

# Energy Planning in 2009, All Systems Go?

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## **The need for renewal of UK energy infrastructure and the steps being taken to answer that need**

There are currently 10 nuclear power stations across the United Kingdom providing around 15 per cent of the consumed electricity. By 2025 all but one of these power stations will be closed as they reach the end of their expected working lives. Government's stated aim is to have the first replacement nuclear power station generating electricity from around 2018.

Renewable energy strategy is a key part of the Government's "UK Low Carbon Transition Plan". The target of sourcing 15 per cent of UK energy from renewable sources by 2020 to meet our legally binding renewable energy and carbon dioxide reduction targets requires 15 per cent of UK total energy (electricity, heat and transport fuel) to come from renewable energy sources by 2020,<sup>1</sup> which in turn will require at least 30 per cent of electricity to come from renewable sources, compared to approximately 5 per cent today. This will involve more on and off-shore wind, tidal and other renewable energy projects.

But fossil fuels will continue to play a significant role for the foreseeable future. Coal is an abundant and flexible energy source, which remains an important part of the UK's energy mix, but burning coal emits more CO<sub>2</sub> per unit of electricity produced than all other forms of generation and a substantial part of our existing coal fired plant faces closure under the Large Combustion Plants Directive. This April the Government confirmed that any new combustion power station at or over 300 MWe would have to be built Carbon Capture Ready (CCR), which means it should be designed so there are no foreseeable barriers to retrofitting CCS (Carbon Capture and Storage) technology, once proven. A government sponsored competition is now underway to develop a commercial scale CCS coal fired plant.

North Sea gas supplies are declining. Whereas in 2003/04 imported gas accounted for 2 per cent of UK demand, in 2008/09 this will increase to 20 per cent and by 2018 some 80 per cent of gas consumed in the United Kingdom will be imported. Currently gas storage infrastructure is simply not capable of coping with this change and security of supply is becoming a significant concern.

National Grid's high voltage electricity transmission system needs substantial network reinforcements to meet the 2020 renewable energy target and to account for the unprecedented churn in the generation fleet from the Large Combustion Plant Directive and the nuclear renewals.

Underpinning the transition to low-carbon electricity generation is the legal duty on the Secretary of State to ensure that the net UK carbon account for the year 2050 is at least 80 per cent lower than the 1990 baseline<sup>2</sup> and the EU Emissions Trading System (EU ETS). The latter has set a cap on the level of emissions that the heavy industrial sectors—including power—can emit. This reminds us that carbon pricing, and market forces generally, are pivotal to the renewal of the UK's energy fleet. This is a process that will be entirely market-, not state-, delivered.

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<sup>1</sup> [http://decc.gov.uk/en/content/cms/what\\_we\\_do/uk\\_supply/energy\\_mix/renewable/res/res.aspx](http://decc.gov.uk/en/content/cms/what_we_do/uk_supply/energy_mix/renewable/res/res.aspx) [Accessed October 16, 2009].

<sup>2</sup> Climate Change Act 2008 s.1.

*NSIPs and the IPC*

The IPC and the Planning Act 2008 are the chief instruments in the delivery of this new energy plant. The essential concept of the IPC is that it will decide on the grant of development consents for certain categories of major infrastructure project, in accordance with the relevant National Policy Statement (NPS), instead of the decision being made by the relevant Government Minister, as now. Where an NPS is not in place the IPC makes a recommendation to the relevant Minister, who will make the decision.

The IPC regime brings together a number of consenting regimes with the aim of a single development consent per project. With limited exceptions, it only applies in England and Wales. The Government is aiming for a consent to be issued within 12 months of an application being lodged. The IPC process introduces a new legal requirement for extensive pre-application consultation, and it seeks to reduce substantially the use of public inquiries.

IPC projects fall into five “fields”: energy, transport, water, waste water and waste, the energy projects being:

- electricity generating stations (above 50MW onshore or above 100MW offshore);
- overhead electric lines;
- underground gas storage facilities;
- gas or oil pipelines;
- gas reception facilities;
- Liquefied Natural Gas facilities.

Those headline propositions provide a wide ranging and, it may be thought, compelling case of need for new development and the means to declare that need. However the conversion of those factual and high level policy propositions into compelling arguments in project specific applications for development consent is where the UK planning process is facing a major test as to whether it is now “All systems Go!” for energy planning. Will that need be delivered in a timely and cost effective way that maintains industry and public confidence in the planning system (and those who practice in that system) in the long term?

In the main part of this paper a range of legal issues are examined that are drawn from the consenting life cycle of the energy projects that are those most likely to be proposed to meet this need. In looking at these issues unifying themes can be identified that both help explain them, and provide material for how best to manage risk from the perspective of promoters of such schemes.

These themes include:

- the increasing emphasis in the planning system on public involvement, and the willingness of the courts to intervene where the public claim to have been excluded from the process;
- the fact that “need” has always presented difficulties in the planning process, in terms of how it should be balanced against more tangible site specific impacts; and
- the potentially unpredictable results that can arise from the UK planning system (and potentially now the IPC) traditionally having been the scheme of UK regulation most able to adapt to bring issues within its ambit.

### Legal Issues Arising At This Time

(a) *The novelty of being required to justify development in the energy sector.*

The combination of NPSs, statements of need and the consultation processes of the IPC that will make up the standard consent mechanisms for energy development from here on are something of a novelty to the energy industry as a whole. If we go back 10–15 years, despite well documented public inquiries for nuclear power stations, and the inevitable public inquiries for planning applications for onshore wind farms, most other forms of consent for electricity generating stations proved largely speaking uncontroversial, whether they were they for coal, gas or others such as hydro-electric. There were public inquiries but decisions seem to be based rather more upon the stated position of the Government department on the need for particular types of development and did not involve promoters in any real requirement to demonstrate the need for their project. The “dash for gas” in the 1990s saw 44<sup>3</sup> combined cycle gas turbine installations consented with few, if any, public inquiries. That was followed by the Government announcing a moratorium on further consents being granted, putting a halt to that trend overnight.

However, the issues being addressed by developers at that time, whilst they did include environmental impacts in a high degree of detail, included little or no uncertainty faced by a developer as to whether they would have to argue any form of balance of need for the development versus impacts involved. Nor did they seem to face any real scrutiny over potential levels of impacts from either alternative locations or alternative methods of energy generation.

Clearly, through present policy formulation, Government is trying to do its bit to limit the uncertainty in these questions but the fact that a NPS is needed at all illustrates keenly that we have entered a new era of energy consenting in which it is not enough to say that one would like to install some form of power generation because you are confident that you can sell the electricity, or at least you are willing to take that risk. Rather your starting point is to explain by reference to whatever objective standards you have before you, why there is a need for this type of development or, alternatively, why those objectives standard show that this type of development is a reasonable response to meeting that need.

(b) *The danger of over reliance on need and policy that (endorses) need, especially early on in the development process.*

One of the counter-intuitive aspects of energy planning is that whilst national need statements are seen as essential to allow planning decisions properly to weigh the benefits of the scheme against local adverse impacts there are, in fact, potential dangers in planning policy that over emphasises need.

The danger lies less in the emphasis that such policy might place on need and more in the effect that such a strongly worded policy can have upon promoters of schemes.

#### Changes in circumstances

Consider the legal position as asserted by Nirex (the body that until 2005 was charged with finding and building a solution to the UK’s high and intermediate level radioactive waste) in its representations to the committee on radioactive waste management (CoRWM), set up by the Government to provide independent recommendations on the disposal of radioactive waste.

<sup>3</sup> Select Committee on Trade and Industry Fourth Report, April 7, 1998, section III, para.38. Available at <http://www.parliament.the-stationery-office.co.uk/pa/cm199798/cmselect/cmtrdind/404iv/ti0406.htm> [Accessed October 16, 2009].

“Policy should set a process not a solution. Nirex had relied heavily on the national policy of deep disposal to support its failed plans, consequently its assessments were limited because it assumed that deep disposal was the Government’s chosen solution. The criticism that Nirex received for this insufficient scrutiny was well placed.”<sup>4</sup>

The thinking behind that position was also clear. Namely that the length of time for which such a development proposal would be under consideration, from the earliest stages in which that policy might have been formulated to the latter stages where it could be relied upon to authorise specific development, could place in jeopardy any subsequent development consent if it could be shown that the policy prevented the consideration of matters upon which that policy was based which might have changed during the currency of the policy. Nirex’s representation to CoRWM continued:

“Knowledge and consensus in relevant areas of science and technology are constantly changing. Therefore policy must enable ongoing research to help ensure previous decisions are robust to any changes.”<sup>5</sup>

Admittedly this example relates to ancillary development to energy production, being a deep geological disposal facility. Moreover, the facility contemplated is accepted to be one that is of such a unique nature that it justifies a planning process that allows for site selection through volunteer communities, evaluation and phased development that could take so long that it is being considered as an inter-generational project.

