure clauses in this case was not itself unlawful, it is necessary to consider the separate complaint that the Secretary of State failed to address the complaints about the use of the non-objection clauses by Scottish Power Renewables. Mr Buley complained that the judge created a false dichotomy between unfairness and practical impact. There are, in our judgment, several cogent answers to this complaint.

68 First, the ExA found that even if some landowners might have felt constrained from taking part in the Examination, they had not in fact been prevented from doing so. The ExA "was satisfied that all affected persons had the opportunity to be heard" (see para 46 above). That was a permissible finding made on all the material before the ExA, which was affirmed by the judge. This is an answer both as a matter of fairness and as a matter of practical impact. Although it is right to acknowledge that a decision-maker cannot know what it does not know if persons have been "neutralised" by non-objection clauses, it is also fair to point out that no new matters have been identified to the court as being relevant to the scheme since the Secretary of State's decision.

69 Secondly, the Secretary of State considered the issue and concluded in terms "that all relevant issues were raised and explored in the Examination and that he has the necessary information to enable him to reach a decision" (see para 47 above). We consider that this was a reasonable and permissible conclusion for the Secretary of State to reach on the relevant material.

70 Thirdly, as we have said, 39 out of 55 landowners did object, notwithstanding the presence of the non-objection and non-disclosure clauses in the Heads of Terms. This supports the findings made by the ExA and Secretary of State that all the necessary information to make a proper decision was before the Secretary of State. In these circumstances, we consider that the Secretary of State properly addressed the complaint about the use of non-objection clauses by Scottish Power Renewables, and that Holgate J was right to dismiss this ground of challenge.

Conclusion

71 For the reasons we have given, we conclude that the appeal must be dismissed. In summary, Holgate J was right to dismiss the claim for judicial review. The use of non-objection clauses in the Heads of Terms and Option Agreements was legitimate in the circumstances of this particular scheme, and the Secretary of State properly addressed the complaint about the use of non-objection clauses by Scottish Power Renewables.

A

Note

1. The relevant national policy statements ("NPS") here are the NPS for Energy (EN-1), the NPS for Renewable Energy Infrastructure (EN-3), and the NPS for Electricity Networks Infrastructure (EN-5).

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Appeal dismissed.

ALISON SYLVESTER, Barrister

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Appendix 2 - *R (Together Against Sizewell C Ltd.) v. Secretary of State for Energy Security and Net Zero* [2023] EWHC 1526 (Admin)

R. (ON THE APPLICATION OF TOGETHER AGAINST SIZEWELL C LTD) v SECRETARY OF STATE FOR ENERGY SECURITY AND NET ZERO

King's Bench Division (Administrative Court)

Holgate J: 22 June 2023

[2023] EWHC 1526 (Admin); [2023] Env. L.R. 29

Construction projects; Development consent; Environmental impact; Nuclear power; Water supply

H1 *Nuclear power—development consent—environmental impact assessment—water supply—whether water supply part of "project" for purposes of Environmental Assessment—Habitats Regulations assessment—whether failure to assess water supply impacts before granting consent was unlawful—whether water supply separate "project" for purposes of Environmental Assessment—whether obligation to assess theoretical supply options*

H2 The claimant (TASC) was set up by a local community group as a special purpose vehicle to oppose the development of the Sizewell C nuclear power station (the development). TASC sought to challenge the Defendant's (SSENZ) decision to grant development consent for the Sizewell C nuclear power station to the Interested Party (SZC). At the relevant examination stage, no permanent potable water supply solution for the development had been identified, as this depended on a separate statutory process undertaken by the local water company (NWL) as part of the preparation and publication of the relevant Water Resources Management Plan (WRMP).

H3 The Panel at the examination stage reported that because there was no assured supply of potable water identified, the cumulative effects of the development could not be assessed for the purposes of both the environmental impact assessment and the 'appropriate assessment' required under the Conservation of Habitats and Species Regulations 2017 (reg.63(1)) (the Habitats Regulations). Consequently, the Panel could not recommend approval without additional information on the provision of a permanent water supply. Subject to this issue, the Panel considered that the benefits of the proposal strongly outweighed the adverse impacts. The panel also advised that an assessment of the cumulative impacts of the water supply should be undertaken before granting consent. In considering the Panel's report and recommendations, SSENZ requested further information from (amongst others) SZC, the Environment Agency (EA) and Natural England (NE). The Secretary of State disagreed with the Panel's recommendations and granted consent on the basis the impacts would be properly assessed under the WRMP process.

H4 TASC sought to challenge SSENZ's decision, arguing that SSENZ had:

(1) failed to assess the environmental impacts of the permanent water supply as part of the "project" contrary to reg.63(1) of the Habitats Regulations. Alternatively, SSENZ had failed to assess the cumulative environmental impacts of the development along with the solution for the potable water supply.

(2) failed to supply adequate reasons for disagreeing with NE's advice that the permanent water supply should be considered to be a fundamental component of the 'operation of the project' and its effects.

(3) failed to consider 'alternative solutions' to the development before concluding that there were imperative reasons of overriding public interest justifying the environmental harm it would cause, as required by reg.64(1) of the Habitats Regulations.

(4) unlawfully taken into account an irrelevant consideration—in that it was supported by no evidence—namely the contribution the development might make to reducing greenhouse gas emissions by 78% from 1990 levels by 2035.

(5) acted irrationally in concluding that the development site would be clear of nuclear material by 2140 and/or failed to supply adequate reasons for rejecting TASC's arguments on this issue.

(6) erred in law in concluding that the development's greenhouse gas emissions would not have a significant effect on the UK's ability to meet its climate change obligations.

H5 **Held,** in dismissing the claim:

H6 (1) The question of what a 'project' was in any particular case, was a matter of judgment for the decision maker. That decision could only be challenged on *Wednesbury* principles. SSENZ was entitled to conclude that the permanent potable water supply for the development was a separate "project" from the power station itself. This was based on various factors including; the water supply and power station were not on adjacent land, but separated by over 1km; the two 'projects' had separate promoters; there was no functional interdependence—the water company responsible for the water supply had a duty to plan water supply for the whole region, not just the development; and the water supply would be subject to a separate statutory process to approve the water company's WRMP.

H7 (2) Although development consent had been granted in the knowledge that the development was dependent on the future provision of a water supply, (a) it was not dependent on the provision of any particular form of supply and that was currently unknown; and (b) the cumulative environmental impact would have to be assessed properly in an integrated environmental assessment following the WRMP process.

H8 (3) When considering the context of the whole decision letter, SSENZ had adequately explained why he disagreed with NE's views were the water supply was an integral part of the project. NE's views were not so much advice as assertions without detailed reasoning or supporting evidence.

H9 (4) In considering the application of reg.64(1) of the Habitats Regulations, SSENZ had considered the Panel's assessment and the need for nuclear power was seen as an integral part of the strategy for tackling climate change by achieving the net zero target. In the same vein, SSENZ had accepted the Panel's rejection of TASC's arguments that alternative solutions should be considered and that the

approach taken by SZC was too narrow. TASC's arguments depended upon an illegitimate attempt to rewrite policy aims by pretending that a central policy objective was at a higher level of abstraction, without any regard to diversity of energy sources and security of supply.

H10 (5) SSENZ had sufficient material before him to entitle him to reach the conclusion on the contribution the development might make to reducing greenhouse gas emissions by 2035. It was impossible to say that his judgment on such an evaluative subject was irrational. On that basis, there was no legal reason why SSENZ could not take into account the contribution which the development was expected to make to reducing the shortfall in electricity generation or to the target for reducing GHGs.

H11 (6) SSENZ's reasoning on the issue of whether the site would be clear of nuclear material by 2140 could not be treated as irrational or legally inadequate. When reading the decision letter as a whole, it was plain that SSENZ relied, as he was entitled to do, upon the normal assumption that relevant regulatory regimes would be operated properly.

H12 (7) In determining whether emission of GHGs from the development would not have a significant impact upon the UK's ability to meet climate change obligations, the SSENZ had relied upon the Panel's conclusions. There was ample material to support the Panel's conclusions and accordingly SSENZ's decision letter was not unreasonable following *Wednesbury* principles. SSENZ was not required to undertake a personal quantitiatve assessment by delving into the Environmental Statement or the Life Cycle Assessment for the development. The summary provided in the Panel's Report and in the draft decision letter, both of which were provided to the SSENZ, were as, a matter of law, perfectly adequate.

H13 **Cases referred to:**

Bowen-West v Secretary of State for Communities and Local Government [2012] EWCA Civ 321; [2012] Env. L.R. 22; [2012] J.P.L. 1128

East Quayside 12 LLP v Newcastle upon Tyne City Council [2023] EWCA Civ 359

Jones v Mordue [2015] EWCA Civ 1243; [2016] 1 W.L.R. 2682; [2016] 1 P. & C.R. 12

Pearce v Secretary of State Business, Energy and Industrial Strategy [2021] EWHC 326 (Admin); [2022] Env. L.R. 4; [2021] J.P.L. 1229

Preston New Road Action Group v Secretary of State for Communities and Local Government [2018] EWCA Civ 9; [2018] Env. L.R. 18; [2018] J.P.L. 807

R. (on the application of Akester) v Department for the Environment, Food and Rural Affairs [2010] EWHC 232 (Admin); [2010] Env. L.R. 33; [2010] A.C.D. 44

R. (on the application of Ashchurch Rural Parish Council) v Tewkesbury BC [2023] EWCA Civ 101; [2023] Env. L.R. 25; [2023] J.P.L. 1099

R. (on the application of Champion) v North Norfolk DC [2015] UKSC 52; [2015] 1 W.L.R. 3710; [2016] Env. L.R. 5

R (on the application of ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy [2021] EWCA Civ 43; [2021] P.T.S.R. 1400; [2021] J.P.L. 1107

R. (on the application of Friends of the Earth Ltd) v Heathrow Airport Ltd [2020] UKSC 52; [2021] P.T.S.R. 190; [2021] J.P.L. 905

R. (on the application of Goesa Ltd) v Eastleigh BC [2022] EWHC 1221 (Admin); [2022] P.T.S.R. 1473; [2022] J.P.L. 1309
R. (on the application of Khan) v Sutton LBC [2014] EWHC 3663 (Admin)
R. (on the application of Larkfleet Ltd) v South Kesteven DC [2015] EWCA Civ 887; [2016] Env. L.R. 4; [2015] P.T.S.R. D50
R. (on the application of Littlewood) v Bassetlaw DC [2008] EWHC 1812 (Admin); [2009] Env. L.R. 21; [2009] J.P.L. 478
R. (on the application of Mott) v Environment Agency [2016] EWCA Civ 564; [2016] 1 W.L.R. 4338; [2017] Env. L.R. 1
R. (on the application of National Association of Health Stores) v Secretary of State for Health [2005] EWCA Civ 154
R. (on the application of Newsmith Stainless Ltd) v Secretary of State for Environment, Transport and the Regions [2001] EWHC Admin 74; [2017] P.T.S.R. 1126
R. (on the application of Plan B Earth) v Secretary of State Transport [2020] EWCA Civ 214; [2020] P.T.S.R. 1446; [2020] J.P.L. 1005
R. (on the application of Spurrier) v Secretary of State Transport [2019] EWHC 1070 (Admin); [2020] P.T.S.R. 240; [2019] J.P.L. 1163
R (on the application of Swire) v Canterbury City Council [2022] EWHC 390 (Admin); [2022] J.P.L. 1026
R. (on the application of Wingfield) v Canterbury City Council [2019] EWHC 1975 (Admin); [2020] J.P.L. 154
R. (on the application of Wyatt) v Fareham BC [2022] EWCA Civ 983; [2023] Env. L.R. 14; [2022] J.P.L. 1509
R. (on the application of Rights: Community: Action) v Secretary of State for Housing, Communities and Local Government [2020] EWHC 3073 (Admin); [2021] P.T.S.R. 553; [2021] Env. L.R. 21
R. (on the application of Transport Action Network Ltd) v Secretary of State Transport [2021] EWHC 2095 (Admin); [2022] P.T.S.R. 31; [2021] A.C.D. 105
R. v Rochdale MBC Ex p. Milne (No.2) [2001] Env. L.R. 22; (2001) 81 P. & C.R. 27; [2001] J.P.L. 229 (Note) QBD
R. (on the application of Association of Independent Meat Suppliers) v Food Standards Agency [2019] UKSC 36; [2019] P.T.S.R. 1443
R. (on the application of Burridge) v Breckland DC [2013] EWCA Civ 228; [2013] J.P.L. 1308; [2013] 18 E.G. 102 (C.S.)
R. (on the application of Finch) v Surrey CC [2022] EWCA Civ 187; [2022] P.T.S.R. 958; [2022] Env. L.R. 27
R. (on the application of Forest of Dean (Friends of the Earth)) v Forest of Dean DC [2015] EWCA Civ 683; [2015] P.T.S.R. 1460; [2016] Env. L.R. 3
R. (on the application of Friends of the Earth Ltd) v Secretary of State for Business, Energy and Industrial Strategy [2022] EWHC 1841 (Admin); [2023] 1 W.L.R. 225; [2022] H.R.L.R. 18
R. (on the application of Law Society) v Lord Chancellor [2018] EWHC 2094 (Admin); [2019] 1 W.L.R. 1649; [2018] 5 Costs L.R. 937
R. v Swale BC Ex p. Royal Society for the Protection of Birds (1990) 2 Admin. L.R. 790; [1991] 1 P.L.R. 6; [1991] J.P.L 39 QBD
Save Britain's Heritage v Number 1 Poultry Ltd [1991] W.L.R. 153; (1991) 3 Admin. L.R. 437; (1991) 62 P. & C.R. 105 HL

Smyth v Secretary of State for Communities and Local Government [2015] EWCA Civ 174; [2015] P.T.S.R. 1417; [2016] Env. L.R. 7

H14 **Legislation referred to:**
Nuclear Installations Act 1965 ss.1 and 3
Directive 92/43 (Habitats)
Senior Courts Act 1981 s.31
Water Industry Act 1991 ss.18, 37A, 55 and 56
Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004/1633)
Directive 2009/147 (Wild Birds)
Water Resources Management Plan Regulations 2007 (SI 2007/727)
Climate Change Act 2008 s.11
Planning Act 2008 ss.5, 6, 104, 105, 106, 114, 118 and 120
Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/572) regs 4, 5, 14, 20 and 21
Conservation of Habitats and Species Regulations 2017 (SI 2017/1012) regs 62, 63, 64 and 84
Carbon Budget Order 2021 (SI 2021/750)
Sizewell C (Nuclear Generating Station) Order 2022 (SI 2022/853) Sch.19 Pt 6
CPR r.23.12

H15 *D. Wolfe KC*, *A. Bowes* and *R. Parekh*, instructed by Leigh Day Solicitors, appeared on behalf of the claimant.
J. Strachan KC and *R. Grogan*, instructed by Government Legal Department, appeared on behalf of the defendant.
H. Phillpot KC and *H. Flanagan*, instructed by Herbert Smith Freehills, appeared on behalf of the interested party.

JUDGMENT

MR JUSTICE HOLGATE:

Introduction

1 The claimant seeks to challenge by judicial review under s.118(1) of the Planning Act 2008 ("the 2008 Act") the decision dated 20 July 2022 made under s.114 of that Act to make the Sizewell C (Nuclear Generating Station) Order 2022 (SI 2022 No. 853) ("the Order") under s.114 of that Act. That decision was made by, and the proceedings were brought against, the Secretary of State for Business, Energy and Industrial Strategy. However, with effect from 3 May 2023 the relevant functions have been transferred to the Secretary of State for Energy Security and Net Zero and he has therefore been substituted as the defendant.

2 The Order grants development consent for the construction, operation, maintenance and decommissioning of a nuclear power station comprising two UK European Pressurised Reactors, each with a net electrical output of 1,670 MW, and a total capacity of 3,340 MW.

3 The claimant, Together Against Sizewell C Limited ("TASC"), is a private company. It was set up on 8 July 2022 by members of a local community group as a special purpose vehicle for the bringing of this claim and to receive public donations to that end. TASC was established in 2013 to oppose the project. It has had about 280 supporters. The group responded to pre-application consultations and participated in the statutory Examination of the draft order. It made written representations on a range of subjects and oral representations at "issue-specific hearings" ("ISHs") held during the Examination.

4 The Order granted development consent to the interested party, NNB Generation Company (SZC) Limited ("SZC").

5 The application for consent was made on 27 May 2020. The defendant appointed a panel of five inspectors ("the Panel") to conduct the Examination of the application under Chapter 4 of Part 6 of the 2008 Act. The Examination took place between April and October 2021.

6 At the time of the Examination, SZC was unable to identify a permanent supply of potable water for the project, because this was to be decided as part of the preparation and publication by Northumbrian Water Limited ("NWL") of a Water Resources Management Plan pursuant to s.37A of the Water Industry Act 1991 ("the 1991 Act") for Essex and Suffolk over the period 2025 to 2050 (referred to as WRMP24).

7 SZC produced a Water Supply Strategy Report in September 2021 which identified the amounts of potable water required during the construction, commissioning and operational phases of Sizewell C. When the station is operating the peak demand will be up to 2,800 m^3/day. This is an entirely separate issue from the cooling water needed in connection with electricity generation, which is obtained directly from the sea.

8 The Panel's Report ("PR") was submitted to the defendant on 25 February 2022. In its assessment of the benefits of the project as part of the overall planning balance the Panel relied upon the contribution of the power station to low-carbon energy production. It would meet the aim of Government policy to achieve delivery of major energy infrastructure including new nuclear electricity generation. They considered that "there is clearly an urgent need for development of the type proposed" and gave "very substantial weight" to the contribution that the scheme would make to meeting that need (PR 7.5.4).

9 Because the project is likely to have a significant effect on "European sites", an "appropriate assessment" was required to be carried out under reg.63(1) of the Conservation of Habitats and Species Regulations 2017 (SI 2017 No. 101 2) ("the Habitats Regulations"). The Panel concluded that an adverse effect on the integrity of the marsh harrier feature of the Minsmere-Walberswick SPA resulting from noise and visual disturbance during the construction phase could not be excluded (PR 6.4.598). Under reg.64 the Panel advised that there were no "alternative solutions" to the proposed development (PR 6.6.12) and the defendant could conclude that the project must be carried out for "imperative reasons of overriding public interest" ("the IROPI test"). The public interest reasons included the continuing growth in the demand for electricity, the retirement of existing generation capacity, the shortfall in generation of 95GW by 2035, the scale of the need for nuclear new build, the UK's commitment to the net zero target for 2050, the continuity and reliability of supply delivered by nuclear energy as part of a diverse energy mix and the urgent need for new nuclear power stations (PR 6.7.4 and

6.7.9). The Panel also identified some additional areas where the information before them was insufficient for the purposes of the Habitats Regulations, but those matters do not give rise to any legal challenge.

10 However, there remained the outstanding issue about a permanent supply of potable water. The power station could not be licensed by the Office for Nuclear Regulation ("ONR") under the Nuclear Installation Act 1965 ("the 1965 Act") and could not be operated without such a supply. The Panel said that because an assured supply of potable water had not been identified, the cumulative environmental effects of the proposed development and that supply could not be assessed (PR 7.5.7) They stated that they could not recommend approval of the application without additional information and assurance on the provision of a permanent water supply. They regarded this "as an important matter of such magnitude that it should not be left unresolved to a future date" (PR 7.5.8). Subject to the permanent water supply issue, the Panel considered that the benefits of the proposal strongly outweighed the adverse impacts. But in view of that unresolved issue as at the close of the Examination, the Panel considered that the case for the grant of development consent had not yet been made out (PR 7.5.9 and 10.3.1)

11 On 18 March 2022 the defendant requested further information from SZC, the Environment Agency ("EA"), Natural England ("NE") and the ONR. The defendant referred to a letter from NWL's Solicitors of 23 February 2022 advising that the company was unable to meet the project's long-term demand for water supply from existing resources and that a number of demand management and supply side options were being appraised. The defendant asked SZC to explain the progress being made to secure a permanent solution so that he could reach a reasoned conclusion on the cumulative environmental effects of different permanent water supply solutions (see DL 4.29).

12 SZC responded to that request on 8 April 2022. In summary, they relied firstly upon the duty of NWL under the 1991 Act to identify through WRMP24 new water resources to meet the demand forecast for its region, including Sizewell C. NWL would carry out an integrated environmental assessment of the Plan, including strategic environmental assessment ("SEA") under The Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004 No.1633) and a Habitats Regulations Assessment ("HRA"). These assessments would be completed before Sizewell could receive the new supply (DL 4.32). SZC submitted that the long-term planning of water supply was subject to the separate requirements of the 1991 Act and could not yet be identified for the power station (and other developments). Indeed, it could change again during the lifetime of the power station as the water undertaker manages its resources in response to *inter alia* changing demand. In accordance with national policy, the decision under the 2008 Act should be taken on the assumption that other statutory regimes will be properly applied (DL 4.33). SZC submitted that there was insufficient information on the permanent solutions that might come forward for any meaningful assessment to be made at that stage.

13 Secondly, SZC said that in the unlikely event of NWL being unable to provide a permanent supply for the power station, SZC could develop a permanent desalination plant. SZC considered that such a plant would be unlikely to generate any new or materially different significant environmental effects (DL 4.30 and 4.66).

14 On 25 April 2022 the defendant invited comments from interested parties on the responses he had received. TASC replied on 23 May 2022. They raised

objections to a permanent desalination plant but offered no comments on the WRMP route. TASC maintained their position that the lack of a guaranteed water supply meant that not all significant environmental effects were being assessed at the development consent stage.

15 The defendant's decision letter was issued on 20 July 2022. The briefing to the Secretary of State for his consideration of SZC's application included the Panel's Report of some 1500 pages, the final HRA for Sizewell C and the draft decision letter, which itself ran to nearly 190 pages.

16 The defendant addressed the potable water supply issue at some length in DL 4.43 to 4.69 (reproduced in the Annex to this judgment). He was satisfied with the tankering arrangements and the temporary desalination plant proposed for the construction period and the assessment of their impacts (DL 4.43). Those conclusions are not challenged in these proceedings.

17 The defendant concluded that the proposed development and NWL's WRMP24 are separate "projects" (DL 4.49). On that basis there was no requirement for an assessment to be made of the permanent water supply solution as a part of the power station project. He then went on to consider the Panel's view that the cumulative impacts of that water supply should nonetheless be considered at the development consent stage for the power station. The defendant concluded firstly, that a long-term water supply for Sizewell C is viable. Secondly, any proposal for the supply of water by NWL will be properly assessed under the WRMP24 process and other relevant regulatory regimes. Thirdly, no further information was required on that subject for the application for development consent to be determined (DL 4.67). Disagreeing with the Panel, the defendant did not consider the present uncertainty over the permanent water supply strategy to be a barrier to granting development consent for the project (DL 4.68).

18 The remainder of this judgment is set out under the following headings:

The grounds of challenge

19 In summary the claimant seeks to advance the following grounds of challenge:

> **Ground 1:** Contrary to reg.63(1) of the Habitats Regulations the defendant failed to assess the environmental impacts of the "project" (including the necessary permanent potable water supply solution).
> **Ground 2:** In the alternative, contrary to reg.63(1), the defendant failed to assess cumulatively the environmental impacts of the power station together with those of the permanent potable water supply solution.
> **Ground 3:** The defendant failed to supply lawfully adequate reasons for departing from the advice of NE that the permanent water supply should be considered to be a fundamental component of the "operation of the project" and its effects at this stage.
> **Ground 4:** Contrary to reg.64(1) of the Habitats Regulations, the defendant also failed lawfully to consider "alternative solutions" to the power station before concluding that there were imperative reasons of overriding public interest justifying the environmental harm it would cause.
> **Ground 5:** The defendant took into account a legally irrelevant consideration (because it was supported by no evidence), namely the contribution the power station might make to reducing greenhouse gas ("GHG") emissions by 78% from 1990 levels by 2035.
> **Ground 6:** The defendant also acted irrationally in concluding that the power station site would be clear of nuclear material by 2140 and/or failed to supply adequate reasons for rejecting the claimant's case on that point.
> **Ground 7:** The defendant also erred in law in concluding that the power station's operational GHG emissions would not have a significant effect on the UK's ability to meet its climate change obligations.

20 On 19 October 2022 Kerr J refused the claimant permission to apply for judicial review on the papers.

21 On the same day the claimant filed an application to amend its statement of facts and grounds to add a new ground 8. The claimant then renewed its application for permission on grounds 1 to 7.

22 On 14 December 2022 I refused permission for the claimant to add ground 8. Having regard to the parties' submissions, I also ordered that the renewed application for permission should be adjourned to a rolled-up hearing. On 10 January 2023 the claimant withdrew its renewed application for permission to argue ground 8.

23 Projects such as Sizewell C may attract both strong opposition and strong support. It is therefore necessary to reiterate what was said by the Divisional Court in *R. (Rights: Community: Action) v Secretary of State for Housing, Communities and Local Government* [2021] P.T.S.R. 553 at [6]:

> "6. It is important to emphasise at the outset what this case is and is not about. Judicial review is the means of ensuring that public bodies act within the limits of their legal powers and in accordance with the relevant procedures and legal principles governing the exercise of their decision-making functions. The role of the court in judicial review is concerned with resolving questions of law. The court is not responsible for making political, social, or economic choices. Those decisions, and those choices, are ones that Parliament has entrusted to ministers and other public bodies. The choices may be matters of legitimate public debate, but they are not matters for the court to determine. The court is only concerned with the legal issues raised by the claimant as to whether the defendant has acted unlawfully. The claimant contends that the changes made by the SIs are radical and have been the subject of controversy. But it is not the role of the court to assess the underlying merits of the proposals. Similarly, criticism has been made of the way in which, or the speed with which, these changes were made. Again, these are not matters for the court to determine save and in so far as they involve questions concerning whether or not the appropriate legal procedures for making the changes were followed."

Statutory framework

The Planning Act 2008

24 The 2008 Act provides a dedicated regime for applications to be made for the grant of development consent orders for "nationally significant infrastructure projects" ("NSIPs"). The framework of the Act has been set out in a number of authorities and need not be repeated in detail here. I refer in particular to the decision of the Supreme Court in *R. (Friends of the Earth Ltd) v Secretary of State for Transport* [2021] P.T.S.R. 190 at [19] to [37].

25 One of Parliament's aims was to make the application of development control to NSIPs more efficient and to reduce delays in decision-making. Issues such as the need for different types of infrastructure and the policy of the Government on such development was to be settled in advance by National Policy Statements ("NPSs"). A draft version of a NPS is subject to SEA, HRA, consultation, public involvement and Parliamentary scrutiny before being designated by the relevant Minister by statutory instrument under s.5 of the 2008 Act.

26 Under s.104(2), when determining an application for development consent, the Secretary of State must have regard to any NPS which "has effect" in relation to development of the description to which that application relates (a "relevant NPS"). Under s.104(3) he must determine the application in accordance with that relevant NPS, save to the extent that one or more of the exceptions in s.104(4) to (8) applies. Section 105 applies in relation to an application for an order granting development consent if s.104 does not apply. Section 105(2) provides that in deciding the application the Secretary of State must have regard to *inter alia* any matters which he considers are both important and relevant to his decision. Section 106 enables the Secretary of State to disregard any representation (including evidence) which he considers *inter alia* relates to the merits of policy set out in a NPS. Section 106 applies whether an application is subject to s.104 or to s.105.

27 In the present case there were two relevant NPSs, the Overarching National Policy Statement for Energy (EN-1) and the National Policy Statement for Nuclear Power Generation (EN-6). Both documents were "designated" by the defendant in July 2011.

28 Paragraphs 3.1.1 to 3.1.4 of EN-1 set out the approach for deciding applications for development consent. The UK needs all the types of energy infrastructure covered by the NPS, which include nuclear power, in order to achieve energy security and reduce GHGs dramatically. Applications should be determined on the basis that the need for these types of infrastructure has been demonstrated in the NPS. There is an urgent need for new nuclear power generation which will play an increasingly important role (para 3.5.1). It is Government policy that new nuclear power should be able to contribute as much as possible to the UK's need for new capacity (para. 3.5.2). New nuclear power stations will help to ensure a diverse mix of technology and fuel sources, increasing the resilience of the UK's energy system (para. 3.5.3). New nuclear power forms one of the three key elements of the Government's strategy for moving towards a decarbonised, diverse electricity sector by 2050 (para. 3.5.5). Given the urgent need for low carbon forms of electricity, it is important that new nuclear power stations are constructed and operational as soon as possible "and significantly earlier than 2025." Accordingly, the sites identified in Part 4 of EN-6 were those considered to be capable of deployment by the end of 2025 (paras 3.5.9 and 3.5.10).

29 EN-6 contains similar policy statements (paras. 2.2.1 and 2.2.2). In Part 4 of EN-6 Sizewell was identified as a potentially suitable site for a new nuclear power station along with Hinkley Point and six other sites.

30 On 7 December 2017 the Government issued a Written Ministerial Statement announcing a consultation document on designating in a NPS potentially suitable sites for nuclear power stations expected to be deployed after 2025 and before the end of 2035. The Government stated that EN-6 only has effect for the purposes of s.104 of the 2008 Act in relation to a project expected to be deployed before the end of 2025, that is when a station first begins to feed electricity into the national grid. The statement says that s.105 of the 2008 Act applies to EN-6 in so far as s.104 does not. For projects due to be deployed beyond 2025 the Government continues to give its strong in principle support to proposals for those sites listed in EN-6. Both EN-1 and EN-6 contain information, assessments and statements which continue to be important for projects being deployed after 2025.

31 The Panel considered that the application for Sizewell C should be assessed under s.105 and that EN-1 and EN-6 were important considerations. There have

been no relevant changes in circumstances reducing the weight to be given to those policies. The acceptability of the proposal in terms of planning policy should be assessed primarily against the nuclear-specific policies in the NPSs. The defendant agreed with the Panel (DL 4.4 and 4.5).

32 The defendant also agreed with the Panel's assessment of the need for nuclear power projects, to which he attached substantial weight. Thus, there is an urgent need for new nuclear energy generating infrastructure of the kind proposed at Sizewell. The contribution that the development would make to the delivery of low carbon energy would assist in the decarbonisation of the UK economy in line with the UK's obligations under the Paris Agreement (DL 4.5 to DL 4.11).

