Neutral Citation Number [2021] EWHC 2697 (Admin)

Case No: CO/1160/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/10/2021

Before :

THE HONOURABLE MR JUSTICE DOVE

- -

Between :

EFW Group Limited	**Claimant**
- and -	
Secretary of State for Business, Energy and Industrial Strategy	**Defendant**

- -
- -

Michael Humphries QC and **Mark Westmoreland Smith** (instructed by **Keystone Law**) for the **Claimant**
Ned Westaway (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 13th and 14th July 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE DOVE

Mr Justice Dove :

1. This is an application for judicial review pursuant to section 118 of the Planning Act 2008 ("the 2008 Act") seeking to quash the defendant's decision dated 19th February 2021. The application before the defendant included two separate and discrete proposals. The first proposal was for the Wheelebrator Kemsley North ("WKN") and the second was for the Wheelebrator Kemsley K3 ("K3"), both of which were proposals for energy from waste described in greater detail below. Whilst the name of the claimant company changed between the determination of the application and the commencement of these proceedings nothing turns on the fact that the claimant's name has altered.

The Facts

2. The claimant is the developer and operator of a pre-existing waste-to-energy plant at Kemsley, Kent which was granted planning permission on 14th June 2019 and has been fully built out ("the Kemsley plant"). It supplies heat to an adjacent paper mill, and has permitted capacity of up to 49.9MW with a waste throughput of 550,000 tonnes per annum. It was commissioned in July 2020.

3. The claimant contemplated two further development projects. Firstly, K3, which amounted to a proposal to increase the generating capacity of the consented Kemsley plant from 49.9MW to 75MW, and increase the total waste tonnage throughput from 550,000 to 657,000 tonnes per annum. This project simply involved an increase in the permitted capacities of the facility and did not require any physical works in order to achieve them. The second proposal was WKN, which was a new waste-to-energy facility capable of processing 390,000 tonnes of waste and generating 42MW of electricity. WKN was intended to supply energy to the adjacent paper mill when the Kemsley plant was offline for maintenance and was designed to be combined heat and power ("CHP") ready in order to take advantage of any future developments. The K3 project fell within the definition of a nationally significant infrastructure project ("NSIP") as defined by section 15 of the 2008 Act (which is dealt with in greater detail below), on the basis that the final capacity for the Kemsley plant following the consenting of the K3 proposal would lead to a generating station which had a capacity in excess of 50MW. The WKN project did not satisfy that criterion and therefore did not fall within the definition of an NSIP.

4. As part of the preparation of the application for the projects, on 1st June 2018 the claimant wrote to the defendant to request that the defendant exercise the power under section 35 of the 2008 Act to direct that the WKN facility be treated as a development for which development consent is required, and thereby bring it within decision-making processes of the 2008 Act. The section 35 application explained that the WKN proposal was "an entirely stand-alone facility, and not an extension to [the Kemsley plant]". Given the close physical proximity between the K3 and the WKN proposals, on the basis that they were proposed to be developed on adjacent sites, the application emphasised the added efficiency to the decision-making process which would arise were they to be considered as part of the same application for a Development Consent Order ("DCO") for both proposals.

5. On 27th June 2018 the defendant granted the section 35 application. In doing so the defendant noted that the development did not currently fall within the definition of an

NSIP and therefore it was appropriate to consider use of the power in section 35 of the Act. The defendant was satisfied, on the basis that the WKN proposal sat on the same site as two significant applications, including the K3 proposed application, that cumulatively the developments located on the same site could "comprise a significant facility of national sustainable energy supply". The defendant directed that an application for the form of development described in the request of 1st June 2018 was to be treated as a proposed application for which a DCO was required, and that any consultation carried out prior to the date of the section 35 direction was to be treated as complying with the consultation requirements under the 2008 Act notwithstanding that it had been carried out prior to the date of the direction.

6. On 11th September 2019 the claimant applied for a DCO in relation to both the K3 and the WKN projects. Although, as noted above, the projects were separate and distinct, in the application they were combined, as anticipated by the section 35 application, within an application for a single DCO. Pursuant to section 55 of the 2008 Act the application was accepted for examination on 8th October 2019. The examination began on 19th February 2020 and concluded on 19th August 2020.

7. The examination proceeded in the form of a series of written exchanges provided in accordance with a structure of eight Deadlines for the submission of material. One of the issues which the examination addressed was the question of whether or not there was sufficient waste arising in order to support the proposed facilities whilst complying with principles of the waste hierarchy and the proximity principle. Participants in the examination included Kent County Council ("KCC") who are the waste planning authority for the area within which the proposals lie. KCC, assisted by BPP Consulting, who had provided them with advice in relation to the Early Partial Review of the Kent Minerals and Waste Local Plan ("the EPR"), presented submissions to the examination at the stage of Deadline 1 contending that there was no robust evidence to justify the need for the facilities in terms of the availability of appropriate waste to support the proposed energy from waste capacity. KCC contended that whilst the claimant's evidence in relation to additional suitable waste capacity produced in support of the application stated it lay within a range of 495,540 tonnes per annum and 840,463 tonnes per annum, BPP Consulting had undertaken a sensitivity analysis using the Environment Agency's WDI 2018 data and the claimant's methodology and found that the range actually fell between -760,390 tonnes per annum and -373,473 tonnes per annum.

8. At Deadline 3 of the examination, the claimant submitted evidence disputing the validity of the sensitivity analysis produced by KCC and BPP Consulting. The claimant indicated that it had tried to replicate the BPP Consulting figures but was unable to do so. The claimant produced its own table which reproduced the two original analyses, firstly, produced by the claimant in support of the application and, secondly, produced by KCC at Deadline 1, and then added a further calculation based on the WDI 2018 data that showed a remaining level of need ranging between 306,554 tonnes per annum and 680,032 tonnes per annum. Whilst this showed a reduction over the original calculation supporting the application, the claimant contended that there was still a substantial need for residual waste treatment capacity even after both of the proposals had been consented.

9. Immediately after Deadline 3, on 23rd April 2020, the Inspector's report on the examination of the EPR was published. As the name of the document implied, the

EPR contained a number of proposals to modify the Kent Minerals and Waste Local Plan adopted in 2016, including KCC's position that it was no longer proposed to produce a Waste Sites Plan following a reassessment of the need for waste facilities over the plan period. The evidence base for the EPR included a further assessment of need. The EPR Inspector set out the essence of that exercise and the conclusions arising in the following terms:

> "20. The Capacity Requirement for the Management of Residual Non-Hazardous waste (CRRNH) has assessed the need for provision for residual non-hazardous waste arising in Kent, including Local Authority Collected Waste (LACW) and Commercial and Industrial (C&I) waste, as well as some waste originating from London. The calculation of need takes into account revised recycling rates which are based on government guidance and the actual rates achieved. The forecast requirement is based on continuing reductions in landfill.
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> 21. The CRNNH considers the capacities of existing consented facilities and the extent to which they would satisfy identified need. A permitted facility at Barge Way has not been built. Irrespective of whether there is any uncertainty as to whether that facility will be provided, the strategy for waste management capacity does not depend on its provision. Waste arisings are forecast for intervals of 5 years up to the end of the Plan period in 2030/31. The proposed diversion of LACW and C&I waste from landfill is greater than that in the KMWLP. The proportions of those waste streams that are to be subject to other recovery instead of recycling/composting are greater in the EPR than in the KMWLP, taking into account the re-assessed recycling rates.
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> 22. Since the adoption of the KMWLP, a significant new waste recovery facility has been built at Kemsley and is being commissioned. This provides capacity of 525,000 tonnes per annum (tpa). Policy CSW7 of the KMWLP identifies a recovery requirement of 562,500 tpa but this requirement has been re-assessed in the CRRNH having regard to the revised recycling rates and revised figures for diversion of waste from landfill.
>
> 23. Table 9 of the CRRNH shows that there is no gap in capacity for other recovery treatment of residual non-hazardous waste throughout the Plan period and demonstrates that the Kemsley facility together with the existing Allington facility will provide a surplus of other recovery capacity. On this basis there is no need to allocate sites. However, Policies CSW6 and CSW7 provide flexibility in that they are permissive policies that would allow for other recovery facilities to be developed should they be required."

10. In its response at Deadline 4, KCC did not submit any further calculation in response to that produced by the claimant, but placed reliance on the endorsement by the EPR Inspector of the data reports produced to support the EPR by KCC in the form of the CRRNH. In response to earlier submissions made by KCC the examining authority ("ExA") requested a copy of the representations made on behalf of the claimant to the EPR examination in support of the contention that the EPR was unsound.

11. In the claimant's response at Deadline 5, the claimant again noted that KCC had offered no explanation for its position beyond reliance upon the EPR Inspector's report. The claimant noted that the EPR report was very short and made no mention of third-party submissions, appearing to take the CRRNH at face value. The claimant made the observation that it was reasonable to assume that the inspector had not considered the analysis of empirical data in relation to need and waste available for incineration in detail at the examination of the EPR.

12. Within the material related to Deadline 5 and Deadline 7, KCC provided the claimant's representations to the EPR, and also made further submissions in relation to waste types and waste data addressing the potential available feedstock for the facilities. Within their Deadline 8 submissions the claimant pointed out that they had responded to the submissions made in Deadline 5 by KCC, and consistently demonstrated throughout their representations to the examination of the DCO that the level of fuel of an appropriate character available to the proposed development would be sufficient to demonstrate a need for both of the proposed developments and indeed still leave even further available capacity for the recovery of waste.

13. By contrast, in its Deadline 8 representations, KCC contended that they had undertaken further analysis of the claimant's data during the course of the examination and discovered that the quantity of waste reported as going to landfill that was suitable for incineration was a good deal less than the claimant had claimed. KCC submitted that no compelling evidence had been presented by the applicant to address their doubts in relation to the suitability or combustibility of the waste targeted by the proposals in the applicant's assessment, and that given the EPR had been found to be sound, on the basis that its waste needs assessment was robust, there was clearly insufficient need to support the additional capacity proposed.

14. At Deadline 8 the final version of the Statement of Common Ground ("the SOCG") was provided to the examination. Within the matters that were agreed in the SOCG the following appeared:

> "2.2.3 …
>
> (b) KCC has undertaken an Early Partial Review (EPR) of the Kent Minerals and Waste Local Plan (KMWLP), which has been found sound with the addition of main modifications. The parties agree that the relevant local waste plan would be the Kent Minerals and Waste Local Plan Early Partial Review, should that be adopted by the KCC prior to the application being determined. In advance of adoption, increasing weight ought to be given to the EPR, given it has now been approved by the Examining Inspector."

