Neutral Citation Number: [2021] EWHC 326 (Admin)

Case No: CO/2836/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/02/2021

Before :

THE HON. MR JUSTICE HOLGATE

- -

Between :

RAYMOND STEPHEN PEARCE	**Claimant**
-and-	
SECRETARY OF STATE FOR BUSINESS ENERGY AND INDUSTRIAL STRATEGY	**Defendant**
-and-	
NORFOLK VANGUARD LIMITED	**Interested Party**

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Ned Westaway and Michael Brett (instructed by **Thrings LLP**) for the **Claimant**
Richard Moules (instructed by **Government Legal Department**) for the **Defendant**
Hereward Phillpot QC (instructed by **Womble Bond Dickinson (UK) LLP)** for the **Interested Party**

Hearing dates: 19 and 20 January 2021

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Approved Judgment

Mr Justice Holgate

Introduction

1. The Claimant, Mr Raymond Pearce, makes this application for judicial review under s.118 of the Planning Act 2008 ("PA 2008") to challenge the decision of the Defendant, the Secretary of State for Business, Energy and Industrial Strategy, on 1 July 2020 to make the North Vanguard Offshore Wind Farm Order (SI 2020 No. 706) ("the Order"). The Order grants development consent to the Interested Party, Norfolk Vanguard Limited ("NVL") for what is said to be one of the largest offshore wind projects in the world. This development ("Vanguard") is closely related to a second wind farm project Norfolk Boreas ("Boreas"), lying immediately to the north-east of the offshore Vanguard array. Together they would have an export capacity of 3.6 GW.

2. On 8 June 2018 NVL submitted its application for a development consent order ("DCO") under s.37 of PA 2008 in respect of Vanguard. The examination of that application began on 10 December 2018 and ended on 10 June 2019. The Examining Authority submitted its report to the Defendant ("ExAR") on 19 September 2019. The application for development consent in respect of Boreas was made on 11 June 2019. The examination of that second application began on 12 November 2019 and closed on 12 October 2020. The court was informed that a decision by the Defendant on the Boreas application is anticipated to be made in April 2021.

3. NVL proposed that the onshore infrastructure of the two projects be co-located. This involved a cable route carrying high voltage direct current for 60 km from the landfall at Happisburgh to a substation site near the village of Necton. There the power would be converted to alternating current and fed into the National Grid.

4. The Environmental Statement ("ES") prepared by NVL for Vanguard assessed cumulative impacts arising from both projects, including landscape and visual impacts from the infrastructure proposed at Necton.

5. The development proposed at Necton for both the Vanguard and Boreas projects has attracted substantial objections, including objections from the Claimant who lives near the planned cable route. They concern both the impacts of the Necton infrastructure for Vanguard in isolation and also the cumulative impacts which would occur if infrastructure for Boreas were to be added at Necton.

6. In their assessment of landscape and visual impacts for the Vanguard application, both the Examining Authority and the Defendant decided that consideration of cumulative impacts from Vanguard and Boreas should be deferred to any subsequent examination of the Boreas proposal.

7. This challenge raises three issues: -

   (1) Whether the Defendant was obliged to take the cumulative impacts at Necton into account when determining the Vanguard application and acted unlawfully by deferring consideration of that subject to any examination of an application for a DCO in respect of the Boreas project;

(2) Whether the reasons given by the Defendant for not taking those cumulative impacts into account when determining the Vanguard application were legally inadequate;

(3) In the event of the court deciding that the Defendant erred in law in either of those two respects, whether it should refuse to grant relief in the exercise of its discretion.

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

The Statutory Framework

Planning Act 2008

9. The framework laid down by the PA 2008 has been summarised in a number of cases, for example, *R (Friends of the Earth Limited) v Heathrow Airport Limited* [2020] UKSC 52 at [19] to [38]; *R (ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy* [2021] EWCA Civ 43 at [6] to [8] and [104] to [105] and *R (Spurrier) v Secretary of State for Transport* [2020] PTSR 240 at [21] to [39] and [98] to [109]. There is no need for that analysis to be repeated here.

10. In so far as is material, s.104 of the PA 2008 provides:

> "(1) This section applies in relation to an application for an order granting development consent if a national policy statement has effect in relation to development of the description to which the application relates.
> (2) In deciding the application, the Secretary of State must have regard to –
>
> (a) any national policy statement which has effect in relation to development of description to which the application relates (a "relevant national policy statement"),
>
> (aa) ….. ,
>
> (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),
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> (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.
>
> (3) The Secretary of State must decide the application in accordance with any relevant national policy statement, except to the extent that one or more of subsections (4) to (8) applies.

> (4) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the United Kingdom being in breach of any of its international obligations.
>
> (5) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the Secretary of State being in breach of any duty imposed on the Secretary of State by or under any enactment.
>
> (6) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would be unlawful by virtue of any enactment.
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> (7) This subsection applies if the Secretary of State is satisfied that the adverse impact of the proposed development would outweigh its benefits.
>
> (8) This subsection applies if the Secretary of State is satisfied that any condition prescribed for deciding an application otherwise than in accordance with a national policy statement is met.
>
> (9) For the avoidance of doubt, the fact that any relevant national policy statement identifies a location as suitable (or potentially suitable) for a particular description of development does not prevent one or more of subsections (4) to (8) from applying."

11. Section 104(2)(d), allows the Secretary of State to exercise a judgment on whether he should take into account any matters which are relevant, but not mandatory, material considerations. This reflects the well-established line of authority which includes *CREEDNZ v Governor General* [1981] NZLR 172, 183; *In Re Findlay* [1985] AC 318, 333-334; *Oxton Farm v Harrogate Borough Council* [2020] EWCA Civ 805 at [8]; and *Friends of the Earth* [2020] UKSC 52 at [116] to [120].

12. When determining an application for development consent, section 114 requires the Secretary of State either to make a DCO or to refuse such consent. Section 116 requires the Secretary of State to prepare and publish a statement of the reasons for his decision.

13. Section 115 enables a DCO to be granted not only for development of the defined categories of nationally significant infrastructure projects ("NSIPs") requiring development consent (Part 3 and s.31 of PA 2008), but also for "associated development" as defined in s.115(2) to (4).

14. A decision to grant a DCO is liable to be challenged by way of judicial review under s.118(1) of PA 2008. The general principles upon which a legal challenge may be

brought were summarised by the High Court in *ClientEarth* at [2020] PTSR [98] to [100].

Environmental Impact Assessment

15. The relevant legislation on environmental impact assessment ("EIA") for the determination of the Vanguard application was Directive 2011/92/EU, which, in relation to DCO procedures, was transposed by the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 (SI 2009 No. 2263) as amended ("the 2009 Regulations"). The 2011 Directive was amended by Directive 2014/52/EU, but the latter does not apply to a project for which a screening opinion was sought before 16 May 2017 (article 3(2) of the 2014 Directive). The 2014 Directive was transposed by the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017 No. 572) ("the 2017 Regulations"), regulation 37(2) of which gave effect to the transitional provisions of the 2014 Directive. In the present case NVL sought a scoping opinion on 3 October 2016 and so it is common ground that the 2009 Regulations governed the EIA process in this case.

16. Paragraph 1.5.4 of the ExAR records that NVL decided voluntarily to prepare the ES in accordance with the 2017 Regulations and the statement submitted was examined in accordance with those regulations. The Defendant's decision letter appears to have proceeded on that basis (see e.g. DL 14.1). Nevertheless, no authority has been cited to show that the subsequent regulations can be treated as applying on a consensual basis for the purposes of determining a judicial review under s. 118. This judgment therefore refers to the 2009 Regulations. Fortunately, it is common ground that there are no relevant differences between the 2009 and 2017 Regulations affecting the merits of the grounds of challenge.

17. Regulation 3(2) provides: -

> "Where this regulation applies, the Secretary of State or relevant authority (as the case maybe) must not (in the case of the Secretary of State) make an order granting development consent or (in the case of the relevant authority) grant subsequent consent unless it has first taken the environmental information into consideration, and it must state in its decision that it has done so."

18. "Environmental information" is defined in regulation 2(1) as follows: -

> *"environmental information"* means the environmental statement (or in the case of a subsequent application, the updated environmental statement), including any further information and any other information, any representations made by any body 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 and of any associated development,"

"Environmental information" therefore covers all information which is obtained through the overall EIA process, which includes the ES and representations in response to the statutory publicity and consultation procedures.

19. "Environmental statement" is defined in regulation 2(1) as follows: -

> *"environmental statement"* means a statement—
>
> (a) that includes such of the information referred to in Part 1 of Schedule 4 as is reasonably required to assess the environmental effects of the development and of any associated development and which the applicant can, having regard in particular to current knowledge and methods of assessment, reasonably be required to compile; but
>
> (b) that includes at least the information referred to in Part 2 of Schedule 4."

20. Schedule 4 defines information for inclusion in the ES. Part 1 includes the following: -

> "17. Description of the development, including in particular—
>
> (a) a description of the physical characteristics of the whole development and the land-use requirements during the construction and operational phases;
>
> (b) a description of the main characteristics of the production processes, for instance, nature and quantity of the materials used;
>
> (c) an estimate, by type and quantity, of expected residues and emissions (water, air and soil pollution, noise, vibration, light, heat, radiation, etc) resulting from the operation of the proposed development.
>
> 18. An outline of the main alternatives studied by the applicant and an indication of the main reasons for the applicant's choice, taking into account the environmental effects.
>
> 19. A description of the aspects of the environment likely to be significantly affected by the development, including, in particular, population, fauna, flora, soil, water, air, climatic factors, material assets, including the architectural and archaeological heritage, landscape and the inter-relationship between the above factors.
>
> 20. A description of the likely significant effects of the development on the environment, which should cover the direct effects in any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the development, resulting from:

(a) The existence of the development;

(b) The use of natural resources;

(c) The emission of pollutants, the creation of nuisances and the elimination of waste,

and the description by the application of the forecasting methods used to assess the effects on the environment.

21. A description of the measures envisaged to prevent, reduce and where possible offset any significant adverse effects on the environment."

21. Part 2 of schedule 4 lists the following information which must be provided: -

"24. A description of the development comprising information on the site, design and size of the development.

25. A description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects.

26. The data required to identify and assess the main effects which the development is likely to have on the environment.

27. An outline of the main alternatives studied by the applicant and an indication of the main reasons for the applicant's choice, taking into account the environmental effects.

28. A non-technical summary of the information provided under paragraphs 1 to 4 of this Part."

22. Under regulation 17(2), where the Examining Authority or the Secretary of State consider that the ES ought to contain further information they must, under regulation 17(1), issue a statement giving clearly and precisely the full reasons for that conclusion and suspend consideration of the application for a DCO until the applicant has provided the further information and the requirements in regulation 17(3) are satisfied. Those requirements include further consultation with the designated consultation bodies and other parties and publicity to enable representations to be made.

23. Alternatively, where the Examining Authority does not consider that additional information ought to be included in the ES, it may request an "interested party" to supply that material under rule 17 of the Infrastructure Planning (Examination Procedure) Rules 2010 (SI 2010 No. 103) ("the 2010 Rules"). By rule 2(1) an "interested party" refers to a person who is an "interested party" for the purposes of Chapter 4 of Part 6 of the PA 2008. By s. 102(1) of that Act an "interested party" includes the applicant for the DCO. Rule 17(2) requires the examining authority to consider whether an opportunity should be given to all interested parties to comment in writing on the further information received.

24. Regulation 23 of the 2009 Regulations sets out a number of requirements for the notification of the decision on the application for a DCO. Regulation 23(2)(d), requires

a statement to be made publicly available which sets out (inter alia) the main reasons and considerations on which the decision has been based and a description of the main measures to avoid, reduce and offset, the "major adverse effects" of the development.

