

'NO GO' FOR OFFSHORE WIND FARM DCO

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Summary

A local resident has successfully challenged the Secretary of State's development consent order ("DCO") for one of the world's largest offshore wind projects on the grounds that the cumulative landscape and visual impacts of both this *Vanguard* project and its 'sister' *Boreas* project (for which a DCO decision is expected in April 2021) were not take into account.

See:

- The judgment in the case of [Pearce v Secretary of State for Business, Energy and Industrial Strategy \[2021\] EWHC 326 \(Admin\)](#), handed down on 18 February 2021.
- [The Norfolk Vanguard Offshore Wind Farm Order 2020](#) (SI 2020/706).

This is of particular interest not only because it is a rare example of the DCO process being held up, although perhaps only temporarily, but also due to the clear indication it gives as to the vigilance which the Courts will exercise to ensure matters are addressed lawfully.

The DCO process is essentially a front loaded activity whereby all relevant matters are identified and thereafter addressed through an extensive pre-application process. Visual and landscape effects being an essential part of that process along with any other relevant matter. This decision related to the cumulative effect in respect of the visual and landscape implications arising from cable runs from two separate schemes, but there does not appear to be any reason why it should not apply equally to other material considerations as well, such as drainage, effect on farm holdings and such like.

Background

The *Vanguard* and *Boreas* off-shore wind farm projects proposed substantial infrastructure development (including new substations) near the Norfolk village of Necton.

The Environmental Statement prepared for *Vanguard* identified and assessed significant cumulative impacts arising from both projects, including the landscape and visual impacts at Necton. Essentially the same information was provided for both projects.

However, the Examining Authority did not consider the cumulative impact. It stated that there was limited detail available and it would be most appropriately assessed as part of any future examination into *Boreas*. The Secretary of State deferred a decision as to how the impact should be evaluated to the *Boreas* DCO process.

Judgment

The Infrastructure Planning (Environmental Impact Assessment) Regulations 2009/2263 applied, although it was agreed there was no material difference under the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017/572. Regulation 3 of the 2009 Regulations required the Secretary of State to take environmental information into consideration before making a DCO.

Holgate J found that it is for the decision-maker to decide what are the environmental effects of a proposed project and whether they are significant. However, under the environmental impact legislation, he is required to evaluate and weigh those effects he considers to be *significant* (*Commission v Ireland* [2011] Env. L.R. 478). Accordingly, he may not grant a DCO without first being satisfied that he has sufficient information to evaluate the likely significant environmental effects.

The Environmental Statement assessed the cumulative landscape and visual impacts as being significant. Neither the Examining Authority nor the Secretary of State disagreed with that assessment.

Therefore, the Secretary of State was obliged to evaluate the impact and could not lawfully defer this to the *Boreas* DCO process. If the Environmental Statement was thought inadequate, additional information should have been sought under regulation 17 of the 2009 Regulations.

R (Littlewood) v Bassetlaw District Council [2009] Env.L.R. 407 was distinguished. In that case, it had not been irrational for the local authority to grant consent for a freestanding project, without assessing cumulative impacts arising from future development of the remaining part of the site. However, there had been no adequate information upon which a cumulative assessment could have been based. In this case, the *Vanguard* and *Boreas* developments are closely linked and sufficient information had been provided.

It was found that the decision to grant the DCO was irrational and inadequate reasons had been given for deferring evaluation of the cumulative impacts.

Relief

The Judge was invited to decline relief under section 31(2A) of the Senior Courts Act 1981 on the ground that it was highly likely the outcome would not have been substantially different.

Holgate J noted that the Court should be very careful to avoid trespassing into the domain of the decision maker in matters of fact and planning judgement; this was 'forbidden territory'. The result of the legal errors was that the Court did not know what the assessment of the cumulative impacts would have been if it had been considered.

Therefore, the decision to grant the DCO was quashed.

The Judge declined to give directions as to how the implications of the judgment should be handled procedurally for the *Vanguard* and *Boreas* DCO applications.

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