15. The SOCG also recorded matters which were not agreed. These matters included the relevance of national policy statements ("NPSs") to WKN. The claimant's position was that policies in NPS EN-1 and EN-3 (see below) were both "important and relevant" to the decision to be made in relation to WKN, firstly, because it was very close to having a capacity which would require it to be an NSIP, and, secondly, because its function, scale, and the nature of its impact was similar to that of K3. Further, it had been accepted by the defendant as being of national significance through the section 35 direction. KCC, by contrast, contended that the parts of the application which were not an NSIP should be determined in accordance with the development plan, and that those parts of the application included the expansion of waste throughput at K3 as well as the construction and operation of WKN.

16. On the 19th November 2020 the ExA completed his report, which contained a recommended decision, and it was passed to the defendant. The report is a lengthy and detailed document, and for present purposes what follows is a summary of those aspects of the report pertinent to this challenge. Within section 3 of the report, the "Legal and Policy Context", the ExA noted the provisions of sections 104 and 105 of the 2008 Act (which are set out in detail below), and that in essence section 104 applies to applications for a DCO where an NPS has effect, and section 105 applies to decisions where no NPS has effect. Where section 104 is in play, then by virtue of section 104(3) the application must be determined "in accordance with any relevant national policy statement", subject to a number of limited exceptions. By contrast, section 105 prescribes matters to which the defendant is to have regard to when making a decision without the statutory presumption set out in section 104(3). The ExA noted that the WKN proposal fell short of the threshold for it to be examined as an NSIP, a position which the ExA concluded was not altered by virtue of the section 35 direction. The ExA noted that neither NPS EN-1 nor EN-3 were worded to include a project subject to a section 35 direction. That said, the ExA noted that although the WKN did not meet the threshold for an NSIP, nonetheless the matters in NPS EN-1 and EN-3 could be taken into account in determining the WKN proposal to the extent that those matters were both important and relevant to the defendant's decision. Thus, the ExA concluded that whilst in relation to the K3 proposal the NPSs formed the primary policy context for the examination given the statutory duty imposed by section 104 of the 2008 Act, with respect to the WKN proposal the following was noted:

> "3.3.4 In relation to the WKN Proposed Development the NPSs are important and relevant matters to take into account in the view of the ExA, however the statutory duties as to the applicability of the NPSs do not apply in the same way as for development which is a nationally significant infrastructure project. The primary policy context is nevertheless found in the PA2008, namely s105 which requires the SoS to have regard to LIRs, matters prescribed by regulations in relation to development of the description to which the application relates; and other matters considered important and relevant which will include so far as relevant, the NPSs."

17. The section went on to assess the relevant policy framework and reached conclusions in relation to the applicable policy. In relation to NPS EN-1 and EN-3, the ExA

concluded that the need for the K3 proposal was established through the NPSs, whereas the WKN proposal generally conformed to high-level policy in NPS EN-1 and EN-3. In relation to the development plan, at paragraph 4.6.4 of the report the ExA recorded as follows:

> "4.6.4 There are no issues arising from development plan policies that necessarily conflict with relevant policy directions arising from NPSs. Whilst NPSs are the primary source of policy for a decision on an NSIP under PA2008 such as Project K3, development plan policies take precedence for a decision on Project WKN. None of the development plan policies indicate against the directions set in NPS EN-1 or NPS EN-3 and it follows that effect can be given to all relevant development plan policies in a manner which reinforces and adds local context and detail to NPS compliance where the NPSs apply."

18. Within this section the ExA set out the competing contentions in relation to whether or not there was a need for the facility in terms of available waste suitable for incineration. The concern raised by KCC was that if there were not adequate quantities of waste arising within their administrative area this would undermine the waste hierarchy and lead to a diversion of waste into Kent, with the potential to undermine wider regional planning objectives and the proximity principle. The ExA introduced his conclusions in relation to the planning issues for the examination by noting as follows:

> "4.10.96 In terms of the core decision-making section of NPS EN-3 (paragraph 2.5.70) it must be clear, with reference to the relevant waste strategies and plans, that the proposed waste combustion generating station would be in accordance with the waste hierarchy and of an appropriate type and scale so as not to prejudice the achievement of local or national waste management targets in England. I am not satisfied that this is the case with reference to the WKN Proposed Development because the increase in capacity which it would bring about would significantly increase the capacity gap already identified by KCC. For such provision to be made at this time for an additional 390,000 tonnes of waste per annum over the 50-year lifetime of the development would present a significant risk to meeting the waste hierarchy objectives set out in KMWLP as revised by the EPR, by pulling Kent waste that might otherwise be recycled down the hierarchy.
>
> 4.10.97 The EPR of the KMWLP has been found sound and the supporting Waste Needs Assessment is taken to be robust, and the arisings and forecasts are now reflected in the most recent Authority Monitoring Report released by KCC. Applying an assessment based on these values to the Proposed Development, the ExA is satisfied that the need for the additional capacity proposed to maintain net self-sufficiency in

> Kent throughout the Plan period while making reduced provision for London's waste, does not exist."

19. In relation to the principles of local policy, and the EPR in particular, the ExA noted that the adverse effects of creating a waste management facility that would be likely to draw waste in from further afield than Kent would include locking waste into feeding the plant that might otherwise be recycled, contrary to the waste hierarchy, as well as undermining the viability of more locally-based solutions which would accord better with the proximity principle. The ExA noted the strategy in the EPR to meet the area's objectively assessed needs. The ExA noted it was an important consideration that the EPR had dispensed with the preparation of a Waste Sites Plan, and that the purpose of this and the other provisions of the EPR were to avoid over provision of other recovery capacity which could discourage the development of recycling and composting capacity further up the waste hierarchy.

20. The ExA went on to consider the energy production issues and noted the following in that connection:

> "4.10.120. Generally, the power produced by both projects would be a benefit to be considered in the overall planning balance.
>
> 4.10.121. However in the case of the WKN Proposed Development, the electricity generation is allied to the sourcing of some 390,000 tpa of waste fuel which is a significant amount in itself, the composition of which should be scrutinised to see whether overall the proposed generation is justified by reference to such matters as the biogenic to fossil carbon ratio and its energy content, the confidence that can be placed on the assumed biogenic content, comparisons with other methods of electricity generation, and whether avoided emissions from landfill would actually materialise. Within that process, consideration of harm to KCC's strategy that underpins its WLP is not excluded."

21. The ExA then went on to consider the provisions of the Kent Minerals and Waste Local Plan Policy CSW4 and need and local capacity issues. The ExA's conclusions in relation to this issue were as follows:

> "4.10.122. I am not persuaded than even assuming 65% recycling is achieved (which is acknowledged to be a higher target than is set out in the KMWLP or EPR) there remains a need for the Proposed Developments in particular Project WKN. The WHFAA [APP-086] sets out in Table ES2 Summary of Fuel Availability Assessment and sensitivities, a projected surplus in the remaining fuel available in the Study Area compared to future capacity likely to be delivered, including taking account of both projects within the Proposed Development.

4.10.123. There is an obvious difference between the lower and upper estimates. This is predominantly due to the substitution of shortlisted waste types disposed to landfill rather than all Household/Industrial/Commercial (HIC) waste disposed to landfill. Clearly in my view the use of the former category is more appropriate since, as is clarified in the WHFAA, the HIC category in the WDI contains certain waste types that would be inappropriate for combustion in the Proposed Development, the use of which would result in an over-estimation of available fuel. Thus, under the WHFAA ones arrives at a remaining level of fuel availability to the tune of 992,540 tpa, which would be taken up by the Proposed Development leaving a shortfall in capacity of facilities equivalent to processing the remaining figure of 495,540 tpa.

4.10.124. However KCC's alternative calculation, based on the same methodology, including an allowance of 27% recycling to achieve the CEP 2035 target, and using the EA's WDI 2018 data as set out in [AS-010] would result in fuel availability of between 420,000tpa and 123,500tpa, which latter figure takes account of shortlisted waste types disposed to landfill within Study Area. Applying the proposed capacity of both projects within the Proposed Development, one arrives at negative figures whether shortlisted waste types or HIC waste disposed of to landfill are applied, indicating a surplus capacity of facilities in the Study Area. I find it significant that KCC's waste needs assessment has underpinned the EPR under which the development of increased waste recovery capacity follows a sustainable pattern of waste management to achieve overall net self-sufficiency, an approach found to be sound in the Examination of the EPR [REP4-016].

…

4.10.126. Turning to the Applicant's criticism of the Inspector's EPR Report [REP4-016] there is no reason to suppose that the Inspector did not properly examine the evidence on the capacity requirement for non-hazardous waste. The Applicant made several representations against the proposed changes in the EPR based on the evidence and appeared at the examination hearings to convey these objections to the Inspector. I asked for these representations which were supplied in full [REP5-040]. They clearly show that the Applicant was critical of the evidence base underpinning the EPR, however the Applicant accepted (p2 [REP5-040], that its own representations were:

"not submitted as in-depth need assessments for waste management in Kent; this is a task for KCC in preparing its development policy plan."

…

4.10.128. Paragraph 23 of the Inspector's Report [REP4-016] accepts that the "CRRNH" (Capacity Requirement for the Management of Non-Hazardous Waste) shows that there is no gap in capacity for other recovery treatment of residual non-hazardous waste throughout the Plan period and demonstrates that the "Kemsley facility" (ie the Consented K3 Facility) together with the existing Allington facility will provide a surplus of other recovery capacity. Paragraph 23 ends:

4.10.129. "*Policies CSW6 and CSW7 provide flexibility in that they are permissive policies that would allow for other recovery facilities to be developed <u>should they be required</u>*". (My emphasis).

4.10.130. I also note that the BPP report, Waste Topic Report 8 concluded the following on the need for Energy from Waste (EfW) capacity: "… sufficient sites should be identified such that new capacity in EfW could be provided for an additional 562,000 tpa. However, only 437,500 tpa new EfW capacity should be permitted until monitoring indicates that the provision of only this amount of EfW capacity would result in non-hazardous landfill capacity in Kent being used up before the end of the plan period. This will need one site to be identified in Kent that would not need to be developed until the long term, if at all." This conclusion underpins Policies CSW7 and CSW8 of KWMLP.

4.10.131. KCC's analysis and data are also more focussed on the particular geographical source of waste accepted at locations to which waste is removed as well as a more localised approach to investigating capacity, which in my view is more important to analysing the geographical need for EfW additional waste treatment capacity. It was found to be sound by the EPR Inspector.

4.10.132. On balance I prefer KCC's assessment in KCC WNA 2018, Capacity Requirement for the Management of Residual Non-Hazardous Waste [REP4-020] of fuel availability and future capacity likely to be delivered, to that of the Applicant. This does not imply that in general future treatment capacity would no longer be necessary, however in the case of the WKN Proposed Development to grant consent for an additional 390,000 tpa throughput would in my judgment seriously undermine the local and regional strategy for managing waste development in Kent and the south east region. This would be contrary to KMWLP Policies CSW2, CSW4, CSW6, CSW7 and CSW8."

