

THE WEIGH IN – NET ZERO AND NATIONALLY SIGNIFICANT INFRASTRUCTURE PROJECTS

Last year, my colleague Mustafa Latif-Aramesh and I wrote an article for this conference reporting on the current state of law and policy relating to Net Zero and Nationally Significant Infrastructure Projects (Time to give up the carbs?). This article provides an update one year on.



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LEGAL AND POLICY UPDATES ONE YEAR ON

The logical place to start is COP26, the 26th annual conference to discuss and agree on steps to combat and adapt to climate change, which was held from 31 October to 12 November 2021 in Glasgow.

This COP was the fifth since COP21, which gave rise to the Paris Agreement to limit climate change to two degrees above pre-industrial levels, and 1.5 degrees if at all possible. The Paris Agreement required countries to update their national plans setting out how much they would reduce their emissions – known as Nationally Determined Contributions (NDC) – every five years (six, as it happened, as COP26 was delayed by a year). The UK had already communicated its NDC to the United Kingdom Framework Convention on Climate Change in 2020, in which it committed to reduce economy-wide greenhouse gas emissions by at

least 68% by 2030, compared to 1990 levels.

What did COP26 achieve? The 'Glasgow Climate Pact', an eight page document (see [here](#)) which reaffirms the long-term global temperature goal and urges the parties to do more to achieve it – 'rapidly scaling up the deployment of clean power generation and clean efficiency measures' and 'emphasising the importance of protecting, conserving and restoring nature and ecosystems, including forests and other terrestrial and marine ecosystems ... by acting as sinks and reservoirs of greenhouse gases' are notably called out. How this will translate into concrete policies in the UK and abroad remains to be seen.

Elsewhere, in June 2021, the government also set in law the sixth carbon budget as required by the Climate Change Act 2008 (CCA2008), which limits the volume of greenhouse gases to be emitted from 2033 to



...POWERING THE UK ENTIRELY BY CLEAN ELECTRICITY BY 2035..

2037. The sixth carbon budget aims to reduce emissions by approximately 78% by 2035 compared to 1990 levels, up from 57% for the fifth carbon budget. The sixth carbon budget was unusual in that it incorporated for the first time, at the Climate Change Committee's recommendation, the UK's share of international aviation and shipping emissions.

There was an abundance of new policy throughout 2021, most notably:

- 'Decarbonising Transport' (July 2021), which sets out how the government proposes to tackle emissions from the transport sector on

delivering Net Zero by 2050. Headline policies included: a ban on the sale of new large diesel trucks weighing more than 26 tonnes by 2040, with smaller diesel trucks banned from 2035; a commitment to electrify the government's own vehicle fleet by 2027; to accelerate spending on public transport and to encourage active travel such as walking and cycling; and

- 'Net Zero strategy: Build Back Greener' (October 2021), which brings together the government's proposals and policies to enable the UK to meet its carbon budgets (the latest being CB6). Headline policies included: ending the sale of new petrol and diesel

cars and vans by 2030, powering the UK entirely by clean electricity by 2035, investment in hydrogen production, 10% sustainable aviation fuel by 2030 and cash to upgrade home heating systems from gas boilers to heat pumps.

What does all of this mean for Nationally Significant Infrastructure Projects (NSIPs)? As we set out last year, carbon emissions can be a material factor in decision-making on NSIP applications. This might be because:

- a National Policy Statement (NPS) applies to an NSIP application and requires carbon emissions to be considered by the Secretary of State in a particular way;
- notwithstanding how an NPS (if any) may require emissions to be considered, the Secretary of State may attribute particular relevance, importance or weight to those emissions in its decision-making on an NSIP application particularly in determining whether the adverse impacts of a project outweigh its benefits; and
- targets and obligations found in supra-national agreements (eg, the Paris Agreement) or national legislation (eg, CCA2008) may

require an NSIP application to be determined in a particular way.