However the principles that lie behind the thinking for that scheme are not alien to schemes that are expected to be delivered in a much shorter timescale. One point these consultation responses illustrated is that, if you have policy that is pointing in the direction of a particular type of development and in doing so is beginning to close doors on the potential for alternative types of development, you have to stay alive to the possibility that there could be changes in science and technology that may challenge those policy stages which have limited the consideration of alternatives.

The planning for a geological repository is so elongated that there may be no choice but to write into the emerging policy that change in relevant factors such as technology has to be kept under review. But when timescales are shorter, it becomes a much more uncertain point as to the extent to which change in factual assumptions on which policy was based could be relevant in making decisions in reliance on the policy.

The July 2009 DCLG consultation on the IPC examination procedures indicated that “relevant representations” on an energy proposal will not include (and therefore will exclude) representations on the merits of national policy.<sup>6</sup> But what if those representations raise clear new evidence that the NPS treatment of an issue that relates to a specific site may no longer be safe? Does the promoter of the scheme simply urge the IPC to refuse to hear the point, or does it bring evidence to resist the suggestion that the NPS has been undermined in that way?

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<sup>4</sup> Nirex’s response to the Committee on Radioactive Waste Management’s consultation on the proper role of planning policy on infrastructure p.7.

<sup>5</sup> Nirex’s response to the Committee on Radioactive Waste Management’s consultation on the proper role of planning policy on infrastructure p.8.

<sup>6</sup> Draft regulations: The Infrastructure Planning (Compulsory Acquisition) Regulations 2010 reg.9. Annex 6 of Planning Act 2008: Consultation on Examination Procedures for Nationally Significant Infrastructure Projects, (DCLG: July 2009). Available at: <http://www.communities.gov.uk/archived/publications/planningandbuilding/consultationexaminationnrips> [Accessed October 16, 2009].

## Quantification of need

Another aspect of any statement of need is whether and if so how, it attempts to address quantification of the actual need. A recent illustration of the point can be found in the January 2008 White Paper announcement on nuclear power “Meeting the Energy Challenge: A White Paper on Nuclear Power”.<sup>7</sup> This is the document that has set in train most of the reforms described in the introduction to this paper in terms of NPSs and the role of the IPC and the parts both would play in new nuclear build.

That is also the document which set in motion the steps that have lead so far, and are now continuing to lead towards new nuclear build, including the 12 billion euro acquisition of British Energy by EDF and the circa £400m sale by auction of the Oldbury, Wylfa and Bradwell sites by the Nuclear Decommissioning Authority, potentially for new nuclear power stations.

So one would expect a pretty substantial statement in support of nuclear power to have caused such a major movement and more importantly such a major financial investment.

However, you will not find any statement of need to date greater than the Government concluding that on the balance of information available to it the option of new nuclear development within a mix of other types of energy development seems prudent.<sup>8</sup> Elsewhere this has been described by the Government as allowing developers “the option” of new nuclear build.

At first glance this may seem a surprisingly anodyne statement of support. To have galvanised such major financial investment you might have thought that the statement would be that new nuclear power stations “must” be built or alternatively a specific number must be built or a specific amount of new installed generating capacity must be built.

The reasoning behind this is clearer when looked at in the context of the effects of over-strident statements of need. A statement of need that is too prescriptive inevitably leads to the suggestion that balancing factors (e.g. local impacts) are incapable of being looked at in enough detail. Far better than this is a formulation that does not require such an absolute demonstration of supporting evidence but rather one which leaves a substantial margin of discretion to the decision-maker.

Looked at another way, a policy that tries to prove need by showing that specified developments are the only way to meet that need will be quite vulnerable to attempts to prove that the logic behind such an absolute proposition is flawed. Far better, certainly if you want to avoid challenges, is to say simply that the policy maker believes these types of development are desirable, rather than absolutely necessary.

The corollary to this, of course, if you are a promoter, is that you have to place a high level of trust in your decision-maker. You have to trust that the Government will hold good to the implied promise in such policy that it will genuinely afford the option of new development such as this to developers.

This much reasoning takes us to the point the Government reached, certainly in nuclear 18 months ago, and perhaps where it has been before with other types of development, but has now reached again with the Renewable Energy Strategy of July 2009,<sup>9</sup> of having set the scene of a high level

<sup>7</sup> Meeting the Energy Challenge: A White Paper on Nuclear Power, (BERR: January 2008). Available at: [http://www.berr.gov.uk/files/file43006.pdf?bsi\\_scan\\_100F6E08E8915525=0&bsi\\_scan\\_filename=file43006.pdf](http://www.berr.gov.uk/files/file43006.pdf?bsi_scan_100F6E08E8915525=0&bsi_scan_filename=file43006.pdf) [Accessed October 16, 2009].

<sup>8</sup> See the conclusions reached in Meeting the Energy Challenge: A White Paper on Nuclear Power, (BERR: January 2008) at p.7.

<sup>9</sup> The UK Renewable Energy Strategy, (DECC: July 2009). Available at: [http://www.decc.gov.uk/en/content/cms/what\\_we\\_do/uk\\_supply/energy\\_mix/renewable/res/res.aspx](http://www.decc.gov.uk/en/content/cms/what_we_do/uk_supply/energy_mix/renewable/res/res.aspx) [Accessed October 16, 2009].

policy review that has concluded there is an urgent, “macro” need for new low carbon energy development. Now we have to look at what the next steps will be to refine that policy into something that can be used in site specific approvals.

*(c) The challenge of drafting NPS and undertaking SEA, especially when deciding between site specific and criteria policy.*

The accepted wisdom on the past difficulties in energy planning are frequently characterised by the oft cited examples of public inquiries into Sizewell B and, although not energy related, Heathrow Terminal 5. The July 2009 IPC guidance sweeps the Dibden Bay container terminal inquiry into that select group attaching a price tag to those proceedings of £45m.<sup>10</sup>

These proceedings formed part of the rationale behind the Planning Act 2008 that a focused policy statement on need for particular types of development is seen as central to the ability to avoid lengthy time spent at public inquiries effectively trying to establish what that planning policy ought in fact to be.

Generic need or site specific?

At the heart of the question of how useful these policy statements will be is the Government’s decision whether they will engage with the issue of need on a site specific basis. The potential options at one end of the range include the generic, such as the 2007 Energy White Paper Statement of Need on Renewables<sup>11</sup> which is an example of what has been used up till now in terms of central government policy statements of need. This sets out a broad formulation of the desirability of that kind of development and a warning that the benefits of the development might not necessarily be apparent on a local level but they should nevertheless be weighed in the planning balance.

At the other end of the spectrum, for example, is what we are expecting in the nuclear sector, where the draftsman is fully intending to make recommendations on suitability of specific sites for development of a specific type of development, in this case new nuclear power stations, against preset criteria. Whilst the present understanding is that only the nuclear NPS will engage in site specific detail, the success, or otherwise, of doing so must influence whether future policies are drafted in this way for nationally important schemes.

<sup>10</sup> Planning Act 2008: Consultation on Examination Procedures for Nationally Significant Infrastructure Projects, (DCLG: July 2009) Annex 9 at p.138.

<sup>11</sup> “We remain committed to the important role renewables has to play in helping the UK meet its energy policy goals. In this publication we are reiterating previous commitments we have made, not least in the 2003 Energy White Paper and Planning Policy Statement 22 on renewable energy (PPS22), on the importance of renewable generation and the supporting infrastructure. We intend this to reconfirm the UK Government policy context for planning and consent decisions on renewable generation projects. As highlighted in the July 2006 Energy Review Report 150, the UK faces difficult challenges in meeting its energy policy goals. Renewable energy as a source of low carbon, indigenous electricity generation is central to reducing emissions and maintaining the reliability of our energy supplies at a time when our indigenous reserves of fossil fuels are declining more rapidly than expected. A regulatory environment that enables the development of appropriately sited renewable projects, and allows the UK to realise its extensive renewable resources, is vital if we are to make real progress towards our challenging goals. New renewable projects may not always appear to convey any particular local benefit, but they provide crucial national benefits. Individual renewable projects are part of a growing proportion of low carbon generation that provides benefits shared by all communities both through reduced emissions and more diverse supplies of energy, which helps the reliability of our supplies. This factor is a material consideration to which all participants in the planning system should give significant weight when considering renewable proposals. These wider benefits are not always immediately visible to the specific locality in which the project is sited. However, the benefits to society and the wider economy as a whole are significant and this must be reflected in the weight given to these considerations by decision-makers in reaching their decisions. If we are to maintain a rigorous planning system that does not disincentivise investment in renewable generation, it must also enable decisions to be taken in reasonable time. Decision-makers should ensure that planning applications for renewable energy developments are dealt with expeditiously while addressing the relevant issues.” Energy White Paper 2007, Ch 5, Box 5.3.3, p.157. Available at: <http://www.berr.gov.uk/files/file39387.pdf> [Accessed October 16, 2009].

