

**APP/C1570/W/20/3256619 (UTT/18/0460/FUL)**

**AIRFIELD WORKS COMPRISING TWO NEW TAXIWAY LINKS TO THE EXISTING RUNWAY (A RAPID ACCESS TAXIWAY AND A RAPID EXIT TAXIWAY), SIX ADDITIONAL REMOTE AIRCRAFT STANDS (ADJACENT YANKEE TAXIWAY); AND THREE ADDITIONAL AIRCRAFT STANDS (EXTENSION OF THE ECHO APRON) TO ENABLE COMBINED AIRFIELD OPERATIONS OF 274 000 AIRCRAFT MOVEMENTS (OF WHICH NO MORE THAN 16 000 MOVEMENTS WOULD BE CARGO AIR TRANSPORT MOVEMENTS (CATM)) AND A THROUGHPUT OF 43 MILLION TERMINAL PASSENGERS, IN A 12 MONTH CALENDAR PERIOD AT STANSTED AIRPORT**

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**CLOSING SUBMISSIONS ON BEHALF OF  
UTTLESFORD DISTRICT COUNCIL**

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**Introduction**

- 1 These submissions follow the main issues identified for the Case Management Conference on 24 September 2020 and are addressed in the order in which they were heard.

**Aviation Forecasting**

- 2 Aviation forecasting underpins the assessment of when and how the operations permitted by the development are expected to progress. Consequently, aviation forecasting figures are critical to the assessment of the environmental impacts on each of the issues raised by the Council, namely aircraft noise, air quality, and carbon emissions. Aviation figures and the environmental impacts arising from the development are for that reason inextricably linked. The ESA of 16 October 2020 moved forward the forecasting baseline by 3 years, from 2016 – 2019, and sought to account for the effects of the COVID-19 pandemic. The revised forecasts predict that Stansted [CD10.1, p.3]:

- (1) will recover to its pre-COVID levels (2019) by 2023;

(2) is likely to reach its current passenger cap of 35mppa by 2027; and  
(3) is likely to reach 43mppa by 2032.

3 If these forecasts are borne out, this will impinge upon the environmental impacts of this proposal. For example, by comparison with STAL's earlier forecasts, there will be a greater uptake of new generation, lower noise aircraft, and greater reductions in carbon emissions due to aircraft improvement factors.

4 But that is a big "if". Past growth at Stansted airport has been erratic. It shows no pattern. There are, moreover, uncertainties inherent in aviation forecasting generally. The past 12 months have served to illustrate this. So did the banking crisis a dozen or so years ago. Aviation forecasting is littered with known unknowns and unknown unknowns. The aviation forecasts provided for Stansted in this appeal need to acknowledge this. A number of points can be made.

5 First, the DfT provides credible, objective evidence as to the limitations of aviation forecasting generally, and specifically with regard to Stansted.

6 As to aviation forecasting generally, Sarah Bishop's evidence given to the High Court in 2019, as a Senior Civil Servant at the DfT on aviation policy, notes that '*there is inherent uncertainty in any forecast...*' [CD17.66, §12]. The inherent uncertainties in aviation forecasting are consistent with Mr. Galpin's acceptance that any forecasting exercise will give rise to a '*large range of outcomes*' (XX of DG). Whilst the approach to aviation forecasting followed by STAL might be '*standard in the industry*' [STAL/2/2, §3.2], aviation forecasting is also an exercise which is not regulated by any professional institute (XX of DG). Reasoned views to this inquiry can sensibly differ.

7 As to aviation forecasting at an airport level, the DfT highlights the heightened uncertainties involved [CD17.65, §87-89]. There is '*uncertainty in the short term around forecasts for individual airports*'. That is because '*[a]irport demand can be affected by a broader set of short-term drivers*'. These views, which are given in the context of distinguishing the DfT's longer term forecasts to inform policy decision-making, are plainly applicable to the forecasts provided by ICF in 2020, covering a period of a little over 10yrs to 2032.

8 When considering aviation forecasting for Stansted specifically, the DfT identify the short term drivers that will lead to yet further uncertainty. There is inherent uncertainty in any forecast,

*'.. especially at airport level where there are strong overlapping catchments that may make forecasting demand less predictable (the overlap of Stansted and Luton Airport catchments is a good example of this)' [CD17.66, §12]. Further, the example given of a short term driver giving rise to uncertainty, namely the conclusion of commercial deals between airports and airlines which could affect route frequencies or destinations year on year [CD17.65, §87], is of particular relevance to the situation Stansted finds itself in now. Stansted's reliance on Ryanair is well documented, with Ryanair accounting for over 80% of passenger volume in 2016 [CD3.4, §4.29], with strong growth between 2013-2018 [CD7.4, §4.1.5], including the take up of the majority of slots left by Easyjet following the closure of their Stansted base [STAL/2/2, §4.5]. Yet the 10yr growth agreement entered into in 2013 is due to expire in 2yrs time, as confirmed by Mr. Hawkins [CD23.32; XX of TH]. Aviation forecasts that are based on the ongoing commitment of Ryanair to Stansted – and in turn, the transition of Ryanair's fleet mix to new generation aircraft and the resulting proportion of such new, cleaner aircraft – are dependent on a number of factors [STAL/2/2, §4.9], including a new commercial deal for Ryanair to stay at Stansted, which is yet to be negotiated or agreed.*

9 Secondly, despite the impression given by STAL that the DfT's forecasts are of limited assistance for the current proposal, Mr. Galpin rightly did not seek to criticise them when asked in evidence. They are not *'incorrect'* but provide a *'different approach'* (XX of DG). That is consistent with the DfT's own position, that where there is an interest in a short-term forecast, the Department recommends the use of alternative forecasts or sensitivities, *'to be considered alongside the Department's forecasts...'* [CD17.65, §89]. The forecasts are provided for different purposes, but their validity is rightly not questioned. The DfT makes valid points as to the uncertainties of forecasting at an airport specific level. It would also be wrong to suggest that their forecasts are not relevant in assessing proposals at that level.

10 Thirdly, the extent to which aviation forecasts of passenger growth have not been realised, both in relation to Stansted and Manchester Airport, is well demonstrated in Mr. Ross's evidence [SSE/3/2, section 5.1]. The second runway application at Manchester Airport in 1997, the 2003 Stansted consent, the Stansted G1 application in 2006, and the MAG Masterplan for Manchester Airport of 2007 all included aviation forecasts which were not realised in practice (and in fact overestimated the demand). There is no suggestion that any of those forecasts were not produced with the assistance of reputable aviation forecasters. These facts have not been seriously challenged by STAL, apart from noting that the actual out-

turn at Manchester Airport in 2005 was 29mppa (not 22.5mppa), as against a forecast given of 50mppa (XX of BR).

11 Fourthly, the uncertainties of forecasting identified by the DfT were all made the year before the COVID-19 pandemic. That pandemic has made all forecasts look like a dream. Mr. Galpin's observation that leisure traffic has shown itself resilient to various crises, such as the Global Financial Crisis and previous epidemics [STAL/2/2, §4.3], fails fully to acknowledge the unprecedented effects of the COVID-19 pandemic. The COVID Base and COVID Low cases presented and applied in the ESA do provide an answer to the uncertainties arising from the COVID-19 pandemic, but it would be wrong to assign any great degree of confidence to such forecasts, given the impact of the pandemic is still unfolding and evolving. Mr. Galpin acknowledged in XX that every input in forecasting has a large range of outcomes, and the pandemic is the paradigm example of uncertainties piled on top of each other.

12 UDC does not seek to challenge the forecasts provided by providing its own competing analysis which necessarily would suffer from the same limitations. For the reasons just given, aviation forecasting is an inherently uncertain exercise involving a wide range of assumptions and conjectures, and all the more uncertain when assessing airport specific forecasts in the shorter term, all compounded by having to grapple with a health pandemic, the effects of which are still unknown and uncertain. That is the explanation for UDC's decision not to offer a competing forecast. Wild theories about UDC having something to hide are just that: wild theories best left to the lower forms of social media.

13 Mr. Scanlon provides entirely sensible and credible observations as to the uncertainties surrounding aviation forecasts at the current time: the need to make assumptions about the potential impact of COVID on both long and short term attitudes to travel; predictions as to the future changes to fleet make up of future operators at Stansted; the uncertainties arising from Brexit; predictions as to long term attitudes to travel given the increasingly popular desire to reduce the carbon footprint of holidays (and business travel); and finally, consideration which must be given to the future role of Heathrow's 3<sup>rd</sup> runway in the London Market. Mr. Scanlon's evidence, that UDC does not suggest that the updated forecasts in the ESA do not represent a reasonable account of future growth in demand, should be read in its proper context with the points he goes on to make. It is a mischaracterisation of his evidence to quote selectively from it, as STAL has repeatedly sought to do in XX of UDC's witnesses. This inquiry should ask itself why would STAL have resorted to such tactics if it had legitimate

criticisms to make. The uncertainties involved in aviation forecasting to which Mr. Scanlon speaks, particularly following an unprecedented health pandemic, give rise to the scope for alternative outcomes.

- 14 All of this supports the need for tying measures to limit the environmental effects of the proposal to something more certain than passenger forecasts<sup>1</sup>. That more certain measure is actual passenger numbers as they happen. It is that certainty which Condition 15 proposed by UDC would bring about, consistent with the national aviation policy's objective of sharing the benefits of aviation growth. We consider Condition 15 later on in these submissions. Suffice it to say that STAL's trenchant opposition to countenance anything of the sort was and is both regrettable and unreasonable.

### **The effects of the development on aircraft noise**

- 15 The Environmental Statement Addendum, published 1 month after UDC's Statement of Case, took the opportunity to respond to the matters raised by UDC [CD10.1, p.2]. On aircraft noise, UDC accepts that the ESA presents a more favourable outcome than that presented in the Environmental Statement, as reflected in the Statement of Common Ground on this topic [CD25.3]. As referred to above, that is a function of the updated environmental and noise exposure forecasts which take account of slower expected rates of recovery from the COVID-19 pandemic and changes to aircraft mixes, against an updated baseline, and forecast years which are set back by 4yrs to 2027 and 2032 respectively.
- 16 The conclusions in the ESA therefore alleviate many of the valid concerns that animated the Reason for Refusal. The fact that the issues which remain are narrow, and focussed on appropriate mitigation measures, should in no way dilute their importance, for a number of reasons:

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<sup>1</sup> This is consistent with the approach which was followed by the Inspector in the 2008 G1 appeal. He had concerns about the forecasting evidence, noted the inherent uncertainty of forecasting growth of air traffic at Stansted, but acknowledged that there was 'scope' to limit that through the dual cap restriction of ATMs and passenger throughput in conditions [CD12.3a, §§14.24-14.29]. Thirteen years on, against an evolved and evolving policy context for aircraft noise, air quality, and carbon emissions, UDC seeks to deal with the uncertainties of forecasting through limiting the environmental effects of the development on those specific matters, in addition to restrictions on ATMs and passenger throughput.

- (1) The uncertainties inherent in forecasting, particularly following the COVID-19 pandemic, cannot provide confidence that the forecast noise improvements will actually be realised.
- (2) That uncertainty is compounded by the conclusion of the forecasts here, that the current 35mppa cap will not be exceeded for another 6yrs (2027), with the proposed 43mppa capacity forecast to be reached 11yrs from now (2032).
- (3) The general principle behind aviation policy in this area is the expectation that *'future growth in aviation should ensure that benefits are shared between the aviation industry and local communities'*, meaning that *'the industry must continue to reduce and mitigate noise as airport capacity grows'* [CD14.1, §3.3].
- (4) It is that general principle which lies behind the overall policy *'to limit and, where possible, reduce the number of people in the UK significantly affected by aircraft noise'*, as part of a policy of sharing the benefits of noise reduction with industry [CD14.1, §3.12].

17 Mitigation which provides appropriate noise limits against current policy, recognising how that is evolving - and with a view to future-proofing the development given the lengthy timescales involved - will provide the certainty required and meet the policy objective.

*Daytime limits*

18 Both UDC and STAL agree that it is necessary to limit noise from the airport having regard to the Government's noise policy objective [CD25.3, p.2]. Happily, it is now agreed that for daytime contour restrictions, a 54dB LAeq 16hr noise contour restriction is appropriate, as reflected in Condition 7, submitted after the noise evidence was given, on 11 February 2021 [CD26.7]. It has also been incorporated into Condition 15.

19 Despite protestations to the contrary by Mr. Cole, the use of a 57dB LAeq 16hr contour restriction for the daytime does not reflect current noise policy. Maintaining such an antiquated threshold for a noise contour would also have the effect of allowing noise effects above recognised policy thresholds without repercussion.

20 As to how noise policy has evolved, Mr. Trow comprehensively set out in his oral evidence how the 57dB LAeq 16hr metric has been overtaken in noise policy on aviation. As relevant, and taken in chronological order:

- (1) The 57dB metric was established back in 2003 when the White Paper was published. It was based on research from 1985 and set the approximate threshold for the onset of

significant community annoyance, in circumstances where the Government had already embarked on a review of its evidence base [CD14.24, p.34].

- (2) The Aviation Policy Framework of 2013 itself observed that there was some evidence that people's sensitivity appears to have increased in recent years, reflecting the ANASE attitudinal study of 2007. The APF committed to providing noise exposure maps for noise designated airports down to a 57dB level to provide '*historic continuity*' and to keep its policy under review [CD14.1, §3.14-3.15, 3.18]. In any event, its policy was to limit and where possible reduce the number of people significantly affected by aircraft noise (ibid. §3.12).
- (3) The DfT's Air Navigation Guidance of 2017 provided guidance to the CAA on its environmental objectives. It referenced a significant reappraisal of the Government's airspace and noise policies since January 2014 [INQ12, p.6], namely SONA14, the most recent major attitudinal survey on aviation noise conducted in England, which found that the level of annoyance at the 57dB threshold referred to in the APF, actually occurred at the 54dB threshold [CD19.2, §8.16-8.17], indicating a need for a policy change. In considering the APF policy to limit and where possible reduce the number of people significantly affected by adverse impacts from aircraft noise, the role of local authorities in land use planning and in setting noise controls through conditions was recognised [INQ12, p.10]. In applying that policy and aligning its noise policy for aviation with the overarching Noise Policy Statement for England, the Guidance recognised [INQ12, §3.5-3.6]:
  - (a) that there was no one threshold at which all individuals could be considered to be significantly adversely affected by aircraft noise;
  - (b) that the LOAEL was regarded as the point at which adverse effects begin to be seen on a community basis; and
  - (c) that the proportion of the population likely to be significantly affected could be expected to grow as the noise level increased above the LOAEL.As a result, ANG 2017 recommended that a LOAEL of 51dB (daytime) and 45 dB (night-time) should be used by the CAA for assessing the noise impacts of airspace changes.
- (4) Should there be any doubt as to the status of the 54dB metric following ANG 2017, it is the 54dB metric which is included as a criterion for the exercise of the SoS's power to call in proposals under the Civil Aviation Authority (Air Navigation) Directions 2017 [INQ12a, Art. 6(5)].

- (5) Since the publication of SONA14 in February 2017, no noise policy has supported the use of the 57dB metric.
- (6) The DfT's Consultation Response on UK Airspace Policy (October 2017) expressly states that its policies '*provide an update to some of the policies on aviation noise contained within the APF, and should be viewed as the current government policy.*' [CD14.65, p.6, §9]. The Government's view that the 54dB metric is appropriate because it is consistent with the findings of SONA14 is confirmed at paras. 2.11 and 2.68ff., with a commitment to set a LOAEL at 51dB for daytime, since this is the lowest point at which adverse effects begin (§2.72).
- (7) The Aviation 2050 Green Paper of December 2018 confirms that new noise policies were introduced in 2017 (reflecting the ANG 2017 and SONA14) [CD14.27, §1.3]. The uncertainty as to how the policy in the APF is to be interpreted, measured, and enforced is to be addressed (inter alia): by setting a new objective to limit, and where possible, reduce total adverse effects on health and quality of life from aviation noise, bringing aviation noise policy in line with airspace policy updated in 2017; by routinely setting noise caps as part of planning approvals for increases in passenger numbers; and by requiring all major airports to set out a plan which commits to future noise reduction, and to review this periodically [§3.113-5].

21 As set out above, there are a number of statements on aviation noise policy which indicate that the 57dB metric is no longer cited as an appropriate metric to use in controlling aviation noise. Government policy on aviation policy cannot be said to be '*silent*' on this issue, as Mr. Cole argued [STAL/4/4, §3.2]. If anything, aviation policy has been '*silent*' in not referring to or providing any endorsement of the 57dB metric since February 2017.

22 Faced with the clear thrust of policy on this issue, it is perhaps unsurprising that Mr. Cole and STAL have now agreed to use the 54dB metric in Condition 7. That this is a major change of position by STAL cannot sensibly be denied. As recently as 5 January 2021 in his rebuttal, Mr. Cole remained wedded to the 57dB metric, contending that there was no evidence in Mr. Trow's proof that setting a noise contour limit at the LOAEL, or any other alternative, provides a superior or more robust control over air noise than a higher value such as the 57dB metric [STAL/4/4, §3.10]. By belatedly accepting the 54dB limit as appropriate in Condition 7, Mr. Cole exposed the bluster of his original convictions. In fact, as explained by Mr. Trow in evidence in chief, there are 2 reasons why sticking to the historic 57dB metric with a tighter contour would not be robust:



- (1) The only proper purpose of having a noise contour restriction is to limit the effects of aviation noise on the population. Where it is consistently recognised in policy (since 2017) that significant community annoyance now arises above a 54dB threshold (and adverse noise effects are experienced above the LOAEL level of 51dB), setting the daytime noise threshold at 57dB would not be appropriate. It would in effect allow adverse noise effects between the 54dB and 57dB thresholds to be experienced without repercussion (in that there would be no incentive for STAL to seek to reduce noise to the lower level).
- (2) The argument that setting a limit on the 57dB contour area has consequential effects on the area of the contour at all other noise levels, only works if aircraft noise performance and flight characteristics remain fixed. As explained in Mr. Trow's rebuttal, that has not been the case at Stansted [UDC/1/4, pp.8-10]. In fact:
- As accepted by Mr. Cole [STAL/4/2, §10.1.1], the noise modelling in the ES confirms that whilst the 57dB daytime contour area is forecast to be smaller in 2023 (both DC and DM) than currently permitted by the extant condition, the 51dB daytime contour area is expected to be larger.
  - The new information on contour comparisons provided by Mr. Cole [STAL/4/2, §10.1.3] demonstrates that the effects of aircraft noise above the LOAEL are greater than as would have been reported for the 2008 consent; and the impact of the Boeing 737-800 aircraft type has been progressively worse than as modelled based on information known at the time of the 2008 consent.
  - The reason for these changes cannot be explained away as due to changes in the ANCON model. They arise from the worsening performance of the Boeing 737-800.
  - The worsening performance of the Boeing 737-800 remains relevant for the assessment for this appeal and will have a major bearing on noise exposure. The ESA shows that the Boeing 737-800 aircraft type made up approximately two thirds of the total average summer's day movements in 2019 (67.5%). Even in the 2032 DC, the Boeing 737-800 is forecast to make up about a quarter of the average summer's day movements (23.8%), with about half (46.2%) of the total forecast to be made up of the Boeing 737max with its modelled noise profile.

23 Nor does STAL's assertion that it was UDC who sought the 57dB contour restriction - and that if UDC had asked for a 54dB metric restriction, it would have been agreed - stand up to scrutiny. Notably, it was an argument that first emerged during XX of Mr. Trow. Despite

voluminous documentation as to the process by which the noise aspects of the application were considered between STAL and the Council, there is no document which STAL can point to before this inquiry which evidences the fact that it was UDC who required that a restriction using the 57dB contour be used for this application. The memo from Bickerdike Allen did not cover the 57dB contour restriction [CD19.38] and UDC's Environmental Health Manager (Protection) generally accepted the findings of the ES and did not further object [CD13.1b, §9.201]. UDC did not raise an issue with STAL's proposal to use the 57dB contour, but that is not the same thing as actively seeking it, and Mr. Trow is clear that he would have required a value consistent with current policy i.e. a 51dB and / or 54dB contour restriction (XX of JT). In reality, STAL's stance on this point is nothing more than an exercise in face saving for this inquiry.

*Night-time limits*

- 24 STAL's belated agreement through Condition 7 to limit aircraft noise using the daytime 54dB metric (0700-2300hrs) drags it into line with government policy. Given that agreement for daytime aircraft noise has at long last been reached, continued refusal to countenance a similar control through a Condition for the night-time defies reason.
- 25 Both the ES and ESA report effects against an 8hr night-time period (2300 – 0700hrs) [CD3.7, §7.38, Table 7.3; CD7.7, §7.5.1], consistent with Government policy and CAA guidance (e.g. the production of night noise contours against an 8hr night time period in the APF at [CD14.1, §3.15], and the setting of an LAeq8hr level for night time noise in the ANG 2017 [INQ12, §3.5]).
- 26 ANG 2017 provides useful guidance on how the Government's overall policy on aviation noise should be interpreted: *'the total adverse effects on people as a result of aviation noise should be limited and, where possible, reduced, rather than the absolute number of people in any particular noise contour'* [INQ12, §3.5]. As explained by Mr. Trow, the clear thrust of this guidance is that the overall policy should not be addressed by a single contour or threshold, but by the use of multiple contours so as to address the total adverse effects on people [UDC/1/2, §3.57].
- 27 As explained by Mr. Trow in oral evidence, with specific relevance to night-time noise restrictions, CAP1731 proposes a limit scheme under which both day and night-time contour limits are set. The DfT commissioned the CAA to undertake analyses and give consideration of how airport noise may be limited, leading to the publication of CAP1731 in February 2019.

The review of suitable noise metrics, targets, and limits undertaken involved a mix of metrics, with consistent use of an 8hr night-time period [CD19.36, pp.5-6]. The limit scheme proposed by the CAA, expressly in order to address the APF's overall policy objective, comprises (as relevant) a nationally set absolute Quota Count limit or noise contour area limit at a particular noise level for both day and night, aggregated across all major airports, and a locally set absolute Quota Count or noise contour area limit at a particular noise level for both day and night for each airport [p.7]. Daytime and night-time noise contours and / or noise quotas are recommended [p.64-65].

28 Against that background, STAL's obstruction to the setting of a night-time restriction on the basis that it is not necessary is both inconsistent with the above approach of policy, and inconsistent with their position on the daytime noise contour. The setting of a night-time restriction would mirror the restriction which STAL agrees should be imposed for the daytime period. It would also be in line with the overall national policy for aviation noise as interpreted and applied in the above documents.

29 The ESA predicts that the aircraft noise arising from the development in 2032 will be lower than if there were no development in the same year. Importantly, that assessment and its outcome is reported against an 8hr night-time period. The only way to ensure that the lower noise effects are actually experienced as predicted is to set a night-time limit according to that 8hr night-time period.

30 Moreover, the assessment in the ESA is predicated on the DfT's night flying restrictions remaining in place, which apply to Stansted as a noise designated airport under s.80 of the Civil Aviation Act 1982. The extent to which the night flying restrictions for Stansted are limited and liable to change can be illustrated as follows [UDC/1/2, §3.17]:

(1) The restrictions imposed under s.78 of the Civil Aviation Act 1982 are subject to consultation, review, and redefinition every 5yrs. The current consultation on night flying restrictions is at [CD19.37].