22. The ExA's overall conclusions in relation to waste hierarchy issues in respect of both of the proposals were expressed in the following terms:

> "**Overall conclusions as to waste hierarchy related matters: K3**
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> 4.10.139. The evidence underpinning the KCC's revised development plan policies which was independently compiled, points to a capacity gap which at both the upper and lower ranges of estimates, produces a negative level of need to manage waste fuel available in Kent, even taking into account the capacities of the Proposed Development. This would be contrary to the Waste Needs Assessment produced by KCC to support the EPR which has now been found sound by the examining Inspector. This evidence base found no need exists in Kent for additional capacity for the Plan period.
>
> 4.10.140. However, although the Applicant's position is that both Project K3 and Project WKN are important, relevant and appropriate infrastructure projects that would meet net zero emissions goals and ensure waste is managed efficiently, there are differences between the two. Project K3 is a CHP facility, connected to the Kemsley Paper Mill with the benefits of increased heat export. That the WKN Proposed Development would provide a sustainable source of steam/heat to local customers for industry and housing within the area is uncertain as there is no clear agreement with any customer for this purpose, except perhaps arguably with DS Smith for the very limited occasions when K3 is undergoing maintenance. Therefore, whilst the benefits of co-location of both facilities to provide steam to the paper mill, remain unclear, increased weight should be given to the K3 Proposed Development in this respect.
>
> 4.10.141. The need for infrastructure covered by NPS EN-3 is assumed and must be accorded significant weight. Further, the increased capacity provided by the K3 Proposed Development would be a more modest increase than that of Project WKN, therefore the risk of prejudice to the principles of proximity and net self-sufficiency in local and regional strategies and plans is reduced. The ability to generate additional electricity without change to its design or increase in throughput would be an additional benefit.
>
> **Overall conclusion as to waste hierarchy related matters: WKN**
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> 4.10.142. The generation of 42MW electricity would be a significant benefit having regard to the need for all types of infrastructure set out in NPS EN-1, although the energy generated would be partially renewable at best.

4.10.143. However, the Applicant has not provided a robust argument that justifies a concentration of a new waste management facility that would increase the capacity gap at this time. Although put forward as a regional facility, given that the waste recovery capacity is well catered for by the Consented K3 Facility and the EfW facility located at Allington, there is no proven need for the plant to be located in Kent. An alternative location outside Kent where the heat produced can be more effectively utilised, would appear to better serve the strategic purposes of member authorities of SEWPAG in order to comply with the aims set out in their respective WLPs, and in particular the KMWLP. Therefore, in this respect I find the WKN Proposed Development inconsistent with the KMWLP and EPR. Such a finding would be in accordance with upholding the role of the planning system as found in NPS EN-1 to provide a framework which permits construction of what Government as well as the market identify as the type of infrastructure needed "in the places where it is acceptable in planning terms (paragraph 2.2.4)".

4.10.144. Further, the introduction of additional Other Recovery capacity of the scale proposed at this time with respect to the WKN Proposed Development would put at risk achievement of the revised recycling and composting targets in the revised KMWLP which would also be in conflict with National Planning Policy for Waste."

23. In section 6 of the report the ExA set out the conclusions reached in relation to the DCO application. So far as relevant to this case those conclusions were as follows:

"**6.2. CONSIDERATIONS IN THE OVERALL PLANNING BALANCE**

Application of NPSs and development plan to the Proposed Development

6.2.1. The designated National Policy Statements (NPSs) NPS EN-1 and NPS EN-3 provide the primary basis for the Secretary of State (SoS) to make decisions on development consent applications for energy based Nationally Significant Infrastructure Projects (NSIPs) in England, which includes the K3 Proposed Development.

6.2.2. In terms of Project WKN the NPSs may be considered "alongside" other national and local policies, however as the adopted local plan for waste matters, I consider the development plan and in particular the Kent Minerals and Waste Local Plan (KMWLP) to be the primary policy against which this element of the Proposed Development should be determined. The presumption in favour of determining the application in accordance with the NPS is absent here although

the relevant NPSs are important and relevant matters to be considered.

6.2.3. I disagree with the Applicant's response [REP5-011] to ExQ3.6.2 [PD-014] that EN-1 and EN-3 are so germane to the assessment of the WKN Proposed Development that it would be irrational not to give them primacy for the reasons they give. As to the reasons given for this proposition, the NPPF is not dispositive of the issue, and the s35 direction does not override s105(2)(c) PA2008. S105 PA2008 does not stipulate that the NPSs take precedence viz a viz local plan policies (although as The Queen (oao David Gate on behalf of Transport Solutions For Lancaster and Morecambe) v The Secretary of State for Transport v Lancashire County Council [2013] EWHC 2937 (Admin) would suggest they are capable of being important and relevant matters).

6.2.4. The Applicant suggested further in its reply [REP5-011] to ExQ3.6.2 [PD-014], that local plan policies would otherwise take precedence by default. Indeed, whatever the reason behind the lack of definitive statutory or judicial clarity over the issue, it would be sensible in my view to apply the statutorily adopted development plan as the primary consideration to a project that, but for the s35 Direction, would have fallen to be considered on that basis.

6.2.5. That said, conclusions on the case for development consent set out in the application are reached in the context of the policies contained in the NPSs, according to how important and relevant are the matters contained therein.

Need for and benefits of the Proposed Development

Project K3

6.2.11. In relation to NPS EN-1 and NPS EN-3 which apply to the K3 Proposed Development I find that the need for infrastructure covered by these national policies is assumed and must be accorded significant weight. The recovery of energy from the combustion of waste forms an important element of waste management strategies in England. Furthermore, the ability to generate an increased amount of electricity without change to the design of the Consented K3 Facility is an additional benefit, as is the potential to generate that amount without necessarily increasing the throughput of waste feedstock. The adverse impacts as a result of increase in throughput are considered separately.

6.2.12. Although there are marked uncertainties as to what if any net carbon benefit would be achieved by comparison to other forms of waste management, it is reasonable to assume

that it would perform better in Greenhouse Gas (GHG) emission terms than had it not been linked to an integrated CHP facility to serve the adjoining DS Smith Paper Mill. This is a further positive benefit that would align with the aspirations of NPS EN-1 and EN-3.

Project WKN

6.2.13. Although the need for the WKN Proposed Development is not established through either NPS EN-1 or EN-3, the generation of up to 42MW of electricity would be in accordance with those national policies and would be a benefit as such. As a fossil fuel generated supply, it could be brought online quickly when demand is high and shut down when demand is low, but the supply generated is not significantly high and the benefits would therefore be limited.

6.2.14. The economic impacts of the Proposed Development would be an additional acknowledged benefit, principally in the form of the anticipated job creation of up to 482 staff during the construction period and between 35 to 49 staff once the WKN Proposed Development is operational and would be a positive factor in support of the WKN Proposed Development.

6.2.15. Achievement of R1 recovery status is not guaranteed and would only be a positive factor insofar as the SoS considers it likely that R1 status would be achieved. The energy produced from the biomass fraction of waste is regarded as renewable under EN-3 although there is uncertainty as to the proportion of waste fuel that would be derived from this component.

6.2.16. However, recognising that EfW facilities have an important role to play in waste management, the key important and relevant matter contained in the relevant NPSs as far as concerns the WKN Proposed Development, is under EN-3: whether, with reference to the relevant waste strategies and plans, the proposed waste combustion generating station would be in accordance with the waste hierarchy and of an appropriate type and scale so as not to prejudice the achievement of local or national waste management targets in England.

6.2.17. I find on this issue that, as described in Chapter 4 and summarised further below, it has not been demonstrated that there is a need for the Proposed Development having regard to the WPA's Need Assessments and other evidence that has underpinned the formulation of KCC's revised development plan. The statutorily adopted development plan and relevant policies discussed, form part of the overall planning system adverted to in NPS EN-3, the role of which is to identify the types of infrastructure needed in the places where it is acceptable in planning terms.

Conformity with the Development Plan

6.2.18. As a preliminary matter it should be noted that it is likely that a final decision on adoption of the changes proposed by the EPR will have been taken by KCC at some point after the close of the Examination (see p2 KCC Closing Statement [REP8-016] which referred to its proposed meeting on 10 September 2020). Therefore, the SoS may wish to consider whether to confirm with KCC whether the changes discussed in this Report have been incorporated into the development plan and have now attained the same status as other development plan policies.

6.2.19.Both the K3 and the WKN Proposed Development would be in conflict with fundamental policies of the development plan, namely KMWLP Policy CSW6 which requires it to be: "demonstrated that waste will be dealt with further up the hierarchy... and where such uses are compatible with the development plan" and Policy CSW7 which would be permissive of new capacity to manage waste "provided that: 1. it moves up the Waste Hierarchy".

6.2.20. In addition, KMWLP Policy CSW4 as revised through the EPR, incorporates revised targets for management of waste in Kent, however waste recovery capacity is sufficiently met by the Consented K3 Facility and the EfW facility at Allington, and there is no proven need for the plant to be located in Kent. This presents a serious risk of prejudice to the principles of proximity and net self-sufficiency which underpin Policy CSW4, and the wider regional strategy in SEWPAG's Memorandum of Understanding (MoU)/"Statement of Common Ground" would clearly be undermined through any significant increase in the capacity gap located in Kent.

6.2.21. The weight attached to the harm thereby caused is however assessed in light of the specific circumstances pertaining to each of the two projects. The increased capacity provided by the K3 Proposed Development would be markedly less than that of Project WKN.

…

Waste Hierarchy

6.2.25. The evidence underpinning KCC's revised development plan policies which was independently compiled, points to a capacity gap which at both the upper and lower ranges of estimates, produces a negative level of need to manage waste fuel available in Kent, even taking into account the capacities of the Proposed Development. This would be contrary to the Waste Needs Assessment produced by KCC to support the EPR

which has now been found sound by the examining Inspector. This evidence base found no need exists in Kent for additional capacity for the Plan period.

6.2.26. Therefore the Proposed Development would be in conflict with KMWLP Policy CSW6 which requires it to be: "demonstrated that waste will be dealt with further up the hierarchy... and where such uses are compatible with the development plan" and Policy CSW7 "provided that: 1. it moves up the Waste Hierarchy".

6.2.27. However, although the Applicant's position is that both Project K3 and Project WKN are important, relevant and appropriate infrastructure projects that would meet net zero emissions goals and ensure waste is managed efficiently, there are differences between the two. Project K3 is a CHP facility, connected to the Kemsley Paper Mill with the benefits of increased heat export. That the WKN Proposed Development would provide a sustainable source of steam/heat to local customers for industry and housing within the area is uncertain as there is no clear agreement with any customer for this purpose, except perhaps arguably with DS Smith for the very limited occasions when K3 is undergoing maintenance.

6.2.28. Therefore, whilst the benefits of co-location of both facilities to provide steam to the paper mill, remain unclear, increased weight should be given to the K3 Proposed Development in this respect.