National Policy Statements

25. Three National Policy Statements were relevant to the application: NPS EN-1 (Overarching National Policy Statement for Energy), NPS EN-3 (Renewable Electricity Generation) and NPS EN-5 (Electricity Networks Infrastructure). NPS EN-1 applies in combination with the relevant technology-specific NPSs.

26. Part 3 of NPS 1 establishes the need for new energy NSIPs. Applications for energy infrastructure falling within its scope are to be assessed on the basis that "the Government has demonstrated that there is a need for these types of infrastructure and that the scale and urgency of that need is as described for each of them in this part" (Paragraph 3.1.3). Substantial weight should be given to the contribution which a project would make towards satisfying that need (paragraph 3.1.4).

27. There is an established urgent need for new, and particularly low carbon, energy NSIPs to be brought forward as soon as possible (paragraph 3.3.15 of EN-1). Section 3.4 of EN-1 sets out the importance of the large-scale deployment of renewable sources of energy for tackling climate change. Offshore wind projects are expected to make the single largest contribution towards renewable energy generation targets (paragraph 3.4.3). The need for such projects is "urgent" (paragraph 3.4.5).

28. Part 4 of EN-1 sets out certain "Assessment Principles" for DCO applications. Paragraph 4.1.2 refers to a presumption in favour of granting consent "unless any more specific and relevant policies set out in the relevant NPSs clearly indicate that consent should be refused" and subject also to s.104 of the PA 2008 (paragraph 4.1.2).

29. Section 4.2 of EN-1 deals with the 2009 Regulations. Paragraphs 4.2.5 to 4.2.8 deal with cumulative effects and cases where details of certain aspects of a project have yet to be finalised: -

> "4.2.5 When considering cumulative effects, the ES should provide information on how the effects of the applicant's proposal would combine and interact with the effects of other development (including projects for which consent has been sought or granted, as well as those already in existence). The IPC may also have other evidence before it, for example from appraisals of sustainability of any relevant NPSs or development plans, on such effects and potential interactions. Any such information may assist the IPC in reaching decisions on proposals and on mitigation measures that may be required.
>
> 4.2.6 The IPC should consider how the accumulation of, and interrelationship between, effects might affect the environment, economy and or community as a whole, even though they may be acceptable when considered on an individual basis with mitigation measures in place.

> 4.2.7 In some instances it may not be possible at the time of the application for development consent for all aspects of the proposal to have been settled in precise detail. Where this is the case, the applicant should explain in its application which elements of the proposal have yet to be finalised, and the reasons why this is the case.
>
> 4.2.8 Where some details are still be to be finalised, the ES should set out, to the best of the applicant's knowledge, what the maximum extent of the proposed development may be in terms of site and plant specifications, and assess on that basis, the effects which the project could have to ensure that the impacts of the project as it may be constructed have been properly assessed."

Following the changes made by the Localism Act 2011, references to the Infrastructure Planning Commission ("IPC") now relate to the Secretary of State.

30. Paragraph 4.2.8 of EN-1 accords with well-known principles set out in *R v Rochdale Metropolitan Borough Council ex parte Milne* [2001] Env. L.R. 406. In the present case NVL's application proposals for the Vanguard infrastructure at Necton were presented as a "Rochdale envelope". That is, because certain design details remained to be determined subsequently, the DCO application defined the parameters within which the buildings would be constructed, and the ES assessed the environmental effects of the proposals by reference to those parameters and any flexibility they involved. The DCO granted by the Defendant authorised the "Works" within those parameters (see [41] below).

31. Section 4.4 of EN-1 deals with alternatives to an applicant's proposal. Paragraph 4.4.3 states that alternatives which are vague or inchoate may be discounted.

32. Part 5 of EN-1 addresses impacts which are common to all types of energy infrastructure, that is "generic impacts", including landscape and visual impacts (section 5.9). Paragraph 5.9.14 states: -

> "Outside nationally designated areas, there are local landscapes that may be highly valued locally and protected by local designation. Where a local development document in England or a local development plan in Wales has policies based on landscape character assessment, these should be paid particular attention. However, local landscape designations should not be used in themselves to refuse consent, as this may unduly restrict acceptable development."

33. On the subject of infrastructure for connections to the National Grid, paragraph 2.6.36 of EN-3 states: -

> "When considering grid connection issues, the IPC should be mindful of the constraints of the regulatory regime for offshore transmission networks. At the time of the application, the applicant may or may not have secured a connection with the

> network operator into the onshore transmission network and is unlikely to know who will own and manage the offshore transmission assets required for the wind farm."

The Proposals

34. The Vanguard wind array would be located in two areas approximately 47 km from the shore. The export capacity of the generating station would be 1.8 GW providing for up to 1.3m UK households or the equivalent of 2% of the UK's annual energy demand. The initial proposal was for a maximum of 200 turbines, with a maximum hub height of 200m and a maximum blade tip height of 350m. During the course of the examination the number of turbines was reduced to 158.

35. The buried onshore cable would run between the landfall at Happisburgh to Necton, some 60 km away. The Vanguard substation would be located to the east of an existing National Grid Substation (ExAR paragraph 2.1.4).

36. Paragraph 2.1.8 of the ExAR noted that NVL's parent company, Vattenfall Wind Power Limited, was also developing Boreas, which would share with Vanguard a grid connection location as well as much of the offshore and onshore cable corridors. The Vanguard DCO would also include some enabling works for Boreas, including installation of ducts along the entirety of the onshore cable route from Happisburgh to the Necton National Grid connection and overhead line modifications.

37. Chapter 4 of the ES addressed NVL's site selection process. This was summarised in paragraphs 4.4.5 to 4.4.8 of the ExAR. The offshore location was limited to areas within the East Anglia Zone which formed part of the Crown Estate's Round 3 Offshore Wind Farm development process. The developer adopted a strategic approach to Vanguard and Boreas, which included site selection based on the co-location of both projects. An iterative process resulted in the identification of the most suitable locations, having regard to technical constraints and environmental impacts. Following the identification of the offshore areas for Vanguard and Boreas, site selection addressed offshore cable corridor routes and a landfall with the aim of avoiding "high level designations". Three potential landfall sites were identified, from which the one at Happisburgh was selected. Then, National Grid Electricity Transmission plc and NVL worked on the identification of a National Grid connection point. This led to a grid connection offer being made by National Grid plc which NVL accepted in November 2016. Following that exercise, the offshore cable corridor was further refined, and the landfall site was finally selected.

38. The design work on Vanguard and Boreas sought to achieve synergies between the two projects. So, ducts for both projects would be installed along the onshore cable route as part of the Vanguard works, reducing construction times and avoiding the need to reopen land at a later date to install ducts for Boreas.

39. All search areas for a National Grid connection point were identified on the basis that they should be capable of accommodating infrastructure for connections by *both* Vanguard and Boreas (Chapter 4 of the ES paragraphs 4 and 47 and table 4.1). The working width of the cable corridor during construction is up to 45m. A width of 20m is required permanently for the majority of that route. Land acquisition under the Vanguard DCO includes land needed for works to connect Boreas cables to the

National Grid (see paragraphs 7.7.6, 7.7.9 and 7.7.37 of NVL's Statement of Reasons for compulsory purchase powers in the DCO).

40. NVL further explained their approach in a document entitled "A strategic approach to selecting a grid connection point for Norfolk Vanguard and Norfolk Boreas" (October 2018). Paragraph 11 stated: -

> "From the outset of development, it was clear to VWPL that it would be more efficient to take a strategic approach to developing the projects. Geographically the projects are close to each other and therefore, the co-location of both projects offers opportunities to explore synergies that might reduce development and operations costs and reduce both regional and local impacts"

Paragraph 18 added that NVL elected to seek common connection points to the National Grid for both Vanguard and Boreas. Paragraph 12 explained that the development programmes for the two projects were only a year apart.

41. Schedule 1 to the DCO defines the works authorised by the Order. They include the two Vanguard substation buildings (Work No. 8A) and the Vanguard extension to the existing National Grid substation at Necton (Work No. 10A). Part 3 of the schedule sets out the "requirements" (which are analogous to conditions imposed on a planning permission) subject to which consent is granted by article 3. Requirement 16 sets out design parameters for onshore works. The area of the fenced compound for Work No. 8A must not exceed 250m by 300m. The total footprint of each of the two buildings in Work 8A must not exceed 110m by 70m and their height must not exceed 19m. The area of the fenced compound for Work No. 10A must not exceed 200m by 150m. The height of the external electrical equipment in Work No 10A may be up to 15m.

42. There was no dispute at the hearing that if Boreas were to be connected to the National Grid at Necton, it would require its own dedicated substation and an extension to the existing National Grid substation, both on a similar scale to the works proposed for Vanguard, along with the associated external electrical equipment. In broad terms the scale of development outside Necton would be doubled. On any view, the development proposed at Necton would be substantial.

Assessment of Cumulative Impacts

43. In November 2016 the Planning Inspectorate issued a Scoping Opinion for the ES that was to be submitted. It stated that, in the assessment of cumulative impacts, other major developments should be identified through consultation with relevant authorities, including projects in the National Infrastructure programme. Boreas was specifically identified in relation to the substation proposals at Necton. Although some cumulative landscape impacts were scoped out of the ES (e.g. offshore infrastructure), those relating to co-located substation development at Necton were not.

44. By the time the ES for the Vanguard project was submitted in June 2018, substantial progress had already been made on Boreas. Grid connection agreements at Necton had been entered into for Vanguard in July 2016 and Boreas in November 2016. The site selection process had already identified preferred substation footprints for both

Vanguard and Boreas. The decision had been taken to use HVDC technology for both developments, determining the nature and scale of onshore infrastructure, including substations at Necton. The Boreas team had a pre-application meeting with the Planning Inspectorate on 24 January 2017, a request for a scoping opinion in respect of Boreas was made in May 2017 and the opinion issued in June 2017.

45. Indeed, paragraph 30 of chapter 33 of the Vanguard ES stated that in view of the request for a scoping opinion for Boreas, the "sister project" to Vanguard, Boreas was included in the cumulative impact assessment, adding: -

> "These projects have been considered for CIA only in those chapters where it is considered that the Scoping Reports contain sufficient detail with which to undertake a meaningful assessment."

Accordingly, where the Vanguard ES assessed cumulative impacts for that project together with Boreas, NVL considered that there was sufficient information available for that assessment to be carried out.

46. Table 33.3, dealing with projects included for cumulative impact assessment of onshore elements, stated that the "status" of the project data for Boreas in relation to landscape and visual impacts was "high". Paragraph 158 of chapter 29 of the ES, dealing with landscape and visual impact, stated:-

> "The development most relevant to the CIA for the Norfolk Vanguard onshore project substation and National Grid substation is the Norfolk Boreas onshore project substation and National Grid substation extension. The cumulative scenario considered in the assessment comprises these developments in the context of the existing Necton National Grid substation and Dudgeon substation."

47. Paragraph 23 of schedule 4 of the 2009 Regulations enables a developer to indicate in the ES any difficulties encountered in compiling the required information. Here there was no suggestion in the ES, or elsewhere, that NVL had found any difficulties in providing information on cumulative visual and landscape impacts from the Vanguard and Boreas developments at Necton. That issue was never raised during the examination. NVL's position did not change on this point during the DCO process.

48. Chapter 29 of the ES followed a conventional approach for EIA. The objective was to identify any "significant effects" of the project on "the landscape and visual resource" (paragraph 22). This approach reflects recital (7) and Article 2(1) of Directive 2011/92/EU and regulations 2(1) and 3(2), together with schedule 4, of the 2009 Regulations. Paragraph 32 in chapter 29 of the ES stated that the guiding principle in preparing the cumulative impact assessment had been to focus on the likely significant impacts and, in particular, those likely to influence the outcome of the DCO process.

