

Case Name: *Pearce v Secretary of State for Business Energy And Industrial Strategy* [2021] EWHC 326 (Admin) (18 February 2021)

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Commentary: The High Court, in a judgment dated 18 February 2021, quashed the decision of the Secretary of State for Business, Energy and Industrial Strategy (the "SoS") on 1 July 2020 to make the North Vanguard Offshore Wind Farm Order (the "Order"). The North Vanguard project is closely related to the neighbouring Norfolk Boreas project, lying immediately to the north-east, and both are to be developed by Vattenfall Wind Power Limited ("Vattenfall"). The reason for quashing the Order was on the basis of the SoS' failure to lawfully assess the cumulative effects of the proposed development.

The promoter of the project, Norfolk Vanguard Limited ("NVL") (a subsidiary of Vattenfall), proposed that the onshore infrastructure for the two projects (North Vanguard and Boreas) be co-located. This would involve a cable route carrying direct current for 60km from the landfall at Happisburgh to a substation site near the village of Necton. There, the power would be converted and fed into the National Grid, with both sharing a grid connection.

The Environmental Statement ("ES") prepared by NVL for the North Vanguard project assessed cumulative impacts arising from both projects, including landscape and visual impacts from the infrastructure proposed at Necton. The ES indicated that sufficient information was available in order to undertake a meaningful assessment. Objections were received from many, including the Claimant, in relation to the impacts of the Necton infrastructure for Vanguard in isolation and also the cumulative impacts which would occur if infrastructure for the Boreas project was added.

In their assessment of landscape and visual impacts for the Vanguard project, however, both the Examining Authority and the SoS decided that consideration of the cumulative impacts from Vanguard and Boreas together should be deferred to any subsequent examination of the Boreas project. The High Court explained that the challenge raised three issues:

- a) Whether the SoS was obliged to take the cumulative impacts at Necton into account when determining the Vanguard application by virtue of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 (the "2009 Regulations") and hence acted unlawfully by deferring consideration of that subject to any examination of an application for a DCO in respect of the Boreas project;
- b) Whether the reasons given by the SoS for not taking those cumulative impacts into account when determining the Vanguard application were legally inadequate; and
- c) In the event of the court deciding that the SoS erred in law in either of those two respects, whether it should refuse to grant relief in the exercise of its discretion.

On the issue of compliance with the 2009 Regulations, the judge explained that a decision-maker may not grant development consent without, firstly, being satisfied that he has sufficient information to enable him to evaluate and weigh the likely significant environmental effects of the proposal (having regard to any constraints on what an applicant could reasonably be required to provide) and secondly, making that evaluation. In the Vanguard ES, NVL assessed the cumulative landscape and visual impacts as being "significant" and neither the Examining Authority nor the SoS disagreed with that judgement. Accordingly, the judge noted that this was not a case where deferral of the consideration of those impacts to a subsequent consenting procedure could have been lawful on the basis that the decision-maker considered these impacts to be insignificant. The court therefore had to proceed on the basis that the SoS had considered the cumulative impacts to be significant effects which needed to be evaluated in a decision on whether or not to grant development consent.

As a result, the court found that the SoS acted in breach of the 2009 Regulations by failing to evaluate the information before him on the cumulative impacts of the Vanguard and Boreas substation development, which had been assessed by NVL as likely to be significant adverse environmental effects. The SoS unlawfully deferred his evaluation of those effects simply because he considered the information on the development for connecting Boreas to the National Grid was "limited". The SoS did not go so far as to conclude that an evaluation of cumulative impacts could not be made on the information available, or that it was "inadequate" for that purpose. The SoS also failed to consider requiring NVL to provide any details he considered to be lacking and did not address his mind to the question of whether NVL could or could not reasonably provide such details under the 2009 Regulations as part of the ES for Vanguard. It followed that the SoS unlawfully decided not to evaluate the cumulative impacts at Necton in the decision he took on the application for the Vanguard DCO.

The court then considered whether the decision to defer evaluation of a significant adverse effect to a subsequent consenting procedure was rational and satisfied the objections and requirements of EIA legislation. The judge found that it was not; the only reason for deferring all consideration of cumulative landscape and visual impacts to the Boreas examination was that the information on Boreas was 'limited'. This was found to be 'illogical or irrational'; the nature and level of information on the two projects for the purpose of assessing the impacts of the substation development at Necton was essentially the same. The SoS proceeded on the basis that the information on the solus impacts of the Vanguard project was sufficient but no basis was advanced for either (a) treating the adequacy of the environmental information on Boreas differently for an evaluation of the cumulative landscape and visual impacts or (b) not making any evaluation of those impacts at all in the Vanguard decision. The SoS' decision was found to be flawed by an obvious internal inconsistency.

In addition, the judge noted that the SoS' approach has had the effect, absent consideration of those cumulative effects, of "making it easier to obtain consent for Vanguard, and providing a "foot in the door" making it easier to obtain consent for Boreas". He agreed with the Claimant's arguments that this has had a "precedent effect" for decision-making in relation to Boreas upon which NVL has relied heavily in the Boreas examination. In sum, there was no rational justification for the SoS not making any evaluation of the cumulative effects at this stage. The reason for deferral could not justify, by itself, leaving the issue entirely to the second examination, particularly where the information was in front of the SoS, NVL considered it to be adequate and no one suggested the contrary. In any event, the Examining Authority and the SoS had powers to obtain further information and should have sought this. For the reasons set out above, the judge also found that the reasons given for deferring the decision were legally inadequate.

As a result of the court finding that the SoS erred in law, it was necessary for the court to consider whether it should refuse to grant relief in the exercise of its discretion. This turned on whether, if the cumulative impacts had been taken into account, the court was satisfied that it would have been highly likely that the SoS would still have granted the Order. Since the SoS reached the conclusion that he would assess cumulative impacts at Necton on the basis that the information on Boreas was 'limited', this made it impossible to deduce what his conclusion would have been if he had evaluated those impacts. Further, it was not appropriate to infer that, because the ES assessed the cumulative impacts at Necton as falling within a radius of 1.2km from the proposed substation, the impact would have been treated as localised and hence would have attracted only 'limited weight', just as the Examining Authority and the SoS had evaluated the solus impacts of the Vanguard substations.

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

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