33 The main consequence of s.105 of the 2008 Act applying to the determination of SZC's application was that the presumption in s.104(3) did not apply. Thus, the defendant did not have to decide the application in accordance with the NPS unless one or more of the exceptions in s.104(4) to (8) applied. Nevertheless, it is relevant to note that where s.104 is engaged, the balancing exercise described in s.104(7) may not be used to circumvent s.106(1)(b), which has the effect of preventing challenges to the merits of policy in a NPS in an Examination or before the Secretary of State. So, for example, changes of circumstance after the designation of a NPS are to be addressed instead through the process under s.6 for a formal review of a NPS (*R. (ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy* [2021] P.T.S.R. 1400 at [105]; *R. (Spurrier) v Secretary of State for Transport* [2020] P.T.S.R. 240 at [106] to [110]).

34 There is no dispute that the NPSs were material considerations for the defendant to take into account under s.105 when determining SZC's application. Section 106 applies to a determination by the Secretary of State under s.105 just as it does to a decision under s.104. Accordingly, the provisions in the 2008 Act preventing challenges to the merits of policy in a NPS were applicable. Although a review of EN-6 under s.6 of the 2008 Act is being carried out, the defendant has decided not to exercise the power in s.11 to suspend either EN-1 or EN-6 pending the completion of that review.

Water Industry Act 1991

35 Section 37(1) lays down a general duty on every water undertaker in the following terms:

> "(1) It shall be the duty of every water undertaker to develop and maintain an efficient and economical system of water supply within its area and to ensure that all such arrangements have been made—
>
> (a) for providing supplies of water to premises in that area and for making such supplies available to persons who demand them; and
>
> (b) for maintaining, improving and extending the water undertaker's water mains and other pipes,
>
> as are necessary for securing that the undertaker is and continues to be able to meet its obligations under this Part."

This primary duty is enforceable by the Secretary of State or OFWAT under s.18 of the 1991 Act.

36 Water undertakers are legally obliged to plan to meet demand within their area through a Water Resource Management Plan. Section 37A provides so far as material:

> "(1) It shall be the duty of each water undertaker to prepare, publish and maintain a water resources management plan.
> (2) A water resources management plan is a plan for how the water undertaker will manage and develop water resources so as to be able, and continue to be able, to meet its obligations under this Part.
> (3) A water resources management plan shall address in particular—
> (a) the water undertaker's estimate of the quantities of water required to meet those obligations;
> (b) the measures which the water undertaker intends to take or continue for the purpose set out in subsection (2) above (also taking into account for that purpose the introduction of water into the undertaker's supply system by or on behalf of water supply licensees);
> (c) the likely sequence and timing for implementing those measures; and
> (d) such other matters as the Secretary of State may specify in directions (and see also section 37AA).
> (4) The procedure for preparing and publishing a water resources management plan (including a revised plan) is set out in section 37B below.
> (5) Before each anniversary of the date when its plan (or revised plan) was last published, the water undertaker shall —
> (a) review its plan; and
> (b) send a statement of the conclusions of its review to the Secretary of State.
> (6) The water undertaker shall prepare and publish a revised plan in each of the following cases—
> (a) following conclusion of its annual review, if the review indicated a material change of circumstances;
> (b) if directed to do so by the Secretary of State;
> (c) in any event, not later than the end of the period of five years beginning with the date when the plan (or revised plan) was last published,
> and shall follow the procedure in section 37B below (whether or not the revised plan prepared by the undertaker includes any proposed alterations to the previous plan).
> (7) …."

37 Under s.37AA(8) before preparing its WRMP the water undertaker must consult *inter alia* the EA, OFWAT and the Secretary of State.

38 Section 37B lays down the procedure for the preparation and publication of a WRMP. The undertaker is obliged to publish a draft of the plan so that representations may be made on its proposals to the Secretary of State (s.37B(3)). The WRMP must be sent to *inter alia* OFWAT, the EA, NE and Historic England so that they too may make representations (see reg.2 of The Water Resources Management Plan Regulations 2007 (SI 2007 No.727)). The undertaker may then

comment on those representations (s.37B(4)). The Secretary of State may cause a public inquiry or hearing to be held to consider any issues arising (s.37B(5) and reg.5 of the 2007 Regulations). The Secretary of State has the power to direct that the WRMP must differ from the draft sent to him and the undertaker must then comply with that direction (s.37B(7)). The undertaker must publish the final version of the plan (s.37B(9)).

39 The duties of a water undertaker under s.37A and s.37B are enforceable by the Secretary of State under s.18.

40 Where the owner or occupier of premises in the area of a water undertaker requests a supply of water for non-domestic purposes it is the undertaker's duty, in accordance with terms and conditions determined under s.56, to take steps to provide that supply. Those terms and conditions are to be determined by agreement between the parties or, in default, by OFWAT according to what appears to it to be reasonable. Section 55(3) qualifies the duty under s.55:

> "A water undertaker shall not be required by virtue of this section to provide a new supply to any premises, or to take any steps to enable it to provide such a supply, if the provision of that supply or the taking of those steps would—
>
> (a) require the undertaker, in order to meet all its existing obligations to supply water for domestic or other purposes, together with its probable future obligations to supply buildings and parts of buildings with water for domestic purposes, to incur unreasonable expenditure in carrying out works; or
>
> (b) otherwise put at risk the ability of the undertaker to meet any of the existing or probable future obligations mentioned in paragraph (a) above."

Any dispute arising under s.55(3) is determined by OFWAT (s.56(2))

The Nuclear Installations Act 1965

41 The use of a site for the installation and operation of a nuclear reactor is prohibited unless authorised by a nuclear site licence by the "appropriate national authority", the ONR (ss. 1 and 3). When granting a licence the ONR must attach such conditions as it considers necessary or desirable in the interests of safety and may also attach conditions to the licence at any time (s.4(1)). Conditions may be attached providing for *inter alia* the design, construction, operation, siting or modification of any plant or other installation on the site (s.4(3)(b)).

The Conservation of Habitats and Species Regulations 2017

42 The defendant is a "competent authority" for the purposes of the Habitats Regulations. Regulations 63 and 64 apply in relation to the making of an order granting development consent under the 2008 Act (regs. 62(1) and 84(1)).

43 In so far as is material, reg.63 provides:

> "(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which—
>
> (a) is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects), and

(b) is not directly connected with or necessary to the management of that site,

must make an appropriate assessment of the implications of the plan or project for that site in view of that site's conservation objectives.

(2) A person applying for any such consent, permission or other authorisation must provide such information as the competent authority may reasonably require for the purposes of the assessment or to enable it to determine whether an appropriate assessment is required.

(3) The competent authority must for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority specifies.

(4) It must also, if it considers it appropriate, take the opinion of the general public, and if it does so, it must take such steps for that purpose as it considers appropriate.

(5) In the light of the conclusions of the assessment, and subject to regulation 64, the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marine site (as the case may be).

(6) In considering whether a plan or project will adversely affect the integrity of the site, the competent authority must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which it proposes that the consent, permission or other authorisation should be given.

…"

The "appropriate nature conservation" body in this case was NE (reg.5(1)).

44 Regulation 64(1) provides:

"(1) If the competent authority is satisfied that, there being no alternative solutions, the plan or project must be carried out for imperative reasons of overriding public interest (which, subject to paragraph (2), may be of a social or economic nature), it may agree to the plan or project notwithstanding a negative assessment of the implications for the European site or the European offshore marine site (as the case may be)."

It is not suggested that reg.64(2) was engaged in this case.

45 In relation to the application of regs.63 and 64 to the development consent procedure, reg.84(2) provides:

"(2) Where those provisions apply, the competent authority may, if it considers that any adverse effects of the plan or project on the integrity of a European site or a European offshore marine site would be avoided if the order granting development consent included requirements under section 120 of the Planning Act 2008 (what may be included in order granting development consent), make an order subject to those requirements."

The Infrastructure Planning (Environmental Impact Assessment) Regulations 2017

46 Regulation 4 of the Infrastructure Planning (Environmental Impact Assessment Regulations 2017 (SI 2017 No. 572) ("the EIA Regulations") prohibits the Secretary of State from making an order granting development consent for "EIA development" under the 2008 Act unless EIA has been carried out (reg.4). Sizewell C constituted EIA development. By reg.5 "EIA" is a process consisting of the preparation of an "environmental statement" ("ES"), the carrying out of consultation under the EIA Regulations and compliance by the defendant with reg.21. Regulation 21 required the defendant when deciding whether to make the development consent order, to examine the environmental information and, taking that into account, to reach a reasoned conclusion on the significant effects of the development on the environment to integrate that conclusion into the decision on whether to grant the order, and to consider whether it was appropriate to impose monitoring measures. Environmental information "means the ES and the representations made by statutory consultees and other persons about the environmental effects of the development" (reg.3(1)).

47 Regulation 5(2) and (3) of the EIA Regulations provides:

> "(2) The EIA must identify, describe and assess in an appropriate manner, in light of each individual case, the direct and indirect significant effects of the proposed development on the following factors—
>
> (a) population and human health;
>
> (b) biodiversity, with particular attention to species and habitats protected under Directive 92/43/EEC and Directive 2009/147/EC;
>
> (c) land, soil, water, air and climate;
>
> (d) material assets, cultural heritage and the landscape;
>
> (e) the interaction between the factors referred to in sub-paragraphs (a) to (d).
>
> (3) The effects referred to in paragraph (2) on the factors set out in that paragraph must include the operational effects of the proposed development, where the proposed development will have operational effects."

48 Regulation 14 prescribes the contents of an ES. It must include a description of "the likely significant effects of the proposed development on the environment" (reg.14(2)(b)). By reg.14(2)(f) the ES must contain any additional information specified in sched. 4 relevant to "the specific characteristics of the particular development or type of development and to the environmental features likely to be significantly affected". Paragraph 5 of sched. 4 refers to:

> "A description of the likely significant effects of the development on the environment resulting from, *inter alia*—
>
> …
>
> (e) the cumulation of effects with other existing and/or approved projects, taking into account any existing environmental problems relating to areas of particular environmental importance likely to be affected or the use of natural resources;
>
> …"

49 Regulation 14(3) provides (so far as is relevant):

> "The environmental statement referred to in paragraph (1) must—
> (a) …
> (b) include the information reasonably required for reaching a reasoned conclusion on the significant effects of the development on the environment, taking into account current knowledge and methods of assessment; and
> (c) …"

Ground 1

A summary of the claimant's submissions

50 The claimant submits that in breach of reg.63 of the Habitats Regulations the defendant failed to make an appropriate assessment of the implications of the "project" for European sites because he wrongly excluded from that project the permanent potable water supply solution without which the project is incomplete and cannot function. As at the date of the decision to make the order, that solution would potentially give rise to further impacts on protected areas which have not been assessed and could not be ruled out.

51 The permanent potable water supply was a fundamental component of the operation of the power station according to NE (para. 2.1.2. of representations in October 2021). The defendant agreed with the ONR that in order to satisfy the conditions of any nuclear site licence for the project, SZC will have to put in place a reliable supply of water before any nuclear safety related activities can take place that are dependent on such a supply.

52 The nuclear power station is functionally interdependent with the permanent water supply solution (*R. (Wingfield) v Canterbury City Council* [2020] J.P.L 154 at [64]).

53 The reasons advanced by the defendant as to why the permanent water supply did not form part of the power station project are irrelevant. The claimant relies in particular upon *R. (Ashchurch Parish Council) v Tewksbury BC* [2023] EWCA Civ 101.

NWL's position on water supply

54 SZC's Water Supply Strategy Report (September 2021) summarised NWL's position as at that stage. The local "water resource zone" Blyth WRZ would be unable to supply water to meet the needs of the power station. NWL had identified the possibility of a connection being made to the Northern/Central WRZ which might have sufficient capacity in the River Waveney, subject to completion of NWL's part of the Water Industry National Environment Programme ("WINEP") study led by the EA. This would require the construction of a new transfer main from Barsham Water Treatment Works to Saxmundham, a distance of 28km, and other water network enhancements. The proposed transfer main would connect into the local Blyth distribution network at Saxmundham Water Tower and at other locations. "These local connections have the potential to provide significant legacy benefit by increasing capacity and resilience of the distribution network" (para 3.2.3 and DL 4.53). The main would benefit consumers in the local area and not

simply Sizewell. There were issues affecting the availability of a sustainable supply across the whole of the East of England, which, if confirmed, would require a strategic response by NWL so that it could discharge its duties under the 1991 Act. Accordingly, longer term plans would need to be put in place by NWL "to serve the region and its committed growth."

55 In the decision letter the defendant noted that the transfer main from Barsham to Saxmundham did not form part of SZC's application for development consent (DL 4.59). But SZC had been able to provide information on the environmental impact of that pipeline and concluded that this would not give rise to any new or different significant cumulative impacts (DL 4.65). The defendant agreed (DL 4.51 to 4.52).

56 On 14 September 2021 the Panel held Issue Specific Hearing 11 ("ISH 11"), which covered water supply issues (DL 4.18). SZC provided a written note on issues arising out of that hearing, including the legal framework for WRMPs and the legal obligations of NWL.

57 On 5 October 2021 the Panel held ISH 15. A statement of common ground was agreed between NWL and SZC on 8 October 2021. In that statement NWL said that it would confirm whether it would be able to meet Sizewell C's long-term needs from the Northern/Central WRZ following completion of the WINEP modelling. If it could not, then NWL would have to develop new supply schemes through WRMP24, but that would not meet Sizewell C's long-term needs until the late 2020s at the earliest. The parties agreed 2032 as the backstop date for this long-term supply to be fully available.

58 NWL was represented by counsel at ISH 15 and agreed with SZC's position at the hearing. SZC pointed out that the Water Resources Planning Guidelines state that water undertakers must ensure that their planned property and population forecasts and resulting supply "must not constrain planned growth". Accordingly, even if NWL could not at that stage identify a water supply for Sizewell C, it was obliged to do so. NWL confirmed that that was the case.

59 After the Examination had closed on 14 October 2021, NWL's solicitors wrote to the defendant on 23 February 2022 to provide an update on the permanent supply of potable water. They said that the WINEP modelling showed that NWL would "not be able to supply all forecast household and non-household demand, including the Project's long-term demand, from existing water resources". "NWL will therefore need to identify new water resources to meet the forecast demand". NWL had included SZC's demand figures from 2032 in its WRMP24 demand forecast for the Suffolk supply area.

60 NWL stated that in addition to demand management options (e.g. reduction in leakage from networks and compulsory metering of households), it was appraising options which included:

(i) Imports from Anglian water (subject to exporting water from the Essex WRZ);
(ii) Nitrate removal at Barsham water treatment works to reduce raw sewage outages;
(iii) Effluent re-use and desalination;
(iv) Winter reservoirs post-2035.

The options in the WRMP24, due for submission to Defra by October 2022, would depend on the final WINEP modelling of abstraction in the River Waveney.

61 NWL reiterated its commitment to providing a long-term supply for Sizewell C, although it was unlikely to be available before the late 2020s at the earliest. This was dependent on finalising and funding new supply schemes to meet future demands in Suffolk, including the power station.

62 On 8 April 2022 SZC provided its response to the defendant's request dated 18 March 2022 for further information. The document summarised the submissions and information already supplied and stated that there was no difference between the positions of SZC and NWL. SZC summarised the range of options being considered by NWL, which included water transfer. It emphasised that WRMP24 would be subject to SEA and HRA. NWL had said that after submitting its plan for consultation it would work with SZC to negotiate an agreement under s.55 of the 1991 Act. Paragraphs 2.1.16 and 2.1.17 read as follows:

> "2.1.16 It is because the long-term planning of water supply is the subject of separate statutory provisions and processes that the identification of the source of Sizewell's long-term supply cannot be known at this stage. Indeed, the source may well change during the lifetime of the power station as the undertaker develops and manages its water resources in response to changing demand and other considerations. For the same reasons, and because on the evidence the source of supply is unlikely to be a constraint to the construction and operation of the new power station, the source does not need to be known for the purposes of the DCO.
>
> 2.1.17 NPS EN-1 is clear that that the DCO decision maker should work on the assumption that other regimes and regulatory processes will be properly applied and enforced so that decisions on DCO applications should complement but not seek to duplicate other processes (NPS EN-1 paragraph 4.10.3). That same principle is clear from paragraph 188 of the NPPF, i.e. planning decisions should assume that regimes will operate effectively."

SZC stated that it had put in place plans for a temporary desalination unit which would cover the project's water requirements up to the commissioning of unit 1 of the power station. That would give NWL 10 years to plan for and deliver a permanent water supply.

63 TASC sent to the defendant representations in response by letters dated 8 April 2022 and 23 May 2022. The first made criticisms of the proposal for a temporary desalination plant and said nothing about WRMP24. The second objected to a possible location for a permanent desalination plant and again said nothing about WRMP24. They made a general point to the effect that SZC had failed to assess impacts on receptors in relation to a permanent water supply solution, relying on the views of NE.

64 On 16 June 2022 SZC responded to the defendant's request for further information about any progress made with NWL. They said that NWL had confirmed that draft WRMP24 would make full provision for the long-term demand from Sizewell C and that, subject to the necessary approvals from Defra and OFWAT, it is likely to be possible to deliver the necessary infrastructure. NWL and SZC had agreed to begin negotiations under the 1991 Act in October 2022 for funding the design and delivery of infrastructure specific to Sizewell C, so as to be ready to sign an agreement once NWL's Business Plan had been approved by

OFWAT, most likely in early 2024. SZC said that there was no reason to think that a new water supply scheme for a "critical NSIP" would not be approved in the 2024 Price Review and every reason to expect that NWL, using reasonable endeavours, would be able to deliver the necessary infrastructure for the permanent water supply connection before the end of construction of Sizewell C (see also DL 4.42).

The decision letter

65 This material on NWL's position regarding a permanent water supply was well summarised in the defendant's decision letter at DL 4.12 to 4.42. At DL 4.44 the defendant considered that the options identified by NWL were potentially viable solutions, as was the "fall back" of SZC providing a permanent desalination plant. He concluded that if development consent were to be granted for the power station, there was a "reasonable level of certainty" that a permanent solution could be found before the commissioning of the first reactor. Plainly in arriving at that conclusion the defendant would have taken into account his further conclusions about the need for environmental impacts to be assessed and considered. The defendant's confidence that a permanent solution would be provided before operation of the power station was a matter for his judgment.

66 The defendant also noted that if, and only if, the WRMP process fails to provide a solution, SZC will have to consider providing its own permanent desalination plant (DL 4.60). He noted the objections which had been raised to this possible option and said that a detailed assessment of the impacts would be required if it were to be pursued. The defendant had not asked for an assessment at this stage because (a) this option did not form part of the proposed development and (b) SZC's position was that it was unlikely to be required (DL 4.61).

67 The defendant dealt with environmental assessment in relation to a mains link to Barsham water treatment works, the WRMP process and the possible fallback of a permanent desalination scheme between DL 4.43 to DL 4.69 in some detail. That section needs to be read as a whole.

68 Part 6 of Sched.19 to the Order contains provisions for the protection of NWL. Paragraph 70 states that subject to either condition 1 or condition 2 being satisfied, and subject to the terms of any agreement made under s.55 or determination made by OFWAT under s.56 of the 1991 Act, NWL will use its reasonable endeavours to supply Sizewell C with the quantities of water required for its operational phase as soon as reasonably practicable. Condition 1 is that the EA confirms the new annual licensed quantities which may be abstracted from the River Waveney and NWL confirms to SZC that there is a sufficient resource in the Northern/Central WRZ to meet forecast demand from its existing and future customers, including demand for Sizewell C (paras.71 to 72). Condition 2 is satisfied if there are new supply schemes in WRMP24, the Secretary of State for Environment, Food and Rural Affairs approves the publication of the final version of WRMP24 and OFWAT approves "the required supply schemes" from the approved WRMP24 in its Final Determination for the 2024 Price Review (paras. 73 to 75).

Discussion

69 Neither the Habitats Regulations nor the EIA Regulations define a "project". It is common ground in this case that principles in the case law on the EIA Regulations

are applicable when considering the scope of a project under the Habitats Regulations.

70 The question of what is the project in any particular case is a matter of judgment for the decision-maker, here the Secretary of State. That judgment may only be challenged in this court on *Wednesbury* principles (*Bowen-West v Secretary of State for Communities and Local Government* [2012] Env. L.R. 22 at [39] to [42]; *Smyth v Secretary of State for Communities and Local Government* [2015] P.T.S.R. 1417; *Wingfield* at [63] and *Ashchurch* at [81], [83], [100] and [105].) In the present case the issue is whether the defendant took into account a consideration which was legally irrelevant and, if not, whether his judgment was otherwise irrational. The threshold for irrationality in the making of such a judgment is a difficult obstacle to surmount (see e.g. *Newsmith Stainless Ltd v Secretary of State for the Environment, Transport and the Regions* [2017] P.T.S.R. 1126).

71 The courts have been astute to detect "salami-slicing", that is the device of splitting a project into smaller components that fall below the threshold for "EIA development" so as to avoid the requirement to carry out EIA altogether (*R. v Swale BC Ex p. RSPB* [1991] 1 P.L.R. 6 at [16]; *Preston New Road Action Group v Secretary of State for Communities and Local Government* [2018] Env. L.R 18 at [69]).

72 In *R. (Larkfleet Ltd) v South Kesteven DC* [2016] Env. L.R. 4 stated at [36] that it is clear from the legislation that the mere fact that two sets of proposed works have a cumulative effect on the environment does not make them a single project. Instead, they may constitute two projects but with cumulative effects which need to be assessed. The court went on to discuss a second type of salami-slicing ([37]-[38]). It acknowledged that the scrutiny of cumulative effects between two projects may involve less information than if the two sets of works are treated together as one project. Accordingly, a planning authority should be astute to ensure that a developer has not sliced up what is in reality one project in order to try to make it easier to obtain planning permission for the first part of the project and thereby gain a foot in the door in relation to the remainder. But the Directives and jurisprudence of the European Court of Justice recognise that it is legitimate for different development proposals to be brought forward at different times, even though they may have a degree of interaction, if they are different "projects". The Directives apply in such a way as to ensure appropriate scrutiny to protect the environment, whilst avoiding undue delay in the operation of the planning control system. Undue delay would be likely if all the environmental effects of every related set of works had to be definitively examined before any of those works could be allowed to proceed. Where two or more linked sets of works are in contemplation, which are properly to be regarded as distinct "projects", the objective of environmental protection is sufficiently secured under the Directives by consideration of their cumulative effects, so far as that is reasonably possible, when permission for the first project is sought, combined with the requirement for subsequent scrutiny under the Directives for the second and each subsequent project.

73 In *Wingfield* at [64] Lang J indicated some factors which *may* be taken into account in determining the extent of a project:

> "64. Relevant factors may include:

i) Common ownership – where two sites are owned or promoted by the same person, this may indicate that they constitute a single project (*Larkfleet* at [60])
ii) Simultaneous determinations – where two applications are considered and determined by the same committee on the same day and subject to reports which cross refer to one another, this may indicate that they constitute a single project (*Burridge* at [41] and [79]);
iii) Functional interdependence – where one part of a development could not function without another, this may indicate that they constitute a single project (*Burridge* at [32], [42] and [78]);
iv) Stand-alone projects – where a development is justified on its own merits and would be pursued independently of another development, this may indicate that it constitutes a single individual project that is not an integral part of a more substantial scheme (*Bowen-West* at [24 – 25])"

The judge made it clear that these factors were not exhaustive. The weight to be given to them will depend upon the circumstances of each case and is a matter for the decision maker.

74 Interdependence would normally mean that *each* part of the development is dependent on the other, as, for example, in *Burridge v Breckland DC* [2013] J.P.L. 1308 at [32] and [42].

75 At DL 4.46 the defendant referred to para 5.15.6 of EN-1 which requires the decision-maker to take into account the interaction of a proposed project with WRMPs (DL 4.46). He had regard to SZC's analysis of the obligations of NWL under the 1991 Act to prepare WRMP24 and to supply water (e.g. DL 4.47, 4.49 to 4.50, 4.55 to 4.60, 4.64 to 4.65 and 4.67). He accepted the key components of that analysis.

76 The defendant's conclusions included the following:

(i) SZC's preferred solution was a link to Barsham *provided by NWL*. SZC's cumulative assessment stated that the pipeline would follow existing roads and boundaries wherever possible. Cut and fill would progress quickly and would impact upon a single receptor for a small number of days at most. Given the footprint and locations of the works ecological impacts "would be minimal and avoidable or mitigable". There would be no significant cumulative effects. The defendant agreed. (DL 4.50 to DL 4.52 and 4.58);
(ii) If NWL's solution for the permanent supply of potable water should require a change to that pipeline connection, that would be subject to its own environmental assessment, including HRA. This would be for NWL to assess (DL 4.56 and 4.58);
(iii) WRMP24 will need to identify new water resources to meet long-term demand in Suffolk, both household and non-household demand. Those new supplies are not limited to meeting the demand for Sizewell C (DL 4.55);
(iv) Sizewell C and the WRMP24 process for identifying new water sources are separate or standalone projects, given that NWL has a duty to undertake WRMP24 regardless of whether Sizewell C proceeds. These two projects have separate "ownership" and "are subject to distinct and asynchronous determination processes". The WRMP process is carried out by NWL and is not something that SZC can dictate (DL 4.49 and 4.60);

(v) Assessment of potential environmental impacts associated with the permanent water supply to be provided by NWL could not be carried out because of the stage reached in the WRMP24 process and the fact that the preferred solution was unknown (DL 4.50 and 4.59);

(vi) Any pipeline or connection needed for the solution adopted by NWL will be the subject of a separate application by that company. That infrastructure does not form part of the current application (DL 4.57 and 4.59);

(vii) The defendant was satisfied with the control that will be exercised by the ONR through the conditions of the nuclear site licence, which will require a reliable supply of potable water to be in place before any nuclear safety-related activities can take place. The cumulative or in-combination environmental effects will be assessed under NWL's WRMP24 process, including a HRA, before operation can commence (DL 4.64);

(viii) The provision of a permanent water supply is not an integral part of the Sizewell C proposal (DL 4.65).

77 Plainly this is not a case where the promoter of a project has sliced up the development in order to make it easier to obtain consent for the first part of a larger project. Sizewell C was initially promoted on the basis that NWL would meet its obligations under the 1991 Act by providing a permanent water supply at Barsham and a transfer main to Saxmundham. Accordingly, the provision of that infrastructure by NWL was not included in SZC's application for development consent. The present uncertainty about what form the long term supply will take only emerged subsequently. In the circumstances, it is inappropriate for the claimant to say that SZC has caused uncertainty by "keeping its options open". SZC has had to react to the changing circumstances of the WINEP modelling and NWL's evolving response to that assessment. SZC has made it plain that it wishes to rely upon the solution that NWL says it will be able to deliver through the WRMP24 process and not upon permanent desalination on-site. On the other hand the defendant's decision recognises that in the unlikely event of NWL being unable to provide a solution, SZC would seek to provide a desalination plant (DL 4.66).

78 In summary, the claimant submits that the defendant took into account the following irrelevant considerations:

(i) The current uncertainty as to the final source of the water supply was irrelevant. The lack of definition of that supply cannot "of itself" provide the answer to the question whether that supply forms part of the project;

(ii) The infrastructure for the potable water supply did not form part of the application for development consent;

(iii) The potable water supply would be subject to a separate and asynchronous decision process;

(iv) Separate ownership.

79 The claimant seeks to base these criticisms upon *Ashchurch*. That case concerned the grant of planning permission for a bridge over a railway line. This is sometimes referred to as "the bridge to nowhere", because when viewed in isolation it served no purpose. It did not connect to any existing road or development. It was a bridge in the middle of a field. It would only begin to be used if and when housebuilders obtained planning permission for and developed a link road and housing site. The claim for judicial review had to succeed in any event because the officer's report

wrongly directed the defendant's planning committee that they could take into account the benefits which would arise from the housing development anticipated but not any of the harm that that development would cause. The benefits of the additional development could not be realised without the concomitant harms. So the decision involved a failure to take into account an obviously material consideration and was irrational (grounds 1 and 2 at [32] to [69]).

80 The claimant relies upon the later part of the judgment of Andrews LJ which dealt with ground 3 at [70] to [104] and the defendant's decision that the bridge should be treated as a single project for the purposes of the EIA Directive. She held that the identification of a project is a fact-specific matter. Consequently, other cases, decided on different facts, are only relevant to the limited extent that they indicate the type of factors which might assist in determining whether a proposed development forms an integral part of a wider project.

81 Andrews LJ referred to the principle under the EIA Regulations that where EIA is required, it should generally be carried out as early as possible. As Lang J said in her second judgment in *Wingfield* [2019] EWHC 1974 (Admin) at [72]-[77] there is no objective in the Habitats Directive (92/43/EEC) requiring appropriate assessment at the earliest possible stage. Instead, the Directive focuses on the end result of avoiding damage to a European site. In the case of a "multi-stage consent" (or a multi-consent) it may be a subsequent rather than the first consent which authorises the implementation of the project (see also *No Adastral New Town Ltd v Suffolk Coastal DC* [2015] Env. L.R. 28 and *R. (Swire) v Canterbury City Council* [2022] J.P.L. 1026 at [94] to [95]).

82 The central flaw in the Council's decision in *Ashchurch* was its failure even to consider whether the bridge formed an integral part of a wider project for the purposes of the EIA Regulations ([82] to [84] and [96]). The court rejected the notion that in a case where the specific development for which permission is sought clearly forms an integral part of an envisaged wider future scheme, without which that development would never take place, there *can only* be a single project if the wider scheme has reached the stage where it could be the subject of an application for planning permission ([88] and see also [101]).

83 The Court then stated that the mere "difficulty" of carrying out any assessment of the impacts of a larger future project which is lacking in detail, is irrelevant to the question whether the application under consideration forms an integral part of that larger project ([90]). *Ashchurch* was a case where it was possible to carry out some assessment of the future scheme. It was not a case where that was impossible ([91] to [92]).

