Written Materials

Is Net Zero still cool?

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(Registration details can be found HERE)

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Net Zero and the Growth Agenda: Obstacle or Opportunity

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1. Before considering the implications of Net Zero for the present Government's ambitions to 'build, build, build' the country out of the Coronavirus-induced recession and deliver on its 'levelling up' agenda, it is useful to start with a bit of the background. So, first of all: What is Net Zero?

2. According to a BEIS press release on 27 June 2019:

> *"The UK today became the first major economy in the world to pass laws to end its contribution to global warming by 2050.*
>
> *The target will require the UK to bring all greenhouse gas emissions to net zero by 2050, compared with the previous target of at least 80% reduction from 1990 levels…*
>
> *Net zero means any emissions would be balanced by schemes to offset an equivalent amount of greenhouse gases from the atmosphere, such as planting trees or using technology like carbon capture and storage."*

3. The *"laws"* referred to in the press release are to be found in the Climate Change Act 2008 (2050 Target Amendment) Order 2019 (SI 2019/1056) made on 26 June 2019 and which came into effect on 27 June 2019. The Order amended the percentage in s.1(1) of the Climate Change Act 2008 from 80% to 100% so that that provision now provides:

> *"(1) It is the duty of the Secretary of State to ensure that the net UK carbon account for the year 2050 is at least 100% lower than the 1990 baseline."*

4. The 1990 baseline is defined by s.1(2) CCA 2008 as:

> *""The 1990 baseline" means the aggregate amount of—*
> *(a) net UK emissions of carbon dioxide for that year, and*
>
> *(b) net UK emissions of each of the other targeted greenhouse gases for the year that is the base year for that gas."*

5. The targeted greenhouse gases are defined by s.24 CCA 2008 and for three of them (i.e. hydrofluorocarbons, perfluorocarbons, and sulphur hexafluoride) the relevant base year (as defined by s.25 CCA 2008) is 1995 rather than 1990. There are different bases for measuring net emissions, with emissions from certain sources either included or excluded. The methods used for the CCA 2008 are set out in the Carbon Accounting Regulations 2009 (SI 2009/1257) and the Carbon Accounting (Provision for 2018) Regulations 2020 (SI 2020/115). S.16 CCA 2008 sets out the requirement for annual reporting of net emissions on a historic basis (i.e. by 31 March of a given year, there must be a reporting of the position 2 years earlier).

6. According to the ONS, in 1990 the UK emitted 794 million tonnes of carbon dioxide equivalent: https://www.ons.gov.uk/economy/environmentalaccounts/articles/netzeroandthedifferentofficialmeasuresoftheuksgreenhousegasemissions/2019-07-24

7. The most recent (2018) figures were published on 4 February 2020: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/862887/2018_Final_greenhouse_gas_emissions_statistical_release.pdf

8. That data was then used in the Annual Statement of Emissions as presented to Parliament in April 2020 (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/880498/annual-statement-of-emissions-for-2018.pdf). This reports two figures for 2018 emissions: a net emissions figure of 451 million tonnes and an adjusted figure of 476 million tonnes (after allowance for emissions trading, including domestic aviation). It is the latter figure which is used to measure progress towards the net zero target.

9. The 2018 figure of 476 million tonnes is 59.9% of the 1990 baseline of 794 million tonnes, which indicates that as at 2018 the UK had moved to a position some 40% below the baseline.

10. Now that the 2050 target is a 100% reduction on the 1990 baseline, the actual value of the 1990 baseline is largely irrelevant to achieving the target itself because a 100% reduction of any figure will always be 0 (zero). Essentially, the critical question now is what is to be done about the 476 million tonnes produced in 2018 and how to get them down to net zero by 2050 (i.e. over the next 30 years). Nonetheless, the baseline does still have value as a measure of the scale of the task and it also informs progression towards the target in the years leading up to 2050. However, the more important factor is that the target is 'net zero' rather than simply zero, so emissions can still arise in 2050, provided that they are offset by other measures at least equal to the level of those emissions.

11. Thus the generation of emissions in 2050 is not precluded but the smaller the level of emissions at that date the less offsetting will be needed to achieve a net zero outcome. Achieving the target is likely to rely on both reducing emissions and offsetting

measures, operating in combination. Where we should be on the spectrum between reduction and offsetting in order to achieve net zero by 2050 will involve political choices as much as it will technological advances.

12. By setting the target as net zero, it could be said that the Government has achieved the objective of both having its cake and eating it. Those concerned about the impact of climate change can see the target as a real challenge that will require significant changes to many areas of modern life and economic endeavour if the target is to be achieved. For those with such a view point, the imperative is on reduction and that reduction is urgently needed if the trajectory of getting to net zero by 2050 is to have any credibility. Those more sceptical about climate change or about the need to adapt to meet its effects can see the role of offsetting as a way to avoid fundamental change because emissions are not being prohibited, they simply have to be compensated for in at least equal measure. In and of itself, the net zero target does not imply any reduction at all in current levels of emissions, provided only that an offsetting regime could be put in place by 2050 that would compensate for those emissions. The Government may therefore think that it has successfully appealed to both audiences by choosing a target that could be seen to mean very different things to the two very different view points.