It is clear that the increasingly ambitious policy and legal framework described is influencing decision-making on NSIP applications. It is requiring the decision maker to consider more than ever how the NPS tests relating to carbon emissions should be applied, the relevance and importance which is attributable to those emissions, and the weight which they should carry in the planning balance. It also continues to generate litigation at the post-decision stage.

The next two sections explore how climate issues affected NSIPs in 2021, in relation to both decision-making and legal challenges.

DEVELOPMENT CONSENT ORDERS (DCOS) AND NET ZERO NEWS

Only four DCOs were made in 2021, so one might have imagined there was little to say. Actually, it is those applications which should have been determined in 2021 but which have been delayed which are most noteworthy.

Most of the delays of relevance relate to highways schemes. The issue of interest first arose

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in relation to National Highways' A38 Derby Junctions scheme, a DCO which was made by the Secretary of State but quashed by the High Court after the Secretary of State conceded that he had failed to provide a reasoned conclusion as to the impacts of that scheme on climate change.

This application returned to the Secretary of State to be re-determined. On 2 August 2021, the Secretary of State published a statement of matters, in which it invited

from interested parties further representations on the impact of the scheme on climate change. In particular, the Secretary of State asked for further representations regarding:

- the implications of the scheme in relation to the Paris Agreement, the NDC, the 2050 Net Zero target and the carbon budgets;
- whether the emissions resulting from the scheme would be so significant that they would have a material impact on the ability of the

- government to meet its carbon reduction targets; and
- the direct, indirect and cumulative likely significant effects of the scheme on climate, including greenhouse gas emissions.

The third requirement has evolved further still since August. The Secretary of State has now asked the Applicant, 'to provide its assessment of the cumulative effects of greenhouse gas emissions from the scheme on other existing and / or approved projects on a local, regional and national level on a consistent geographical scale'. This reflects the original request of interested parties, endorsed by the Examining Authority, on the A38 scheme. However, it is a departure from the approach to date, which has involved a comparison of a scheme's carbon emissions against the carbon budgets, as required by the NPS. Here is an example of the shifting legal and policy context seemingly changing the parameters of decision-making.

It remains to be seen how this issue will play out and how long it will take to resolve. Four more highways schemes, and one rail scheme, are affected. Some clarity is badly needed to uphold faith in timely decision

making under the Planning Act 2008 regime. Perhaps the review of the NPS for national networks, announced by government last year will shed some light? However, that review might not be complete until Spring 2023.

It is also worth noting a decision on the South Humber Energy Centre DCO project. On that project, the Secretary of State indicated that operational emissions 'will be addressed in a managed, economy-wide manner, to ensure consistency with carbon budgets, net zero and our international climate commitments'. Too much should not be made of this, the baseline for the project included an existing facility and so any uplift in carbon impacts was more limited than it would be for most DCO projects and, in any event, the NPS which has effect for the project explicitly says that carbon emissions should not be a reason for withholding consent.

RECENT CASE LAW ON NET ZERO

In last year's article, we reported on the Heathrow Third Runway and the second Drax Power Station litigation, in which the courts rejected challenges based (in part) on climate grounds.

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Aside from the A38 decision referred to, the most notable case of 2021 was R (on the application of Transport Action Network Ltd) v Secretary of State for Transport [2021] EWHC 2095.

This was a challenge brought by Transport Action Network of the Secretary of State's decision to set a Road Investment Strategy (RIS) under the Infrastructure Act 2015 (IA2015). The RIS sets out the government's expenditure priorities for the operation, maintenance, renewal and enhancement of the strategic road network (SRN) (motorways and some A roads). The RIS relates to a five

year period. This challenge was brought against RIS2, which is the government's strategy for the period 2020-2025 and commits further funding for five new schemes, which would create or improve about 40 miles to the SRN.

The case centred on s3(5) IA2015, which requires the Secretary of State when setting a RIS to 'have regard, in particular, to the effect of the strategy on (a) the environment'. TAN argued that the Secretary of State had not met that duty because it had failed to consider the effect of RIS2 on:

- achieving the temperature objective in Article 4.1 of the

Paris Agreement on climate change;

- the Net Zero emissions target for the UK in 2050 contained in s1 of the Climate Change Act 2008 (CCA2008); and
- the UK's carbon budgets set under s4 CCA2008.