(2) The restrictions for Stansted were last set in 2017, came into force in October 2017, and will remain in place until October 2022 when they will be subject to change. Whilst the current consultation indicates a move towards an 8hr set of restrictions after 2024 (to allow for the recovery from the pandemic), it confirms that the night-time noise abatement objective for Stansted is measurable over the 8hr period.

(3) The movement and noise quota limits apply to the noise quota period, namely from 2330hrs to 0600hrs. That means that the shoulder periods of 2300-2330hrs and 0600-0700hrs are not regulated by the night-time restrictions and would not be caught by the agreed daytime noise contour restriction (0700-2300hrs).

31 As a result, a night-time contour restriction covering the 8hr period between 2300-0700hrs:

(1) provides certainty that the predicted noise effects will actually be realised, where the DfT night flying restrictions are subject to change and cannot be guaranteed. Mr. Cole's assurance that it is unlikely that Stansted will be de-designated without some sort of similar restrictions being imposed by the DfT is unsubstantiated speculation. Even if his guess proves right for the next 5yr period, this scheme is for the long term, which cannot safely be predicted.

(2) Secondly, the contour would cover the full night-time period from 2300-0700hrs in circumstances where the DfT night-flying restrictions would otherwise leave the shoulder periods (amounting to 1.5 night-time hours) unregulated. It is not a question of the proposed condition being more onerous than the DfT restrictions; rather it ensures that the noise assessment as reported in STAL's own ESA is secured in practice.

(3) Thirdly, the contour meets the Government's objective of limiting and, where possible, reducing the number of people significantly affected by aircraft noise, as part of the Government's policy of sharing the benefits of noise reduction with industry.

32 The setting of a night-time contour restriction in addition to a daytime restriction at a local level is clearly envisaged in recent DfT endorsed publications such as CAP1731. There is no suggestion that this might lead to a duplication of controls between national and local restrictions in a way which would be unworkable. The DfT night flying restrictions and planning condition limiting night-time noise would be enforced by separate regulatory bodies. It would not lead to over-regulation, since STAL would be tied to the noise effects which they have predicted in their ESA. For that reason, local communities would have confidence that proportionate action is being taken at a local level, in line with the core principle of transparency under the APF [CD14.1, §3].

33 STAL has rightly not disputed that the appeal proposal falls within Regulation 3 of the Airports (Noise-related Operating Restrictions) (England and Wales) Regulations 2018, that the 2018

Regulations apply to Stansted as an airport within Regulation 2, and that UDC is therefore the competent authority, empowered to ensure that the balanced approach is followed, in accordance with EU Regulation 598/2014 [UDC1/2, §3.25ff.]. Importantly, the Regulations could have prevented the imposition of night-time noise restrictions in circumstances where night-flying restrictions were already in place pursuant to the Civil Aviation Act 1982. The 2018 Regulations do not fetter UDC's power to impose noise related operating restrictions by reference to the 1982 Act.

- 34 Overall, there is no legal or policy impediment to such an approach. On the contrary, the imposition of a night-time contour restriction is both necessary and would be fully consistent with the application of aviation policy on noise at a local level. UDC's Position Statements on the night-time noise contour restriction [CD26.13] and on the DfT's night flying consultation [CD26.28 (mislabelled as CD26.27)] should be read with these submissions.

*Inclusion of Thaxted Primary School within the Enhanced Sound Insulation Grant Scheme*

- 35 With respect to the proposed Enhanced Sound Insulation Grant Scheme incorporated into the Unilateral Undertaking, UDC recognises the fact that STAL has gone beyond the minimum noise level thresholds set out in the APF, above which acoustic insulation is expected to be offered for schools [CD14.1, §3.37]. Such an approach brings the scheme into line with more recent and emerging noise policy. In particular:

- (1) Two of the key findings of SONA14 were that people had become more sensitive to noise than as stated by the ANIS study (though not as sensitive as reported by the ANASE study), and that the level of annoyance at the 57dB threshold, marking the approximate onset of significant community annoyance, was found to occur at the lower 54dB level [UDC/1/2, §4.9].
- (2) The Aviation 2050 Green Paper of December 2018 states that noise insulation schemes are '*an important element in giving impacted communities a fair deal*'. For that reason, the Government proposes to extend the noise insulation policy threshold beyond the current 63dB contour to the 60dB contour [CD14.27, §3.122].

- 36 The issue is whether, when assessed against appropriate criteria, including those set by STAL, there is a case for the inclusion of Thaxted Primary School within the Enhanced Sound Insulation Grant Scheme.

37 The eligibility criteria chosen for STAL's Enhanced Sound Insulation Grant Scheme should be considered in context [STAL/4/2, §8.2.1-3]. There are three aspects to this context:

*> 57 dB LAeq 16hr average*

First, the use of a 57 dB contour in establishing eligibility is not used in assessment guidance for schools. Since an average 16hr period is applied (0700-2300hrs), that has the potential to understate the effect on schools where noise would be experienced during the shorter school day [UDC/1/2, §6.45].

*N65 > 200 average across 16hrs*

Secondly, the use of a N65 16hr average is also not used in assessment guidance for schools, and the same point as to the use of an average 16hr period potentially understating the effect over the shorter school day can be made.

In any event, when applied to Thaxted Primary School, the number of noise events from aircraft with levels above 65 dB LAmax at Thaxted Primary School is 181, which is only just short of the criteria for eligibility of 200 [CD19.25, §2.2]. Given that the Boeing 737-800 type used for the assessment (see below) has maximum noise levels reported for Thaxted of 62dB and 60dB, the maximum event levels at Thaxted are above 65dB as a result of other aircraft types.

*> 72 dB LAmax based on operations from a single aircraft type (Boeing 737-800)*

Thirdly, the 72 dB LAmax has been converted to an internal level of 60dB LAmax by allowing a 12dB reduction from the external free field level through an open window. This criterion has also been applied for the noise originating from a single aircraft type. To that extent, the modelling undertaken is a proxy for a "pure" LAmax level assessment.

38 More generally, when assessing the application of these criteria to Thaxted Primary School, there are two considerations that should never be lost sight of:

- (1) First, as Mr. Trow explained in evidence in chief, Thaxted Primary School is clearly within the 54dB LAeq 16hr contour for the 2027 and 2032 development forecasts in the ESA [e.g. CD8.3(m) for 2032]. The LAmax levels should be much higher than those presented if

those events were influencing the LAeq. This suggests either that aircraft other than the Boeing 737-800 have a more dominant effect at Thaxted Primary School in terms of individual levels, or that the LMax level for the Boeing 737-800 is understated.

(2) Secondly, the proximity of the N65 200 contour for eligibility is vanishingly small and can be said to be within the thickness of the contour line as drawn on the plan, contrary to Mr. Cole's bold assertion in XX that it was outside of the contour [CD8.3(ee)]. It is acknowledged by Cole Jarmon that the detailed grid data on which the contours are plotted can vary between 10m and 100m depending on the metric [CD19.25, §1.1]. The uncertainty in the modelling referred to above could easily result in Thaxted Primary School coming within the eligibility criteria.

39      Importantly, the Department for Education's Acoustic Design of Schools: Performance Standards of 2015 (Building Bulletin 93) is plainly relevant and applicable to sound insulation proposals such as that proposed by STAL [INQ14]. As explained by Mr. Trow in evidence in chief, BB93 itself envisages that it might be used in considering mitigation measures within the planning regime [§0.3.7]. The Heathrow Cranford decision of 2017 shows that BB93 has been used for assessment purposes [CD14.16, §330ff.], and the Leeds Bradford assessment applied BB93 by considering short term noise events during the school day [CD19.40, see Fig. 10.12].

40      Mr. Cole accepted in XX that if any of the schools included in the Enhanced Sound Insulation Scheme list (including Thaxted) were to be refurbished, then consideration of aircraft noise against the guidelines would be required. Given the potential that any one of the schools in the list might refurbish their premises during the life of the proposal here, that begs the question as to why the eligibility criteria for the sound insulation scheme as proposed has not fully considered the guidelines in BB93.

41      The position is that:

- (1) Of STAL's eligibility criteria, only the 72 dB LMax criterion has a basis under BB93, as accepted by Mr. Cole in XX. However, this is only considered for two aircraft types.
- (2) The guidelines provide that, in order to protect students from noise, indoor ambient noise levels should not exceed specific 30mins guideline design values [INQ14, p.21]. Yet, as explained by Mr. Trow in evidence in chief, no 30min levels are presented in the ESA for any of the schools.

- 42 In that context, Mr. Cole’s oral evidence that Thaxted Primary School has experienced similar levels in 2019 to those forecast to be experienced in 2032, that the school has not complained about aircraft noise previously, and it has not objected to the current proposals, is devoid of substance. It would be unsurprising if a particular school were not aware of the studies potentially linking aircraft noise and children’s cognition and learning, or conscious of that being a particular issue at their school, let alone have the time to make noise complaints about it year on year. There could be many reasons, which have nothing to do with the substance of any noise impacts, as to why an educational establishment fails to object to a planning application.
- 43 The publications and studies that have highlighted the potential effects of aircraft noise on children within school environments are well summarised in Mr. Trow’s evidence and need not be repeated here [UDC/1/2, §4.28ff.]. What they underline is the need for particular care in assessing which schools might be included in a sound insulation scheme to mitigate the aircraft noise effects of a long-term proposal such as this. Whether on the basis of the proper application of the eligibility criteria in STAL’s scheme, or applying the guidelines in BB93, or both, there is a compelling case for the inclusion of Thaxted Primary School in the sound insulation scheme. Mr. Trow and UDC’s position is not that a bespoke mitigation package should be committed for each of the schools listed in any event. UDC’s proposed amendments to the UU (now agreed by STAL [CD26.15]) seek that a reappraisal of the need for insulation at each school is conducted prior to any work being undertaken, when the aircraft noise can actually be experienced, which provides a proportionate response.
- 44 Finally, as to the means by which the noise impacts of the appeal scheme should be mitigated, it is notable that Mr. Cole himself acknowledged the principle of a noise envelope condition which progressively tightens over the years [CD19.24, §5.1-5.2]. Mr. Cole’s claimed bewilderment at the complexity of Condition 15 should be considered against his acceptance of the principle which Condition 15 seeks to achieve. It provides a set of limits backed by minimum requirements, the currency of which is maintained with each major increase in passenger numbers. Specifically, the Condition requires STAL, as a minimum, to meet the noise exposure forecasts which they present to this inquiry, and to improve upon them where possible and supported by policy. It is the only meaningful way in the context of this proposal to ensure that the benefits of future growth in aviation are shared with the local communities surrounding the airport, and that the aviation industry ‘*continues to reduce and mitigate noise*



*as airport capacity grows'*, which is the principle lying at the heart of government policy on aviation noise [CD14.1, §3.3]. STAL has offered no alternative that properly accommodates this principle.

### **The effect of the development on air quality**

#### *Extant policy on air quality*

- 45 The clear thrust of national planning policy on air quality is that development should look to improve air quality and to identify opportunities to do so to achieve that objective. The overarching objective of section 15 of the NPPF (Conserving and enhancing the natural environment) is that planning decisions should contribute to and enhance the natural and local environment by wherever possible helping to improve environmental conditions such as air quality [CD14.6, §170(e)]. With specific reference to air pollution, the same section of the NPPF provides that planning decisions should sustain and contribute towards compliance with relevant limit values or national objectives for pollutants, and that opportunities to improve air quality or mitigate impacts should be identified [§181].
- 46 National aviation policy does not relax those objectives with regard to airports and expansion plans. On the contrary, it envisages airports taking a leading role in delivering ongoing improvements in the air quality impacts of aviation. The APF states the Government's policy on air quality in unqualified terms, namely to seek improved international standards to reduce emissions from aircraft and vehicles, and to work with airports and local authorities as appropriate to improve air quality [CD14.1, §3.48]. In the same section, in the context of minimising the air quality impact of surface transport journeys, the expectation on airports is stated to be: '*.. to take this responsibility seriously and to work with the Government, its agencies and local authorities to improve air quality*' [§3.51].
- 47 Dr. Bull rightly accepted in XX that extant policy specific to aviation includes the objective of working with airports to improve air quality, and that the expectation of working with Government to improve air quality is of relevance to this application. It is that objective, taken from the APF, which is referred to in STAL's Sustainable Development Plan 2015, as the policy of relevance at a national level [CD15.5, p.24]. Dr. Bull was also right to accept that the aim of the SDP to '*Reduce air pollution*' is based on that part of national policy [p.29]. It is therefore very surprising that the Air Quality chapter in the ES omits reference to the aviation policy objective of improving air quality when summarising the APF. Dr. Bull was forced to

acknowledge this omission in XX [CD3.10, §10.10]. He sought to excuse the omission by saying that it was covered elsewhere in the Chapter. This answer said more about his allegiance to his client than anything else. Improving air quality as a specific aviation policy objective is not referred to anywhere in the relevant sections of the ES [§10.4-10.23] or ESA [CD7.10, §10.3.1-10.3.12]. The information provided on the effect of the proposed development on emissions [CD7.10, Tables 10.5 and 10.6] and concentrations [CD8.6 Tables 32-39] of air pollutants demonstrates a consistent picture of worsening air quality.

48 This understatement of relevant aviation policy on air quality is mirrored by a lack of action by STAL to show that they have lived up to the air quality objectives they have set themselves in their SDP. A key purpose of the SDP is to provide *'guidance and information'* to statutory agencies and the local community against strategic objectives, which include one to *'Actively manage and contain environmental impacts'* over a 5yr period [CD15.5, pp.4-5]. Yet against two of its stated aims, to *'reduce air pollution'* and *'reduce emissions generated by ground vehicles and aircraft'*, it is notable that Dr. Bull was unable to point to any evidence that demonstrates what improvements in air quality have been achieved and (on ground vehicles and aircraft) what steps have been taken. This is another remarkable omission, since it is this mitigation which is referred to as incorporated mitigation in the ES and ESA [CD3.10, §10.112; CD7.10, §10.6.1]. The objectives set out in the SDP are just words if not backed by measurable actions.

49 There is nothing in MBU which suggests any dilution of the extant policy objectives which are referred to above and carried forward into the SDP. STAL sought to salvage the position in its Re-ex of Dr. Bull by referring him to para. 1.22. That did not resuscitate STAL's position, as it merely summarises extant policy on local environmental impacts as relevant to aviation. There is no suggestion that extant aviation policy on air quality is somehow relaxed where airports look to make best use of their existing runways. The SDP provides further proof of this. The SDP is stated to be a document that will evolve and be kept under review *'at least'* every 5yrs [CD15.5, p.5]. Yet no review has been undertaken by STAL to suggest that MBU provides any different approach to air quality (or any other environmental impact) from that contained in extant aviation policy. That is because MBU does not provide any different approach or dispensation for airports in these areas<sup>2</sup>.

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<sup>2</sup> Reference to MBU within Aviation 2050 also does not signal any relaxation of policy on air quality [CD14.27, §3.6].

*Emerging aviation policy on air quality*

- 50 Emerging aviation policy signals an even greater ambition from Government to improve air quality, an ambition which is expressly tied to the commitment in the Clean Air Strategy 2019 to an ongoing tightening of air quality standards.
- 51 The Green Paper *'Aviation 2050: The future of UK aviation'* sets out the Government's most up to date thinking on aviation policy on air quality, as part of its final consultation on policy proposals for the long term Aviation Strategy to 2050 and beyond [CD14.27, p.8, December 2018].
- 52 With regard to environmental impacts generally, whilst future expansion in response to forecast demand is welcomed, it is noted that it must be sustainable, with affected communities supported *'and the environment protected'*. The investments in cleaner aircraft and improvements in road and rail access are acknowledged, but even with these improvements, it is noted that *'there are challenges that need to be addressed. Growth can have significant environmental impacts which affect local communities and increase emissions... Therefore, while the government supports continued growth in aviation over the next 30 years, it also believes that the UK must be more ambitious on environmental protection to ensure that growth is sustainable.'* [p.48, §3.2-3.3].
- 53 As to air quality specifically, the Government's scale of ambition with regard to air pollution could not be clearer in Aviation 2050:
- (1) The Government recognises that air pollution is the top environmental risk to health in the UK and it remains determined to improve air quality. [§3.123]
  - (2) Whilst recognising the UK's compliance with air quality legislation for most pollutants (with nitrogen oxides an exception), *'.. much work remains to be done'* by reference to the Air Quality Plan and draft Clean Air Strategy (subsequently finalised and published in 2019) [§3.123].
  - (3) In the context of sustainable journeys to airports, the Government expects airports to make the most of their regional influence to provide *'innovative solutions and incentives against ambitious targets which reduce carbon and congestion and improve air quality'* [§3.101].

54 The proposed measures for air quality in Aviation 2050 reflect the Government's ambitions [§3.127]. *'The government recognises the need to take further action to ensure aviation's contribution to local air quality issues is properly understood and addressed'* (emphasis added). Both understanding and meeting these objectives will be met by proposed measures which include the improvement of monitoring of air pollution, including ultrafine particles (UFP), and:

- *'requiring all major airports to develop air quality plans to manage emissions within local air quality targets'* which will be achieved *'through establishing minimum criteria to be included in the plans'*.

55 The Clean Air Strategy 2019 is applicable extant policy, which is in any event incorporated into emerging aviation policy by reference (Aviation 2050 [§3.123]), as Dr. Bull accepted in XX. Its commitment progressively to cut exposure to particulate matter pollution as suggested by the WHO, and to set a new, ambitious, world leading target *'to reduce human exposure to PM2.5'* over the long term, over and above the ambitious emissions ceilings set by 2020 and 2030 is an integral part of the Strategy [CD16.4, pp.7, 28 (emphasis added)]. Mr. Andrew's reference in evidence in chief to p.52 of the Strategy added nothing: he referred to government seeking to improve international standards, but omitted to refer to the references on the right hand column of the same page to the action considered in the Aviation Strategy on (inter alia) potential requirements and guidance for airports to produce air quality plans. The omission undermines his credibility as a witness. As accepted by Dr. Bull in XX, the upshot of the Strategy is that:

- (1) There is an expectation that there will be a world leading goal to reduce human exposure to PM2.5 in the next couple of years.
- (2) The aviation industry and airports will be expected to play their part in meeting that goal [see p.52] through the development of air quality plans with minimum criteria.
- (3) Given the shorter term strategies in the CAS for 2020 and 2030 [p.28], it is probable that the long term goal for the reduction of human exposure to PM2.5 will need to be achieved after 2032 when the proposal here is forecast to reach capacity.

56 The clear thrust of both extant and emerging aviation policy on air pollution set out above stands in stark contrast to Dr. Bull's interpretation of it: namely, that the inclusion of the words

*'where possible'* in para. 170 of the NPPF somehow acknowledges that some types of project by their very nature will result in proportionate increases in emissions; that it may not be possible to achieve absolute improvements in air quality; and that the above concessions necessarily apply to any airport seeking to make best use of their existing runway [STAL/5/4, §5].

- 57 This defiance of the thrust of aviation policy on air pollution, and the role which airports are expected to play in reducing it, is consistent with STAL's trivialisation of the policy objective of improving air quality in the ES and ESA (see above).

*Increases in emissions of key pollutants*

- 58 As agreed by Dr. Bull in XX, whether in 2032 comparing the Development Case with the Do Minimum Case, or against the 2019 baseline, the proposal will give rise to increases in key pollutants [see also UDC/2/2, Table 1, §20]:

Nitrogen oxides

- 48 tonnes/yr increase in 2032 comparing the Development Case with the Do Minimum Case
- c.10% increase in 2032 in the Development Case against the 2019 Base

PM2.5

- 0.9 tonnes/yr in 2032 comparing the Development Case with the Do Minimum Case
- c.20% increase in 2032 in the Development Case against the 2019 Base

PM10

- 2.1 tonnes/yr in 2032 comparing the Development Case with the Do Minimum Case
- c.23% increase in 2032 in the Development Case against the 2019 Base.

- 59 As to the breakdown of those emissions, Tables 10.5 and 10.6 of the ESA show that for NOx and PM10 pollutants, the proposal will give rise to increases arising from the Landing and Take Off cycle of aircraft, other airport sources, and airport related road vehicles, all within the control of the airport [CD7.10, pp.17-19]. As to road related pollutants, whilst they are observed to reduce significantly from 2019, that is not due to any steps taken by STAL, but because of national level changes to the emissions controls of vehicles.

60 Against a proper interpretation and application of policy, it is simply not sufficient for an airport to suggest, as STAL does, that the increases in concentration will not be significant against air quality standards and to claim that the proposal is therefore policy compliant. There are increases in key pollutants which are a priority for national and local policy, are adverse, and are within the control of the airport which will be producing them. They are contrary to the extant policy framework applicable to airports to improve air quality and reduce air pollution, and emerging policy requiring further action by airports to achieve those objectives.

#### *Mitigation on Air Quality*

61 All of this begs the question as to what mitigation is offered by STAL to offset these increases in emissions from its proposal. As referred to above, with regard to the incorporated mitigation referred to in the ES and ESA, STAL does not demonstrate how historic commitments referred to in the SDP have met the objective of improving air quality.

62 In a similar fashion, with regard to its current proposal, there is an abject failure to demonstrate how the objectives of improving air quality and reducing air pollution will be met and to what degree. The UU essentially rolls forward measures contained in previous s.106 Agreements from 2003 and 2008 with minor amendments [CD26.15]. A number of points can be made:

(1) The measures contained within the UU are within a Transport Section which seeks to bring about highway improvements (Part 2). There is no bespoke mitigation package proposed for improving air quality, and any potential improvements could at most only indirectly result from certain measures coming forward.

(2) The Transport Targets in clause 8 of the Transport Section are just that; targets for mode share percentages which STAL is required to use only '*Reasonable Endeavours*' to meet. That so-called "obligation" could be easily met by '*the expenditure of such effort and / or sums of money and the engagement of such professional or other advisers as in all the circumstances may be reasonable*' (clause 1.32).

(3) As to specific mode shares under clause 8:

- The target for public transport mode share is to '*maintain*' a 50% mode share for non-transfer air passengers. That is a distinctly lacklustre target given that in its most

recent reported figures, STAL is suggesting that it has, in fact, already achieved a 54% public transport mode share [CD23.34, p.3, 54.22% for Bus & Coach and Rail for the Moving Annual Target]. In this context, a target to achieve a 50% mode share does not represent an improving picture for air quality (indeed, it could be said to represent a worsening).

- The target for single occupancy private car use by Stansted Airport staff is to reach and thereafter maintain 45% by the 43mppa date. The reduction from 55% is marginal when it is noted that the target date is 43mppa, which is forecast to occur 11yrs from now, requiring the operator to deliver less than a 1 percentage point improvement per year.

(4) The means by which alternative modes of transport, car-sharing (by Stansted staff and employees), and sustainable modes of transport are to be achieved is through a Sustainable Transport Levy, with the funds made available to the Stansted Area Transport Forum to be allocated at their discretion, pursuant to the Terms of Reference in Annexure 8 (clause 5). There is nothing in this mechanism which will ensure that the allocation of funds will necessarily be targeted towards measures that would improve air quality (e.g. the allocation of funds for low carbon fuels such as bio-diesel may not result in a net improvement in emissions).