13. Of course, practical realities mean that neither a 'hair-shirt' approach nor a 'business as usual' approach is likely to deliver net zero. The former would impose too many restrictions on what many people regard as everyday freedoms in terms of personal travel and domestic consumption of goods and services to be politically acceptable to any main stream political grouping. The latter would involve an unbounded faith in human ingenuity to deliver technological solutions of sufficient scale that no hard choices ever have to be made.

What does net zero mean for individual projects?

14. In the CCA 2008 the target of net zero is not disaggregated or apportioned between economic sectors or geographic areas within the UK (such as the four nations) or imposed on individual projects. There is no regulatory requirement for an individual project to achieve its own net zero. However, the extent to which a project is designed to minimise emissions or includes its own offsetting is likely to be relevant to an evaluation of the merits of the project, and positive steps on those matters could be potentially relied on to outweigh negative impacts on other matters.

15. It is for consenting authorities to decide (as a matter of judgment) whether an individual project will or will not be likely to inhibit the achievement of the net zero target by 2050.

16. There are various consenting regimes currently operating for different types of development. This paper addresses two of the most common: the Planning Act 2008 regime for Nationally Significant Infrastructure Projects and the Town & Country Planning Act 1990 regime for most 'conventional' development. Whilst there may be

sweeping reforms to the latter in order to deliver on the aims of the recent Planning White Paper, the detailed nature of those reforms will not be known until the outcome of the recent consultation is known. Hence, this paper does not seek to address how the TCPA regime may be changed.

The NSIP regime

17. At the present time, all but one of the designated National Policy Statements pre-date the adoption of the net zero target and so they do not directly give guidance on how it is to be achieved. They do, however, address the previous target of a reduction of at least 80% below the 1990 baseline. The one exception is the Geological Disposal Infrastructure NPS which was designated by the Secretary of State for Business, Energy, & Industrial Strategy on 17 October 2019. The GDI NPS states (at paras 5.51 and 5.52):

"5.5.1 Anthropogenic activities continue to increase the concentration of greenhouse gases in the atmosphere. The Climate Change Act 2008 established a legally binding target to reduce the UK's greenhouse gas emissions to at least 80% below 1990 levels by 2050. The Paris Agreement** marked a clear turning point towards a sustainable and low carbon future, requiring countries to have national mitigation plans to reduce emissions, with the goal of keeping global warming below 2 °C.*

5.5.2 Geological disposal infrastructure will aid the government in reaching these targets by enabling the development of new, low-carbon nuclear power plants. The implementation of new nuclear power plants requires the government to be satisfied that effective arrangements exist or will exist to manage and dispose of the waste they will produce. Geological disposal satisfies this requirement."

18. The first footnote (fn 110) stated:

"On 12 June 2019, the Prime Minister announced that, following advice from the independent Committee on Climate Change, the UK would eradicate its net contribution to climate change by 2050. The Climate Change Act 2008 (2050 Target Amendment) Order 2019 came into force on 27 June 2019 and amends the Climate Change Act 2008 to replace the 80% target for the reduction in the UK's greenhouse gas emissions with a target of net zero."

19. The second footnote (fn 111) stated:

"At the Paris climate conference (COP21) in December 2015, 195 countries adopted the first-ever universal, legally binding global climate deal".

20. The GDI NPS therefore recognised the existence of the net zero target. Its substantive guidance was (at paras 5.5.5 and 5.5.9):

"5.5.5. While it is unlikely that the development of geological disposal facility infrastructure will adversely affect the government's ability to meet its emissions targets, the applicant should provide evidence of the carbon impact of the development and an assessment of emissions associated with construction against government targets.

5.5.9 An increase in emissions resulting from the development of geological disposal infrastructure is not a reason to refuse development consent, unless the resulting increase in carbon emissions is so significant that it would have a material impact on the ability of government to meet its carbon reduction targets. When assessing emissions as a result of the development, the Secretary of State should take into account that:

- *nuclear power is a low carbon form of electricity generation;*
- *government policy is that before consent is granted for the development of new nuclear power stations, government should be satisfied that arrangements exist or will exist to manage and dispose of the waste they produce;*
- *geological disposal infrastructure provides this management and disposal solution and is therefore an enabler for low carbon new nuclear power."*

21. Thus, the general message is that whilst the effects on emissions should be reported as part of the DCO application, it was unlikely that an individual project would have material effects on the ability of the Government to meet the stated carbon reduction targets. That message was no different to the position taken in the various NPSs designated before the net zero target was adopted.

22. However, the question of whether pre-Net Zero NPSs are compatible with the obligations that flow from the adoption of the Net Zero target is being pursued by some environmental campaigners. The Good Law Project (and others) has issued a claim seeking judicial review of the Secretary of State for BEIS's failure to review or commit to a review of the Energy NPSs EN-1 to EN-6. All of these NPSs were designated in July 2011. A pre-action protocol letter before claim was issued on 2 March 2020. BEIS responded to this letter on the basis that any such claim would be premature whilst BEIS was actively considering whether it would be appropriate to review the Energy NPSs and at a time when that consideration was still ongoing.