49. The ES explained that the significance of effects was assessed as a combination of (i) the sensitivity of the landscape or visual receptor and (ii) the magnitude of the change resulting from the project. To count as a "significant" effect, either the sensitivity or magnitude of change had to be assessed as being at least "high" or "medium/high". If

both factors were assessed as "medium/low", "low", or "negligible", the effect was not treated as "significant".

50. The assessments of cumulative impacts were presented in table 29.17 of the ES and summarised in paragraph 174 of chapter 29: -

> "Table 29.17 shows the detail of the assessment for each receptor. In summary, the onshore project substation and National Grid substation extension for Norfolk Vanguard in conjunction with the onshore project substation and National Grid substation extension for Norfolk Boreas would have a significant cumulative effect on landscape character in the localised parts of the Settled Tributary Farmland LCT – River Wissey Tributary Farmland LCU and Plateau Farmland LCT – Beeston Plateau LCU and Pickenham Plateau LCU but would not have significant effects on the remaining parts and all other LCUs. In respect of the representative viewpoints, significant cumulative effects would arise from Lodge Lane to the immediate south of the site and a very localised section of Ivy Todd Road to the south-west. These effects would all occur within 1.2 km of the onshore project substation, making them localised."

It is to be noted that the term "localised" was simply used to describe effects occurring within 1.2 km of the substation development.

51. Mr Phillpot QC pointed out that language very similar to that in paragraph 174 was also used in another part of the ES to describe the effects of the Vanguard substation development. In my judgment that point is of little, if any, significance for two reasons. First, the term "significant" covers a range of effects involving varying degrees of harm. Thus, the broad categorisation of an effect as "significant" does not mean that solus and cumulative effects so classified are in fact equivalent. Second, the more detailed comments in the ES on cumulative impacts recognised, for example, the effects of the proposed "concentration of these large-scale energy developments" in a rural area. In any event, it should be noted that several objectors made representations during the examination that the cumulative impacts would be more harmful than had been assessed in the ES.

52. It became common ground during the hearing before me that the ES presented the same type and level of detail on the Vanguard and Boreas projects in order to assess the impacts on landscape and visual receptors, whether considering Vanguard in isolation or in combination with Boreas. In both cases the details provided were consistent with a "Rochdale envelope" approach.

53. The ES presented proposals for strategic landscape mitigation, including "embedded mitigation", for both the Vanguard substation development as a solus project and the Vanguard and Boreas schemes together (see e.g. section 4.5.14 in chapter 4, paragraph 175 and table 29.17 in chapter 29).

The Examination

54. Both the Claimant and other parties in the examination raised objections to the cumulative landscape and visual impacts of the Vanguard and Boreas projects.

55. The local planning authority, Breckland Council, submitted a Local Impact Report under s.60(3) of the PA 2008. When taking his decision, the Defendant was obliged to take this document into account (s.104(2)). Although it appears to have been supportive of the principle of the Vanguard project, the Council did express substantial concerns about the substation development near Necton: -

> "The predicted change in the form of development is of considerable magnitude and size. It is considered that the proposed extension to the existing National Grid substation in Necton would appear as a disproportionate additional development in the countryside. By more than doubling the size of the floor area to cover 51,000 square metres supporting a built height of up to 15 metres would not usually be allowed by the Local Planning Authority except in very special circumstances. Adding to this the 75,000 square metre new substation for the 19 metre tall HVDC convertor station with higher lightning masts, (potentially together with the Boreas development), then land coverage comparable with the core centre of Necton itself, with structures extending much further into the air, would be the outcome.
>
> It is appreciated that the Applicant has gone to considerable lengths in assessing visibility and the photomontages produced are helpful. However, on the ground it would be extremely difficult to screen a development of this huge scale. This is defined as a national infrastructure project for a reason and it will appear disproportionately dominant against the landscape which is remote from Necton. The new structures would be of such a size that the perceived distance from the A47 would appear relatively short. This would be a prominent and obtrusive feature against the skyline.
>
> The cumulative landscape and visual effects of the development would create negative disbenefits in planning terms. The Secretary of State for Energy must therefore balance the advantages of this major renewable energy project with these negative effects."

Plainly these observations were directed at both solus and cumulative effects on what was described as a "sensitive landscape and visual resource."

56. A number of the parties made representations about the dominant and disproportionate effects of the proposed substation development for Vanguard and, even more so, the cumulative effects of both schemes. They included the Necton Substation Action Group, Necton Parish Council and individual objectors. They took issue with the impact assessment in the ES and they asked that the DCO be rejected because of the unacceptable impact of the substation development. For example, the Parish Council referred to the "huge magnitude" of the change to the area and objected to the

development of the "largest substation in Europe" "beside a small village in a rural environment." Some objectors put forward alternatives for a connection to the National Grid away from Necton.

57. In its report the Examining Authority accepted that there is a strong need for the Vanguard project, supported by the NPSs. Vanguard would be one of "the biggest offshore-wind projects in the world" and together with Boreas could prevent more than 4m tCO_2 from entering the atmosphere (paragraphs 4.2.13 to 4.2.15).

58. The Examining Authority reviewed alternative locations for onshore infrastructure, notably the connection point to the National Grid (ExAR paragraphs 4.4.9 to 4.4.33). It found that NVL had made reasonable decisions on alternatives after following an appropriate process. NVL had narrowed down the choice to three locations, Necton, Norwich Main and Eye. It appears that a connection at Eye was unlikely to be achievable "within the required time-frames". Necton was then preferred because of the greater "environmental and other implications" for Norwich Main.

59. The Examining Authority noted the strongly held view of several participants that in view of the number of offshore wind farm projects coming forward in the region, there should be a strategic approach requiring contributions to an offshore ring main to avoid or reduce onshore environmental impacts. The Authority considered that because that would require co-ordination between projects, it was not an alternative which could be considered within the remit of an examination of a single offshore wind farm project. Although it is not apparent how well that reasoning sits with the requirements of the 2009 Regulations, particularly as the Examining Authority did consider elsewhere cumulative impacts resulting from a project being undertaken by an independent developer, no such argument was raised in the grounds of challenge. That is understandable in view of the way in which the Defendant discounted this particular alternative on the merits in his decision letter (see [71] below).

60. The Examining Authority summarised objections to landscape and visual impacts at Necton (paragraph 4.5.18 to 4.5.23 of the ExAR). It accepted that the Vanguard development could not be completely screened and would result in a material change to the landscape character and visual characteristics of the locality (paragraph 4.5.35). It noted that the substation location is not subject to any national or local landscape designations denoting a special sensitivity (paragraph 4.5.46). The Authority set out its assessments of the effects of the Vanguard substation development as a solus project at paragraphs 4.5.46 to 4.5.60 of the ExAR. It accepted that the impacts would be "localised" in that they would only occur within 1.2 km of the Vanguard substations (paragraphs 4.5.54 and 4.5.60). There would be no significant effects on the views of residents in Necton. The Examining Authority addressed the cumulative impacts of the proposed Vanguard buildings and came to the view that although members of the public "would be conscious of two large-scale energy plants in the locality", those "views would be localised and there would not be other views of the totality of the project" (paragraph 4.5.62 of the ExAR). It is common ground that these findings did not address the cumulative impacts of substation development at Necton for both Vanguard and Boreas.

61. Paragraphs 4.5.97 to 4.5.101 of the ExAR assessed cumulative impacts of Vanguard and another offshore wind farm project, Hornsea Project Three, ("Hornsea") located in the vicinity of the two Vattenfall projects. Hornsea was being brought forward

simultaneously with Vanguard but by a different developer. The cable corridor for Hornsea linking to the National Grid at Norwich Main would cross the cable corridor for the Vattenfall projects at Reepham near the Claimant's home. On 1 July 2020 (the day on which the DCO for Vanguard was granted) the Defendant issued a decision letter stating that he was minded to grant a DCO for Hornsea, subject to the resolution of certain matters. The DCO was in in fact granted on 31 December 2020.

62. However, in paragraph 4.5.102 of ExAR the Examining Authority took a different approach to the assessment of the cumulative landscape and visual impacts of Vanguard and Boreas :-

> "Finally, whilst the Norfolk Boreas Offshore wind farm has been included in the Applicant's LVIA cumulative impact assessment, the ExA have not considered it in this part of the assessment due to the limited amount of details available. The ExA considers it would most appropriate for cumulative impacts to be considered in any future examination into Norfolk Boreas." (sic)

63. At paragraph 4.5.114 of the ExAR the Examining Authority said:-

> "The impacts of the development in landscape terms would be generally acceptable save for the localised harm to visual amenity in relation to the substation and associated works. In this respect the proposal would not be in full conformity with Breckland Core Strategy DP11 and DC15. Given the localised nature of the permanent harm the ExA ascribes limited weight to it in the overall planning balance."

This passage related solely to the effects of Vanguard in isolation and not the cumulative effects of Vanguard and Boreas. Nevertheless, it is plain that the solus effects were not regarded as being "acceptable". But purely because of the "localised effect" of the permanent harm that would be caused, the Examining Authority gave limited weight to this factor in the overall planning balance. Plainly, they left unresolved the issue as to how much harm would be caused (including harm within a radius of 1.2km) if both the Vanguard and the Boreas substation developments were to proceed and development on that scale were to take place in the vicinity of Necton.

64. The Examining Authority set out its analysis and conclusions on the Habitats Regulations Assessment under The Conservation of Habitats and Species Regulations 2017 (SI 2017 No. 1012) in chapter 6 of its report. It dealt with cumulative effects with the Boreas project, for example at paragraphs 6.7.167 to 6.7.181 of the ExAR. NVL had agreed with Natural England that these effects had to be considered so as to ensure that mitigation solutions would be compatible for both projects.

65. The Examining Authority set out its overall conclusion on the case for granting development consent in chapter 7 of its report. In relation to landscape and visual impacts the Authority concluded at paragraph 7.3.9: -

> "In terms of landscape effects there would be no significant effects upon landscape character or visual amenity other than

> for limited localised effects on visual amenity in the vicinity of the substation. Significant localised landscape character effects, as a result of the new substation and substation extension, would reduce to moderate after 10 years. Along the onshore cable route and at landfall any effects would be temporary and localised. Subject to the mitigation measures to be secured through the Requirements, the ExA concludes that proposal would accord with the policy requirements of NPS EN-1 and EN-3 and would not cause material harm to key characteristics protected by relevant development plan policies."

66. The Examining Authority struck the overall balance in paragraph 7.3.26:-

> "Many of the principal issues have been resolved to the satisfaction of the ExA or are capable of resolution subject to the recommended changes to the DCO. Excepting the offshore ecology matters, the ExA concludes that, in relation to all other matters, the Proposed Development would be in accordance with NPSs and national policy objectives. When these matters are taken into account the ExA concludes that, in a general planning balance the benefits of the scheme in terms of the large-scale generation of renewable energy and its contribution to sustainable development objectives substantially outweigh the limited harms which have been set out above."

67. In chapter 10 of its report, the Examining Authority summarised its conclusions for the purposes of applying the provisions in s.104 of the PA 2008. They were in line with their conclusions in chapter 7.

The Decision Letter

68. The Defendant's decision letter mainly summarised and accepted the conclusions of the Examining Authority.

69. The Defendant regarded the contribution which would be made to the decarbonisation of the electricity generation sector as a significant benefit (DL 3.5). DL 4.3 referred to the policy in EN-1 that the assessment should begin with a presumption in favour of granting development consent for electricity generating stations in general and offshore wind farms in particular (DL 4.3 and 4.4). The Defendant added: -

> " 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. "

70. The Defendant assessed alternatives at DL 4.5 to 4.11. He agreed with the Examining Authority that NVL had undertaken a reasonable process for considering alternatives when finalising its site options (DL 4.10).