(5) The Local Bus Network Development Fund is to be administered at the discretion of the SATF (clause 4). The priority given to grants to fund ultra-low emissions vehicles or electric vehicles is subject to justification by a business case, the demonstration of which is not made contingent on air quality matters, and might well be focussed solely on matters such as economic viability.

63 As a result, the measures in the Transport Section of the UU are not specific to air quality, lukewarm with regard to mode share, and heavily qualified, leading to uncertainty as to whether air quality improvements would actually be achieved. Moreover, there is no assessment provided in the ES, ESA, or Dr. Bull's evidence that demonstrates the extent to which these measures would improve air quality. All this, in circumstances where that is the objective of extant and emerging policy.

*The impact on air pollution in the Bishops Stortford AQMA*

64 There can be no doubt that there is a longstanding air quality problem at Hockerill Junction within Bishop's Stortford Town Centre. An Air Quality Management Area was declared in 2007

by East Hertfordshire District Council and for nearly 15yrs the air quality standard for nitrogen dioxide levels ( $40\mu\text{g}/\text{m}^3$ ) has not been met. The narrow historic roads, the canyon effect of the unbroken taller buildings, and the gradient of Hockerill Street up to the junction, and the Dunmow Road away from the junction, are features which exacerbate the air quality issues arising from congested vehicular traffic in this location. The measured annual mean nitrogen dioxide concentrations between 2012 and 2019 are well illustrated by Dr. Broomfield's Table 2 [UDC2/2, p.24]. As Dr. Bull accepted in XX, measured levels of the pollutant nitrogen dioxide are:

- well above the air quality standard for every year (2012 – 2019) on the Dunmow Road and London Road arms of the junction (in some cases by a margin of 50% (c. $60\mu\text{g}/\text{m}^3$ );
- above the air quality standard for Hockerill Street for every year (2012 – 2019);
- above the air quality standard for Stansted Road in 2013-5 inclusive.

65 These levels of nitrogen dioxide are currently unacceptable, and the policy objective of the NPPF is to enhance the local environment by preventing new development from contributing to unacceptable levels of air pollution [CD14.6, §170(e)].

66 The proximity of the AQMA to junction 8 of the M11 providing access to the airport, the fact that the AQMA provides a ready means of access to the airport from the centre and south of Bishops Stortford and an alternative means of access to the bypass to the north and west, and the stated objective of STAL to create significant employment and training opportunities for people from the local area including Bishops Stortford, all clearly suggest that there is likely to be a causal link between the use of the airport and traffic through the Hockerill junction. Dr. Bull accepted in XX that, as the local authority charged with the duty to bring down air quality levels in the AQMA, East Herts District Council can be expected to be aware of the factors contributing to the air quality issues in the AQMA. It is all the more significant therefore that in its Local Plan, adopted as recently as October 2018, EHDC should cite the historic road network in Bishops Stortford '*combined with its proximity to Stansted Airport*' as causative factors resulting in congestion and poor air quality [CD14.10, §24.5.3]. EHDC's view in its published Local Plan cannot easily be dismissed as wrong or explained away. As Dr. Bull accepted in XX, the Local Plan was subject to independent scrutiny and an assessment of its soundness, following a statutory process through which STAL would have been consulted and given an opportunity to make representations.



67 EHDC's published view of the impact of the airport on traffic through the AQMA is shared by Dr. Broomfield. Whilst he does not dispute the traffic flow figures contained within Mr. Rust's Rebuttal as to the 61 additional annual average daily total trips on the A1250 immediately east of Hockerill Junction arising from the proposed development [STAL/10/3, Table 2.1], he carefully set out his reasons for considering that to be potentially significant:

- (1) It should be noted that the daily total impact for the other arms of the junction will be less, but not zero.
- (2) The figure provided is an annual average daily total. Dr. Bull's fixation with arithmetically calculating this to be one trip every half hour fails to reflect the reality of how that annual daily average would actually occur, accounting for the ebb and flow of traffic, shift patterns of employees driving from the area to work at Stansted, avoidance of the bypass due to accidents etc.
- (3) During evidence in chief, Dr. Bull dismissed the idea that an increase of 61 additional annual average daily vehicle movements could have a significant air quality effect. However, this increase is not far below the agreed screening threshold of 100 vehicles per day in IAQM Guidance [CD16.9, p.21, Table 6.2] and in the particularly challenging circumstances of the Hockerill Street junction, which are not well represented by the model results presented by Dr. Bull, such an increase in vehicle movements could well result in more harmful increases in air pollution in this highly sensitive area than envisaged by Dr. Bull [see UDC2/2, section 5.3].
- (4) The measured levels of nitrogen dioxide in the AQMA show consistently high levels above the air quality standard over a number of years (see above). By contrast, the reduction in more recent years is at a slow rate. Attempts by Dr. Bull to explain these reductions by reference to the poor performance of Euro V controls before 2015 are unlikely to explain these marginal reductions when viewed in context. The fact that Euro VI emissions controls for cars became available from 2015 would not be expected to bring about a step change in emissions, as fleet mixes take time to change. Euro controls on buses and HGVs without performance problems were in place before 2015, as was the availability of hybrid and (more latterly) electric cars. Yet these factors did not result in reductions in air pollution in the AQMA. Separately, it can be noted that the upgrades to the relevant bus fleet to latest emissions standards for services in East Herts referred to by Mr. Andrew have not had the effect of materially reducing the air pollution in the AQMA [UDC/13/4, §2.17].

- (5) STAL's forecasts are overly optimistic compared with measured trends. The measured trends between 2012-2019 show a reduction in levels of air pollution which is less than that forecast by STAL, as demonstrated by Dr. Broomfield and accepted by Dr. Bull in XX [UDC/2/2, §79 as corrected in UDC/2/5]. The application of an adjustment factor to accommodate this is not uncommon, but the adjustment factor of 8.5 required here is relatively high and rare on Dr. Bull's own evidence (an adjustment factor above 8 was applied in only 2 out of the 40 air quality studies referred to by Dr. Bull [STAL/5/4, Fig.1]). As explained by Dr. Broomfield, the need to apply a relatively high adjustment factor of 8.5 should ring alarm bells about the accuracy of the model used, but in any event shows that even small increases in modelled emissions in the AQMA would have a proportionately higher impact in real terms.
- (6) When interpreting the significance of any increase in emissions, the actual number of properties affected should be borne in mind. Here, the 2 measurement locations within the AQMA represent a total of 57 properties within the AQMA which is within the town centre, which could be frequented by and lead to exposure of the population in this area [UDC/2/2, §77].

68 Viewed against the above context, Dr. Broomfield's assessment stands out for its detachment and is informed by his professional judgment. By contrast, the hyperbole of Dr. Bull's oral evidence in chief, that he was astonished that the level of traffic flow here could even be considered to be significant, fails to take account of the full circumstances explained by Dr. Broomfield. In any event, Dr. Bull did not depart from his written evidence that the airport related activities do make a contribution to air pollution in Bishops Stortford (albeit, on his case, very small) [STAL/5/2, §99].

69 Notably, Dr. Broomfield's assessment is consistent with the note of WYG (White Young Green, who advised the Council at the application stage) dated 15 August 2018 [CD16.14], which took account of the Technical Notes undertaken by STAL in July 2018 including [CD11.2(g)], and concluded:

*'.. The scheme will increase pollutant emissions as a result of additional vehicle movements within the Bishop's Stortford Air Quality Management Area where levels of pollutants are already above the level where health effects are likely to be observed in the most sensitive members of the population. As such these health effects should be considered against the benefits of the scheme and an appropriate balance of mitigation should be sought.'*

70 The fact that WYG were identifying an air quality impact in the AQMA, which necessitated appropriate mitigation, cannot sensibly be denied. Although WYG considered that the potential worst effect would remain ‘just’ within the negligible banding, they noted that there ‘still remained an air quality effect in the AQMA’ [Task 1]. Dr. Bull strove in XX to explain away these comments as not relating to the application, but to the issues within the AQMA generally. His attempt at explanation was simply not credible. Whilst EHDC did ultimately withdraw their objection to the application, the lack of any damage costs assessment in line with their own Air Quality Planning Guidance remains a concern, given the ongoing tightening of air quality standards envisaged in national policy, and the fact that health and associated economic impacts can occur even at levels below the currently established air quality standards. There is a need for the mitigation to be properly assessed and quantified. The lack of a damage costs assessment was also noted in WYG’s note [Task 3].

#### *Ultra-fine Particles*

71 Ultrafine Particles (namely those with a diameter of less than 0.1 microns) and the specific health effects which ambient UFPs can cause, were the subject of a comprehensive report by the Air Quality Expert Group, an expert committee of Defra [CD16.2]. Dr. Bull’s evidence that there is increasing interest in UFPs, but that it is not a new issue [STAL/5/2, §103], is fully reflected in the terms of that report and in its publication date of July 2018, several months before the application was first considered by UDC in November 2018.

72 The relevant parts of the AQEG report were not disputed by Dr. Bull in XX:

- (1) UFPs are believed to contribute to the toxicity of airborne particulate matter but the magnitude of their contribution is currently unclear [Exec. Summary, p.10].
- (2) Emissions of UFPs arise primarily from combustion sources and especially transport-related sources which burn sulphur-containing fuels. Emissions from aviation are significant in the vicinity of major airports [Exec. Summary, p.11].
- (3) Policies and actions to control ambient PM2.5 and PM10 will not always control UFPs [Exec. Summary, p.11].
- (4) Measures designed to mitigate concentrations of PM2.5 and PM10, of which UFPs are part, may also affect UFPs, but because very small particles individually have very little mass, the sources, behaviour and impacts of UFPs in the atmosphere can differ from those

of the substantially fewer, larger particles that dominate the currently regulated PM2.5 and PM10 fractions [p.12].

- (5) Future projections show an increasingly important contribution of UFPs from aviation [p.23].
- (6) Aviation fuel has a far higher sulphur content than fuels for road vehicles, and the growth of air traffic is likely to cause increased UFP concentrations in the vicinity of airports, unless the fuel sulphur content is reduced [p.87].
- (7) One recommendation of the report is to establish a permanent site, monitoring ultrafine particulate number concentration and size distribution in the vicinity of a major airport [p.94].

73 Shortly after the AQEG report, the Government's thinking on UFPs and aviation was included in the Aviation 2050 Green Paper in December 2018 [CD14.27]. The Government's recognition of the need to take further action to ensure aviation's contribution to local air quality issues is properly understood and addressed, includes a proposed measure to improve the monitoring of air pollution, including UFPs, by standardising processes for airport air pollution monitoring and communication [§3.127].

74 Given the increasing interest in UFPs and aviation, both at an advisory level to central government, and in emerging aviation policy, it is surprising that the ES and subsequent submissions during the application process omitted to address the issue of UFP. At the very least, UFPs should have been identified as a potential impact of the proposed development, consistent with the need for transparency in assessing the effects of aviation growth, which is a core principle underpinning the APF [CD14.1, p.8].

75 The position is that there will be an increase in emissions of PM2.5 arising from the development and a consequential increase in UFPs, the effects of which may be harmful to human health. Applying a precautionary approach to a recognised issue, where projections show an increasingly important contribution of UFPs from aviation, and the proposal will allow for aviation growth over the long term, there is a need to regulate UFPs. The fact that the impacts of UFPs cannot be accurately or reliably quantified, should not be an impediment to an appropriate condition regulating their production. As accepted by Dr. Bull in XX, UFPs are likely to be subject at least to a monitoring requirement in the near future. Limiting the PM2.5 emissions through Condition 15 Schedule A would be one way in which to achieve regulation

in the short term. Pursuant to that Condition, the scheme submitted when the airport is due to exceed 35mppa will need to grapple with policy as it has evolved at that stage, subject to the limit set in Schedule B. A responsive condition, such as that provided by Condition 15, will enable the potential impacts of UFPs to be managed, and for the evaluation and management of impacts of UFPs to improve as data and methods become available.

*Air Quality Conditions*

- 76 Each of the air quality impacts identified by UDC is capable of being mitigated through an appropriate condition and / or mitigation package. Specifically, the understatement of relevant aviation policy on air pollution, the failure to demonstrate how the mitigation proposed will achieve the policy objective of improving air quality, the potentially significant contribution which the proposal will make to air quality in the Bishops Stortford AQMA, and the need to regulate UFPs, can all be addressed via conditions which limit the amount of key pollutants generated by the proposal.
- 77 As increases in the permitted passenger numbers are realised, Condition 15 maintains the currency of air quality standards by evaluating them by reference to the standards applicable at the time of realisation of a lockstep increase in passenger numbers, together with ongoing management. As with the other environmental impacts of the proposal, the air quality limits set within Schedules A and B of Condition 15 are derived from STAL's ESA, essentially tying the realisation of the growth in passenger numbers permitted to the environmental effects that have been assessed, and that are within STAL's control, delivering the improvements in air quality which are now required by extant and emerging policy relevant to aviation. Given the responsibility on airports to improve air quality, those limits are set by reference to the Do Minimum case [CD26.11].
- 78 Given the proximity to the airport of Hatfield Forest and Elsenham Woods, which are Sites of Special Scientific Interest, the lack of any assessment of short term (24hr mean) levels of oxides of nitrogen for these (and any) ecological sites needs to be addressed. Dr Broomfield's suggested Condition 18 is supported by his updated evidence in response to STAL in his Rebuttal [UDC2/4, pp.3-5]. The airport could constitute a large individual source to generate an acute NOx peak, and even without that, NOx emissions can readily exceed the 24hr critical level specified on the APIS website, as demonstrated by the most recent air quality report for

Stansted. As such, location specific evidence justifies the need for this assessment to be undertaken.

### **Whether the development would conflict with UK obligations to combat climate change**

#### *Extant policy on carbon emissions*

79 Decarbonisation through radically reducing greenhouse gases (the most important of which is CO<sub>2</sub>) forms an integral part of achieving sustainable development in the NPPF [CD14.6]:

- Mitigating and adapting to climate change, including moving to a low carbon economy form part of the environmental objective of sustainable development, with a view to protecting and enhancing the natural environment (§8(c)).
- Section 14 of the NPPF, on meeting the challenge of climate change, goes on to frame the objective in the following terms:

*'The planning system should support the transition to a low carbon future in a changing climate... It should help to: shape places in ways that contribute to radical reductions in greenhouse gas emissions...'* (§148).

80 This objective, and the strong terms in which it is framed, are not new in national planning policy (cf. the similar wording of the NPPF 2012 as to the key role of planning in shaping places *'to secure radical reductions in GHG emissions'* [CD14.7, §93]). It reflects the urgent need to tackle climate change. At a high level, the achievement of this objective engages the essence of sustainable development, namely *'meeting the needs of the present without compromising the ability of future generations to meet their own needs'* [CD14.6, §7].

81 Mr. Robinson, as STAL's witness on carbon policy, accepted in XX that the policy in para. 148 of the NPPF was relevant here, that carbon emissions are a type of GHG, and that the Government was looking to achieve a radical reduction in carbon emissions as an integral part of the achievement of sustainable development. It is a misreading of national policy to confine para. 148 to flooding and coastal change (as suggested through Re-ex of Mr. Robinson). That the objective of para. 148 is not stated to be specific to aviation in the NPPF does not detract from its importance to this proposal. Put another way, para. 148 applies to the whole economy, and aviation is not exempt.

82 Given his acceptance of the relevance of this part of national policy, it is surprising that nowhere in Mr. Robinson's evidence is this part of the NPPF considered. It is yet more surprising that it is not discussed or considered at all in the ES or ESA on carbon emissions [CD3.12, §12.6-12.25; CD7.12, §12.3.1-12.3.9]. This misreading of, and failure to address, an important planning policy document puts a big question mark over the reliability of Mr. Robinson's evidence.

83 Similarly, the rapidly evolving policy framework on carbon in recent years - and throughout the consideration of this application and appeal - is in large part due to the Paris Agreement 2015 and its greater ambition to achieve "net zero" greenhouse gas emissions during the second half of the 21<sup>st</sup> century (at least 100% lower than the 1990 baseline)<sup>3</sup>, with the consequential amendment in June 2019 of the UK Government's fundamental objective in relation to climate change enshrined in the Climate Change Act 2008, so as to impose a duty on the Secretary of State to achieve the net zero target. Yet no reference is made to the Paris Agreement in the carbon emissions chapters of the ES and ESA.

84 As to aviation specific policy, whilst the APF places emphasis on action to be taken at an international and European level, it equally states that the Government '*will also take unilateral action at a national level where it is appropriate and justified in terms of the balance between benefits and costs.*' [CD14.1, p.41, §2.5]. Importantly for this application, MBU simply does not say what STAL wants it to say. Mr. Robinson's conclusion in his proof, that carbon emissions associated with airports have already been considered by Government in formulating MBU '*and they are not therefore a matter for local planning decision making*' [STAL/8/2], completely unravelled in XX. He accepted that:

- (1) One of the key policies to be relied upon in planning decision making was the NPPF [a policy which he had inexplicably omitted to consider].
- (2) Whilst paras. 1.11-1.13 of MBU provide that carbon emissions are important environmental elements which should be considered at a national level, that does not preclude their consideration at a local level.
- (3) There is nothing in MBU which states that carbon emissions must not be taken into account by local planning authorities when considering decisions on airport growth.

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<sup>3</sup> Less than 2 degrees and preferably no more than 1.5 degrees of warming, implying any and all sources of warming need to be addressed, particularly, but not limited to carbon dioxide emissions.

(4) The interpretation of MBU in (2) and (3) above is consistent with the evidence of Sarah Bishop of the DfT referred to in Mr. Robinson’s proof [STAL/8/2, §3.5], that there is ‘*no requirement*’ for LPAs to assess airport planning applications against wider national carbon emission ambitions. Carbon emissions can be a matter for the LPA to take into account.

85 Putting to one side the serious damage done to the credibility of his evidence, these concessions were rightly made. It is important to recognise that MBU does not seek to limit the wide ambit of local environmental impacts which can be considered by local planning authorities in considering airport growth applications<sup>4</sup>.

86 First, it is stated that the Government understands the concerns of communities living near airports over ‘*Local environmental impacts, ‘particularly noise, air quality and surface access.’* [CD14.2, §1.22, emphasis added]. They are not confined to those stated.

87 Secondly, within the ‘*Policy statement*’ - where the policy to be applied by LPAs should be found [§1.25 – 1.29] – the Government states that it ‘*believes there is a case*’ for airports making best use of their existing runways. But [§1.26]:

- It is for airports to submit their application to local planning authorities;
- ‘*This policy statement does not prejudge the decision of those authorities...*’
- The policy ‘*leaves it up to local rather than national government, to consider each case on its merits*’.

This part of the policy could easily have stated that carbon emissions are not for LPAs to consider. It does not say that.

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<sup>4</sup> Indeed, UDC’s position on carbon is entirely consistent with the interpretation and approach to similar policy endorsed by the Court of Appeal in the recent case of *R (Client Earth) v SoS for BEIS and Drax Power Ltd.* [2021] EWCA Civ 43, in which the Court rejected a challenge on the interpretation of the Overarching National Policy Statement for Energy (EN-1) on carbon emissions. The relevant policy in EN-1 stated that (as relevant): Government has determined that CO2 emissions are not reasons to prohibit the consenting of projects or to impose more restrictions on them than are set out in the energy NPS, and that therefore the decision maker does not need to assess individual applications in terms of carbon emissions against carbon budgets (§30). In interpreting that policy, the Court held that it does not diminish the need for relevant infrastructure or undo the positive presumption, ‘*But nor does it prevent greenhouse gas emissions from being taken into account as a consideration attracting weight in a particular case. How much weight is for the decision-maker to resolve. It follows that, in a particular case, such weight could be significant, or even decisive, whether with or without another “adverse impact”*’. (§87, per Lindblom LJ, emphasis added).



- 88 Thirdly, MBU expressly envisages that the forthcoming Aviation Strategy will progress the wider policy towards tackling aviation carbon [§1.12]. Again, the ‘*Policy statement*’ expressly requires consideration of such policies. Airports will need to demonstrate how they will mitigate against ‘*local environmental issues*’, which are not defined or restricted, taking account of ‘*new environmental policies emerging from the Aviation Strategy*’ [§1.26, emphasis added]. As a result, it is acknowledged within MBU itself that the analysis of carbon emissions does not provide the complete answer on carbon. Rather, MBU expressly advocates consideration of emerging environmental policies, which includes carbon, through the Aviation Strategy.
- 89 That last point shows how STAL has overstated its case as to the consideration given to carbon emissions in MBU. Paras. 1.11 – 1.21 show that an analysis has been undertaken which ‘*[o]n balance*’ suggests it is likely that measures would be available to meet the planning assumption under the policy. However, that is very much the start of the analysis. It is not a “cumulative assessment” of UK wide airport expansion, since it does not name or assess any single or cumulative set of airport proposals. It does not “pre-authorise” any airport expansion in terms of carbon emissions, both as suggested by STAL.
- 90 Fourthly, and in any event, in terms of its assessment of carbon emissions, MBU is not an aviation policy which is calibrated to net zero. It was formulated at a time when the carbon reduction target was 80%. Approximately 1yr after its publication in June 2018, the Climate Change Act 2008 was amended to reflect net zero and a 100% carbon reduction target [CD17.24, 26 June 2019]. Given this change in the law, it is unreal to suggest that this will not affect both domestic and international aviation emissions. Emissions from international aviation and shipping (IAS) are currently required to be taken into account in setting carbon budgets under s.10(2) of the 2008 Act (with budgets set allowing headroom for projected future emissions from IAS). Moreover, the clear indication from the Government’s latest report on reducing UK emissions [CD17.64, p.106, Oct 2020] and the formal recommendation of its statutory adviser on the 6<sup>th</sup> Carbon Budget [CD17.77, p.162, Table 8.1, 9 Dec 2020], both of which post-date the amendment to the 2008 Act, is that IAS are now likely to be formally included in UK climate targets when setting the 6<sup>th</sup> Carbon Budget. In any case, nothing precludes national and local policy and action, in addition to international action.
- 91 As a result, the carbon analysis that lies behind MBU is out of date and should carry little weight in the context of net zero and emerging policy which seeks to take account of it.

Alternatively, adopting the same approach endorsed by the Supreme Court with regard to the ANPS (published at the same time as MBU and complementary to it) applications under MBU must take into account carbon emissions policy (targets and budgets) as it has evolved at the time of the application, in this case accounting for net zero and the direction of travel of emerging policy (*R (Friends of the Earth Ltd et al.) v Heathrow Airport Ltd.* [2020] UKSC 52, paras. 10, 98).

92 Finally, in response to the amendment to the Climate Change Act 2008 to reflect net zero, UDC passed its own resolution declaring a climate emergency, to commit to achieving net-zero status by 2030, and to produce a bold plan of action to achieve that aim [CD17.34, 30 July 2019]. The resolution, which is a material consideration in its own right, and underpinned by a change in the law on climate change, was passed approximately one month after the amendment to the 2008 Act, and during its consideration of this application, seeking to enable growth at Stansted Airport by 8mppa. Against that background, the interpretation of MBU advocated by Mr. Robinson (until his abandonment of it in XX), to the effect that a local planning authority is prevented from considering carbon emissions in relation to airport expansion in its area, makes no sense.