The complexity of this drafting exercise is illustrated by the steps undertaken so far in bringing the document to life.<sup>12</sup> In terms of headline requirements, they break down into a consultation over siting criteria, followed by an invitation for nomination of sites, then evaluation of those sites against those criteria. All of those stages which contribute to the process that is being called the Strategic Siting Assessment, once undertaken by Government, will lead on to a draft and then a final NPS.

#### Strategic Environmental Assessment

A fundamental legal question, the answer to which heavily influences this range of drafting options, is whether, and if so, to what level of detail, Strategic Environmental Assessment is required as part of the process.

SEA is a mandatory legal requirement in respect of “plans and programmes” adopted by public authorities.<sup>13</sup> “Plans or programmes” is a wide class that could certainly cover many kinds of policy statements. The SEA Directive, and its implementing Regulations, provide these steps in the test of whether SEA is required in any case:

- Is there a specific legislative, regulatory or administrative requirement for the plan or programme?<sup>14</sup>
- Does the plan or programme set a framework for future development consents?<sup>15</sup>
- Does it relate to a subject matter contemplated by the Directive (energy is certainly specifically mentioned in the list of subjects within the Directive)?<sup>16</sup>
- And is it “likely to have significant environmental effects”?<sup>17</sup>

SEA brings with it procedural steps and requirements for consultation that lead to the production of formal documents such as the Environmental Report (akin to the Environmental Statement in a project level Environmental Impact Assessment).

The Government takes a view that pure statements of Government policy do not fall within the SEA Directive, such as the Energy White Papers of 2006 or 2008. This is likely to be for a number of reasons including that such policy is not required by legislative or administrative process. If it were to be argued that the Government were wrong not to have subjected these White Paper policy announcements to SEA then one obstacle that would now be faced is that the relevant judicial review challenge period is now long past without any action having been taken.

That does however leave us needing to identify what the dividing line is between those documents of Government policy that require SEA and those that do not.

The answer must lie in the Directive and Regulations themselves and to what in practice the drafting of policy documents lead. Is the document one that is specifically required by legislation? Will it be used as a framework (or part of a framework) for subsequent development consent decisions? Are the issues it addresses ones that are likely to have significant environmental effects?

<sup>12</sup> See the Infrastructure Planning Commission Routemap, (DCLG: January 2009). Available at: <http://www.communities.gov.uk/documents/planningandbuilding/pdf/routemap.pdf> [Accessed October 16, 2009].

<sup>13</sup> SEA regime is set out in the Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004/1633), which transposes Directive 2001/42 into English law.

<sup>14</sup> Directive 2001/42 art.2(a) and Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004/1633) reg.2(1).

<sup>15</sup> Directive 2001/42 art.3(4) and Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004/1633) regs 5(1) and 5(2).

<sup>16</sup> Directive 2001/42 art.3(2)(a) and Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004/1633) reg.5(2).

<sup>17</sup> Directive 2001/42 art.3(1) and Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004/1633) reg.9(1).

If the plan or programme proceeds on the basis of identifying development suitability on a site specific basis, the pressure is all the more intense to ensure that SEA has been undertaken.

Taking the proposed Nuclear NPS as a example, all these criteria are clearly met. Having additionally resolved to invite nominations of specific sites for assessment against a range of criteria relevant to the subsequent grant of a development consent for new nuclear power stations, the Government has accepted it is inevitable that Strategic Environmental Assessment is required.<sup>18</sup> Although it is now undertaking that process at the same time as drafting the NPS, the Government recognises that formal stages of SEA are such that the draft NPS and the formal SEA Environmental Report cannot be one and the same thing, but have to be offset. The NPS has to have been issued in draft before the Environmental Report under the SEA Regulations can be prepared.<sup>19</sup>

In such cases policy makers are faced with the challenge of ensuring that there is adequate environmental investigation of policy they intend putting forward. In this respect, the forthcoming Nuclear NPS is expected to set the standard of the level of information required for the drafting of a NPS that is site specific.

#### Alternatives

One area where the Government will be cautious, and all parties will be looking very closely, is how the question of alternatives has been dealt with.

Two recent court cases illustrate that this is very much a live issue. In *Bard*<sup>20</sup> a challenge to the Government's Eco Town policy was pursued on the basis that it failed properly to take account of alternatives. It was argued that various documents including a Housing Green Paper, an Eco Towns prospectus and a consultation document "Eco Towns—Living a Greener Future" together with the process by which bids for eco-town status were solicited and in some cases rejected, all combined to be a plan or programme in which alternatives had been inadequately considered due to the absence of formal SEA having been undertaken. This was dismissed by the High Court on the grounds that on a fair reading of the documents in question they had not progressed to a sufficiently advanced state that they could be treated as a plan or programme that required SEA. But this was only because there was still a stage at which a policy document would be drafted in which the Government would shortlist sites for eco-town status in favour of sites that would be discarded from the process. That would be the point where SEA would be required.

Another way of looking at the judgment is that SEA is not required when the policy in question is not preventing further consideration of alternatives. That dismissal has very recently been upheld by the Court of Appeal.<sup>21</sup>

In the *St Albans/Hertfordshire CC* case<sup>22</sup> the court has taken a different view at first instance and concluded that the East of England Regional Spatial Strategy is flawed in respect of a number of

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<sup>18</sup> For consistency with other projects the phrase SEA will be used throughout this paper. For the nuclear NPS OND/DECC has indicated that an "Assessment of Sustainability" (AoS) will be undertaken that discharges all requirements of the SEA Regulations. For this nuclear NPS, at least, the AoS may replace SEA. (See Towards a Nuclear National Policy Statement—Applying the Strategic Siting Assessment Criteria: an update to the study of the potential environmental and sustainability effects, (OND: January 2009) para.1.15).

<sup>19</sup> Towards a Nuclear National Policy Statement: Consultation on the Strategic Siting Assessment Process and Siting Criteria for New Nuclear Power Stations in the UK, (BERR: July 2008) Ch.1, para.1.46.

<sup>20</sup> *Bard Campaign v Secretary of State for the Communities and Local Government* [2009] EWHC 308 (Admin).

<sup>21</sup> *Bard Campaign v Secretary of State for Communities and Local Government* [2009] EWCA Civ 712.

<sup>22</sup> *City and District Council of St Albans v Secretary of State for Communities and Local Government; Hertfordshire CC v Secretary of State for Communities and Local Government* [2009] EWHC 1280 (Admin).

polices dealing with new settlements and the affect they have in determining where house building should occur in relation to three new towns and the surrounding Metropolitan Green Belt. In this case the SEA Regulations have been looked at much more specifically and we see the tests for SEA set out in a similar way to how they are described above.

Various consultants' reports that had been commissioned and relied upon by the Regional Assembly were reviewed by the court. Where it was shown that they had considered only the alternatives contained within the policy as it then was drafted they were inadequate to meet the requirements of the Regulations. Those reports that did properly assess options and discard them with clear reasoning could justifiably be relied upon as reason not to look at those discarded options any further.

Whilst some policies survived the challenge, those where alternatives could not be shown to have been considered (those relating to protection of the green belt) were quashed as not having been compliant with SEA requirements.

This latitude of discretion open to the court on this question of alternatives obviously raises the question whether, when any NPS is issued making site specific references, there has been adequate investigation on the alternatives of those sites (and the proposed use of those sites) in a manner which will meet the SEA Directive and Regulations.

#### Other ways of defining need

Whilst looking at the challenges of site specific policy drafting it is easy to miss that some other substantial factors can be addressed in a need statement, not necessarily tied to any specific site.