23. Nonetheless the claim was issued at the end of May 2020, and it is now for the High Court to decide whether permission should be granted for it to proceed. The High Court has decided on a 'rolled up' hearing, so that the permission stage and the substantive hearing will be heard together. The case is expected to be heard in early November 2020 and so an update may be possible by the time of the Planning Week. The grounds of challenge are that the stance of suggesting the claim is premature because no decision has yet been made is tantamount to a decision not to review the Energy NPSs, that there is now a duty to review those NPSs in the light of changed circumstances since they were designated, that a decision not to review them has failed to have regard to obviously material considerations, and that the decision not to review is irrational.

24. On 27 February 2020 the Court of Appeal gave its judgment in R (Plan B Earth) v Secretary of State for Transport and Others [2020] EWCA Civ 214. The CA held that the designation by the Secretary of State for Transport of the Airports National Policy Statement (ANPS) on 26 June 2018 was unlawful because (i) in breach of s.5(8) Planning Act 2008 he had (by consciously disregarding the Government's commitment to and ratification of the Paris Agreement of December 2015) failed to give reasons explaining how the ANPS had taken account of Government policy relating to the mitigation of and adaptation to climate change, (ii) in breach of s.10(3) PA 2008 he had (for the same reason) failed to have regard to the desirability of mitigating and adapting to climate change, (iii) the SA/SEA which supported the ANPS was (for the same reason) in breach of the requirements of the SEA Directive and the SEA Regulations, and (iv) in preparing and designating the ANPS he had failed to have regard to the effect of emissions beyond 2050 and the non-CO2 impacts of aviation on climate change. The designation of the ANPS was quashed and the SST was left to reconsider that document and whether to re-designate it having regard to the matters that had not been taken into account.

25. Whilst the CA decision has no direct effect on any existing designated NPS, which could not now be the subject of a legal challenge, the reasons given by the CA as to the materiality of the Paris Agreement, in the wake of the Government's commitment to it, might at first sight have implications for whether those current NPSs remain up to date or are in need of review and on the discharge of the duties in s.104 PA 2008 when making decisions on individual DCO projects. However, the decision of Holgate J in R (ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy [2020] EWHC 1303 (Admin) on 22 May 2020 (see below) would suggest that the question of whether a NPS is up-to-date or in need or review is not a matter that should be considered when making a decision on an individual DCO application. Thus, unless there is a successful judicial review challenge to the absence of review of any specific NPS (as is sought in the Good Law Project claim), it would seem that decisions can continue to be made by reference to the current designated NPSs.

26. On 7 May 2020 the Supreme Court granted permission to Heathrow Airports Ltd to appeal against the CA decision in Plan B Earth in relation to the question of whether the failure to have regard to the Paris Agreement rendered the designation of the ANPS unlawful. The SST did not seek permission to appeal. The Supreme Court heard the case on 7 and 8 October 2020. Any decision ahead of the Planning Week will be picked up by way of update.

27. In the decision letter dated 4 October 2019 (after the making of the Climate Change Act 2008 (2050 Target Amendment) Order 2019 but before the CA decision in Plan B Earth), authorising the Drax Power Generating Stations DCO (in Selby, North Yorkshire), notwithstanding a recommendation from the Examining Authority that the DCO should not be made, the Secretary of State for BEIS said (at paras 5.6 to 5.9

"5.6 As noted above, the policies contained in the NPSs reflect wider UK decarbonisation objectives arising from the legally binding targets set out in the Climate Change Act 2008 ("the CCA") which, as originally enacted, required an at least 80% reduction in the UK's GHGs emissions by 2050 when measured against the 1990 baseline for such emissions. On 26 June 2019, the Climate Change Act 2008 (2050 Target Amendment) Order 2019 was made (SI 2019 No.1056), coming into force the following day. This amended the CCA by replacing the 80% target with 100%.

> *5.7 The Secretary of State considers that the amendment to the CCA, which sets a new legally binding target of an at least 100% reduction in GHG emissions against the 1990 benchmark ("Net Zero"), is a matter which is both important and relevant to the decision on whether to grant consent for the Development and that regard should be had to it when determining the Application. The new target post-dates the NPSs and, while there is a reference in the ExA's Report to Net Zero, the ExA does not deal with its implications due to the timing of the amendment to the CCA [ER 3.4.2].*
>
> *5.8 The Secretary of State notes with regard to the amendment to the CCA that it does not alter the policy set out in the National Policy Statements which still form the basis for decision making under the Act. Section 2.2 of EN-1 explains how climate change and the UK's GHG emissions targets contained in the CCA have been taken into account in preparing the suite of Energy NPSs. As paragraph 2.2.6 of EN-1 makes clear, the relevant NPSs were drafted considering a variety of illustrative pathways , including some in which "electricity generation would need to be virtually [greenhouse gas] emission-free, given that we would expect some emissions from industrial and agricultural processes, transport and waste to persist." The policies contained in the relevant NPSs regarding the treatment of GHG emissions from energy infrastructure continue to have full effect.*
>
> *5.9 The move to Net Zero is not in itself incompatible with the existing policy in that there are a range of potential pathways that will bring about a minimum 100% reduction in the UK's emissions. While the relevant NPSs do not preclude the granting of consent for developments which may give rise to emissions of GHGs provided that they comply with any relevant NPS policies or requirements which support decarbonisation of energy infrastructure (such as CCR requirements), potential pathways may rely in future on other infrastructure or mechanisms outside the planning regime [to?] offset or limit those emissions to help achieve Net Zero. Therefore, the Secretary of State does not consider that Net Zero currently justifies determining the application otherwise than in accordance with the relevant NPSs or attributing the Development's negative GHG emissions impacts any greater weight in the planning balance. In addition, like the ExA, the Secretary of State does not consider there to be any evidence that granting consent for the Development would in itself result in a direct breach of the duties enshrined in the CCA, given the scope of the targets contained in the CCA which apply across many different sectors of the economy. This remains the case following the move to Net Zero and therefore she does not consider that the exception in section 104(5) of the 2008 Act should apply in this case."*

