The Great Grid Upgrade

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Bramford to Twinstead Reinforcement

Volume 8: Examination Submissions

Document 8.3.10: Legal Note on EIA Points Raised at Preliminary Meeting

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The Infrastructure Planning (Examination Procedure) Rules 2010 Regulation 8(1)(k)

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Contents

1. Context

1.1.1 The Preliminary Meeting of the proposed Bramford to Twinstead Reinforcement: Development Consent Order was held at 10:00 on 12 September 2023 at Ipswich Town Football Club, Portman Road, Ipswich IP1 2DA. As part of Agenda Item 7 (Any other matters), consideration was given to the status of the submitted Environmental Statement (APP-068 to APP-144 and PDA-002) and additional environmental surveys.

1.1.2 The Examining Authority ("**ExA**") raised the case of R v Cornwall CC, ex p. Hardy [2000] 9 WLUK 276 ("**Hardy**"). National Grid Electricity Transmission plc ("the **Applicant"**) said at the Preliminary Meeting that it would produce a note by Deadline 1 to set out the relevant legal framework for considering the adequacy of the Environmental Statement in the context of additional environmental surveys.

1.1.3 This note complements but does not repeat the factual explanation of the environmental surveys undertaken in relation to the temporary access route off the A131 forming part of the project, provided by the Applicant's document 8.2.2 dated September 2023[1] submitted to the ExA.

[1] Document 8.2.2: Applicant's Response to Questions Raised at the Preliminary Meeting on 12 September 2023 Regarding the Temporary Access Route off the A131

2. Analysis

2.1 The Environmental Impact Assessment (EIA) Process

2.1.1 The EIA Process applicable to nationally significant infrastructure projects (NSIP) is governed by the Infrastructure Planning (EIA) Regulations 2017 (the "**2017 Regs**").

2.1.2 Reg.4 of the 2017 Regs prohibits the Secretary of State from making a development consent order for EIA development unless an EIA has been undertaken for that application.

2.1.3 "EIA" is defined in Reg. 5 of the 2017 Regs as the process consisting of *inter alia* the preparation of an Environmental Statement; the identification, description, and assessment of the direct and indirect significant effects of the proposed development on a range of prescribed factors; and the steps required to be taken by the Secretary of State under Reg. 21 of the 2017 Regs.

2.1.4 Reg. 21(1) and (2) of the 2017 Regs provide that:

"(1) When deciding whether to make an order granting development consent for EIA development the Secretary of State must—

(a) examine the environmental information;

(b) reach a reasoned conclusion on the significant effects of the proposed development on the environment, taking into account the examination referred to in sub-paragraph (a) and, where appropriate, any supplementary examination considered necessary;

(c) integrate that conclusion into the decision as to whether an order is to be granted; and

(d) if an order is to be made, consider whether it is appropriate to impose monitoring measures.

(2) The reasoned conclusion referred to in paragraph (1)(b) must be up to date at the time that the decision as to whether the order is to be granted is taken, and that conclusion shall be taken to be up to date if in the opinion of the Secretary of State it addresses the significant effects of the proposed development on the environment that are likely to arise as a result of the development described in the application."

The "environmental information" that the Secretary of State is required to examine and utilise in their decision-making process is defined in Reg. 3(1) of the 2017 Regs as including not only the Environmental Statement but also "any further information and any other information, any representations made by anybody required by these Regulations to be invited to make representations and any representations duly made by any other person about the environmental effects of the development".

"Further information" and "any other information" are also defined in Reg. 3(1) as, respectively:

"additional information which, in the view of the Examining authority, the Secretary of State or the relevant authority, is directly relevant to reaching a reasoned conclusion on the significant effects of the development on the environment and which it is necessary

to include in an environmental statement or updated environmental statement in order for it to satisfy the requirements of regulation 14(2)"; and

"any other substantive information provided by the applicant in relation to the environmental statement or updated environmental statement".

2.1.5 Reg. 14(2) of the EIA Regs prescribes the contents of an Environmental Statement, which contents are focussed on identifying likely significant effects on the environment.

2.1.6 It follows from the above that, as part of the EIA process for NSIPs, the Secretary of State may receive and take into account environmental information that is additional to the information contained within the Environmental Statement, but which was not required to make the Environmental Statement compliant with the requirements of Reg. 14(2).

2.1.7 Other core elements of the EIA process for NSIPs may conveniently be summarised as follows:

2.1.8 The requirement is that the relevant consenting body be informed of the likely significant effects before reaching a decision on whether to grant consent for a project;

2.1.9 The important criterion of "likelihood" requires an informed judgement based on the evidence available but does not require "certainty"; and

2.1.10 It follows that in many cases the exercise of judgement is needed from the decision-maker. That judgement can include reasonable assumptions based upon the likely effectiveness of conventional mitigation measures.