84 At [102] and [104] Andrews LJ held that the fact that the EIA Regulations would require EIA to be carried out on the future wider scheme could not be conclusive on the issue of whether the earlier phase, the bridge, should be treated as a standalone project. But the Court did not suggest that this factor was altogether irrelevant and therefore must be disregarded. For example, it could be relevant to an assessment of whether the procedure being followed would have the effect of avoiding the requirements of the legislation, as in a salami-slicing case.

85 In the present case, unlike *Ashchurch*, the defendant considered whether the provision of a permanent water supply formed an integral part of the Sizewell C development and concluded that it did not. In reaching that conclusion the defendant did not take into account any irrelevant considerations.

86 The defendant did not rely upon the mere "difficulty" of carrying out an assessment of the water supply solution or the mere lack of detail on any option. Rather, WRMP24 had yet to be published in draft. NWL's solution to the water supply issue for Suffolk was unknown and would remain so until that process was completed. There was no option to assess. In any event, the defendant did not treat this factor as conclusive. Instead, it was one of a number of matters to which he had regard in the exercise of his judgment.

87 The defendant was entitled to take into account the fact that the permanent water supply had not formed part of the application for development consent and would be dealt with under a subsequent, separate process and subject to an integrated environmental assessment. He did not treat those matters as conclusive. His approach was lawful in accordance with *Wingfield* at [64] and *Ashchurch*.

88 I understand that "separate ownership" in DL 4.49, read in context, to be a reference to the separate responsibilities of SZC, for Sizewell C, and NWL, for WRMP24 and the supply of water. As the defendant noted, NWL is under a statutory duty to prepare and publish WRMP24 and SZC has no control over that process. Undoubtedly this was a relevant factor which the defendant was entitled to take into account.

89 The claimant alleges that there is functional interdependence between the Sizewell C scheme and the provision of a permanent water supply. This argument relies upon the assertion that "the need for the permanent potable water supply arose from the power station development." The implication would appear to be that there would be no such need in the absence of that development and so there is interdependence. This was not an argument which appears to have been pursued before the Panel during the Examination or subsequently before the Secretary of State. The claimant has not identified any evidence to support its assertion. Rather NWL stated that they would need to make additional water supplies available to meet the forecast demand and not just the demand from Sizewell C. The defendant had regard to NWL's obligation to undertake WRMP24 so as to be able to meet its duties under the 1991 Act. Beyond that the defendant took into account the requirement for the permanent water supply to be available before Sizewell C can operate under a nuclear site licence.

90 I have already summarised the considerations to which the defendant had regard in deciding that the provision by NWL of additional water sources for Suffolk is not part of the Sizewell C project. There is no basis upon which the defendant's evaluative judgment can be said to be irrational.

91 The claimant's argument has much wider implications. The need for the supply of utilities such as water is common to many, if not all, forms of development. A utility company's need to make additional provision so as to be able to supply existing and new customers in the future does not mean that that provision (or its method of delivery) is to be treated as forming part of each new development which will depend upon that supply. The consequence would be that where a new supply has yet to be identified by the relevant utility company, decisions on those development projects would have to be delayed until the company is able to define and decide upon a proposal. That approach would lead to sclerosis in the planning system which it is the objective of the legislation and case law to avoid (*R. (Forest of Dean (Friends of the Earth)) v Forest of Dean DC* [2015] P.T.S.R. 1460 at [18]).

92 Lastly, in his reply Mr. Wolfe chose to focus more on the complaint that a permanent desalination plant was not treated as forming part of the Sizewell C

project. He submits that SZC could have put forward a design for assessment. He claims that the absence of that information and an assessment was unlawful by virtue of *Ashchurch* at [90] and [92]. I disagree. In *Ashchurch* the bridge was only going to be constructed in order to serve the wider development in the Masterplan area. As Andrews LJ said, although it was a matter for the local authority to address on a redetermination, it was difficult to see how the bridge could not be treated as an integral part of the wider project ([100]). The unassessed wider project was a real proposal. But there is no obligation to assess a hypothetical scheme (*Preston New Road* at [75]). Here SZC considered that a permanent desalination plant was unlikely to be necessary and was not currently proposing that option. The defendant's decision that such a desalination plant was not an integral part of the Sizewell C project cannot be faulted.

93 For all these reasons ground 1 must be rejected.

Ground 2

94 On the assumption that the defendant was entitled to treat Sizewell C and the provision of a permanent water supply as separate projects, the claimant argues that the defendant acted in breach of reg.63 of the Habitats Regulations by failing to assess the cumulative impacts of both. The defendant relies upon the Panel's conclusion that even if the water supply did not form part of the project, nevertheless those cumulative effects should be assessed at the development consent stage (PR 5.11.284 to 5.11.287 and 7.5.7).

95 The claimant accepts that the adequacy of the information in an assessment is a matter for the judgment of the competent authority, the defendant, subject to a legal challenge on *Wednesbury* principles, whether under the Habitats Regulations or the EIA Regulations (*R. (Champion) v North Norfolk DC* [2015] 1 W.L.R. 3710 at [41]; *Wingfield* at [97]; *R. (Friends of the Earth Ltd) v Secretary of State for Transport* [2021] P.T.S.R. 190 at [142] to [148]). The claimant submits that the defendant exercised his judgment irrationally and in breach of the principle stated in *Ashchurch* at [90] and [92] (see above). It is also suggested that the approach taken by the defendant is inconsistent with the decision in *R. v Rochdale MBC Ex p. Milne* [2001] Env. L.R. 22 (referred to by Andrews LJ in Ashchurch at [76] and [88]).

96 In this case the grant of development consent depended upon the IROPI test being satisfied. Mr. Wolfe submits that if assessment of the cumulative effects of power station and water supply are left to a subsequent decision, the IROPI test cannot be applied properly at that stage. By that he means that it cannot be applied in the same way as if the cumulative impacts were being assessed before the decision on whether to grant the development consent order was made. He suggests that the prior grant of the Order under the 2008 Act will make it easier for the public interest in Sizewell C going ahead to override cumulative harm or, indeed, that that would "automatically" be the outcome.

Discussion

97 It is well-established that a decision-maker may rationally reach the conclusion that the consideration of cumulative impacts from a subsequent development which is inchoate may be deferred to a later consent stage (e.g. *R. (Littlewood) v Bassetlaw DC* [2009] Env. L.R. 21; *Larkfleet* at [37]-[38]; Forest of Dean at [13] to [18]; *R.*

(Khan) v Sutton LBC [2014] EWHC 3663 (Admin) at [121] – [134] approved in Preston New Road at [67] and *R. (Finch) v Surrey CC* [2022] P.T.S.R. 958 at [15 (4)]).

98 In the present case the defendant referred to the possibility that new sources of water might enable a connection to be made by NWL providing a tunnel to Barsham. He accepted the assessment that that option would not give rise to additional cumulative impacts (e.g. DL 4.52). Beyond that, he decided that the new sources of water and any consequential need for a different connection were simply unknown and could not be assessed at the development consent stage. He agreed that they would instead be appropriately assessed under the WRMP process. Those judgments cannot be faulted as irrational.

99 Ground 2 is predicated upon ground 1 having failed. In other words the provision of the permanent water supply does not form part of the Sizewell C project for the purposes of the decision under challenge. On that basis the claimant's suggestion that the insufficiency of detail could have been addressed by the defendant assessing a "*Rochdale* envelope" is misconceived. *Rochdale* was concerned with the grant of outline planning permission for a project which *included* uncertain components. In any event, the claimant did not develop this submission so as to show how an "envelope" could even be defined (and then assessed) covering possible options for additional water supplies and the connections that could be necessary, all of which would be outside the development site at Sizewell C. The suggestion was wholly unrealistic.

100 The defendant's conclusion that an assessment of the permanent water supply could not be carried out does not conflict with *Ashchurch* at [90] and [92]. Those paragraphs were concerned with whether subsequent works formed part of the current project (i.e. ground 1 of this challenge). They do not detract from the principles in the case law referred to in [97] above.

101 Mr. Wolfe made a faint attempt to rely upon the decision in *Pearce v Secretary of State for Business, Energy and Industrial Strategy* [2022] Env. L.R. 4 as requiring cumulative impacts of the permanent water supply to be assessed in the decision on whether to make the Order. The decision in Pearce turned on its own special facts (see e.g. [118] to [119]). The circumstances of the present case are completely different. Furthermore, in Pearce the promoter had been able to produce a cumulative impact assessment and the reasons given by the decision-maker for deferring consideration of that material were legally flawed. Here options for providing a permanent water supply were unknown at the time of the decision.

102 I do not think there is any merit in Mr. Wolfe's IROPI point. If a future assessment should show that the water supply option chosen would adversely affect the integrity of a European site, whether by itself or in combination with Sizewell C, IROPI would have to be applied according to the language of the Habitats Regulations and the relevant principles in the case law. It would not be appropriate to take into account the overall *benefits* of Sizewell C without also taking into account the overall *harms* of that project. The court has not been shown any authority in which deferral of the consideration of the cumulative impacts to a subsequent consent stage has caused the application of the IROPI test to be distorted or biased or watered down in some way. I note that in *Forest of Dean* Sales LJ (as he then was) stated at [19] that the earlier grants of planning permission for the original project in that case created no presumption and added no force to the contention that planning permission should subsequently be granted for the spine

road that connected the two sites. The earlier permissions had not been granted on the footing that the development of those two sites was dependent upon the spine road.

103 True enough, in this case Sizewell C cannot be operated without a permanent water supply. But although the development consent has been granted in the knowledge that the power station is dependent on the future provision of a water supply, (a) it is not dependent on the provision of any particular form of supply and that is currently unknown and (b) the cumulative impact will have to be assessed properly in accordance with the legislation without any bias or distortion. The benefits of Sizewell C could not be taken into account in that future IROPI assessment without also taking into account the disbenefits. I understood Mr. Strachan KC for the defendant and Mr. Phillpot KC for SZC to adopt this analysis. They both submitted that the defendant's decision has not allowed SZC to have a "foot in the door."

104 I also note that, according to the evidence before the defendant, NWL and SZC expect a s.55 agreement to be signed in early 2024 following the WRMP process in which the integrated environment assessment will have been carried out. It is also expected that the water supply scheme will be approved in the 2024 Price Review. Paragraph 75 of sched.19 to the Order under the 2008 Act has been drafted on that basis (see [68] above).

105 Accordingly, ground 2 must be rejected.

Ground 3

106 NE is the "nature conservation body" for the purposes of the Habitats Regulations. In this case it performed the role of providing specialist advice within its remit to the defendant as the competent authority. There is no dispute that the defendant is entitled to disagree with NE. But the claimant complains that when the defendant did so in the present case he failed to comply with the line of authority which indicates that the decision-maker is expected to give significant weight to the views of an expert body such as NE and to give "cogent reasons" for disagreeing with their views (see e.g. *R. (Akester) v Department for Environment, Food and Rural Affairs* [2010] Env. L.R. 33 at [112] and *R. (Wyatt) v Fareham BC* [2023] Env. L.R. 14 at [9 (4)]).

107 But it is important to note two additional points. First, this issue arises in the context of s.116 of the 2008 Act by which the defendant is obliged to prepare a statement of his reasons for deciding to make an order granting development consent. Even when disagreeing with the expert views of a body such a NE, the relevant standard to apply in assessing the adequacy of the reasons given is that set out in *Save Britain's Heritage v Number 1 Poultry Ltd* [1991] 1 W.L.R. 153 and *South Bucks District Council v Porter (No.2)* [2004] 1 W.L.R. 257 (see Sales LJ in *Mordue v Secretary of State for Communities and Local Government* [2016] 1 W.L.R. 2682 at [26] and Sir Keith Lindblom SPT in *East Quayside 12 LLP v Newcastle upon Tyne City Council* [2023] EWCA Civ 359 at [51], drawing also a parallel with *R. (Mott) v Environment Agency* [2016] 1 W.L.R. 4338 at [69] to [77]).

108 Second, the basis for the deference given to the decision of an expert body such as NE in proceedings to review their own decisions was explained more fully by Beatson LJ in Mott at [69] to [77]. He also stated at [64] that the court may insist

upon being provided with a sufficiently clear and full explanation of the reasons for that decision as a *quid pro quo* for that deference. In my judgement similar considerations apply where a decision-maker is expected to show deference to the advice of an expert body. The level of reasoning which the law expects of a decision-maker disagreeing with the view of an expert body may depend upon whether that view is an unreasoned statement or assertion, or a conclusion which is supported by an explanation and/or evidence. It may also depend upon the nature of the subject-matter. Some advice may not call for reasoning and/or supporting evidence, other advice may do.

109 The views of NE shown to the court were sent in a submission dated 12 October 2021. They provided comments to the defendant on a Report by the Panel on the implications of the proposed development for European protected sites and species which had been submitted to the defendant. The claimant has not relied upon any other document from NE. In paragraphs 2.1.1. and 2.1.2. NE said:

> "2.1.1. It is Natural England's advice that pushing any Habitats Regulations Assessment (HRA) conclusions for integral and inextricably linked elements of the project down the line into other consenting regimes beyond the Development Consent Order (DCO) raises the likelihood that cumulative and 'in combination' impacts in these regards may get missed/ downplayed, and we wish to draw the Examining Authority's attention to this point.
>
> 2.1.2. For example, the current Water Supply Strategy proposes a mains pipeline to the site from the central/ northern Suffolk Water Resource Zone (WRZ). The environmental impacts of this pipeline have not yet been fully assessed through the HRA process. Neither have the interim solutions of a desalination plant as proposed through Change 19 [PD-050] (not considered within the RIES) and tankered water supply. Currently, the Applicant's position is 'no likely significant effects (LSE)' to any European sites from water use as stated in [REP7 -073] and summarised in paragraph 3.2.55 of the REIS. Clearly, such works could lead to a LSE on those European sites already scoped into the HRA or European sites further afield through the pipeline works, abstraction of this magnitude and other associated works to facilitate it. The water supply is a fundamental component of the eventual operation of the project, and the potential impacts of its construction should be clearly assessed in accordance with sections 4.2 and 5.15 of National Policy Statement EN-1 (NPS EN-1), sections 3.7 and 3.9 of NPS EN-6 and paragraph 3.3.9 of the Planning Inspectorate's Scoping Opinion for the Proposed Sizewell C Nuclear Development (July 2019) [APP-169]…"

110 In essence NE said no more than:

(i) The water supply is a fundamental component of the eventual operation of the project and potential impacts of its construction should be assessed with Sizewell C;

(ii) Pushing any HRA for integral and inextricably linked elements of the project down the line into other consenting regimes beyond the development consent

order raises the likelihood that cumulative and in combination impacts may be missed or downplayed.

In relation to NE's comments on the pipeline connection to Barsham and the temporary desalination plant, the defendant has explained why he is satisfied with the assessment of the impacts from those elements. There is no legal challenge to that part of his decision.

111 The two bare points set out in [110] above were not so much advice as assertions without any reasoning or supporting evidence. There was no explanation as to why the water supply should be considered part of, or integral to, the project, nor any application of considerations of the kind indicated in *Wingfield*. Why should relevant impacts be altogether missed in a subsequent assessment, any more than if assessed as part of the power station project? The same statutory regime will be applicable and NE will scrutinise the environmental information provided by NWL. Why should those impacts be downplayed without any consultee noticing, or downplayed by the decision-maker? It should not be forgotten that the water supply solution is to address a regional issue. On any view, it will be a project in its own right and the normal standards of assessment will apply to the proposal as a whole, including any connection to Saxmundham. Why should any cumulative impact of NWL's proposal not take into account cumulative impacts with Sizewell C? None of these points were addressed by NE to justify their apparent concerns.

112 I also note that, notwithstanding the national importance of the proposed project, SZC found it necessary to complain about the "unfairness" of NE having failed to attend Examination hearings to which they had been specifically invited, so that their views could be clarified and tested, in the same way as those of experts relied upon by SZC and other participants (see para. 1.3.1 of SZC's written summary of oral submissions made at ISH 15 held on 5 October 2021).

113 NE's views were summarised by the Panel in PR 5.11.284. No complaint is made about the adequacy of that summary, nor could there be. To the limited extent that NE expressed any views on this subject, they were before the defendant.

114 In my judgment the defendant did adequately explain in DL 4.65 why he disagreed with the bare assertions of NE, all the more so when that paragraph is read properly in the context of the other parts of the decision letter dealing with the same subject. The present case illustrates the inappropriateness of relying upon statements in the *Akester* line of authority as a mantra, rather than looking properly at the materials in any given case in context. Ground 3 should never have been raised by the claimant.

Ground 4

115 The defendant concluded that the project would have an adverse effect upon the integrity of the breeding marsh harrier feature of the Minsmere – Walberswick SPA arising from noise and disturbance during the construction phase (DL 5.20). Accordingly, under reg.64(1) of the Habitats Regulations the defendant had to be satisfied that there were no "alternative solutions" to the project. At DL 5.33 he did so conclude, in agreement with the Panel.

116 The claimant made representations in the Examination that there were alternative means of achieving the objective of generating electricity compatibly with the Climate Change Act 2008 which do not involve the use of nuclear power. It submits that the defendant failed to comply with the requirement in reg.64(1) to consider

alternative solutions by failing to consider how that objective could be met without relying upon new nuclear power. In so far as nuclear power is considered to have particular benefits, those matters ought to have been assessed as part of a wider consideration of alternative methods of generating electricity and their respective benefits. The defendant acted unlawfully by basing his conclusion on too narrow a policy objective, namely to provide additional nuclear power. However, if the defendant was legally entitled to adopt that approach, the claimant does not contend that he failed to assess "alternative solutions" lawfully.

117 The claimant submits that the decision-maker must consider alternative solutions which fulfil the "core policy objectives" or the "central policy objective", these being legal terms of art. They are not simply factual descriptions of a decision-maker's policy position. They fall to be identified not by the "mere election of the decision-maker", but with reference to the purpose of reg.64(1) and case law. The central policy objective should not be drawn so narrowly as to curtail the ability of the Habitats Regulations to inhibit unnecessarily harmful development in favour of less harmful alternatives. Furthermore, the phrase "alternative solutions" means that the "central policy objective" must comprise, or closely relate to, a problem "capable of solutions".

118 The claimant submits that the policy goal of providing nuclear power is "artificially limiting", to the extent that it "cannot logically be characterised as 'central'". The claimant says that, by contrast, the provision of comparatively clean energy does qualify as a central policy objective because that goes to the heart of what is sought to be achieved. Relying on its submission that the "solutions" referred to in the Habitats Regulations correspond to problems, the claimant asserts that a lack of nuclear energy is not a problem. Instead, a lack of clean energy is a problem capable of a range of alternative solutions, and so it is the provision of clean energy which qualifies as a central policy objective.

119 Lastly, the claimant suggests that the defendant erred in law by treating NPS EN-6 as determinative in deciding what were the appropriate policy objectives and alternative solutions.

Discussion

120 That last point can be rejected immediately. There is no basis for suggesting that the defendant in his decision treated the NPSs, or either of them, as conclusive on the issue of what could be considered to be relevant objectives or alternative solutions. Plainly, they were treated as "important" considerations (see e.g. DL 4.9), about which no complaint could possibly be made.

121 NPS EN-1 and EN-6 treat the need for nuclear power generation as having been demonstrated as part of the national strategy for achieving the net zero target in 2050 and ensuring diversity of supply and energy security. The Government's Energy White Paper, "Powering our Net Zero Future" (published in December 2020), announced a review of the suite of the energy NPSs but confirmed that they would not be suspended under s.11 of the 2008 Act in the meantime (DL 4.9). The White Paper includes as a "key commitment" the aim to bring at least one large-scale nuclear project to the point of Final Investment Decision by the end of the current Parliament (pp.16 and 48). The British Energy Security Supply Strategy (April 2022) states that the Government's aim is that by 2050 up to 25% of the electricity consumed in Great Britain will be generated by nuclear power, a

deployment of up to 24GW (see p.197 of the defendant's HRA and DL 4.656 and 8.10).

122 The Panel accepted SZC's case that there is an urgent need for new nuclear energy generating infrastructure of the kind proposed for Sizewell C, the proposed development responds directly to that need and would make a significant contribution to low-carbon electricity generation. Furthermore, that need case accords with Government policy (see e.g. PR 5.19.1 to 5.19.18, 5.19.90 to 5.19.110, 5.19.129 to 5.19.138, 5.19.261 to 5.19.266, 6.6.4 to 6.6.5, 6.7.4, 6.7.8, 7.2.1. to 7.2.4, 7.5.4, 7.5.9 and 10.2.19).

123 The defendant's conclusions on need in the HRA and in his decision letter were based upon the Panel's assessment (see e.g. HRA at pp.189 to 190 and 196 to 201 and DL 4.1 to 4.11, 4.242, 7.1 to 7.4 and 7.13 to 7.15). The need for new nuclear power was seen as an integral part of the strategy for tackling climate change by achieving the net zero target.

124 In the same vein, the Panel rejected submissions by the claimant and others that alternative technologies should be considered and that the approach taken by SZC was too narrow (see e.g. PR 5.4.106 to 5.4.108 and 6.6). The defendant accepted those conclusions (DL 4.133 and 4.148 to 4.152 and 4.155).

125 The claimant seeks to base its approach to the identification of objectives and alternative solutions upon the judgments of the Divisional Court and the Court of Appeal in the legal challenge to the "Airports National Policy Statement" designated in June 2018 (*Spurrier* and *R. (Plan B Earth) v Secretary of State for Transport* [2020] P.T.S.R. 1446).[1] But they lend no support to the claimant's case.

126 The Court of Appeal held that the standard of review in relation to both art.6(3) and art.6(4) of the Habitats Directive, and therefore reg.64 of the Habitats Regulations, is the *Wednesbury* standard ([77] to [79]). Subject to those principles, it is a matter for the decision-maker to determine the relevant objectives which need to be met and which alternative solutions would or would not meet that need.

127 At [92] and [93] the Court of Appeal addressed the problem of when objectives are defined in an unlawfully narrow manner. It endorsed the approach of the Divisional Court that an option that does not meet the core objectives of a policy statement is not an alternative solution for the purposes of reg.64(1). Such objectives must be both "genuine and critical", in the sense that a development which failed to meet those objectives would have no policy support. But it would clearly be insufficient to exclude an option simply because, in the decision-maker's view, it would meet those policy objectives to a lesser degree than the proposed or preferred option. The extent to which an option meets those policy objectives is different from an option failing to meet them at all. The judgments of the Divisional Court and the Court of Appeal provide no support for any of the additional glosses which the claimant now seeks to place on reg.64.

128 In *Plan B Earth* the objectives of the NPS under challenge were to increase airport capacity in the south east *and* to maintain the international "hub status" of the UK. The NPS rejected the option of a second runway at Gatwick as an "alternative solution" to a north west runway at Heathrow because expansion at Gatwick would not enhance, rather it would threaten, the UK's hub status ([64] to [65]). The Court of Appeal held that the Secretary of State had been legally entitled to reach that conclusion ([87] to [93]). The "hub objective" had been one of the

[1] I mention for completeness that this issue was not before the Supreme Court.

"central", or "essential", or "genuine and critical", objectives of the policy. That objective had not been constructed with deliberate and unlawful narrowness so as to exclude other options improperly.

129 The objectives of EN-1 and EN-6 include the generation of clean energy but the central or essential objectives of those policies is not limited to that aim. They also include diversity of methods of generation and security of supply. The Government sees new nuclear power as an essential component of those objectives, just as wind and solar power. That has remained the Government's policy in its recent statements (see also [28] to [32] above). Accordingly, there can be no legal challenge to the approach taken by the Panel and by the defendant which excluded alternative technologies as alternative solutions. In the light of the Court of Appeal's decision in Plan B Earth the legal position is crystal clear.

130 The claimant's argument depends upon an illegitimate attempt to rewrite the Government's policy aims by pretending that the central policy objective is at a higher level of abstraction, namely to produce clean energy, without any regard to diversity of energy sources and security of supply. But it is not the role of a claimant, or of the court, to rewrite Government policy, or to airbrush objectives of that policy which are plainly of "central" or "core" or "essential" importance.

131 The absurdity of the claimant's argument was well-demonstrated by Mr. Strachan KC and by Mr. Phillpot KC for the defendant and SZC respectively. The implication of ground 4 would be that a decision-maker dealing with a proposal for a solar farm or wind turbine array, obliged to comply with reg.64(1), would have to consider as alternative solutions nuclear power and, as the case may be, wind power or solar power options, But in my judgment there is nothing artificial or unlawfully limiting about a Government policy which identifies as core objectives the need to provide a mix of new electricity generation technologies, comprising solar, wind and nuclear power. Indeed, in para. 9.1.1 of the HRA the defendant noted a decision of the CJEU that the objective of ensuring security of supply may constitute IROPI.

132 For these reasons, ground 4 must be rejected. In my order providing for a rolled up hearing, I directed the claimant to review the legal merits of its various grounds, taking as an example its failure to address (a) the content of the Government's policy on nuclear power as part of a mix of energy sources and (b) the decision in Plan B Earth. The claimant should have abandoned ground 4, but chose instead, in effect, to try to continue its challenge to the merits of Government policy through the means of judicial review. The use of the court's process in that way is wholly inappropriate.

Ground 5

133 The claimant submits that when the defendant carried out his IROPI assessment he took into account a legally irrelevant consideration and/or one which was "unevidenced", namely that the project would contribute to achieving the objective of reducing GHG emissions by 78% by 2035 from the UK's 1990 baseline (para. 74 of skeleton).

134 I interpose to make one point straight away. The claimant's two propositions cannot both be correct. Either a consideration is irrelevant or it is not. If it is, then it does not matter whether any evidence was before the decision-maker on the point. Not surprisingly, it turns out that the claimant does not really contend that this consideration is incapable of being relevant. Instead, the complaint is that the

defendant drew a conclusion which was unsupported, or "insufficiently" supported, by evidence (skeleton paras. 76 and 80 to 81).

135 The claimant points out that, according to SZC's Construction Method Statement, it is expected that the first of the two reactors would be operational at the end of 2033 and the second by mid-2034. But that depends upon a number of assumptions, including the provision of a permanent potable water supply before the power station can be operated. The claimant submits that there was no evidence that that water supply would be implemented before 2035. It is said that SZC's expectation does not take into account uncertainty and delay in resolving that issue (paras. 75 to 76 of skeleton). The claimant complains about the absence of a timeline for the provision of the water supply and of evidence as to the degree of contribution Sizewell C would make to "the 2035 target". These are said to have been "obviously material considerations", applying the irrationality test laid down by the Supreme Court in the *Friends of the Earth* case. But ultimately, the criticism that the contribution to reducing GHG emissions by 2035 was not estimated comes down to an allegation that the timescale for determining and providing a permanent potable water solution was unclear (para. 85 of skeleton).

136 The claimant also submits that the defendant could not maintain that there was insufficient information about the eventual water supply to assess its environmental impacts (under ground 2) and at the same time rely upon the environmental benefits of Sizewell C where its operation is dependent upon that supply.

Discussion

137 A reduction in GHG emissions by 78% by 2035 relates to the Sixth Carbon Budget ("CB6") which was set under the Climate Change Act 2008 by the Carbon Budget Order 2021 (SI 2021 No. 750). It requires the UK's net carbon account not to exceed 965 Mt CO2e over the period 2033-2037 (see *R. (Friends of the Earth Ltd) v Secretary of State for Business, Energy and Industrial Strategy* [2023] 1 W.L.R. 225 at [2] to [12]). This is said to equate to a reduction in GHG emissions from the 1990 baseline by 78% by 2035.

138 Initially the claimant's argument was a little difficult to follow because the main sources upon which it relied in the Statement of Facts and Ground and its skeleton do not address the 78% target. Instead, it referred to the IROPI case for Sizewell C, which was based upon the national importance and urgent need for new nuclear power generation, including:

(i) The continuing growth in the UK's electricity demand, the retirement of existing electricity capacity and "a generation shortfall of 95GW by 2035."
(ii) The UK's commitment to reducing GHG emissions to net zero by 2050 (page 195 of the defendant's HRA and see also paras. 8.1, 8.3.4 and 8.3.5).

Similarly, the HRA rejected alternatives which would involve a significant delay to the construction programme, because Sizewell C would not contribute to addressing the shortfall in generation capacity of 95GW in 2035.

139 Likewise, the Panel had referred in its Report to the 95GW shortfall in 2035 and the contribution which Sizewell C could make (PR 6.6.4 and 6.7.4). But Mr Bowes showed how that issue was linked to the CB6 target, relying upon PR 5.19.137. That explained that in a report by the Climate Change Committee making recommendations for the sixth carbon budget, the "Balanced Net Zero Pathway",

which they treated as a central scenario, assumed that it would be necessary for the power sector to reach zero emissions by 2035, or to decarbonise completely.

140 The defendant and SZC sought to argue that the focus of the decision letter was on the net zero target for 2050 rather than any 2035 target along the way. But I do not agree. The Panel's conclusions took into account the contribution that Sizewell C could make to meeting a shortfall in generating capacity by 2035 and not simply the net zero target for 2050. Although one part of the decision letter referred in broad terms to the contribution of Sizewell C to limiting climate change in accordance with the objectives of the Paris Agreement (DL 5.35), other parts rely upon the Panel's Report at PR 7.5.4 (i.e. DL 7.3). PR 7.5.4 was based in turn upon the detailed assessment in PR 5.19. That section of the Report relied upon the urgent need for new nuclear power to contribute to electricity generation by 2035 (see e.g. PR 5.19.78, 5.19.136 to 5.19.137 and 5.19.163).

141 Furthermore, the defendant's decision also took into account his HRA. In that document he decided that the IROPI test was satisfied, basing himself upon the policy context for the project, its benefits as presented by SZC and the UK's commitment to decarbonising the electricity sector by 2035 (pp.195-6). In his overall conclusion on IROPI the defendant also relied upon section 6.7 of the Panel's Report which, as we have seen, was based upon section 5.19 of that document. Accordingly, it cannot be said that the project's claimed contribution to addressing the shortfall in 2035 in electricity generation did not materially influence the defendant's decision on the application of the Habitats Regulations as well as his decision to grant development consent. That leaves the gravamen of the claimant's complaint, namely the claimed lack of evidential support for the Secretary of State's view that the project would make such a contribution by 2035.