93 When viewed together, STAL's refusal to acknowledge relevant and longstanding national planning policy on radically reducing carbon emissions, its misinterpretation of aviation policy in MBU so as to suggest that carbon emissions are a matter to be dealt with at a national level and cannot be considered by LPAs in local decision making (before resiling from that position in oral evidence), its overstatement of the carbon analysis lying behind MBU as "pre-authorising" airport growth in carbon terms, and its failure to accept that MBU is now out of date in carbon terms, reflect an airport which is failing to acknowledge and grapple with its responsibilities on carbon emissions. Against a context where, since 1990, the rest of the economy has achieved very significant reductions in CO<sub>2</sub>, whilst aviation's emissions have more than doubled [CD17.33, 4<sup>th</sup> para.], STAL's approach at this inquiry, that in policy terms these are not matters for local decision making, is both stark and unbalanced. It is symptomatic of an applicant that has not played its part in the planning process in a way that fostered trust and confidence in any thing it said.

*Direction of travel and emerging policy on carbon emissions*

94 Even before the amendment to the Climate Change Act in 2019, in order to implement its long term vision and pathway for addressing UK aviation's impact on climate change, the

Government in late 2018 was proposing to require all planning applications for capacity growth to provide a full assessment of emissions, drawing on all feasible, cost-effective measures to limit their climate impact, and demonstrating that their project will not have a material impact on the Government's ability to meet its carbon reduction targets [CD14.27, Dec 2018, p.74, §3.96].

95 A statute is an unassailable Parliamentary statement of what the public interest demands. The amendment to the Climate Change Act to reflect net zero in June 2019 was, on any view, a material consideration in the consideration of the application. In addition, a number of statements from the Committee for Climate Change during 2019 - whilst the application was under consideration by UDC - also showed a clear direction of travel on carbon emissions and aviation [summarised at UDC3/1, §26; UDC3/2, p.3]. According to the CCC:

(1) The Climate Change Act (before amendment) and ratification of the Paris Agreement implied that even stronger action on the reduction of GHGs was required, including in aviation.

(2) IAS emissions should be formally included in UK carbon targets.

(3) The Government should assess its airport capacity strategy against the context that zero-carbon aviation is highly unlikely to be feasible by 2050, the reductions envisaged in aviation emissions could be reduced further with lower levels of demand, and novel fuels are highly speculative and should not be relied upon.

(4) Against the current planning assumption as well as in the context of net zero, limiting growth in aviation demand will be required, which could include the management of airport capacity.

96 The Government's Response to the CCC's 2020 Progress Report to Parliament [CD17.64, Oct 2020] represents emerging policy. It plainly signals a seismic shift in approach, noting that *'[r]eaching net zero will involve fundamental changes across the UK economy. Under any feasible scenario, meeting net zero will require reductions in emissions across the economy on a scale not previously seen...'* [p.7]. In line with that shift in approach, in response to the CCC's recommendation formally to include IAS emissions within UK climate targets, the Government clearly acknowledges that an international approach to such emissions is not sufficient on its own, that a contingency measure is required at a domestic level, and that it is *'minded to*

*include international aviation*’ in carbon budgets if international measures do not go far enough or fast enough [pp.105-6].

- 97 The CCC’s recommendations for the UK’s 6<sup>th</sup> Carbon Budget (2033-2037), represent the culmination of its previous statements and its most up to date, formal, position [CD17.75, 9 December 2020, ‘6CB’]. It is the most comprehensive advice the CCC has ever produced, describes the path to net zero, and is a blueprint for a fully decarbonised UK against the increased ambition implied by the net zero target [p.5]. The scale of what is required in policy terms, engaging every sector - including aviation - is plainly relevant, particularly when considering the timescale of STAL’s proposed growth in this application, envisaged to come forward between 2027 and 2032 [p.5, emphasis added]:

*‘The implication of this path is clear; the utmost focus is required from government over the next ten years. If policy is not scaled up across every sector .. the UK will not deliver Net Zero by 2050. The 2020s must be the decisive decade of progress and action.’*

- 98 The policy recommendations for aviation include the formal inclusion of IAS emissions within UK climate targets, working with ICAO to set a long-term goal for aviation consistent with the Paris Agreement, committing to a net zero goal for UK aviation, monitoring of the non-CO2 effects of aviation, and longer-term support for Sustainable Aviation Fuels and technologies [CD17.77, p.162, Ch. 8, Table 8.1]. Importantly for this inquiry, demand management is an integral part of the approach, with a formal recommendation on airport growth consistent with the CCC’s previous statements:

*‘There should be no net expansion of UK airport capacity unless the sector is on track to sufficiently outperform its net emissions trajectory and can accommodate the additional demand.’*

- 99 As explained by Mr. Lockley in examination in chief, the effect of the recommendation is that passenger demand should not be allowed to grow ahead of the development of e.g. SAFs [pp. 169-170]. The passenger analysis behind that policy approach is set out in 6CB. The demand growth envisaged by 2050 arises from passenger numbers of 365 million, in circumstances where current UK airport capacities are at least 370 million passengers [CD17.79, Box 8.1, p.262]. The recommendation is that further airport growth in passenger numbers should not

be permitted unless actual progress on decarbonisation can be demonstrated by reference to the uptake of SAFs or other measures.

- 100 UDC has never disputed that the Government’s planning assumption of 37.5MtCO<sub>2</sub> for the aviation budget has not changed, nor the compatibility of 60% in growth against a 2005 base [UDC/3/2, p.2-3]. But this does not sit in splendid isolation from what is going on in other sectors. The point made both by Dr. Hinnells and Mr. Lockley is that given the 100% reduction target as a result of net zero, there is inevitably less headroom for emissions from aviation to be made up by other sectors, which has been the case to date, and so aviation will inevitably be squeezed. The policy recommendations in 6CB, including the need for demand management, must be considered in that light.
- 101 The policy recommendations made by the CCC cannot easily be dismissed as non-binding<sup>5</sup>. As accepted by Mr. Robinson in XX, the CCC was created by the Climate Change Act 2008 as an expert body to give advice to the Government on, amongst other things, carbon budgets. Before setting a carbon budget, the SoS must take into account the advice of the CCC (s.9(1)(a)). If the SoS sets the carbon budget at a different level from that recommended by the CCC, the SoS must publish a statement setting out the reasons for that decision (s.9(4)). As for the 6CB, this is the first to be produced by the CCC following the ratification of the Paris Agreement and the amendment to the 2008 Act to reflect the net zero target. Mr. Robinson was right to concede in XX that it would only be in exceptional circumstances that the CCC’s advice would not be followed.
- 102 Nor would a “first come first served” approach to airport expansion be consistent with extant policy, or the CCC’s advice and proposed policy approach. The CCC’s recommendations outlined above envisage a strategic approach to all airport growth so as to ensure that aviation as a sector plays its proper part in achieving net zero in 2050. An approach which allows each airport to apply for a bit more growth and increase in carbon emissions against an “upper ceiling” budget, with each grant of permission for growth being a material consideration for the next decision, would be contrary to the policy objective of radically reducing emissions and lead to an unstructured free for all, particularly given the number and scale of known proposals for growth in the sector [UDC/3/1, p.34, Table 2].

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<sup>5</sup> In addition to the points made above, the approach of the Inspector Panel to emerging policy in the Manston appeal is relevant. Their conclusion, that the aviation emissions there would have a material impact on the ability of Government to meet its carbon reduction targets, was based on ‘*the direction of emerging policy*’ [CD14.59, §6.5.71]. The quashing of the SoS’s decision did not relate to this point [INQ034].

- 103 The CCC’s policy recommendations on demand management also rightly seek to prioritise the climate over (1) suggestions that carbon emissions are really an international issue, and (2) promises from the aviation industry of a better tomorrow in terms of sustainable aviation.
- 104 As to the first point, STAL seek to emphasise the Government’s commitment to work with ICAO to set a long-term goal for aviation consistent with the Paris Agreement, and to strengthen CORSIA. But the ICAO process has little to show for it at the current time, and both Mr. Lockley and Dr. Hinnells explained the limitations of CORSIA, with regard to it being voluntary until 2027, its end date of 2035, the inadequacy of its overall goal to off-set against 2019 levels of emissions, and the very concept of offsetting, with the time delays it inevitably involves to achieve any offset, and the reducing availability of offset options. Set against these limitations, the reliance placed by STAL on the ICAO process and CORSIA is best characterised as faith-based.
- 105 As to the promise of a better tomorrow, the over-optimism of the aviation industry on the potential for significant take up of Sustainable Aviation Fuels (as argued in the Sustainable Aviation Roadmap) is properly set against reality by Dr. Hinnells in his Rebuttal. He was not seriously challenged on this analysis [UDC/3/2, pp.1-2], which was made by reference to the recent Ricardo and E4Tech report ‘*Advanced Biofuels for Aviation*’ of September 2020, which was commissioned by the DfT. SAFs are a “First of a Kind” technology, there is currently no production of SAFs, and they are in their infancy as a technology. The Sustainable Aviation Roadmap estimates that £1bn of investment is required: £500m of Government investment to be matched by £500m from industry. Yet, at present, the relatively small sum of £15m has been committed by Government. As explained by Dr. Hinnells in XX, not all of the sums referred to in [INQ19] relate to SAFs but, in any event, taken together they form a very small proportion of what will be required. The vast majority of uptake and saving would be from 2040-2050 from a low base before that. Whilst a somewhat more optimistic view of SAFs than previously lies behind the CCC’s 6CB and its recommendations, the CCC is still a long way from endorsing the aviation industry’s level of optimism, given the very considerable uncertainties involved.

*Significance of the carbon emissions arising from the proposal*

106 Dr. Hinnells' judgment, that the carbon emissions arising from the proposal are significant, is supported by a number of contextual points (figures by reference to [CD7.12, p.16, Fig. 12-3]):

- (1) Between 2019-2032, the increase in carbon emissions reported in the ESA arising from the proposal (comparing DC with DM) is 0.14MtCO<sub>2</sub> annually, which represents a 6.3% increase in CO<sub>2</sub> emissions over the DM scenario. Mr. Vergoulas accepted in XX that this outcome was not moving in the right direction, could not be dismissed as of no consequence, and was a matter of concern.
- (2) By 2050, the Annual DC Central case also shows an increase in carbon emissions of 0.09MtCO<sub>2</sub> compared with the Annual DM Central case.
- (3) The above "headline" 2050 figure does not reflect what the proposal will actually yield in terms of additional CO<sub>2</sub> over the period 2032-2050. Over that 18yr period, a cumulative total of more than 2MtCO<sub>2</sub> will be produced by the proposal.
- (4) Every tonne today adds to the cumulative impact of carbon emissions. The atmospheric lifetime of CO<sub>2</sub> in the atmosphere is in the range of 30-95yrs [UDC/3/1, §90, and Mr. Lockley's evidence in chief].
- (5) The above increases have to be considered against policy in the NPPF to radically reduce GHGs [CD14.6, §148]. Both Mr. Robinson and Mr. Vergoulas accepted that this part of the NPPF was relevant, but it is not considered in the ES, ESA, or their evidence. This undermines their judgments on significance.
- (6) There is quite a variance of 65% between the pessimistic and best practice scenarios for flight carbon emissions by 2050 reported by STAL, as accepted by Mr. Vergoulas in XX [STAL/9/2, §6.1.3]. A wide range of scenarios is required because of the wide variation in trajectories of aviation emissions and wide range of scenarios for the uptake of SAFs, as explained by Mr. Vergoulas. There is uncertainty in estimating carbon emissions out to 2050 [STAL/9/2, §5.3.5].
- (7) Compared to the UK planning allowance of 37.5MtCO<sub>2</sub>, the pessimistic scenario (5.3%) would be approximately a third higher than Stansted's 2016 share of aviation carbon emissions (4%) as reported by the DfT, as accepted by Mr. Vergoulas in XX (see also [UDC/3/1, §55]). That stretches the meaning of the words 'not dissimilar' which Mr. Vergoulas uses to describe the comparison.
- (8) The achievement of either the central or best-case scenarios relies on the significant uptake of SAFs. Dr. Hinnells does not share the optimism of the aviation industry with

regard to the speed and scale of their uptake, as set out in his Rebuttal and supported by a recent DfT commissioned report [UDC/3/2, pp1-2, see above].

- (9) If the aviation planning budget reduces from 37.5MtCO<sub>2</sub> down to 30MtCO<sub>2</sub> [or 25MtCO<sub>2</sub> suggested by the Sustainable Aviation Carbon Roadmap, or 23MtCO<sub>2</sub> suggested by the CCC], Stansted's proportion of that budget will only increase.
- (10) The non-CO<sub>2</sub> warming impacts of aviation (carbon equivalence) are well documented and, whilst there are uncertainties, should not be ignored in considering the significance of carbon emissions, applying the precautionary principle, the potential effect of non-CO<sub>2</sub> impacts, and the CCC's recommendations in 6CB that it be further considered and monitored.
- (11) As to significance criteria, the ESA records that there is no specific guidance or standard on how to determine whether carbon emissions are significant or not for EIA purposes. The IEMA guidance referred to, to which Mr. Vergoulas contributed, provides that '*GHG emissions from all projects will contribute to climate change*', and that '*any GHG emissions from a project might be considered to be significant*' [CD7.12, §12.4.19].

107 Mr. Vergoulas fairly accepted in XX that there was nothing technically or methodologically unsound in Dr. Hinnells' approach and that the difference between himself and Dr. Hinnells on the significance of the proposal was one of professional judgment. In that context, STAL's reliance on Dr. Hinnells' acceptance in XX that the proposal's carbon emissions were a small fraction of the overall carbon budget, to argue that he accepts that the impact of the proposal would not be significant, is both unfair and misguided. First, it misinterprets the evidence he gave: acceptance that the percentage concerned is arithmetically a small fraction of the overall budget, does not equate to a conclusion on significance. Secondly, the emissions expressed as a percentage of a particular carbon budget forms but one strand of many in assessing the significance of the proposal in carbon emissions terms.

108 It is questionable whether policy 'tests' from the ANPS can be taken and applied to proposals such as this. As Mr. Scanlon explained in XX, the ANPS was published at the same time as MBU, but it is a policy document which applies specifically to the 3<sup>rd</sup> runway proposal at Heathrow. Regardless of its applicability in terms of setting policy tests for this proposal, Dr. Hinnells is able to express his view by reference to its policy test [CD14.3, §5.82]], namely that the additional 8 million passengers per year in 2032 will, on current data and assumptions, almost certainly adversely impact on the UK's ability to meet its 2050 net zero target to a degree which cannot be overlooked [UDC/3/1, para. 100].



109 The full context for this judgment, set out above, underpins his view, but it can be explained briefly. The IEMA guidance recognises that climate change, to which GHG emissions will contribute, is the largest interrelated cumulative environmental effect. That recognises that the effects of carbon emissions are cumulative. The thrust of the IEMA guidance is that even small increases could be significant. An application of aviation policy under MBU, set against extant and emerging policy, which allows each airport seeking to expand to say that it is not materially affecting the carbon budget, is a recipe for piecemeal increases in carbon emissions, which would not achieve the reductions sought by policy, and would materially affect the carbon budget when taken together.

#### *Mitigation on Carbon Emissions*

110 STAL's position on carbon on entering this inquiry can be illustrated as follows:

(1) As at 2032, 93% of the carbon emission increases are projected to be from flights at Stansted [CD7.12, §12.7.2].

(2) In practice, STAL's "carbon neutrality" applies to just 1% of its overall carbon emissions [UDC/3/1, §69].

(3) None of the specific mitigation initiatives referred to in Mr. Vergoulas' evidence address the lion's share of the emissions (i.e. flights) [STAL/9/2, §6.2.1].

(4) STAL offers no condition on carbon emissions, arguing instead that the impacts of the proposal are not significant and are for Government to deal with at a national and international level.

111 Against the full force of carbon emissions policy, its direction of travel, and emerging policy in the light of the net zero target, there is a need for the carbon emissions of this proposal to be conditioned, so as to limit the carbon emissions to those which have been predicted, as maximum limits. Such an approach would be consistent with the need for the aviation industry to share the benefits of aviation growth, which is the recognised policy approach to balancing the benefits of aviation with its environmental impacts.

112 The approach taken to Heathrow's expansion provides a precedent for this approach. As part of the consultation on Environmentally Managed Growth, the preliminary results of the assessment on Carbon and Greenhouse Gases includes '*details of measures that would be taken to reduce emissions*' [INQ20, A9, June 2019]. The proposal is that Heathrow will commit to '*a mechanism for an ongoing review and reporting of carbon emissions involving*

*independent oversight to ensure the scheme is not having a material impact on the ability of the Government to meet its carbon reduction targets, and a requirement to take additional action in the event that that objective is threatened.’ [A9-A10]*

113 Although the Heathrow scheme is of a greater scale in terms of development and its environmental effects, there is no reason why the principle behind its approach should not apply here. Given the rapidly evolving and tightening framework of carbon emissions policy in the context of net zero, there is every necessity for such a condition to be imposed here to secure the outcomes predicted as a minimum requirement.

#### **Whether the development would be supported by necessary infrastructure**

114 Given the terms of the RFRs, namely that STAL had failed to demonstrate to UDC that the proposal would not give rise to detrimental effects from aviation noise and air quality, and that the granting of the proposal would be contrary to current and emerging policy on carbon emissions, it is hardly surprising that RFR4 contended that there was a failure to provide the necessary infrastructure or mitigation to address the detrimental effects of the proposal. This was nothing more than a logical extension of the concerns raised through the other reasons for refusal.

115 So it has transpired. As to the UU, quite separately from the subsequent amendments to highway mitigation necessitated by the funding shortfall for the improvements to Junction 8 of the M11, UDC’s experts have concluded that further necessary mitigation is required on noise and air quality. On noise, a consistent application of the criteria for the Enhanced Sound Insulation Grant Scheme points to the need for Thaxted Primary School to be included. On air quality, the potentially significant effects on air quality in the Bishops Stortford AQMA are not met by a bespoke mitigation package, and the Transport section of the UU will not bring about air quality improvements, contrary to the objective of national policy (both of which UDC seeks to bring about through conditions). As to conditions, the expert evidence of each of UDC’s witnesses supports the need for conditions ensuring that the environmental effects of the proposal are limited and appropriately managed in line with extant and emerging policy. It’s just a matter of how this is best secured.

#### **Planning balance and mitigation**

116 As Courts regularly remind parties when challenging Inspectors' decisions, Mr. Scanlon's proof needs to be read as a whole and fairly, rather than dissected as if it were a piece of tax legislation. In undertaking the planning balance, Mr. Scanlon acknowledges the significant weight to be given to the need to support economic growth and productivity and the wide scope of benefits identified by STAL in its application, which are not disputed by UDC. As to environmental matters, the predicted improvements in noise impacts, which are positive, are balanced by the predicted air quality and carbon emissions impacts, which detract. Weighing these and other matters in the planning balance, Mr. Scanlon's conclusion, that there is overall compliance with the development plan, is expressly subject to the accuracy of the predicted environmental impacts. There is a mix of positive and negative influences comprising other material considerations, and compliance with aviation policy is mixed, such that the balancing exercise does not deliver a clear outcome. However, his judgment that the appeal proposals - based on the predicted assessments in the Environmental Statement Addendum - should be approved, is crucially dependent on securing those environmental benefits through conditions.

117 That the grant of permission is dependent on the imposition of conditions regulating the environmental matters raised by UDC, was reiterated by Mr. Scanlon when he gave oral evidence. It is entirely consistent with a number of passages in his proof: his judgment that the appeal proposals should be approved is '*dependent*' upon securing the environmental mitigation [§2.9]; the uncertainties of forecasting and the scope for different outcomes '*requires the imposition of a condition*' on any grant; his conclusion is '*based on*' the predicted impacts being accurate and on '*reaching*' an agreed position on mitigation [UDC/4/1, §§2.9, 2.11, 10.11]. Importantly, reading paras. 9.77 and 9.78 together, it is clear that his conclusion that the planning balance would favour approval is on the basis that the impacts predicted can be realised and that Condition 15 would meet that requirement. Attempts to read para. 9.77 in isolation, or to suggest that there is a staged approach in Mr. Scanlon's evidence to the effect that Condition 15 is an "added extra" were both artificial and rightly rejected by Mr. Scanlon as an unfair reading of his evidence. Moreover, it defies judicial strictures in the planning context that documents must be read both fairly and as a whole. Rejecting the evidence of the statement maker is the opposite of reading the statement fairly. Reading the statement as a whole does not reveal any ambiguity. Even if one part of Mr. Scanlon's evidence were sought to be misinterpreted to suggest something different, his oral evidence made absolutely clear that his position has consistently been that the grant of permission is

dependent on conditioning the scheme pursuant to Condition 15 (or equivalent). That evidence cannot be ignored or gainsaid.

118 There are certain key differences between Mr. Scanlon's and Mr. Andrew's evidence:

- (1) Mr. Scanlon makes entirely straightforward, sensible, and reasonable points about the inherent uncertainties of forecasting generally and with regard to Stansted in particular, exacerbated by the effects of the COVID-19 pandemic [UDC/4/1, §8.5]. Mr. Hill again invited the Inquiry to adopt a blinkered reading of the first sentence of para. 8.9 of Mr. Scanlon's proof as if the remainder of the paragraph did not exist. The use of linguistic lunettes should have no role in the Inquiry process: it is wholly unfair on a witness and does no credit to Mr. Hill. His further attempts in XX to suggest that Mr. Scanlon's views here were somehow informed by an expert forecasting report were as odd as they were desperate. They reveal a lack of confidence by STAL in their own forecasts, and a need to have their evidence bolstered by that of another party. As explained by Mr. Scanlon in evidence in chief, the current uncertainties of forecasting support the need for mitigation.
- (2) STAL's SDP is rightly given no weight by Mr. Scanlon [UDC/4/1, §9.65]. STAL's commitment to review it has not been fulfilled, and attempts by Mr. Andrew to blame UDC for STAL's failure to update it (to reflect evolving environmental policy) ring hollow. It is through this document that STAL should explain to all stakeholders how it proposes to manage its environmental impacts [CD15.5, p.4]. Not only is it out of date on such matters, but there is little within the document to demonstrate that 'aims' such as 'to reduce air pollution' have been achieved [p.29], and none of its provisions are enforceable. Mr. Andrew's apparent wish for it to carry some weight is misplaced [STAL/13/2, §7.11]; it provides no assurance that environmental considerations will be properly addressed by STAL, which can only be achieved by appropriate mitigation.
- (3) Mr. Scanlon properly takes account of the NPPF's policies of adapting to climate change by moving to a low carbon economy and through seeking radical reductions in greenhouse gases [UDC/4/1, §§9.29, 10.5]. These are policies which are consonant with the definition of sustainable development, to meet the needs of the present without compromising the ability of future generations to meet their own needs, and with the environmental objective of achieving sustainable development [CD14.6, §§7-8]. By contrast, and as discussed further below, Mr. Andrew has simply missed these policies in his assessment.