2.1.11 It is against this background that case-law has reviewed the elements of the process and the standards applicable to the exercise of judgement.

2.2 The Facts in Hardy

2.2.1 In Hardy, a claim for judicial review was brought against the grant of planning permission for the extension of an existing landfill site. The grounds of challenge were that:

a) there was insufficient information in the local authority's possession concerning the effect of the proposal upon existing communities of badgers, bats and a rare species of liverwort to be able to reach a rational conclusion on the likely environmental effects of the development before the permission was granted. Instead the local authority had made the requisite surveys the subject of post-permission conditions; consequently.

b) the local authority had failed to take into account the full "environmental information" on the impact of the proposed extension under the relevant EIA Regulations rendering its decision to grant planning permission unlawful.

2.2.2 The Court quashed the grant of planning permission on the basis that because the requisite surveys would have to be carried out after permission had already been granted the local planning authority could not have rationally concluded, as part of its decision to grant permission, that there were no likely significant effects (namely, in this case, impacts on protected habitats and species). It had therefore failed to comply with one of the essential components of the EIA Regulations.

2.2.3 Although the Court accepted that it is for the local planning authority to judge the adequacy of the environmental information available to it, the local planning authority's

failing was to defer fully any consideration of the likely impacts until after planning permission was granted.

2.2.4 Although the EIA Regulations under consideration in Hardy were the Town and Country Planning (EIA) Regulations 1999, the approach taken in that case is considered to be good law in respect of subsequent EIA regulations, including the 2017 Regs.

2.3 The Principles that have Developed Post-Hardy

2.3.1 Whilst Hardy remains good law it must be borne in mind that its facts were stark. Unarguably there was a failure to apply the proper procedure to the assessment of likely significant effects on the environment. That is the reason why the challenge succeeded.

2.3.2 Hardy concerned a procedural failing. Subsequent cases have examined the lawfulness of decisions where it is argued that, although the correct procedure has been followed, insufficient information is available for a decision to be reached. They have confirmed that the decision-maker enjoys greater latitude when exercising a reasonable discretion about the adequacy of information provided to it.

2.3.3 Subsequent cases have made clear that an environmental statement does not have to contain all available information about environmental effects but instead must consider the 'likely' significant effects (for NSIP applications the statement is now found in Regs 14(2) and 21 of the 2017 Regs). Consequently, when reviewing an environmental statement, the focus for the decision-maker is whether the missing information means that it is not possible to form a rational judgement as to the 'likely' significant effects of the development on the environment.

2.3.4 There are, we submit, five core principles that can be taken from subsequent case-law where the adequacy of information is placed in issue. We summarise these below along with our commentary:

Principle 1: an environmental statement may not be perfect, but is instead part of a wider iterative process, meaning that the environmental statement itself can be legally sufficient without containing "full information"

2.3.5 The decision of Sullivan J (as he then was) in R (Blewett) v Derbyshire County Council [2004] Env. L.R. 29 ("**Blewett**")[2] is widely regarded as the authoritative statement on the acceptability of an environmental statement alleged to be *"incomplete"*.

2.3.6 The effect of the High Court's decision[3] in Blewett was to confirm that the requirements of EIA relate to a process as a whole, rather than just one document, with the information submitted in an environmental statement not itself being the whole EIA but rather a step in an evaluative procedure under the EIA Regulations (paras 38 to 39 of the judgment). Sullivan J noted in Blewett that the EIA Regulations themselves "*recognise that an environmental statement may well be deficient, and make provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting 'environmental information' provides the local planning authority with as full a picture as*

[2] In the Appendix we have set out in full some of the key passages from the judgment but where relevant we have provided more limited extracts in the main body of the note to illustrate the points being made

[3] The judgment of Sullivan J was upheld in the Court of Appeal and his comments referred to in this note were left undisturbed

possible" (para 41). This understanding is supported by Planning Inspectorate Advice Note Seven (Environmental Impact Assessment: Process, Preliminary Environmental Information and Environmental Statements), which notes that the "*Planning Inspectorate acknowledges that the EIA process is iterative…*".