28. This decision provides useful clarification on the way in which the new Net Zero target was seen by BEIS as not undermining the existing NPS for energy development and not

being a factor in itself which would preclude a decision in accordance with the relevant NPS. In January 2020 Client Earth was granted permission by the High Court to bring a judicial review of the Drax DCO decision, in part on grounds of a failure to properly address the net zero target. The legal challenge was heard in April 2020 (before Holgate J) and a judgment was given on 22 May 2020: R (ClientEarth) v SSBEIS. The challenge was rejected on all grounds.

29. Perhaps the most interesting part of Holgate J's reasoning is the analysis of the role of NPSs in the PA 2008 regime. Drawing attention to the duty imposed on the Secretary of State by s.6 PA 2008 to review a NPS whenever he considers it *"appropriate"* to do so, having regard, inter alia to any significant changes of circumstance not anticipated when the policy in the NPS was formulated, Holgate J said that the corollary was that such changes of circumstance could only be taken into account in such a review (para 38) and that similarly the question of whether a NPS is out of date (whether for reasons related to the Net Zero target or otherwise) could not be raised during a DCO examination (or if raised could and should be disregarded as not legally relevant) and was exclusively a matter for a review under s.6 PA 2008 (para 243). Holgate J made the point (more than once) that the challenge he was considering did not include any judicial review of a decision not to review the Energy NPSs (paras 134, 243 and 258).

30. Holgate J also found that the decision of the Secretary of State that the approval of the Drax development (which would result in a 90% increase in the power station's own CO2 emissions) was not incompatible with the achievement (in due course) of the Net Zero target in 2050 was a matter of judgment for the SoS that could only be challenged on the grounds of irrationality (para 254).

31. On 21 July 2020 the Court of Appeal (Lewison LJ) granted permission to appeal against the decision of Holgate J. There is, as yet, no date set for when the appeal will be heard.

32. In the decision letter dated 6 February 2020 authorising the A30 Chiverton to Carland Cross DCO (in Cornwall) the Secretary of State for Transport said (at para 25):

    "25.The Secretary of State notes that the carbon assessment conducted identified that the Proposed Development would result in a net reduction in carbon, with the benefit from the reduction in congestion outweighing the carbon associated with the extra distance travelled and the carbon associated with the Proposed Development construction (ER 4.12.17). The Secretary of State notes the Applicant's position that the revised carbon reduction target did not alter the assessment of the proposed development and agrees that the Development would not have a long-term detrimental impact of the Government's ability to meet its carbon targets and the effect would remain not significant for the purposes of the ES (ER 4.12.20)."

33. It is apparent from the report of the Examining Authority that *"the revised carbon reduction target"* was a reference to the 100% reduction in the Climate Change Act (2050 Target Amendment) Order 2019 (see ER 4.12.19).

34. In the decision letter dated 20 March 2020 authorising the Reinforcement of the North Shropshire Electricity Distribution Network DCO the Secretary of State for BEIS said (at para 18):

"18. On 27 June 2019, following advice from the Committee on Climate Change, the UK Government announced a new carbon reduction 'net zero' target for 2050 - this was given effect by an amendment to the Climate Change Act 2008 (the target for the net UK carbon account for 2050 changed from 80% to 100% below the 1990 baseline). The Secretary of State notes that the energy NPSs continue to form the basis for decision-making under the Planning Act 2008. He further notes that the ExA concludes that the principle of the Development is in line with the national need for secure and reliable supplies of electricity as part of the transition to a low carbon economy. The Secretary of State therefore considers that granting consent for the Application would not be incompatible with the amendment to the Climate Change Act."

35. In the decision letter dated 9 April 2020 authorising the Riverside Energy Park DCO (in Bexley) the Secretary of State for BEIS said (at paras 4.12, 8.1, and 8.2):

"4.12 The Secretary of State agrees with the ExA's conclusion that the current CIF level is the relevant minimum level of carbon emissions against which the Development should be assessed [ER5.3.22], CCGT is the appropriate counterfactual against which the Development should be assessed [ER 5.3.24]. The Secretary of State also agrees that as the Order includes provisions to ensure compliance with the waste hierarchy therefore inclusion of the carbon equivalent benefit of diverting waste from landfill is acceptable, and that the carbon equivalent benefit of the Development would be higher if the maximum throughput of waste fuel stock was assumed [ER 5.3.26]. If the CIF is to change in the future to meet the EPS for 2030, then the Development will, as part of London's waste infrastructure, have to play its part. As the Mayor's analysis shows the most recently assessed baseline CIF for London is 700 grams of CO2/kWh and will have to improve to meet the targets by a combination of further development of CHP infrastructure and 6 greater recycling of fossil carbon containing feedstocks (in particular plastics). The Secretary of State also agrees with the ExA that the Applicant has included provisions to improve the likelihood of successful development of combined heat and power. The Secretary of State therefore agrees with the ExA's overall conclusion that the Development meets the carbon emissions targets currently in place for energy from waste.