One such factor is the extent of legal commitment that the United Kingdom has taken on in terms of emissions reductions. For example, the United Kingdom has committed to sourcing 15 per cent of its energy from renewable sources by 2020.<sup>23</sup> The Climate Change Act 2008 created the legal framework for the United Kingdom to reduce greenhouse gas emission to at least 80 per cent below 1990 levels by 2050. The reported aim of the Act is to give the public and private sectors in the United Kingdom greater certainty about future regulation of carbon emissions to enable them to make long term decisions about investments in energy efficiency and low-carbon technologies. Amongst other things, the Act imposes a duty on the Secretary of State to ensure the United Kingdom meets the target set out in the Act,<sup>24</sup> and imposes a duty on him to prepare proposals and policies which he considers will enable the carbon budgets set under the Act to be met.<sup>25</sup> However, the Climate Change Committee, established by the Act to monitor progress, does not have the power to hold ministers to account.<sup>26</sup>

It remains to be seen whether proper recognition of those legal obligations will be able to be written clearly into any NSP in a way that is of real assistance in demonstrating that a specific site is needed to meet those obligations. The ability to evidence the contribution a specific site will make to meeting legally binding obligations may be of particular importance if the choice of development sites requires decisions having to be taken under the Habitats Regulations. This may well be the case with a number of the potential coastal nuclear and coal fired/CCS sites that would need to intake and discharge significant amounts of cooling water. This does not necessarily mean that the test of "imperative

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<sup>23</sup> Directive 2009/28.

<sup>24</sup> Climate Change Act 2008 s.1(1).

<sup>25</sup> Climate Change Act 2008 s.13(1).

<sup>26</sup> Climate Change Act 2008 Pt II.

reasons of overriding public interest' will be required to be met, but if it is, the ability to show a clear link between these national commitments and specific development proposals will be of assistance.

A further factor in considering how in drafting you might describe national need is to recognise how any such definition is likely to be interpreted by those in the development process. Experience demonstrates that consultees rarely do, in fact, challenge Government policy in the way that the draftsmen of the Planning Act believed when they designed the combination of the IPC and the NPSs.

Whilst outside the energy field, experience from the Stansted airport inquiry showed that whilst the decision-maker was willing to accept that the relevant White Paper could record the Government's position that factors such as the potential economic benefits of airport expansion were in principle desirable, it was not willing to accept that the policy statement could, as a matter of fact, establish definitively that those economic benefits would occur.

That kind of finesse applied to a need statement should be expected in every case. The quality of the supporting evidence considered in the preparation of that statement and the clarity with which it is recorded in the wording of the statement will determine how wide is the opportunity for consultees, and ultimately the decision-maker, to argue that issues are not definitively dealt with by the policy statement.

In presenting such arguments consultees may maintain that they are not in any way arguing against Government policy, merely seeking to identify exactly its extent and effect. In a similar way, consultees (which phrase should be taken to include objectors) may well argue that it is not an argument against national policy merely to differ over the weight to attach to conflicting considerations in any case. They will argue that that need cannot be treated as overriding in every case, certainly not as a result of a national need statement alone, and that opens the way to arguing how much weight should attach to need in any specific set of facts.

*(d) The challenge of integrating SEA with project level EIA.*

Despite the fact that SEA has been a legal requirement since 2005 relatively little practice has emerged on what one does with the output of the SEA process. It has led to it being a relatively untried aspect for energy planning at the moment and indeed many other forms of major development. Exactly how, if at all, should promoters aim to integrate Strategic Environmental Assessment with the process of granting individual development consents for projects?

*Offshore wind farms experience*

Not much in the way of overarching energy need policies has been written since 2005 (leaving aside the Government White Papers that have not been subject to SEA) so perhaps that lack of practical experience is not surprising. One area in which an SEA has been undertaken that led on to development control decisions was in Round 2 of the offshore windfarms. Round 2 refers to the tranches of sites that have been released by the sole title holder of the areas where offshore development can occur, the Crown Estate. The Department for Business, Enterprise and Regulatory Reform (BERR), as then was, undertook a sustainability appraisal to assist with the consent applications it would face, and although it was just outside the commencement dates for SEA, the process was described as an SEA and as far as possible was carried out as if it were a formal SEA.

Subsequent reference was of course made to the findings of the SEA, especially in terms of the development areas that were set out within it. The importance of the SEA was recognised in as much

as BERR made it clear it would not determine applications that strayed outside the area assessed, and hence developers did not do so. But outside of that, little has emerged as to how the site specific applications integrated with the SEA assessment. Applications were made to the Marine Consents Unit of BERR (now DECC) and local authority consultees tended to concentrate on shore based impacts. Offshore impacts had some high points of political profile (such as MoD concern over radar impacts in the Greater Wash Strategic Area) but on the whole they were far less than what has been seen with onshore windfarms. Of the whole complement of Round 1 and 2 consents granted only one was subject to judicial challenge, by another wind farm developer.

What might consistency between SEA and EIA mean?

Even outside of the energy sector there is surprisingly little written guidance on this and indeed little written opinion on appropriate use of SEA material at development consent stage (such challenges relating to SEA that we have seen above being to the policies themselves, not subsequent reliance upon them), potentially leaving one with the mistaken belief that the process of Strategic Environmental Assessment and the Environmental Report on a plan or programme is an exercise with no real end. That does not look to be a safe assumption. The way in which that SEA material influences project level development control decisions will be how in practice the process of Strategic Environmental Assessment influences development on the ground.

In principle what we are talking about here should be relatively simple. When making a development consent application which relies upon, or perhaps more widely just bears upon, any plan or programme which has been subject to Strategic Environmental Assessment, it will be important to make reference in that project level Environmental Impact Assessment to the Environmental Report that is the output of Strategic Environmental Assessment.

However, quite a bit of devil probably lies within that detail. First, what might we mean by “make reference to that Environmental Report”? If there are conflicts between the two which is going to take precedence? Similarly, the Office of the Deputy Prime Minister’s guidance<sup>27</sup> indicates that SEA is an iterative process and that a regular process of monitoring and revision of the SEA should be undertaken.

If it is right that policy should not be so prescriptive that it is incapable of recognising changes in circumstances, then assembly of the project level information which draws upon the SEA Environmental Report may also have to recognise the potential for that strategic level information to change even while the development consent process is underway.

Consistency of need statements with other plans

One area that will be easy to overlook, but which could lead to real issues at local consents stage, is the integration of national need statements with local development plan policy, be that Regional Spatial Strategy (RSS) or Local Development Framework (LDF). By definition, that integration is unlikely to be there, as the draftsman of such policies, certainly the nuclear NPS, have not made compliance with local plan policy a relevant factor in assessing a site as suitable for development in the Strategic Siting Assessment.<sup>28</sup>

<sup>27</sup> A Practical Guide to the Strategic Environmental Assessment Directive, (ODPM: September 2005). Available at: <http://www.communities.gov.uk/documents/planningandbuilding/pdf/practicalguidesea.pdf> [Accessed October 16, 2009].

<sup>28</sup> See Towards a Nuclear National Policy Statement: Government response to consultations on the Strategic Siting Assessment process and siting criteria for new nuclear power stations in the UK; and to the study on the potential environmental and sustainability effects of applying

That almost guarantees that the statement of need for such matters will be in conflict with a number of local planning policies, such as development in rural locations, unless by chance the local policy has been evolving to track the possibility of such new development, which is unlikely.

Again, the starting proposition that national need will override such local restraint is reasonable enough provided it does not drift into being a supposition that inevitably all local policy will be dropped in favour of need. Those policies are, after all, just a manifestation of local sensitivity, and as set out already, there will inevitably be a balance struck between such interests in any decision.

Developers will need to look sensitively at local planning policy and look for the combination of factors in their design that shows the least conflict with local policy.

What effect will the IPC examination rules have?

This is not a paper on the prospective IPC per se, but some of the July 2009 guidance on how the examination processes are expected to work are particularly relevant here.

The provision that a “relevant representation” does not include comment on the merits of Government policy lies at the heart of whether consultees will be able to raise questions over whether the site specific application has in some way strayed outside of what the NPS is authorising.

Much is made in the guidance of the inquisitorial role of the IPC, at the early stages of examination, both in considering written representations made at any preliminary hearing to look further into the issues raised and in any subject specific hearings where the IPC commissioners themselves, in their roles as Examining Authority, are expected to lead on questioning. How open they will be to investigating the link between the two bodies of environmental information remains to be seen, but it can be expected that they may well look to the promoter to explain its case fully on any such point.

Part of these cases may be based on the level of testing of evidence that has gone into the NPS. Those statements have been fully open to consultation, and they will have the added robustness to challenge given by parliamentary scrutiny, as well as a separate challenge period, after which the policy cannot be questioned in proceedings. However, even in combination, those safeguards will not prevent consultees looking for factual issues in the site specific applications that cannot be shown to have been fully and finally addressed in the NPS stage, and thus are still open for debate.