142 I have previously summarised under ground 1 much of the material before the Examination and the defendant on the steps which NWL and SZC stated would be followed in relation to WRMP24 so that NWL will comply with its duties under ss. 37, 37A and 37B.

143 In a statement of common ground between NWL and SZC dated 8 October 2021, NWL acknowledged that 2032 had been identified by SZC in discussion as "the backstop date" for the permanent water supply to be "fully available". The Panel referred to this date in its Report (PR 5.11.283).

144 In its letter to the defendant dated 23 February 2022 NWL confirmed that the water demand figures for the operational phase of Sizewell C had been included in WRMP24 from 2032 and that new schemes would be required in that Plan to meet all the forecast demand in the Suffolk supply area, including that of the project. NWL reiterated its commitment to providing the supply required for Sizewell C. That would be reliant upon the finalisation of new supply schemes and their identification in WRMP24, the completion of a s.55 agreement under the 1991 Act and "the costs approval process". The defendant was informed that the draft WRMP would be submitted to Defra by October 2022.

145 The position of both NWL and SZC was that after the submission of the draft WRMP for statutory consultation, they would work together from October 2022 to negotiate an agreement under s.55, which would include funding for the design and delivery of any infrastructure specific to Sizewell C.

146 SZC pointed out that the WRMP24 would be subject to a fully integrated environmental appraisal, including SEA and, where necessary, HRA. That would involve consultation with *inter alia* NE. The final version of the plan would have

to be compliant with the Habitats Regulations and by definition that would have to precede the installation of a permanent water supply. I also note that the defendant has already stated in his decision letter that he is satisfied with the assessment of the Barsham transfer pipeline if that connection should be chosen.

147 The provision of a *temporary* supply by SZC (which has been assessed in the process under the 2008 Act and is not itself the subject of legal challenge) gives NWL 10 years within which to provide a permanent solution. In addition, SZC indicated (in para. 2.2.5 of its response dated 8 April 2022) that, subject to detailed assessment, the lifespan of the temporary desalination plant could be extended for a short period after the end of the construction phase, if necessary.

148 Subsequently, SZC informed the defendant that an agreement with NWL under s.55 and/or s.56 of the 1991 Act would be likely to be ready to be signed once NWL's Business Plan had been approved by OFWAT most likely in 2024. There was no reason to suppose that a new water supply scheme for a critical NSIP would not be approved in the 2024 Price Review.

149 This material was carefully summarised in the decision letter (DL 4.12 to 4.42). The weight to be given to it was a matter for the defendant. He concluded that there was a reasonable level of certainty that a permanent water supply solution can be found before the first reactor is commissioned (DL 4.44). He was satisfied on the basis of the information supplied on the WRMP process under the 1991 Act that "there is a requisite degree of confidence that a long-term solution is deliverable" (DL 4.64).

150 In my judgment the material before the defendant was legally adequate to entitle him to reach those conclusions. It is impossible to say that his judgment on such an evaluative subject looking into the future was irrational. Once that position is reached, there is no legal reason why the defendant could not take into account the contribution which Sizewell C is expected to make to reducing the shortfall in electricity generation in 2035 (or to the target for reducing GHGs).

151 Lastly, there is no internal contradiction in the decision letter between the approach taken by the defendant to the assessment of cumulative effects arising from the permanent water supply for Sizewell C and his reliance upon environmental benefits which are dependent upon the provision of that supply. As to the former, the defendant decided that there was no option under the WRMP24 process which could be assessed at the stage when the decision letter was issued. As to the latter, the defendant was sufficiently confident that a solution would be found through the WRMP24 process (after having been subject to environmental assessment) and then completed before the operation of the power station is expected to begin in 2033. It is therefore apparent from the decision letter that there is no inconsistency in the defendant's reasoning or lack of coherence. The two conclusions are self-evidently compatible.

152 For all these reasons, ground 5 must be rejected.

Ground 6

153 The claimant submits that the defendant acted irrationally in concluding that the Sizewell C site would be clear of nuclear material by 2140 and/or failed to give legally adequate reasons for rejecting the claimant's case on this subject. Inadequacy of reasoning depends upon the claimant showing a lacuna in the decision raising

a substantial doubt as to whether it was tainted by a public law error (see *Save* and *South Bucks*).

154 The Panel noted that it is a requirement of Government policy that spent fuel be stored on a new nuclear site such as Sizewell C until a UK Geological Disposal Facility ("GDF") becomes available (PR 5.20.57 and 5.20.97). NPS EN-6 states that the key factors in determining the duration of on-site storage are the availability of a GDF and the time needed for spent fuel to cool sufficiently for disposal in a GDF (PR 5.20.96.).

155 The claimant submits that the defendant was aware of an estimate provided by SZC that a GDF would not be available to accept spent fuel from a new build project until 2145. Furthermore, during the Examination the claimant had relied upon information provided by the ONR in relation to Hinkley Point C which, according to the claimant, suggested that spent fuel would need to be kept at the Sizewell C site until about 2165.

156 The claimant submits that it was irrational for the defendant to proceed on the basis that spent fuel would be removed from the site by 2140. The modelling of future sea levels, storm events and the adequacy of the coastal defences only ran to 2140. It was irrational for the defendant not to engage with the risk of the site being flooded from the sea while spent fuel remains on site after 2140 and before the site is decontaminated.

Discussion

157 It is well-established that an enhanced margin of appreciation is to be afforded to a decision-maker relying on scientific, technical and predictive assessments (*Mott* at [69] to [78]). Plainly that principle is engaged when dealing with the evaluation of predictions far into the future about such matters as the effects of climate change on sea levels, the availability of a GDF and the life span and decommissioning of a project such as Sizewell C. It is also clear that a decision-maker deciding whether to grant development consent for such a project does so in the context of a range of statutory regimes which address changes in circumstance (and predictions) as they occur during the remainder of this century and well into the next. Those regimes are obviously material considerations.

158 SZC stated in the Examination that for the purposes of the EIA of the project it is assumed that the operation of the power station will end in the 2090s and by 2140 the interim spent fuel store will have been decommissioned (PR 5.20.19 to 5.20.20). Under its nuclear site licence SZC is required to demonstrate that the on-site facilities for interim storage of spent fuel can be designed, operated and decommissioned in a safe manner that ensures any risks to *inter alia* the environment are suitably and sufficiently controlled, including risks from flooding (PR 5.20.55). At PR 5.20.104 the Panel noted that Suffolk County Council and East Suffolk Council had raised no concerns regarding radioactive waste and said that that was to be expected because ONR would regulate on-site radioactive waste management and the EA would regulate gaseous and aqueous emissions.

159 The Panel summarised objections to the modelling work made by the claimant (e.g. at PR 5.20.59).

160 The Panel referred to the Government's firm policy commitment to the GDF for the long-term storage of high-level radioactive waste, in order to meet the UK's international obligations (PR 5.20.123 to 5.20.125). SZC's assumptions regarding

on-site storage of spent fuel had been based upon there being a GDF available for transfer in the long term. The Panel considered that to be a reasonable assumption (PR 5.20.130), although it acknowledged that there was a degree of uncertainty in relation to the timing of the GDF (PR 5.20.131). The Panel reached the judgment that there was sufficient evidence to be able to conclude that the policy tests for the handling of the waste were met, taking into account SZC's statement that spent fuel would be removed from Sizewell C by 2140 (PR 5.20.133 to 5.20 134). They said that this issue should not weigh against the making of the Order (PR 7.4.195 to 7.4.202).

161 On 7 August 2020 the ONR had provided information in an email which responded to questions sent to them by the claimant on 15 June 2020. Those questions covered a range of issues. One question asked ONR whether, in the light of a comment made by the Nuclear Decommissioning Agency (NDA), the spent fuel from Sizewell C would not be accepted at the GDF until about 140 years from the end of operations, and so would have to remain on site for about 200 years from start up. ONR responded that they did not have information on this subject in relation to Sizewell C. But for Hinkley Point C their understanding was that:

(i) The cooling period was dependent upon the burn-up rate assumed for the fuel used in a reactor. The NDA had used a maximum peak burn-up rate and had not taken into account a number of aspects of the strategy for Hinkley Point C. The average burn-up for spent fuel at that power station would be lower than the NDA had assumed and would therefore have a lower heat output;

(ii) The thermal output of a dry disposal canister containing four spent fuel assemblies is dependent upon a mixing strategy which combines high and low burn-up fuel assemblies within a single cannister;

(iii) An analysis had shown that a storage period of 55-60 years after the end of operation would be needed to meet the assumed GDF thermal limits for disposal for all fuel assemblies, using the strategy for Hinkley Point C;

(iv) Accordingly, on the assumption that generation at Hinkley Point C begins in 2025 and ends in 2085, that fuel would be sufficiently cool to transfer to the GDF in 2140-2145. Assuming that it takes just over 9 years to remove fuel to the GDF, all fuel would be transferred from Hinkley Point C by between 2150 and 2155, which would determine the end of use of the fuel stores at that site.

The ONR also stated that the "assumed availability date for the GDF" to accept fuel from new reactors is around 2130, which is earlier than the date relied upon by the claimant taken from a document produced by SZC (see [155] above).

162 The ONR's response also stated that if there were to be a subsequent acceleration in the effects of climate change, so that the impacts were greater or more rapid than currently predicted, that would involve timescales of several decades, so that monitoring would be able to inform decisions under the conditions of the nuclear site licence on the protective measures required. "Managed adaptive options", such as an increase in the height of a coastal defence, with trigger points, would ensure that the site remains safe under the terms of the nuclear site licence.

163 In its representations to the Panel dated 24 September 2021 the claimant relied upon the email from the ONR and submitted that, assuming Sizewell C begins

operation in 2035 and ceases to operate in 2095, a 60-year cooling period would end in 2155 and the removal of spent fuel off site would take until 2165.

164 In its representations to the Panel in September 2021 after ISH 11, SZC stated that the Fourth Addendum to the Environmental Statement for the project assumed that Sizewell C would cease to operate in the 2090s, the fuel store will have been decommissioned by "the 2140s" and 2190 was "the theoretical maximum site lifetime". An EIA for decommissioning would be required in the years leading up to the end of electricity generation (paras. 1.11.1 to 1.11.2 on p.14).

165 An Addendum to the Flood Risk Assessment for the main development site, produced by SZC in January 2021, had increased the height of the proposed "hard coastal defence feature" to 14.6m above Ordnance Datum. Updated modelling was said to show that this would be sufficient to protect the site against events up to 2190 under reasonably foreseeable climate change scenarios. More extreme events are to be dealt with in SZC's safety case which will be assessed by the ONR (para. 1.36 of the Flood Risk Assessment and the Panel's Report at PR 5.8.91).

166 The issues concerning the adequacy of coastal defence proposals and long-term flood risks impact not only on-site radiological waste management but also a number of other subjects. The issues were considered by the Panel in some detail in a number of sections of their report, such as sections 5.7, 5.8 and 5.20. The Panel's Report has an interlocking structure and needs to be read as whole. The Panel was well aware of the objections on this point raised by the claimant and by other participants, such as Professor Blowers. The Report provided a good summary of the material submitted, including that provided by SZC (e.g. PR 5.7.35 to 5.7.40, 5.8.252 and 5.8.259 to 5.8.260, 5.8.276, 5.8.295 to 5.8.296, 5.20.6, 5.20.18 to 5.20.20, 5.20.59 and 5.20.98). In several places in its Report the Panel expressed satisfaction with *inter alia* the "adaptive design" for the proposed coastal defences, the monitoring of future sea levels through the Coastal Processes Monitoring and Mitigation Plan ("CPMMP") and future modifications of the design through the controls exercisable by the ONR and EA (e.g. 5.8.97, 5.8.99, 5.8.231, 5.8.239, 5.8.259 to 5.8.260, 5.8.299, 5.8.315 to 5.8.320, 5.20.98 to 5.20.102). At PR 5.8.313 the Panel noted that the design parameters of the sea defences would be secured by Requirement 19 of the development consent.

167 Participants continued to make representations after the close of the Examination. For example, a Mr. Parker returned to the subject of the lifetime and adequacy of the sea defences at Sizewell C. The EA and ONR provided a joint response dated 7 June 2022 which was forwarded to the defendant. At DL 4.366 the Secretary of State relied upon this response which he had summarised at DL 4.365:

> "4.365 The Secretary of State notes the post-Examination representations submitted by IPs related to flood risk, including Mr Bill Parker who raised concerns regarding the protection from flooding during operation, decommissioning and the residual time spent fuel is stored on site. The Secretary of State notes the EA's letter to Mr Bill Parker of 7 June 2022 which confirmed that the FRA extended to 2190, and that for the Reasonably Foreseeable actual risk up to 2190, there would be no inundation of the main platform or SSSI crossing from overtopping of the HCDF or the remaining lower northern and southern sand dunes/shingle defences in all events up to the 0.1% annual probability flood events in 2019. The EA's letter also included a subsection titled 'ONR' response, confirming that during the operation of

> a nuclear licenced site, it is a regulatory expectation for the licensee to periodically review the validity of the safety case for all facilities on site against external hazards, to ensure the site remains protected, including the dry fuel store and taking updated climate change projections into account for coastal flood hazard."

The ONR specifically said that the design of the sea defences had been based upon the period running up to 2140, but if the life-time of the station extended beyond that year, SZC would need to demonstrate that the sea defences will continue to protect the site adequately, and if not provide additional protection.

168 In DL 4.250 the defendant agreed with the conclusions of the Panel summarised in DL 4.244 to DL 4.248. In DL 4.295 he expressed satisfaction with the modelling of sea level rises to 2140 for reasonably foreseeable events, including up to the 1 in 10,000 year event and in DL 4.246 with the adaptive design to provide a feasible means of increasing the crest height of the Hard Coastal Defence Feature to cope with a "credible maximum sea level rise". The defendant also relied upon further work carried out by SZC and the EA after the close of the Examination which had resolved all of the Agency's outstanding concerns at that stage. The defendant was also satisfied that matters such as the monitoring of climate change and adaptive measures would be adequately addressed by the ONR through the nuclear site licensing regime (DL 4.235 to DL 4.241, 4.247 and 4.250).

169 The defendant returned to these issues at DL 4.279 which summarised the Panel's views as follows:

> "4.279 The ExA considers [ER 5.8.232 et seq.] the adequacy of the proposed climate change adaptation measures and the resilience of the Proposed Development to ongoing and potential future coastal change during its operational life and any decommissioning period including the scope for the HCDF to undergo design adaptation to maintain nuclear safety against predicted sea level rises. The Sizewell Coastal Defences Design Report [REP8-096] provides a design description of the HCDF Adaptive Design at section 3.11 and is designed to protect the Proposed Development from a 1 in 10,000 year storm event with reasonably foreseeable ("RF") climate change effects up to the end of its design life in 2140. The ExA consider that the Applicant recognises that, given the inherently uncertain nature of climate change, the RF climate change scenario may be exceeded. ONR and EA guidance requires that the sea defence be capable of adaptation to a credible maximum sea level rise [ER 5.8.252]. The sea defences have therefore been designed to allow for future adaptation to accommodate the credible maximum scenario, should it develop. The Adaptive Design would provide a simple means of increasing the crest height of the HCDF to reach a crest level of 16.4m OD [ER 5.8.252]. The implementation of measures to enact the Adaptive Design would be driven by progressively observed effects of climate change, specifically mean sea level rise. The MDS FRA [AS-018] confirms that the impacts of climate change on sea level rise would be monitored and assessed at set intervals to determine the trajectory of the projections, and consider whether there is any change from either the current considered projections or the climate change guidance as applied in the application [ER 5.8.253]. A number of issues were raised by IPs in relation to Adaptive design and its implementation [ER 5.8.254 et seq.]. Having considered the

> submissions and responses from the Applicant [ER 5.8.252 et seq.] the ExA takes the view that as indicated in relation to the SMP, and having regard to the details and explanation provided by the Applicant, that the HCDF, including the Adapted Design, would be positioned as landward as possible. In addition, the requirement 19 in the Order would provide a means whereby the design details of various aspects of the HCDF would require ESC approval in consultation with the MMO and the EA before commencement of that work. The ExA considers that this would provide an appropriate safeguard at detailed design stage in relation to matters relating to layout, scale and external appearance of the HCDF, and its integration with other marine infrastructure [ER 5.8.256]."

The defendant agreed (DL 4.293) (and see also DL 4.280, 4.284, 4.285 and DL 4.290).

170 DL 4.261 referred to the Fourth Addendum to the Environmental Statement (see [164] above) and additional modelling work carried out during the Examination. DL 4.266 referred to the suitability of the CPMMP to provide controls in the future for coastal defence. Certain extreme events are to be left to regulation by the ONR (DL 4.267).

171 The decision letter began to deal with radiological issues at DL 4.583 and in that context it returned to the subject of climate change, sea levels and the safe storage of fuel rods. The defendant summarised the views of the Panel at DL 4.589 to DL 4.597. At DL 4.598 the defendant agreed with the Panel's conclusions and referred to the further information on coastal defence modelling and the requirement for a nuclear site licence.

172 The claimant relied upon DL 4.590 which states:

> "The issues of coastal defences, and the impact of climate change on the modelling for the safety of those defences, were considered by the ExA in section 5.8 and section 5.7 of the ExA Report respectively. The ExA considers [ER 5.20.101] that the coastal defences have been designed so they can be modified if it is necessary to do so, with the monitoring of the sea levels secured through the CPMMP, and this is further reinforced by the obligations required by the NSL regime regulated by the ONR and the permits regulated by the EA. The ExA is persuaded [ER 5.20.102] that the Applicant's conclusions are predicated on the basis that the site will be clear of nuclear material by 2140, the period which has been modelled for coastal defences, and under these circumstances the ExA consider the tests set out in paragraph 2.11.5 of NPS EN-6 would be met."

The claimant places a good deal of emphasis on the last sentence, and also upon DL 4.245. These paragraphs refer to an assumption that spent fuel will be removed from Sizewell C by 2140, which is also the year to which the modelling for predicted extreme sea levels runs.

173 The claimant complained that the defendant failed to give reasons addressing its reliance upon the ONR's email dated 7 August 2020. In my judgment he was under no legal obligation to do so. The limitations of that material produced in 2020 were obvious on the face of the document itself, without there being any need for the Panel or the defendant to spell that out by simply repeating them. The comments by the ONR related to the Hinkley Point C project in the absence of

information on Sizewell C. They were not of any real significance. Naturally the Panel and the defendant would focus on later material produced in 2022 which specifically related to the Sizewell C project (see e.g. [167] above). An application for a nuclear site licence for that scheme had yet to be submitted. SZC said to the Examination that the fuel store would be decommissioned by the 2140s, that is not necessarily by 2140 (DL 4.252). Although the ONR had estimated in 2020 that the GDF would be available by 2130, the claimant relies upon an alternative prediction, 2145, emanating from SZC. The Panel stated that it was reasonable to assume that storage would be available in a GDF in the long term, but added, not surprisingly, that there is a degree of uncertainty (PR 5.20.131), referring no doubt to timing.

174 It is obvious that the issue of how far into the next century spent fuel will need to remain at Sizewell C is subject to uncertainty. But that is not the only uncertainty about the future. The ONR, EA, SZC and others have addressed the possibility that climate change may cause sea levels to increase more quickly. Estimates about the availability of facilities and projections are having to be made an unusually long way into the future. On any fair reading of the Panel's Report and the decision letter, that uncertainty was recognised. I agree with counsel for the defendant and for SZC that what matters is how that subject was addressed.

175 The claimant's ground 6 is a classic example of a failure to read the decision letter fairly and as a whole. It is plain that in DL 4.590 the defendant also relied upon the adaptive nature of the design for the coastal defences, the monitoring of sea levels through the CPMMP and the controls which will be applied by the ONR and the EA through their respective regulatory regimes. That paragraph has to be read in the context of the many passages in the Panel's Report and in the decision letter where those matters were explained and relied upon. The suggestion by the claimant's counsel that the defendant did not rely upon those matters when addressing the future adequacy of coastal defences in relation to the storage of spent fuel is wholly untenable. The point was made clear in relation to the ONR and the nuclear site licence, for example in DL 4.365. The defendant relied, as he was entitled to do, upon the normal assumption that those other regulatory regimes will be operated properly. The defendant's reasoning cannot be treated as irrational or legally inadequate.

176 In addition, Requirement 19 of the development consent requires details of coastal defence features to be submitted and approved by the local planning authority, before construction of those works may commence, which must include a monitoring and adaptive sea defence plan that sets out periodic monitoring proposals and the trigger point for when the crest height of the sea defence would need to be increased to 16.9m above Ordnance Datum.

177 Accordingly, ground 6 must be rejected. In reaching that conclusion, I have not found it necessary to consider the application of s.31(2A) or (3C) and (3D) of the Senior Court Act 1981.

Ground 7

178 This ground is concerned with GHG emissions from the operation of Sizewell C. The claimant refers to DL 4.248 and DL 4.250 in which the defendant agreed with the Panel that "emissions of the magnitude demonstrated would not have a significant effect on the UK's ability to meet its carbon budget commitments or the ability of the Government to meet the UK's obligations under the Paris

Agreement". The claimant then says that that conclusion is inconsistent with this part of DL 8.9:

> "Operational emissions will be addressed in a managed, economy-wide manner, to ensure consistency with carbon budgets, net zero and our international climate commitments. The Secretary of State does not, therefore need to assess individual applications for planning consent against operational carbon emissions and their contribution to carbon budgets, net zero and our international climate commitments."

179 The claimant submits firstly, that DL 8.9 should be read as meaning that the defendant has made no assessment of the contribution of *operational* GHG emissions to the carbon budgets and secondly, there was no evidential basis upon which he could conclude in DL 4.248 and DL 4.250 that operational emissions from Sizewell C would not have a significant effect on the UK's ability to meet its climate change obligations (skeleton paras. 106 to 110).

Discussion

180 DL 8.9 appears in section 8 of the decision letter which is entitled "Other Matters". Under that heading DL 8.8 to DL 8.9 refer to the Climate Change Act 2008 and the Net Zero Target in broad terms. The context for the part of DL 8.9 which the claimant quotes is set by the opening two sentences to which it did not refer. Thus, the context is the continuing significance of the NPSs and the need for nuclear generation of the kind represented by Sizewell C in accordance with those policy statements.

181 EN-1 states that carbon emissions from a new nuclear power station are likely to be much less than from a fossil fuelled plant (para. 3.5.5.). New nuclear power forms one of the three key elements of the Government's strategy for moving towards a decarbonised, diverse electricity sector by 2050, along with *inter alia* renewable electricity generation (para. 3.5.6 and see also para 3.5.10). I agree with the defendant and SZC that the part of DL 8.9 which the claimant seeks to criticise is entirely consistent with para 5.2.2 of EN-1 which states:

> "5.2.2. CO_2 emissions are a significant adverse impact from some types of energy infrastructure which cannot be totally avoided (even with full deployment of CCS technology). However, given the characteristics of these and other technologies, as noted in Part 3 of this NPS, and the range of non-planning policies aimed at decarbonising electricity generation such as EU ETS (see Section 2.2 above), Government has determined that CO_2 emissions are not reasons to prohibit the consenting of projects which use these technologies or to impose more restrictions on them in the planning policy framework than are set out in the energy NPSs (e.g. the CCR and, for coal, CCS requirements). Any ES on air emissions will include an assessment of CO_2 emissions, but the policies set out in Section 2, including the EU ETS, apply to these emissions. The IPC does not, therefore need to assess individual applications in terms of carbon emissions against carbon budgets and this section does not address CO_2 emissions or any Emissions Performance Standard that may apply to plant."

182 Section 4 of the decision letter is entitled "Matters considered by the ExA [the Panel] during the Examination." DL 4.232 to DL 4.250 dealt with climate change and resilience. Within that part DL 4.242 to DL 4.243 addressed GHG emissions and the carbon footprint. DL 4.244 to DL 4.250 summarised the Panel's overall conclusions on various climate change issues and stated that the defendant agreed with the Panel on those matters.

183 DL 4.242 and DL 4.248 referred back to the parts of the Panel's Report which summarised the quantitative analysis before the Examination, the responses of other parties to that material, and the Panel's conclusions at PR 5.7.56 to PR 5.7.100. That summary covered the quantitative analysis in the ES and in the subsequent Life Cycle Analysis carried out for SZC.

184 At PR 5.7.90 the Panel concluded:

> "The ExA concludes that the ES [APP-342], as updated by [AS-181, REP2-110], and [REP10-152], demonstrates that construction emissions from the Proposed Development would be less than 1% of the UK Government's carbon budget for the relevant period, and would not be significant in accordance with the criteria as described in Chapter 26 [APP-342]. The ExA is therefore content that those emissions would not materially affect the ability of the Government to meet the UK's obligations under the Paris Agreement. Similarly, the gross emissions associated with the operational phase have been found to be less than 1% of relevant periods in which they arise. The ExA also recognises the support provided by national policy for low carbon power generation projects such as the Proposed Development, and that the importance for the UK's carbon budgets should also be considered from the perspective of the carbon emissions that would otherwise be produced by other sources, if they were not generating. The national policy support for such low carbon generation projects has been considered in detail in section 5.19 of this Report."

That conclusion was then carried forward to PR 5.7.100. It is also relevant to note the reference here to the policy support for new nuclear power generation because of the contribution it makes to reducing GHGs that would otherwise be produced from other sources (as opposed to the "gross" emissions from a nuclear power station taken in isolation).

185 The defendant's decision letter accepted both PR 5.7.90 and PR 5.7.100. There was therefore ample quantitative material to support the conclusions of the Panel and, in turn, the Secretary of State. Mr. Wolfe KC relies once again upon a dictum in *R. (Association of Independent Meat Suppliers) v Food Standards Agency* [2019] P.T.S.R. 1443 at [8]. But for the reasons set out in *R. (Goesa Ltd) v Eastleigh BC* [2022] P.T.S.R. 1473 at [19] that passage does not alter the well-known *Wednesbury* principles applied by the Courts (see also *R. (Law Society) v Lord Chancellor* [2019] 1 W.L.R. 1649 at 98]).

186 The claimant then complains that there is no evidence that the defendant personally considered the quantitative assessment carried out for SZC, whether in the ES or the Life Cycle Assessment. This is yet another attempt to rely upon part of the judgment of Sedley LJ in *R. (National Association of Health Stores) v Secretary of State for Health* [2005] EWCA Civ 154 without reading the relevant passages as a whole. The High Court has analysed the principles in *R. (Transport Action Network Ltd) v Secretary of State for Transport* [2022] P.T.S.R. 31 at [60] to [73] and *R. (Save Stonehenge World Heritage Site Ltd) v Secretary of State for*

Transport [2020] P.T.S.R. 74 at [62] to [66] and [178]. A Minister is entitled to rely upon a summary prepared by his officials of the material which his department has received. The issue is therefore the narrower one of whether there are any grounds for criticising the legal adequacy of that summary in the context of ministerial decision-making. In my judgment the Secretary of State was not required himself to delve into the ES or the Life Cycle Assessment in the way the claimant suggests. The summary provided in the Panel's Report and in the draft decision letter, both of which were provided to the defendant for him to consider, were as, a matter of law, perfectly adequate.

187 Ground 7 is utterly hopeless and must be rejected.

Conclusions

188 The court is faced with a similar situation to that which arose in the Heathrow litigation where, having heard full submissions in a rolled-up hearing (in that case dealing with five different claims), it had to decide whether permission to apply for judicial review should be granted on each ground (*Spurrier* at [667]). In the present case as in *Spurrier*, the mere fact that the court has had to consider in a rolled-up hearing, and in a judgment, a substantial amount of material and legal submissions, does not mean that the grounds raised pass the threshold for arguability.

189 I consider that each of grounds 3 to 7 is totally without merit (CPR 23.12). Accordingly, permission must be refused in relation to those grounds.

190 In relation to grounds 1 and 2 I conclude that both are unarguable and permission should be refused.

191 The application for permission to apply for judicial review is dismissed.

Appendix 3 – Extract from The Sizewell C Project, 9.121, Written Summaries of Oral Submissions made at Issue Specific Hearing 15: Proposed Temporary Desalination Plant (5 October 2021)

- The application being examined today is for a temporary desalination plant. If it was ever necessary to plan a permanent facility (or any alternative permanent solution) a formal application and assessment would be necessary and widely consulted upon.

1.2.15 HPQC stated that the Applicant would respond in writing to a specific query raised by Mr Galloway as to how many generators comprised the desalination plant in its two locations. SZC Co.'s response is contained in the Applicant's **Written Submissions Responding to Actions Arising from ISH15** (Doc Ref. 9.122).

1.3 Agenda Item 3: The Environmental Assessment and the environmental implications of the proposed temporary desalination plant including matters relevant to the Habitats Regulations Assessment:

(a) The additional environmental assessments and supporting documentation submitted in connection with the proposed temporary desalination plant.

1.3.1 HPQC noted that Natural England were once again not in attendance at an Issue Specific Hearing to which they had been specifically invited, and where its attendance would plainly have been of significant benefit to the examination. Their Deadline 9 written submissions in lieu of attendance [EV-222] were not an adequate substitute. An examination under the Planning Act 2008 is an inquisitorial process, and an important role of the Issue Specific Hearings within that process is to enable the examining authority to probe, clarify and test the positions that Interested Parties set out in writing. That includes the positions adopted by statutory consultees such as Natural England, who have a particular role to play in the process pursuant to statute. The non-attendance of Natural England in this context creates an imbalance in the inquisitorial process and frustrates its fair operation. The Applicant has attended the hearings with its relevant experts throughout, so that its written material can be tested and explained, its position on the issues can be clarified where needed, and responses can be given to issues raised by the examining authority and interested parties. Natural England's lack of attendance therefore has implications in terms of the overall fairness of the process, as its position cannot be probed and tested by the Examining Authority in the same way and to the same extent, nor can the Applicant obtain clarity as to Natural England's stance where that is needed to allow for an informed response.