8.1 On 2 May 2019, the Climate Change Committee recommended the UK reduce greenhouse gas emissions by net zero by 2050. This was proposed to deliver on the commitments the UK made by signing the Paris Agreement in 2016. On 26 June 2019, following advice from the Committee on Climate Change, Government announced a new carbon reduction 'net zero' target for 2050 which resulted in an amendment to the Climate Change Act 2008 requiring the UK to reduce net carbon emissions by 2050 from 80% to 100% below the 1990 baseline.

8.2 The Secretary of State notes that the energy National Policy Statements continue to form the basis for decision-making under the Planning Act 2008. He further notes that the ExA concludes that the principle of the Development is in line with the national need for secure and reliable supplies of electricity as part of the transition to a low carbon economy. As discussed above, at 4.7 and 4.10, the Secretary of State also notes that current waste policy confirms that where energy from waste does not compete with greater waste prevention, re-use or recycling, it plays an important role in diverting waste from landfill, with an acknowledged carbon equivalent benefit. The Secretary of State therefore considers that granting consent for the Application would not be incompatible with the amendment to the Climate Change Act 2008."

36. This decision has been challenged in a judicial review brought by the Greater London Authority. Permission was granted for the application to be made in June 2020. The grounds of challenge include the approach taken to climate change. The substantive challenge will be heard at the beginning of October 2020 and any decision before the Planning Week will be picked up in an update.

37. In the decision letter dated 9 April 2020 authorising the A585 Windy Harbour to Skippool Improvement DCO (near Blackpool) the Secretary of State for Transport said (at paras 17 and 18):

"17. The Secretary of State notes that the ExA requested the Applicant to provide an update on how the amended emissions target in the NPSNN as a result of the Climate Change Act 2008 (2050 Target Amendment) affects assessments made in the application. The Secretary of State notes that the Applicant confirmed that "Environmental Statement 15: Climate…states that 'Overall, the effects on climate are anticipated to be Not Significant during the construction phase. At this stage, it is anticipated that due to the quantity of material resources required for the Scheme, a further carbon assessment, including GHG emissions, should be undertaken post-construction. During operation, effects on climate are anticipated to be Not Significant.' This conclusion would not change when considering the revised targets." The Secretary of State agrees with the ExA's view that the Applicant has demonstrated that the ES has made a realistic assessment of the effects of the Proposed Development on Climate (ER 5.2.8).

18. The Secretary of State concurs with the ExA's conclusions that the ES sets out how the proposal will take account of the projected impacts on climate change, adaptation measures have been assessed in the ES, which also sets out how and where such measures are proposed to be secured, evidence is provided on the carbon impact of the project and an assessment against the Government's carbon budgets, and the mitigation measures relating to design and construction are viewed to be adequate. The Secretary of State is satisfied with the ExA's conclusion that climate matters do not weigh against the Order being made (ER 5.2.9)."

38. NB: despite the terms of para 17 of this letter, there has been no amendment of the National Networks NPS to reflect the revised 2050 target in the CCA 2008. The NPS remains unchanged from its publication in January 2015.

39. Paras 5.16, 5.17 and 5.18 of the NN NPS state:

"5.16 The Government has a legally binding framework to cut greenhouse gas emissions by at least 80% by 2050. As stated above, the impact of road development on aggregate levels of emissions is likely to be very small. Emission reductions will be delivered through a system of five year carbon budgets that set a trajectory to 2050. Carbon budgets and plans will include policies to reduce transport emissions, taking into account the impact of the Government's overall programme of new infrastructure as part of that.

5.17 Carbon impacts will be considered as part of the appraisal of scheme options (in the business case), prior to the submission of an application for DCO. Where the development is subject to EIA, any Environmental Statement will need to describe an assessment of any likely significant climate factors in accordance with the requirements in the EIA Directive. It is very unlikely that the impact of a road project will, in isolation, affect the ability of Government to meet its carbon reduction plan targets. However, for road projects applicants should provide evidence of the carbon impact of the project and an assessment against the Government's carbon budgets.

5.18 The Government has an overarching national carbon reduction strategy (as set out in the Carbon Plan 2011) which is a credible plan for meeting carbon budgets. It includes a range of non-planning policies which will, subject to the occurrence of the very unlikely event described above, ensure that any carbon increases from road development do not compromise its overall carbon reduction commitments. The Government is legally required to meet this plan. Therefore, any increase in carbon emissions is not a reason to refuse development consent, unless the increase in carbon emissions resulting from the proposed scheme are so significant that it would have a material impact on the ability of Government to meet its carbon reduction targets."

40. In the decision letter dated 30 April 2020 authorising the Lake Lothing Third Crossing DCO (in Lowestoft) the Secretary of State for Transport said this (at para 13):

"… The Secretary of State notes that amendments to the Climate Change Act 2008 made by the Climate Change Act 2008 (2050 Target Amendment) Order 2019 were not taken into account by the Panel due to timing (PR 3.5.3). The Secretary of State notes the assessment of carbon dioxide emissions undertaken in paragraphs 8.5.38-8.5.42 of the Environmental Statement ("ES") and considers that the small increase in carbon dioxide emissions identified would not have a material impact on the ability of the Government to meet its carbon targets."