*(e) The challenge of integrating energy planning with other regulation, especially European/international treaties and domestic safety regulation.*

The Planning Act has gone a long way to integrating consents that might be required for an energy infrastructure project. It can holistically deal with power generation, grid connection, harbour works, associated transport infrastructure and acquisition of land and rights. Controls in other areas like scheduled monuments and listed buildings are also swept into its remit. The IPC has also had to be shaped to accommodate mandatory European requirements for development consents, hence regulations have been drafted<sup>29</sup> to ensure that its processes allow decisions taken to comply with EIA and Habitats Directives, by ensuring adequate assessment material will be provided before decisions

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the criteria, (DECC: January 2009) Annex C at p.72. Available at: <http://www.berr.gov.uk/consultations/page47143.html> [Accessed October 16, 2009].

<sup>29</sup> Planning Act 2008: Consultation on Examination Procedures for Nationally Significant Infrastructure Projects, (DCLG: July 2009) Annex 5 at p.87.

are taken and that the appropriate criteria are reflected in the decision-making of the IPC. NPSs are intended to be subject to appropriate assessment (this has already been done for the nuclear NPS) but one challenge is the level of detail of design upon which that assessment can be made.

However in other areas it has not been possible to achieve that unification of process. Health and Safety controls such as COMAH and in the nuclear field Nuclear Installations Act and Radioactive Substances Act controls continue to be administered separately.

Even before such attempts at unification, the planning process has for a long time recognised that there are often uncertain interfaces between the extent of planning and other regulatory codes. Certain principles hold good in these situations such as there being a general presumption that regulatory codes should not duplicate each other.<sup>30</sup>

In some areas the law has found a relatively stable level such as the interface between planning and waste management legislation.<sup>31</sup> In air pollution control a similar clear message was given in the recent *Prenergy* judicial review decision where the judge indicated that the Secretary of State was entitled in approving a 350MW wood burning biomass energy plant to rely on the air pollution controls available to the Environment Agency satisfactorily to control air quality issues thus taking them outside of the ambit of planning.

What these principles also illustrate, however, is another general presumption, that when it is not clear that another form of statutory regulation will regulate a particular issue, planning control, rather akin to the way that nature abhors a vacuum, will expand to cover that issue. This can probably be traced back to early judgments such as *Stringer*<sup>32</sup> that established the general proposition in planning that the list of material considerations is not finite, or a closed class and that effectively anything that amounts to a physical consequence arising from a use of land is potentially a material consideration.

There are however continuing areas of uncertainty. Again nuclear development gives us an illustration of this and an indication of how in practice attempts have been made to limit those areas of uncertainty.

#### Nuclear safety as a planning issue

One of the principal reasons that an inquiry such as Sizewell B took as long as it did was that safety was debated at length at the inquiry with no clear policy statements available to indicate why safety did not need to be considered in that forum or in that level of detail.

The Government, in recognising that difficulty, has acted to bring forward the role of the Health and Safety Executive (HSE) (in this case through its nuclear installations inspectorate, the NII) to require it to pre licence modern nuclear power station designs. This is via the Generic Design Assessment (GDA) that will provide an initial safety clearance on one of two modern designs, but not on a site specific basis. That is partly to de-risk that area for potential investors in the market, who otherwise would have had to wait until after they had obtained planning permission to be

<sup>30</sup> See for example Circular 11/95 para.22.

<sup>31</sup> Planning Policy Statement 10 provides that planning bodies should prepare and deliver strategies that are consistent with obligations required under European legislation and support and complement other guidance and legal controls such as those set out in the Waste Management Licensing Regulations 1994. (Planning Policy Statement 10: Planning for Sustainable Waste Management, (ODPM: July 2005) para.3.)

<sup>32</sup> *Stringer v Minister of Housing and Local Government* [1971] 1 All E.R. 65.

given a firm indication that the reactor they proposed developing would in fact be licensed as safe for operation in the United Kingdom. It was also so that in planning inquiries, whether through the IPC or through the previous s.36 consent process, it could legitimately be said that the planning process is not concerned with safety because that was being fully dealt with by another agency.

But the tendency of the planning system to expand to fill policy gaps is strong and one of the questions that nuclear new build will face and indeed which other forms of energy development will also face, is the extent to which there is tangible evidence from the appropriate safety regulators to input to the planning process as reassurance that the necessary controls will be in place and if so, what residual levels of risk can be identified which should be taken account of in the planning process. The fact that the first IPC nuclear approvals are anticipated before the GDA will be completed raises an obvious question as to how this input from GDA to IPC can be made.

There will always be some residual level of risk for any kind of development even if large parts of that fall within the description negligible. Those levels of risk, including the ones within the negligible category, need to be firmly established as such and even then it may be reflected in the planning process for example by reference to public fear. This has an established place in the planning process now (as in *Newport BC*<sup>33</sup>) as being a relevant material consideration even if it is not supported by objective scientific evidence.

Another proposition here is that in every type of development it is important that the promoter understands what safety or other means of regulation operate and the extent to which they can intrude or should provide input to the planning process to enable a fully balanced planning decision to be taken. The problems occur when uncertainty over these issues leads the developer to have failed to accurately assess those impacts and then failed to be able to show that the other forms of statutory regulation are not as preclusive or as all-encompassing as they had originally expected.

(f) *Particular difficulties in energy planning when relying on conditions reserving matters for future approval.*

Large amounts of litigation time in planning have been taken up in recent years with the Bradford cases<sup>34</sup> and *Barker and Commission v United Kingdom*<sup>35</sup> which have led to the recent revision to the EIA Regulations allowing for further Environmental Assessment if reserved matter conditions or indeed any planning condition operating in such a way allows a sufficient latitude in design solutions to generate environmental impacts that have not been assessed within the main consent.

The link of this to major energy developments is obvious, although the latitude for storing up significant amounts of design uncertainty into what we will call reserved matter conditions seems to be limited in principle by the IPC consultation guidance which requires that a relatively high level of “design freeze” is achieved before a development consent application is made.

Of course, the effect of this examination process being seen as a “straight jacket” on the developer may well be tempered by pre-application consultation being encouraged. In the case of some very large Welsh wind farms currently being brought forward (in advance of the IPC, but with an eye to its consultation requirements) this is leading to design iterations being published and revised in

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<sup>33</sup> *Newport BC v Secretary of State for Wales* [1998] 1 P.L.R. 47.

<sup>34</sup> For example: *R. v Rochdale MBC, Ex p. Milne* [2001] Env.L.R. 22; *R. (on the application of Barker) v Bromley LBC* (C-290/03) [2006] E.C.R. I-3949; and *Commission of the European Communities v United Kingdom* (C-508/03) [2006] E.C.R. I-3969.

<sup>35</sup> *R. (on the application of Barker) v Bromley LBC* (C-290/03) [2006] E.C.R. I-3949; and *Commission of the European Communities v United Kingdom* (C-508/03) [2006] E.C.R. I-3969.

response to consultation responses, to provide the audit trail of how the scheme has responded to consultee input.

The fact remains, however, that there is always more detail to be agreed, and there is no clear mechanism which allows a promoter or a planning authority with any certainty to agree at the outset that matters in a planning condition will definitely not require EIA in advance of their approval.

This inevitably presents an area of risk to a developer particularly where there is entrenched opposition which may be looking to present obstacles to development wherever and whenever they can, at any stage in the development consent process.

The antidote lies in the hands of the developer primarily to ensure that the Environmental Statement is sufficiently clear on design parameters that may be contained within conditions looking for subsequent approval. This should be a clear assessment of possible environmental impacts of variations in design that may be approved.

Given that in very many cases planning conditions are negotiated only at the very end of the approval process, and often well after the Environmental Statement has been finalised, this will remain an ever present area of sensitivity to ensure the developer is not storing up problems for the future and the need for further Environmental Assessment as a result of what might have been seen as a relatively unthreatening process of agreeing conditions prior to planning permission being granted.

*(g) The effect of more front loaded, pre-application processes and the retreat of the mediating role of consenting bodies such as DECC.*

The Government is now well into the process of bringing the IPC to life and by doing so we see what the new order for consenting energy developments will be, in comparison to what we have been used to. This has included the March 2009 consultation paper on IPC applications and pre-application consultation required for nationally significant infrastructure projects, as well as the July 2009 papers on examination of applications already referred to.<sup>36</sup> So what might this mean in practice to energy development applications?

The role of DECC to date

Energy consenting over the last 5–10 years inevitably brought you into contact with DTI, subsequently BERR and now DECC. The experience of dealing with these emanations of Government in relation to applications for consent under s.36 of the Electricity Act 1989 (a consent process that also operates as a deemed planning permission under the Town and Country Town Planning Act 1990), reveals that they did not see public inquiries as inevitable in every case and therefore took seriously their role as consenting authority in terms of engagement with all involved parties, the applicant, the relevant planning authorities and other statutory consultees as well as public lobby groups in particular locations.