2.3.7 Sullivan J's judgment in Blewett has been endorsed in later decisions, for example:

a) "*Blewett has been consistently followed in relation to judicial review of the adequacy of environmental statements produced for the purposes of environmental assessment under the EIA Directive and endorsed at the highest level.*" (R (on the application of Friends of the Earth Ltd and others) v Heathrow Airport Ltd [2020] UKSC 52 ("**Friends of the Earth**"), judgment of the Supreme Court para 142)

b) "*No doubt more information could have been provided, but the observations of Sullivan J in Blewett at para 41, which I have quoted in para 38, show that this does not make the statement inadequate"* (R (on the application of Edwards) v Environment Agency [2008] UKHL 22, judgment of the House of Lords para 61)

2.3.8 Sullivan J himself also noted in R (Davies) v Secretary of State for Communities and Local Government [2008] EWHC 2223 (Admin) that *"…in an ideal world the applicant's Environmental Statement would be the last word on the environmental impact of a proposal because it would contain the 'full information'…however, the [EIA] Regulations are not premised upon such a counsel of perfection"* (para 39). Therefore, when considering the adequacy threshold for an environmental statement the case law encourages developers to produce environmental statements that are accessible to readers and helpful for decision-makers, rather than including every *"possible scrap of environmental information just in case someone might consider it significant at a later stage"* (Sullivan J in Blewett, para 42).

2.3.9 Ultimately, the environmental statement will be but a part of the 'environmental information' to be considered by the local planning authority (Sullivan J in Blewett, para 68), it being "*not just a document to which the developer refers as an Environmental Statement; it is that document plus the other information which the local planning authority thinks that it should have in order for the document to be an Environmental Statement"* (R (Bedford & Clare) v Islington LBC [2002] EWHC 2044 (Admin), Ouseley J at para 199).

Principle 2: the applicant is entitled to supplement an environmental statement with additional survey information

2.3.10 Unlike Hardy, in most cases there will be some environmental information available on a topic prior to the decision considering whether or not to grant planning permission.

2.3.11 Where *some* survey work had been undertaken on a particular issue as part of the environmental statement, the Court in R (Jones) v Mansfield DC [2003] EWCA Civ 1408 held that a planning condition requiring *further* survey work be undertaken at a later point reflected the practicalities of dealing with protected species that are often mobile and that, therefore, re-surveying prior to implementation will be beneficial. The availability of some information upon which a rational judgement about likely significant effects could be based, even though it would benefit from being supplemented, is what distinguished the facts in Jones from the facts in Hardy. The Court's conclusion was compatible with both:

(a) wanting a better understanding of any adverse effects; and

(b) being able still to reach a conclusion on the available material that the development would not be likely to have significant effects.

Principle 3: the decision-maker is entitled to rely on the effectiveness of standard future controls (such as protected species licences) when considering the residual likely significant environmental effects after mitigation.

2.3.12 In assessing the 'likely' environmental effects of a development, the decision-maker is entitled to assume the effectiveness of standard mitigation/controlling conditions when predicting 'likely' residual environmental effects (Gillespie v Secretary of State [2003] EWHC 8 (Admin)). It is only when mitigation methods are novel, with unpredictable results, that the decision-maker may not be able to assume effects will be mitigated (Hereford Waste Watchers Ltd v Hereford Council [2005] EWHC 191 (Admin) ("Hereford")).

2.3.13 In R (on the application of PPG11 Ltd) v Dorset CC [2003] EWHC 1311 (Admin), an environmental statement was submitted pursuant to the applicable EIA Regulations, from which Dorset CC produced a report noting there would be no *"significant adverse effects"* on protected species or important areas for nature conservation, provided that the planning permission was granted subject to a number of listed conditions. The claimant (a limited company formed as an action group from those opposed to the scheme) sought to quash the subsequent decision to grant planning permission on the basis that the conditions should first have been investigated and assessed in the environmental statement, and that Dorset CC's report wrongly looked at remedial measures rather than environmental impact.

2.3.14 The claim was dismissed on the basis that Dorset CC had:

a) taken the environmental information into account and had come to an appropriate conclusion that a significant adverse effect on the relevant ecology would be unlikely, and that any adverse effects would be addressed by the proposed conditions; and thus

b) granted the planning permission with full knowledge of the likely significant effects of the development so far as they were relevant and had incorporated a rational scheme for meeting the procedural requirements of the applicable EIA Regulations.

2.3.15 Consequently, Dorset CC's conclusion was not contingent on the significance of any effects that were dependent on receiving further information. They concluded on the information available that there were unlikely to be any significant effects, and consequently a requirement for post-grant surveys was acceptable. The Court was content that this was a lawful process to have embraced.

Principle 4: when assessing the likely significant environmental effects, 'likely' means no more than 'a serious possibility'.

2.3.16 In Wiltshire Waste Alliance Ltd v Secretary of State for Communities and Local Government [2018] Env. L.R. 33, the Court considered the concept of 'likely' as follows:

"*Under the EIA Regulations, the Environmental Statement must set out a description of the aspects of the environment likely to be significantly affected by a development. In this context "likely" means a serious possibility but no more"*

The same observation was made in R (on the application of Bateman) v South Cambridgeshire District Council [2011] EWCA Civ 157 at para 66.