All three grounds were rejected by the court.

In relation to the first, the court held that the 'urgency' objective in article 4.1 of the Paris Agreement was not an obviously material consideration to which the Secretary of State was required to have regard. Section 3(5) required the Secretary of State, when setting RIS2, to have regard to its effect on the environment, without any specific reference to climate change. This ground, and the court's response to it, has echoes of the Heathrow Third Runway decision. In that case, the Supreme Court was implicitly saying that the Paris Agreement was not an obviously material consideration for the Secretary of State in setting the Airports National Policy Statement.

In dealing with the second and third grounds, the court was effectively rejecting TAN's case that the Secretary of State was obliged to take into account a

quantified assessment of the emissions from RIS2 and to consider their impact on the ability of the UK to meet the net zero target in 2050 and the carbon budgets running to 2032.

First, the Secretary of State was not obliged to take into account a quantified assessment at all. Setting RIS2 involved the adoption of a national policy at a strategic level for the purpose of public investment in the SRN; there was no legal or policy imperative which required a quantified assessment. The Secretary of State was advised of the impact of the programme on the net zero target and carbon budgets in CCA2008, but the supporting numerical analysis was not an obviously material consideration which had to be placed before the Secretary of State.

This element of the reasoning recalls Chris Packham's challenge to the government's decision to continue with the construction of HS2 (as set out in the Oakervee Report). In rejecting the challenge, the court held that there was no requirement for that Report to go any further than it did in dealing with the implications of HS2 for the UK's commitments on greenhouse gases and climate change. The thread

through these cases appears to be that, in the absence of a legal or policy requirement, it is for the Secretary of State to determine how far to go in its assessment of such matters.

Furthermore, even if the numerical analysis had been an obviously material consideration, the court accepted the Secretary of State's evidence that CO₂ emissions attributable to RIS2 were so insignificant that a failure by the Secretary of State to take them into account would not have materially affected the decision to set RIS2. This has some parallels with the Drax case reported last year, where the court accepted the secretary of State's conclusion that the emissions generated by the power station during its operation would not be so significant as to displace the need for the project enshrined in national policy.

A question: if the court was agreeing that the emissions from a portfolio of road schemes at a national level were legally insignificant, it might be said to be academic then to embark on the kind of

cumulative assessment which the Secretary of State appears to be asking for in the recent run of road schemes (see section 3 of this article)?

WHAT MIGHT WE EXPECT IN 2022?

Further legal challenges of relevance to NSIPs are expected in 2022. Most recently, ClientEarth and Friends of the Earth announced that they are applying for permission to judicially review the government's UK Net Zero Strategy (see section 2 above). The challenge essentially says that the Net Zero Strategy breaches CCA2008, because it will not enable the carbon budgets to be met. In other words, the strategy is not, they say, ambitious enough. The Good Law Project also announced last year that it was considering legal action in relation to the decision by the Secretary of State not to update the Airports National Policy Statement. The flow of climate litigation therefore shows no sign of abating.

Things might be slightly more sedate on the policy front this year, as 2021 was a bumper

year. That said, the Transport Decarbonisation Plan told us to expect a review of the National Networks NPS. In addition, the consultation on the suite of draft energy NPSs recently concluded and the government's response is now awaited. The drafts published last year confirmed there would no longer be any policy support for new coal or large-scale oil-fired electricity generation and clarified that government is taking active steps to phase those out of the energy system altogether. There is no indication yet when the new suite of NPSs might be designated.

The evolving legal and policy context are increasingly difficult to navigate as we approach 2050. Stringent targets, commitments and obligations are to be welcomed. However, they do not need to, nor should they, come at the expense of clarity as to what the policy tests are and how they should be applied in any case. As the recent flow of delayed NSIPs decisions highlights, the regime is currently faltering on that measure.

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