41. In the decision letter dated 4 May 2020 authorising the West Midlands RFI DCO (at Junction 12 of the M6 in Staffordshire) the Secretary of State for Transport did not

address the issue of net zero but this had been considered in the Examination (which took place between February and August 2019) and the Examining Authority concluded (at para 6.15.1):

"6.15.1 The UK Government has a commitment to cut greenhouse gas emissions by 100% by 2050, with planning policy at all levels providing strong support for development which helps the transition to a low carbon future and to limit climate change. The NPSNN (paragraph 2.35) recognises that rail transport and SRFIs have a particular role to play in delivering significant reductions in pollution, including CO2, at a national level. By contributing to the national need for network of SRFIs, the Proposed Development would assist in meeting the Government's objectives with regard to carbon reduction."

42. In the decision letter dated 28 May 2020 authorising the A63 Castle Street Improvement DCO (at Hull) the Secretary of State for Transport made no more than a broad brush comment on emissions (at para 25):

"The Secretary of State notes that the scheme is not of sufficient scale to have an impact on the ability of the Government meeting its carbon reduction targets (PR 4.3.50)…"

43. The Examining Authority had recommended that the DCO should not be made (because of the heritage impacts of the improvement scheme, in particular on a listed disused public house, but the Secretary of State did not agree, on the basis that the pub could be relocated and rebuilt outside of the scheme footprint and the resulting heritage harm was outweighed by the scheme's public benefits. The ExA made no mention of the Net Zero target in his conclusions on emissions but simply referred to the scale of the project being insufficient to have an effect on the Government's ability to meet its (unspecified) targets.

44. In the decision letter (also) dated 28 May 2020 authorising the Cleve Hill Solar Park DCO (near Faversham, Kent), the Secretary of State for Business, Energy & Industrial Strategy noted that the particular form of development (being solar powered electricity generation) fell outside of any current NPS (at para 4.5). The Secretary of State concluded (at para 4.6):

"The Secretary of State agrees with the ExA that the Development, which would comprise the construction, operation, maintenance and decommissioning of a solar photovoltaic array with either an electrical storage facility or an extension to the solar photovoltaic array, together with connection infrastructure and other Associated Development (with the solar photovoltaic array and the energy storage facility each having a generating capacity of greater than 50MW) is consistent with government policy and will contribute to the delivery of low-carbon and renewable energy, ensuring a secure, diverse and affordable energy supply in line with legal commitments to "net zero" and the need to address climate change."

45. In the decision letter dated 1 July 2020 authorising the Norfolk Vanguard Offshore Windfarm, the Secretary of State for Business, Energy & Industrial Strategy concluded

(at para 4.4) that the proposal, which would generate some 1,800 mega watts from some 2,000 wind turbines, was acceptable in climate change terms because:

"The Secretary of State considers that the proposed Development is in accordance with the NPS EN-1, NPS EN-3 (and NPS EN-5) and benefits from the presumption in favour of electricity generating stations in general and in favour of offshore wind farm generating stations in particular. In addition, granting development consent for the Development would be consistent with government policy and will contribute to the delivery of low-carbon and renewable energy, ensuring a secure, diverse and affordable energy supply in line with legal commitments to "net zero" and the need to address climate change."

46. In the decision letter dated 9 July 2020 authorising the Manston Airport DCO (a freight handling facility) the Secretary of State was somewhat circumspect in engaging with climate change matters. This was not directly related to the quashing of the ANPS (which did not directly apply to the proposal in any event) but the Secretary of State was clearly looking to avoid a further legal challenge (especially as he was disagreeing with the ExA's recommendation to withhold consent) and the Secretary of State had had to 'recuse' himself from the decision making process because of prior statements of support. The decision was made on his behalf by the Minister of State for Transport. The Secretary of State was therefore 'content' to accept the view of the ExA that the contribution of the proposal to carbon emissions (which the ExA regarded as large enough to have a 'material impact' on the Government's ability to meet its carbon reduction target for aviation) was a negative factor which should be given 'moderate weight' in the planning balance. The Secretary of State declined to grapple with the issue of whether a proposal that would have a material impact on the achievement of the target was acceptable looking simply at climate change matters, because giving the negative factor 'moderate' weight meant it could be outweighed by wider (non-climate change) benefits. The decision letter stated:

"25. More widely, the ExA notes that under section 30 of the Climate Change Act 2008 ("CCA08") greenhouse gas emissions from international aviation do not currently count as emissions from sources in the UK for the purposes of carbon targets and budgeting, except as provided by Regulations made by the Secretary of State [ER 6.5.21 and 6.5.44]. However, on 1 May 2019 the UK Government declared a climate emergency and 'Net Zero The UK's contribution to stop global warming' was published the following day. This publication included the Committee on Climate Change's ("CoCC") recommendation of a new emissions target for the UK of net-zero greenhouse gases by 2050 [ER 6.5.23]. The CCA08 was amended on 26 June 2019 through the Climate Change Act 2008 (2050 Target Amendment) Order 2019 to establish the net-zero greenhouse gas target in law [ER 6.5.25]. The ExA notes that the CoCC is accordingly advising that the planning assumptions for international aviation should be to achieve net-zero emissions by 2050 [ER 6.5.44] and its emerging advice to the UK Government is that this should be reflected in the UK's emerging Aviation Strategy, which means reducing actual emissions in the international aviation sector. The CoCC advises that the UK Government should assess its airport capacity strategy in this context. The ExA notes specifically for the Development, it will need to be demonstrated to make economic sense (i.e. to establish a need case, in a net-zero