He accepted in XX that he did not refer to paras. 7 and 148 in his proof or rebuttal, and his Appendix 3 finds that the NPPF is “not applicable” on carbon emissions [STAL/13/3, p.41]. It is on any analysis a remarkable omission from the developer’s planning expert, striking a deep blow against his general reliability and judgment. Paras. 7, 8, and 148 of the NPPF provide proper policy support for the mitigation proposed by UDC on carbon emissions, and both Mr. Robinson and Mr. Vergoulas accepted in XX that they were relevant to the proposal.

(4) As explained by Mr. Scanlon in XX, the proposal is largely consistent with MBU, but the weight to be given to MBU in the planning balance is discounted because of the direction of travel in carbon policy [see also UDC/4/1, §9.51]. That approach rightly reflects how MBU has become out of date in terms of reflecting net zero and emerging carbon policy. Mr. Andrew’s evidence, that MBU contains the complete answer on questions of carbon policy, which lie outside of the remit of LPA considerations, is at odds with Mr. Robinson’s own oral evidence to this inquiry: namely that LPAs can consider carbon emissions when considering applications to them under MBU. The direction of travel of carbon emissions policy supports the need for a condition on this impact.

119 Each of the above points supports UDC’s contention that mitigation in the form taken by Condition 15 is necessary. As accepted by Mr. Andrew, STAL accepts the need for a noise condition (though disputing the need for night-time regulation). Based on Dr. Broomfield and Dr. Hinnells’ evidence, there are air quality and carbon emission impacts which are significant and, when assessed against extant and emerging policy, need to be conditioned.

120 Mr. Andrew’s evidence that in determining the application, UDC laboured under a misapprehension as to a fallback position, involving the potential for STAL to develop its cargo and other movements, is wholly unwarranted. He fairly accepted in XX that the fallback of the existing permission for 35mppa was properly referred to in the papers before UDC. However, the particular fallback now espoused in his proof [STAL/13/2, §§6.12-6.26], was never put before UDC and appears for the first time in his evidence. It is not in the Planning Statement (which refers to the 35mppa fallback only) and not in any Officer Report. Mr. Scanlon’s Rebuttal comprehensively explains that this was an afterthought and unrealistic [UDC/4/3]. Mr. Andrew also accepted in oral evidence that the growth in passenger numbers to 35mppa - to which STAL is committed in its Planning Statement for this application and in its Planning

Statement for the Arrivals Building - is dependent on expansion of that facility [Response to Inspector's questions].

*Condition 15*

- 121 Condition 15 has already been touched on in these closing submissions. Much time at this Inquiry has been spent on Condition 15, both in questions to witnesses and in written submissions<sup>6</sup>. Given that Condition 15 provides an opportunity to bridge the gap separating UDC from STAL, the importance of dealing with this condition properly and intelligently cannot be over-stated.
- 122 It is a matter of regret to UDC that STAL is so intractably opposed to Condition 15. Indeed, STAL has been so intractably opposed to the very concept of such a condition that it was unwilling even to discuss it for months after it was first offered. Shutting one's eyes, blocking one's ears and closing one's mind to anything that a condition has to offer is not how a reasonable developer should behave on a development such as this.
- 123 Following UDC having proposed the condition in December 2020 [CD26.1], UDC has prepared a 16-page position statement on it (9/2/21) [CD26.6] and, following STAL's submission on it (24/2/21) [CD26.8], a 5-page reply (2/3/21) [CD26.17a]. UDC has thus made its position and its thinking on the condition very clear.

*What is Condition 15?*

- 124 What is apparent from Mr Andrew's Rebuttal [STAL/13/4, §§3.1-3.13], from the questions asked on behalf of STAL, from the answers given by STAL's witnesses (most notably Mr Andrew) and from STAL's written submission (24/2/21) [CD26.8] is that, whether genuine or confected, there is in STAL's camp a fundamental misunderstanding about what Condition 15 actually is. Having cast it as an apparition, STAL has devoted much energy to attacking the phantom.
- 125 So, on pain of repeating ourselves, let us make clear – yet again – what Condition 15 is.

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<sup>6</sup> The final version of Condition 15 is at [CD26.23]. UDC's submissions are at [CD26.6] and [CD26.17a]. The principles from case law referred to in UDC's submissions have not been challenged by STAL and are in any event hyperlinked within those documents.

- 126 Condition 15 is a mitigating measure enabling, within fixed ceilings, limits to be set for the three main environmental effects produced by the proposed operations. Condition 15 recognises that the full operational fruit of the planning permission will not be borne for years, possibly decades. It recognises that, for all the reasons explained above, no-one can pinpoint the date, the year or even the decade when the developer will harvest all the fruit of the permitted development. It also recognises that environmental standards, and our understanding of what is environmentally necessary, changes – sometimes quite radically, sometimes over a short space of time.
- 127 A familiar example of such changing environmental standards and understanding are the European emissions standards that set acceptable limits for exhaust emissions of new cars and light vehicles, which were discussed during the air quality evidence. We know these as “Euro 1”, “Euro 2” etc to “Euro 6.” The emissions with which these standards are concerned include nitrogen oxide (NO<sub>x</sub>) and particulate matter. Euro 1 was promulgated in 1991, Euro 6 was promulgated 23 years later in 2014. Euro 1 and Euro 2 set no limit for NO<sub>x</sub> emissions. Limits for NO<sub>x</sub> emissions were introduced by Euro 3, taking effect in January 2001. By the time of Euro 6, 14 years later, the limit for new diesel cars was less than 1/6th of the limit set in 2001.
- 128 What do we take away from that? What we take away from that is that it would have been folly for those setting the NO<sub>x</sub> emission standards in 2001 to compromise the ability of those setting NO<sub>x</sub> emission standards in 2014. By 2014 our understanding of NO<sub>x</sub> emissions had very much evolved from what it was in 2001. Those setting standards in 2014 had to have the ability to meet that enhanced level of understanding.
- 129 For particulate matter, it is a similar story. The limit on emissions of particulate matter from diesel cars imposed by Euro 3 was over 10 times greater than that set by Euro 6. Again, what we take away from that is that it would have been folly for those setting the particulate matter limits in Euro 3 to compromise the ability of those setting the particulate matter limits 14 years later.

- 130 That two of the pollutants we have just spoken to are part of Condition 15, tells us that this is not fanciful conjecture. It tells us that when we set environmental limits on operations that are being permitted decades into the future, those limits must not be set in stone. It tells us that they must – I repeat “must” – be allowed to maintain contemporaneity. It illustrates why we, the current generation, must not prevent future generations from doing what they consider necessary to mitigate what the current generation permits.
- 131 We mention all of this to illustrate the principle that what satisfies the needs of one generation does not necessarily satisfy the needs of the next generation. STAL would have done well in this whole planning process to recognise this principle. Not once in the course of 30 days has this Inquiry heard from STAL any acknowledgment of the principle.
- 132 The principle finds powerful policy expression in paragraph 7 of the NPPF [CD14.6]. STAL’s planning expert, Mr Andrew, airbrushed this out of consideration. Whether in terms or otherwise, this Inquiry will not find any acknowledgment of it anywhere in over 70 pages of his various proofs of evidence [STAL/13/1, STAL/13/2, STAL/13/4]. When confronted with this glaring omission in cross-examination, Mr Andrew told the Inquiry that when he referred to the definition of “sustainable development” in paragraph 8 of the NPPF he actually meant paragraph 7 [STAL/13/2, §7.8]. It was, he said, a typographical error. No-one in STAL’s extensive legal team, some boasting 30+ years’ experience of planning inquiries, apparently picked up this glaring mistake. Nowhere is there any consideration by Mr Andrew of whether the conditions proposed would compromise the ability of future generations to meet their own needs when mitigating and managing the adverse effects of the proposed development [STAL/13/2, §§2.5, 7.7-7.10, 10.28, 11.9-11.11]. Lest this Inquiry be in any doubt, Mr Andrew’s table in Appendix 3 to his main proof gives the lie to his excuse [STAL/13/3, p.41].
- 133 The truth is that STAL will not countenance any condition providing that, when in future it steps up its harvest of operational benefits from the planning permission, the LPA will be able to adjust the environmental mitigation measures to maintain their adequacy for contemporary needs.
- 134 This is not revisiting the principle of the development. It is fantasy to pretend that this is what Condition 15 does: [cf. CD26.8, §§14-17]. Yet, at no less than six points in STAL’s written



submission (24/2/21) that is what STAL asserts Condition 15 does [CD26.8, §§16, 18, 19, 23, 32(a), 32(f)]. It is as if by repetition, STAL thinks it can transform fantasy into reality.

135 Analysis exposes the holes in STAL's position. STAL's fundamentalism [CD26.8, §§1, 18, 32(f); STAL/13/4, §3.13] does mean that there are sharp legal questions that fall to be answered in this Inquiry. There is no ducking them. It is sensible to take them one at a time.

*Q.1 Is a progressively tightening condition necessarily unlawful?*

136 UDC does not understand that STAL is contending that *any* progressively tightening condition is necessarily unlawful.

*Q.2 Is a condition that leaves its progressive tightening to later agreement necessarily unlawful?*

137 UDC's position is that such a condition can be lawful.

138 STAL's position is at best ambivalent, but more likely contradictory. STAL's submission on it (24/2/21) [CD26.8, §§14-20] and Mr Andrew's rebuttal [STAL/13/4, §3.7] claim that such a condition would necessarily be unlawful.

139 On the other hand, STAL's noise expert, Mr Cole, had in his discussions with UDC said that there was no reason why "a condition that progressively tightens [the noise envelope] over the years" could not be applied to this development [CD19.24, §§5.1-5.2]. He gave as a precedent a condition that had been applied to Luton Airport in 2014. That condition required the airport operator, within five years of commencement, to submit to the LPA for their approval a strategy that defined the methods that the airport operator would use to reduce to a fixed area the noise contours for daytime and for night-time. In other words, it was a condition that left to later agreement with the LPA the method that was to be used to secure the tightening of the noise contour.

140 There is nothing in law that *precludes* a condition that leaves its progressive tightening to later agreement. Whether or not the particular instance complies with the principles relating to planning conditions will depend upon the specific terms of the condition.

141 The answer to Q.2 is “no.”

*Q.3 By what principles is a condition that leaves its progressive tightening to later to be evaluated?*

142 UDC has already set out the answer to that in its position statement on it (9/2/21) [CD26.6, §§15-31] and its reply (2/3/21) [CD26.17a, §§7-28]. It stands by those submissions. UDC reminds the Inquiry that the judgment of the House of Lords in *Newbury DC v SSE* (quoted in UDC’s main submission [CD26.6, §24]) is a binding declaration of the law: Ministerial guidance is not. STAL does not quarrel with this declaration of the law [CD26.8, §7].

*Q.4 Does Condition 15 have a planning purpose?*

143 Condition 15 is devoted to imposing enforceable limits on the noise effects, the carbon emissions and the air quality detriments produced by the permitted operations. These are all environmental impacts.

144 As STAL itself is forced to acknowledge, it is commonplace for conditions to be imposed for the purpose of regulating environmental impacts [CD26.8, §32(a)].

145 Indisputably the answer to Q.4 is “yes.”

*Q.5 Does Condition 15 relate to the proposed development?*

146 Condition 15 is directly tied to the permitted operations.

147 In seeking to suggest otherwise STAL variously:

- (a) reverts to the fantasy that Condition 15 allows UDC to re-visit the principle of the planning permission [CD26.8, §16]; and
- (b) re-defines “directly related” to mean “proportionate” [CD26.8, §32(a)], while offering no authority for this remarkable proposition.

Both of STAL’s arguments are both hopeless and contrary to law.

148 The answer to Q.5 is “yes.”

*Q.6 Is Condition 15 “reasonable”?*

149 A condition that is unnecessary will not be “reasonable.” Similarly, a condition that is either imprecise or unenforceable will not be “reasonable.” These are all respects that go to the reasonableness of a condition. This is acknowledged by the concluding words of the first sentence of paragraph 55 of the NPPF (“reasonable in all other respects”) [CD14.6].

150 A condition that enables future generations to maintain the contemporaneity of environmental mitigation measures as the developer increases by steps the operations allowed by the planning permission is necessary so as not to contravene paragraph 7 of the NPPF [CD14.6]. Condition 15 is just such a condition. As UDC said above, no-one can know what the environmental needs of future generations will be. No-one knows today how the yardstick will be marked by future generations. Those future generations must not be hamstrung by the needs of today, depriving them of the ability to meet their own needs. If STAL, as the appeal permission would permit it, are to be allowed to increase the scale of operations by up to 8mppa over the next decades, it is necessary that at each milestone as it ramps up the numbers a fresh eye is cast upon the mitigation measures that accompany that milestone. This is not merely a “nice-to-have.” The NPPF tells us that we must not compromise the ability of future generations to meet their own needs.

151 STAL have not offered any alternative way of achieving this. Their notion of “necessary” is blind to needs beyond 2021. It cannot conceive that the needs of future generations may be different [CD26.8, §32(a), (b)]. The vacuity of STAL’s position forces it back into incanting its mantra that Condition 15 re-visits the principle of development [CD26.8, §37]. Hopeless in all its earlier appearances, hopeless the argument is here too.

152 Condition 15 is necessary.

153 Precision and enforceability often go hand in hand. There is nothing imprecise or unenforceable about Condition 15. Mr Andrew complained in his rebuttal proof that there were “numerous aspects of the wording [of Condition 15] that are imprecise ...” [STAL/13/4, §3.12]. But, tellingly, he failed to identify a single instance. Nor is a single instance given in

STAL's 13-page submission [CD26.8]. A STAL annotated version of Condition 15, which emerged last month, is an exercise in pedantry [CD26.20]. "What does first commencement mean?" it complained. The phrase "all legislative provisions" is imprecise it complained. And so on it complained. This is not a promising basis for the submission.

154 Examination of Condition 15 reveals that it is precise. The measures in Schedules A and B are as clear as could be. And even if greater precision could be achieved, it was incumbent that STAL go back to UDC with a suggestion.

155 For the reasons set out above, Condition 15 meets all the legal requirements for a valid condition. It receives ample support from both policy and guidance. UDC commends Condition 15 to this Inquiry.

#### *Alternative Conditions to Condition 15*

156 Conditions 7 (noise contours) and 10A (air quality and carbon management strategy) seek to limit the environmental effects of the proposal through separate conditions<sup>7</sup>. The limit values included in each of the conditions are identical to those in Schedules A and B to Condition 15, with methodologies for the calculation of limit values in each of those conditions taken from the ES and ESA. As with Condition 15, the noise contour limits are agreed with STAL (although the need for a night-time contour is not agreed), whilst the limit values for air quality and carbon emissions all derive from STAL's ESA, seeking to tie the development to the environmental effects STAL has assessed, taking account of what policy seeks to achieve, as explained in UDC's Position Statements [CD26.11; CD26.12]. There has been no challenge by STAL to the way in which these figures have been arrived at in UDC's proposed conditions.

157 Although UDC would accept these alternative conditions - if for any reason Condition 15 did not provide an acceptable approach - limiting the environmental effects of the proposal through Conditions 7 and 10A would be considerably less effective than under Condition 15<sup>8</sup>.  
Condition 15:

- has the benefit of combining all of the relevant environmental effects into a single

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<sup>7</sup> See General Conditions Schedule submitted on 10 March 2021 [CD26.26b].

<sup>8</sup> Condition 17 is offered as an alternative to Condition 10A, but applies to carbon emissions only and contains no limit values so is even less effective than Condition 10A.

process, thereby reducing the logistics associated with managing schemes under separate conditions;

- allows a more flexible approach in requiring the mitigation to be defined and re-defined as the airport reaches passenger growth milestones, whereas Condition 10A is tied to a 3yr cycle of review from the commencement of the development;
- provides a more prescriptive, certain, and transparent process for the management of environmental effects, for the benefit of all stakeholders, compared with the mechanism in Conditions 7 and 10A;
- provides for an alternate decision maker which, if utilised, would enable a quicker decision to be made than the planning appeals process applicable under Conditions 7 and 10A.

158 For the reasons set out in UDC's joint Position Statement [CD26.29], UDC does not consider that Condition 10B proposed by STAL provides an effective means of limiting the air quality effects of the development. Due to its misreading and misinterpretation of carbon policy and its direction of travel, STAL offers no condition to control its carbon emissions to this Inquiry, which reveals a wilful disregard for the responsibility on airports in the face of climate change policy.

### **Conclusion**

159 For all of the above reasons, a condition marrying mitigation of the environmental effects of the future growth in operations to the requirements of paragraph 7 of the NPPF must be imposed. Condition 15 does that. Conditions 7 and 10A also meet that objective, albeit less effectively. STAL has offered no conditions which come close to what is required as an alternative, effectively paying lip service to the need for conditions limiting the environmental effects of its proposal, and denying the need for any condition on carbon emissions. Its struthonian attitude to the requirement that development not compromise the ability of future generations to meet their own needs should not be endorsed by this Inquiry. STAL's intransigence has been wholly unreasonable. If appropriate and necessary mitigation cannot be secured, this appeal should be refused.

PHILIP COPPEL QC  
ASITHA RANATUNGA  
11 March 2021

Cornerstone Barristers, 2-3 Gray's Inn Square, London





Neutral Citation Number: [2021] EWCA Civ 43

Case No: C1/2020/0998/QBACF

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**(PLANNING COURT)**  
**THE HONOURABLE MR JUSTICE HOLGATE**  
**[2020] EWHC 1303 (Admin)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 21/01/2021

Before:

**LORD JUSTICE LEWISON**  
**SIR KEITH LINDBLOM, SENIOR PRESIDENT OF TRIBUNALS**  
and  
**LORD JUSTICE LEWIS**

Between:

<b>R. (on the application of ClientEarth)</b>	<b><u>Appellant</u></b>
<b>- and -</b>	
<b>(1) Secretary of State for Business, Energy and Industrial Strategy</b>	<b><u>Respondents</u></b>
<b>- and -</b>	
<b>(2) Drax Power Limited</b>	

**Gregory Jones Q.C. and Merrow Golden (instructed by ClientEarth) for the Appellant**  
**Andrew Tait Q.C. and Ned Westaway (instructed by the Government Legal Department) for the**  
**First Respondent**  
**James Strachan Q.C. and Mark Westmoreland Smith (instructed by Pinsent Masons LLP) for the**  
**Second Respondent**

Hearing dates: 17 and 18 November 2020

**Approved Judgment**

## **The Senior President of Tribunals:**

### *Introduction*

1. This appeal raises questions on the interpretation of the Overarching National Policy Statement for Energy (“EN-1”) and the National Policy Statement for Fossil Fuel Electricity Generating Infrastructure (“EN-2”), both designated in July 2011, and their legal effect in the determination of an application for a development consent order to approve a nationally significant infrastructure project (“NSIP”). The NSIP in question is the proposal to construct and operate two gas-fired generating units at the Drax Power Station, near Selby in North Yorkshire.
2. With permission granted by Lewison L.J., the appellant, ClientEarth, appeals against the order of Holgate J., dated 22 May 2020, dismissing its claim for judicial review of the decision of the first respondent, the Secretary of State for Business, Energy and Industrial Strategy, on 4 October 2019, to make the Drax Power (Generating Stations) Order 2019 (S.I. 2019 No.1315) (“the DCO”), approving an application made by the second respondent, Drax Power Ltd. The claim was brought by ClientEarth under section 118 of the Planning Act 2008 (“the Planning Act”).
3. The proposed generating units, known as “Unit X” and “Unit Y”, would incorporate parts of two coal-fired units currently in operation at the site, which are due to be decommissioned in 2022. They would be fuelled by natural gas. Each would have a capacity of up to 1,800 megawatts, battery storage of up to 100 megawatts and carbon capture and storage reserve space, giving a total capacity of up to 3,800 megawatts, with a designed operational life of up to 25 years. That development is an NSIP.
4. Drax Power made its application for a development consent order under section 37 of the Planning Act, in May 2018. In July 2018 the Secretary of State appointed an examining authority to conduct an examination of the application and report to him with conclusions and a recommendation. The examination began in October 2018 and ended in April 2019. ClientEarth objected to the development, and took part in the examination, submitting written representations. The examining authority’s report was produced in July 2019. It recommended that consent be withheld. In her decision letter of 4 October 2019 the Secretary of State disagreed with that recommendation.

### *The issues in the appeal*

5. Lewison L.J. granted permission to appeal on three grounds, which raise these issues: first, whether the Secretary of State misinterpreted EN-1 on the approach to assessing an energy NSIP’s contribution to satisfying the need for the type of infrastructure proposed; second, whether the Secretary of State misinterpreted EN-1 on the approach to greenhouse gas emissions; and third, whether the Secretary of State misapplied section 104(7) of the Planning Act.



### *The Planning Act*

6. Section 5 of the Planning Act provides for the designation by the Secretary of State of a national policy statement, which “sets out national policy in relation to one or more specified descriptions of development” (subsection (1)(b)). The policy in a national policy statement “may in particular”, among other things, “set out, in relation to a specified description of development, the amount, type or size of development of that description which is appropriate nationally or for a specified area” (subsection (5)(a)), “set out the relative weight to be given to specified criteria” (subsection (5)(c)), and “set out circumstances in which it is appropriate for a specified type of action to be taken to mitigate the impact of a specified description of development” (subsection (5)(f)). Section 6(1) requires the Secretary of State to “review each national policy statement whenever [he] thinks it appropriate to do so”.
7. Section 104 governs the determination of an application for a development consent order where a relevant national policy statement has effect. In deciding the application, the Secretary of State is required to “have regard” to any “relevant national policy statement” (subsection (2)(a)), and “any other matters which [he] thinks are both important and relevant to [his] decision” (subsection (2)(d)). Section 104(3) states:

“(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.”

Section 104(7) states:

“(7) This subsection applies if the Secretary of State is satisfied that the adverse impact of the proposed development would outweigh its benefits.”

8. Section 106 provides that in deciding an application, the Secretary of State “may disregard representations” if he considers that they “relate to the merits of policy set out in a national policy statement” (subsection (1)(b)).

### *EN-1*

9. EN-1 sets out the Government’s policy for the delivery of major energy infrastructure. It is to be read together with five technology-specific national policy statements for the energy sector (paragraph 1.4.1). The relevant technology-specific national policy statement is EN-2. Paragraph 1.7.2 says that the energy national policy statements “should speed up the transition to a low carbon economy and thus help to realise UK climate change commitments sooner than continuation under the current planning system”, but recognises the difficulty in predicting “the mix of technology that will be delivered by the market against the framework set by the Government”.
10. Part 2 contains the Government’s policy on energy infrastructure development. Paragraph 2.1.1 refers to three goals – reducing carbon emissions, energy security and affordability.
11. The text in section 2.2, “The road to 2050”, assumed the target then in place under the Climate Change Act 2008 (“the Climate Change Act”) of reducing greenhouse gas emissions in 2050 by at least 80% compared to 1990 levels. This would require the “electrification” of

much of the United Kingdom's heating, industry and transport (paragraph 2.2.1). Delivery of this change would be "a major challenge not least for energy providers ..." (paragraph 2.2.2).

12. Paragraph 2.2.4 states:

"2.2.4 Not all aspects of Government energy and climate change policy will be relevant to [Infrastructure Planning Commission ("IPC")] decisions or planning decisions by local authorities, and the planning system is only one of a number of vehicles that helps to deliver Government energy and climate change policy. The role of the planning system is to provide a framework which permits the construction of whatever Government – and players in the market responding to rules, incentives or signals from Government – have identified as the types of infrastructure we need in the places where it is acceptable in planning terms. ... ."