6.2.29. The need for infrastructure covered by NPS EN-3 is assumed and must be accorded significant weight. Further, the increased capacity provided by the K3 Proposed Development would be a more modest increase than that of Project WKN, therefore the risk of prejudice to the principles of proximity and net self-sufficiency in local and regional strategies and plans is reduced. The ability to generate additional electricity without change to its design or increase in throughput would be an additional benefit.

6.2.30. As to the WKN Proposed Development, the generation of 42MW electricity would be a benefit having regard to the need for all types of infrastructure set out in NPS EN-1, although the energy generated would be partially renewable at best.

6.2.31. However, the Applicant has not provided a robust argument that justifies a concentration of a new waste management facility that would increase the capacity gap at this time. Although put forward as a regional facility, given that the waste recovery capacity is well catered for by the Consented K3 Facility and the EfW facility located at

Allington, there is no proven need for the plant to be located in Kent. An alternative location outside Kent where the heat produced can be more effectively utilised, would appear to better serve the strategic purposes of member authorities of SEWPAG in order to comply with the aims set out in their respective WLPs, and in particular the KMWLP.

6.2.32. Therefore, I find that the WKN Proposed Development would be inconsistent with the KMWLP and EPR. Such a finding would be in accordance with upholding the role of the planning system as found in NPS EN-1 to provide a framework which permits construction of what Government as well as the market identify as the type of infrastructure needed "in the places where it is acceptable in planning terms (paragraph 2.2.4)."

6.2.33. Further, the introduction of additional Other Recovery capacity of the scale proposed at this time with respect to the WKN Proposed Development would justifiably put at risk achievement of the revised recycling and composting targets in the revised KMWLP which would also be in conflict with National Planning Policy for Waste.

…

6.3. OVERALL CONCLUSIONS ON THE PLANNING BALANCE

…

Project K3

6.3.4. The public benefits of the Proposed Development can be identified in the context of NPS EN-1's recognition of the need for energy generating infrastructure and the presumption in favour of granting consent for energy NSIPs whilst recognising that Energy from Waste (EfW) facilities play a vital role in providing reliable energy supplies.

6.3.5. The potentially adverse impacts of Project K3 and the concerns raised in submissions on the application have been considered. The ES identifies that the practical effect of the K3 Proposed Development would have no significant effects from construction, operation and decommissioning activities on the environment, or that the potentially significant effects identified can be mitigated as far as practicable by the package of controls that are appropriately secured in the Recommended DCO.

6.3.6. I have found that, as with the WKN Proposed Development the Applicant has not provided a sufficiently robust assessment of fuel availability in relation to assessed

capacity in facilities for its treatment. Nevertheless, taking account of the positive benefits of Project K3 as described above, and mindful of the limited harms identified, I find that it would generally accord with the waste hierarchy and would be of an appropriate type and scale so as not to significantly prejudice the achievement of local or national waste management targets. Therefore, all harmful effects would be within the scope envisaged in the relevant NPSs as policy compliant.

6.3.7. In conclusion, I find that the identified harms in relation to the K3 Proposed Development would be outweighed by the benefits from the provision of energy to meet the need identified in NPS EN-1 and by the other benefits of the application as summarised above.

6.3.8. No HRA effects have been identified and there is no reason for HRA matters to prevent the making of the Order.

6.3.9. For the reasons set out in the preceding chapters and summarised above, I conclude that the K3 Proposed Development is acceptable, and that development consent should be granted therefor. This conclusion is taken forward in light of identified minor changes required to the DCO, described in Chapter 7 below.

Project WKN

6.3.10. Although the need for the WKN Proposed Development is not established through either NPS EN-1 or EN-3, the generation of up to 42MW of electricity would be in accordance with those national policies and would be of some benefit. In addition, there would be some positive economic advantages through job creation during the construction and operational phases of the facility.

6.3.11. However, the prospect of Project WKN becoming a viable CHP facility is uncertain. The lack of a clear and immediate sustainable source of steam/heat to local customers contrasts unfavourably with Project K3. With no guaranteed heat offtake, the proposed incineration would not qualify as Good Quality CHP. In my view this is an important and relevant factor to weigh in the balance, not least having regard to the need to transition to a low-carbon electricity market, as underlined by the UNFCCC Paris Agreement and the June 2020 Progress Report which indicates that plants without CHP should not be regarded as supplying renewable energy.

6.3.12. Moreover, the Applicant's assessment of fuel availability in relation to assessed capacity for its treatment, compares unfavourably with the Waste Planning Authority's

own assessments of need and capacity that underpin its strategy in revising targets within the KMWLP which aim to ensure that new facilities demonstrate that waste will be dealt in a manner that clearly moves its management further up the waste hierarchy. Therefore, the WKN Proposed Development would be in conflict with key policies of KMWLP including Policy CSW4, Policy CSW6 and Policy CSW7.

6.3.13. I have had regard to the other benefits of the WKN Proposed Development set out by the Applicant that may comply with other provisions of the development plan including both the Swale Local Plan and KMWLP. However my conclusion is that the provision of too much waste capacity in conflict with the waste hierarchy, represented by the WKN Proposed Development, is a serious conflict that would result in conflict with the development plan as a whole, the adverse impacts arising from which in my view would clearly outweigh the benefits of the facility.

6.3.14. It would also be in conflict with National Planning Policy for Waste (NPPW) which expects applicants to demonstrate that waste disposal facilities not in line with the Local Plan, would not undermine its objectives through prejudicing movement up the waste hierarchy. The WKN Proposed Development is a non-NSIP proposal and where the NPSs do not apply as such, the more recent NPPW that sets out detailed waste planning policies should in my view carry considerable weight.

6.3.15. I have had regard to NPS EN-1 at paragraph 5.2, that CO2 emissions are not reasons to place more restrictions on projects in the planning policy framework than are set out in the energy NPSs. However, as I have found that there is no need for the WKN Proposed Development, the GHG emissions would be an additional harm that would result, whether or not a conclusion could have been reached as to any net carbon benefit that would result.

6.3.16. To conclude, I find that the identified harms in relation to the WKN Proposed Development would outweigh its benefits from the provision of energy and by the other benefits of the application as summarised above.

6.3.17. For the reasons set out in the preceding chapters and summarised above, I therefore conclude that the WKN Proposed Development should not proceed at this time, and that development consent should not be granted, therefore.

6.3.18. However, should the SoS consider that the advantages of Project WKN outweigh the harm caused by the adverse effects as I have described, and is minded to grant consent, then

> consideration should be given to the Alternative Recommended DCO set out at Appendix E, which is the subject of minor changes required to the Applicant's Preferred DCO, and as described in Chapter 7 below."

24. In the light of these conclusions the ExA's recommendation was that a DCO should be granted in respect of the K3 proposal, but that the WKN proposal ought to be refused.

25. On 19th February 2021, having considered the report of the ExA the defendant issued his decision. Having set out the provisions of sections 104 and 105 of the 2008 Act and the approach taken to them by the ExA the defendant observed as follows:

> "4.6 The Secretary of State takes the view that the Application should be treated as a whole and determined under section 104 of the Planning Act 2008. This section, and section 105 would seem to be mutually exclusive and it would not be correct to determine different parts of the Application under different provisions. It is also noted that WKN is a type of generating station which would generally fall to be considered under EN-3 had it met the 50MW threshold by itself and was directed into the Planning Act regime on the basis of its combined significance with the WK3 project. In any event, the Secretary of State does not consider that determining the whole application under section 104 has a material impact on the overall outcome in this case. Section 104(2)(d) of the 2008 Act enables the Secretary of State to give consideration to any important and relevant matters appropriate to this aspect of the application as fully considered by the ExA."

26. In relation to the waste hierarchy and fuel availability the defendant set out a summary of the issues considered by the ExA, and then provided a summary of the ExA's conclusions together with the conclusions of the defendant as follows:

> "*Wheelabrator Kemsley K3* [ER.4.10.139 et seq]
>
> 4.18 While Kent County Council submits that there is no need in Kent for additional waste capacity for the period of the Kent Minerals and Waste Local Plan (up to 2030) and that neither WK3 nor WKN should benefit from the National Policy Statements' presumption in favour of energy development infrastructure, the Applicant submits that both projects are important and relevant to meeting a number of critical national needs including on net zero and waste management. The ExA notes that WK3 would, in addition to generating electricity, also provide steam and heat to local customers which is a factor in its favour. The ExA's overall conclusion is that the need for WK3 should carry significant weight in the decision-making process and the small increase in the proposed generating capacity with related increase in waste throughput would not

prejudice the principles of sourcing waste locally and aiming for self-sufficiency.

Wheelabrator Kemsley North [ER 4.10.142 et seq]

4.19 The project would contribute 42MW of electricity to the electricity grid. Whilst noting this, the ExA states that the Applicant has not provided robust arguments to support the new plant and that there is no proven need for it to be located in Kent. WKN would be inconsistent with the Kent Mineral and Waste Local Plan and the revisions to it that were the result of the 'Early Partial Review' carried out on the Plan. (The Early Partial Review is an independent report carried out by the Planning Inspectorate which checks whether local plans are 'sound'.) The ExA considered that WKN did not accord with paragraph 2.5.70 of NPS EN-3 as it was not in compliance with the Kent Minerals and Waste Local Plan and there was no evidence provided as to why an exception should be made. Following on from that, WKN would not satisfy the statement in paragraph 2.2.4 of NPS EN-1 that the planning system should provide a framework which permits the construction of the infrastructure needed in the place where it is acceptable in planning terms. Finally, the ExA noted that WKN would be in conflict with the National Planning Policy for Waste because it would put at risk the achievement of revised recycling and composting targets in the Kent Minerals and Waste Local Plan.

4.20 The Secretary of State sees no reason to disagree with the ExA's conclusions in this matter."

27. The decision then records the defendant's conclusion that in relation to the various environmental and infrastructural issues considered by the ExA there was no reason to depart from the ExA's conclusions, nor any new information which justified a different approach. The defendant's decision then turns to the consideration of the planning balance and the conclusions of the defendant in that respect are set out as follows:

"**6. The Secretary of State's Consideration of the Planning Balance**

6.1 All nationally significant energy infrastructure developments will have some potential adverse impacts. In the case of WK3 and WKN, most of the potential impacts have been assessed by the ExA as being acceptable subject in some cases to suitable mitigation measures being put in place to minimise or avoid them completely. As set out above, the ExA determined that consent should be granted for WK3 only. The adverse impacts for the WK3 project did not outweigh the significant weight attaching to the need case established by the National Policy Statements.

6.2 However, the ExA's consideration of all the issues, particularly in respect of arguments about where the incineration of waste stood in the waste hierarchy and how this related to adopted policies in relevant local plans, led to the conclusion that WKN, while offering some benefits (particularly from the 42MW of electricity that would be generated), did not accord with the relevant provisions in the National Policy Statements, the National Planning Policy Framework and in relevant local plans. The ExA recommended, therefore, that WKN should not benefit from the grant of consent.