world and the transition towards it) [ER 6.5.45]. The ExA concludes that the Development's Carbon Dioxide contribution of 730.1KtCO2 per annum, which according to the Applicant forms 1.9% of the total UK aviation carbon target of 37.5 Mt CO2 for 2050, will have a material impact on the ability of Government to meet its carbon reduction targets, including carbon budgets. The ExA concludes that this weighs moderately against the case for development consent being given [ER 8.2.75].

26. For the reasons set out above in paragraphs 20 and 21, the Secretary of State considers there is a clear need and public benefit case for the Development and notes that the ExA's conclusions above appear to be based in part on emerging policy on climate change. However, as the Government is still considering the consequences of the ANPS judgment, and ahead of the publication of the Government's Transport Decarbonisation Plan and new Aviation Strategy to be published later this year, the Secretary of State is satisfied that it would not be appropriate to consider further at this stage. He is content therefore to accept the ExA's view that this is a matter that should be afforded moderate weight against the Development in the planning balance."

47. In the decision letter dated 16 July 2020 authorising the A19 Downhill Lane Junction DCO, the Secretary of State for Transport took the more orthodox approach of regarding an individual transport scheme as having minimal implications for the achievement of carbon reduction targets. He said (at para 23):

"The Secretary of State notes that the regional assessment results show small increases in NOx, CO2 and PM10 emissions as a result of the Proposed Development and that the increase in greenhouse gas emissions has been included in the Benefit Cost Ratio (ER 4.12.18). The approved CEMP is intended to consider methods to reduce the impact of energy use in construction (ER 4.12.19). The ExA noted that the Secretary of State may wish to consider whether the Proposed Development would have a material impact on the UK Government meeting its increased carbon reduction target in light of the amendments to the Climate Change Act 2008 made by the Climate Change Act 2008 (2050 Target Amendment) Order 2019 (ER 4.12.5). The Secretary of State agrees with the ExA's conclusion that in terms of the regional air quality impacts, the small increases in emissions that were identified are unlikely to have a material impact on the ability of the Government to meet its carbon reduction targets (ER 4.12.34) and does not consider that the change in the carbon target alters this conclusion."

48. In the decision letter dated August 2020 authorising the Immingham Open Cycle Gas Turbine Plant (in Linclonshire), the Secretary of State for Business, Energy & Industrial Strategy chose simply to accept the ExA's conclusions that the effects of a 299 megawatt gas turbine power station on climate change were minimal. He said:

"4.75. The Climate Change Act 2008 sets a legally binding target for the UK to reduce its net greenhouse gas emissions from 1990 levels. When the application was submitted the target was 80%. In June 2019, the UK Government altered this target to 100% by the Climate Change Act 2008 (2050 Target Amendment) Order 2019.
…

4.79. The ExA asked the Applicant to provide updated information on how the amended emissions target in the 2019 Order affected the assessment in the ES. The Applicant concluded that the Amendment had no effect on the assessments contained in the ES as the emissions of the Development equates to less than 1% of the total emissions under the fourth and fifth carbon budgets to 2032, and that the sixth carbon budget has not yet been published. The ExA was satisfied with this response. [5.12.10 et seq]

…

4.82. The ExA was satisfied that the Development accords with the guidance in NPS EN-1 and EN-2 and would be in accordance with the UK's commitment under the Climate Change Act 2008 and the Paris Agreement. [5.12.14]

…

4.85. The Secretary of State has considered the ExA's Report and agrees with its conclusions. … The Secretary of State notes the inevitable increase in greenhouse gases arising from the Development but considers that this is outweighed by its contribution to a secure and responsive energy supply which will facilitate the roll out of increased levels of renewable energy."

49. Thus, the tenor of recent DCO decisions, both before and after the Plan B Earth decision, has been to see the fact that Net Zero is a legally binding target which the Government has committed to achieving via a series of carbon budgets to deliver reducing levels of net emissions, coupled with the small-scale nature of the effects of any individual project, as meaning that the Net Zero target should not be a reason for with-holding consent for any specific DCO project. Even where the effects have been seen to have a 'material impact' on the achievement of the targets (Manston Airport) this factor was only given moderate weight in the planning balance and did not stand in the way of consent. Indeed, in the Drax case, where there would be a 90% increase in carbon emissions from the site, the Secretary of State was not persuaded that there would be any implications for the Government's ability to achieve its targets. Whether the Court of Appeal will agree with Holgate J that the Secretary of State was entitled to be unconcerned remains to be seen.

50. Promoters of such projects should ensure that they do provide information on the emissions effects of their project (as would be generally expected in any event as part of the EIA process), but for the time being at least should be able to progress those projects without an expectation that they will be required to demonstrate that the project itself will achieve a net zero effect on emissions, either now or in 2050.

