



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**

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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>	

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**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  
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**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 CO2 emissions are a significant adverse impact of fossil fuel generating stations. Although an ES on air emissions will include an assessment of CO2 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 CO2 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 *Spurrer*, 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.