6.3 As set out in above, sections 104 and 105 of the Planning Act 2008 set out the procedures to be followed by the Secretary of State in determining applications for development consent where National Policy Statements have and do not have effect. In both cases, the Secretary of State has to have regard to a range of policy considerations including the relevant National Policy Statements and development plans and local impact reports prepared by local planning authorities in coming to a decision. However, for applications determined under section 104, the primary consideration is the policy set out in the National Policy Statements, while for applications that fall to be determined under section 105, it is local policies which are specifically referenced although the National Policy Statements can be taken into account as 'important and relevant considerations'.

6.4 The Secretary of State adopts a different approach to the ExA's in this matter and is of the view that the whole application (including the benefits and impacts of WKN) fall to be considered under section 104 of the Planning Act 2008. This means that in the consideration by the Secretary of State, more weight has been given to the National Policy Statements. However, the Secretary of State does not consider that this different approach to the planning process results in a different conclusion to that reached by the ExA, namely that development consent should not be granted for WKN and that the benefits of WKN are outweighed by the non-compliance with policies elsewhere, in particular, the policies regarding compliance with the NPS EN-1 and the policies referencing both the waste hierarchy and local waste management plans in NPS EN-3.

6.5 The determination of applications for development consent for nationally significant infrastructure projects is a balancing exercise and the weight afforded to different elements of the matrix of impacts and benefits may affect the overall conclusion. The ExA identifies that there are undoubtedly concerns that WKN would have adverse impacts on local and

> regional targets for moving waste up the waste hierarchy. As noted, the ExA has had regard to these matters in framing its recommendation. However, the Secretary of State is not bound to follow that recommendation if he feels that the evidence presented to him can support a different conclusion.
>
> 6.6 The Secretary of State has considered the arguments in the ExA Report together with the strong endorsement of developments of the type that is the proposed Development. He notes the ExA's comments that WK3's anticipated provision of steam to nearby industrial facilities are a further benefit in its favour. He considers that the overall planning balance supports the grant of consent for the increase in generating capacity and an increase in waste-fuel throughput at WK3. As noted, whilst taking a different approach to the application of sections 104 and 105 of the Planning Act 2008 and consequently to the application of the planning balance in considering WKN, the Secretary of State nevertheless agrees with the ExA's conclusion that even though there are benefits from WKN, these do not outweigh the adverse impacts. The Secretary of State does not, therefore, consider that development consent should be granted for WKN."

28. The ultimate decision of the defendant was, therefore, that although he approached the decisions on the basis that section 104 of the 2008 Act applied to both the elements of the application, as distinct from the approach taken by the ExA (namely that K3 fell to be assessed under section 104 of the 2008 Act and WKN fell to be considered under section 105 of the 2008 Act), the substance of the decision which he reached would be the same, namely that a DCO should be granted for K3 but refused for WKN.

<u>The Proceedings</u>

29. The claimant brought these proceedings within the prescribed timescales and challenged the defendant's decision on the basis that, having correctly concluded that the application should be determined under section 104 because sections 104 and 105 of the 2008 Act were mutually exclusive, the defendant had failed to appreciate the fundamental difference that this made to decision-making, and ought to have unpicked the conclusions of the ExA prior to seeking to reach his own decision within the context of a different statutory framework. In particular, the decision failed to give effect to the conclusion that section 104 applied to the application as a whole in a variety of ways, which included a failure to properly reflect the presumption in favour of granting consent to applications falling within section 104 which accorded with NPS policies, in particular in the event of conflict with development plan policies. Other instances of the differences between the decision-making frameworks of sections 104 and 105 of the 2008 Act were also relied upon.

30. Four grounds of challenge were, and still are, advanced. Ground 1 is the failure to give proper effect to section 104 in the decision-making process and, in particular, the failure to give primacy to the relevant NPSs in accordance with section 104(3). It is alleged that the defendant allowed the primacy of the NPSs to be overtaken by the

application of the development plan's policies as an important and relevant consideration: the adoption of the conclusions of the ExA in their entirety, which were predicated upon primacy of the development plan policies not the NPS, demonstrates the defendant's error in this respect.

31. Ground 2 is the contention that the defendant failed to determine whether or not the WKN proposal complied with the NPSs judged as a whole, in particular, again, by adopting the ExA's conclusions which were made in the context of section 105 of the 2008 Act, without considering any conflict with the NPSs which the ExA found in the light of the section 104 duty to consider whether the application was in accordance with the NPS "judged as a whole". Ground 3 is the failure of the defendant to give adequate reasons in the context of his disagreement with the ExA. Ground 4 is the contention that the defendant failed to comply with the requirements of fairness: in the light of the fact that the defendant was proposing to make a decision on a different statutory footing to that which had been reached by the ExA, it was incumbent upon him to go back to the parties and invite their comments on the effect of such a change of approach.

32. In responding to the claim the defendant, having reflected on the position, concluded that the better view was that section 105 of the 2008 Act applied to WKN rather than section 104 and, therefore, that these sections were not mutually exclusive. In effect, therefore, the defendant conceded that he was at least arguably wrong in law to have solely applied section 104 of the 2008 Act to the whole application, and the approach of the ExA to these provisions was correct. However, the defendant went on to submit that this was not a material error of law, because in reality whilst the defendant had given more weight to the NPSs than the ExA in favour of the WKN proposal and the consideration of need, there was nothing to suggest that the defendant had in fact directly applied the policy provisions from NPS EN-1 or EN-3 to the WKN proposal, and therefore he had undertaken a lawful exercise in planning judgment. Further, it was submitted by the defendant that any legal error that may have occurred did not cause the claimant any prejudice and no relief should be granted as a matter of discretion. Further detailed submissions were advanced in relation to the claimant's grounds which it is unnecessary to rehearse fully at this point in the judgment.

The Law

33. The 2008 Act established a bespoke statutory code for addressing the granting of consent to certain types of project identified as NSIPs. It is an essential feature of the 2008 Act that a key part of the process for considering NSIPs is, as will have been gathered from the facts of the present case, the designation of NPSs. Section 5 of the 2008 Act gives power to the defendant to designate an NPS for the purposes of the 2008 Act if it is issued by the defendant and "sets out national policy in relation to one or more specific descriptions of development". Section 5(3) provides that prior to the designation of a statement as an NPS the defendant must carry out a sustainability appraisal of it, and section 5(4) provides that both specified consultation requirements and Parliamentary endorsement, in the form of the statement being approved by the House of Commons, have to be complied with prior to it being designated. Section 5(5) provides than an NPS may, in particular, set out in respect of a particular description of development "the amount, type or size of development of that description which is appropriate nationally or for a specified area".

34. NSIPs are defined by section 14 of the 2008 Act, and for present purposes they include, by virtue of section 14(1)(a), a project consisting of "the construction or extension of a generating station" and, by virtue of section 15(1)(c) such a project achieves NSIP status if the generating station when constructed or extended is expected to have a capacity of more than 50MW. Section 31 of the 2008 Act provides that consent under the 2008 Act is required for development to the extent that it is, or forms part of, an NSIP.

35. As set out above, the defendant made a direction under section 35 of the 2008 Act in relation to the WKN proposal. Section 35 of the 2008 Act provides as follows:

> "35 Directions in relation to projects of national significance
>
> (1) The Secretary of State may give a direction for development to be treated as development for which development consent is required. This is subject to the following provisions of this section and section 35ZA.
>
> (2) The Secretary of State may give a direction under subsection (1) only if –
>
> (a) the development is or forms part of –
>
> (i) a project (or proposed project) in the field of energy, transport, water, water waste or waste, or
>
> (ii) a business or commercial project (or proposed project) of a prescribed description,
>
> (b) the development will (when completed) be wholly in one or more of the areas specified in subsection (3), and
>
> (c) the Secretary of State thinks the project (or proposed project) is of national significance, either by itself or when considered with –
>
> (i) in a case within paragraph (a)(i), one or more other projects (or proposed projects) in the same field;
>
> (ii) in a case within paragraph (a)(ii), one or more other business or commercial projects (or proposed projects) of a description prescribed under paragraph (a)(ii)."

36. Sections 104 and 105, as alluded to above, relate to the approach to be taken to decisions where an NPS has effect (when section 104 provides the decision-making framework) and where no NPS has effect (where section 105 provides the decision-making framework). These sections, so far as material to the issues in the present case, provide as follows:

> "104 Decisions in cases where national policy statement has effect

(1) This section applies in relation to an application for an order granting development consent if a national policy statement has effect in relation to development of the description to which the application relates.

(2) In deciding the application the Secretary of State must have regard to –

(a) any national policy statement which has effect in relation to development of the description to which the application relates (a "relevant national policy statement"),

…

(b) any local impact report (within the meaning given by section 60(3) submitted to the Secretary of State before the deadline specified in a notice under section 60(2),

(c) any matters prescribed in relation to development of the description to which the application relates, and

(d) any other matters which the Secretary of State thinks are both important and relevant to the Secretary of State's decision.

(3) The Secretary of State must decide the application in accordance with any relevant national policy statement, except to the extent that one or more of subsections (4) to (8) applies.

(4) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the United Kingdom being in breach of any of its international obligations.

(5) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the Secretary of State being in breach of any duty imposed on the Secretary of State by or under any enactment.

(6) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would be unlawful by virtue of any enactment.

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

(8) This subsection applies if the Secretary of State is satisfied that any condition prescribed for deciding an application otherwise than in accordance with a national policy statement is met.

…

105 Decisions in cases where no national policy statement has effect

(1) This section applies in relation to an application for an order granting development consent (if section 104 does not apply in relation to the application).

(2) In deciding the application the Secretary of State must have regard to –

(a)any local impact report (within the meaning given by section 60(3) submitted to the Secretary of State before the deadline specified in a notice under section 60(2),

(b) any matters prescribed in relation to development of the description to which the application relates, and

(c) any other matters which the Secretary of State thinks are both important and relevant to the Secretary of State's decision."

37. The effect of the statutory provisions is to create a separate statutory regime in relation to certain identified types of project, freestanding from other statutory regimes of development control. Projects that are within the scope of the regime created by the 2008 Act require a DCO before they can be implemented. As set out above, a key feature of the regime created by the 2008 Act is the NPS, a form of policy designated pursuant to a specific statutory process which includes Parliamentary approval. The NPS is key to the 2008 Act's regime, as NPSs play an important role in the determination of applications for NSIPs. As Holgate J observed in paragraph 46 of his judgment in *R (Client Earth) v Secretary of State for Business, Energy and Industrial Strategy* [2020] EWHC 1303 (Admin); [2020] PTSR 1709, the content and merits of an NPS are the responsibility of the defendant who, in that connection, is accountable to Parliament. The statutory process of designation, alongside the statutory prescription of those matters which may be part of an NPS, underline the national character of such policy statements.