The TCPA 1990 regime

51. Many TCPA 1990 development proposals will be too small in scale to engage climate change issues to the extent of affecting the Government's ability to achieve its net zero target. Thus, the topic features relatively rarely in appeal decisions and (as yet) not at all in s.288 TCPA 1990 challenges to those decisions.

52. The difficulties of making much of net zero in the context of planning objections to an individual scheme are illustrated by the recent decision of the Secretary of State for

Housing, Communities, and Local Government to refuse planning permission for mineral extraction (coal) at Highthorn, Northumberland (APP/P2935/V/16/3158266). The case has a somewhat complex history. The application was made in 2015, was called in for determination by the Secretary of State, an Inquiry took place in 2017, and an initial decision was quashed by the High Court in November 2018. The appeal was then re-determined, with the Inspector recommending the grant of permission. The Secretary of State, however, disagreed and refused the application in a decision letter dated 8 September 2020. By the time of the re-determination, climate change issues in the light of the Paris Agreement and net zero were part of the battleground between opponents and the promoter of the scheme. The Secretary of State specifically invited representations on the extent to which the burning of the extracted coal (the expected end result of the mineral operation for which permission was sought) would have any different effects, in terms of greenhouse gas emissions, to the burning of imported coal.

53. The Inspector explored this issue in some detail, as did the Secretary of State. Ultimately, however, the Secretary of State concluded that there was insufficient evidence to reach any clear conclusions. He set out the position as follows:

"62. The Inspector's conclusions on this issue are set out at IRC112– C115. In summary

- *The extraction, processing and combustion of up to 3MT of coal from Highthorn would result in significant GHG emissions including releasing some 7 Mt CO2 eq¬ into the atmosphere.*
- *There would be extensive use of diesel plant and equipment to extract the coal. This would represent a substantial addition of carbon emissions to those generated from burning the coal.*
- *It is impossible to calculate the likely emissions overall from imported coal, but if it was transported some distance by ship that would be likely to result in overall higher carbon emissions than using indigenous coal.*
- *There is uncertainty as to what the nature of imported coal as a substitute for Highthorn coal replacement would be and what GHG emissions would result.*
- *If permission was granted, GHG emissions from the proposed scheme would adversely impact on measure to limit climate change. The impact would be temporally variable, but overall the adverse effect on GHG emissions and climate change would be of substantial significance.*

63.The Secretary of State has given careful consideration to the Inspector's analysis set out above. For the avoidance of doubt, the Secretary of State notes the applicant's change to the estimated volume of extracted coal (from 3mt to 2.75mt) since the inquiry, but considers that the volume change is sufficiently small that it, of itself, makes no significant material impact to the Inspector's overall findings. For the reasons given the Secretary of State agrees that GHG emissions from the proposed development would adversely impact upon measures to limit climate change. However, the analysis of carbon effects by the Inspector was based on the prospective use of Highthorn coal for electricity generation rather than for industrial purposes. In order to obtain further information about the extent of such impact, parties were asked as part of the reference back exercise in April 2019 whether they considered

that GHG emissions resulting from the burning of coal extracted at Highthorn would in effect substitute for the GHG emissions that would in any event arise from burning imported coal.

64.The applicant's position is that GHG arising solely from the use of coal – whether imported or indigenous – will be the same, as the source of the coal does not alter how it is used. But there would be possible savings in transport emissions from indigenous coal. The contrary view, which has been expressed by parties opposing the proposal, is that there is no evidence that indigenous coal has a smaller carbon footprint than imported coal and that any GHG benefit of increasing indigenous coal to replace imports would be offset either by the UK exceeding government projections of coal use in coal fired power stations or by exporting to other countries. In addition, if there is a stockpile of coal sufficient to meet need, the extraction and combustion of additional coal will lead to unnecessary GHG emissions.

65. The Secretary of State agrees with the Inspector that imported coal transported some distance by ship would appear likely to result in overall higher carbon emissions than using indigenous coal. But he considers that the representations received from the parties do not provide sufficient evidence to reach a robust conclusion on the comparative GHG emissions of using Highthorn coal as against imported coal. Furthermore, nor does the evidence clarify whether GHG emissions would be different if Highthorn coal is used for industrial purposes rather than electricity generation.

66.In terms of impacts of GHG emissions, the Secretary of State is guided particularly by paragraph 148 of the Framework and the duty in section 1 of the Climate Change Act 2008 to reach the specified target by 2050. Since the parties' written representations were received, the Climate Change Act has been modified to amend a target of 80% reduction from 1990 levels to net zero by 2050. The Government affords combating climate change particular importance.

67.However, the Secretary of State considers that it is not possible, on the evidence before him, to reach a clear and robust conclusion on the respective likely GHG emissions of imported or Highthorn coal or which would produce greater or lesser emissions in either electricity production or industrial use. For these reasons, in the changed circumstances of this particular case, he disagrees with the Inspector, and concludes that the impact on climate change is neutral in the planning balance."

54. Thus, even in the case of a large-scale proposal to extract some 3 million tonnes of minerals for the purpose of onward sale for burning to produce (inter alia) carbon emissions, the Secretary of State was not persuaded that the effects on climate change would be anything other than neutral in the planning balance.

55. Unless the Courts take a more interventionist stance in some of the forthcoming cases that are due to be hear this autumn, it would seem that net zero is not a particular obstacle for individual projects securing consent.

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