1.3.2 By way of example of this general point, paragraph 3.1 of Natural England's written submissions [EV-222] makes reference to the screening process

Appendix 4 - *R (Wyatt) v. Fareham BC* [2022] EWCA Civ 983

R. (ON THE APPLICATION OF WYATT) v FAREHAM BC

COURT OF APPEAL (CIVIL DIVISION)

Sir Keith Lindblom P (Senior President of Tribunals) and Singh and Males LJJ: 15 July 2022

[2022] EWCA Civ 983; [2023] Env. L.R. 14

Assessment; Development plans; Habitats; Irrationality; Local authorities' powers and duties; Planning permission; Protected areas; Residential development; Wetlands

H1 *Judicial review—nature conservation—Town & Country Planning—Habitats Regulations—Natural England Advice Note on risk to protected habitats from new development wastewater nutrient outputs—'nutrient neutrality' principle—whether reg.63 duty performed lawfully—whether planning application determined appropriately—whether judge erred in approach to "precautionary principle"—whether "reasonable worst-case scenario" had to be assessed where data was uncertain*

H2 The appellant (W) appealed against dismissal of his claim for judicial review of the grant by the respondent (F) of outline planning permission for a development of eight detached houses with four or more bedrooms in each indicated. The site was close to a Special Protection Area and excess nutrient deposits from new housing development, especially nitrogen from wastewater, could harm the integrity of the protected site if suitable mitigation measures were not put in place. Between the resolution to grant permission and decision notice being issued, Natural England (NE) published a technical guidance note. The application was amended to include mitigation measures and NE approved the nitrogen budget. In undertaking an "appropriate assessment" under reg.63 of the Habitats Regulations to ensure that the development would not adversely affect the integrity of the protected site, F had regard to NE's advice about "nutrient neutrality" in the technical guidance note. It used average land use figures in calculating the baseline nitrogen deposition from the site, based its calculation of how much nitrogen the proposed development would produce on a national average occupancy rate for new dwellings of 2.4 persons per dwelling, and applied a 20% "precautionary buffer". On appeal, the two issues were whether F: (1) lawfully performed its duty under reg.63; and (2) complied with its duty under s.38(6) of the Planning and Compulsory Purchase Act 2004 to determine the application in accordance with the development plan unless material considerations indicated otherwise? On the first issue, W submitted that the judge made two fundamental errors in his approach to the legal framework governing appropriate assessment. First, he accepted NE's evidence on the

soundness of the method used by F in conducting the appropriate assessment but should have looked at the underlying evidence and considered, for himself, whether the figures used were sound, relying on the *Dutch Nitrogen* case. Secondly, the judge had erred in his approach to the "precautionary principle" in that he should have accepted that where data was uncertain, the "reasonable worst-case scenario" had to be assessed.

H3 **Held,** in dismissing the appeal:

H4 (1) F's conclusion on the crucial question under reg.63(5) was, ultimately, an evaluative judgment for it to make as "competent authority". The conclusion it reached, as a matter of evaluative judgment, had been legally sound.

H5 (2) The judge's self-direction on the relevant legal principles could not be faulted and he went on to apply those principles appropriately. Nor had he simply accepted NE's evidence without question. On the contrary, he examined in appropriate depth and detail the evidence of the expert witnesses on either side. Occupancy rates and the 20% precautionary buffer had been considered with care. More generally, the judge adopted the correct approach in his consideration of F's appropriate assessment as a whole. He applied an appropriately intense standard of scrutiny, consistent with the proper application of *Wednesbury* principles in the light of the jurisprudence to which he had referred.

H6 (3) The submission that the judge ought to have given greater weight than he did to the unfavourable status of the water environment in parts of the Solent was rejected. That fact was explicitly acknowledged and taken into account by NE when issuing the advice in its technical guidance note. There was no support either in the habitats legislation itself or in the relevant authorities for the proposition that the unfavourable status of a protected site raised the level of certainty which had to be achieved if the proposed development was to be approved, or for the proposition that the standard of review the court should adopt in those circumstances was more demanding. Whatever the particular circumstances in a given case, the basic duty of the competent authority under reg.63 was to grant planning permission only if satisfied that the proposed development "will not adversely affect the integrity" of the European protected site. The duty of the court was, and remained, to ensure that the authority's evaluative judgment on that question was lawfully exercised.

H7 (4) The judge had not adopted too lax an understanding of the precautionary principle, or wrongly discounted the concept of the "reasonable worst-case scenario". It had been legitimate for him to conclude that, at least in the present case, the "reasonable worst-case scenario" did not have to be assessed if the precautionary principle was to be satisfied.

H8 (5) There could not be any proper challenge to the lawfulness of the advice given by NE in its technical guidance note, which was an advisory document; neither mandatory in effect nor prescriptive of a single correct procedure to be followed. Nor did it misstate the legal position under reg.63.

H9 (6) Criticisms of F's use of the 2.4 occupancy rate, average land use figures and the 20% precautionary buffer were also rejected. Although an appropriate assessment had to be based on "best scientific knowledge", the question for the court was not whether each individual figure used in it was intrinsically the "best scientific knowledge" when considered on its own, divorced from the full context in which it was used. The court had to take a "holistic" view on the question whether the assessment methodology as a whole represented "best scientific knowledge".

When that was done, there was no *Wednesbury* error in F's approach. Nothing said in *Dutch Nitrogen* implied that the use of averages was inherently objectionable. Although their use would necessarily involve the exercise of judgment on their validity in the particular context, that did not mean that using them was, in principle, contrary to the requirement for the necessary degree of certainty. The use of average figures may sometimes be conducive to sufficient certainty, sometimes not. Whether that was so in a particular case would be a matter of judgment for the competent authority. The fact that the 20% precautionary buffer was not the product of arithmetic, but of judgment, did not mean that it lacked an adequate basis.

H10 (7) The officer's assessment under s.38(6), regarded with realism and common sense, was not flawed by any error of law. There was no misunderstanding or unlawful misapplication of development plan policy, and the path had been open to the officer to reach the conclusion that, "on balance", when it was "considered against the development plan as a whole", the proposal ought to be approved. The officer's conclusions on other material considerations were predicated on that conclusion and were sufficient to comply with the second limb of s.38(6).

H11 **Cases referred to:**

Bayer CropScience v Commission (T-429/13) EU:T:2018:280

BDW Trading Ltd (t/a David Wilson Homes (Central, Mercia and West Midlands)) v Secretary of State for Communities and Local Government [2016] EWCA Civ 493; [2017] P.T.S.R. 1337

Braintree DC v Secretary of State for Communities and Local Government [2018] EWCA Civ 610; [2018] 2 P. & C.R. 9; [2018] J.P.L. 1036

Compton Parish Council v Guildford BC [2019] EWHC 3242 (Admin); [2020] J.P.L. 661

Cooperatie Mobilisation for the Environment UA v College van Gedeputeerde (C-293/17) EU:C:2018:882; [2019] Env. L.R. 27

Craeynest v Brussels Hoofdstedelijk Gewest (C-723/17) EU:C:2019:533; [2020] Env. L.R. 4; [2020] 1 C.M.L.R. 7

Edinburgh City Council v Secretary of State for Scotland [1997] 1 W.L.R. 1447; 1998 S.C. (H.L.) 33; 1997 S.C.L.R. 1112 HL (SC)

Heard v Broadland DC [2012] EWHC 344 (Admin); [2012] Env. L.R. 23; [2012] P.T.S.R. D25

Holohan v An Bord Pleanala (C-461/17) EU:C:2018:883; [2019] P.T.S.R. 1054; [2019] Env. L.R. 16

Inclusion Housing Community Interest Co v Regulator of Social Housing [2020] EWHC 346 (Admin)

Kennedy v Information Commissioner [2014] UKSC 20; [2015] A.C. 455; [2014] 2 W.L.R. 808

Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij (C-127/02) EU:C:2004:482; [2005] 2 C.M.L.R. 31; [2005] Env. L.R. 14

Mansell v Tonbridge and Malling BC [2017] EWCA Civ 1314; [2019] P.T.S.R. 1452; [2018] J.P.L. 176

People Over Wind v Coillte Teoranta (C-323/17) EU:C:2018:244; [2018] P.T.S.R. 1668; [2018] Env. L.R. 31

R. (on the application of Plan B Earth) v Secretary of State for Transport [2020] EWCA Civ 214; [2020] P.T.S.R. 1446; [2020] J.P.L. 1005

R. (on the application of Friends of the Earth Ltd) v Heathrow Airport Ltd [2020] UKSC 52; [2021] P.T.S.R. 190; [2021] J.P.L. 905
R. (on the application of A) v Secretary of State for the Home Department [2021] UKSC 37; [2021] 1 W.L.R. 3931; [2021] H.R.L.R. 17
R. (on the application of BACI Bedfordshire Ltd) v Environment Agency [2019] EWCA Civ 1962; [2020] Env. L.R. 16
R. (on the application of Champion) v North Norfolk DC [2015] UKSC 52; [2015] 1 W.L.R. 3710; [2016] Env. L.R. 5
R. (on the application of Corbett) v Cornwall Council [2020] EWCA Civ 508; [2020] J.P.L. 1277
R. (on the application of Hampton Bishop PC) v Herefordshire Council [2014] EWCA Civ 878; [2015] 1 W.L.R. 2367
R. (on the application of Mahmood) v Secretary of State for the Home Department [2001] 1 W.L.R. 840; [2001] H.R.L.R. 14; [2001] A.C.D. 38 CA (Civ Div)
R. (on the application of McMorn) v Natural England [2015] EWHC 3297 (Admin); [2016] P.T.S.R. 750; [2016] Env. L.R. 14
R. v Ministry of Defence Ex p. Smith [1996] Q.B. 517; [1996] 2 W.L.R. 305; [1996] I.C.R. 740 CA (Civ Div)
R. (on the application of Morge) v Hampshire CC [2011] UKSC 2; [2011] 1 W.L.R. 268; [2011] Env. L.R. 19
R. (on the application of Mott) v Environment Agency [2016] EWCA Civ 564; [2016] 1 W.L.R. 4338; [2017] Env. L.R. 1,
R. (on the application of Pearce) v Parole Board of England and Wales [2022] EWCA Civ 4; [2022] 1 W.L.R. 2216
R. (on the application of Preston) v Cumbria CC [2019] EWHC 1362 (Admin); [2020] Env. L.R. 3
R. (on the application of Prideaux) v Buckinghamshire CC [2013] EWHC 1054 (Admin); [2013] Env. L.R. 32; [2013] P.T.S.R. D39
R. v Rochdale MBC Ex p. Milne (No.2) [2001] Env. L.R. 22; (2001) 81 P. & C.R. 27; [2001] J.P.L. 229 (Note) QBD
R. (on the application of United Trade Action Group Ltd) v Transport for London (TfL) [2021] EWCA Civ 1197; [2022] R.T.R. 2; [2022] L.L.R. 141
R. v Westminster City Council Ex p. Ermakov [1996] 2 F.C.R. 208; (1996) 28 H.L.R. 819; (1996) 8 Admin. L.R. 389 CA (Civ Div)
R. (on the application of Spurrier) v Secretary of State for Transport [2019] EWHC 1070 (Admin); [2020] P.T.S.R. 240; [2019] J.P.L. 1163
Smyth v Secretary of State for Communities and Local Government [2015] EWCA Civ 174; [2015] P.T.S.R. 1417; [2016] Env. L.R. 7
St Modwen Developments Ltd v Secretary of State for Communities and Local Government [2017] EWCA Civ 1643; [2018] P.T.S.R. 746; [2018] J.P.L. 398
Sweetman v An Bord Pleanala (C-258/11) EU:C:2013:220; [2014] P.T.S.R. 1092; [2015] Env. L.R. 18
Tesco Stores Ltd v Dundee City Council [2012] UKSC 13; [2012] P.T.S.R. 983; 2012 S.C. (U.K.S.C.) 278
Tiviot Way Investments Ltd v Secretary of State for Communities and Local Government [2015] EWHC 2489 (Admin); [2016] J.P.L. 171

H12 **Legislation referred to:**
Town and Country Planning Act 1990 s.54A
Directive 92/43 (Habitats) art.6
Planning and Compulsory Purchase Act 2004 s.38
Conservation of Habitats and Species Regulations 2017 (SI 2017/1012) regs 5, 7, 63 and 64

H13 *G. Jones KC* and *C. Fegan* (instructed by Fortune Green Legal Practice) appeared on behalf of the appellant.
T. Mould KC (instructed by Southampton & Fareham Legal Services Partnership) appeared on behalf of the respondent.
D. Elvin KC and *L. Wilcox* (instructed by Browne Jacobson LLP) appeared on behalf of Natural England.

JUDGMENT

THE SENIOR PRESIDENT OF TRIBUNALS:

Introduction

1 There are two basic questions in this case. First, was the duty to make an "appropriate assessment" under regulation 63 of the Conservation of Habitats and Species Regulations 2017 ("the Habitats Regulations") lawfully performed by a local planning authority when it granted planning permission for housing development on land near a European protected site in the Solent? Second, did the authority comply with its duty under section 38(6) of the Planning and Compulsory Purchase Act 2004 to determine the application in accordance with the development plan unless material considerations indicated otherwise? Neither question involves any novel issue of law. The relevant legal principles are well established and clear.

2 With permission granted by Lord Justice William Davis, the appellant, Ronald Wyatt, as Chairperson of Brook Avenue Residents Against Development ("BARAD"), appeals against the order of Mr Justice Jay dated 28 May 2021 dismissing his claim for judicial review of the decision of the respondent, Fareham Borough Council on 1 October 2020 to grant outline planning permission for a development of eight detached houses on land at Egmont Nurseries, Brook Avenue, Warsash. The council is the local planning authority, and the "competent authority" under regulation 7 of the Habitats Regulations. It has filed a respondent's notice. The fourth interested party is Natural England, the "appropriate nature conservation body" under regulation 5. It too has filed a respondent's notice. The first, second and third interested parties – Lorraine, Michael and Thomas Hanslip – are the landowners. They filed detailed grounds of resistance opposing the claim but have played no part in the appeal.

The main issues in the appeal

3 The judge rejected Mr Wyatt's challenge on all eight grounds. Permission to appeal was granted on four of the five grounds in the appellant's notice (grounds 1, 2, 4 and 5). The issue arising from grounds 1, 2 and 4 and the council's respondent's notice is whether the council failed to make a lawful "appropriate

assessment" of the proposed development under regulation 63 of the Habitats Regulations, in part because it relied on the technical guidance note published by Natural England, entitled "Advice on Achieving Nutrient Neutrality for New Development in the Solent Region (Version 5 – June 2020)", which Mr Wyatt contends is legally flawed. The issue arising from ground 5 is whether the council failed lawfully to perform its duty under section 38(6) of the 2004 Act. These two main issues are distinct and can be dealt with separately.

The application for planning permission and the council's decision

4 The site of the proposed development lies a little to the east of the mouth of the River Hamble and about 5.5km from the Solent and Southampton Water Special Protection Area ("the SPA"), which is a European protected site. Aquatic habitats for many species of plants and birds within the protected site, including the Brent Goose, are vulnerable to the excess deposition of nutrients – in particular nitrogen compounds in wastewater, which cause algal growth. New housing development can thus harm the integrity of the protected site if suitable mitigation measures are not put in place.

5 The application for outline planning permission was submitted in June 2018. The proposed development was the "[demolition] of existing buildings, [the construction] of eight detached houses [and the creation] of [a] paddock". The existing use was described as "[redundant] glasshouses and nursery buildings". The application form indicated that each dwelling would have four or more bedrooms. When the council's Planning Committee considered the proposal in December 2018, it resolved that planning permission should be granted. Before the required section 106 agreement had been entered into and a decision notice issued, Natural England published its technical guidance note. The application came back to the committee on 19 August 2020. By then it had been amended to include mitigation measures, and Natural England had approved the nitrogen budget.

6 As competent authority, the council was required by regulation 63 of the Habitats Regulations to undertake an "appropriate assessment" to ensure that the development would not adversely affect the integrity of the protected site. In undertaking the "appropriate assessment" it had regard to Natural England's advice about "nutrient neutrality" in its technical guidance note. It used average land use figures in calculating the baseline nitrogen deposition from the site, based its calculation of how much nitrogen the proposed development would produce on a national average occupancy rate for new dwellings of 2.4 persons per dwelling, and applied a 20% "precautionary buffer".

The legislative provisions for "appropriate assessment"

7 Article 6(3) of Council Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Flora and Fauna ("the Habitats Directive") states:

> "3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of

the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public."

8 That provision was transposed into domestic law by regulation 63 of the Habitats Regulations, "Assessment of implications for European sites and European offshore marine sites", which states:

> "(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which –
>
> (a) is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects), and
>
> (b) is not directly connected with or necessary to the management of that site,
>
> must make an appropriate assessment of the implications of the plan or project for that site in view of that site's conservation objectives.
>
> …
>
> (3) The competent authority must for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority specifies.
>
> …
>
> (5) In the light of the conclusions of the assessment, and subject to regulation 64, the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marine site (as the case may be).
>
> (6) In considering whether a plan or project will adversely affect the integrity of the site, the competent authority must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which it proposes that the consent, permission or other authorisation should be given."

An exception to the obligation in paragraph (5) arises under regulation 64, where the authority is satisfied that there are "no alternative solutions" and that there are "imperative reasons of overriding public interest" for the project to be carried out.

9 There is a wealth of case law relevant to article 6(3) and regulation 63, both in the Court of Justice of the European Union ("the CJEU") and in the domestic courts. Some basic points emerge:

(1) The duty imposed by article 6(3) of the Habitats Directive and regulation 63 of the Habitats Regulations rests with competent authorities, not with the courts. Whether a plan or project will adversely affect the integrity of a European protected site under regulation 63(5) is always a matter of judgment for the competent authority itself (see the judgment of the CJEU in *Holohan v An Bord Pleanála* (C-461/17) [2019] P.T.S.R. 1054 at paragraph 44). That is an evaluative judgment, which the court is neither entitled nor equipped to make for itself (see the judgment of Lord Carnwath in *R. (on the application of Champion) v North Norfolk DC* [2015] UKSC

52; [2015] 1 W.L.R. 3170 at paragraph 41, and the judgment of Lord Justice Sales, as he then was, in *Smyth v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174; [2015] P.T.S.R. 1417 at paragraph 83). In a legal challenge to a competent authority's decision, the role of the court is not to undertake its own assessment, but to review the performance by the authority of its duty under regulation 63. The court's function is supervisory only. This has been emphasised often in the domestic cases (see, for example, the recent first instance judgment in *Compton Parish Council v Guildford BC* [2020] J.P.L. 661 at paragraph 207).

(2) In *Coöperatie Mobilisation for the Environment UA, Vereniging Leefmilieu v College van Gedeputeerde Staten van Limburg* (C-293/17) [2019] Env. L.R. 27 ("*Dutch Nitrogen*"), the CJEU said that it is "for the national courts to carry out a thorough and in-depth examination of the scientific soundness of the "appropriate assessment"…" (paragraph 101 of the judgment), which "makes it possible to ensure that there is no reasonable scientific doubt as to the absence of adverse effects of each plan or project on the integrity of the site concerned, which it is for the national court to ascertain" (paragraph 104). The force of these statements is that the court, for its part, must be wholly satisfied in the exercise of its supervisory jurisdiction that the competent authority's performance of its obligations under article 6(3) was lawful. It must satisfy itself of the lawfulness of the authority's consideration of the scientific soundness of the appropriate assessment. But there is nothing in the CJEU's judgment to suggest that it intended to transform the respective roles of the competent authorities and the domestic courts by giving the court the job of undertaking an alternative appropriate assessment of its own.

(3) When reviewing the performance by a competent authority of its duty under regulation 63, the court will apply ordinary public law principles, conscious of the nature of the subject-matter and the expertise of the competent authority itself. If the competent authority has properly understood its duty under regulation 63, the court will intervene only if there is some *Wednesbury* error in the performance of that duty (see the judgment of Sales L.J. in *Smyth*, at paragraph 80, and the judgment of this court in *Plan B Earth v Secretary of State for Transport* [2020] P.T.S.R. 1446, at paragraphs 68 and 75 to 79, which were not doubted by the Supreme Court in the same proceedings ([2021] P.T.S.R. 190)). When exercising its supervisory function, the court will apply the normal *Wednesbury* standard, not a heightened standard such as "anxious scrutiny" (cf. *R. v Ministry of Defence Ex p. Smith* [1996] Q.B. 517, and *R. (on the application of Mahmood) v Secretary of State for the Home Department* [2001] 1 W.L.R. 840). It is well-established that such a heightened standard will apply only where fundamental rights or constitutional principles are at stake (see the judgment of Lord Carnwath in *Kennedy v Charity Commission* [2014] UKSC 20, at paragraph 245, and the first instance decision in *R. (on the application of McMorn) v Natural England* [2015] EWHC 3297 (Admin) at paragraphs 204 and 205). Given the demanding requirement inherent in regulation 63(5) – for the competent authority to ascertain that the project "will not adversely affect the integrity of the European site" – the court's examination of the authority's performance of its duty will be suitably exacting within

the bounds of its jurisdiction. But it should be remembered that the autonomous approach of the domestic courts in judging the lawfulness of such action has been explicitly approved by the CJEU (see the judgment of this court in *Plan B Earth*, at paragraphs 74, 75 and 137, discussing the CJEU's decision in *Craeynest v Brussels Hoofdstedelijk Gewest* (C-723/17) [2020] Env. L.R. 4).

(4) A competent authority is entitled, and can be expected, to give significant weight to the advice of an "expert national agency" with relevant expertise in the sphere of nature conservation, such as Natural England (see the judgment of Sales L.J. in *Smyth*, at paragraph 84, and the first instance judgment in *R. (on the application of Preston) v Cumbria CC* [2019] EWHC 1362 (Admin) at paragraph 69). The authority may lawfully disagree with, and depart from, such advice. But if it does, it must have cogent reasons for doing so (see the judgment of Baroness Hale in *R. (on the application of Morge) v Hampshire CC* [2011] 1 W.L.R. 268 at paragraph 45, the judgment of Sales L.J. in *Smyth*, at paragraph 85, and the first instance judgment in *R. (on the application of Prideaux) v Buckinghamshire CC* [2013] Env. L.R. 32 at paragraph 116). And the court for its part will give appropriate deference to the views of expert regulatory bodies (see, for example, the judgment of Lord Justice Beatson in *R. (on the application of Mott) v Environment Agency* [2016] 1 W.L.R. 4338 at paragraphs 69 to 77).

(5) When provided with expert evidence in a claim for judicial review, the court will not substitute its own opinion for that of the expert. As this court emphasised in *R. (on the application of BACI Bedfordshire) v Environment Agency* [2020] Env L.R. 16 at paragraph 87, "[unless] there is clear evidence revealing a failure of … expertise – for example, some conspicuous factual or scientific error – the court is entitled to conclude there was no such failure". Experts may be expected to provide enough explanation to enable the court to decide whether the views they have stated are based on a conspicuous error (see the judgment of Sales L.J. in *Smyth*, at paragraph 83). But the court will bear in mind that decisions which entail "scientific, technical and predictive assessments by those with appropriate expertise" and which are "highly dependent upon the assessment of a wide variety of complex technical matters by those who are expert in such matters and/or who are assigned to the task of assessment (ultimately by Parliament)" should be accorded a substantial margin of appreciation (see the judgment of this court in *Plan B Earth*, at paragraph 68, and, at first instance in the same case, *Spurrier v Secretary of State for Transport* [2020] P.T.S.R. 240 at paragraphs 176 to 180).

(6) The requirement in the second sentence of article 6(3) of the Habitats Directive and in regulation 63(5) of the Habitats Regulations embodies the "precautionary principle, and makes it possible effectively to prevent adverse effects on the integrity of protected sites as a result of the plans or projects being considered" (see the judgment of the CJEU in *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris Van Landbouw, Natuurbeheer en Visserij (Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij UA intervening)* (C-127/02) [2005] 2 C.M.L.R. 31) ("*Waddenzee*"), at paragraph 58). The "precautionary principle" requires

a high standard of investigation (see the judgment in *Waddenzee*, at paragraphs 44, 58, 59 and 61).

(7) The duty placed on the competent authority by article 6(3) and regulation 63 is to ascertain that there will be no adverse effects on the integrity of the protected site, but that conclusion does not need to be established to the standard of "absolute certainty". Rather, the competent authority must be "satisfied that there is no reasonable doubt as to the absence of adverse effects on the integrity of the site concerned" (paragraphs 44, 58, 59, and 61 of the CJEU's judgment and paragraphs 107 and 108 of the Advocate General's opinion in *Waddenzee*, and the judgment in *Holohan*, at paragraphs 33 to 37). In *Waddenzee* (at paragraph 59), the CJEU emphasised the responsibility of the competent authority, having taken account of the conclusions of the appropriate assessment, to authorise the proposed development "only if [it] has made certain that it will not adversely affect the integrity of that site". That, it said, "is the case where no reasonable scientific doubt remains as to the absence of such effects". But as Advocate General Kokott explained in *Waddenzee* (in paragraphs 102 to 106 of her opinion), a requirement of "absolute certainty" would be "disproportionate". As she said (at paragraph 107), "the necessary certainty cannot be construed as meaning absolute certainty …", the conclusion of an appropriate assessment is, "of necessity, subjective in nature", and "competent authorities can, from their point of view, be certain that there will be no adverse effects even though, from an objective point of view, there is no absolute certainty". Similar observations appear in the judgment itself (in paragraphs 44, 58, 59 and 61). As the Supreme Court acknowledged in *Champion*, adopting the approach in *Waddenzee*, "while a high standard of investigation is demanded, the issue ultimately rests on the judgment of the authority" (see the judgment of Lord Carnwath, at paragraph 41). This approach is, in essence, what the "precautionary principle" requires in the context of article 6(3) of the Habitats Directive and regulation 63 of the Habitats Regulations.

(8) The requirement that there be "no reasonable doubt as to the absence of adverse effects on the integrity of the site concerned" does not mean that the "reasonable worst-case scenario" must always be assessed. In the European Commission guidance document entitled "Communication on the precautionary principle" (2000) it is stated in Annex III that "[when] the available data are inadequate or non-conclusive, a prudent and cautious approach to environmental protection, health or safety could be to opt for the worst-case hypothesis". That guidance, however, is not law (see *Heard v Broadland DC* [2012] Env. L.R. 23, at paragraph 69, and *Prideaux*, at paragraph 112), nor is it in mandatory terms. What is required in law is a sufficient degree of certainty to ensure that there is "no reasonable doubt" on the relevant question. It may sometimes be useful to consider a "reasonable worst-case scenario" when assessing whether the necessary degree of certainty has been achieved. But whether there are grounds for "reasonable doubt" will always be a matter of judgment in the particular case.

(9) An appropriate assessment must be based on the "best scientific knowledge in the field" (see *Holohan*, at paragraph 33). Such knowledge must be both up-to-date and not merely an expert's bare assertion (see the judgment of

Sales L.J. in *Smyth*, at paragraph 83). And the concept of "best scientific knowledge" is not a wholly free-standing requirement, separate from the precautionary principle itself. It is inherent in the precautionary principle, and in the concept of "no reasonable doubt".

(10) What is required of the competent authority, therefore, is a case-specific assessment in which the applicable science is brought to bear with sufficient rigour on the implications of the project for the protected site concerned. If an appropriate assessment is to comply with article 6(3) of the Habitats Directive it "cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned" (see the judgment of the CJEU in *Sweetman v An Bord Pleanála* (C-258/11) [2014] P.T.S.R. 1092, at paragraph 44, and its judgment in *People Over Wind and Sweetman v Coillte Teoranta* (C-323/17) [2018] P.T.S.R. 1668, at paragraph 38).

Natural England's technical guidance note

10 Natural England's technical guidance note was issued under section 4 of the Natural Environment and Rural Communities Act 2006, which provides, in subsection (4), that "Natural England may give advice to any person on any matter relating to its general purpose … (b) if [it] thinks it appropriate to do so, on its own initiative".

11 The technical guidance note advocated the calculation of a "nutrient budget" for a proposed development. If this showed that the development was likely to generate greater levels of nitrogen than would the existing lawful use of the site, the thrust of the advice given was that the local planning authority, when granting planning permission, would have to secure appropriate mitigation measures to avoid any residual increase in nutrient levels in the Solent.

12 In its opening paragraph the technical guidance note recognised that the water environment of the Solent is highly protected for its habitats and species of international importance. It acknowledged that the high levels of nitrogen input to this water environment were causing excessive plant growth – "eutrophication" – in the designated sites, and that the resulting mats of green algae and other impacts on the marine ecology were affecting protected habitats and bird species (paragraph 1.1). It referred to the "potential for future housing developments across the Solent region to exacerbate these impacts, [which] creates a risk to their potential future conservation status". It introduced "nutrient neutrality" as "a means of ensuring that development does not add to existing nutrient burdens", adding that "this provides certainty that the whole of the scheme is deliverable in line with the requirements of [the Habitats Regulations]" (paragraph 1.3). It advocated a practical method for calculating how nutrient neutrality could be achieved, based on "best scientific knowledge" but subject to revision as further evidence was obtained (paragraph 1.4).

13 The "best available up-to-date evidence" indicated that some of the protected sites were "widely in unfavourable condition due to existing levels of nutrients" and "at risk from additional nutrient inputs" (paragraph 2.3). In Natural England's view, there were likely significant effects on several internationally designated sites "due to the increase in wastewater from the new developments coming

forward" (paragraph 2.4). Nutrient neutrality would allow local planning authorities to comply with their duties under regulation 63 (paragraph 2.5), and provide "a means of ensuring that development does not add to existing nutrient burdens" (paragraph 2.6).