71. As to the suggestion that an offshore ring main be considered, the Defendant concluded at DL 4.11: -

> "Whilst discussions are taking place in respect of the future shape of the offshore transmission network, such discussions are at the preliminary stage. The Secretary of State considers that he must assess the Development in line with current policy as set out in the National Policy Statements. He does not consider that the decision should be delayed to await the outcome of the discussions on the offshore transmission network given the urgent need for offshore wind development as identified in the National Policy Statements."

72. The Defendant summarised the views of the Examining Authority on landscape and visual impacts at DL 4.12 to 4.49. He noted that the substation location is not within any designated landscape area (DL 4.27). In DL 4.46 the Defendant referred to the Authority's conclusions on cumulative impact in ExAR 4.5.102:-

> "The ExA notes that, while the Applicant's Landscape and Visual Impact Assessment cumulative assessment included the proposed Norfolk Boreas offshore wind farm, it was not considered by the ExA because of the limited information available on that project. The ExA concluded, therefore, that this matter should be considered in the future as part of the examination of the development consent application for the Norfolk Boreas offshore wind farm."

73. In DL 7.4 the Defendant stated: -

> "The Secretary of State notes that there were a range of views about the potential impacts of the Development with strong concerns expressed about the impacts on, among other things, the landscape around the substation, traffic and transport impacts and potential contamination effects at the site of the F-16 plane crash. However, he has had regard to the ExA's consideration of these matters and to the mitigation measures that would be put in place to minimise those impacts wherever possible. The Secretary of State considers that findings in the ExA's Report and the conclusions of the HRA together with the strong endorsement of offshore wind electricity generation in NPS EN-1 and NPS EN-3 mean that, on balance, the benefits of the proposed Development outweigh its adverse impacts. He, therefore, concludes that development consent should be granted in respect of the Development."

74. In DL 8.4 the Defendant dealt with a post-examination representation from a member of the public proposing an alternative location for the Vanguard substations: -

> "A member of the public wrote to suggest that the Secretary of State should seek to move the site of the Necton substations to a new site in the vicinity to lower its visual impact. However,

> the proposed location would need to be subject to a new application for consent (as it does not form part of the Application submitted by the Applicant) and the ExA considered that the locations of the substations proposed by the Applicant were acceptable (while acknowledging that there would be localised visual impacts). In this situation, the Secretary of State does not believe that there is any need to consider an alternative location where an existing proposal is acceptable."

The grounds of challenge: a summary of the parties' submissions

75. I am grateful to all counsel for their clear and helpful written and oral submissions. In this section I simply give a brief summary of those submissions to provide context for the conclusions I reach.

76. Mr Westaway submitted that the Defendant had unlawfully excluded from consideration the cumulative landscape and visual impacts of Vanguard and Boreas in the Necton area. He expressed this initially as a breach of regulation 3(2) of the 2009 Regulations, alternatively a failure to determine the application in accordance with policies in the NPSs (see s.104(3) of the PA 2008), or a failure to take into account an obviously material consideration (see the *CREEDNZ* line of authority). He pointed out that the ES itself had treated Boreas as a relevant project for the purposes of assessing the environmental impact of Vanguard, not least because of co-located and shared infrastructure, notably the 60 km cable corridor from Happisburgh to Necton and the National Grid connection points there. The ES assessed the cumulative landscape and visual impacts on the basis that there was sufficient information available on Boreas to enable that exercise to be carried out. It had arrived at the conclusion that the impacts were significant.

77. Mr Moules submitted for the Defendant (and Mr Phillpot QC adopted his submissions on behalf of NVL) that in this case the Defendant did take into account the material on cumulative impacts, but, because of the limited information available on Boreas, he deferred his decision on how those impacts should be evaluated and weighed to the DCO process on Boreas.

78. The Claimant submits that that decision was irrational. The same type and amount of information was available for Boreas as for Vanguard and yet the solus effects of the latter were assessed by the Defendant in his decision. The lack of information is the sole reason given for the decision to defer, but this was not raised by the Examining Authority during the examination, nor by any participant. So, it is not possible to identify any other explanation from that process. NVL plainly did not consider that the material they had provided on cumulative impacts was inadequate so that those impacts could not be assessed in the decision on the Vanguard DCO. The shared infrastructure and co-location aspects (including combined mitigation) of the two "sister" projects made it necessary for cumulative impacts to be assessed in the decision on the Vanguard DCO. Any deficiencies in the material provided should have been identified by the Examining Authority so that additional information could be requested under regulation 17 of the 2009 Regulations or rule 17 of the 2010 Rules.

79. Mr Westaway reinforces his submission by drawing attention to the effect of the decision to grant the Vanguard DCO on decision-making on the Boreas proposal. By the time the examination of the Boreas application began, the Vanguard DCO had become part of the baseline for the assessment of the environmental impacts of Boreas. Moreover, it would be said in the examination of Boreas, that that proposal should be judged on the basis that Vanguard had already been found to be acceptable. In other words, the decision on Vanguard has a "precedent" effect. He points to a Vattenfall document in the Boreas examination entitled "Implications of the Norfolk Vanguard Decision and Hornsea Three Letter on Norfolk Boreas," where the promoter relies on the similarities of its two projects and says that the Defendant would need to give very clear reasons for departing from his decision on Vanguard. At paragraph 2.2 the promoter relies upon the "consistency" principle established in the line of authorities beginning with *North Wiltshire District Council v Secretary of State for the Environment* (1993) 65 P & CR 137. The document relies upon "principles" which are common to both Vanguard and Boreas, including the sharing of the same cable corridor and the similarity of the substation development at Necton to achieve a connection to the National Grid. Mr Westaway says that the cumulative effects of both projects upon landscape and visual receptors in the Necton area were not evaluated and weighed by the Defendant before he granted consent for the first project, which decision has a significant "precedent" effect in the determination of the Boreas DCO application.

80. Under ground 2, the Claimant relies essentially upon the same arguments and submits that the reasons given by the Examining Authority and the Defendant on the cumulative impact issue were legally inadequate. Nothing was said as to why the information provided was insufficient, so that any inadequacy could be remedied, whether in the examination of Vanguard or of Boreas. Nothing was said as to why it was thought appropriate to defer the cumulative assessment, other than the unexplained "limited information" on Boreas. This is a case where the inadequacy of the reasoning creates a substantial doubt as to whether the decision-maker has erred in law (*South Bucks District Council v Porter (No. 2)* [2004] 1 WLR 1953 at [36]).

81. Mr Moules submitted that the Defendant has complied with regulation 3(2) of the 2009 Regulations. He did take into account the environmental information on the cumulative impacts, but he decided that it was unnecessary to evaluate that material in reaching a decision on whether the application for the Vanguard DCO should be granted, because only limited information on Boreas was available at that stage and because he judged that such cumulative effects would most appropriately be considered as part of the Boreas examination (paragraphs 46-47 of skeleton). Regulation 3(2) allows a decision-maker to note the existence of certain environmental information but to decide that it need not be an input into the determination of the application. There is no obligation to take into account or weigh every piece of environmental information when reaching that decision.

82. Mr Moules sought to support those submissions by relying upon the context for the decision on the Vanguard DCO. It was important for projects such as Vanguard to be approved without delay, and that decision should not be held up to enable cumulative effects to be assessed, particularly where the solus impacts of the Vanguard proposal did not affect any designated landscape area and were judged to have "limited weight", albeit they had been categorised as "significant effects." Mr Moules submitted that a

deferral of the cumulative assessment to the Boreas examination would also enable the overall benefits of the two projects to be properly weighed in the balance against any disbenefits.

83. Mr Phillpot QC submitted that the extent of the "Rochdale envelope" and mitigation for the Boreas application would be matters for the examination of that project. By contrast the material put forward in the Vanguard application on Boreas involved the making of assumptions about that project.

84. On the issue of whether the Defendant's judgment to defer consideration of cumulative impacts was irrational, Mr Phillpot QC asked the court to compare how the assessment of those impacts would differ in the separate examinations of the two projects. It is only the subsequent Boreas examination which could result in the authorisation of any cumulative impacts arising from the two projects after having determined their acceptability. If those impacts are unacceptable Boreas would be refused. If, however, they could be made acceptable by additional mitigation, that would be dealt with by imposing a "requirement" in the DCO granted for Boreas. The circumstances of the examination of Vanguard were different. That process could not have authorised cumulative impacts arising from both projects, irrespective of whether they were judged to be acceptable or unacceptable.

85. Mr Phillpot QC laid emphasis on the fact that the Defendant found the Vanguard proposal to be acceptable, leaving only to one side the cumulative impacts on landscape and visual resources at Necton. He submitted that, if instead those cumulative impacts had been taken into account and resulted in the refusal of consent for Vanguard, that would have been nonsensical if subsequently Boreas were to be refused on other grounds. Furthermore, if the solus effects of Vanguard were judged to be acceptable, but cumulative impacts with Boreas found to be unacceptable, that could not justify restricting the "Rochdale envelope" for the Vanguard project when granting development consent.

86. Mr Moules adopted those submissions to explain why it had been considered "most appropriate" to defer consideration of cumulative impact to the Boreas examination. But both he and Mr Phillpot QC accepted that this analysis could not be treated as a set of principles of general application. Instead, the analysis is sensitive to the circumstances of each case. He accepted that no such reasoning had been set out in the ExAR or in the decision letter, but submitted that the court should draw the inference that it had been in the mind of the Examining Authority and also the decision-maker. He relied upon the findings on the national need for Vanguard, the urgency of that need, the express rejection of alternatives and the acceptability of the solus impact of Vanguard.

Discussion

Introduction

87. Many challenges concerned with EIA allege a failure to address a particular subject in the ES. It is well-established that the judgment of the decision-maker on the adequacy of an ES may only be challenged on *Wednesbury* grounds (*Friends of the Earth* [2020] UKSC 52 at [142] to [143]). In the present case there is no such dispute. The ES did deal with the subject at the heart of this challenge. Moreover, NVL did not suggest that

they had encountered any difficulties in compiling information on cumulative impacts (paragraph 23 of schedule 4 to the 2009 Regulations). It did not ask for the consideration of cumulative impacts to be deferred to the subsequent examination of the Boreas application, whether that would be the "most appropriate" course of action, or because there was a limited amount of information available on Boreas, or for any other reason. Nor did any other participant in the examination raise any such matters.

88. The court was told that the first time that the view contained in paragraph 4.5.102 of the ExAR was revealed was when that report was published along with the decision letter on 1 July 2020. Up until then, participants in the examination had no reason to think that cumulative landscape and visual impacts would not be addressed in the ExAR and the decision letter, just as other cumulative impacts were. I am in no doubt that, in terms of the legal obligation on the Secretary of State to give reasons for his decision, the evaluation of cumulative landscape and visual impacts in the Necton area resulting from the Vanguard and Boreas grid connections was one of the important, controversial issues which had to be addressed in the decision on the Vanguard DCO, applying the test in *South Bucks District Council* at [27] and [36].

89. I note that the Claimant has not argued that the process followed was unfair because what emerged as paragraph 4.5.102 of the ExAR had not been raised beforehand. On the other hand, the fact that the points made by the Examining Authority were not raised before their report was published along with the decision letter means that their reasoning cannot be explained by what took place during the examination. Neither the Defendant nor NVL suggested otherwise. The Defendant has not filed any evidence to explain (in so far as might have been admissible) how paragraph 4.5.102 of the ExAR, or indeed DL 4.46, came about.