Of course, if formal objections from planning authorities were lodged, a public inquiry would inevitably follow and that would dictate the process of evidence gathering that would lead to a recommendation from a Planning Inspector for the Secretary of State to make a decision upon. As

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<sup>36</sup> Planning Act 2008: Consultation on the Pre-Application Consultation and Application Procedures for Nationally Significant Infrastructure Projects, (DCLG: March 2009). Planning Act 2008: Consultation on Examination Procedures for Nationally Significant Infrastructure Projects, (DCLG: July 2009). Both available at: [www.communities.gov.uk](http://www.communities.gov.uk) [Accessed October 16, 2009].

with other types of development where the Secretary of State takes the decision, the possibility has existed that despite the inquiry process the Secretary of State was sufficiently seized of the issues of need and impact to be confident to differ from his inspector's recommendation, either to grant or refuse consent for the scheme.

Throughout that process the Government department also often acted in a mediating role, for example, carrying out site views with the local planning authority well before any decision by that planning authority was undertaken, engaging in discussion with all parties over the adequacy of environmental information submitted and the possible use of the Regulation 19 process for requiring further information. Frequently it would engage in open dialogue about the length of time needed for the planning authority to determine an application and often seek to persuade promoters that it was in their interest to allow further time for determination. It would also engage in similar discussions about the readiness of parties to proceed to inquiry. Finally it would engage in correspondence with all parties about whether, post inquiry, sufficient information was available to the Secretary of State to make a decision and whether any subsequent information that had come to light had been adequately dealt with, prior to a decision being made.

All of these have strongly contributed to the success of the process of decision-making for electricity generating projects and have definitely mixed in elements of mediation as well as pure determination of evidence submitted. This seems to have been done without any major issues being raised over the propriety of the determining body being involved in such mediation.

The anticipated role of the IPC

Turning to the IPC, similar procedural responsibilities are imposed upon the commissioners, with the aid of its secretariat, to fix timetables in the light of clear written statements of the issues that parties want to pursue. At the same time the guidance makes clear that the IPC cannot express opinions on the merits of proposals, suggesting that the role of DECC to date in weeding out weaknesses in an applicant's case, if it is to survive at all, will be seen only in the formal exchanges of correspondence the IPC engages in.

However, these exchanges will be immensely valuable. One of the biggest hurdles faced by a promoter of an energy scheme to date has been in the inability to get any certainty until very late in a consent application (sometimes not until well after a public inquiry has started) as to the full extent of the issues that it has to face. Even then, there has been little opportunity to get any firm indication of the issues that the inspector sees as important, with the inevitable consequence that at inquiries, examination of witnesses and submissions on evidence will get longer and longer to ensure they have comprehensively addressed everything that has been advanced in evidence in a case. A reliable process that requires challenge points to be made early, supported with evidence, and that can discount weak points at an early stage must assist promoters in knowing just what issues they have to concentrate on at formal evidential hearings.

The corresponding obligation on the promoter is that engagement with the planning authority is expected long before an application is made. In fact there are formal stages of reporting on the adequacy of consultation which have to be satisfied before an application will be accepted and registered by the IPC.

With the expectation on the applicant of a high degree of "design freeze" on the project for which consent is being sought and readiness to proceed to determination at the point at which an application is made, it seems unlikely there will be any meaningful period of negotiation and indeed mediation

with planning authorities and statutory consultees after an IPC application is made. Rather a timer will start at that point pushing all parties on to determination of the evidence by the IPC through whatever means it chooses to use to achieve its ambitious timescales for determination.

What the effect of the change will be in practice is hard to predict. Clearly it will focus the minds of all parties, not just the promoter, to know that once accepted by the IPC the determination will proceed swiftly and parties need to be ready to present whatever case they choose to advance in response to the application.

The process carries with it the risk of battle lines being drawn at the point the IPC application is submitted with little room for any further process of negotiation taking place. Clearly it is open to the promoter to continue negotiation on outstanding issues and much will turn on how successful they are in doing so particularly given the potential unwillingness of a number of objecting parties to engage in that sort of dialogue.

#### The new role of government

One final mention should be made of the potential role that Government has mapped out for itself as a result of the IPC coming into existence. Until now, reinforced by judgments such as *Alconbury*<sup>37</sup> its role as policy maker and decision-maker has meant that Government has been muted in its support for specific development schemes, for fear that it would be seen as partial in the decision-making process. However, its stated aim<sup>38</sup> with NSIPs to be decided by the IPC, is to be able to lobby for development and to assist in clearing lines of communication to enable consultees' concerns to be met. That aspiration helps explain the creation of the Office for Nuclear Development, which until now has been the focal point for the drafting of new nuclear policy, but is likely to take an active role in promoting schemes. A similar office for renewables has also now been set up, under the title of the Office for Renewable Energy Deployment (ORED).<sup>39</sup>

Depending on the political support afforded to such Government offices, they could be a major force in overcoming opposition, particularly from statutory consultees, at the same time as providing a strong motivation on promoters to go the extra mile to meet such consultees' concerns.

#### (h) *The existing and potential role of volunteerism and community benefit in development consents.*

It is useful to pose the question whether the procedural steps of the NPS and IPC should be seen as the sole antidote to risks over planning for major energy projects. If that view were taken, it is likely that a massively important further component would be missed. That further component sits at the heart of all the latest streamlined approaches to planning and, as already stated, is the balance of local impacts in any development location against such formulation of need as emerges.

#### Public Opinion

But here local impact means more than just quantitative measures of impact such as hectares of agricultural land concreted over, but also levels of local support for the scheme.

<sup>37</sup> *R. (on the application of Holding & Barnes Plc) v Secretary of State for the Environment, Transport and the Regions (Alconbury)* [2001] UKHL 23.

<sup>38</sup> Planning for a Sustainable Future, White Paper, DCLG, DEFRA, DTI, DfT May 2007, para.1.24.

<sup>39</sup> Announced in the UK Renewable Energy Strategy, DECC, July 15, 2009. Available at: [http://www.decc.gov.uk/en/content/cms/what\\_we\\_do/uk\\_supply/energy\\_mix/renewable/ored/ored.aspx](http://www.decc.gov.uk/en/content/cms/what_we_do/uk_supply/energy_mix/renewable/ored/ored.aspx) [Accessed October 16, 2009].

In the nuclear sector, the question of public opinion, and its importance in the development consent process has been monitored particularly keenly. The importance of public acceptance has not been lost for a moment on the Government who recognise public opinion on nuclear new build is central to it remaining a viable political option. In fact it is the swing of public opinion towards concern over climate change, energy security and most latterly, energy prices that has led the Government to conclude that public opinion is sufficiently strong to float the series of policy announcements from 2006–08 that heralded the return of nuclear power generation.

Of course in the nuclear sector the picture seems to have emerged that the level of public support for new build around existing facilities is far more predictable and reliable than areas with no such history. Equally, our work with nuclear developers both in the United Kingdom and overseas has revealed that even for what would appear the most unwelcome of developments, such as a deep geological repository for radioactive waste, when meeting potential host communities it is clear that whilst safety is of concern, it is taken almost as a given. In practice, what is of greater importance to local people are direct impacts. It's not that they aren't interested in theoretical risk predictions, but they are rather more interested in whether their wells will run dry during construction or whether the school run would be interrupted by construction traffic for years to come.

This point extends further into whether engagement of the public can and should only be limited to consultation on the direct impacts of a particular development and mitigation of them. Increasingly that is likely to be a minority view.

#### Community Benefit

In many areas of power generation community benefit is now seen as an appropriate response from a developer to a local community in recognition of the burden that a local community shoulders on behalf of wider regional and national interests. In some places this has made its way into official pronouncements. In the 2008 Government White Paper on radioactive waste<sup>40</sup> the Government recognised the concept of volunteer communities being central to the success of the project. Whilst the language the Government then used in terms of community benefit linked to that “voluntarism” (the phrase it has coined) is quite subtle, nuclear legacy communities certainly have in mind substantial community benefit packages to recognise the burden they are being expected to shoulder in the national interest.

Often on a question of community benefit lawyers focus on the question of legality or authority for it within formal policy statements.

The prevailing law on s.106 contributions and determination of planning permissions is well settled, drawing on the House of Lords judgment in *Tesco*.<sup>41</sup> The more than de minimis link between an offer and the development it is expected to relate to in order that a decision-maker can take account of it and give weight to it in the decision-making process is well known law. Yet, we still see constant reference to the inability to offer any community benefit or other provisions in a s.106 Agreement if that offer does anything more than overcome the direct negative consequences of a specific planning application.

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<sup>40</sup> Managing Radioactive Waste Safely, A Framework for Implementing Geological Disposal, (DEFRA & BERR: June 2008). Available at: <http://www.defra.gov.uk/environment/radioactivity/nrus/index.htm> [October 16, 2009].