13. The proposed transition to a low carbon economy is described, and the role of the Climate Change Act in driving that transition by delivering reductions in emissions through a series of five-year carbon budgets setting a trajectory to 2050 is explained (paragraphs 2.2.5 to 2.2.11). It is stated that "[the] EU Emissions Trading System ... forms the cornerstone of UK action to reduce greenhouse gas emissions from the power sector" (paragraph 2.2.12). Paragraph 2.2.19 states:

"2.2.19 The Planning Act and any market reforms associated with the Electricity Market Reform project will complement each other and are consistent with the Government's established view that the development of new energy infrastructure is market-based. While the Government may choose to influence developers in one way or another to propose to build particular types of infrastructure, it remains a matter for the market to decide where and how to build, as market mechanisms will deliver the required infrastructure most efficiently. Against this background of possibly changing market structures, developers will still need development consent for each proposal. Whatever incentives, rules or other signals developers are responding to, the Government believes that the NPSs set out planning policies which both respect the principles of sustainable development and are capable of facilitating, for the foreseeable future, the consenting of energy infrastructure on the scale and of the kinds necessary to help us maintain safe, secure, affordable and increasingly low carbon supplies of energy."

14. In the following paragraphs emphasis is placed on the security of energy supplies. That the United Kingdom should continue to have "secure and reliable supplies of electricity" as the transition is made to a low carbon economy is said to be "critical". The need for "diversity" in technologies and fuels is stressed (paragraph 2.2.20). Paragraph 2.2.23 says that the United Kingdom "must ... reduce over time its dependence on fossil fuels, particularly unabated combustion", but acknowledges that "some fossil fuels will still be needed during the transition to a low carbon economy".

15. Policy for decision-making is set out in Part 3, "The need for new nationally significant energy infrastructure projects". Paragraphs 3.1.1 to 3.1.4 state:

"3.1.1 The UK needs all the types of energy infrastructure covered by this NPS in order to achieve energy security at the same time as dramatically reducing greenhouse gas emissions.

- 3.1.2 It is for industry to propose new energy infrastructure projects within the strategic framework set by Government. The Government does not consider it appropriate for planning policy to set targets for or limits on different technologies.
- 3.1.3 The IPC should therefore assess all applications for development consent for the types of infrastructure covered by the NPSs on the basis that the Government has demonstrated that there is a need for those types of infrastructure and that the scale and urgency of that need is as described for each of them in this Part.
- 3.1.4 The IPC should give substantial weight to the contribution which projects would make towards satisfying this need when considering applications for development consent under the Planning Act 2008<sup>16</sup>.”

A footnote to paragraph 3.1.4 – footnote 16 – states:

“<sup>16</sup>In determining the planning policy set out in Section 3.1, the Government has considered a range of projections and models that attempt to assess what the UK’s future energy needs may be. Figures referenced relate to different timescales and therefore cannot be directly compared. Models are regularly updated and the outputs will inevitably fluctuate as new information becomes available.”

16. Paragraph 3.2.3 states:

“3.2.3 This Part of the NPS explains why the Government considers that, without significant amounts of new large-scale energy infrastructure, the objectives of its energy and climate change policy cannot be fulfilled. However, ... it will not be possible to develop the necessary amounts of such infrastructure without some significant residual adverse impacts. This Part also shows why the Government considers that the need for such infrastructure will often be urgent. The IPC should therefore give substantial weight to considerations of need. The weight which is attributed to considerations of need in any given case should be proportionate to the anticipated extent of a project’s actual contribution to satisfying the need for a particular type of infrastructure.”

17. The means of addressing the objectives of achieving energy security and reducing greenhouse gas emissions are explained. In a passage headed “Meeting energy security and carbon reduction objectives”, it is stated that the Government “needs to ensure sufficient electricity generating capacity is available to meet maximum peak demand, with a safety margin or spare capacity to accommodate unexpectedly high demand and to mitigate risks such as unexpected plant closures and extreme weather events” (paragraph 3.3.2). Paragraph 3.3.4 states:

“3.3.4 There are benefits of having a diverse mix of all types of power generation. It means we are not dependent on any one type of generation or one source of fuel or power and so helps to ensure security of supply. ... [The] different types of electricity generation have different characteristics which can complement each other ...”.

Three types of electricity generation are then mentioned: fossil fuel generation, renewables and nuclear power.

18. Therefore, to meet the challenges of energy security and climate change, the Government “would like industry to bring forward many new low carbon developments (renewables, nuclear and fossil fuel generation with [Carbon Capture and Storage (“CCS”)])” within the period up to 2025 (paragraph 3.3.5). The conclusion, in paragraph 3.3.6, again recalls the earlier text in paragraph 3.1.2:

“3.3.6 Within the strategic framework established by the Government it is for industry to propose the specific types of developments that they assess to be viable. This is the nature of a market-based energy system. The IPC should therefore act in accordance with the policy set out in Section 3.1 when assessing proposals for new energy NSIPs.”

19. The need for additional electricity capacity to support the required increase in supply from renewables is recognised. Paragraph 3.3.11 states:

“3.3.11 An increase in renewable electricity is essential to enable the UK to meet its commitments under the EU Renewable Energy Directive. ... However, some renewable sources (such as wind, solar and tidal) are intermittent and cannot be adjusted to meet demand. As a result, the more renewable generating capacity we have the more generation capacity we will require overall, to provide back-up at times when the availability of intermittent renewable sources is low. If fossil fuel plant remains the most cost-effective means of providing such back-up, particularly at short notice, it is possible that even when the UK’s electricity supply is almost entirely decarbonised we may still need fossil fuel power stations for short periods when renewable output is too low to meet demand, for example when there is little wind.”

Paragraph 3.3.12 says it is “therefore likely that increasing reliance on renewables will mean that we need more total electricity capacity than we have now, with a larger proportion being built only or mainly to perform back-up functions.”

20. Under the heading “Future increases in electricity demand”, paragraph 3.3.14 states:

“3.3.14 ... As a result of this electrification of demand, total electricity consumption ... could double by 2050. ... In some outer most circumstances, for example if there was very strong electrification of energy demand and a high level of dependence on intermittent electricity generation, then the capacity of electricity generation could need to triple. The Government therefore anticipates a substantial amount of new generation will be needed.”

21. In text headed “The urgency of the need for new electricity capacity”, paragraph 3.3.18 states:

“3.3.18 It is not possible to make an accurate prediction of the size and shape of demand for electricity in 2025, but in order to get a sense of the possible scale of future demand to 2025, one possible starting point is provided by the most recent Updated Energy and Emissions Projections (UEP) which DECC published in June 2010. It

is worth noting that models are regularly updated and the outputs will inevitably fluctuate as new information becomes available. ... The projections do not reflect a desired or preferred outcome for the Government in relation to the need for additional electricity generating capacity or the types of electricity generation required.”

22. Paragraph 3.3.21 adds that “[whilst] no such projections of the UK’s future energy mix can be definitive, they illustrate the scale of the challenge the UK is facing and help the Government to understand how the market may respond”. And paragraph 3.3.23 says that “[to] minimise risks to energy security and resilience, the Government therefore believes it is prudent to plan for a minimum need of 59 GW of new electricity capacity by 2025”.
23. Returning to the theme of the earlier text in paragraph 3.1.2, paragraph 3.3.24 continues:

“3.3.24 It is not the Government’s intention in presenting the above figures to set targets or limits on any new generating infrastructure to be consented in accordance with the energy NPSs. It is not the IPC’s role to deliver specific amounts of generating capacity for each technology type. The Government has other mechanisms to influence the current delivery of a secure, low carbon, affordable electricity mix. Indeed, the aim of the Electricity Market Reform project ... is to review the role of the variety of Government interventions within the electricity market.”
24. The important role of renewable electricity generation is described in section 3.4. The United Kingdom’s commitment to producing 15% of its total energy from renewable sources by 2020 is confirmed (in paragraph 3.4.1). The role of nuclear power is dealt with in section 3.5. Nuclear power is expected to play an increasingly important role in the move to diversifying and decarbonising sources of electricity (paragraph 3.5.1). It is said to be “Government policy that new nuclear power should be able to contribute as much as possible to the UK’s need for new capacity” (paragraph 3.5.2).
25. The role of fossil fuel electricity generation is addressed in section 3.6. Paragraph 3.6.1 says that “[fossil] fuel power stations play a vital role in providing reliable electricity supplies: they can be operated flexibly in response to changes in supply and demand, and provide diversity in our energy mix ... as the UK makes the transition to a low carbon economy, and Government policy is that they must be constructed, and operate, in line with increasingly demanding climate change goals”. And paragraph 3.6.2 adds this:

“3.6.2 ... Gas will continue to play an important role in the electricity sector – providing vital flexibility to support an increasing amount of low-carbon generation and to maintain security of supply.”
26. Paragraph 3.6.3 says that “[some] of the new conventional generating capacity needed is likely to come from new fossil fuel generating capacity in order to maintain security of supply, and to provide flexible back-up for intermittent renewable energy from wind”. It is also noted that “new technology offers the prospect of reducing the carbon dioxide emissions of both fuels [i.e. coal and gas] to a level where, whilst retaining many of their existing advantages, they can also be regarded as low carbon energy sources”. Paragraph 3.6.4 emphasises the importance of CCS, which is said to have the potential to reduce carbon emissions from fossil fuel generation by up to 90%.

27. Under the heading “The need for fossil fuel generation”, paragraph 3.6.8 states:
- “3.6.8 .... [A] number of fossil fuel generating stations will have to close by the end of 2015. Although this capacity may be replaced by new nuclear and renewable generating capacity in due course, it is clear that there must be some fossil fuel generating capacity to provide back-up for when generation from intermittent renewable generating capacity is low and to help with the transition to low carbon electricity generation. It is important that such fossil fuel generating capacity should become low carbon, through development of CCS, in line with carbon reduction targets. Therefore there is a need for [Carbon Capture Ready (“CCR”)] fossil fuel generating stations and the need for the CCS demonstration projects is urgent.”
28. In Part 4 of EN-1, “Assessment Principles”, paragraph 4.1.2 states a presumption in favour of granting consent to applications for “energy NSIPs”:
- “4.1.2 Given the level and urgency of need for infrastructure of the types covered by the energy NPSs set out in Part 3 of this NPS, the IPC should start with a presumption in favour of granting consent to applications for energy NSIPs ...”
29. Paragraph 4.1.3 says that “[in] considering any proposed development, and in particular when weighing its adverse impacts against its benefits, the IPC should take into account” both “its potential benefits including its contribution to meeting the need for energy infrastructure, job creation and any long-term or wider benefits” and “its potential adverse impacts, including any long-term and cumulative adverse impacts, as well as any measures to avoid, reduce or compensate for any adverse impacts”.
30. In Part 5, “Generic Impacts”, paragraph 5.2.2 states:
- “5.2.2 CO<sub>2</sub> emissions are a significant adverse impact from some types of energy infrastructure which cannot be totally avoided (even with full deployment of CCS technology). However, given the characteristics of these and other technologies ... and the range of non-planning policies aimed at decarbonising electricity generation such as EU ETS ... , Government has determined that CO<sub>2</sub> emissions are not reasons to prohibit the consenting of projects which use these technologies or to impose more restrictions on them in the planning policy framework than are set out in the energy NPSs (e.g. the CCR and, for coal, CCS requirements). Any ES on air emissions will include an assessment of CO<sub>2</sub> emissions, but the policies set out in Section 2, including the EU ETS, apply to these emissions. The IPC does not, therefore, need to assess individual applications in terms of carbon emissions against carbon budgets and this section does not address CO<sub>2</sub> emissions or any Emissions Performance Standard that may apply to plant.”

*EN-2*

31. EN-2 stresses the “vital role” played by fossil fuel generating stations in “providing reliable electricity supplies and a secure and diverse energy mix as the UK makes the transition to a low carbon economy” (paragraph 1.1.1). It confirms that the Government’s policy is to require a substantial proportion of the capacity of all new coal-fired stations to be subject to

CCS, that new stations of that kind will be expected to retrofit CCS to their “full capacity”, that other fossil fuel generating stations are expected to be “carbon capture ready, and that all such stations will be required to comply with Emissions Performance Standards (paragraph 1.1.2).

32. Paragraph 2.5.2 of EN-2 states:

“2.5.2 CO<sub>2</sub> emissions are a significant adverse impact of fossil fuel generating stations. Although an ES on air emissions will include an assessment of CO<sub>2</sub> emissions, the policies set out in Section 2.2 of EN-1 will apply, including the EU ETS. The IPC does not, therefore, need to assess individual applications in terms of carbon emissions against carbon budgets and this section does not address CO<sub>2</sub> emissions or any Emissions Performance Standard that may apply to plant.”

*The examining authority’s report*

33. On the question of need, the examining authority accepted ClientEarth’s contention that, under EN-1, no weight should be given to the need for the proposed development, because, when current projections and other relevant factors were considered, there was no need for it. It concluded that an assessment of need is required for every energy NSIP and although the national policy statements supported a need for additional energy infrastructure in general, Drax Power had not demonstrated that this development would itself meet an identified need for gas generation capacity when assessed against EN-1’s “overarching policy objectives of security of supply, affordability and decarbonisation” (paragraphs 5.2.4, 5.2.24, 5.2.26, 5.2.27 to 5.2.74, 5.3.27, 7.2.7 and 11.1.1 of the examining authority’s report).
34. On the likely increase in greenhouse gas emissions, the examining authority concluded that “a reasonable baseline” was likely to be somewhere between the figures assessed by Drax Power and by ClientEarth, and therefore that the increase in greenhouse gas emissions was likely to be higher than had been estimated by Drax Power (paragraph 5.3.22).
35. In the examining authority’s view, the proposed development would not accord with the energy national policy statements, and that it would undermine the Government’s commitment to cut greenhouse gas emissions, made explicit in the Climate Change Act (paragraphs 5.2.4, 5.3.27, 7.2.7, 7.2.10 and 11.1.2). Striking the balance under section 104(7) of the Planning Act, it concluded that the case for development consent had not been made out, and that development consent should therefore be withheld (section 7.3).

*The Secretary of State’s decision letter*

36. In a section of her decision letter headed “The Principle of the Proposed Development and Conformity with National Policy Statements”, the Secretary of State referred to the examining authority’s conclusions on “need”, in particular its conclusion “that the Development would not be in accordance with the relevant National Policy Statements for the purposes of section 104(3) of [the Planning Act]”. She noted that “when considering the planning balance for the purposes of section 104(7) ... , the ExA gave no positive weight to the contribution of the Development towards meeting identified need and gave considerable negative weight in the planning balance to both the adverse effects of the Development’s

GHG emissions on climate change ... and the perceived conflict with the NPSs' overarching decarbonisation objective" (paragraph 4.7). Having referred to paragraphs 3.1.1 and 3.1.3 of EN-1, she quoted the statement in paragraph 3.6.1 that fossil-fuel power stations play a "vital role in providing reliable electricity supplies", and the statement in paragraph 3.6.8 that "there is a need for [carbon capture ready] fossil fuel generating stations" (paragraph 4.10). And she acknowledged that the proposed development – "a gas-fired generating station which would be carbon capture ready (with directly linked battery storage)" – is "a type of infrastructure ... covered by EN-1 and [EN-2] and as such the presumption in favour of granting consent ... in paragraph 4.1.2 of EN-1 should apply" (paragraph 4.12).

37. She then said (in paragraph 4.13):

"4.13 The Secretary of State has considered the assessment that [the examining authority] has undertaken to determine whether the Development would meet an identified need for gas generation capacity by reference to the high-level objectives of security of supply, affordability and decarbonisation. However, the Secretary of State is of the view that the NPSs clearly set out the specific planning policies which the Government believes both respect the principles of sustainable development and are capable of facilitating, for the foreseeable future, the consenting of energy infrastructure on the scale and of the kinds necessary to help us maintain safe, secure, affordable and increasingly low carbon supplies of energy. The Secretary of State's view is that these policies, including the presumption in favour of granting consent for energy NSIPs in EN-1 have already taken account of the need to achieve security of supply, affordability and decarbonisation at a strategic level. The NPSs do not, therefore, require decision makers to go beyond the specific and relevant policies they contain to assess individual applications against those high level objectives and there was no need, therefore, for the ExA to make a judgement on those issues when assessing whether this specific application was in accordance with the NPS. The ExA's views on these matters do not, therefore, remove the need to apply the general presumption in favour of Carbon Capture Ready ("CCR") fossil fuel generation which already assumes a positive contribution from such infrastructure."

38. Despite having concluded that "the presumption in favour of fossil fuel generation" applied, she accepted that she "must still consider whether any more specific and relevant policies set out in the relevant [national policy statements] clearly indicate that consent should be refused". The examining authority had "identified that there would be significant adverse effects from the Development in respect of GHG emissions which gave rise to a perceived conflict with the decarbonisation objective of EN-1". She said she had "considered the [examining authority's] arguments on greenhouse gas emissions" (paragraph 4.14).

39. She went on to say (in paragraphs 4.15 to 4.17):

"4.15 However, in line with paragraph 4.13 above, the Development's impacts on decarbonisation must, in the first instance, be assessed by reference to the specific policies on carbon emissions from energy NSIPs which are contained in the relevant [national policy statements] and which reflect the appropriate role of the planning system in delivering wider climate change objectives and meeting the emissions reduction targets contained in the [Climate Change Act ("CCA")]. In this regard, the Secretary of State has noted that section 2.2 of EN-1 explains how



climate change and the UK's GHG emissions reduction targets contained in the CCA have been taken into account in preparing the suite of Energy [national policy statements]. She has also noted the policy contained in paragraph 5.2.2 of EN-1[, which she then quoted in full].

- 4.16 This policy is also reflected in paragraph 2.5.2 of EN-2. It is the Secretary of State's view, therefore, that, while the significant adverse impact of the proposed Development on the amount of greenhouse gases that will be emitted to atmosphere is acknowledged, the policy set out in the relevant NPSs makes clear that this is not a matter that ... should displace the presumption in favour of granting consent.
- 4.17 In light of this, the Secretary of State considers that the Development's adverse carbon impacts do not lead to the conclusion that the Development is not in accordance with the relevant NPSs or that they would be inconsistent with the CCA. The Secretary of State notes the need to consider these impacts within the overall planning balance to determine whether the exception test set out in section 104(7) of the 2008 Act applies in this case. The ExA considers that the Development will have significant adverse impacts in terms of GHG emissions which the Secretary of State accepts may weigh against it in the balance. However, the Secretary of State does not consider that the ExA was correct to find that these impacts, and the perceived conflict with NPS policy which they were found to give rise to, should carry determinative weight in the overall planning balance once the benefits of the project are properly considered, including in particular its contribution towards meeting need as explained below."

40. The Secretary of State's conclusions on need were these (in paragraphs 4.18 to 4.20):

- 4.18 The ExA's views on the need for the Development and how this is considered in the planning balance have also been scrutinised by the Secretary of State. As set out above, paragraph 3.1.3 of EN-1, and the presumption in favour of the Development already assume a general need for CCR fossil fuel generation. Furthermore, paragraph 3.1.4 of EN-1 states: "*the [decision-maker] should give substantial weight to the contribution which projects would make towards satisfying this need when considering applications for development consent*". The ExA recommends that no weight should be given to the Development's contribution towards meeting this need within the overall planning balance. This is predicated on its view that EN-1 draws a distinction between the need for energy NSIPs in general and the need for any particular proposed development. The Secretary of State disagrees with this approach. The Secretary of State considers that applications for development consent for energy NSIPs for which a need has been identified by the NPS should be assessed on the basis that they will contribute towards meeting that need and that this contribution should be given significant weight.
- 4.19 The Secretary of State notes that paragraph 3.2.3 of EN-1 states that "*the weight which is attributed to considerations of need in any given case should be proportionate to the anticipated extent of a project's actual contribution to satisfying the need for a particular type of infrastructure*". The Secretary of State has, therefore, considered whether, in the light of the ExA's findings, there is any

reason why she should not attribute substantial weight to the Development's contribution to meeting the identified need for new CCR fossil fuel generation infrastructure in this case. In particular, she has considered the ExA's views on the changes in energy generation since the EN-1 was published in 2011, and the implications of current models and projections of future demand for gas-fired electricity generation and the evidence regarding the pipeline of consented gas-fired infrastructure which the ExA considered to be relevant [ER 5.2.40-43].

- 4.20 The Secretary of State's consideration of the ExA's position is that (i) whilst a number of other schemes may have planning consent, there is no guarantee that these will reach completion; (ii) paragraph 3.3.18 of EN-1 sets out that the Updated Energy and Emissions Projections (on which the ExA partially relies ... to reach its conclusions on current levels of need) do not "*reflect a desired or preferred outcome for the Government in relation to the need for additional generating or the types of electricity required*"; and (iii) paragraph 3.1.2 of EN-1 explains that "*[i]t is for industry to propose new energy infrastructure projects within the strategic framework set by Government. The Government does not consider it appropriate for planning policy to set targets for or limits on different technologies*". These points are reinforced elsewhere in EN-1, for example in paragraphs 2.2.4 and 2.2.19, which explain that the planning system will complement other commercial and market based mechanisms and rules, incentives and signals set by Government to deliver the types of infrastructure that are needed in the places where it is acceptable in planning terms – decisions on which consented energy schemes to build will therefore also be driven by these factors. In light of this, the Secretary of State does not accept that the ExA's findings on these issues should diminish the weight to be attributed to the Development's contribution towards meeting the identified need for CCR gas fired generation within the overall planning balance. The Secretary of State considers that this matter should be given substantial weight in accordance with paragraph 3.1.4 of EN-1. The Secretary of State's overall conclusions on the planning balance are set out at paragraphs 6.1-6.14 below."

41. Under the heading "The Climate Change Act 2008 (2050 Target Amendment) Order 2019: "Net Zero"", the Secretary of State concluded that the amendment to the Climate Change Act, which set a new legally binding target of at least a 100% reduction in greenhouse gas emissions against the 1990 benchmark ("Net Zero"), was "a matter which is both important and relevant to the decision on whether to grant consent for the Development and that regard should be had to it when determining the Application" (paragraph 5.7). She noted that the amendment "does not alter the policy set out in the National Policy Statements which still form the basis for decision making under the Act" (paragraph 5.8). And she did "not consider that Net Zero currently justifies determining the application otherwise than in accordance with the relevant NPSs or attributing the Development's negative GHG emissions impacts any greater weight in the planning balance" (paragraph 5.9).
42. In section 6 of the decision letter, "Conclusions on the Case for Development Consent", the Secretary of State set out the provisions of section 104(3) and (7), and said that she "therefore ... needs to consider the impacts of any proposed development and weigh these against the benefits of any scheme" (paragraph 6.1). On the question of whether the proposed development was in accordance with EN-1 for the purposes of section 104(3), she referred again – as she had in paragraph 4.4 – to the fact that the examining authority had not applied

“the policy presumption in favour of granting consent for energy NSIPs set out in EN-1 when determining whether the Development was in accordance with the relevant NPSs”. She considered that “the Development should benefit from the presumption because there are no more specific and more relevant NPS policies which clearly indicate that consent should be refused and therefore the Development accords with the relevant NPSs” (paragraph 6.2).