90. A number of points are common ground between the parties. First, in his decision letter the Defendant relied upon the conclusions of the Examining Authority in paragraph 4.5.102 of the ExAR without having the benefit of any further explanation from that Authority. Second, the Defendant did not find that the cumulative impacts at Necton, which the ES had identified as significant adverse effects, were of no significance and therefore could be set to one side for that reason. This stands in stark contrast, for example, to the combined visual effects of the offshore arrays proposed for Vanguard and Boreas which were screened out of the ES because they were judged not to be significant. Third, the Defendant has accepted that the cumulative effects at Necton do need to be assessed and weighed in a decision on consenting under the PA 2008, but has deferred that evaluation entirely to the decision on the application for the Boreas DCO.

The issues

91. It is convenient to deal with grounds 1 and 2 together. They give rise to three issues which I will address in the following order: -

    (i) Did the Defendant's decision not to evaluate the cumulative impacts at Necton when determining the application for the Vanguard DCO breach the 2009 Regulations?

    (ii) In any event, was the Defendant's decision not to do so irrational?

(iii) In any event, did the Defendant fail to give legally adequate reasons in relation to this issue?

Neither the Defendant nor NVL disputed that if the Claimant should succeed on any one of these issues, the Defendant's decision to grant the Vanguard DCO was unlawful. But they submitted that in those circumstances it would be necessary for the court to consider a further issue, namely whether the quashing order sought by the Claimant should be granted or refused.

92. Mr Westaway accepted that his alternative arguments under ground 1, that the Defendant had been obliged to assess the cumulative impacts by virtue of NPS policy and s.104(3) of the PA 2008, or because they were "obviously material" added nothing to the legal merits of the Claimant's argument. This is because they each depend upon the Claimant establishing that the Defendant's decision on this aspect was irrational.

93. Before going on to address the issues, it is necessary to deal with the difference between the reasoning of the Examining Authority and the Defendant. As Mr Moules said, there were two strands to the reasoning of the Authority. First, they considered the amount of detail available to be limited. Second, they thought it would be "most appropriate" for those impacts to be considered in the Boreas examination. However, they did not give any explanation of either factor to assist the Defendant in coming to a view on whether he should accept their judgment.

94. Ultimately, however, it is the Defendant's reasoning which matters for the purposes of determining this legal challenge. The Defendant only dealt with the deferral point in DL 4.46. The court has nothing else to go on, the topic not having been discussed during the examination. The Defendant has not simply said that he agreed with the Examining Authority. Instead, he has relied upon his own formulation as expressed in DL 4.46. The Defendant merely stated that the cumulative impacts should be considered in the Boreas examination because of the limited information available on that project. The Defendant's use of the word "therefore" makes it plain that the information on Boreas is the only reason he gave as to why the evaluation of the cumulative impacts should be deferred. But like the Authority, he has not given any clue as to why he considered the information available on Boreas to be "limited".

Was there a breach of the 2009 Regulations?

95. I accept the Defendant's submission that the 2009 Regulations did not require him to weigh every single piece of "environmental information" when deciding whether or not to grant development consent. But the material on cumulative impacts at Necton was not just any piece of environmental information. NVL's position was that they amounted to significant adverse environmental impacts falling within schedule 4. The Defendant did not disagree with that view. Furthermore, this information concerned an important controversial issue during the examination which had to be addressed by the Defendant through legally adequate reasoning as part of the reasons for his decision.

96. It is necessary to consider whether a decision to defer an evaluation and weighing of such impacts may in itself amount to a breach of the 2009 Regulations, in particular regulation 3(2).

97. I return to Directive 2011/92/EU. Recital (7) states: -

> "Development consent for public and private projects which are likely to have significant effects on the environment should be granted only after an assessment of the likely significant environmental effects of those projects has been carried out. That assessment should be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the public likely to be concerned by the project in question."

98. Article 1 of the Directive provides: -

> "This directive shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment."

99. Article 2 of the Directive provides (inter alia): -

> "1. Member States shall adopt all measures necessary to ensure that before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. Those projects are defined in Article 4.
>
> 2. The environmental impact assessment may be integrated into the existing procedure for consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of this Directive. "

100. Article 3 requires the EIA to "identify, describe and assess in an appropriate manner in the light of each individual case, and in accordance with Articles 4 to 12, the direct and indirect effects of a project" on a number of features including "the landscape."

101. Article 5(1) sets out requirements linked to Annex IV for the content of an ES to be provided by a developer: -

> "In the case of projects which pursuant to Article 4, are to be made subject to an environmental impact assessment in accordance with this Article and Article 6 to 10, Member States shall adopt the necessary measures to ensure that the developer supplies in an appropriate form the information specified in Annex IV in as much as:
>
> (a) the Member States consider that the information is relevant to a given stage of the consent procedure and to the specific characteristics of a particular project or type of project and of the environmental features likely to be affected;

> (b) the Member States consider that a developer may reasonably be required to compile this information having regard, inter alia, to current knowledge and methods of assessment."

102. It will be noted that paragraphs (a) and (b) provide criteria for making a judgment in each individual case as to the extent to which the items listed in Annex IV should be provided in an ES.

103. However, Article 5(3) of the Directive sets out minimum requirements for the content of an ES: -

> "The information to be provided by the developer in accordance with paragraph 1 shall include at least:
>
> (a) a description of the project comprising information on the site, design and size of the project;
>
> (b) a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects;
>
> (c) the data required to identify and assess the main effects which the project is likely to have on the environment;
>
> (d) an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects;
>
> (e) a non-technical summary of the information referred to in points (a) to (d)."

104. That distinction between the obligatory and discretionary contents of an ES has been reflected in the definition of "environmental statement" in regulation 2(1) of the 2009 Regulations (see [19] above) and the two parts of schedule 4 to those regulations (see [20] to [21] above). The judgment as to *whether* a topic falling within part 1 of schedule 4 should be addressed in an ES is a matter for the authority responsible for deciding whether development consent should be granted. The *extent* to which the ES should contain information on any of the topics listed in either part 1 or part 2 of schedule 4 is also a matter for the judgment of that same authority. The authority has the power to require additional information to be provided by the developer (Article 6(2) of the Directive and regulation 17 of the 2009 Regulations).

105. Article 8 of Directive 2011/92/EU requires the information gathered and the results of consultation under articles 5, 6 and 7 to be taken into consideration in the development consent procedure. That is an obligation imposed on the decision-maker. That is how regulation 3(2) of the 2009 Regulations has transposed article 8 (see [17] above).

106. Article 9 of the Directive has been transposed by regulation 23 of the 2009 Regulations (see [24] above). The decision-maker is required to make available to the public a description of (inter alia) the "main measures" to mitigate "the major adverse

effects of the development". That requirement cannot be satisfied without the decision-maker evaluating those effects in his decision. This analysis aligns with the developer's obligation in Article 5(3) of the Directive and part 2 of Schedule 4 to the 2009 Regulations to include in the ES "the data required to identify and assess the main effects which the development is likely to have on the environment."

107. The parties agree that in this area of the law, Directive 2014/52/EU is substantially to the same effect as Directive 2011/92/EU. Recital (34) of the 2014 Directive does not indicate any intention to alter the law on decision-making significantly. The 2011 Directive is amended by the insertion of Article 8a. This has been transposed by regulations 21 and 30 of the 2017 Regulations. The decision-maker must (inter alia) reach a "reasoned conclusion" on "the significant effects of the project on the environment", taking into account his examination of the environmental information, and describe any measures to mitigate "likely significant adverse effects" on the environment. Those matters must be published (regulation 31). In my judgment, these parts of the 2017 Regulations simply express more clearly that which was already necessarily implicit in the 2009 Regulations. The drafting alteration from "main effects" to "significant effects" does not involve any significant alteration of the law. It only confirms that the rules on decision-making are aligned with the requirement that the process of EIA includes an assessment by the decision-maker of the likely significant effects of a project on the environment and the measures to mitigate those effects. In this way the legislation gives effect to the objective set out in recital (7) and the requirements in articles 1, 2 and 8 of Directive 2011/92/EU (see [98] to [100] and [105] above). Sullivan J (as he then was) adopted essentially the same approach in *ex parte Milne* at [104] and [113] when commenting on schedule 3 to SI 1988 No. 1189.

108. Although it is a matter of judgment for the decision-maker as to what are the environmental effects of a proposed project and whether they are significant, EIA legislation proceeds on the basis that he is required to evaluate and weigh those effects he considers to be significant (and any related mitigation) in the decision on whether to grant development consent (see e.g. *Commission v Ireland* [2011] Env. L.R. 478). It follows that if the decision-maker considers that a particular effect is not significant, he is not obliged to weigh that matter in his decision on whether or not development consent should be granted. Whether he need explicitly state that conclusion or give reasons for it will depend on the circumstances. For example, the matter may have been treated in the ES and by the parties as a significant environmental effect and become an important controversial issue in the examination. Subject to complying with any obligation to give reasons that may arise, a decision-maker's conclusion that an effect is not significant may only be challenged in the courts on *Wednesbury* grounds.

109. The next issue is whether consideration of an environmental effect can be deferred to a subsequent consenting process. If, for example, the decision-maker has judged that a particular environmental effect is not significant, but further information and a subsequent approval is required, a decision to defer consideration and control of that matter, for example, under a condition imposed on a planning permission, would not breach EIA legislation (see *R v Rochdale Metropolitan Borough Council ex parte Milne* [2001] Env. L.R. 406).

110. But the real question in the present case is whether the evaluation of an environmental effect can be deferred if the decision-maker treats the effect as being

significant, or does not disagree with the "environmental information" before him that it is significant? A range, or spectrum, of situations may arise, which I will not attempt to describe exhaustively.

111. In some cases, the decision-maker may be dealing with the environmental implications of a single project. In *R v Cornwall County Council ex parte Hardy* [2001] Env. L.R. 473 the court held that the local planning authority had not been entitled to grant planning permission subject to a condition which deferred a requirement for surveys to be carried out to identify whether a European species would be adversely affected by the development. The authority could only have decided that it was necessary for the surveys to be carried out and additional data obtained because they had thought that the species might be present and harmed. It was possible that that might turn out to be the case and so, in granting planning permission, the authority could not rationally have concluded that there would be no significant adverse effects in the absence of that data. Consequently, they were not entitled to defer that decision ([61] to [62]).

112. In other cases, it may be necessary to decide whether associated works form part of a single project. Once that decision is made, it may be obvious that consideration of the environmental effects of the associated works cannot be deferred. In *R (Brown) v Carlisle City Council* [2011] Env. L.R. 71 the Court of Appeal held that where the acceptability in planning terms of a proposal for a freight distribution centre was contingent upon the provision of improvements to the runway and terminal at Carlisle Airport (which was reflected in a planning obligation under s. 106 of the Town and Country Planning Act 1990), the airport improvements formed part of the overall project comprising the distribution centre. Consequently, the EIA was required to assess the cumulative environmental effects of that overall project and not just the distribution centre. That was the only rational conclusion ([25]). The fact that the airport improvements were to be dealt with in a separate planning application was nothing to the point. As Lindblom LJ explained in *Preston New Road Action Group v Secretary of State for Communities and Local Government* [2018] Env. L.R. 440, the airport works formed an integral part of the overall project which included the distribution centre. The environmental assessment of the airport works could not be deferred to a subsequent consenting procedure because they were intrinsic to the decision as to whether any part of the project should go ahead.