<sup>41</sup> *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 2 All E.R. 636. Circular 05/05: Planning Obligations, (ODPM: July 18, 2005).

Yet in practice the point would be missed if this approach to the legality of community benefit were treated as firm limitations for when community benefit should and should not be used. That approach reduces community benefit to a box ticking exercise, assuming that those legal rules provide the framework for knowing with certainty when a planning permission can be granted because such an offer had been made.

That approach misses the point that community benefit is about providing a catalyst and a focus around which existing, and potentially latent, public support for a development proposal can marshal itself. The test of success in engagement with the community, including any offer of a community benefit package is entirely one of measuring tangible public support for a scheme by the time a decision-maker has the case put before them for decision. That point also means that you are unlikely to find reference to community benefit packages in formal policy documents, or in the processes of bodies such as the IPC. The process does not need that formal policy support in order to operate.

Of course there will be limits to the use of such initiatives. Partly these are legal. *Tesco* does contain firm rules that, if broken, could result in development consents being quashed. Partly they are practical, that simply throwing money at potential objectors will not guarantee their support.

Many areas of planning practice know nothing of community benefit and indeed may never do so. It is not a tax on development that is gradually passing into general use. It is very development sector specific and certainly in the energy sector it already forms and is very likely to continue to form an integral part of the progress of engagement with the public.

(i) *Compulsory acquisition of rights for energy developments, political acceptability vs practical necessity.*

Twenty years ago compulsory purchase was a rare beast indeed. It is not that they didn't happen, but they did so only very rarely. The great slum clearances of the 1950s and 1960s being long gone and the power of local authorities being significantly curtailed by the central government's actions in the 1980s, the incidence of CPO began to wane.

That process began to reverse from 2000 onwards with the issue of ODPM Circular 02/03: Compulsory Purchase Orders<sup>42</sup> but more importantly the demonstration by ODPM and then DCLG that there was a willingness to confirm CPOs in reliance upon that guidance. That indicated to the development community that the Government was sincere in its statements that it would support compulsory purchase orders for the right sort of project.

So will energy developments be the right sort of projects?

Interestingly, having used new nuclear to illustrate many points in the immediate future of energy consenting, we draw a surprising blank on the likelihood of using compulsory purchase in that arena. The answer seems to be mainly political. The view seems to have been formed by Government that reliance on compulsory purchase powers to assemble sites for new nuclear development ran the risk of crystallising levels of opposition which would be better circumvented if the development community could be encouraged to look for sites that didn't require such intervention.

This has been achieved in part by the release of land from bodies like the NDA and also the sale into the private sector of British Energy which retained very large amounts of potentially developable

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<sup>42</sup> ODPM, February 26, 2003 cancelled and replaced by Circular 06/04: Compulsory Purchase and The Crichel Down Rules except to the extent that it is still applicable to earlier compulsory purchase orders to which Pt 1 of the Memorandum to the 2005 Circular is not applicable.

land in its portfolio. However, it has also been achieved in some areas by power companies acquiring strategic land at rates that ensured any qualms that landowners might have had were overcome.

So whether we will see the existing powers of acquisition in the Electricity Act 1989 used in earnest for energy development or the powers of CPO potentially vested in the IPC to do the same, remains to be seen. There will be an interesting balance to be struck between the usual tests required to be demonstrated when confirming a CPO in terms of requiring the land for such a purpose and whatever formulation of need, in terms of the relevant NPS, supports that requirement.

It is too early to speculate here but it will be relatively new territory when an energy developer looks to assemble major parts of a development site for an energy scheme from unwilling landowners through a compulsory purchase process.

#### Grid acquisition powers

That is not to say that there are not already powers of compulsion that have bit by bit been opened up to developers in that way. Generation of electricity anywhere requires a grid connection to export that electricity. Depending on the location of the development and the voltage at which the electricity is best exported, grid connections can range from a few hundred metres to tens of kilometres. In 2005, Ofgem, the regulator of conditions attached to licences granted under the Electricity Act 1989, extended the powers of private entities holding generation licences to include the compulsory acquisition of grid connection rights. Previously these had been granted on a case by case basis to energy generators, but outside of this vested only in bodies holding distribution licences (i.e. National Grid and the Regional DNOs).

This seems to have provoked little or no comment in terms of possible human rights complaints that, although not legally sound, might be expected when private interests are overridden in favour of the public good but that public good is identified on a site by site basis by private companies.

*(j) Trends in challenging consents process, especially the legitimacy and reasonableness of third party demands to see raw assessment data.*

Most energy developers will go into the consent process in full recognition that a s.288 appeal or judicial review application has to be anticipated on their scheme. Those preparing for the IPC will do so with the same expectation. These grounds of challenge tend to follow a basic pattern of either being alleged breaches of procedural requirements, allegations that decisions have been taken without adequate regard to the evidence put before the decision-maker, or that there has been a fundamental breach of the understanding of the law on a point central to the determination.

#### Evidence challenges

Frequently s.288 and judicial review challenges appear to be re-runs of the application or inquiry evidence, sometimes citing 20 or more individual extracts of evidence with corresponding complaints that they are not adequately reported or considered in the decision-maker's reasoning.

Generally, this type of challenge is given short shrift by the court. Courts relying on various well established authorities<sup>43</sup> allow a wide margin of discretion to the decision-maker in the language

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<sup>43</sup> For example *Seddon Properties v Secretary of State for the Environment* [1978] J.P.L. 835; (1978) 248 E.G. 951.

used to summarise the consideration of complicated, wide ranging evidence. Particularly wide discretion is afforded to the decision-maker to attach whatever weight is felt appropriate to that evidence.

Only if an evidential matter of central importance to a decision is either wholly absent without explanation or manifestly unintelligible in the way in which it has been referred to in a decision, is there likely to be a successful judicial challenge on such a point.

As an aside, the continuing trend of such challenges does lead to closing submissions for promoters and Inspector's Reports becoming ever more detailed and lengthy, to head off suggestions that evidential aspects have been missed, and to ensure explicit references on almost every point of evidence can be found in the report to answer such allegations.

The IPC's move to shorten inquiry/hearing times by increasing the role of written evidence does mean that exchanges of written material on contested points will be very lengthy indeed. Even then, they should be substantially shorter than the aggregate amount of information put before a traditional energy project inquiry. That will include proofs of evidence that cover many issues that ultimately prove not to be pursued at inquiry, and often scores of core documents that are put into evidence to be on the safe side, but to which no real mention is then made.

#### Challenges linked to background data

An increasing trend seen in the energy sector are demands for background data to support conclusions reached in documents like the Environmental Statement.

The development industry is still looking to find a balance on how to deal with such requests.

One has to remember here that we are often talking about massive amounts of raw data on subjects such as ecological surveys or noise monitoring. The temptation has often been for developers to question what use such data would be put to by objectors. Sometimes those developer responses have been made in an attempt to make more manageable what can be very extensive and vague demands for information. However, in some cases<sup>44</sup> we begin to see dividing lines emerging over how one should, and should not, respond to such requests for information.

In the *Denbrook*<sup>45</sup> case requests for raw data on noise monitoring were initially complied with by the applicant but continued to a point where those demands reached such a stage that the developer simply concluded that it was unreasonable to be required to supply ever more detailed levels of data, with no apparent purpose behind the requests.

A challenge was brought only after planning permission was granted on appeal, to both the applicant's refusal to supply further data (albeit that refusal amounted to no more than attaching conditions to any future releases of information) and the inquiry inspector's ruling that he had enough information to proceed to a decision. That process was upheld at first instance but a clear indication was given by the Court of Appeal at permission stage that the third parties could have been prejudiced in their ability to present a case against the scheme, and with that the developer submitted to judgement.

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<sup>44</sup> *Finn-Kelcey v Milton Keynes BC* [2008] EWCA Civ 1067; *R. (on the application of Hulme) v Secretary of State for Communities and Local Government (Denbrook)* [2008] EWHC 637 (Admin).

<sup>45</sup> *Denbrook* [2008] EWHC 637 (Admin)

In the Milton Keynes decision the court formed the view that similar demands for information (although not in a public inquiry arena) would not in fact have led to any different decision on the policy tests that were before the planning authority and hence the decision was upheld at first instance, supported by a full judgment of the Court of Appeal. Neither court was, however, unsympathetic to the principle behind the challenge that it is legitimate for the public to be able to require disclosure of any level of information that would enable them to develop a case against a development proposal.