43. Turning to the question of whether the adverse impacts of the development would outweigh its benefits under section 104(7), she summarised the relevant conclusions of the examining authority on matters they had given a “neutral weighting” (paragraph 6.3); on those they had given “positive weight” – namely “biodiversity outcomes, socio-economics and the proposed re-use of existing infrastructure at the Drax Power Station” (paragraph 6.4); on those they had given “considerable negative weight”, namely “impacts on decarbonisation and climate change”; and on “landscape and visual impacts”, which were “negative” but did “not weigh heavily in the overall consideration of planning balance for the Development” (paragraph 6.5).
44. She then returned to the issue of need (in paragraph 6.6):

“6.6 The Secretary of State considers that the ExA’s interpretation of the need case set out in the NPSs is incorrect. In taking the position it did on need and GHG emissions, the ExA arrived at a position where it recommended that consent for the Development should be refused. The Secretary of State considers that the NPSs support the case for new energy infrastructure in general and, in particular, the need for new CCR fossil fuel generation of the kind which the Development would provide. While acknowledging the GHG emissions from the Development, the generating capacity of the Development in either two- or one-unit configurations is a significant argument in its favour, with a maximum of 3.8GW possible if the Applicant builds out both gas-fired and battery storage units as proposed. Therefore, the Secretary of State considers ... that the Development would contribute to meeting the identified need for CCR fossil fuel generation set out in the NPS and that substantial weight should be given to this in the planning balance.”

45. On greenhouse gas emissions and the overall balance she said (in paragraph 6.7):

“6.7 In assessing the issue of GHG emissions from the Development and the ExA’s conclusions in this matter, the Secretary of State notes that the Government’s policy and legislative framework for delivering a net zero economy by 2050 does not preclude the development and operation of gas-fired generating stations in the intervening period. Therefore, while the policy in the NPS says GHG emissions from fossil fuel generating stations are accepted to be a significant adverse impact, the NPSs also say that the Secretary of State does not need to assess them against emissions reduction targets. Nor does the NPS state that GHG emissions are a reason to withhold the grant of consent for such projects. It is open to the Secretary of State to depart from the NPS policies and give greater weight to GHG emissions in the context of the Drax application but there is no compelling reason to do so in this instance.”

46. She accepted the examining authority's "overall weighting" of the visual and landscape impacts. And she found there were "no other negative issues that weigh against the Development" (paragraph 6.8). Her conclusion on section 104(7) was this (in paragraph 6.9):

"6.9 ... [The] ExA identifies positive effects from the Development in respect of biodiversity outcomes, socio-economics and the proposed re-use of existing infrastructure at the Drax Power Station. The Secretary of State's overall conclusion on the planning balance is that there are strong arguments in favour of granting consent for the full, two gas units and two battery storage units, 3.8GW project because of its contribution to meeting the need case set out in the NPSs. On balance therefore [the] Secretary of State considers that the benefits of the Development outweigh its adverse effects."

47. Her overall conclusion was that there was a "compelling case for granting consent for the development". She considered "that the Development would be in accordance with the relevant NPSs and, given the national need for such development as set out in the relevant NPSs, [she did] not believe that its benefits are outweighed by [its] potential adverse impacts, as mitigated by the terms of the Order". She therefore "decided to make the Order granting development consent" (paragraph 7.1).

*Did the Secretary of State misinterpret EN-1 on the approach to the assessment of need?*

48. The essential argument put forward here – as in the court below – is that the policy on need in EN-1 requires an assessment of the particular contribution a project will make to meeting the need for the relevant type of infrastructure. The Secretary of State erred in simply assuming that, because the proposal fell within one of the types of infrastructure for which a need was said to exist, it would necessarily contribute to that need and thus comply with policy in EN-1. She misinterpreted paragraph 3.2.3 of EN-1, asking herself whether there was any reason for not giving substantial weight to the need for the proposed development under the policy in paragraph 3.1.4. A "quantitative" assessment of need was required. None was provided.
49. In Holgate J.'s view, the fact that EN-1 does not seek to define need in "quantitative" terms, except in some limited respects, is "consistent with (a) the broad indications of the potential need to double or treble generating capacity by 2050 previously given in Part 2 of the NPS ... and (b) the unequivocal statement in paragraph 3.1.2 that it is inappropriate for planning policy to set targets for, or limits on, different types of technology" (paragraph 73 of the judgment). In paragraphs 3.1.2 and 3.3.15 to 3.3.24 of EN-1 it is "plain that, apart from indicating need for a *minimum* amount of new capacity by 2025, the references to need in EN-1 were not expressed in quantitative terms". This "is said to be consistent with the market-based system under which electricity generation is provided and the other non-planning mechanisms by which Government seeks to influence the operation of the market" (paragraph 80). Instead, EN-1 "focuses on qualitative need such as functional requirements". Paragraph 3.1.1 states that the United Kingdom needs all types of energy infrastructure covered by EN-1 "in order to achieve energy security while at the same time dramatically reducing GHG", and paragraphs 3.3.2 to 3.3.6 "explain how those twin objectives should be addressed" (paragraph 81).
50. The judge said that, reading EN-1 as a whole, rather than selectively, "[it] is plain that the NPS ... does not require need to be assessed in quantitative terms for any individual

application” (paragraph 129), that “[putting] to one side the “interim milestone” which did not feature in the discussion in this case, there are no benchmarks against which a quantitative analysis ([e.g.] consents in the pipeline or projections of capacity) could be related” (paragraph 130); and that “[given] those clear statements of policy in EN-1 there was no justification for the Panel to have regard to the 2017 UEP projections in order to assess the contribution of the Drax proposal to meeting the qualitative need identified in the NPS” (paragraph 131).

51. After those observations, the judge went on to say that the Secretary of State had “assessed the contribution which the proposed development would make to need in terms of both function and scale” (paragraph 133). The effect of the interpretation of EN-1 advanced by ClientEarth, and accepted by the examining authority, was that “any applicant for a DCO for gas-fuelled power generation would need to demonstrate a quantitative need for the development proposed”. This, said the judge, “would run counter to the thinking which lay behind the introduction of [the Planning Act] and the energy NPSs” (paragraph 135). He saw the policy on need in EN-1 as “analogous” to that considered in *R. (on the application of Scarisbrick) v Secretary of State for Communities and Local Government* [2017] EWCA Civ 787, where the Court of Appeal had “rejected the argument ... that the NPS [for hazardous waste] required the Secretary of State to assess project-specific need when determining an application for a DCO” (paragraph 138). EN-1 expressly provides, in paragraph 3.1.4 that “substantial weight” is to be given to the contribution a project makes to the identified need (paragraph 139). Paragraph 3.2.3 of EN-1 is “entirely consistent with paragraphs 3.1.3 and 3.1.4”. It “does not require an assessment of quantitative need for gas-fired generation” (paragraph 141). So the interpretation of EN-1 contended for by ClientEarth had to be rejected (paragraph 142).
52. Mr Gregory Jones Q.C., for ClientEarth submitted to us that the Secretary of State misinterpreted the policy on need in EN-1. She ought to have understood that EN-1 establishes only a need for particular “types” of energy infrastructure, and not that any particular project will necessarily contribute towards meeting that need, or that the level of need for each type is the same (paragraphs 2.1.1 and 3.1.1 of EN-1). It does not support a “flat-rule” approach to the need for different types of infrastructure (paragraph 3.1.3). It differentiates the “scale and urgency” of the need for each type (paragraphs 3.4.5, 3.5.9 and 3.6.8). The need for fossil-fuel infrastructure is limited (paragraphs 2.2.19, 2.2.23, 3.4.2, 3.4.5, 3.5.2 and 3.6.3). Holgate J. was right to say (in paragraphs 73, 80, 129 and 130 of his judgment) that EN-1 does not set any “quantitative” limits or targets on the need for particular types of energy infrastructure, and (in paragraph 81) that EN-1 concentrates on “qualitative need”. But he did not recognise that EN-1 does distinguish between the “scale and urgency” of the need for different types of infrastructure.
53. Mr Jones maintained that EN-1 requires the decision-maker to consider, case by case, the “anticipated ... actual contribution” of the individual project to satisfying the need for a “particular type” of infrastructure (paragraphs 3.1.3, 3.1.4, 3.2.3 and 4.1.3). He relied in particular on the statement in the last sentence of paragraph 3.2.3 that “[the] weight which is attributed to considerations of need in any given case should be proportionate to the anticipated extent of a project’s actual contribution to satisfying the need for a particular type of infrastructure”. As the examining authority concluded (in paragraphs 5.2.21 and 5.2.23 of its report), paragraph 3.2.3 of EN-1 distinguishes between the need for energy NSIPs and the need for the proposed development. EN-1 is not to be read as simply telling the decision-maker to give “substantial weight” to a need for certain types of energy infrastructure

established in the policy (paragraph 3.1.1). That would be to adopt an approach of the kind rejected in *Scarisbrick* (at paragraph 31) – “the bigger the project, the greater is the need for it”.

54. Although the “scale and urgency” of the need for particular types of infrastructure may be described as “qualitative” factors, this does not mean – Mr Jones submitted – that the decision-maker’s approach to giving “proportionate” weight to considerations of need must be confined to a “qualitative” analysis. “Quantitative” considerations are inherent in the project-specific assessment required under paragraph 3.2.3. The national policy statement considered in *Scarisbrick* was different. It did not refer to the different “scale and urgency” of need for different types of infrastructure, nor did it require a consideration of “proportionate weight”.
55. I cannot accept that argument. I agree with the submission made to us by Mr Andrew Tait Q.C. for the Secretary of State, adopted by Mr James Strachan Q.C. for Drax Power, that the Secretary of State did not misinterpret, or fail lawfully to apply, relevant policy in EN-1. On its true interpretation, EN-1 does not compel the approach contended for by Mr Jones.
56. As always, it is necessary to undertake the exercise of policy interpretation by construing the language of the relevant policy objectively, in its context, and having regard to its evident purpose (see the judgment of Lord Reed in *Tesco Stores Ltd. v Dundee City Council* [2012] UKSC 13, at paragraphs 17 to 19, the judgment of Lord Carnwath in *Suffolk Coastal District Council v Hopkins Homes Ltd.* [2017] UKSC 37, at paragraphs 22 to 26). These general principles apply equally to the interpretation of national policy statements as they do to the interpretation of other planning policies (see my judgment in *Scarisbrick*, at paragraph 19).
57. Starting with the most salient passages on need in EN-1, in Part 3, one can see seven things. First, there is a recognised need for “all the types of energy infrastructure” within its scope. Secondly, this is compatible, in principle, not only with the aim to “achieve energy security” but also with that of “dramatically reducing greenhouse gas emissions” (paragraph 3.1.1). Thirdly, in the Government’s view it would be inappropriate “to set targets for or limits on” different technologies (paragraph 3.1.2). Fourthly, “all applications” for development consent should be assessed “on the basis that the Government has demonstrated that there is a need for those types of infrastructure” and “the scale and urgency of that need is as described in [Part 3]” (paragraph 3.1.3). Fifthly, when development consent is sought, “substantial weight” should be given to “the contribution which projects would make towards satisfying this need” (paragraph 3.1.4). Sixthly, because “without significant amounts of new large-scale energy infrastructure, the objectives of [the Government’s] energy and climate change policy cannot be fulfilled”, it is right that “substantial weight” should be given to “considerations of need” (paragraph 3.2.3). And seventhly, “[the] weight which is attributed to considerations of need in any given case should be proportionate to the anticipated extent of a project’s actual contribution to satisfying the need for a particular type of infrastructure” (paragraph 3.2.3).
58. Those seven points are expanded elsewhere in EN-1. In Part 2 there is a clear emphasis on the “market-based system” (paragraph 2.2.2); on the proposition that “the planning system is only one of a number of vehicles that helps to deliver Government energy and climate change policy” (paragraph 2.2.4); on the place of the EU Emissions Trading Systems as “the cornerstone of UK action to reduce greenhouse gas emissions from the power sector” (paragraph 2.2.12); on the changes being promoted under the Electricity Market Reform

project (paragraph 2.2.15); and on the complementary relationship between the Planning Act and the Electricity Market Reform project, which is “consistent with the Government’s established view that the development of new energy infrastructure is market-based”, it being “a matter for the market to decide where and how to build, as market mechanisms will deliver the required infrastructure most efficiently” (paragraph 2.2.19).

59. Both in Part 2 and in Part 3 the absence of any quantitative definition of relevant need is striking. No attempt is made to describe in quantitative terms either the general need for the types of generating capacity within the scope of EN-1 or a specific need for any particular type. No targets or limits are set. This is deliberate and explicit. It is stressed that the Government has “other mechanisms”, including the Electricity Market Reform project, to influence delivery (paragraph 3.3.24).
60. That is the background to the first basic concept in paragraph 3.1.3: that proposals are to be assessed on the basis that need has been demonstrated for the types of infrastructure covered by the energy national policy statements. The second basic concept in paragraph 3.1.3 – that proposals are to be assessed on the basis that the “scale and urgency” of the demonstrated need is “as described in this part” – is also enlarged in the subsequent text. It extends to the fundamental policy in paragraph 3.1.4 that, in decision-making, “substantial weight” is to be given to the contribution that projects make to the satisfaction of need. It embraces the reference in footnote 16 to the “projections and models” considered by the Government when it prepared the policy in section 3.1 being “regularly updated” with “outputs” that “inevitably fluctuate as new information becomes available”. It includes the recognition in paragraph 3.3.18 that “it is not possible to make an accurate prediction of the size and shape of demand for electricity in 2025”, and that the projections published in June 2010 “do not reflect a desired or preferred outcome for the Government in relation to the need for additional electricity generating capacity or the types of electricity generation required”, and in paragraph 3.3.21 that “no such projections ... can be definitive”. And it carries the caution in paragraph 3.3.24 that the figures mentioned in the preceding paragraphs are not intended by the Government to set “targets or limits on any new generating infrastructure ...”, that decision-making is not expected to “deliver specific amounts of generating capacity for each technology type”, and that there are “other mechanisms to influence the current delivery of a secure, low carbon, affordable electricity mix”.
61. These are all general statements of policy. They apply to fossil fuel generating capacity as well as other types of infrastructure. But the “vital role” of fossil fuel power stations in providing “reliable electricity supplies” is recognised throughout Part 3: their “important role” in the “energy mix” as the transition is made to a low carbon economy (paragraph 3.6.1); the requirement for “some fossil fuel generating capacity to provide back-up” for intermittent renewable generating capacity (explained in paragraphs 3.3.11 and 3.3.12), and “to help with the transition to low carbon electricity generation”, the importance of such fossil fuel generating capacity becoming “low carbon, through development of CCS”, and thus “a need for CCR fossil fuel generating stations ...” (paragraph 3.6.8).
62. The principles guiding the consideration of applications, in Part 4, flow from the text on decision-making in paragraphs 3.1.1 to 3.1.4. They provide a “presumption in favour of granting consent to applications for energy NSIPs” (paragraph 4.1.2). They also include as a potential benefit, in the balancing of “adverse impacts” against “benefits”, a proposed development’s “contribution to meeting the need for energy infrastructure” (paragraph 4.1.3).

63. None of the passages to which I have referred stipulates that a “quantitative” assessment of need must always be carried out in a development consent order process. Nor is that done anywhere else in EN-1. The same may also be said of EN-2.
64. It is necessary to come back now to paragraph 3.2.3, which became a focus of the argument we heard on this issue. That paragraph must be read in the context set by the other relevant passages of EN-1. It confirms that “without significant amounts of new large-scale energy infrastructure” it will be impossible to fulfil the objectives of [the Government’s] energy and climate change policy. And it refers to the explanation, in Part 3, of the Government’s view that “the need for such infrastructure will often be urgent”. No reference is made to the scale or limits of that need, either in general terms or specifically for any particular type of infrastructure.
65. The meaning of the final two sentences of paragraph 3.2.3 was controversial between the parties. But when those two sentences are read as continuing the thrust of the previous three, and in the wider context of the policies on need taken together, their sense is clear. The penultimate sentence looks back to what has just been said, with the connecting word “therefore”. It makes plain that the matters referred to in the first three sentences are the reasons why, in decision-making, “substantial weight” should be given to “considerations of need”. And this is wholly consistent with what has already been said in paragraphs 3.1.1 to 3.1.4 – in particular, paragraph 3.1.4.
66. It is with this point firmly established – “substantial weight” should be given to “considerations of need” – that one comes to the final sentence of the paragraph, which concerns decision-making “in any given case”. From the sentence itself three things are clear. First, while the starting point is that “substantial weight” is to be given to “considerations of need”, the weight due to those considerations in a particular case is not immutably fixed. It should be “proportionate to the anticipated extent of [the] project’s actual contribution to satisfying the need” for the relevant “type of infrastructure”. To this extent, the decision-maker – formerly the IPC and now the Secretary of State – may determine whether there are reasons in the particular case for departing from the fundamental policy that “substantial weight” is accorded to “considerations of need”. Secondly, the decision-maker must consider this question by judging what weight would be “proportionate” to the “anticipated extent” of the development’s “actual contribution” to satisfying the need for infrastructure of that type. These are matters of planning judgment, which involve looking into the future. Thirdly, beyond the description of the decision-maker’s task in those terms, there is no single, prescribed way of performing that task, and there are no specified considerations to be taken into account, or excluded. It is not stated that the issue of what is “proportionate” to the proposal’s “actual contribution” must, or should normally, be approached on a “quantitative” rather than a “qualitative” basis.
67. There is, in my view, no justification for reading such a requirement into the policy. The way in which a decision-maker’s task is to be carried out in a particular case is for him to resolve. The policy leaves him with an ample discretion to decide how best to go about making the evaluative judgment required. As its language makes clear, the assessment of weight must be grounded in reality. But it demands a predictive assessment: hence the reference to the “anticipated extent” of the development’s “actual contribution” to satisfying the relevant need. It should be remembered that paragraph 3.2.3 applies not merely to fossil fuel generating capacity, but to every kind of energy infrastructure to which EN-1 relates, including renewable energy projects. Even without there being in the relevant national policy



statements a specific target or limit for a particular type of infrastructure, or a range of the likely requirement for such capacity within a given timescale, it might still be possible to carry out a “quantitative” assessment of need. And there may be circumstances in which, for a particular type of infrastructure, or a particular proposal, it is appropriate to undertake a “quantitative assessment”. The important point here, however, is that paragraph 3.2.3 does not compel the decision-maker to do it.

68. Properly understood, paragraph 3.2.3 is not in tension with the other policies. It supports them. Based, as it is, on the fundamental policy that “substantial weight” is to be given to the contribution made by projects towards satisfying the established need for energy infrastructure development of the types covered by EN-1, including CCR fossil fuel generation infrastructure, it ensures that the decision-maker takes a realistic, and not an exaggerated, view of the weight to be given to “considerations of need” in the particular case before him, which should be “proportionate to” the “actual contribution” the project is likely to make to “satisfying the need” for infrastructure of that type. That is its function.
69. One must be careful not to read across unjustifiably from the court’s interpretation of a different policy in another national policy statement. But there is, in my view, a parallel between the policies we are considering here and those considered by this court in *Scarisbrick*. Among the policies considered in that case was one indicating that a need for the relevant infrastructure should be taken as demonstrated, and a presumption in favour of consent being granted. From these policies there arose, in this court’s view, “a general assumption of need for such facilities”, which “applies to every relevant project capable of meeting the identified need, regardless of the scale, capacity and location of the development proposed” (paragraph 24). A difference between that case and this is that the policies there did not indicate the level of weight to be given to need in decision-making. Here they do.
70. Did the Secretary of State proceed on the correct interpretation of the relevant policies on need? In my view she did. She concluded, as she was entitled to do, that the presumption in favour of granting consent, in paragraph 4.1.2 of EN-1, should apply (paragraph 4.12 of the decision letter). She reminded herself that although the “presumption in favour of fossil fuel generation” applied, she “must still consider whether any more specific and relevant policies ... in the relevant NPSs clearly indicate that consent should be refused” (paragraph 4.14). She went on to do that, in the light of the examining authority’s conclusions. It is not suggested that in doing so she ignored or misunderstood any relevant conclusion of the examining authority, or that her reasons for differing from the examining authority are inadequate or unclear.
71. She considered the issue of need in paragraphs 4.18 to 4.20 of her decision letter. In my view she did so impeccably. She acknowledged “the presumption in favour of the [proposed development]”, the assumption of “a general need for CCR fossil fuel generation”, and the requirement that the decision-maker “should give substantial weight to the contribution which projects would make towards satisfying this need ...”. She noted that the examining authority had recommended that no weight be given to the development’s contribution to meeting this need. She made it clear that she disagreed with the examining authority’s approach. In her view applications for consent for energy NSIPs for which a need had been identified by the national policy statements “should be assessed on the basis that they will contribute towards meeting that need and that this should be given significant weight” (paragraph 4.18). This seems an accurate understanding of what EN-1 says.

72. The issue was not left there. The Secretary of State applied the principle in the final sentence of paragraph 3.2.3 of EN-1. Again, in my view, she did so impeccably. First, she quoted the relevant words. Secondly, she made it clear that her mind was open to the possibility of reducing the weight given to the development's contribution to satisfying the relevant need. She said she had considered whether, in light of the examining authority's findings, there was "any reason why she should not attribute substantial weight to the Development's contribution to meeting the identified need for new CCR fossil fuel generation infrastructure in this case". Thirdly, she pointed to the three considerations relevant to this question: the examining authority's "views on the changes in energy generation since ... EN-1 was published in 2011", the "implications of current models and projections of future demand for gas-fired electricity generation", and "the evidence regarding the pipeline of consented gas-fired infrastructure" (paragraph 4.19). It is not suggested that this was an incomplete description of the three main points in the examining authority's assessment.
73. The Secretary of State explained why she was not persuaded by the examining authority's assessment to conclude that less than "substantial weight" should be given to the identified need. There were three points: first, the lack of any "guarantee" that other schemes with consent would "reach completion"; second, as paragraph 3.3.18 of EN-1 says, the updated projections on which the examining authority had relied did not reflect "a desired or preferred outcome ... in relation to ... need ..."; and third, the principle, in paragraph 3.1.2, that it is the responsibility of "industry" to propose new infrastructure "within the strategic framework set by Government", and "the Government does not consider it appropriate for planning policy to set targets for or limits on different technologies". All three of these points were, in the Secretary of State's view, reinforced by other passages in EN-1. The examining authority's findings did not, in her view, "diminish the weight to be attributed to the [development's] contribution towards meeting the identified need for CCR gas fired generation ...". This, she concluded, "should be given substantial weight in accordance with paragraph 3.1.4 of EN-1" (paragraph 4.20).
74. There is, in my view, no legal error there. The Secretary of State's conclusions show that she had interpreted the relevant policies correctly, and proceeded to apply them lawfully.
75. The same may also be said of the Secretary of State's conclusions on need in paragraph 6.6 of her decision letter, where she stated again, that the development's contribution to the "identified need for CCR fossil fuel generation set out in [EN-1]" should, in her view, be given "substantial weight ... in the planning balance". Like those in paragraphs 4.18 to 4.20, these conclusions demonstrate a correct interpretation and lawful application of the policies on need in EN-1 and EN-2.
76. I conclude, therefore, that on this issue the appeal should fail.