113. In some cases where the decision-maker is dealing with a single project, the issue of whether the evaluation of significant environmental effects may be deferred has not been so straightforward. For example, a project for the laying out of a residential or business estate may evolve over a number of years in a series of phases, led by changing market demand. At the outset planning permission may be sought in outline. In such cases there is a risk that if outline planning permission is granted for a proposal lacking in detail, significant adverse environmental impacts may only be identified at the reserved matters stage when the authority is powerless to go back on the principle of the development already approved and so cannot prevent it from taking place. A decision to defer the evaluation of a significant adverse effect and any mitigation thereof to a later stage may therefore be unlawful *(R v Rochdale Metropolitan Borough Council ex parte Tew* [2000] Env. L.R. 1, 28-31).

114. In order to comply with the principle identified in *Commission v Ireland*, and illustrated by *Tew* and *Hardy*, consideration of the details of a project defined in an

outline consent may be deferred to a subsequent process of approval, provided that (1) the likely significant effects of that project are evaluated at the outset by adequate environmental information encompassing (a) the parameters within which the proposed development would be constructed and operated (a "Rochdale envelope"), and (b) the flexibility to be allowed by that consent and (2) the ambit of the consent granted is defined by those parameters (see *ex parte Milne* at [90] and [93] to [95]). Although in *Milne* the local planning authority had deferred a decision on some matters of detail, it had not deferred a decision on any matter which was likely to have a significant effect (see Sullivan J at [126]), a test upon which the Court of Appeal lay emphasis when refusing permission to appeal (C/2000/2851 on 21 December 2000 at [38]). Those matters which were likely to have such an effect had been adequately evaluated at the outline stage.

115. Sullivan J also held in *ex parte Milne* that EIA legislation plainly envisages that the decision-maker on an application for development consent will consider the adequacy of the environmental information, including the ES. He held that what became regulation 3(2) of the 2009 Regulations imposes an obligation on the decision-maker to have regard to a "particularly material consideration", namely the "environmental information". Accordingly, if the decision-maker considers that the information about significant environmental effects is too uncertain or is inadequate, he can either require more detail or refuse consent ([94] to [95] and [106] to [111]). I would simply add that the issue of whether such information is truly inadequate in a particular case may be affected by the definition of "environmental statement", which has regard to the information which the applicant can "reasonably be required to compile" (regulation 2(1) of the 2009 Regulations - see [19] above).

116. The principle underlying *Tew, Milne* and *Hardy* can also be seen in *R (Larkfleet Limited) v South Kesteven District Council* [2016] Env. L.R. 76 when dealing with significant cumulative impacts. There, the Court of Appeal held that the local planning authority had been entitled to grant planning permission for a link road on the basis that it did not form part of a single project comprising an urban extension development. The court held:-

(i) What is in substance and reality a single project cannot be "salami-sliced" into smaller projects which fall below the relevant threshold so as to avoid EIA scrutiny ([35]);

(ii) But the mere fact that two sets of proposed works may have a cumulative effect on the environment does not make them a single project for the purposes of EIA. They may instead constitute two projects the cumulative effects of which must be assessed ([36]);

(iii) Because the scrutiny of the cumulative effects of two projects may involve less information than if they had been treated as one (e.g. where one project is brought forward before another), a planning authority should be astute to see that the developer has not sliced up a single project in order to make it easier to obtain planning permission for the first project and to get a foot in the door for the second ([37]);

(iv) Where two or more linked sets of works are properly regarded as separate projects, the objective of environmental protection is sufficiently secured by

consideration of their cumulative effects in the EIA scrutiny of the first project, so far as that is reasonably possible, combined with subsequent EIA scrutiny of those impacts for the second and any subsequent projects ([38]);

(v) The ES for the first project should contain appropriate data on likely significant cumulative impacts arising from the first and second projects to the level which an applicant could reasonably be required to provide, having regard to current knowledge and methods of assessment ([29]-[30], [34] and [56]).

117. However, in some cases these principles may allow a decision-maker properly to defer the assessment of cumulative impacts arising from the subsequent development of a separate site not forming part of the same project. In *R (Littlewood) v Bassetlaw District Council* [2009] Env. L.R. 407 the court held that it had not been irrational for the local authority to grant consent for a freestanding project, without assessing cumulative impacts arising from future development of the remaining part of the site, where that development was inchoate, no proposals had been formulated and there was not any, or any adequate, information available on which a cumulative assessment could have been based (pp. 413-5 in particular [32]).

118. I agree with Mr Westaway that the circumstances of the present case are clearly distinguishable from *Littlewood.* Here, the two projects are closely linked, site selection was based on a strategy of co-location and the second project has followed on from the first after a relatively short interval. They share a considerable amount of infrastructure, they have a common location for connection to the National Grid at Necton (the cumulative impacts of which are required to be evaluated) and the DCO for the first project authorises enabling works for the second. In the present case, proposals for the second project have been formulated and the promoter of the first project has put forward what it considered to be sufficient information on the second to enable cumulative impacts to be evaluated in the DCO decision on the first. This information was before the Defendant. I reject the attempt by NVL to draw any analogy with the circumstances in *Littlewood* (at [32]) or with those in *Preston New Road* (at [75]). In any event, the decision-maker in the present case, unsurprisingly, did not rely upon any reasoning of that kind in his decision letter (nor did the Examining Authority in the ExAR).

119. Instead, this case bears many similarities with the circumstances in *Larkfleet.* If anything, the ability to assess cumulative impacts from the two projects in the decision on the first project was much more straightforward here and the legal requirement to make an evaluation of those impacts decidedly stronger. First, the promoter carried out an assessment identifying significant cumulative effects at Necton and it is common ground that, for this purpose, essentially the same information was provided on the two projects (see e.g. [52] to [53] above). Second, there were strong links between the two projects which were directly relevant to this subject (see [118] above).

120. The effect of Directive 2011/92/EU, the 2009 Regulations and the case law is that, as a matter of general principle, a decision-maker may not grant a development consent without, firstly, being satisfied that he has sufficient information to enable him to evaluate and weigh the likely significant environmental effects of the proposal (having regard to any constraints on what an applicant could reasonably be required to provide) and secondly, making that evaluation. These decisions are matters of judgment for the decision-maker, subject to review on *Wednesbury* grounds. Properly

understood, the decision in *Littlewood* was no more than an application of this principle.

121. In the Vanguard ES NVL assessed the cumulative landscape and visual impacts as being "significant". Neither the Examining Authority nor the Defendant disagreed with that judgment. Accordingly, this was not a case where deferral of the consideration of those impacts to a subsequent consenting procedure could have been lawful on the basis that the decision-maker considered these impacts to be insignificant (see *ex parte Milne*). The conclusion reached by the Examining Authority and the Defendant on the solus impacts of Vanguard cannot be used to support any such conclusion. Neither Mr. Moules nor Mr. Phillpot QC suggested otherwise. Thus, the court must proceed on the basis that the Defendant considered the cumulative impacts to be significant effects which still need to be evaluated in a decision on whether or not to grant development consent, albeit not in the decision granting the Vanguard DCO.

122. In the circumstances of this case, I am in no doubt that the Defendant did act in breach of the 2009 Regulations by failing to evaluate the information before him on the cumulative impacts of the Vanguard and Boreas substation development, which had been assessed by NVL as likely to be significant adverse environmental effects. The Defendant unlawfully deferred his evaluation of those effects simply because he considered the information on the development for connecting Boreas to the National Grid was "limited". The Defendant did not go so far as to conclude that an evaluation of cumulative impacts could not be made on the information available, or that it was "inadequate" for that purpose. He did not give any properly reasoned conclusion on that aspect. I would add that because he did not address those matters, the Defendant also failed to consider requiring NVL to provide any details he considered to be lacking, or whether NVL could not reasonably be required to provide them under the 2009 Regulations as part of the ES for Vanguard. It follows the Defendant could not have lawfully decided not to evaluate the cumulative impacts at Necton in the decision he took on the application for the Vanguard DCO. For these reasons, as well as those given previously, the present circumstances are wholly unlike those in *Littlewood.*

123. For the reasons set out above, ground 1 must be upheld.

124. I have referred to the Defendant's submissions on the importance of avoiding delay to an urgently needed project of national importance. For completeness, I should add that the court was not shown any provision which would enable that factor to overcome any requirement under regulation 17 to obtain additional information, where a decision-maker considers that the details in the ES are inadequate for assessing likely significant adverse environmental effects. In any event, the Defendant's decision letter did not purport to approach the matter on that basis.

125. It is also necessary for the court to deal with irrationality and the legal adequacy of the reasoning in the decision letter. All of these issues are closely inter-related.

Rationality

126. If, contrary to my view, a decision-maker may, in the exercise of his judgment, depart from the general principle set out in [120] above, by deferring the evaluation of a significant adverse environment effect to a subsequent consenting procedure, he may only do so on grounds which:-

(i) are rational in the circumstances of the case; and

(ii) satisfy the objectives and requirements of EIA legislation.

127. Irrationality is not confined to decisions which simply defy comprehension, or which are beyond the range of reasonable responses to a given set of information. It also embraces decisions which proceed by flawed logic *(R v North and East Devon Health Authority ex parte Coughlan* [2001] QB 213 at [65]).

128. There is no dispute that Vanguard and Boreas are separate projects. They did not fall to be treated as a single project for the purposes of EIA legislation. This is not a case where, for example, the developer has sought to define the development for which he seeks permission so as to avoid EIA scrutiny. I also accept the submission of the Defendant and NVL that the proposals for Vanguard and Boreas have been made on the basis that the implementation of the Vanguard DCO is not dependent upon the approval or implementation of a DCO for Boreas. Accordingly, the present case should be distinguished from *Brown v Carlisle City Council.* But none of these points address the true circumstances of this case (see e.g. [118] to [119] above) and so do not assist the Defendant and NVL in resisting this challenge to the DCO.

129. NVL included in the ES an assessment of cumulative landscape and visual impacts at Necton. They considered the information available on the two projects to be adequate for this purpose and they concluded that there were likely to be significant environmental impacts. No complaint has been made about the adequacy of the ES or of the environmental information subsequently gathered. The legal challenge in this case has simply arisen because, first the Examining Authority, and then the Defendant, decided to defer *any* evaluation of those cumulative impacts to the decision on the Boreas project. They did so without the point being discussed publicly during the examination process. They did so on the basis of reasoning which, even on a generous view, could only be described as cursory, despite the importance of the decision being taken and the substantial concerns which had been raised about the selection of Necton for co-located grid connections. A departure from the general principle set out in [120] required proper justification by the Defendant directed to the environmental information and the issues before him, *a fortiori* given the somewhat unusual circumstances of this case as described above.

130. The ES for Boreas was submitted in June 2019. Vattenfall's report on the interrelationship between the two projects explained that the Boreas ES considered two "scenarios" according to whether Vanguard either would or would not receive consent. In the former scenario, Boreas would rely upon the authorisation by the Vanguard DCO of the cable corridor and provisions at Necton (including land acquisition). In the latter scenario, the Boreas DCO was promoted on the basis that it would authorise all the works needed for that project. However, the legality of the decision letter dealing with the Vanguard DCO must be assessed in the context that it authorised shared infrastructure for both projects and, as Mr. Westaway demonstrated (and was not challenged), compulsory acquisition of land at Necton needed solely for the Boreas project. In these circumstances, the general principles in *Larkfleet* for linked projects are applicable. Absent any rational justification, cumulative impacts of both projects had to be evaluated by the decision-maker when considering whether to grant a DCO in each case, even accepting that in some cases less information about the second project may be available when deciding whether to approve the first.