14 In section 4, "Nutrient Neutrality Approach for New Development", it was stated that "[achieving] nutrient neutrality is one way to address the existing uncertainty surrounding the impact of new development on designated sites", and that "[this] practical methodology provides advice on how to calculate nutrient budgets and options for mitigation, should this be necessary" (paragraph 4.1). It suggested this approach to calculating "nutrient budgets" (in paragraphs 4.6 to 4.9):

> "4.6 For those developments that wish to pursue neutrality, Natural England advises that a nitrogen budget is calculated for new developments that have the potential to result in increases of nitrogen entering the international sites. A nutrient budget calculated according to this methodology and demonstrating nutrient neutrality is, in our view, able to provide sufficient and reasonable certainty that the development does not adversely affect the integrity, by means of impacts from nutrients, on the relevant internationally designated sites. This approach must be tested through the 'appropriate assessment' stage of the Habitats Regulations Assessment. The information provided by the applicant on the nutrient budget and any mitigation proposed will be used by the local planning authority, as competent authority, to make an appropriate assessment of the implications of the plan or project on the designated sites in question. …
>
> 4.7 The nutrient neutrality calculation includes key inputs and assumptions that are based on the best-available scientific evidence and research. It has been developed as a pragmatic tool. However, for each input there is a degree of uncertainty. For example, there is uncertainty associated with predicting occupancy levels and water use for each household in perpetuity. Also, identifying current land/farm types and the associated nutrient inputs is based on best-available evidence, research and professional judgement and is again subject to a degree of uncertainty.
>
> 4.8 It is our advice to local planning authorities to take a precautionary approach in line with existing legislation and case-law when addressing uncertainty and calculating nutrient budgets. This should be achieved by ensuring nutrient budget calculations apply precautionary rates to variables and adding a precautionary buffer to the [total nitrogen] calculated for developments. A precautionary approach to the calculations and solutions helps the local planning authority and applicants to demonstrate the certainty needed for their assessments.
>
> 4.9 By applying the nutrient neutrality methodology, with the precautionary buffer, to new development, the competent authority may be satisfied that, while margins of error will inevitably vary for each development, this approach will ensure that new development in combination will avoid significant increases of nitrogen load to enter the internationally designated sites."

15 For development which would drain to the mains network, the suggested method would involve four stages. In the first stage, which was to calculate the total nitrogen derived from the development which would leave wastewater treatment works, the

first step was to "Calculate [the] additional population" arising from the development. Relevant here is the advice given on occupancy rates:

> "4.18 New housing and overnight accommodation can increase the population as well as the housing stock within the catchment. This can cause an increase in nitrogen discharges. To determine the additional population that could arise from the proposed development, it is necessary that sufficiently evidenced occupancy rates are used. Natural England recommends that, as a starting point, local planning authorities should consider using the average national occupancy rate of 2.4, as calculated by the Office for National Statistics (ONS), as this can be consistently applied across all affected areas.
> 4.19 However competent authorities may choose to adopt bespoke calculations tailored to the area or scheme, rather than using national population or occupancy assumptions, where they are satisfied that there is sufficient evidence to support this approach. Conclusions that inform the use of a bespoke calculation need to be capable of removing all reasonable scientific doubt as to the effect of the proposed development on the international sites concerned, based on complete, precise and definitive findings. The competent authority will need to explain clearly why the approach taken is considered to be appropriate. Calculations for occupancy rates will need to be consistent with others used in relation to the scheme (e.g. for calculating open space requirements), unless there is a clear justification for them to differ."

16 The second step in the first stage was to "Confirm water use". In Natural England's view, planning authorities ought to impose conditions for maximum water usage of "110 litres per person per day" on new developments (paragraphs 4.11 and 4.22). The advice here was that "[the] water use figure is a proxy for the amount of wastewater that is generated by a household", that "[new] residential development may be able to achieve tighter water use figures" (paragraph 4.23), and that "while new developments should be required to meet the 100 litres per person a day standard, the risk of standards slipping over time and the uncertainty inherent in the relationship between water use and sewage volume should be addressed by the use in the calculation of 110 litres per person per day figure" (paragraph 4.25).

17 The third step in the first stage involved identifying the "[wastewater] treatment works" into which water from the development would drain. Natural England adopted a precautionary approach, stating that "[where] there is a permit limit for Total Nitrogen, the load calculation will use a worst case scenario that the [wastewater treatment works] operates at 90% of its permitted limit" (paragraph 4.29).

18 The fourth step in the first stage was to "Calculate Total Nitrogen (TN) in Kg per annum that would exit the [wastewater treatment works] after treatment derived from the proposed development". It was noted that "[natural] reductions in nitrogen concentrations, mainly through de-nitrification processes, also occur within watercourses". But there was "[insufficient] evidence … to properly evaluate de-nitrification rates within the greater Solent catchments"; so that factor was not included. Natural England took the view that this provided "an additional precautionary factor for the methodology" (paragraph 4.42).

19 The second stage was to "Adjust nitrogen load to account for existing nitrogen from current land use". This advice was given:

> "4.45 This next stage is to calculate the existing nitrogen losses from the current land use within the redline boundary of the scheme. The nitrogen loss from the current land use will be removed and replaced by that from the proposed development land use. The net change in land use will need to be subtracted from or added to the wastewater Total Nitrogen load.
> 4.46 Nitrogen-nitrate loss from agricultural land can be modelled using the Farmscoper model. …
> 4.47 If the development area covers agricultural land that clearly falls within a particular farm type used by the Farmscoper model then the modelled average nitrate-nitrogen loss from this farm type should be used. …
> …
> 4.51 It is important that farm type classification is appropriately precautionary. It is recommended that evidence is provided of the farm type for the last 10 years and professional judgement is used as to what the land would revert to in the absence of a planning application. In many cases, the local planning authority, as competent authority, will have appropriate knowledge of existing land uses to help inform this process.
> 4.52 There may be areas of a greenfield development site that are not currently in agricultural use and have not been used as such for the last 10 years. In these areas as there is no agricultural input into the land a baseline nitrogen leaching value of 5 kg/ha should be used. This figure covers nitrogen loading from atmospheric deposition, pet waste and nitrogen fixing legumes."

20 The third stage was to adjust the nitrogen load to account for land uses in the proposed development.

21 The fourth stage was to "Calculate the net change in the Total Nitrogen load that would result from the development". The advice was this:

> "4.67 It is necessary to recognise that all the figures used in the calculation are based on scientific research, evidence and modelled catchments. These figures are the best available evidence but it is important that a precautionary buffer is used that recognises the uncertainty with these figures and in our view ensures the approach prevents, with reasonable certainty, that there will be no adverse effect on site integrity. Natural England therefore recommends that a 20% precautionary buffer is built into the calculation.
> 4.68 There may be instances where it is the view of the competent authority that an alternative precautionary buffer should be used on a site-specific basis where sufficient evidence allows the legal tests to be met."

22 Since the judge's decision in the court below, Natural England has, in March 2022, issued further guidance. This does not bear on the claim with which we are concerned.

Natural England's response to consultation on the application for planning permission

23 On 9 June 2020, as statutory consultee under regulation 63(3), Natural England gave its advice to the council on "nutrient neutrality" for the proposed development. It did so in the light of the council's "Nitrogen Budget", dated 11 May 2020. The "Nitrogen Budget" was based on an occupancy rate of 2.4 persons per dwelling and included a precautionary buffer of 20%, both of which were subsequently used

in the council's appropriate assessment. Natural England said that "[provided] the council, as the competent authority, [was] assured and satisfied [that] the site areas [were] correct and that the existing land uses [were] appropriately precautionary", it raised "no further concerns with regard to the nutrient budget". Nor did it raise concern about the use of average land use figures for calculating the baseline nitrogen deposition from the site, about the 2.4 occupancy rate, or about the 20% precautionary buffer applied.

Mr Wyatt's objection

24 Mr Wyatt and his wife submitted several letters of objection to the council. In his "further comments" dated 15 June 2020, Mr Wyatt addressed the use of the 20% precautionary buffer, arguing that it appeared "irrational" because there was "no evidential basis explaining why a 20% buffer has been used". He also expressed his concern about the use of the occupancy rate of 2.4 persons per dwelling. He noted that the council had used its "discretion to vary this figure" when considering a proposal of "16 age related apartments" in Station Road, Portchester, for which it had "used what [it] termed an overall "cautious average" occupancy rate of 2", which was "in line with the 2011 Census figure". He expected the council to be consistent. The 2011 Census gave an average occupancy rate of 3.4 persons per household for houses of the size proposed, which would be "a more appropriate figure". If the council was "consistent" and used "the correct land use figures and a more realistic occupancy rate", it would "reject the application on the grounds that it will be in deficit and therefore cannot meet the nitrate neutrality regulations".

Natural England's further advice

25 Natural England gave further advice to the council on 18 August 2020, now in the light of the council's draft appropriate assessment. It did not doubt the conclusions of the draft appropriate assessment or the likely efficacy of the proposed mitigation measures. Again, it raised no concerns about the use of average figures, the occupancy rate of 2.4 persons per dwelling, or the use of the 20% precautionary buffer.

The appropriate assessment

26 In the appropriate assessment presented to the council's Planning Committee on 19 August 2020, it was acknowledged (on p.2) that "[all] new housing development within 5.6 km of the Solent SPAs is considered to contribute towards an impact on the integrity of the Solent SPAs", and (on p.4) that "[the] proposed development is within 5.6 km of the Solent & Southampton Water SPA". The likely nitrogen output of the proposed development was identified, and the proposed mitigation measures described and considered. These conclusions were stated (on p.17):

> "The project being assessed will result in a positive nitrogen output of 10.5 kg/TN/yr and therefore the waste water from the development will add to the nitrogen levels within the Solent. … The pathway is via the wastewater treatment works. Therefore, the surplus in the nitrogen output would need to be mitigated. … In order for the development proposal to demonstrate nitrogen neutrality, an on-site wetland will be created on site. The proposed wetland would remove nitrates from surface water and roof water drainage through a

> combination of physical, chemical and biological processes via interactions between the water, substrate and micro-organisms such as algae. The wetland would in turn provide a reduction of 11.51 kg/N/yr meaning there would be an overall reduction in nitrates being discharged from the site. The mitigation will be secured through a Section 106. …".

and (on p.18):

> "In conclusion, the application will have a likely significant effect in the absence of avoidance and mitigation measures on [the protected sites] … This represents the authority's Appropriate Assessment as Competent Authority in accordance with requirements under Regulation 63 of the [Habitats Regulations], [and] Article 6 (3) of the Habitats Directive … .
> The authority has concluded that the adverse effects arising from the proposal are wholly consistent with, and inclusive of the effects detailed in the Solent Recreation Mitigation Strategy. The authority's assessment is that the proposed mitigation package complies with this Strategy and that it can therefore be concluded that there will be no adverse effect on the integrity of the Solent and Southampton Water SPA."

The officer's advice on the appropriate assessment

27 In his report to the committee, the officer considered the possible impact of the development on the European protected sites in the Solent, under the requirements in regulation 63 of the Habitats Regulations and in the light of the appropriate assessment. He reminded the members that "[regulation 63] provides that planning permission can only be granted by a 'competent authority' if it can be shown that the proposed development will either not have a likely significant effect on designated [protected sites] or, if it will have a likely significant effect, that effect can be mitigated so that it will not result in an adverse effect on the integrity of the designated [protected sites] …" (paragraph 8.26). He referred to Natural England's advice, explaining the concept of "nutrient neutrality" and the need for local planning authorities to take a "precautionary approach" (paragraphs 8.32 and 8.33); to the "nutrient budget" (paragraph 8.34); and to the existing land use (paragraphs 8.35 to 8.37).

28 He then came to the "assumed occupancy rate" (in paragraphs 8.38 to 8.42):

> "8.38 Natural England recommends that, as a starting point, local planning authorities should consider using the average national occupancy rate of 2.4 persons per dwelling as calculated by the Office for National Statistics (ONS), as this can be consistently applied across all affected areas. However competent authorities may choose to adopt bespoke calculations where they are satisfied that there is sufficient evidence to support this approach.
> 8.39 Concern has been raised by third parties over the use of the average occupancy rate of 2.4 for this development of eight houses. Some have expressed the view that a higher occupancy rate ought to be applied since the houses are likely to be larger than average dwellings (although it should be noted that the application is in outline form and scale and layout of the

development are reserved matters). Third parties have noted that the Council used bespoke calculations when determining a recent planning application for a sheltered housing development elsewhere in the Borough.

8.40 It is acknowledged that some houses will have more than the average number of occupants. It is also of course the case that some will have less. The figure of 2.4 is an average based on a well evidenced source (the ONS) and which has been shown to be consistent over the past ten years. As stated above the Natural England methodology allows bespoke occupancy rates however to date the Council has only done so to lower, not raise, the occupancy rate and where clear evidence has been provided to demonstrate that the proposed accommodation has an absolute maximum rate of occupancy. In the case of sheltered housing which is owned and managed by the Council for example it has been previously been considered appropriate to apply a reduced occupancy rate accordingly.

8.41 In all instances it is the case that the Natural England methodology is already sufficiently precautionary because it assumes that every occupant of every new dwelling (along with the occupants of any existing dwellings made available by house moves) is a new resident of the Borough of Fareham. There is also a precautionary buffer of 20% applied to the total nitrogen load that would result from the development as part of the overall nutrient budget exercise.

8.42 Taking the above matters into account, Officers do not consider there to be any specific justification for applying anything other than the recommended average occupancy rate of 2.4 persons per dwelling when considering the nutrient budget for the development."

The evidence before the judge

29 The judge had before him in evidence a witness statement, dated 25 February 2021, of Dr James O'Neill on behalf of Mr Wyatt, and three witness statements, dated 9 December 2020, 4 February 2021 and 12 April 2021, of Ms Allison Potts on behalf of Natural England. Dr O'Neill is the Principal of James O'Neill Associates, an environmental consultancy. Ms Potts is the Acting Area Manager of Natural England's Thames Solent team.

30 In his witness statement, Dr O'Neill said that "[if] an incorrect occupancy rate is used then it will cause the total nitrogen figure … to be wrong", and lead to a figure "which has a real risk of significantly underestimating and therefore downplaying the actual nitrogen output of the development in question". Natural England suggested that an occupancy rate of 2.4 persons per dwelling should be used as a starting point, but that a "bespoke calculation" would be appropriate in some cases (paragraph 20). However, in Dr O'Neill's view, as the proposed dwellings would have four or five bedrooms, the national average occupancy rate would not represent best scientific evidence available. A "specific dataset for four to five bedroom dwellings" was available for Fareham, which would have given an average occupancy rate of 3 for such dwellings, not 2.4, broadly in alignment with the national average of 3.14. The use of the national average was not, therefore, justifiable (paragraphs 23 to 29).

31 On the "use of averages in the land classification", Dr O'Neill said the "selection of the correct land use for the site is a matter of judgement which [he was] not

qualified to make an assessment of here" (paragraph 36). But he made four points: first, existing land use figures should be "sufficiently precautionary" (paragraph 38); second, there was "reasonable doubt in respect of the land classification employed" in the appropriate assessment (paragraph 39); third, the "Farmscoper model" relied on average data, rather than using site-specific data; and fourth, the inaccuracy introduced by the use of the 2.4 occupancy rate would be compounded by the use of average land use figures (paragraph 42).

32 Finally, he addressed the 20% precautionary buffer. He said that, "for such a buffer to be valid, the level of uncertainty associated with each step of the calculation must be known" (paragraph 47). There was a range of statistical methods for quantifying that uncertainty, but "no evidence that they have been applied in respect of the impugned calculation". The buffer applied was "insufficiently precautionary" (paragraph 48).

33 Ms Potts did not agree with Dr O'Neill's opinion. In her evidence she said that his "focus on the 2.4 figure takes no account of the precaution that is built into the methodology as a whole" (third witness statement, paragraph 5). Natural England had considered the available data and concluded that the national average occupancy rate was "the best available scientific evidence for use in the methodology when applied to development within the Solent catchments." (third witness statement, paragraph 7).

34 Seven reasons were given for that conclusion. First, the 2.4 figure was often used, and it would only be necessary for a local planning authority to adopt bespoke figures in an "extreme occupancy scenario". The fact that a development consisted of larger houses was not in itself enough to warrant the adoption of a bespoke rate (second witness statement, paragraphs 23 to 25). Second, Natural England had concluded that reliance on the "finer grain detail" would have introduced "unnecessary and unwieldy complication". It "would have required using 65 different occupancy rates across the area (13 ONS areas x 1-5+ bedroom rates)", and it would also have been "necessary to use a per bedroom water usage rate". These figures were "not easily obtainable" (third witness statement, paragraph 8). Third, Natural England had assumed "100% inward migration", whereas in reality "some occupants of new dwellings will be moving within the affected catchments, so do not represent an entirely new burden" (second witness statement, paragraph 31, and third witness statement, paragraph 9). Fourth, "while larger properties tend towards having more occupants than smaller properties (but not in a linear relationship to the number of bedrooms), occupancy and dwelling size are not very highly correlated" (second witness statement, paragraph 26). Fifth, the occupancy rate of 2.4 persons per dwelling was part of a broader "strategic solution", and a "standardised approach" (second witness statement, paragraphs 32 and 33). Sixth, the data showed that houses with higher occupancy rates had significantly lower water use figures per occupant (second witness statement, paragraph 27). And seventh, the data was "suggestive of a decline in average occupancy over time". The 2.4 occupancy rate was meant to account for "the nutrient impact arising from the proposed development in perpetuity" (second witness statement, paragraphs 28 to 30).

35 Ms Potts drew attention to three "precautionary" elements in the method used for estimating "water use": first, "[the] water use figure used (110 l/p/d) is 10% higher than Southern Water's target required …"; second, "[all] new build development will have meters and water use in metered properties is significantly

lower than non-metered properties"; and third, "[water] supply is less than water return to [wastewater treatment works] reflecting use of water to wash cars, water gardens". She also referred to two "precautionary" elements in the consideration of "Wastewater Treatment Work Operations": first, that it "[assumes wastewater treatment works with total nitrogen] permits operate at the maximum possible within legal limits", whereas the "Solent [wastewater treatment works] with [a total nitrogen] permit are currently on average performing 25% more effectively than [the] assumed level"; and second, that "[an] unknown proportion of nitrogen discharged seaward of the international sites will be lost to sea and will not affect the designated sites" (second witness statement, Table 1).

36 Ms Potts also referred to the 20% precautionary buffer, and explained in detail how the correct figure was arrived at. She said the development of the buffer had "involved consideration of the likelihood, severity, duration and tendency of potential impacts", and "in determining the level of the buffer, each component was assessed individually, as well as evaluating the relationships between each component, the risk of exceedances and the severity of such exceedance". Among the factors taken into account were "the degree of known variability for each component" and "the fact that not all risks are fully known". Ms Potts emphasised that defining the buffer had involved "expert judgement", and the choice of 20% as the appropriate figure was considered to be commensurate with "no reasonable doubt" about the absence of adverse effects on the integrity of the protected site (second witness statement, paragraphs 56 to 64, and third witness statement, paragraphs 19 to 21).

The judge's conclusions on the "appropriate assessment" grounds

37 Jay J. was critical of the approach to occupancy rates in Natural England's technical guidance note, and of the council's use of an occupancy rate of 2.4 persons per dwelling in this case. But adopting the degree of deference he thought right in the circumstances, and approaching the matter on a *Wednesbury* basis, he concluded that the use of the 2.4 occupancy rate was sufficiently precautionary. He concentrated, in particular, on two "precautionary elements" of the appropriate assessment that could "legitimately be brought into account": first, that "the relationship [between occupancy rates and water usage] is not one of direct proportionality", and second, that "the algorithm assumes 100% migration to the area" (paragraph 84 of his judgment). He was "satisfied that there was an adequate precautionary leeway afforded by [these] two key factors" (paragraph 86). He added, however, that the technical guidance note would need to be reviewed in the light of his judgment (paragraph 87).

38 The judge did not accept that the use of average land use figures was inappropriate, or that site specific measurements should have been taken. He thought that site specific measurements would provide "no more than a snapshot of existing land use", and it was not clear that "the overly rigorous approach recommended by Dr O'Neill would in fact yield more protective data" (paragraph 110).

39 On the use of the 20% precautionary buffer, the judge concluded that the lack of "any arithmetical calculation or other algorithm" in the calculation of the buffer was not fatal to it. He thought that there was "room for debate between reasonable scientists, using their judgment, expertise and experience, as to whether the figure

should be, say, 10%, 20% or 30%". And he found "no place for judicial intervention on any *Wednesbury* basis" (paragraph 111).

40 Those were the judge's principal conclusions on this part of the case. I shall also refer to some other passages in his judgment when I come to the argument put forward on the first main issue.

Did the council fail to comply with regulation 63 of the Habitats Regulations?

41 Mr Gregory Jones Q.C., for Mr Wyatt, submitted that the judge made two fundamental errors in his approach to the legal framework governing appropriate assessment. First, he accepted Ms Potts' evidence on the soundness of the method used by the council in conducting the appropriate assessment. He ought to have looked at the underlying evidence and considered, for himself, whether the figures used were sound. This, submitted Mr Jones, follows from the CJEU's judgment in *Dutch Nitrogen*, in particular at paragraph 101. He accepted that the court must adopt a *Wednesbury* approach, but he submitted that the approach should be more stringent given the high level of certainty required under regulation 63. Given that much of the water environment in the Solent was in unfavourable or failing status, the level of certainty required was higher. A distinction must be made between evidence considered by decision-makers at the time, and expert evidence produced later in explanation. Secondly, the judge had erred in his approach to the "precautionary principle". He should have accepted that where data is uncertain, the "reasonable worst-case scenario" must be assessed. This follows from the European Commission's guidance on the precautionary principle, cited with approval in *Bayer CropScience v Commission* (T-429/13), and it would be consistent with the approach taken in environmental impact assessment (see *R. v Rochdale Metropolitan Borough Council, ex parte Milne (No.2)* (2001) 81 P. & C.R. 27).

42 On ground 1 of the appeal Mr Jones argued that Natural England's technical guidance note invited error when it said local authorities "may choose to adopt bespoke calculations" for occupancy rates. In particular, he criticised the first sentence of paragraph 4.7 of the technical guidance note, the first sentence of paragraph 4.19, and paragraph 4.42. It would never be permissible for an authority to adopt the national average occupancy rate unless it was the correct occupancy rate for the development proposed. Authorities must adopt bespoke calculations. Otherwise, their decisions will not be based on the "best scientific knowledge". The correct occupancy rate was not a matter of expert judgment; it was a simple and readily ascertainable fact. In this case it was common ground that the occupancy rate of 2.4 persons per dwelling was inaccurate, and that an occupancy rate of 3 would have been accurate for the four-bedroom houses proposed. The council's decision to adopt an occupancy rate of 2.4 was therefore wrong, and unlawful. Each factor in the calculation of the nitrogen budget had to be precautionary, and based on the best available evidence. It was not permissible to rely on the precautionary nature of other factors, or on the precautionary buffer applied at the end, to justify using an insufficiently precautionary occupancy rate. Once the judge had concluded that using an occupancy rate of 2.4 did not represent the "best scientific knowledge", he could not hold that its use was lawful (see *Holohan*, at paragraph 33). He should not have found it sufficiently precautionary on the strength of the two factors mentioned by Ms Potts; there was no evidence that they would counteract the error. It was also inconsistent to conclude, as he did, that Natural

England's technical guidance note would need to be reviewed in the light of his judgment but that the decision in this case, based on the advice given in that document, was nonetheless sound.

43 On ground 2 Mr Jones criticised the use of average figures, and, in particular, the use of "average land use figures" in calculating the baseline nitrogen deposition from the site. Average figures relied on speculation about what might happen in the future, and so were necessarily contrary to the requirement for certainty under regulation 63. In *Dutch Nitrogen* the CJEU had made it clear that reliance on average values was impermissible (paragraphs 55 and 147 of the Advocate General's opinion, and paragraph 119 of the judgment). Using average land use figures to calculate the baseline nitrogen deposition from the site was insufficiently precautionary. Both in adopting these average figures and in its use of the Farmscoper model, Natural England's advice in paragraphs 4.45 to 4.52 of the technical guidance note was flawed, and so was the council's application of that advice in the appropriate assessment.

44 On ground 4 Mr Jones argued that the 20% precautionary buffer applied by the council was unlawful, because it lacked any evidential basis. The purpose of the buffer was not merely to provide an extra level of protection but to ensure that the whole exercise met the required standard of scientific certainty. To remove "all reasonable scientific doubt" about the effects of the proposed works on the protected site concerned", the uncertainty inherent in the initial steps must first be quantified, and then an appropriate buffer applied in light of that uncertainty (see *People Over Wind*, at paragraph 38). Natural England's relevant advice (in paragraphs 4.8, 4.9 and 4.67 of the technical guidance note) was flawed, and so was the council's application of that advice in the appropriate assessment.

45 Those arguments all go to the contention that the council erred in law when performing its duty under regulation 63(5) of the Habitats Regulations not to grant planning permission unless it had ascertained that the proposed development would "not adversely affect the integrity of the European site". I do not accept that contention. The council's conclusion on the crucial question under regulation 63(5) was, ultimately, an evaluative judgment for it to make as "competent authority". And in my view the conclusion it reached, as a matter of evaluative judgment, was legally sound. I therefore agree with the decision in the court below on this part of the claim.

46 I cannot fault the judge's self-direction on the relevant legal principles (in paragraphs 29 to 39 of his judgment), and in my opinion he went on to apply those principles appropriately. I do not think he made the fundamental errors of which he is accused.

47 The first of those alleged errors, essentially, is that the judge simply accepted the evidence of Ms Potts without question. I do not think he did that. On the contrary, he examined in appropriate depth and detail the evidence of the expert witnesses on either side (in paragraphs 58 to 72, and paragraphs 106 to 111).

48 On occupancy rates, he approached the evidence before him with care. He expressed his own concerns about some of that evidence (in paragraphs 75 to 80). He did not rely on the parts he found less than convincing (paragraph 84). He reminded himself of "[the] need for judicial deference in a domain of technical and scientific expertise" (paragraph 81). He acknowledged that the figures used by the competent authority must "have the effect of removing all scientific doubt "based on complete, precise and definitive findings"" (paragraph 79).

49 Nor did he accept unquestioningly the use of the 20% precautionary buffer, in the way in which it had been applied, merely because Ms Potts said that this was appropriate. In her evidence, she had explained, at length, the justification for using the 20% buffer (her second witness statement, paragraphs 56 to 64, and her third witness statement, paragraphs 18 to 21). She did not simply assert that its use was correct. And the judge, for his part, did not simply take her evidence at face value. He considered the reasons she had given in support of the 20% buffer, and he concluded, in the light of that evidence, that there was no justification for the court's intervention "on any *Wednesbury* basis" (paragraph 111). I agree.

50 More generally, it seems to me that the judge adopted the correct approach in his consideration of the council's appropriate assessment as a whole. He understood that the *Wednesbury* standard of review had to be deployed with suitable rigour in the legislative context here. He knew that he had to establish whether, in all the circumstances, the council had reached a reasonable and lawful conclusion, as a matter of its own exercise of evaluative judgment, in ascertaining whether the high threshold set by regulation 63(5) had been surmounted. He applied an appropriately intense standard of scrutiny, consistent with the proper application of *Wednesbury* principles in the light of the jurisprudence to which he had referred.

51 I reject the submission that the judge ought to have given greater weight than he did to the unfavourable status of the water environment in parts of the Solent. This was a fact explicitly acknowledged and taken into account by Natural England when issuing the advice in its technical guidance note – advice on which the council relied in its appropriate assessment. And there is no support either in the habitats legislation itself or in the relevant authorities for the proposition that the unfavourable status of a protected site raises the level of certainty which has to be achieved if the proposed development is to be approved, or for the proposition that the standard of review the court should adopt in those circumstances is more demanding. In this case, Natural England's technical guidance note, to which the council had regard in undertaking the appropriate assessment, took into account the fact some of the protected sites in the Solent were "widely in unfavourable condition due to existing levels of nutrients" and "at risk from additional nutrient inputs" (paragraph 2.3).

52 Whatever the particular circumstances in a given case, the basic duty of the competent authority under regulation 63 is, and remains, to grant planning permission only if satisfied that the proposed development "will not adversely affect the integrity" of the European protected site. The duty of the court is, and remains, to ensure that the authority's evaluative judgment on that question was lawfully exercised.

53 In doing that, the court must keep in mind the difference between evidence of what was considered by a decision-making authority at the time of its decision and evidence put forward after the event to explain or justify that decision (see *R. (on the application of United Trade Action Group Ltd.) v Transport for London* [2021] EWCA Civ 1197). It is trite, for example, that later evidence of a decision-maker's thinking cannot be used to contradict the original reasons given or to provide wholly new reasons (see *R. v Westminster City Council, ex parte Ermakov* [1996] 2 All E.R. 302, and *Inclusion Housing Community Interest Company v Regulator of Social Housing* [2020] EWHC 346 (Admin), at paragraph 78). But that has not been done in this case. Ms Potts' evidence goes no further than to amplify the reasons why Natural England decided to adopt the approach it did, and reached

the view it did, at the time of its consultation by the council. The evidence was properly admitted, and the judge was entitled to rely on it as he did.

54 As for the second fundamental error of which the judge is accused, I do not think he adopted too lax an understanding of the precautionary principle, either generally or as it applied in this case, or that he wrongly discounted the concept of the "reasonable worst-case scenario", contrary to the CJEU's reasoning in Bayer CropScience and the High Court's in *ex parte Milne*. In *Bayer CropScience* the CJEU cited the European Commission's guidance, "Communication on the precautionary principle" (2000) Annex III, which advises that in cases of doubt a "worst-case" hypothesis "could" – not must – be assessed (paragraph 114 of the judgment). But it did not treat the guidance as if it had the status of law. It adopted the established approach, consistent with its own judgment in *Waddenzee*. Nor does the principle referred to in *ex parte Milne* – that a proposal requiring environmental impact assessment must be sufficiently detailed to allow for proper assessment – bear on the question here, which is whether any uncertainty in the data involved in an appropriate assessment under regulation 63 must always be resolved by using a "reasonable worst-case scenario". In *Waddenzee*, as Jay J. said (in paragraph 32 of his judgment), the CJEU accepted that national authorities do not need to be "absolutely certain" that there will not be adverse effects on the integrity of the protected site, but must be "satisfied that there is no reasonable doubt as to the absence of adverse effects". The judge asked himself "whether "reasonable worst case scenario" is an apt synonym for "precautionary"", but he did not think it was necessary to come to a decisive view on the point (paragraph 47). I do not think he needed to do so. In my view it was legitimate for him to conclude that, at least in this case, the "reasonable worst-case scenario" did not have to be assessed if the precautionary principle was to be satisfied.