*Did the Secretary of State misinterpret EN-1 on the approach to greenhouse gas emissions?*

77. ClientEarth's argument on this issue is, essentially, that the Secretary of State misinterpreted EN-1 as requiring the decision-maker to treat the greenhouse gas emissions of the development either as irrelevant or as having no weight.
78. Holgate J. saw no force in that argument. In his view it was "plain ... that the Secretary of State did not treat GHG emissions as irrelevant, nor did she treat them as something to which

no weight should be given”. In paragraph 4.17 of the decision letter she moved from her conclusions on section 104(3) and (5) to the balance under section 104(7). She accepted that the examining authority’s finding on the “significant adverse impacts of GHG emissions” from the development “could be weighed in the balance against the proposal”. But she disagreed with their “evaluation of the benefits of the proposal, including its contribution towards meeting policy need”. Once those benefits were “correctly weighed”, she found “the impact of GHG emissions should not “carry determinative weight in the overall planning balance””. This, said the judge, “can only mean that the disbenefits did not carry more weight than the benefits”; it was “the other way round”. In paragraph 4.17 the Secretary of State was “describing a straight forward balancing exercise ... in no way dependent upon the terms of paragraphs 5.2.2 of EN-1 or 2.5.2 of EN-2”. She returned to this exercise in paragraphs 6.3 to 6.9 of the decision letter (paragraph 167 of the judgment).

79. The judge did not see the approach in paragraph 5.2.2 of EN-1 as “legally objectionable”. It accorded with section 5(5)(c) of the Planning Act, and was also “supported by established case law on the significance of alternative systems of control (see e.g. [*Gateshead Metropolitan Borough Council v Secretary of State for the Environment* (1996) 71 P. & C.R. 350])” (paragraph 170). In paragraph 6.7 of the decision letter, when carrying out the exercise required by section 104(7), the Secretary of State did not suggest that the policy in paragraph 5.2.2 of EN-1 and paragraph 2.5.2 of EN-2 treats greenhouse gas emissions as “an irrelevant consideration in a development consent order application or as a disbenefit to which no weight may be given” (paragraph 172). EN-1 and EN-2 “proceed on the basis that there is no justification in *land use planning terms* for treating GHG emissions as a dis-benefit which in itself is dispositive of an application for a DCO” (paragraph 178). EN-1 does not preclude greenhouse gas emissions being given “greater weight” in the section 104(7) balance, “so long as [they are] not treated as a freestanding reason for refusal” (paragraph 179).
80. Mr Jones submitted that the judge’s interpretation of EN-1 was wrong. Neither EN-1 nor EN-2 prevents greenhouse gas emissions being a reason for withholding consent for an energy NSIP, overriding the presumption in paragraph 4.1.2 of EN-1. The statement in paragraph 5.2.2 of EN-1 that CO<sub>2</sub> emissions are not “reasons to prohibit the consenting of projects which use these technologies ...” is in general terms. It reflects the selection of some of the types of energy infrastructure covered by EN-1, including developments that will emit CO<sub>2</sub>. It does not dictate how greenhouse gas emissions are to be considered in decision-making on an individual project.
81. This understanding of paragraph 5.2.2, submitted Mr Jones, is confirmed by its reference to the environmental statement for a project, which, it says “on air emissions ... will include an assessment of CO<sub>2</sub> emissions”. Under the Environmental Impact Assessment Directive 2011/92/EU (as amended) (“the EIA Directive”) and the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (“the EIA Regulations”), greenhouse gas emissions would have to be assessed and taken into account within the “environmental information” before the decision-maker when considering whether to grant consent (regulation 21). Under the regime for environmental impact assessment, a significant environmental effect such as CO<sub>2</sub> emissions must potentially be capable of providing a reason for refusing consent for a project. EN-1 could not prevent that outcome, because it must be interpreted in accordance with EU law (see *Marleasing SA v La Comercial Internacional de Alimentacion SA* (1990) C-106/89), and otherwise would be overridden by the statutory exceptions under section 104(5) and (6) of the Planning Act. It was not open to the Government, through national policy, to prevent greenhouse gas emissions and their

contribution to climate change from being, as Mr Jones put it, a “material consideration” in a decision on an application for a development consent order (see the speech of Lord Hoffmann in *Tesco Stores Ltd. v Secretary of State for the Environment* [1995] 1 W.L.R. 759, at pp.764, 780, 783 and 784; and *R. (on the application of Wright) v Forest of Dean District Council* [2019] UKSC 53, at paragraphs 42, 52 and 53). That there are other means by which the United Kingdom seeks to reduce greenhouse gas emissions from existing infrastructure, including the EU Emissions Trading System, does not bear on this analysis.

82. Mr Jones submitted that the judge was wrong to conclude that greenhouse gas emissions cannot, in themselves, be the basis for a refusal of consent under EN-1 whilst nevertheless accepting that they can be an “adverse impact” to which weight can be given in the balancing exercise under section 104(7). If greenhouse gas emissions can be given weight in the balance, it must be possible for them to weigh against the grant of consent, whether in combination with other “adverse impacts” or on their own. It is illogical and artificial for greenhouse gas emissions, on their own, to be incapable of founding a reason for refusing consent, but capable of doing so in combination with some other adverse impact, regardless of how powerful that second factor was.
83. Finally, Mr Jones submitted that the Secretary of State did not, in fact, take greenhouse gas emissions into account as a “significant adverse impact”. Though she referred to greenhouse gas emissions, it is clear that she gave them no weight – because she misinterpreted relevant policy in EN-1 and EN-2.
84. Those submissions do not, in my view, demonstrate that the Secretary of State’s relevant conclusions on this issue were legally flawed. Her conclusions were, I think, entirely lawful.
85. The policy in paragraph 5.2.2 of EN-1 must be read in its entirety, and in its context. It should not be read in a way that puts it into conflict with other provisions in EN-1. The first sentence of the paragraph recognises that CO<sub>2</sub> emissions are “a significant adverse impact from some types of energy infrastructure which cannot be totally avoided (even with full deployment of CCS technology)”. The second sentence begins with a reference to “the characteristics of these and other technologies, as noted in Part 3 of this NPS” and to “the range of non-planning policies aimed at decarbonising electricity generation such as EU ETS ...”. It is clear therefore that the policy is seen by the Government as compatible with the policies on need in Part 3. There is no suggestion that it removes or qualifies the general “presumption in favour of granting consent to applications for energy NSIPs” in paragraph 4.1.2, which is founded on the “level and urgency of need for infrastructure of the types covered by the energy NSIPs set out in Part 3” – including fossil fuel generating capacity.
86. Seen in this context, the policy itself is plain in its meaning. It says that “... CO<sub>2</sub> emissions are not reasons to prohibit the consenting of projects which use these technologies ...”. And it adds that although an assessment of CO<sub>2</sub> emissions will be included in an environmental statement for a proposed development, the policies in Part 2 of EN-1 apply to them, and in decision-making it is unnecessary “to assess individual applications in terms of carbon emissions against carbon budgets ...”. The same policy, but specifically for “fossil fuel generating stations”, appears in paragraph 2.5.2 of EN-2, which acknowledges that “CO<sub>2</sub> emissions are a significant adverse impact of fossil fuel generating stations”.
87. The force of the policy, therefore, is not that CO<sub>2</sub> emissions are irrelevant to a development consent decision, or cannot be given due weight in such a decision. It is simply that CO<sub>2</sub>

emissions are not, of themselves, an automatic and insuperable obstacle to consent being given for any of the infrastructure for which EN-1 identifies a need and establishes a presumption in favour of approval. If they were, the policy need and the policy presumption would effectively be negated for certain forms of infrastructure supported by EN-1, and those essential provisions contradicted. Paragraph 5.2.2 does not diminish the need for relevant energy infrastructure established in national policy or undo the positive presumption. But nor does it prevent greenhouse gas emissions from being taken into account as a consideration attracting weight in a particular case. How much weight is for the decision-maker to resolve. It follows that, in a particular case, such weight could be significant, or even decisive, whether with or without another “adverse impact”. This, I accept, differs from the judge’s conclusion, in paragraph 179 of his judgment, that greenhouse gas emissions are not capable of being “treated as a freestanding reason for refusal”.

88. The Secretary of State’s understanding of the policy was, in my view, the correct one. Having concluded that “the presumption in favour of fossil fuel generation” applied, she directed herself to consider “whether any more specific and relevant policies ... in the relevant NPSs clearly indicate that consent should be refused”, given the examining authority’s conclusion that “there would be significant adverse effects from the [development] in respect of GHG emissions which gave rise to a perceived conflict with the decarbonisation objective of EN-1” (paragraph 4.14). She thought not, for three reasons. First, as she reminded herself in the light of section 2.2 of EN-1, “climate change and the UK’s GHG emissions reduction targets contained in the [Climate Change Act] have been taken into account in preparing the suite of Energy NPSs” (paragraph 4.15 of the decision letter). Secondly, having in mind the policy in paragraph 5.2.2 of EN-1 and paragraph 2.5.2 of EN-2, she acknowledged “the significant adverse impact of the proposed Development on the amount of greenhouse gases that will be emitted to atmosphere”, but recognised that the policy “makes clear that this is not a matter that ... should displace the presumption in favour of granting consent” (paragraphs 4.15 and 4.16). And thirdly, she concluded, unequivocally, that “the Development’s adverse carbon impacts do not lead to the conclusion that the Development is not in accordance with the relevant NPSs or that they would be inconsistent with the [Climate Change Act]” (paragraph 4.17).
89. That, however, was not the end of the Secretary of State’s consideration of greenhouse gas emissions. As she went on to say, she was aware of the “need to consider these impacts within the overall planning balance to determine whether the exception test set out in section 104(7) of [the Planning Act] applies in this case”. She referred to the examining authority’s conclusion that the development would have “significant adverse impacts in terms of GHG emissions”, which she accepted “may weigh against it in the balance”. But she disagreed with the examining authority’s finding “that these impacts and the perceived conflict with NPS policy ... should carry determinative weight in the overall planning balance once the benefits of the project are properly considered, including in particular its contribution towards meeting need ...” (paragraph 4.17). In saying this, the Secretary of State was accepting that greenhouse gas emissions had a place in the balancing exercise she was going to conduct, though she concluded that they should not have “determinative weight”. There is no legal flaw in this conclusion. It is faithful to the policy in paragraph 5.2.2 of EN-1.
90. So too is the Secretary of State’s subsequent conclusion, heeding the commitment to “Net Zero” in the amendment to the Climate Change Act, that this did not justify “... attributing the Development’s negative GHG emissions any greater weight in the planning balance” (paragraph 5.9).

91. When she came to the balancing exercise under section 104(7) (in paragraphs 6.1 to 6.9 of the decision letter), the Secretary of State expressly considered the examining authority's view that "considerable negative weight" should be attached to "impacts on decarbonisation and climate change" (paragraph 6.5). She referred to "the GHG emissions from the Development" when considering the weight to be given to the need for it under EN-1 (paragraph 6.6). She dealt specifically with the weight given to greenhouse gas emissions as "a significant adverse impact" of fossil fuel generating stations, which EN-2 acknowledges it to be in paragraph 2.5.2. She said, rightly, that EN-1 and EN-2 did not require her "to assess [greenhouse gas emissions] against emissions reduction targets", which matches the similar statement in paragraph 5.2.2 of EN-1 and paragraph 2.5.2 of EN-2. She also said, again rightly, that EN-1 does "[not] state that [greenhouse gas emissions] are a reason to withhold the grant of consent for such projects", which corresponds to the statement in paragraph 5.2.2 that they are "not reasons to prohibit the consenting of projects which use these technologies ...". She accepted it was "open" to her to "depart from the NPS policies" and "give greater weight to GHG emissions in the context of the Drax application". But she found "no compelling reason to do so" in this case (paragraph 6.7).
92. Paragraph 6.7 of the decision letter, and especially the reference to her having decided not to give them "greater weight" than is indicated in national policy, shows that the Secretary of State did give weight to greenhouse gas emissions in the balancing exercise as a "significant adverse impact", in accordance with the relevant policies in EN-1 and EN-2. Her acknowledgment that she was free to give this consideration "greater weight", and to "depart from the NPS policies" is, I think, telling. This paragraph of the decision letter betrays no misunderstanding of the relevant policies. It makes it impossible to submit that "greenhouse gas emissions" were excluded from the balance, or given no weight. To suggest that the Secretary of State meant to say, though she did not, that greenhouse gas emissions had no place in the balance is mistaken. Nor can it be said that she was not entitled to assess weight in the way she did. The policy was properly interpreted and lawfully applied.
93. In the striking of the balance, the weight given to greenhouse gas emissions in combination with the weight given to the "negative visual and landscape impacts" (paragraph 6.8), as "adverse effects" of the development, was not as strong as the weight the Secretary of State gave to its "positive effects", including its "contribution to meeting the need case set out in the NPSs" (paragraph 6.9). This was a classic balancing exercise, in which weight was lawfully given to each of the relevant factors.
94. The Secretary of State did not misdirect herself on the meaning and effect of the policy in paragraph 5.2.2 of EN-1 and paragraph 2.5.2 of EN-2, or misapply it. She did not read it as purporting to make CO<sub>2</sub> emissions, or greenhouse gas emissions, irrelevant in a decision on an application for a development consent order. She clearly did not regard herself as constrained by EN-1 to treat greenhouse gas emissions as having no bearing on her decision on the Drax project – either because there are other means by which the United Kingdom seeks to reduce greenhouse gas emissions from infrastructure, including the EU Emissions Trading System, or for any other reason.
95. One cannot say that she misunderstood the purpose of environmental impact assessment under the EIA Directive and the EIA Regulations, or the relevance of an assessment of CO<sub>2</sub> emissions in an environmental statement for a project within the scope of EN-1 and EN-2. As Mr Tait submitted, the requirement to assess the environmental impacts of a development,

under regulation 21 of the EIA Regulations, is not incompatible with a statement of national policy in which the Government explains how impacts of a particular kind are viewed, and how they are being addressed by different means. And there is no basis here for the submission that the Secretary of State thought the policy in paragraph 5.2.2 of EN-1 could, in principle, prevent greenhouse gas emissions, if assessed as a likely significant effect on the environment in an environmental statement, from warranting a refusal of development consent. This was not a conclusion she reached, nor implicit in any she did.

96. The law on “material considerations” in the sphere of decision-making on applications for planning permission under section 70 of the Town and Country Planning Act 1990 does not assist Mr Jones’ argument. It does not go to the issue we are concerned with, which is whether the Secretary of State, in making her decision on the Drax proposal, misinterpreted and misapplied policies in national policy statements produced under the self-contained statutory regime for such projects in the Planning Act. The relevant provisions for decision-making in that statute do not refer to “material considerations” – though of course normal public law principles will apply to proceedings challenging a development consent order. But in any event the relevant policies here, in EN-1 and EN-2, exemplify the wide scope of the policy-making power in section 5(5) of the Planning Act, in particular subsections (5)(c) and (5)(f). Their merits as policy are not contested in these proceedings, and could not be. It is enough for us to conclude, as I think we should, that they were neither misinterpreted nor misapplied by the Secretary of State when making her decision on the Drax project.
97. On this issue, therefore, as on the first, I think the appeal should fail.

*Did the Secretary of State misinterpret and misapply section 104(7) of the Planning Act?*

98. The essence of ClientEarth’s argument on this issue is that the Secretary of State failed to discharge her obligation under section 104(7) of the Planning Act to weigh the “adverse impact” of the proposed development against its “benefits”, simply repeating her assessment under section 104(3). Though ClientEarth accepts that policy in a national policy statement is relevant to the exercise under section 104(7), it contends that the Secretary of State erred by taking the same approach to the issues of need and greenhouse gas emissions, in paragraphs 6.6 and 6.7 of the decision letter, as she had already taken in considering the policies in the national policy statements under section 104(3). In effect, she fettered her assessment under section 104(7).
99. Holgate J. saw no difficulty in rejecting this ground of the claim. Citing the decision of this court in *R. (on the application of Thames Blue Green Economy Ltd.) v Secretary of State for Communities and Local Government* [2015] EWCA Civ 876, and at first instance in the same case ([2015] EWHC 727 (Admin)), and also that of the Divisional Court in *R. (on the application of Spurrier) v Secretary of State for Transport* [2020] P.T.S.R. 240, he acknowledged that section 104(7) may not be used to “circumvent the application of ss.87(3), 104(3) and 106(2)” of the Planning Act (paragraph 176 of the judgment). But the Secretary of State was “legally entitled to ... give “substantial weight” to the need case in accordance with the NPS”, and “fully entitled to take that assessment into account under s.104(7)” (paragraph 177 of the judgment). In paragraph 6.7 of the decision letter she recognised that in EN-1 greenhouse gas emissions are accepted to be a “significant adverse impact”, and then went on to consider whether, in the section 104(7) balance, that factor should be given “greater weight” in the case of the Drax proposal. The proposal also gave rise to landscape and visual

impacts, which were “further disbenefits”. The suggestion that the Secretary of State looked at the balance under section 104(7) “solely through the lens of, or improperly fettered by, the NPSs” was “untenable” (paragraph 179). She decided not to give “greater weight” to greenhouse gas emissions because she found there to be “no compelling reason in this instance”. To criticise this as improperly introducing a “threshold test” was “an overly legalistic approach to the reading of the decision letter”. The Secretary of State was “simply expressing a matter of planning judgment”, and “saying that there was no sufficiently cogent reason for giving more weight to this matter”. She was “entitled to exercise her judgment in that way”. She went on, in paragraph 6.9, to “weigh all the positive and negative effects of the proposal before concluding that the benefits outweighed the adverse effects of the proposal” (paragraph 180).

100. Mr Jones submitted that the availability of the power to review under section 6 of the Planning Act does not prevent reduced weight being given to policies in a national policy statement that have become out-of-date, or greater weight to other “material considerations” because circumstances have changed since the designation of the national policy statement – such as greenhouse gas emissions in the light of the target of “Net Zero” (see *Spurrier*, at paragraph 109). If that balancing exercise results in “adverse impacts” outweighing “benefits”, the obligation under section 104(3) to determine the application in accordance with the national policy statement is released. The section 104(3) assessment must not be allowed to override the operation of section 104(7).
101. Yet, Mr Jones submitted, that is what the Secretary of State did in her assessment under section 104(7). She assumed the project would contribute to the identified need in EN-1 for CCR fossil fuel generation simply because it was a project of that type, but failed to consider the weight to be given to its actual contribution to meeting a national need. And in dealing with greenhouse gas emissions, she merely asked herself whether to give them “greater weight” than was contemplated in the relevant policy in EN-1. This was wrong. Section 104(7) involves a balancing exercise in which any “adverse impact” should be considered, no matter how that kind of impact is addressed in the relevant national policy statement. While an objector in a development consent order examination cannot challenge the need for a type of energy infrastructure included in EN-1 or contend that consent should be refused because the development is of a type that generates greenhouse gas emissions, it can argue under section 104(7) that the greenhouse gas emissions of this proposed development are an “adverse impact” outweighing its “benefits”. This does not offend the principle that matters settled by a national policy statement should not be revised or re-opened in a development consent order process (see *Spurrier*, at paragraphs 103 to 105 and 107, and the first instance judgment in *Thames Blue Green Economy Ltd.*, at paragraphs 8 and 9, and 37 to 43).
102. In my view, as Mr Tait and Mr Strachan submitted, this argument is not sound. The Secretary of State did not adopt an unlawful approach to the assessment required under section 104(7). She did not fetter that assessment. She carried out the balancing exercise required, taking into account the considerations relevant to it and giving them lawful weight. No legal error was made.
103. The reasoning on this issue largely coincides with that on the previous two, which need not be repeated. There are six main points.
104. First, the purpose of the balancing exercise in section 104(7) is to establish whether an exception should be made to the requirement in section 104(3) that an application for



development consent must be decided “in accordance with any relevant national policy statement”. The exercise involves a straightforward balance, setting “adverse impact” against “benefits”. It is not expressed as excluding considerations arising from national policy itself. It does not restrain the Secretary of State from bringing into account, and giving due weight to, the need for a particular type of infrastructure as recognised in a national policy statement, and setting it against any harm the development would cause (see the judgment of Sales L.J. in *Thames Blue Green Economy Ltd.*, at paragraph 16).

105. Secondly, however, as Mr Tait and Mr Strachan submitted, section 104(7) may not be used to circumvent other provisions in the statutory scheme, including section 106(1)(b), which enables the Secretary of State, when deciding an application for development consent, to “disregard representations” relating to “the merits of policy set out in a national policy statement”. It does not provide a means of challenging such policy, or of anticipating a review under section 6, which is the process for accommodating changes of circumstances after designation (see *Spurrier*, at paragraphs 106 to 110).
106. Thirdly, in this case the Secretary of State identified her task under section 104(7) in paragraph 6.1 of the decision letter. She did so accurately by setting out the provisions of both subsection (3) of section 104 and subsection (7), and directing herself that she would “need to consider the impacts of any proposed development and weigh these against the benefits of any scheme”.
107. Fourthly, the Secretary of State concluded in paragraph 6.2, on the basis of her earlier conclusions in paragraphs 4.8 to 4.20, that the proposed development was “in accordance with EN-1”, having satisfied herself that it “should benefit from [the policy presumption in favour of granting consent for energy NSIPs in EN-1] because there are no more specific and more relevant NPS policies which clearly indicate that consent should be refused” and that “therefore the Development accords with relevant NPSs”. This was a lawful conclusion.
108. Fifthly, the Secretary of State undertook the balancing exercise under section 104(7) in paragraphs 6.3 to 6.9, concluding in paragraph 6.9 that “[on] balance ... the benefits of the Development outweigh its adverse effects”. This too was a lawful conclusion. There is nothing illogical or unlawful in recognising the general policy that greenhouse gas emissions are “not reasons to prohibit the consenting of projects”, but considering whether to “give greater weight to GHG emissions in the context of the Drax application” and deciding not to do so. In undertaking the section 104(7) balance, this was perfectly appropriate.
109. Sixthly, there is no question of the Secretary of State having fettered herself in striking the section 104(7) balance, either by proceeding as if she had to adhere slavishly to the policies in EN-1 and EN-2, including the policies on need and on greenhouse gas emissions, or in any other way. She took those policies into account. But she did not regard herself as unable to give such weight to the proposal’s compliance with them as she thought was right in the circumstances. In weighing the adverse effect of greenhouse gas emissions in paragraph 6.7, she took account of “the Government’s policy and legislative framework for delivering a net zero economy by 2050”. She acknowledged that she was free to “depart from the NPS policies and give greater weight to GHG emissions” in this case, but decided not to do so. I do not read her reference to there being “no compelling reason” as setting some unduly onerous test. She was merely expressing a lawful planning judgment on the facts of the case – as she also did on the question of need in paragraph 6.9, where she recognised that there were

“strong arguments” weighing in favour of granting consent for a development of this capacity, because of its “contribution to meeting the need case set out in the NPSs”.

110. In my view, therefore, the appeal should not succeed on this issue.

*Conclusion*

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

**Lord Justice Lewis**

112. I agree.

**Lord Justice Lewison**

113. I also agree.