38. An important part of the significance of the NPS is the role that it plays under section 104 of the 2008 Act in the determination of DCO applications in respect of applications for which the NPS has effect. By virtue of section 104(2) the defendant "must have regard" to any NPS which has effect in relation to the development. As Holgate J observed in paragraph 48 of *Client Earth*, section 104(3) goes further in requiring that the defendant "must decide the application in accordance with any relevant national policy statement except to the extent that one or more of subsections (4) to (8) applies". As was observed in the claimant's submissions, this decision-making framework is akin to that created in relation to planning permissions by section 38(6) of the Planning and Compulsory Purchase Act 2004. Obviously, in the context of the 2008 Act's regime there are the specific caveats contained within section 104(4) to (8), but the claimant was correct to observe that section 104(3)

creates a form of presumption in favour of a DCO which is in accordance with relevant NPSs.

39. In addition to these matters it is also to be noted that in the case of *R (Gate) v Secretary of State for Transport* [2013] EWHC 2937 (Admin) Turner J observed in relation to a challenge to a highway scheme for which there was no directly relevant NPS that, as a matter of the statutory construction of section 105(2)(c) of the 2008 Act, as well as common sense, a decision-maker is not precluded from taking into account matters incorporated within an NPS in determining an application to which section 105 applies, so long as they are both important and relevant to the decision under consideration. Turner J found there had been no legal error in that case arising from the ExA referring to NPSs in respect of ports and nuclear power generation where both a port and two nuclear power stations were matters of relevance to the decision being made (see paragraphs 55 to 58 of the judgment).

40. In relation to the claimant's grounds with respect to the defendant's reasons, it is to be noted that section 116 of the 2008 Act creates a requirement for the defendant to provide reasons when making a decision on a DCO application. In respect of the quality of those reasons, the claimant relies upon the well-known summary of the applicable legal principles contained within the speech of Lord Brown at paragraphs 35-36 in *South Bucks DC v Porter (No 2)* [2004] UKHL 33; [2004] 1 WLR 1953.

41. Turning to the requirements of fairness, whilst it is to be noted that a duty to reconsult the parties is provided by rule 19 of the Infrastructure Planning Examination Procedure Rules 2010, the circumstances giving rise to that duty do not apply in the present case, as the difference from the ExA arising in the defendant's decision did not relate to either a matter of fact, or any new evidence or new matter of fact, which gave rise to the defendant's reasons for disagreeing with the ExA. Rather, the claimant relies upon the principles of fairness within a process of this kind which was set out by the Court of Appeal in the case of *Hopkins Developments Ltd v SSCLG* [2014] EWCA Civ 470; [2014] PTSR 1145, in particular at paragraph 62.

Relevant Policy

42. There are two NPSs that are particularly relevant for the purposes of these proceedings. The first is EN-1, entitled Overarching National Policy Statement for Energy. It is important to appreciate that the document was published in July 2011, at which time the arrangements under the 2008 Act for decision-making were different from those at present. The version of the 2008 Act in force at that time provided that decisions on NSIPs were to be examined and determined by the Infrastructure Planning Commission ("the IPC"). The NPS notes at paragraph 1.3.1 that at the time of it being designated there were proposals in what was then the Localism Bill (which subsequently became the Localism Act 2011) proposing to abolish the IPC. Prior to the reforms of the Localism Act 2011, decisions where NPSs had effect were determined by the IPC pursuant to section 104 of the 2008 Act; where decisions were taken in relation to projects where there was not a designated NPS having effect, the decisions pursuant to section 105 of the 2008 Act were taken by the defendant. The reforms brought both types of decisions before the defendant for determination. Against that background, in paragraph 1.1.1 of the NPS it explains that the NPS has effect "on the decisions by the Infrastructure Planning Commission (IPC) on applications for energy developments that fall within the scope of the NPSs". At

paragraph 1.4.1 the NPS explains that it is part of a suite of NPSs dealing with energy and climate change. At paragraph 1.4.2 the NPS points out that the Act empowered the IPC to examine applications and make decisions on NSIPs in relation to energy generating stations generating more than 50MW of power which were onshore. This NPS is therefore only of application to proposals falling within the statutory definition of an energy NSIP.

43. Part 4 of EN-1 sets out Assessment Principles. In particular, so far as relevant to the present decision, these principles are expressed as follows:

> "4.1.2 Given the level and urgency of need for infrastructure of the types covered by the energy NPSs set out in Part 3 of this NPS, the IPC should start with a presumption in favour of granting consent to applications for energy NSIPs. That presumption applies unless any more specific and relevant policies set out in the relevant NPSs clearly indicate that consent should be refused. The presumption is also subject to the provisions of the Planning Act 2008 referred to at paragraph 1.1.2 of this NPS.
>
> …
>
> 4.1.5 The policy set out in this NPS and the technology-specific energy NPSs is, for the most part, intended to make existing policy and practice of the Secretary of State in consenting nationally significant energy infrastructure clearer and more transparent, rather than to change the underlying policies against which applications are assessed (or therefore the "benchmark" for what is, or is not, an acceptable nationally significant energy development). Other matters that the IPC may consider both important and relevant to its decision-making may include Development Plan Documents or other documents in the Local Development Framework. In the event of a conflict between these or any other documents and an NPS, the NPS prevails for purposes of IPC decision making given the national significance of the infrastructure."

44. The other relevant NPS is EN-3 which is entitled National Policy Statement for Renewable Energy Infrastructure. This was designated in July 2011 at the same time as EN-1. In paragraph 1.2.1 of the document it explains that this NPS, alongside EN-1, provides "the primary basis for decisions of the Infrastructure Planning Commission (IPC) on applications it receives for nationally significant renewable energy infrastructure". That relationship is emphasised in paragraph 1.3.1 in terms of the need and urgency for new energy infrastructure to be consented in order to make a contribution to sustainable development and to mitigate and adapt to climate change. EN-1 noted the need for specific technologies including the infrastructure to which EN-3 relates. At paragraph 1.8.1 the NPS points out that it covers renewable energy projects such as energy from biomass and/or waste in excess of 50MW. At paragraph 1.8.2 the NPS states that it "does not cover other types of renewable energy generation that are not at present technically viable over 50MW onshore". Paragraph 2.1.2 observes that reading EN-3 and EN-1 together, the position for the IPC is that

they "should act on the basis that the need for infrastructure covered by this NPS has been demonstrated".

45. Amongst the matters covered by the NPS in relation to biomass/waste impacts is the issue of waste management. The NPS notes that waste combustion generating stations need not disadvantage reuse or recycling initiatives where the proposed development accords with the waste hierarchy. In this connection it provides the following in relation to IPC decision-making:

> "2.5.70 The IPC should be satisfied, with reference to the relevant waste strategies and plans, that the proposed waste combustion generating station is in accordance with the waste hierarchy and of an appropriate type and scale so as not to prejudice the achievement of local or national waste management targets in England and local, regional or national waste management targets in Wales. Where there are concerns in terms of a possible conflict, evidence should be provided to the IPC by the applicant as to why this is not the case or why a deviation from the relevant waste strategy or plan is nonetheless appropriate and in accordance with the waste hierarchy."

46. In terms of development plan policy, as noted above, reference in the decision-making process was made to the Kent Minerals and Waste Local Plan 2013-2030 which was adopted in September 2020 in an amended form as a result of the EPR process. Particular reference within the decision-making process was made to policies CSW6 and CSW7 which provide as follows:

> "Policy CSW 6
>
> Location of Built Waste Management Facilities
>
> Planning permission will be granted for proposals that:
>
> a. do not give rise to significant adverse impacts upon national and international designated sites, including Areas of Outstanding Natural Beauty (AONB), Sites of Special Scientific Interest (SSSI), Special Areas of Conservation (SAC), Special Protection Areas (SPAs), Ramsar sites, Ancient Monuments and registered Historic Parks and Gardens. (See Figures 4, 5 & 6).
>
> b. do not give rise to significant adverse impacts upon Local Wildlife Sites (LWS), Local Nature Reserves (LNR), Ancient Woodland, Air Quality Management Areas (AQMAs) and groundwater resources. (See Figures 7, 8, 10 & 15)
>
> c. are well located in relation to Kent's Key Arterial Routes, avoiding proposalswhichwouldgiverisetosignificantnumbersoflorrymovementsthroughvillagesor on unacceptable stretches of road.

d. do not represent inappropriate development in the Green Belt.

e. avoid Groundwater Source Protection Zone 1 or Flood Risk Zone 3b

f. avoid sites on or in proximity to land where alternative development exists/has planning permission or is identified in an adopted Local Plan for alternate uses that may prove to be incompatible with the proposed waste management uses on the site.

g. for energy producing facilities - sites are in proximity to potential heat users.

h. for facilities that may involve prominent structures (including chimney stacks)- the ability of the landscape to accommodate the structure (including any associated emission plume) after mitigation.

i. for facilities involving operations that may give rise to bioaerosols (e.g. composting) to locate at least 250m away from any potentially sensitive receptors.

Policy CSW 7

Waste Management for Non-hazardous Waste

Waste management capacity for non-hazardous waste that assists Kent in continuing to be net self-sufficient while providing for a reducing quantity of London's waste, will be granted planning permission provided that:

1. it moves waste up the hierarchy,

2. recovery of by-products and residues is maximised

3. energy recovery is maximised (utilising both heat and power)

4. any residues produced can be managed or disposed of in accordance with the objectives of Policy CSW 2

5. sites for the management of green waste and/or kitchen waste in excess of100 tonnes per week are Animal By Product Regulation compliant (such as in vessel composting or anaerobic digestion)

6. sites for small-scale open composting of green waste (facilities of less than100 tonnes per week) that are located within a farm unit and the compost is used within that unit.

> Where it is demonstrated that waste will be dealt with further up the hierarchy, or it is replacing capacity lost at existing sites, facilities that satisfy the relevant criteria above on land in the following locations will be granted consent, providing there is no adverse impact on the environment and communities and where such uses are compatible with the development plan:
>
> 1. within or adjacent to an existing mineral development or waste management use
>
> 2. forming part of a new major development for B8 employment or mixed uses
>
> 3. within existing industrial estates
>
> 4. other previously developed, contaminated or derelict land not allocated for another use
>
> 5. redundant agricultural and forestry buildings and their curtilages
>
> Proposals on greenfield land will only be permitted if it can be demonstrated that there are no suitable locations identifiable from categories 1 to 5 above within the intended catchment area of waste arisings. Particular regard will be given to whether the nature of the proposed waste management activity requires an isolated location."

Submissions and Conclusions

47. As set out above, the claimant's ground 1 is the contention that the defendant failed to properly apply section 104 of the 2008 Act. As will be apparent from the history of both the decision-making and also the submissions in these proceedings, there is clearly a preliminary issue arising in relation to the question of whether or not section 104 and section 105 of the 2008 Act are mutually exclusive, or whether it is appropriate, as the ExA did, to apply those sections differentially where there are two freestanding and distinct projects within the scope of a single application for a DCO and the NPSs apply to one of those projects but not the other.