131. It is inescapable that the only reason given by the Defendant for deferring *all* consideration of cumulative landscape and visual impacts to the Boreas examination was that the information available on Boreas was "limited". I am in no doubt that this bare statement was, in the circumstances of this case, illogical or irrational. It was common ground in the hearing before this court that the nature and level of information on the two projects for the purposes of assessing landscape and visual impacts of the substation development at Necton was essentially the same. Plainly, the Defendant must have proceeded on the basis that the information on the solus impacts of the Vanguard project was sufficient for him to be able to evaluate and weigh that matter. No basis has been advanced in these proceedings by either the Defendant or NVL for either (a) treating the adequacy of the environmental information on Boreas differently for an evaluation of the cumulative landscape and visual impacts or (b) not making *any* such evaluation *at all* in the Vanguard decision. The Defendant's decision is flawed by an obvious internal inconsistency. The decision was all the more perverse because, in accordance with *ex parte Milne*, NVL's approach employed a "Rochdale envelope" in order to cater for the absence of more detailed information, for the evaluation of (a) the Vanguard solus impacts and (b) the cumulative impacts of both projects in the Necton area. The decision was also irrational in other respects.

132. There were a number of features which plainly required the cumulative impacts of the substations for both projects to be assessed as part of the Vanguard decision and not simply left over to the Boreas decision. The two projects had been based on a strategy of co-location. Necton and alternative locations for the essential connection to the National Grid were assessed for their ability to accommodate the substations and infrastructure needed for both Vanguard and Boreas. That was important, if not critical, to the decision to select Necton for the grid connection and to include in the Vanguard DCO authority for the provision of a 60 km cable corridor between Happisburgh and Necton to serve both projects and compulsory acquisition of some land at Necton for Boreas (which would need to satisfy a "compelling public interest" test). Consequently, consistency required the cumulative impacts of the substation development at Necton to be evaluated in the Vanguard decision. In the circumstances of this case, it was irrational for the Defendant to defer that evaluation.

133. If the cumulative impacts in the Necton area had been evaluated when considering the application for the Vanguard DCO, one possible outcome is that they would have been found to be unacceptable. That could have led the Defendant to decide that Necton was not an appropriate location to provide a grid connection for both projects, as intended by the developer, which would also call into question the appropriateness of the co-located cable corridor leading to that connection point. Even assuming that the Defendant would still have decided all the other issues in favour of the Vanguard proposal, it would have been permissible for him to refuse to grant the DCO on the basis that the location of a grid connection at Necton to serve both Vanguard and Boreas (and the related cable corridor) needed to be reconsidered by the developer. Plainly, that ought to be determined before granting consent for the first project. In that way the promoter could reapply or modify or even abandon its strategic co-locational approach before proceeding with either project. Here, the decision to leave that issue over to consideration of the DCO for the second project prevented that course from being taken.

134. Accordingly, there is nothing "nonsensical" in requiring cumulative impacts at Necton to have been evaluated in the Vanguard decision, even if that resulted in the refusal of a DCO for that project (see NVL's submission at [85] above). Any such outcome would simply be the corollary of NVL having chosen to rely upon a co-locational strategy and the common infrastructure involved. Such a choice may have advantages and disadvantages for the promoter, depending upon which of the two projects it decides to promote first and ultimately the Defendant's assessment of their respective merits. Even if DCO consent for a second project were to be refused on other grounds, that would not render absurd the rejection of a co-location strategy advanced in a DCO application for a first project on the grounds of cumulative impact. At the very least, it would remain open to the promoter to submit a further DCO application for that first project. Unlike the situation discussed in [133] above, that outcome would not be prejudiced or pre-empted. Given that NVL itself assessed cumulative impacts in the Vanguard ES, the submission it now makes against those impacts forming a basis for refusal of the Vanguard application which the ES accompanied is, to say the least, surprising.

135. The Defendant has decided that the cumulative impacts at Necton should be assessed solely in the Boreas examination and decision and not also in the Vanguard process, despite (1) the availability of information to enable him to make an evaluation of those impacts and (2) the Court of Appeal's judgment in *Larkfleet.* The Defendant's approach has had the effect, absent consideration of those cumulative effects, of making it easier to obtain consent for Vanguard, and providing a "foot in the door" making it easier to obtain consent for Boreas. Although there is no evidence that NVL sought those outcomes, the Vanguard DCO decision has had a "precedent effect" for decision-making in relation to Boreas upon which, understandably, NVL has relied heavily in the Boreas examination. In view of the familiar *North Wiltshire* line of authority on consistency in decision-making, these were highly likely, if not inevitable, consequences of the Defendant's decision to approve the DCO for Vanguard. These were obviously material considerations which went directly to the rationality of the decision.

136. These considerations underscore the absence of any rational justification in the Vanguard decision letter for refusing to make *any* evaluation of the cumulative impact issue at that stage. The single, perfunctory reason given for deferral, the limited amount of information available on Boreas, could not, in the circumstances of this case, justify by itself leaving the issue entirely to the second examination, particularly where the information was in front of the Defendant, NVL considered it to be adequate and no one suggested the contrary.

137. In any event, the Examining Authority and the Defendant had powers to obtain further information. Indeed, if the Authority had considered the application of regulation 17 of the 2009 Regulations and decided that additional material should have been included in the ES, they would have been obliged to require that information to be provided and suspend the examination in the meantime.

138. Even putting that regulation to one side, and looking at the matter more broadly in the context of rule 17 of the 2010 Rules, the Defendant's decision was unlawful. A bare, unexplained statement that the information on Boreas was "limited", without any attention being given to an obvious solution, namely to ask for more material, or at the very least to consider the pros and cons of taking that step, could not rationally justify

departing from the requirement that the significant adverse cumulative impacts at Necton should be evaluated and weighed before deciding whether to grant a DCO for the first of the two linked projects.

139. The submissions by Mr. Moules and Mr. Phillpot QC in [82] to [83] above do not lend any support to their contention that the Defendant's decision to defer the cumulative impact issue was rational. They suffer from a number of flaws. First, there is no evidence that the points advanced by counsel were in the minds of the Examining Authority or of the Defendant, or that any of these matters had been raised during the examination and, therefore might have been taken into account by the decision-maker even tacitly. With respect, these submissions amounted to no more than an *ex post facto* justification of the decision, or, to put it more directly, an impermissible attempt to rewrite the ExAR and the decision letter. Second, even if those matters had been taken into account by the decision-maker, they do not overcome the points set out above as to why the decision to defer in this case was irrational. For example, it is common ground that the information on both projects was of the same nature and level of detail and so it was illogical, in any event, to treat the information on Boreas as inadequate when the decision-maker was content to rely upon that supplied on Vanguard.

140. The analysis by Mr Phillpot QC and Mr Moules of the differences between an assessment of cumulative impacts in the Vanguard examination as opposed to the Boreas examination (see [84] to [86] above) proves too much. The same approach could be applied to the consideration of the cumulative visual impacts of any two projects where the consenting of one is determined before the other. In other words, the analysis would amount to a set of legal principles. However, Mr. Phillpot QC and Mr Moules rightly eschewed that outcome. It would conflict with the 2009 Regulations and established case law (e.g. *Larkfleet*). But, as they accepted, the only way of avoiding that problem is to treat the points they made as depending upon the application of judgment to the circumstances of each case. But, of course, that judgment has to be made by the decision-maker and there is no evidence whatsoever, whether in the decision letter or elsewhere, that the Defendant had any of these considerations in mind, let alone that he decided how much weight to give to any of them. In any event, I am not persuaded that the analysis by counsel overcomes the various aspects of irrationality in the decision to defer as explained above.

141. For these additional reasons, ground 1 must be upheld.

Adequacy of reasons

142. From the discussion of the issues arising under ground 1, it is apparent that the reasons given for the decision to defer evaluation of cumulative impacts to the Boreas examination were legally inadequate. Having regard to the various matters discussed under ground 1 above, there must be, at the very least, a substantial doubt as to whether the decision was tainted by an error of public law, namely a breach of the 2009 Regulations and/or irrationality. For that reason alone, ground 2 must be upheld.

143. Furthermore, even if it be assumed that it was legally permissible to defer the evaluation of the cumulative impacts at Necton to the examination of the Boreas DCO application, any such decision had to be adequately reasoned. The bare statement in this case that the information on Boreas was "limited" did not come anywhere near

discharging that requirement, particularly as the Boreas information did not differ materially from that available on Vanguard and no party had raised this suggestion during the examination. There was no explanation as to why an evaluation could not have been made by the Defendant in accordance with regulation 3(2) of the 2009 Regulations.

144. Furthermore, the decision letter gave no indication as to what was meant by "limited information" so that the issue could be addressed properly in the Boreas examination. As Mr. Moules rightly accepted, if the Vanguard application for a DCO had been refused because information for assessing cumulative impacts at Necton was thought to be "limited", without more, NVL would have been entitled to have that decision quashed. There is no reason why that flaw should be treated any differently by the court when the party prejudiced by the lack of reasons is an objector to the proposal (see e.g. *South Bucks District Council* at 30-32). None has been suggested. The objector has no real idea as to why the EIA process has not been completed in accordance with the 2009 Regulations. The Claimant and other objectors, especially those concerned about the cumulative impacts of substation development at Necton, cannot be adequately assured that the decision on deferral was taken on relevant and material grounds (see Lord Bridge in *Save Britain's Heritage v Number 1 Poultry Limited* [1991] 1 WLR 153, 170G).

145. For all these reasons, ground 2 must also be upheld.

Whether relief should be granted or refused

146. The Claimant is entitled to an order quashing the decision to grant the DCO unless there is any proper legal basis for the court to withhold that relief. The Defendant and NVL rely upon s.31(2A) of the Senior Courts Act 1981: -

> "The High Court—
>
> (a) must refuse to grant relief on an application for judicial review, and
>
> (b) may not make an award under subsection (4) on such an application,
>
> if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred."

147. Where a decision is flawed on a point of EU law, the bar for the withholding of relief is set higher than under s.31(2A) (see e.g. *R (Champion) v North Norfolk District Council* [2015] 1 WLR 3710 at [57] to [58]). Two recent cases have raised the issue whether section 31(2A) is overridden or disapplied by the EU legal test where the latter is applicable, without finding it necessary to decide the point *(R (XSWFX) v London Borough of Ealing* [2020] EWHC 1485 (Admin) and *Gathercole v Suffolk Country Council* [2020] EWCA Civ 1179).

148. I am grateful to Mr Moules for producing a very helpful note on these issues and the implications of the European Union (Withdrawal) Act 2018 and the European

Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 (SI 2020 No. 1525). Counsel for the Claimant and for NVL agreed with the note. In a nutshell, their agreed position is that the High Court is bound by EU retained case law to apply the more exacting EU law test where a challenge succeeds on an EU point of law.

149. Here the Claimant has succeeded in establishing a breach of the 2009 Regulations, as well as a domestic error of public law (irrationality) and a breach of the duty to give reasons (which straddles both EU and domestic law, the 2009 Regulations and the PA 2008).

150. Because I have reached the firm conclusion that, applying the test in s.31(2A) of the Senior Courts Act 1981, there is no justification for withholding the quashing order the Claimant seeks, the same would follow if I were to apply the EU law test.

151. The central issue under s. 31(2A) is whether, if the error identified by the court had not occurred, it is highly likely that the decision on whether or not to grant the DCO would not have been substantially different; in other words, the DCO would still have been granted. The arguments for the Defendant and NVL proceeded on the basis that the court should consider what would be "highly likely" to have happened if, in his decision on the Vanguard DCO, the Defendant had evaluated cumulative impacts from the Necton infrastructure for both projects.