55 Turning to ground 1 of the appeal, I do not think there can be any proper challenge in these proceedings to the lawfulness of the advice given by Natural England in its technical guidance note, which seems to have been the real target for much of the argument advanced on behalf of Mr Wyatt.

56 It should be remembered that the technical guidance note is not statute. It does not create some additional legal requirement or test. It is an advisory document, which is neither mandatory in effect nor prescriptive of a single correct procedure to be followed. It contains guidance, whose purpose is to assist competent authorities in performing their functions under the habitats legislation. It does not assert that the approach it suggests is the only means of conducting an appropriate assessment. On the contrary, it expressly acknowledges that this approach is only "a means" or "one way" of undertaking that task (paragraphs 1.3, 2.6 and 4.1).

57 The Supreme Court has recently confirmed that there are only limited grounds on which a policy can be challenged as itself being unlawful (see *R. (on the application of A) v Secretary of State for the Home Department* [2021] UKSC 37, and also the recent decision of this court in *R. (on the application of Pearce) v The Parole Board* [2022] EWCA Civ 4). In *R. (on the application of A)* Lord Sales and Lord Burnett C.J. stressed that it is "not the role of policy guidance to eliminate all uncertainty regarding its application and all risk of legal errors" (paragraph 34). The appropriate question for the court is this: "does the policy in question authorise or approve unlawful conduct by those to whom it is directed?" (paragraph 38).

58 Where Natural England's advice on the appropriate occupancy rate is concerned, the answer to that question would clearly be "No". At the level of generality at

which the technical guidance note was suggesting it, the use of an occupancy rate of 2.4 persons per dwelling cannot be said to be unlawful on the ground that it is inconsistent with the "best scientific evidence". The technical guidance note did not misstate the legal position under regulation 63 (see *R. (on the application of A),* at paragraphs 46 and 47). It did not "authorise or approve", let alone prescribe, the use of that occupancy rate by all local planning authorities in every case, regardless of the circumstances. It did not remove or reduce the onus on those authorities to be sure, beyond "all reasonable scientific doubt", that the integrity of the protected site would not be adversely affected (see paragraphs 1.4, 2.5, 4.6 to 4.9, and 4.18 to 4.19 of the technical guidance note).

59 Nor do I accept the criticism made of the council's use of an occupancy rate of 2.4 persons per dwelling in the particular circumstances of this case. Although an appropriate assessment must be based on "best scientific knowledge", the question for the court is not whether each individual figure used in it is intrinsically the "best scientific knowledge" when considered on its own, divorced from the full context in which it is used. As Mr David Elvin Q.C. submitted for Natural England, the court must take a "holistic" view on the question whether the assessment methodology as a whole represents "best scientific knowledge".

60 When that is done here, it is, I think, plain that the council understood its duty under regulation 63 correctly. This much is clear from the summary of the law which the officer set out in his report (in particular, at paragraph 8.26), and from the equivalent summary in the appropriate assessment itself (in particular, at pp.15 to 19).

61 The council consulted Natural England twice. As the judge said (in paragraph 81 of his judgment), Natural England had specifically considered "the application of more size-sensitive datasets but rejected the need for [that]". It does not seem to have intended that the occupancy rate of 2.4 persons per dwelling should always be only a "starting point". It evidently took the view that there were sound reasons in consistency, given the nature and availability of other datasets, to use that occupancy rate for development in the Solent (Ms Potts' third witness statement, paragraphs 7 and 8). This was, on the face of it, a carefully considered judgment. And in any event, the council's committee considered objections to the use of an occupancy rate of 2.4 for the proposed development, but rejected them in the light of Natural England's response to consultation. Tellingly, Natural England did not oppose the use of that occupancy rate in this particular case, rather than the adoption of a bespoke figure. It had seen the council's nitrogen budget before responding to consultation, and it knew therefore that an occupancy rate of 2.4 was being used in that nitrogen budget. Had it been concerned about this, one would have expected it to make that clear, but it raised no such concern. And as Mr Timothy Mould Q.C. submitted for the council, compelling reasons would have been required for the council to depart from Natural England's position.

62 In the circumstances it was, I think, open to the council to rely on the precautionary nature of several factors in the nitrogen budget to ground its own judgment that the use of an occupancy rate of 2.4 persons per dwelling was consistent with a sufficiently precautionary approach in this instance.

63 The judge recognised the strength in two of the points made by Ms Potts in her evidence – that the relationship between occupancy rates and water usage was "not one of direct proportionality", and that the algorithm "assumed 100% migration to the area" (paragraph 84 of the judgment). He did not confine himself to reliance

on these two reasons alone – he merely said (in the same paragraph) that these two reasons "have force" and that he found the other reasons "less persuasive".

64 There were, I think, at least six other factors identified by Ms Potts in her second witness statement which, in combination with the two considerations on which the judge focused, were capable of justifying the conclusion that the use of the 2.4 occupancy rate would be consistent with the precautionary principle here. First, the water use figures for the proposed development were themselves precautionary. They were "10% higher than Southern Water's target required", and they did not take into account the fact that "[all] new build development will have meters and water use in metered properties is significantly lower than non-metered properties". Second, the water use figures were based on "water supply", which would in fact be "less than water return to [wastewater treatment works] reflecting use of water to wash cars, [and] water gardens". Third, the wastewater treatment works were "performing 25% more effectively" than the level assumed in the nitrogen calculations (see also paragraph 4.29 of Natural England's technical guidance note). Fourth, there would be natural reductions in nitrogen concentrations, mainly through de-nitrification processes, which were unquantifiable and so were not taken into account in the calculation (see also paragraph 4.42 of the technical guidance note). Fifth, there was not a high degree of correlation between occupancy rates and dwelling sizes. And sixth, an unknown proportion of the nitrogen discharged to the sea would not affect the protected sites.

65 The council was also entitled to rely, as the planning officer did in paragraph 8.41 of his report, on the use of the 20% precautionary buffer applied at the end of the calculation to strengthen the conclusion that the use of the 2.4 occupancy rate was appropriate in the particular circumstances of this case. Obviously, the application of such a buffer at the end of a calculation would not excuse a general lack of precaution in the figures used in the calculation itself. This could lead to impermissible "double-counting". But that is not what happened here. Even though, in this respect, the approach adopted by the council seems not to have been what the technical guidance note contemplated, the precautionary buffer was not used here to justify a general lack of precaution in the exercise, but to strengthen the justification for using an occupancy rate of 2.4 in the calculation. As Mr Mould submitted, it was not *Wednesbury* unreasonable to use it in this way. It was not the sole justification for the council's conclusion, as a matter of judgment, that an occupancy rate set at this level was consistent with a sufficiently precautionary approach in the appropriate assessment for this proposed development. It was one element in the broader justification for the use of that occupancy rate, to be seen in the context of the assessment methodology as a whole.

66 It would not be right for the court to intervene in a case of this kind simply because there is a divergence of expert opinion on some of the figures used in the appropriate assessment. Sometimes, perhaps often, there may not be a consensus of expert opinion. If that is so, there is nothing in law to compel the competent authority in making an appropriate assessment, or the court in reviewing the authority's decision taken in the light of that appropriate assessment, to default to the most conservative or cautious view propounded.

67 The argument advanced by Mr Jones does not demonstrate that in this case it was inappropriate or unlawful for the council to adopt the occupancy rate of 2.4 persons per dwelling on the ground that it was, in one expert's view, insufficiently precautionary – or for any other reason. As Mr Elvin submitted, this is a paradigm

case of expert witnesses differing on matters of scientific judgment, in which the court would need to be shown some conspicuous error in the competent authority's own evaluation of the expert advice it received at the time of its decision before that decision could properly be overturned. For the court to upset a decision when it has not been shown that the competent authority's own exercise of evaluative judgment was so defective as to be *Wednesbury* unreasonable but where there is disagreement between experts on the correct ingredients of the appropriate assessment, would involve the court stepping beyond its proper supervisory jurisdiction into the realm of the competent authority's own remit under the habitats legislation.

68 I think Mr Jones' criticism of the judge's reasoning on this issue is mistaken. The judge accepted that "[an] occupancy rate of 3 would be the best available scientific evidence for 4-5 bedroom houses in the Fareham region" (paragraph 83). This, however, was not fatal to his essential analysis. Reading the relevant passage of his judgment fairly as a whole, I do not think it can be said that he fell into error. He was recognising the fact that, taken in isolation, an occupancy rate of 3 would generally be appropriate for four and five-bedroom houses in the area. Nowhere did he suggest, however, that in this case the appropriate assessment as a whole was inconsistent with "best scientific knowledge". He found that the method used in the appropriate assessment, taken in its entirety and thus including the occupancy rate of 2.4, complied with the precautionary principle. He accepted as lawful the council's conclusion, as a matter of its own judgment, that in the circumstances here an assessment using that occupancy rate was sufficiently precautionary. And in my view he was right to do so.

69 Lastly on this ground, I do not think the judge's view that Natural England's technical guidance note would have to be reviewed in the light of his judgment is inconsistent with his view that the approach taken to the occupancy rate in this case was legally defensible. In effect, he was pointing out that the technical guidance note, as drafted, could be liable to misinterpretation or misapplication in other cases, and suggesting that Natural England might describe more clearly the general approach it suggested to this part of the calculation.

70 Ground 2 is also, in my view, unmeritorious – for two reasons. First, I see no objection in principle to the use of average land use figures to calculate the baseline level of nitrate deposition from the site of the proposed development.

71 And secondly, I cannot agree with the reading of the CJEU's judgment in *Dutch Nitrogen* urged on us by Mr Jones. That case concerned the question of whether "programmatic legislation" – where the appropriate assessment for certain types of project was carried out in advance at a general level and those projects would then be exempt from the requirement for individual assessment – was compatible with article 6(3) of the Habitats Directive. This was the issue to which the observations of the court and Advocate General Kokott on the use of average figures were directed. When the Advocate General said (in paragraph 55 of her opinion), that "[it] would not be sufficient merely to show rough averages and to ignore local or temporary peak load values where those peak values are likely adversely to affect the conservation objectives of the site", she meant, I think, that it was not appropriate to use averages for all projects of a certain type where some projects of that type might exceed those averages and thus damage the integrity of the protected site. She made clear (in paragraph 147 of her opinion) that the difficulty with using an average value for a number of sites was that it might fail

to "guarantee that there are no significant effects on any single protected site". To the same effect, the court said (in paragraph 119 of its judgment) that "[an] average value is not, in principle, capable of ensuring that there are no significant effects on any single protected site".

72 Those statements about the use of average values in that context must be viewed with care in a case such as this, which is not concerned with "programmatic legislation" but with the individual assessment of the particular effects of a specific project. Nothing said in *Dutch Nitrogen* implies that in this situation the use of averages is inherently objectionable. It is true that the use of average figures will necessarily involve the exercise of judgment on their validity in the particular context. But this does not mean that using them is, in principle, contrary to the requirement for the necessary degree of certainty, as amplified in Waddenzee . The use of average figures may sometimes be conducive to sufficient certainty, sometimes not. Whether that is so in a particular case will be a matter of judgment for the competent authority.

73 Nothing suggests that in this case either Natural England or the council misunderstood the degree of certainty required by the precautionary principle. Nor is there any evidence to show some justiciable error in the conclusion reached, as a matter of judgment, that the use of average land use figures was, in this case, suitable for the appropriate assessment, and sufficiently robust. Dr O'Neill's evidence does not demonstrate that there was such an error. Indeed, he recognised (in paragraph 36 of his witness statement) that the selection of the correct land use for the site was "a matter of judgement", on which he "did not feel qualified to make an assessment".

74 I do not accept that the judge held that the use of average land use figures was impermissible but failed to carry that conclusion through to a finding of legal error. What he did (in paragraphs 75 to 77 of his judgment) was to point out that the relevant advice in Natural England's technical guidance note might be misconstrued in some other case in which the circumstances were different. One should not infer from what he said that in his view the use of average figures would always be impermissible, or that this was so in the circumstances here.

75 Coming finally to ground 4, I do not think there can be any serious dispute that, in a particular case, the use of a 20% precautionary buffer can ensure that the appropriate assessment meets the required standard of scientific certainty. As the judge said (in paragraph 111 of his judgment), the 20% figure is "not derived from any arithmetical calculation or other algorithm". There is, however, no legal requirement that every element of an appropriate assessment be based on arithmetic or algorithm. That would be a fallacy. If a precautionary buffer is employed, it should be set at a reasonable level, to help achieve adequate certainty that the high threshold in regulation 63 is crossed. But as Mr Mould submitted, to think that reasonable scientific judgments in undertaking an appropriate assessment can only be reached through arithmetical calculation would be to take too narrow a view of rational enquiry. Such judgments can be formed, and sometimes will best be formed, without resort to arithmetic. This will not, in principle, expose the appropriate assessment to the charge that it suffers from "lacunae" or that it lacks "complete, precise and definitive findings", as required by the CJEU (see the CJEU's observations in *People Over Wind,* at paragraph 38).

76 The fact that the 20% precautionary buffer was not the product of arithmetic, but of judgment, does not mean that it lacked an adequate basis. As Ms Potts made

clear, the appropriate figure to adopt as a buffer was considered carefully by Natural England, knowing the nature of the risks and uncertainties involved (second witness statement, paragraphs 56 to 64, and third witness statement, paragraphs 19 to 21).

77 Once again, the essence of the complaint is that there is an expert witness – Dr O'Neill – who, in his evidence to the court, has disagreed with a particular figure used in the calculation. That disagreement does not automatically equate to evidence of serious scientific doubt about an appropriate figure for a precautionary buffer. No doubt Dr O'Neill's evidence shows that, for the reasons he gave, some experts might have adopted a more generous buffer than 20%. This does not mean, however, that the court is bound to find that the buffer actually chosen by Natural England and applied by the council as competent authority was insufficiently precautionary. As Ms Potts' evidence effectively confirmed, the choice of 20% as the appropriate figure represented the expert regulatory body's judgment on the level of precautionary buffer consistent with "no reasonable doubt" that the integrity of the protected site would not be adversely affected. It was made with that level of certainty explicitly in mind (third witness statement, paragraph 21). Neither the selection of that figure in Natural England's technical guidance note nor its use in the appropriate assessment undertaken by the council in this case is open to attack on any legal grounds.

Section 38(6) of the 2004 Act

78 Section 38(6) of the 2004 Act provides:

> "(6) If regard is to be had to the development plan for the purpose of any determination to be made under the Planning Acts, the determination must be made in accordance with the plan unless material considerations indicate otherwise."

79 This provision and its predecessor, section 54A of the Town and Country Planning Act 1990, are the subject of ample authority, including several decisions at the highest level and in this court. The relevant principles do not need to be set out at length yet again. They have been stated and restated many times (see, for example, the decision of this court in *Secretary of State for Communities and Local Government v BDW Trading Ltd. (trading as David Wilson Homes (Central, Mercia and West Midlands)* [2017] P.T.S.R. 1337 at paragraphs 19 to 23). A decision-maker must always heed the statutory priority given to the development plan, but is free to assess what weight to give to its policies and to all other material considerations in deciding whether the decision should be made, as the statute presumes, in accordance with the plan (see the speech of Lord Clyde in *City of Edinburgh v Secretary of State for Scotland* [1997] 1 W.L.R. 1447 at pp.1458 and 1459). If the decision-maker fails to have regard to a relevant policy in the plan or to interpret it properly, conscious that relevant policies in the plan may pull in different directions, the court can act (Lord Clyde's speech in *City of Edinburgh* at p.1459D-F, and the judgments of Lord Reed and Lord Hope of Craighead in *Tesco Stores Ltd v Dundee City Council* [2012] P.T.S.R. 983 at paragraphs 19 and 34 respectively). But there is no prescribed method for discharging the section 38(6) duty, such as a two-stage approach. This is left to the decision-maker's good sense in the particular circumstances of the case in hand (Lord Clyde's speech in *City of Edinburgh* at pp.1459 and 1460).

80 In *R. (on the application of Hampton Bishop Parish Council) v Herefordshire Council* [2014] EWCA Civ 878, Lord Justice Richards said (in paragraph 28) that "[it] is up to the decision-maker how precisely to go about the task, but if he is to act within his powers and in particular to comply with the statutory duty to make the determination in accordance with the development plan unless material considerations indicate otherwise, he must as a general rule decide at some stage in the exercise whether the proposed development does or does not accord with the development plan". As Mrs Justice Patterson emphasised in *Tiviot Way Investments Ltd v Secretary of State for Communities and Local Government* [2015] EWHC 2489 (Admin) (at paragraphs 27 to 36), with the later endorsement of this court in *BDW Trading Ltd* (at paragraph 21), the decision-maker must ascertain whether there is compliance or conflict with the development plan "as a whole".

81 It is axiomatic that the interpretation of a development plan policy is ultimately a matter for the court, but that the application of policy is for the decision-maker, subject to the court's review on public law grounds. The court will intervene on a misconstruction of policy by the decision-maker if satisfied that this has had a material bearing on the decision. But it will only upset a local planning authority's decision based on an officer's exercise of planning judgment in assessing compliance with policy if it is convinced that a public law error has been committed (see the judgment of Lord Reed in *Tesco v Dundee City Council* at paragraph 19).

The policies of the development plan

82 At the time of the decision to grant planning permission, the development plan for the borough of Fareham comprised the adopted Fareham Borough Core Strategy and the adopted Fareham Local Plan Part 2: Development Sites and Policies Plan. In his report to the committee the officer identified a number of relevant policies, including Policy CS2 ("Housing Provision"), Policy CS6 ("The Development Strategy") and Policy CS14 ("Development Outside Settlements") of the core strategy, and Policy DSP6 ("New Residential Development Outside of the Defined Urban Settlement Boundaries") and Policy DSP40 ("Housing Allocations") of the local plan (paragraph 4.1 of the officer's report).

83 Policy CS14 of the core strategy says that "[built] development on land outside the defined settlements will be strictly controlled to protect the countryside and coastline from development which would adversely affect its landscape character, appearance and function", and that "[acceptable] forms of development will include that essential for agriculture, forestry, horticulture and required infrastructure …".

84 The first part of Policy DSP40 of the local plan refers to the sites allocated for residential development, sites with planning permission for residential development, and sites safeguarded from other forms of development. The second part of the policy deals with the situation where the requisite five-year supply of land for housing is lacking. It states:

> "Where it can be demonstrated that the Council does not have a five year supply of land for housing against the requirements of the Core Strategy (excluding Welbourne) additional housing sites, outside the urban area boundary, may be permitted where they meet all of the following criteria:
>
> > i. The proposal is relative in scale to the demonstrated 5 year housing land supply shortfall;

> ii. The proposal is sustainably located adjacent to, and well related to, the existing urban settlement boundaries, and can be well integrated with the neighbouring settlement;
> iii. The proposal is sensitively designed to reflect the character of the neighbouring settlement and to minimise any adverse impact on the Countryside and, if relevant, the Strategic Gaps;
> iv. It can be demonstrated that the proposal is deliverable in the short term; and
> v. The proposal would not have any unacceptable environmental, amenity or traffic implications."

The officer's advice on section 38(6) of the 2004 Act

85 When considering the implications of the five-year housing land supply, the officer advised the members that section 38(6) of the 2004 Act was the "starting point for the determination of this planning application" (paragraph 8.8 of the report), and that "there is a presumption in favour of policies of the extant Development Plan, unless material considerations indicate otherwise". He also reminded them that "[material] considerations include the planning policies set out in the [National Planning Policy Framework ("NPPF")]" (paragraph 8.9).

86 He then referred to several policies of the NPPF, including the policy for the "presumption in favour of sustainable development" in paragraph 11 (paragraph 8.12), and the policy in paragraph 177, which states that "[the] presumption in favour of sustainable development does not apply where the plan or project is likely to have a significant effect on a habitats site (either alone or in combination with other plans or projects), unless an appropriate assessment has concluded that the plan or project will not adversely affect the integrity of the habitats site" (paragraph 8.14).

87 On the question of the proposal's acceptability as residential development in the countryside, the officer concluded that it was in conflict with Policy CS14 and several other policies of the development plan, stating "[the] site is clearly outside of the defined urban settlement boundary and the proposal is therefore contrary to Policies CS2, CS6 and CS14 of the adopted Core Strategy and Policy DSP6 of the adopted Local Plan Part 2: Development Sites and Policies Plan" (in paragraph 8.22).

88 The officer quoted Policy DSP40 of the local plan in full (in paragraph 8.52) and then dealt with it in a series of paragraphs (paragraphs 8.53 to 8.65), in which he addressed each of the five criteria in the second part of the policy. On the second criterion, he said this (in paragraph 8.55):

> "8.55 The site is considered to be sustainably located within a reasonable distance of local schools, services and facilities at nearby local centres (Warsash and Locks Heath). This part of the northern arm of Brook Avenue is located outside of the urban area, the existing urban settlement boundary being approximately 140 metres east of the site. The proposal is not therefore adjacent to the urban settlement boundary."

He found compliance with each of the other four criteria (paragraphs 8.54 and 8.56 to 8.65.).

89 When he came to the "planning balance", the officer said (in paragraph 8.78):

> "8.78 Section 38(6) of [the 2004 Act] sets out the starting point for the determination of planning applications …".

He then quoted section 38(6), and continued (in paragraphs 8.79 to 8.83):

> "8.79 This application has previously been the subject of a favourable Committee resolution to grant planning permission. The revised application proposes additional measures to address the matter of nutrient neutrality but is otherwise the same.
> 8.80 The site is outside of the defined urban settlement boundary and the proposal does not relate to agriculture, forestry, horticulture and required infrastructure. The principle of the proposed development of the site would be contrary to Policies CS2, CS6 and CS14 of the Core Strategy and Policy DSP6 of Local Plan Part 2: Development Sites and Policies Plan.
> 8.81 Officers have carefully assessed the proposals against Policy DSP40: Housing Allocations which is engaged as this Council cannot demonstrate a 5YHLS. In weighing up the material considerations and conflicts between policies; the development of a greenfield site weighted against Policy DSP40, Officers have concluded that the proposal is relative in scale to the demonstrated 5YHLS shortfall (DSP40(i)), can be delivered in the short-term (DSP40(iv)), and would not have any unacceptable environmental, traffic or amenity implications (DSP40(v)). Whilst there would be harm to the character and appearance of the countryside the unsightly derelict buildings currently on the site would be demolished. Furthermore, it has been shown that the site could accommodate eight houses set back from the Brook Avenue frontage and an area of green space to sensitively reflect nearby existing development and reduce the visual impact thereby satisfying DSP40(iii). Officers have however found there to be some conflict with the second test at Policy DSP40(ii) since the site is acknowledged to be in a sustainable location but is not adjacent to the existing urban area.
> 8.82 In balancing the objectives of adopted policy which seeks to restrict development within the countryside alongside the shortage in housing supply, Officers acknowledge that the proposal could deliver 8 dwellings, as well as an off-site contribution towards affordable housing provision, in the short term. The contribution the proposed scheme would make towards boosting the Borough's housing supply would be modest but is still a material consideration in the light of this Council's current 5YHLS.
> 8.83 There is a clear conflict with development plan policy CS14 as this is development in the countryside. Ordinarily, officers would have found this to be the principal policy such that a scheme in the countryside should be refused. However, in light of the Council's lack of a 5YHLS, development plan policy DSP40 is engaged and officers have considered the scheme against the criteria therein. The scheme is considered to satisfy four of the five criteria and in the circumstances, officers consider that more weight should be given to this policy than CS14 such that, on balance, when considered against the development plan as a whole, the scheme should be approved."

90 The officer went on to consider relevant policies in the NPPF (in paragraphs 8.84 to 8.87). He referred to the fact that an appropriate assessment had been undertaken and had "concluded that the development would not have an adverse

effect on the integrity of the sites"; noted that in these circumstances paragraph 177 of the NPPF said "the presumption in favour of sustainable development imposed by paragraph 11 … is applied" (paragraph 8.84); confirmed that officers had "therefore assessed the proposals against the 'tilted balance' test set out at paragraph 11 of the NPPF" (paragraph 8.85), and considered there to be "no policies within the [NPPF] that protect areas or assets of particular importance which provide a clear reason for refusing the development proposed" and that "any adverse impacts of granting permission would not significantly and demonstrably outweigh the benefits, when assessed against the policies in the [NPPF] taken as a whole" (paragraph 8.86). He recommended that planning permission be granted, subject to a section 106 obligation and suitable conditions (paragraph 8.87).

The judge's conclusions on the section 38(6) grounds

91 Jay J. found it clear that the officer had advised the committee that the proposed development did not accord with the development plan in a number of respects. However, paragraph 8.83 of the report gave rise, in his view, to "a degree of interpretative challenge", and "its various strands are difficult to identify and disentangle" (paragraph 159). That paragraph, he thought, was "somewhat elliptical" and "a degree of benevolence" was required. The issue was "how much?" (paragraph 160).

92 On that question the judge said that in paragraph 8.83 the officer "was dealing with the first stage of the s.38(6) analysis", and "considering the extent of compliance with the development plan and the ordering of policies within that plan". The officer had "found, as he was entitled to, that policy DSP40 was more important in this case than CS14, owing to the shortfall in housing supply, and that the failure to satisfy the second criterion did not undermine this conclusion". In the judge's view, "[the] final clause in para 8.83 could be better worded, but it sets out the planning officer's conclusion on the first stage". It was "not a conclusion on the s.38(6) issue tout court, still less the planning application as a whole" (paragraph 160).

93 Having concluded that paragraphs 8.84 to 8.87 of the officer's report dealt with "the second stage of the s.38(6) exercise", the judge described paragraph 8.86 of the report as a "composite conclusion on all remaining material considerations in the light of the tilted balance [in NPPF policy]". The officer's "overall conclusion" in paragraph 8.87 was, he said, was "legally unexceptionable" (paragraph 161).

Did the council lawfully discharge its duty under section 38(6)?

94 Mr Jones submitted, as he did before the judge, that the council had failed to comply with section 38(6). The officer's advice in paragraphs 8.78 to 8.87 of his report did not contain a conclusive view on the question of whether the proposed development was in accordance with the development plan as a whole – an essential part of the decision-making process, as Patterson J. had said in *Tiviot Way Investments* (paragraph 27). There was at least "substantial doubt" over the council's performance of its duty (see the judgment of Lord Justice Elias in *Secretary of State for Communities and Local Government v Calderdale MBC* [2011] J.P.L. 412 at paragraph 46). The officer had not dealt properly with the "nature and extent" of the proposal's conflict with the plan, and the significance of that conflict (see the judgment of Lord Reed in *Tesco v Dundee City Council* at paragraph 22). In

the final sentence of paragraph 8.83 of the report, it was not clear whether he was saying that the proposal accorded with the plan as a whole, or that, despite not being in accordance with the plan, it should be approved because "other material considerations [indicated] otherwise". Having recognised the ambiguity in the officer's assessment, the judge should have found there was "substantial doubt" sufficient to justify his quashing the planning permission. He went beyond the "benevolence" appropriate in the reading of a planning officer's report.

95 Mr Mould supported the judge's analysis. The court, he submitted, should not read the officer's report with undue rigour, but with "reasonable benevolence" and bearing in mind it was written for councillors with local knowledge (see *R. (on the application of Mansell) v Tonbridge and Malling BC* [2019] P.T.S.R. 1452; [2017] EWCA Civ 1314 at paragraph 42). Reading the report fairly, it could not conclude that the members had been materially misled. The officer understood the priority to be given to the development plan. He was clearly satisfied that, on balance, the proposal was in accordance with the plan. Because of the shortfall in the housing land supply, he gave more weight to Policy DSP40 of the local plan than to Policy CS14 of the core strategy. In paragraph 8.83 of the report he concluded, in effect, that the limited conflict with Policy DSP40, a partial conflict with only one of its five criteria, when added to the conflict with other plan policies, did not prevent him from finding the proposal in accordance with the plan "as a whole". This was a reasonable and lawful exercise of planning judgment. The following four paragraphs of the report, paragraphs 8.84 to 8.87, were devoted to "other material considerations" arising from the NPPF, which, again as a matter of planning judgment, the officer found not to indicate the refusal of planning permission. Both limbs of section 38(6) were properly dealt with. And the officer's ultimate conclusion on the "planning balance", in paragraph 8.87, was not irrational or otherwise unlawful.

96 This is an issue to be dealt with in the spirit of realism and common sense to which this court has often referred (see, for example, what was said in *Mansell*, at paragraph 42; and in *St Modwen Developments Ltd v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643 at paragraph 7).

97 Like the judge, I am not persuaded by Mr Jones' argument here. On a fair reading of the officer's report, in particular the passages which embody the performance of the decision-maker's duty under section 38(6), I would accept that the assessment may, in part, be infelicitously expressed, but not that it is, in substance, unlawful. This is not to ignore the well-known principles governing the approach to planning officers' reports to committee stated by this court in *Mansell*, but only to apply those principles sensibly in the circumstances here. When that is done, I do not think one can conclude that there was any "material defect" in the officer's advice justifying interference by the court (see *Mansell*, at paragraph 42(3)).

98 Unlike several cases which have recently found their way to the Court of Appeal or above (see, for example, *Braintree District Council v Secretary of State for Communities and Local Government* [2018] EWCA Civ 610), there is no issue of policy interpretation for the court to resolve here. The meaning and effect of the relevant policies of the development plan are uncontentious.

99 In any event, I do not think it can be said that this is one of those cases in which the officer, or the members, misinterpreted any of the relevant policies (see *R. (on the application of Corbett) v The Cornwall Council* [2020] EWCA Civ 508 at paragraphs 65 to 67). The officer recognised that the proposal was in conflict with

Policy CS14 of the core strategy because it would be development in the countryside which did not fall into any of the acceptable forms of development identified in that policy. Indeed, he accepted that there was a "clear conflict" with that policy, "as this is development in the countryside", and that this conflict would "ordinarily" have led to the refusal of planning permission (paragraph 8.83 of his report).