48. The claimant contends that, in principle, the defendant was correct in making his decision by applying section 104 of the 2008 Act to the application as a whole. The claimant advances this position on the basis of two principal lines of argument. The first is that the mutual exclusivity arises from the specific language of the statute. Both section 104 and section 105 of the 2008 Act refer to those sections applying "in relation to an <u>application</u> for an order granting development consent" (emphasis added). Thus, it is clear from the language of the legislation itself that where there is an application for which the NPS has effect it is to be decided within the section 104 framework.

49. Furthermore, the claimant submits that this language is to be contrasted with the language of section 14 of the 2008 Act which defines an NSIP in terms of being "a

project", consisting of one of the types of infrastructure identified within section 14(1). The selection of the word "application" in section 104 and 105 of the 2008 Act is clear and deliberate, and has the effect of attracting the section 104 decision-making framework to applications like the present where there is more than one free-standing development or proposal comprised within the same application, albeit that one of those projects or developments is not one which falls within the definition of an NSIP for which an NPS has effect.

50. The second line of argument pursued by the claimant places reliance upon the section 35 direction which was given in the present case. The claimant submits that when section 35 of the 2008 Act provides that the defendant "may give a direction for development to be treated as development for which development consent is required" this is in the first place a reference back to section 31 of the 2008 Act, which provides as follows:

> "31 When development consent is required
>
> Consent under this Act ("a development consent") is required for development to the extent that the development is or forms part of a nationally significant infrastructure project."

51. The claimant contends that when section 35(1) of the 2008 Act describes the effect of the direction as being that development subject to the direction is "to be treated as development for which development consent is required" it means what it says. In other words, the effect of the section 35 direction is to lift the development proposed into section 31, and thereafter to bring it within scope of section 104 of the 2008 Act, on the basis that it is to be treated as NSIP development. Thus, reading all of these provisions together, and observing the subtlety in the statutory language, where as here there are two projects falling within an application, and one of them falls within the definition of an NSIP, and the other does not but has been subject to a section 35 direction, then the application containing these two projects requires each of them to be determined applying the framework provided by section 104 of the 2008 Act.

52. Finally, the claimant contends that in effect the position for which the defendant argues reads words into section 104 of the 2008 Act, by treating it as if it included words to apply the provisions of section 104 to part only of an application.

53. As set out above, although the defendant disagreed with the ExA and approached his decision on the basis that sections 104 and 105 of the 2008 Act are mutually exclusive, the position which he now adopts is that the ExA was correct to apply section 104 and section 105 separately to the individual standalone proposals comprised within the application. The analysis presented in the defendant's submissions commences from the observation that the 2008 Act creates a specific and bespoke statutory framework for approving particular kinds of development within what was intended to be a streamlined process of determination. A key feature of this bespoke statutory framework is the NPS which, pursuant to the broadly drafted provisions of section 5 of the 2008 Act, is specified in advance and has a special status and a particular process to produce it including Parliamentary approval.

54. Against this background the defendant submits, firstly, that the starting point for addressing the question of whether section 104 applies is to examine whether an NPS

applies to the project which is being evaluated. In this case a clear policy choice was made in the designation of the NPS that it should only apply to projects fulfilling the statutory definition of an NSIP, and therefore that it cannot apply to the WKN proposal. Once that is understood, if section 104 of the 2008 Act were to be deployed to determine the WKN proposal this would have the effect, in practice, of expanding the application of the NPS to a scale of project for which it had never been intended. Such an approach would be quite inconsistent with the centrality of the NPS within the statutory framework devised by the 2008 Act. As noted above, the contents of an NPS are not open to question within the decision-making process, and that includes the thresholds adopted for the application of the NPS in the policy.

55. Furthermore, the defendant submits that the section 35 direction in the present case does not assist the claimant. When section 35 speaks of treating the proposal as an NSIP that does not and could not have the effect of altering the terms of the NPS policy framework and the choices which have been made in designating the scale of proposals to which it will apply: it cannot give rise to an assumption that the proposal is bigger than in fact it is. The reference to section 31 is also contended to be of no avail to the claimant. Sections 31 and 35 are in a different part of the 2008 Act, Part 4, to the part of the Act containing sections 104 and 105, namely Part 6, and the purpose of section 35 is simply to bring qualifying proposals for which a direction is granted within the 2008 Act's decision-making processes.

56. In short, the defendant submits that sections 104 and 105 of the 2008 Act are mutually exclusive on the basis that the language of section 104 precludes its application to a proposal such as WKN which does not fall within the scale of projects to which the NPS specifically applies. This is as a result of the clear intention to be derived from the structure of the 2008 Act which places the NPS at the heart of the statutory framework as well as ensuring that NPSs are only applied within their identified scope. The defendant submits that section 105(1) can, in the context of the intent of the statutory framework, be read more broadly as including "where" or "to the extent that" section 104 does not apply to the proposal and so as to be consonant with the statutory purpose.

57. In my view the ExA was correct in his approach to sections 104 and 105 of the 2008 Act in the context of the present proposals. Clearly there is no dispute, firstly, that it is possible to include more than one project or development within the same application for a DCO and, secondly, that the K3 Project was one for which the NPS had effect, and therefore to which section 104 applied. Whilst I can see the force in the submissions of the claimant in relation to the use of the word "application" in both sections 104 and 105, the use of this word needs to be understood in the context of the statutory framework as a whole.

58. To suggest that by incorporating a project in respect of which the NPS has no effect within an application for a separate free-standing project which does fall within the scope of an NPS it is possible effectively to enlarge the scope of the NPS so as to include a project to which it was not designed to apply would clearly run contrary to the overall statutory scheme. That overall statutory scheme places the NPS at the heart of the decision-making process, and prescribes specific procedures, including endorsement by Parliament, prior to its designation. The contents of the NPS cannot be questioned in the decision-making process: so much is made clear in sections such as section 106(1) which applies in the decision-making context, and which entitles the

defendant to disregard representations which "relate to the merits of policy set out in a national policy statement". Similar provisions are contained in section 87(3) respecting like representations to the ExA, and section 94(8) in relation to like representations made at hearings. It would be inconsistent with the centrality of the NPS within the statutory decision-making framework for its scope to be enlarged and its provisions bypassed by the manner in which an application has been formulated.

59. Whilst specific circumstances of the kind presented by the application in the present case may not have been directly foreseen by those framing the 2008 Act, it is clear that the overarching approach of the legislation is that decisions should be reached in relation to proposals for development in respect of which an NPS has effect deploying the framework within section 104 of the 2008 Act, whereas proposals for development within the statutory framework's decision-making process for which there is no applicable NPS having effect are to be decided pursuant to the framework provided by section 105 of the 2008 Act. Such an approach clearly reflects the language of section 104(1) which refers to an NPS having effect "in relation to development of the description to which the application relates". It is less consistent with a literal reading of section 105(1), but when that text is placed in the context of the purpose and structure of the legislation as a whole, it is clear that section 105(1) should be interpreted as applying to those discrete elements of an application which comprise proposals for development for which no NPS which has effect. I accept the submission of the defendant that section 105 of the 2008 Act should be interpreted as applying to free-standing parts of an application to the extent that "section 104 does not apply in relation to the application". Such an approach reflects the purpose and intent of the legislation without unduly disturbing the effect of the statutory language. Thus, the ExA was correct to take the approach which he did.

60. The question arises as to whether or not the section 35 direction which was made in relation to WKN has the effect of bringing it within the scope of the decision-making framework pursuant to section 104. In my view it does not. I am unable to accept the submission that the terms of section 35(1) have the effect of turning a project or development which does not fall within the definition of NSIPs provided within sections 14 and 15 of the 2008 Act into a project which has such a designation. The words "be treated as development for which development consent is required" simply have the effect of making the proposed development subject to the decision-making framework contained within the provisions of the 2008 Act. They do not change the understanding of the proposal as not being within the definition of an NSIP, any more than they change the physical nature of what is comprised within the development. More particularly, they cannot have the effect of altering the scope of an NPS which has been drafted specifically to apply only to those projects that are within the definition of an NSIP.

61. There are clear advantages of the 2008 Act incorporating a provision like section 35, both procedurally in terms of the economy of dealing with projects which are not NSIPs alongside those which are leading to more efficient decision-making, as well as enabling a project of national significance which does not fulfil the definition of an NSIP to take advantage of the DCO regime, for instance in the form of the exemptions from other consenting processes comprised within section 33 of the 2008 Act. It is pertinent to the understanding of the intention of section 35 that it appears in the same Part of the 2008 Act as section 31 and 33 which all refer to the requirement

for development consent, rather than that part of the Act containing sections 104 and 105 which deals with the processes of deciding applications.

62. The cross reference made by the claimant to section 31 of the 2008 Act does not assist. It is clear that the purpose of section 35 is not to make a project which is not and does not form part of an NSIP into an NSIP. Its purpose is more modest, namely to enable the defendant to bring within the scope of the 2008 decision-making framework projects which satisfy the requirements of section 35(2), and are of a particular type of infrastructure which either by themselves or when considered with other specified types of project are of national significance. They are then able to take advantage of the streamlined decision-making processes as well as the available exemptions from other consenting regimes.

63. In the light of these conclusions it is clear that the defendant clearly did misdirect himself when issuing his decision in relation to the WKN project in relation to the statutory framework for determining that part of the application which related to it. Section 104 did not apply to the WKN project, unlike the K3 project, and the defendant ought to have assessed the WKN project deploying the section 105 decision making framework. In the light of these conclusions, albeit contrary to the claimant's submissions on the preliminary issue, the clear outcome is that the defendant has reached a decision incorporating a misdirection and an error of law. The defendant, however, contends that the error of law is not material and that relief should be refused as a matter of discretion. These are matters which are returned to below, following consideration of the claimant's grounds.

64. To deal with the balance of ground 1, it is contended on behalf of the claimant that the defendant ought, in applying section 104, to have accorded primacy to the NPS, accepted that need had been demonstrated for the WKN and, to the extent necessary, have unpicked the conclusions of the ExA in order to reach a lawful decision. In effect, this ground is predicated on the basis that the defendant was right to apply the section 104 decision-making framework to the WKN project, but that he failed to faithfully apply that framework in practice. In reality, in the light of the conclusions in relation to the applicability of section 105 to the WKN project this ground no longer arises. The claimant's ground 2 is similarly predicated upon the WKN proposal needing to be evaluated against the decision-making framework in section 104 of the 2008 Act. For the reasons which have been explained that is not the case. There was no need for the presumption in favour of the proposal pursuant to section 104(3) to be applied, nor was the NPS the primary decision-making tool in the assessment of the application, against which the WKN proposal was required to be judged as a whole. Although within ground 2 the claimant complains that the defendant found a conflict with the waste hierarchy provisions of paragraph 2.5.70 (by adopting the ExA's conclusions in that regard) but failed to judge that conflict against the NPS taken as a whole, in the light of the conclusion that section 104 did not apply to the appraisal of the merits of the WKN proposal there is no substance in this criticism.