152. The Court of Appeal has laid down principles for the application of s.31(2A) in a number of cases, including *R (Williams) v Powys County Council* [2018] 1WLR 439; *R (Goring-on-Thames Parish Council) v South Oxfordshire District Council* [2018] 1 WLR 5161; and *Gathercole.* The issue here involves matters of fact and planning judgment, and so the court should be very careful to avoid trespassing into the Defendant's domain as the decision-maker, sometimes referred to as "forbidden territory" (see e.g. *R (Smith) v North Eastern Derbyshire PCT* [2006] 1 WLR 3315 at [10]). Instead, the court must make its own objective assessment of the decision-making process which took place. In this case it was common ground that the Court should consider whether the Defendant's decision would still have been the same by reference to untainted parts of the Defendant's decision (as in *Goodman Logistics Developments (UK) Limited v Secretary of State for Communities and Local Government* [2017] J.P.L. 1115).

153. Although the test in s.31(2A) is less strict than that which applies in the case of statutory reviews (see *Simplex GE (Holdings) Limited v Secretary of State for the Environment* [2017] PTSR 1041), it nevertheless still sets a high threshold. In *R (Plan B Earth) v Secretary of State for Transport* [2020] PTSR 1446 the Court of Appeal held at [273]: -

> "It would not be appropriate to give any exhaustive guidance on how these provisions should be applied. Much will depend on particular facts of the case before the court. Nevertheless, it seems to us that the court should still bear in mind that Parliament has not altered the fundamental relationship between the courts and the executive. In particular, courts should still be cautious about straying, even subconsciously, into the forbidden territory of assessing the merits of a public

> decision under challenge by way of judicial review. If there has been an error of law, for example in the approach the executive has taken to its decision-making progress, it will often be difficult or impossible for a court to conclude that it is "highly likely" that the outcome would not have been "substantially different" if the executive had gone about the decision-making process in accordance with the law. Courts should also not lose sight of their fundamental function, which is to maintain the rule of law. Furthermore. although there is undoubtedly a difference between the old *Simplex* test and the new statutory test, "the threshold remains a high one" (see the judgment of Sales LJ as he then was, in *R (Public and Commercial Services Union) v Minister for the Cabinet Office* [2018] ICR 269, para 89)."

154. Both the Defendant and NVL submitted that the decision was taken to grant the DCO for Vanguard after taking into account all material considerations, other than cumulative impacts at Necton, and after striking the balance in s.104(7) of the PA 2008. Accordingly, the question is whether if those cumulative impacts had been taken into account, the court is satisfied that it is highly likely that the Defendant would still have granted the DCO.

155. In support of their contention that the answer to that question is yes, the Defendant and NVL emphasised a number of conclusions in the decision letter, including the strength and urgency of the need for the development as set out in the NPSs, the benefits which would flow from the development, the rejection of alternatives, and the assessment that the solus impacts of the Vanguard substations on landscape and visual receptors would be localised (i.e. within a 1.2m radius) and attracted only limited weight.

156. However, the consequence of the legal errors made by the Defendant is that the court does not have any notion as to what the evaluation of cumulative impacts by the Defendant would have been if he had considered the matter. The court does not even have an idea as to how the Examining Authority evaluated the cumulative impacts, because they too decided not to do so. It would be impermissible for the court to make findings on that issue for itself. To do that would involve entering forbidden territory.

157. So instead, the court is being asked to deduce from the Defendant's conclusions on the solus impacts of the Vanguard development at Necton and the way in which the overall balance was struck that it is highly likely that the outcome would have been the same if the cumulative impacts had been evaluated as well.

158. In my judgment, there is a fundamental flaw in the argument relying upon s.31(2A) which cannot be overcome. It flies in the face of the conclusion which the Defendant actually reached, namely that he would not assess cumulative impacts at Necton because the information on Boreas was "limited". This criticism by the Defendant makes it impossible to deduce what his conclusion would have been if he had evaluated those impacts. But even if that point is put to one side, there are other flaws.

159. First, I note that when the Defendant struck the overall balance in DL 7.4, he said that "on balance" the benefits of the Vanguard development outweighed its adverse impacts, looking at the proposal as a whole. No indication was given as to how far those findings tilted the balance in favour of granting the DCO, not even in broad terms.

160. More importantly, the Defendant and NVL are inviting the court effectively to infer that because the ES assessed the cumulative impacts at Necton as falling within a radius of 1.2 km from the proposed substation, that impact would have been treated in the decision as "localised" and would therefore have attracted only "limited weight", just as the Examining Authority and the Defendant had evaluated the solus impacts of the Vanguard substations.

161. However attractively these submissions were presented, they cannot disguise the reality that the court is being asked to take on an inappropriate fact-finding role to supply conclusions which, unlawfully, are missing from the decision letter. This would conflict with the separation of powers between the courts and the executive, the "fundamental relationship" referred to in *Plan B Earth.*

162. This is illustrated by Mr. Westaway's submission, which I endorse, that if more development is concentrated within the 1.2 km radius (which itself is only an assessment tool), it does not follow that any so-called "localised effect" would attract only "limited weight". That argument could be repeated if the additional development within that area was substantially greater than even the doubling of the Vanguard substations which the Boreas project would entail. That would be nonsensical. Instead, the evaluation of the cumulative impacts is a matter for proper fact-finding by the person responsible for taking the decision on the DCO, and not something capable of being deduced by a judge from the decision letter in this case.

163. The addition of further substation development is to some extent a matter of degree, but it also involves other considerations, such as the effect of the nature and scale of the development on the character of the rural area, including the village of Necton. In part, this comes back to the straightforward points made by Breckland Council in its Local Impact Report (which the Defendant was obliged to take into account under s.104(2) of the PA 2008) that the scale of the Vanguard and Boreas substation developments would be disproportionate in relation to the village of Necton and this rural area. These were important concerns for members of the public objecting to the Vanguard scheme, which they were entitled to have evaluated by the Defendant as the decision-maker responsible, before he decided whether or not to grant the DCO for that project.

Conclusions

164. For the above reasons I uphold grounds 1 and 2 of the challenge. There is no justification for the court to withhold the relief sought by the Claimant and so the Defendant's decision letter dated 1 July 2020 to grant a development consent order for the Norfolk Vanguard Offshore Wind Farm together with SI 2020 No. 706 must be quashed.

165. The court's order is being made at a time when the application for a DCO in respect of Norfolk Boreas remains to be determined. The Defendant will need to give

careful consideration as to how the evaluation of cumulative impacts relating to development at Necton for both projects should be approached in each decision and whether, and if so, to what extent, the examination of the Vanguard project needs to be re-opened. The court was not asked during the hearing to express its opinion on those matters.

Addendum: the Court's order

166. The Claimant has submitted that the court's order should contain specific directions on how the implications of this judgment should be handled procedurally in both the Vanguard and Boreas DCO applications. The Defendant and VNL oppose that suggestion. I conclude that the court's order should not include any formal directions of that kind. I will explain my reasons in relation to the submissions which have been made.

167. First, the Boreas application has not yet been determined and is not currently the subject of any proceedings in this court. Second, the Defendant states through counsel that, in accordance with well-established convention, he can be expected to comply with the terms of this judgment without the need for any mandatory order. That is an important consideration. Third, there may be more than one way in which the defendant can properly give effect to the law stated in this judgment, and any other relevant legal principles or requirements, and so it would be inappropriate now for the court to prescribe how such matters should be handled.

168. The Defendant and NVL also rely upon rule 20 of the 2010 Rules which provides:-

> "Where a decision of the Secretary of State in respect of an application is quashed in proceedings before any court, the Secretary of State—
>
> (a) shall send to all interested parties a written statement of the matters with respect to which further representations in writing are invited for the purposes of the Secretary of State's further consideration of the application;
>
> (b) shall give all interested parties the opportunity of making representations in writing to the Secretary of State in respect of those matters."

169. The Defendant submits that "unusually, and unlike the situation in respect of "ordinary" planning applications, Parliament has addressed its mind to the redetermination of DCO applications and prescribed a procedure". It is submitted that rule 20 provides a complete statement of the steps required for a fair redetermination of the application.

170. In deciding not to grant the additional relief sought by the Claimant, it should be clearly understood that I do not accept these additional submissions.

171. First, it has been well-established for many years that procedural rules such as the 2010 Rules are generally *not* exhaustive of the requirements of procedural fairness or

other public law requirements (see e.g. *Lake District Special Planning Board v Secretary of State for the Environment* 1st January 1975 and noted at [1975] JPL 220; *Bank Mellat v HM Treasury (No. 2*) [2014] AC 700 at [35]; *Hopkins Developments v Secretary of State for Communities and Local Government* [2014] PTSR 1145 at [62]; De Smith's Judicial review (8th edition) at paras. 7-012 to 7-016).

172. Rule 20 imposes *minimum* procedural requirements. The language of rule 20 should not be misread as laying down an exclusionary rule in relation to any additional steps that might be required in order to satisfy the duty to act fairly in a particular case. Furthermore, the court has not been shown any statutory provision indicating that Parliament intended the 2010 Rules to be an exhaustive code which excludes, or is incompatible with, additional requirements arising from that duty.

173. Second, the 2010 Rules are not unusual. Rules of this kind have existed for some time. They deal with *some* of the consequences of the quashing of decisions in the planning sphere. For example, the Town and Country Planning (Inquiries Procedure) (England) Rules 2000 (SI 2000 No. 1624) applies to certain planning appeals and called-in planning applications. I note that rule 19 expressly provides for the re-opening of a public inquiry as well as for written representations. However, it cannot be inferred that, simply because the 2010 Rules only mention the making of written representations, the re-opening of an examination is excluded where any quashing order is made under s. 118 of the PA 2008. The requirements of natural justice, which are often fact-sensitive, may require additional procedural steps to be taken beyond those contained in such rules.

174. The procedural consequences of a quashing order will normally depend upon the nature of the legal error or errors which have led to it being made. It is not too difficult to think of a fundamental error affecting the application process from the outset, which would therefore require the matter to be rewound to the beginning, notwithstanding rule 20 of the 2010 Rules.

175. In view of the submissions which have been made it is necessary to refer here to some of the issues arising from this judgment which need to be addressed. There may be others which the parties would wish to raise.

176. First, part of the problem has been the failure of both the Examining Authority and the Defendant to explain in what respects the information on Boreas was thought to be "limited", so that the parties involved in either examination process could address that point. That calls for an explanation from the Defendant, including any implications for the operation of regulation 17 of the 2009 Regulations, before any representations could sensibly be made by interested parties on matters of either procedure or substance.

177. Second, there are procedural implications arising from the failure of both the Examining Authority and the Defendant to evaluate the cumulative impacts in the Necton area. Likewise, the obviously material considerations referred to in [132] to [136] above, were not addressed by either the Authority or the Defendant. Consequently, the findings and the recommendation in the report which the Authority was required to make under s. 74 of PA 2008 (and rule 19 of the 2010 Rules), and which the Defendant is required to take into account, have not been based upon those factors.

178. Furthermore, the points in [132] to [136] above, which go to the relationship between the two projects, may have implications for the timing of the decisions on both projects.

179. In these circumstances, it is very doubtful whether the Defendant could properly proceed to re-determine the Vanguard application, or to determine the Boreas application, without at least giving a reasonable opportunity for representations to be made by interested parties on the implications of this judgment for the procedures now to be followed in each application, considering those representations, and then deciding and explaining what course will be followed.

180. Paragraph 11c of NVL's submissions relies upon "the importance in the public interest of determining applications for nationally significant infrastructure projects such as this without undue delay" as a factor influencing the timing of the Defendant's decision. That does indeed reflect one of the purposes of the PA 2008 and the procedural timetables it contains (see also the case law cited in [9] above). But that consideration does not override the need for compliance with EIA legislation and with principles of public law and procedural fairness. It is most unfortunate that there has been a failure to grapple with an important issue in the Vanguard decision (and before the Boreas decision) and that this has resulted in delay to the determination of an important application. But that only serves to underscore the need for care now to be taken to avoid future procedural steps in relation to either project being impugned.