The practical test that is emerging for developers and planning authorities follows the thinking behind the Freedom of Information Act, that a consultee in the planning process, including members of the public, does not have to show need for information, provided that the information requested can reasonably be shown to be linked to the issues that are before the determining authority. One of the most obvious ways in which that link can be demonstrated is if the information requested contributes to a conclusion reached in a formal application document such as the Environmental Statement. If it does, then a promoter will have to treat very seriously any such request for disclosure of raw information that lies behind such a conclusion.

Disclosure of information like this raises practical questions over management of such data. These include ensuring very extensive material that often can only be produced electronically is quality checked and sufficiently version-controlled to ensure that copies put into the public domain remain in the form they were released and do not give rise to future disputes over what that data actually comprised.

#### IPC challenge risk

These evidential challenges apply just as keenly to the IPC, particularly given the indication that the IPC examination process will act as a clearing process by which the real issues of concern are winnowed out from those that will not be afforded significant weight (and by extension, will not be afforded significant time for assessment).

One can see that the claims by objectors that they have not yet received sufficient data to be able to explain fully whether there is a real issue to address is one that will probably be put to the IPC. How that is dealt with by promoters will be central to the speed of examination of their case and to the robustness of such decisions to judicial review.

Will the fact that IPC decisions are based on an NPS that has received parliamentary approval reduce challenge risk to decisions? Primarily parliamentary approval will bear upon the risk of challenge to the NPS itself, potentially allowing a greater degree of latitude to the drafting of that policy, and the need for it to have been rigorously supported with evidence than would be the case if it was just the Secretary of State issuing such a policy. That said, in essence the same challenge rules will apply to the NPS as they would to a development consent decision. Ultimately though, if there proves to be greater latitude allowed by the court, that will filter down into the IPC's decisions. That may be in no more complicated way than claims that an NPS has not fully dealt with an issue (because there is no clear evidence that it did so on a subject) being answered that, whether backed by evidence or not, the intention of parliament is that the issue in question would not be open for further debate.

More relevant to the issue of challenge risk to IPC decisions is how it deals in practice with testing of evidence before it. Draft guidance released in July 2009<sup>46</sup> indicates that there is still a lot of discretion vested in the commissioners and a recognition that a failure to exercise that discretion risks judicial challenge.

A new factor to consider (certainly in the context of energy planning) is the role of any advocate appointed by the IPC, particularly if that person is vested with primary responsibility to lead questioning at an IPC hearing. Cross examination of witnesses is rarely seen as impartial, whatever the question being put, yet to deliver on the ambitious timescales set for the IPC's examination of a proposal, there will inevitably have to be controls imposed on the desire of hearing participants to be allowed to question at all, and if they are, on the scope and particularly duration of such questioning. The quality of the written exchanges that have preceded any hearing will be vital to underwriting any decisions to refuse or curtail cross examination, by objectors or promoters.

(k) *Decommissioning of energy developments, including the provision of financial guarantees.*

One further characteristic of energy planning is the emphasis laid on decommissioning. Whilst by no means comprehensive, throughout many forms of energy development, in contrast to non-energy developments, there is a widespread requirement for these types of energy development not only to have legal requirements that they are decommissioned at the end of their working life but also that there will be guaranteed money available to do so.

Compare this with mainstream built development. Construction of factories, retail parks or leisure facilities would rarely if ever contemplate any form of control to the effect that at the end of the useful life of that development it shall be removed and the land returned to its original state. However, if you construct a wind farm onshore in the United Kingdom you can expect that the best you will achieve is a 25-year planning permission, not a permanent planning permission, and that conditions will require presentation of a scheme of decommissioning at the end of the life of the permission to ensure that all above surface infrastructure is fully removed from the site and the land made good at the end of that 25-year period.

In many cases, rarely supported by approved LDF policy, a financial guarantee will also be sought to ensure that when the time comes for decommissioning, if the landowner is not in a position to do so, there will be funds available to the local authority to carry those decommissioning steps into effect themselves. These will usually be secured by a s.106 although one would expect flexibility in negotiation of financial guarantees. Usually the ability to generate a fund out of income earned from the development during its lifetime can be proposed rather than the uneconomic, forward funding burden of a bank guarantee, which can present a very heavy financial burden to a developer long before any revenue is being produced by the scheme, or indeed before there is any realistic prospect of decommissioning being required.

#### Decommissioning of new nuclear

The situation with nuclear is that requirements for decommissioning are drawn from a different political imperative. Whilst the debate continues about what to do with nuclear waste, scientific opinion on the issue is relatively settled with no real dissent that the safe method of disposal is physical

<sup>46</sup> Planning Act 2008: Consultation on Examination Procedures for Nationally Significant Infrastructure Projects, (DCLG: July 2009) Annex 4, para.101.

isolation from the environment in a geological strata demonstrably separate from any contact with air or surface/ground waters.

The biggest practical difficulty in achieving that scientific ideal, is the cost of such a scheme. Planning and developing such a repository is now accepted as requiring effort over decades, far longer than the immediate need for new nuclear re-powering would allow. That has meant that the decommissioning hurdle for new nuclear to clear is the ability to demonstrate that new nuclear power stations will pay for their own eventual decommissioning and waste management costs.

More work is being done in this direction on new nuclear in terms of structures to deliver future funding of liabilities than for any other type of development. A new advisory body, the Nuclear Liabilities Funding Advisory Board, will act as policy adviser and overseer of the funding proposals to be developed by all nuclear promoters and maintained throughout the life of those plants.

An open question is whether the principles and practice developed by that Board find their way into other forms of development, not just nuclear energy. That may begin to happen where opposition to a scheme leads a developer to offer that it seeks the use of land only for a finite period of time after which it is willing to return it to its former condition.

Our present understanding of asset value of land makes us believe that nobody would voluntarily do this because having paid full development value for land it is essential the land retains the ability to be used for that purpose for all time, if the asset in the hands of the developer is to retain the value they originally paid for it. However, future development pressures may need promoters in marginal cases to look to do no more than rent land for a defined period of time and not seek to create a capital asset out of it. To make that kind of proposal creditable there may need to be firm guarantees that the promise of decommissioning would be carried into place.

### **Unifying Themes**

Ironically, energy planning has enjoyed a history that has not resulted in the imposition of any great burden in justifying the need for a proposal at a time when it would have been relatively hard for it to have done so. Now, with environmental, economic and political factors creating a context in which a climate supportive of need is readily apparent, with or without NPSs, the requirement to prove need is being tackled as a priority by policy writers and energy developers.

The highest profile initiatives to meet that need are the issue of NPSs and the power they will give the IPC to consent nationally important new energy infrastructure. Those new processes look to colour all energy planning in the United Kingdom for the foreseeable future and it is to those in particular that attention is focussed over whether we are now really at “All systems Go!” with UK energy planning in Autumn 2009. The answer to that question looks to be that there is a clear path ahead to the re-powering of the United Kingdom that is needed but there are warnings along the way that have to be heeded.

Need, although a vital part of the planning equation is not a panacea, certainly when it comes to a site specific development consent. On the contrary, the existence of need arguments, and the prospect of how they might appear in policy statements, come with the warning that promoters do not over rely upon them, or the prospect of them, in deciding how extensive their assessment of a site specific proposal should be.

Separating out issues into national need statements that prevent those issues being rehearsed at project approval stages is a worthwhile objective. Considerable savings of time are achievable in the

consenting process if due regard is paid to the link between policy wording and the assessment of its impacts through SEA. The primary route by which connections are made between that assessment and site specific applications for development consents is likely to be through the use made of the Environmental Report from the SEA in that consenting process.

Streamlining development consents through the Planning Act 2008 will bring a degree of procedural simplification, but a number of other regulatory codes bear upon any energy project. The advice still has to be that a promoter must understand and be able to explain the dividing line between those codes and the planning system to ensure that there is not confusion between them that seeps into the planning process and causes delay and the risk of refusals.

Front loading of public consultation with IPC schemes also looks like it will speed up formal consent processes but at the cost that there will be little room for retro-fitting design solutions to issues identified once those approval processes begin. Developers must understand that responsibility and the major part they can play in minimising the risk of judicial review of the consents they obtain by concentrating on the quality of the evidence submitted in support of their scheme. If they do, restrictions on cross examination need not give rise to valid grounds for legal challenge.

On the other hand, factors that are available to assist promoters in ways that have not been seen to any great extent until now include the willingness of Government, freed from the *Alconbury* impartiality required of it as decision-maker, to act as facilitator and trouble shooter along the way of consenting NSIPs. Further assistance will also be drawn from the opportunities that creative use of community benefit gives to focussing the often latent local public support for schemes such as these.

Will the lights begin to fade and our homes grow colder as we near the end of the next decade? Not if we use the system now in front of us, carefully.