2.3.17 In the event of the local planning authority being uncertain as to whether it has sufficient information to reach a conclusion of the "likely" significant effects, Elias J in Hereford identified the following principle:

"*If the authority is left uncertain as to the effects, so that it is not sure whether they may be significant or not, it should either seek further information from the developer before reaching a conclusion, or if an environmental statement has already been provided it should require a supplement to the environmental statement which provides the necessary data and information.*" (para 34)

Principle 5: because of the element of judgement involved there is a high threshold for any challenge to the adequacy of an environmental statement to meet.

2.3.18 There are numerous examples of unsuccessful challenges to the adequacy of an environmental statement as a consequence of there being a high threshold for any such challenge to meet, as demonstrated above; see, for example, R (Littlewood) v Bassetlaw DC [2008] EWHC 1812 (Admin) and Friends of the Earth).

2.3.19 Sullivan J noted in Blewett that any such challenge to the adequacy of an environmental statement will need to show that the *"environmental statement is so deficient that it could not reasonably be described as an environmental statement as defined by the Regulations … but they are likely to be few and far between"* (para 41).

3. Conclusions

3.1.1 In summary, having regard to the foregoing analysis, the Applicant's position is as follows:

a) Case-law has consistently acknowledged that there is a high threshold to clear before an environmental statement will be considered to be legally inadequate; reaching that threshold is rare.
b) The process of undertaking EIA is necessarily iterative. Perfection is not necessary, so long as there is sufficient information upon which a decision-maker can rationally form a view of the likely significant effects of a development on the environment, a decision can still be made on whether or not to grant consent.
c) A particular example of this general principle is that it is lawful to base a decision on information provided in an environmental statement even if that information is to be supplemented later.
d) The case of Hardy to which reference was made by the ExA is still relevant case-law but it needs to be understood in context, including subsequent case law. The failing in Hardy was a procedural failing, namely the failure to require any environmental information on a particular topic until after the main consent had been granted; that is not the case here.

3.1.2 Applying the above principles to the facts as set out in the complementary document 8.2.2 it follows that:

a) The process that has been followed is both lawful and reasonable;
b) The information presented in the Environmental Statement has focused upon the likely significant environmental effects. The Applicant submits that it made a rational (and proportionate) judgment about those effects, based on information that was adequate for that purpose. In respect of the proposed temporary access route off the A131 in particular, the Applicant notes that it is a highly managed agricultural landscape with managed hedgerows, and that the high-quality aerial imagery and baseline data held in the public domain indicated the habitat types present and an indication of the protected species likely to be present. Therefore, the Applicant was able to formulate a worst-case scenario for environmental assessment to determine likely significant effects;
c) The information presented in the Environmental Statement is sufficient for the ExA to reach a reasoned conclusion on the likely environmental effects of the project. The fact that additional information will be forthcoming does not alter that conclusion;
d) Such information as may be forthcoming would be "any other information" within the meaning of Reg. 3(1) and not "further information" necessary to remedy any existing legal deficiency in the environmental statement submitted; and
e) The ExA may therefore proceed with the examination on the basis of the environmental information that has been submitted.

Appendix A: Detailed remarks of Sullivan J in R (Blewett) v Derbyshire County Council [2004] Env. L.R 29

"…In an imperfect world it is an unrealistic counsel of perfection to expect that an applicant's environmental statement will always contain the 'full information' about the environmental impact of a project. The Regulations are not based upon such an unrealistic expectation. They recognise that an environmental statement may well be deficient, and make provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting 'environmental information' provides the local planning authority with as full a picture as possible. There will be cases where the document purporting to be an environmental statement is so deficient that it could not reasonably be described as an environment statement as defined by the Regulations…but they are likely to be few and far between." (para 41)

"It would be of no advantage to anyone concerned with the development process…if environmental statements were drafted on a purely "defensive basis", mentioning every possible scrap of environmental information just in case someone might consider it significant at a later stage. Such documents would be a hindrance, not an aid to sound decision-making by the local planning authority, since they would obscure the principal issues with a welter of detail." (para 42)

"I have dealt with it in some detail because it does illustrate a tendency on the part of claimants opposed to the grant of planning permission to focus upon deficiencies in environmental statements, as revealed by the consultation process prescribed by the Regulations, and to contend that because the document did not contain all the information required by Sch.4 [of the EIA Regulations] it was therefore not an environmental statement and the local planning authority had no power to grant planning permission. Unless it can be said that the deficiencies are so serious that the document cannot be described as, in substance, an environmental statement for the purposes of the Regulations, such an approach is in my judgment misconceived. It is important that decisions on EIA applications are made on the basis of 'full information', but the Regulations are not based on the premise that the environmental statement will necessarily contain the full information. The process is designed to identify any deficiencies in the environmental statement so that the local planning authority has the full picture, so far as it can be ascertained, when it comes to consider the 'environmental information' of which the statement will be but a part." (para 68).

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