100 I agree with Mr Jones that we can put to one side the general quality of the officer's report, and the obvious care he took in other parts of his planning assessment. As Mr Jones submitted, the judge's observations praising the officer for the way in which he dealt with other matters could not override a finding that he went wrong in handling the requirements of section 38(6). But I also accept Mr Mould's submission that those observations of the judge played no part in his conclusions on those parts of the officer's report where the officer applied the policies of the development plan and took other material considerations into account.

101 It cannot be suggested that either the officer or the committee was unaware of section 38(6) and the need to perform the duty it states. The officer quoted that provision at the beginning of his consideration of "the planning balance", in paragraph 8.78 of his report. He obviously had it in mind as he went about that assessment. So this is not a case where it is unclear whether the decision-maker had in mind the words of the statute and proceeded in the light of them. Here, the officer plainly did that. The question is whether he did so lawfully.

102 As Mr Mould submitted, the structure of the officer's section 38(6) assessment, in paragraphs 8.78 to 8.87 of his report, is divided into two parts. In the first, comprising paragraphs 8.78 to 8.83, the officer addressed the first limb of the duty – to ascertain whether the proposal was or was not "in accordance with the development plan". In the second part, which comprises paragraphs 8.84 to 8.87, he turned to "other material considerations", in particular the policy for the "presumption in favour of sustainable development" in paragraph 11 of the NPPF. He did not have to split the assessment in this way, there being no statutory requirement to do so. But he was entitled to do it, and was thus able to divide his conclusions on the two limbs more distinctly than if he had combined them in a single sentence or paragraph.

103 I consider, as the judge did, that the officer reached a clear conclusion on the compliance of the proposal with the development plan as a whole. That conclusion appears in the final sentence of paragraph 8.83 of the report. It is true that the officer did not express it in the language used in the first limb of the section 38(6) duty. He did not say, explicitly, that the proposal was "in accordance with the development plan". He said that "on balance, when considered against the development plan as a whole, the scheme should be approved". This corresponds to the first limb of the statutory duty. In the context of the officer's consideration of the four policies of the development plan to which he referred in paragraph 8.80 and his consideration of Policy DSP40 of the local plan and Policy CS14 of the core strategy in paragraphs 8.81 to 8.83, it was, in my view, a sufficiently clear conclusion that the proposal was in accordance with the plan as a whole. To hold otherwise would be to rob the officer's conclusion of its real meaning, and to undo the committee's acceptance of it in resolving as it did.

104 Was the officer lawfully entitled to reach the conclusion that the proposed development accorded with the development plan as a whole? In my view he was. So long as he did not lapse into a misunderstanding of any relevant policy of the

plan – which he did not – the accordance of the proposal with the plan as a whole was a matter of planning judgment for him.

105 What the planning officer did here, as one sees in paragraph 8.22 of the report, was to acknowledge that the application site was "clearly outside … the defined urban settlement boundary", so that the proposal was "contrary to" several policies of the core strategy and also Policy DSP6 of the local plan. However, because of the absence of a five-year supply of housing land under the requirements of the core strategy it was Policy DSP40 of the local plan on which the officer focused, as the policy of central relevance to the proposal. There can be no complaint about that. This was a classic case of two policies of the development plan pulling in different directions: Policy CS14 of the core strategy pointing to a refusal of planning permission for housing development in the countryside, and Policy DSP40 creating, in its second part, a different and permissive approach to such proposals in the absence of a five-year supply of housing land, subject to the criteria set out. In those circumstances the two policies would obviously be in tension with each other. A proposal satisfying the criteria in the second part of Policy DSP40 would accord with the policy formulated specifically for the situation which arose here, but would likely be in conflict with Policy CS14. In that situation, the decision-maker would have to consider which of these two policies should prevail, the general policy for development in the countryside or the policy deliberately crafted for housing development in the countryside where there is not a five-year supply of housing land. In this case the officer effectively gave precedence to Policy DSP40, as he was clearly entitled to do.

106 The part of Policy DSP40 which fell to be applied here, because of the absence of a 5-year supply of housing land, sets out what is, in effect, a self-contained policy approach to the determination of applications for planning permission for housing development in those circumstances. The five criteria in the policy encapsulate considerations to which the council will need to have regard when determining such an application.

107 The officer quoted the relevant part of Policy DSP40 in paragraph 8.52 of his report, and then went through the five criteria, one by one, in paragraphs 8.53 to 8.65. He did not suggest that any of those criteria could be left out of account. He found that four of them – the first, third, fourth, and fifth – were fully complied with. There is no criticism of his consideration of those four criteria. The other criterion – the second – he dealt with in paragraph 8.55, reaching the significant conclusion that the site was "sustainably located within a reasonable distance of local schools, services and facilities at nearby local centres …". But because the urban settlement boundary was "approximately 140 metres east of the site", the development would "not … [be] adjacent to [that] boundary". Thus the proposal complied partially with the second criterion, though not totally. It was non-compliant only to the extent that the site was 140 metres from the urban settlement boundary, not "adjacent" to it. There is, however, no definition of the concept of adjacency in the policy. This is left to the decision-maker's planning judgment on the facts of the particular case. In summary, therefore, the proposal was fully compliant with four of the five criteria in the policy and substantially compliant with the other.

108 Those conclusions were picked up later in the officer's report, and distilled in paragraph 8.81, where he concluded that there was compliance with the first, third, fourth and fifth criteria of Policy DSP40, but "some conflict" with the second

criterion, "since the site is acknowledged to be in a sustainable location but is not adjacent to the existing urban area". None of that part of the officer's assessment betrays any misunderstanding of Policy DSP40, nor any unlawful application of it.

109 The advice in the following paragraph (paragraph 8.82) is also unimpeachable. It refers to the contribution that the proposed development would make towards the provision of housing and affordable housing in the situation to which the second part of Policy DSP40 is directed – the absence of a five-year housing land supply.

110 In paragraph 8.83 the officer recognised the "clear conflict" with Policy CS14 of the core strategy, because this would be "development in the countryside". That policy, however, was not "the principal policy" because the lack of a five-year housing land supply meant that Policy DSP40 was engaged, and that the proposal was to be considered under the criteria in that policy. Having stated that position, the officer then returned to his assessment of the proposal's compliance with Policy DSP40. He concluded that "in the circumstances, … more weight should be given to this policy than CS14 such that, on balance, when considered against the development plan as a whole, the scheme should be approved".

111 That clearly was an expression of planning judgment, having regard to the role of Policy DSP40 as the main policy of relevance, and the degree of compliance the officer had found with it. One can readily infer that in his view some provisions of the development plan pulled in opposite directions (see Lord Clyde's speech in *City of Edinburgh* at p.1459 D-F, and the judgments of Lord Reed and Lord Hope in *Tesco v Dundee City Council* respectively at paragraphs 19 and 34, and the judgment of Mr Justice Sullivan, as he then was, in *ex parte Milne*, at paragraphs 48 to 50). Policy CS14 of the core strategy was in tension with Policy DSP40 of the local plan, but the latter prevailed because there was not a five-year supply of housing land. The proposal substantially complied with the relevant part of Policy DSP40, satisfying all five criteria save for its limited conflict with the second criterion. And that limited conflict with one element of a single criterion in the policy was not, in the officer's view, enough to prevent a finding of compliance with "the development plan as a whole". In other words, the degree of conflict with the policy was not, overall, of such significance as to prevent approval of the scheme being in accordance with the plan for the purposes of section 38(6). This conclusion too, was a matter of planning judgment for the officer and is not assailable on any public law grounds.

112 There was, in my view, no misunderstanding or unlawful misapplication of development plan policy, and the path was open to the officer to reach the conclusion he did in the final sentence of paragraph 8.83 – that, "on balance", when it was "considered against the development plan as a whole", the proposal ought to be approved. Though not perhaps expressed with perfect clarity, this was a rational conclusion in the exercise of planning judgment, consistent with the relevant passages of the officer's report read fairly together, and plain in its meaning in that context. In short, it was lawful.

113 The officer's conclusions on other material considerations in paragraphs 8.84 to 8.87 were predicated on his conclusion on the first limb of the section 38(6) duty – that a decision to grant planning permission for the proposed development would be in accordance with the development plan. Those conclusions, whose import was that "material considerations" did not indicate that planning permission should

be refused, were clearly stated, and are sufficient, in my view, to comply with the second limb of section 38(6). I agree with the judge's conclusions to that effect.

114 In my view, therefore, the officer's assessment under section 38(6), regarded with realism and common sense, is not flawed by any error of law. The reality here is that in the conscious performance of the section 38(6) duty, he undertook every necessary exercise of planning judgment for that duty to be complied with, and none of those planning judgments are infected by legal error. In substance, the officer's assessment, accepted by the members, was not materially defective.

Conclusion

115 For the reasons I have given, I would dismiss the appeal.

LORD JUSTICE SINGH:

116 I agree that this appeal should be dismissed for the reasons given by the Senior President of Tribunals.

LORD JUSTICE MALES:

117 I agree with the judgment of the Senior President of Tribunals on grounds two, four and five, concerned respectively with the use of average land use figures in the calculation of baseline nitrogen deposition, the use of a 20% buffer in the budget calculation, and section 38(6) of the Planning and Compulsory Purchase Act 2004. On those issues I have nothing to add.

118 On the first ground of appeal, which is concerned with the use of the average national occupancy rate of 2.4 persons per dwelling in calculating a nutrient budget for a development of 4-5 bedroom houses, I agree with what the Senior President has said and with his conclusion that the appeal should be dismissed. However, I think it necessary to spell out that, in my view at any rate, the Council's appropriate assessment was not in accordance with the procedure set out in the technical guidance issued by Natural England, but was nevertheless lawful because there was a good reason not to follow that procedure. In short, that good reason was that the Council consulted Natural England, making clear that it had used the 2.4 persons occupancy rate, and Natural England had no objection to this. I set out my reasoning in this judgment.

The legal framework

119 Council Directive 92/43/EC ("the Habitats Directive") was transposed into domestic law by the Conservation of Habitats and Species Regulations 2017 ("the Habitats Regulations"). In the case of a proposed development which is likely to have a significant effect on a protected site, Regulation 63 imposes three relevant obligations on a planning authority (referred to in the Regulations as a "competent authority"). It is common ground that the development here was likely to have such an effect, and that Regulation 63 is therefore engaged.

120 Those three obligations are as follows. They are mandatory. First, the planning authority must make an "appropriate assessment" of the implications of the proposed development for that site (para (1)). Second, it must consult the appropriate nature conservation body, in this case Natural England, and have regard to any representations made by that body (para (3)). Third, it must refuse planning permission if the conclusion of the "appropriate assessment" is that the proposed

development will adversely affect the integrity of the site in question (para (5): strictly, para (5) says that permission may only be granted if the development will not adversely affect the integrity of the site, but this amounts to the same thing.

121 This latter obligation is subject to an exception, not applicable here, if the planning authority is satisfied that there are "no alternative solutions" and that there are "imperative reasons of overriding public interest" for the grant of permission (see Regulation 64). But that is the only circumstance in which permission may be granted for a development when an "appropriate assessment" carried out by the planning authority indicates an adverse effect on the site in question. The existence of an exception in these very limited circumstances, but not otherwise, demonstrates the importance which the legislature has attached, as a matter of policy, to the protection of endangered habitats. Unless a proposed development qualifies as necessary for imperative reasons of overriding public interest, with no alternative solution, planning permission *must* be refused for a development which will adversely affect the integrity of the site. There is no balance to be undertaken, weighing protection of the environment against (for example) the need for housing, however acute that need may be. Unless Regulation 64 applies, the planning authority has no discretion to exercise once it has concluded, by means of an "appropriate assessment", that the effect of the proposed development will be adverse – and that is equally so even if the adverse effect is only modest.

122 Accordingly Fareham Borough Council had an obligation in the present case to carry out an appropriate assessment, to consult Natural England and to have regard to any representations which it made. The decision whether to grant permission in the light of that "appropriate assessment" remained that of the Council as the planning authority. But that decision was constrained by the outcome of the "appropriate assessment". If the assessment was unfavourable, permission had to be refused and the grant of permission would necessarily be unlawful. If the assessment was favourable, the Council would have to make a planning judgment in the usual way, with which the court would only interfere on *Wednesbury* grounds.

123 Thus in a case where Regulation 63 (but not Regulation 64) applies, the task for the planning authority is not merely to undertake an overall evaluation of all the circumstances, giving such weight to each as it thinks fit. Rather, a favourable "appropriate assessment" is a necessary gateway through which an application must pass before the grant of permission can be considered.

The nature of the "appropriate assessment"

124 Accordingly the nature of the "appropriate assessment" which a planning authority is obliged to carry out and the degree of rigour which it must bring to bear may be of critical importance. A more rigorous assessment may show an adverse effect which a less rigorous assessment would not. The question therefore arises, who decides what should be done by way of "appropriate assessment" and how it should be carried out? The answer is that, in general, it is left to the planning authority to decide for itself what steps should be taken to investigate the impact of the proposed development on the protected site. This was explained by Lord Carnwath, giving the judgment of the Supreme Court, in *R. (Champion) v North Norfolk DC* [2015] UKSC 52; [2015] 1 W.L.R. 3710:

> "41. The process envisaged by article 6(3) should not be over-complicated. As Richards LJ points out, in cases where it is not obvious, the competent

authority will consider whether the 'trigger' for appropriate assessment is met (and see paras 41-43 of *Waddenzee*). But this informal threshold decision is not to be confused with a formal 'screening opinion' in the EIA sense. The operative words are those of the Habitats Directive itself. All that is required is that, in a case where the authority has found there to be a risk of significant adverse effects to a protected site, there should be an 'appropriate assessment'. 'Appropriate' is not a technical term. It indicates no more than that the assessment should be appropriate to the task in hand: that task being to satisfy the responsible authority that the project 'will not adversely affect the integrity of the site taking account of the matters set out in the article. As the court itself indicated in *Waddenzee* the context implies a high standard of investigation. However, as Advocate General Kokott said in *Waddenzee* [2005] All E.R. (EC) 353, para 107:

> 'the necessary certainty cannot be construed as meaning absolute certainty since that is almost impossible to attain. Instead, it is clear from the second sentence of article 6(3) of the Habitats Directive that the competent authorities must take a decision having assessed all the relevant information which is set out in particular in the appropriate assessment. The conclusion of this assessment is, of necessity, subjective in nature. Therefore, the competent authorities can, from their point of view, be certain that there will be no adverse effects even though, from an objective point of view, there is no absolute certainty.'

In short, no special procedure is prescribed, and, while a high standard of investigation is demanded, the issue ultimately rests on the judgment of the authority."

125 Accordingly, and in general, so long as the planning authority makes rational choices as to the steps which it will take to investigate the impact of the proposed development, the court will not interfere. Those rational choices must include application of the precautionary principle, which is implicit in the Regulations, and must involve a high standard of investigation, but precisely what that means in practice in any given case is left to the judgment of the planning authority, subject only to review by the court on *Wednesbury* grounds.

Natural England's Advice to planning authorities

126 In the present context, however, Natural England as the appropriate nature conservation body has published specific guidance to planning authorities as to the nature of the "appropriate assessment" which they should carry out, which is precisely applicable to the proposed development in this case. The relevant Advice was its "Advice on Achieving Nutrient Neutrality for New Development in the Solent Region (Version 5 – June 2020)" ("the 2020 Advice").

127 The 2020 Advice sets out "a practical methodology to calculating how nutrient neutrality can be achieved", which is said to be "based on best available scientific knowledge". The methodology consists of calculating a "nutrient budget", by which the amount of nutrient deposition on protected sites resulting from a proposed development can be estimated. It is, however, important that the 2020 Advice states repeatedly that it is "one way" (or "one means") of addressing this question (see paras 1.3, 2.2 and 4.1). It does not purport to prescribe a calculation which planning

authorities in the Solent region *must* perform in all circumstances in order to carry out a lawful "appropriate assessment".

128 The 2020 Advice begins by explaining the importance for wildlife of the water environment within the Solent region and the existing (and in some cases increasing) deterioration of protected sites. The methodology which it sets out does not seek to reverse the deterioration. Rather, it has the more limited ambition that new developments should not make things worse. In that context it emphasises repeatedly that planning authorities should take a precautionary approach when addressing uncertainty and calculating nutrient budgets. For example:

> "1.4 … It is our advice to local planning authorities to take a precautionary approach in line with existing legislation and case-law when addressing uncertainty and calculating nutrient budgets."

129 The 2020 Advice goes on to explain that this precautionary approach must be adopted separately at two stages, first when determining each of the "key inputs and assumptions" underpinning a nutrient budget, one of which is the prediction of occupancy levels for a new development, and then again when adding a precautionary buffer to the Total Nitrogen ("TN") which has been calculated:

> "4.7 The nutrient neutrality calculation includes key inputs and assumptions that are based on the best-available scientific evidence and research. It has been developed as a pragmatic tool. However, for each input there is a degree of uncertainty. For example, there is uncertainty associated with predicting occupancy levels and water use for each household in perpetuity. Also, identifying current land / farm types and the associated nutrient inputs is based on best-available evidence, research and professional judgement and is again subject to a degree of uncertainty.
>
> 4.8 It is our advice to local planning authorities to take a precautionary approach in line with existing legislation and case-law when addressing uncertainty and calculating nutrient budgets. This should be achieved by ensuring nutrient budget calculations apply precautionary rates to variables and adding a precautionary buffer to the TN calculated for developments. A precautionary approach to the calculations and solutions helps the local planning authority and applicants to demonstrate the certainty needed for their assessments."

130 The 2020 Advice explains at para 4.12 that the proposed methodology "is for all types of development that would result in a net increase in population served by a wastewater system, including new homes, student accommodation, tourism attractions and tourist accommodation".

131 The methodology contains a number of stages for developments which will drain to the mains network. The first stage is to calculate the Total Nitrogen (measured in kilograms per annum) derived from the development that would exit the Wastewater Treatment Works after treatment. Within this first stage are three steps, the first of which is to calculate the additional population resulting from the proposed development. This is dealt with at paras 4.18 and 4.19, on which much of the argument focused:

> "**Stage 1** Step 1 Calculate additional population

> 4.18 New housing and overnight accommodation can increase the population as well as the housing stock within the catchment. This can cause an increase in nitrogen discharges. To determine the additional population that could arise from the proposed development, it is necessary that sufficiently evidenced occupancy rates are used. Natural England recommends that, as a starting point, local planning authorities should consider using the average national occupancy rate of 2.4, as calculated by the Office for National Statistics (ONS), as this can be consistently applied across all affected areas.
>
> 4.19 However competent authorities may choose to adopt bespoke calculation tailored to the area or scheme, rather than using national population or occupancy assumptions, where they are satisfied that there is sufficient evidence to support this approach. Conclusions that inform the use of a bespoke calculation need to be capable of removing all reasonable scientific doubt as to the effect of the proposed development on the international sites concerned, based on complete, precise and definitive findings. The competent authority will need to explain clearly why the approach taken is considered to be appropriate. Calculations for occupancy rates will need to be consistent with others used in relation to the scheme (e.g. for calculating open space requirements), unless there is a clear justification for them to differ."

132 As is apparent from these paragraphs, the occupancy rate of 2.4 persons per dwelling is the average national occupancy rate for all kinds of dwellings, calculated by the Office for National Statistics. It is derived from the 2011 Census.

133 I would make two observations on what is said in these paragraphs. First, Natural England's recommendation is that this occupancy rate should be "considered" by competent authorities, not that its use is in any way mandatory. It is described as no more than "a starting point". Second, the Advice states that competent authorities "may" choose to adopt a different rate, tailored to a particular area or particular scheme, but that where they do so, the occupancy rate adopted must be evidence-based, clearly explained and consistent with other calculations used in relation to the proposed development.

134 Mr Timothy Mould QC for the Council and Mr David Elvin QC for Natural England emphasised the use of the word "may", submitting therefore that competent authorities can be under no obligation to use another occupancy figure. Mr Gregory Jones QC for the appellant objectors submitted that the word "may" should be read as "must". I would not accept either of these submissions. In my judgment the advice to planning authorities is to begin ("a starting point") by considering whether the average national occupancy rate of 2.4 is appropriate to use for the development in question. As it is a national average rate over all kinds of dwelling, it is likely that it can appropriately be used where a development consists of mixed housing, including both larger and smaller properties. In such cases, the starting point may well also be the finishing point. But it is common sense that a new development consisting exclusively of larger houses is likely to have a higher occupancy rate than the national average. In such a case, there seems to me to be a powerful argument that it is not appropriate to use the 2.4 rate, which a planning authority needs to consider. I would read these paragraphs as encouraging planning authorities to consider whether there is an alternative evidence-based occupancy rate for which

a clear justification can be stated. In fact, such an alternative rate would not have been difficult to find in this case: the Office for National Statistics, which is the source of the 2.4 rate, also publishes an average occupancy rate for four-bedroom houses based on the same source (i.e. the 2011 Census), namely 3.14 persons per dwelling.

135 Once the occupancy rate for the nitrogen budget calculation has been determined, the next step is to determine the estimated water use for the proposed development. The 2020 Advice recommends using a figure, itself described as precautionary, of 110 litres per person per day. There was nothing to indicate any circumstances in which a lesser usage figure should be used, for example that some occupants of the new dwellings might already be residents within the catchment area.

136 Stages 2 to 4 of the calculation need not be considered in any detail for the purpose of this ground of appeal. Stage 2 is to adjust the nitrogen load to account for existing nitrogen from current land use; Stage 3 is to adjust the nitrogen load to account for land use with the proposed development; and Stage 4 is to calculate the net change in the Total Nitrogen load that would result from the development. It is at this last stage that a precautionary buffer is recommended:

> "4.67 It is necessary to recognise that all the figures used in the calculation are based on scientific research, evidence and modelled catchments. These figures are the best available evidence but it is important that a precautionary buffer is used that recognises the uncertainty with these figures and in our view ensures the approach prevents, with reasonable certainty, that there will be no adverse effect on site integrity. Natural England therefore recommends that a 20% precautionary buffer is built into the calculation."

137 Thus the 20% precautionary buffer is not a substitute for use of the best available evidence-based figures for the previous stages of the methodology. On the contrary, it is an additional protection which assumes that the best available figures have been used in those previous stages.

The status of the 2020 Advice

138 Mr Jones submitted that the guidance set out in the 2020 Advice was unlawful, although it is fair to say that his primary attack in this court was that it had not been properly applied. I would reject the submission that the 2020 Advice was itself unlawful. It is a rational methodology recommended by the appropriate nature conservation body.

139 The question then arises whether a planning authority in the Solent Region must carry out an "appropriate assessment" in accordance with the 2020 Advice – or to put it another way, whether any departure from the methodology set out in the 2020 Advice would render an "appropriate assessment" unlawful, such that a grant of planning permission based on such an assessment would be *Wednesbury* unreasonable. In my judgment that cannot be the case. The 2020 Advice itself makes clear that it is only one way of carrying out an "appropriate assessment" and that its use is not mandatory. The true position is that a planning authority ought to follow the methodology contained in the 2020 Advice unless it has good reason not to do so. That is for the same reason, explained by Lord Justice Sales in *Smyth v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174; [2015] P.T.S.R. 1417, that a planning authority must place

considerable weight on the response of Natural England in response to a consultation under Regulation 63(3):

> "85. Moreover, the authorities confirm that in a context such as this a relevant competent authority is entitled to place considerable weight on the opinion of Natural England, as the expert national agency with responsibility for oversight of nature conservation, and ought to do so (absent good reason why not): *Hart*, supra, [49]; *R. (Akester) v DEFRA* [2010] Env. L.R. 33, [112]; *R. (Morge) v Hampshire County Council* [2011] UKSC 2; [2011] 1 W.L.R. 268, [45] (Baroness Hale); *R. (Prideaux) v Buckinghamshire County Council* [2013] EWHC 1054 (Admin); [2013] Env. L.R. 32 at [116]. The Judge could not be faulted in giving weight to this consideration in the present case, at para. [165] of her judgment."

140 One potentially good reason not to follow the methodology in the 2020 Advice precisely would be that Natural England itself has raised no concerns about a proposed development, despite appreciating that the methodology has not been precisely followed.

The obligation to consult Natural England

141 This brings me to the obligation, contained in Regulation 63(3), to consult Natural England and to have regard to its view. As explained in the passage from Lord Justice Sales' judgment in *Smyth* quoted above, the Council was both entitled and required to place considerable weight on the opinion of Natural England, unless there was good reason not to do so.

142 In this case the Council did consult Natural England. Although it did not draw specific attention to the use of the national average occupancy rate of 2.4 persons per dwelling for a development consisting of 4-5 bedroom houses, it provided information about the proposed development to Natural England from which the nature of the development and the use of the national average occupancy rate were both readily apparent. We can safely proceed on the basis that Natural England understood this. That is apparent from its stance and evidence in this action, opposing the claim for judicial review. Natural England made clear in its response to the consultation that it had no concerns about the proposed development, including the use of the average national occupancy rate, provided that certain conditions were imposed. That was so even though using the occupancy rate of 2.4 resulted in a nitrogen budget calculation which was only just positive, from which it would have been apparent that taking any higher occupancy rate would have meant that the assessment was negative and that permission would necessarily have had to be refused.

The Officers' Report

143 The Officers' Report for the proposed development, dated 19th August 2020, noted that the application was for eight detached dwellings which were likely to be larger than average. It summarised accurately the content of paras 4.18 and 4.19 of the 2020 Advice, noting that Natural England recommended that, as a starting point, local planning authorities should consider using the average national occupancy rate of 2.4 persons per dwelling, but that they might choose to adopt bespoke calculations where satisfied that there is sufficient evidence to support

this approach. Referring to the concern of objectors that a higher occupancy rate ought to be applied since the houses were likely to be larger than average dwellings, the Report concluded as follows:

> "8.40 It is acknowledged that some houses will have more than the average number of occupants. It is also of course the case that some will have less. The figure of 2.4 is an average based on a well evidenced source (the ONS) and which has been shown to be consistent over the past 10 years. As stated above the Natural England methodology allows bespoke occupancy rates however to date the Council has only done so to lower, not raise, the occupancy rate and where clear evidence has been provided to demonstrate that the proposed accommodation has an absolute maximum rate of occupancy. In the case of sheltered housing which is owned and managed by the Council for example it has previously been considered appropriate to apply a reduced occupancy rate accordingly.
>
> 8.41 In all instances it is the case that the Natural England methodology is already sufficiently precautionary because it assumes that every occupant of every new dwelling (along with the occupants of any existing dwellings made available by house moves) is a new resident of the Borough of Fareham. There is also a precautionary buffer of 20% applied to the total nitrogen load that would result from the development as part of the overall nutrient budget exercise.
>
> 8.42 Taking the above matters into account, Officers do not consider there to be any specific justification for applying anything other than the recommended average occupancy rate of 2.4 persons per dwelling when considering the nutrient budget for the development."

144 For my part, and without (I hope) reading the Report in an unduly legalistic way, I do not think that these paragraphs represent a correct application of the methodology contained in the 2020 Advice. The Report treats the average national occupancy rate as the rate "recommended" by Natural England, to be applied unless there is a "specific justification" for taking some other rate. But that is not what the 2020 Advice says. What it says is that the 2.4 rate should be considered, but it does not suggest that it is anything more than a starting point.

145 Moreover, the Report's justification for using the 2.4 figure was that the Natural England methodology "is already sufficiently precautionary". The first reason for this view was that the methodology assumes that every occupant of every new development would be a new resident of the borough. On this point the Report is mistaken. There is nothing to that effect in the 2020 Advice. It does not suggest, for example, that in the case of a mixed development where it might be expected that occupancy will be in line with the average national rate, some adjustment should be made to take account of this factor. The second reason was that there was also "a precautionary buffer of 20% applied to the total nitrogen load". But the existence of that buffer is not a justification for using anything other than the best available evidence-based occupancy rate for the development concerned. Rather, the 20% buffer is intended to be an additional protection, over and above the use of the best available evidence as to the "key inputs and assumptions" underpinning the nutrient budget. It is applied only after the four stages of the methodology have been completed. In my view, therefore, the Report departs from the methodology set out in the 2020 Advice on the question of occupancy rate.

Conclusion

146 Despite this, however, I consider that the use of the national average occupancy rate of 2.4 persons per dwelling did not render the "appropriate assessment" carried out by the Council unlawful. The question for the Council was not whether it had followed precisely the methodology set out in the 2020 Advice, but rather whether it had carried out a sufficient "appropriate assessment" for the purpose of the Habitats Regulations. It was not mandatory to follow precisely the methodology set out in the 2020 Advice and the use of the national average occupancy rate was not questioned by Natural England when consulted about the proposed development. Rather, Natural England stated that it had no concerns. That was a view to which the Council was entitled and required to have regard. It provided a good reason not to follow precisely the methodology set out in the 2020 Advice. In those circumstances we can only interfere with the conclusion of the Council, based on the assessment which it had undertaken, that the proposed development would not contravene Regulation 63 of the Habitats Regulations, if that conclusion was *Wednesbury* unreasonable. That is a demanding test and I am not persuaded that it is satisfied here.

Postscript – the 2022 Advice

147 I would add that we have been provided with the latest version of Natural England's Advice to planning authorities, issued in March 2022 and updated expressly in the light of (among other things) the judgment of Mr Justice Jay in this case. This Advice is not limited to the Solent region.

148 Interestingly, the 2022 Advice emphasises the importance of local conditions in selecting an occupancy figure, and the need to focus on the particular project being assessed. It recognises that the average national occupancy rate of 2.4 persons per dwelling (which it notes will be subject to change when the results of the 2021 Census become available) may not be appropriate for certain types of development:

> **"Occupancy rates based on dwelling type**
> Should the nature or scale of development associated with a particular project proposal suggest that the use of an average occupancy rate is not appropriate, then the Local Planning Authority may decide to adopt an occupancy rate based on the dwelling types proposed for that particular project, provided it meets the criteria outlined above …"

Those criteria include that the rate selected reflects local conditions, is sufficiently robust and appropriate for the project being assessed, and is derived from a reliable source which can show trends over a protracted period of time, such as data from the Office for National Statistics.

149 For the future it is the 2022 Advice which planning authorities will need to consider.