65. Turning to ground 3 the claimant's contentions in relation to the failure to give reasons relate, firstly, to the failure of the defendant, when purporting to consider the WKN proposal within the context of section 104, to properly analyse the weight to attach to the need established through the NPS for the electricity which it would generate and the benefit that would bring. Adoption of the ExA's conclusions, forged through the application of section 105 of the 2008 Act was inappropriate, and the

difference between the ExA and the defendant was not properly explained. Again, in the light of the conclusions reached as to the applicable decision-making framework these criticisms are to some extent moot. They are criticisms which do not arise since the defendant was wrong to have sought to reach his decision by solely applying the framework derived from section 104 of the 2008 Act.

66. Further criticisms of the reasons provided by the ExA, giving rise to errors on behalf of the defendant, relate to, firstly, what is said to be a muddling or conflation of the issues in relation to electricity generation and the waste hierarchy. The claimant contends that in the ExA's report, in particular for example at paragraphs 6.2.11 and following, the reasoning of the ExA conflates two separate issues, namely energy need on the one hand, and compliance with the waste hierarchy or the need for further waste facilities on the other. This muddling of the benefits arising from meeting the need for further sustainable energy generation, with the impact on the waste hierarchy of the proposal occurs again in paragraphs 4.18–4.20 of the defendant's decision to accept the conclusions of the ExA on these matters.

67. Having examined these paragraphs, and the ExA's report as a whole, I am not satisfied that there is any legitimate complaint in relation to the reasons that are provided by the ExA in connection with these issues. It is important, obviously, for the ExA's report to be read in its entirety. Further, both in paragraphs 6.2.13-6.2.17, 6.2.25–6.2.33 as well as in paragraphs 6.3.10-6.3.17, the conclusions of the ExA are clear in relation to the benefit to be recognised from the energy generated by the WKN proposal but also (and bearing in mind the differences in the increase in capacity between the K3 proposal and the WKN proposal) the impact of the WKN proposal upon the interests of the waste hierarchy. The reflection of these conclusions in the decision letter again clearly identifies the assessments in relation to electricity generation and impact on the waste hierarchy. The issues are not in my judgment muddled: it was necessary in terms of the applicable policy for the ExA and the defendant to form conclusions in relation to the benefits of energy generation as well as any impact on the waste hierarchy since both are material issues in relation to the operation of the proposed facility. Both the ExA and defendant undertook an analysis of these considerations and then brought them into their analysis of the planning balance. The conclusions arrived at in the decision-making process with respect to these issues are clearly spelt out. They are treated separately, as they should be and as the policy framework required, in the light of the fact that they are both individual elements of the overall planning appraisal as well as integrally related to the operation of the facility which is under consideration.

68. The second aspect of the reasoning with which the claimant takes issue is that pertaining to the dispute set out above in respect of waste arisings and the availability of fuel for the application proposals. It is contended on behalf of the claimant that there was a clear issue joined between itself and KCC in relation to the volumes of waste arising which fell to be considered when examining the availability of fuel for the proposal. It is said by the claimant that the ExA, and thereafter the defendant, provided no reasons which grappled with this difference in the figures, nor did the ExA or the defendant provide any understanding as to why the claimant's analysis of the waste arisings had been rejected.

69. I am unable to accept these criticisms. In my view the basis upon which the ExA reached his interconnecting conclusions about, firstly, the evidence in relation to

available waste as fuel, secondly, the conclusions to be drawn from this evidence as to the proposal's impact on the waste hierarchy and, therefore, thirdly, the relationship between the proposals and the policies of the EPR and NPS EN-3 at paragraph 2.5.70 are all clearly expressed. In respect of the competing positions as to volumes of waste, and the available capacity of additional waste fuel, paragraphs 4.10.122-4.10.132 of the ExA's report quoted above provide clearly articulated conclusions resolving the issues. The ExA explains why he prefers the KCC assessment, noting that the EPR inspector had accepted KCC's consultant's analysis as a sound evidence base for the revised plan. These paragraphs also explain the relationship between these conclusions and, alongside paragraphs 4.10.139-4.10.144, their impact in relation to the merits of the WKN project upon the interests of the waste hierarchy. Subsequent paragraphs within the ExA's analysis of the overall planning balance further reflect these conclusions and explain them. In my judgment this material is more than adequate to clearly explain the reasons for the ExAs conclusion that the KCC assessment was to be preferred to that of the claimant, as well as the further consequences for the assessment of the merits of the WKN project against the relevant planning policies.

70. Ground 4 is the contention that in the light of the difference between the approach of the ExA and that of the defendant, fairness required the defendant to return to the parties for submissions on the impact that this change of approach would have upon the decision-making process. In particular, the claimant contends that submissions would have been made on the primacy of the NPS within the section 104 decision-making framework, together with the establishment by the NPS of the need for the electricity which was being generated. Further submissions could have been made on matters covered by section 104(7) of the 2008 Act on how these issues should be weighed in the overall balance to determine the merits of the proposal.

71. In my judgment, the difficulty with this submission is that it is necessary for the claimant, in reliance upon the principles of procedural fairness set out in *Hopkins Developments Ltd*, to establish there has been any relevant or material prejudice as a result of the failure to reconsult. As set out above, there was no requirement pursuant to the 2010 Rules to revert to the parties in these circumstances. The reality is that all of the matters which the claimant contends would have been raised upon the matter being referred back to them are matters which were already before the defendant: the claimant had emphasised the importance of the benefits arising from electricity generation at the WKN proposal, and the importance of the policies contained in the NPS. In any event, these matters pertained to the application by the defendant of the section 104 decision-making framework which for the reasons already given was not the correct approach to reaching a decision in connection with the WKN proposal. I do not consider, therefore, that there is any substance in the claimant's ground 4.

<u>Relief</u>

72. The defendant contends that the claimant should be deprived of relief, in particular in relation to the quashing of the decision, either in so far as it relates to the WKN proposal, or in its entirety. In order to evaluate this submission, it is important to start with the error of law which has been identified. In this case the error of law is the application by the defendant of section 104 of the 2008 Act to both the K3 and WKN proposals whereas, in accordance with the findings set out above, the defendant should have applied section 105 of the 2008 Act to the WKN proposal. Since this is

an application for judicial review the framework for considering this submission is set out in section 31(2A) of the Senior Courts Act 1981, and amounts to the question of whether or not it was highly likely that the outcome would not have been substantially different.

73. The approach to this question has been the subject of consideration in a number of cases in recent years and it is important to observe that it sets a high threshold to be overcome before relief can be withheld. It is less strict than that which applies in statutory reviews which requires that the court be satisfied that the decision would have been the same (see *Simplex GE (Holdings) Limited v Secretary of State for the Environment* [2017] PTSR 1041), albeit as Coulson LJ observed in the recent case of *R (on the application of Hudson) v Royal Borough of Windsor and Maidenhead* [2021] EWCA Civ 592 at paragraph 80, the precise formulation of the test whether in the terms of the section 31(2A) test, or the alternative test derived from the *Simplex* case that the decision would inevitably have been the same, may not matter in practice, save in a very unusual case.

74. The court must be cautious about straying into assessing the merits of the application in evaluating this question, which is the reserve of the defendant as decision-maker. This point has been observed in several of the relevant authorities dealing with the discretion to withhold relief both under section 31(2A) and also the *Simplex* jurisdiction: see *SSCLG v South Gloucestershire Council* [2016] EWCA Civ 74 at paragraph 25 and *R(Plan B Earth) v Secretary of State for Transport* [2020] PTSR 1446 at paragraph 273 for instance. Obviously, the proper evaluation of the question posed by section 31(2A) is one which will vary from case to case and no single analysis will be capable of resolving all of the many scenarios which courts will have to address. In addressing the question in the present case I have found the following approach helpful.

75. As the *South Gloucestershire* case demonstrates, it is useful, firstly, to clearly identify the error of law infecting the decision, and secondly, those findings or elements of the decision-making process or of the decision itself which are untainted by illegality. This can then enable an analysis of the decision to be undertaken which properly tests the proposition that the decision would have been the same, or would not have been likely to be substantially different. The *South Gloucestershire* case is a helpful illustration of the necessary analysis: in that case the Inspector's error related to the absence of a five-year housing land supply, but Lindblom LJ was satisfied that so strong were the considerations in favour of the grant of permission that even had the Inspector taken into account, as he should have done, that the local planning authority could demonstrate a five-year housing supply, he would still have granted consent as he did in the decision under challenge: see paragraph 26 of the judgment in particular.

76. In considering these questions in relation to the present case it is important to observe, firstly, that the contentions of the claimant in relation to any error of law in the ExA's report have not been upheld. Secondly, in relation to the waste hierarchy and fuel availability, the Secretary of State adopted the ExA's conclusions. He also adopted the ExA's conclusions in relation to all of the other environmental and infrastructure considerations which were examined, and in paragraphs 4.18-4.20 accepted the overall conclusions reached by the ExA in relation to each of the individual proposals. The defendant noted at paragraph 4.6 his view that determining the whole application under section 104 of the 2008 Act did not have a material impact on the overall

outcome in relation to the case. This observation is further justified at paragraphs 6.4-6.6 in which the defendant explains that whilst taking a different approach to the ExA and, as a result of considering both projects under section 104 of the 2008 Act according "more weight" to the NPS, nevertheless his balancing of the issues did not result in a different conclusion to that which was reached by the ExA, namely, that the benefits of the WKN project were outweighed by its non-compliance with policies in NPS EN-1 and EN-3 related to the issues associated with the waste hierarchy and local waste management plan policies.

77. The effect of the defendant's conclusions set out above is that the defendant's assessment of the planning balance did not favour the grant of consent for the WKN project whether it was considered under section 104 of the 2008 Act (with the additional weight being afforded to the NPS in assessing the merits), or whether it was assessed under section 105 of the 2008 Act. It follows that on the basis of the defendant's assessment, the overall outcome of the application would have been the same even if he had adopted the decision-making framework contained within section 105 of the 2008 Act. That assessment is unsurprising because, as the defendant's reasons explain, even applying greater weight to the NPS as required by section 104 of the 2008 Act, and adopting a more favourable approach to the balance than that afforded by the ExA, the adverse impacts of the WKN proposal would still outweigh its benefits. It follows that the decision of the defendant would have been the same, and certainly the outcome would not have been substantially different, without commission of the error of law which has been identified in his decision, and therefore I have formed the view that the claimant is not entitled to relief by way of the quashing of the decision.

Conclusions

78. For the reasons set out above whilst I am satisfied that there was an error of law in the defendant's decision in relation to the application, in the very particular circumstances of this case I do not consider that the claimant is entitled to relief on the basis that the decision would have been the same, and certainly unlikely to have been substantially different, even if the error of law had not been committed by the defendant.