Neutral Citation Number: [2023] EWCA Civ 1517

Case No: CA-2023-001257

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT
Mr Justice Holgate
[2023] EWHC 1526 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 December 2023

Before:

SIR KEITH LINDBLOM
(Senior President of Tribunals)
LADY JUSTICE ANDREWS
and
LORD JUSTICE LEWIS

- -

Between:

THE KING
(on the application of
TOGETHER AGAINST SIZEWELL C LIMITED) **Appellant**

- and -

(1) SECRETARY OF STATE FOR ENERGY SECURITY AND NET ZERO

(2) SIZEWELL C LIMITED **Respondents**

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David Wolfe K.C., Ashley Bowes and Ruchi Parekh (instructed by **Leigh Day Solicitors**) for the **Appellant**
James Strachan K.C. and Rose Grogan (instructed by the **Government Legal Department**) for the **First Respondent**
Hereward Phillpot K.C. and Hugh Flanagan (instructed by **Herbert Smith Freehills**) for the **Second Respondent**

Hearing dates: 1 and 2 November 2023

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Approved Judgment

This judgment was handed down remotely at 11.45am on 20 December 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Sir Keith Lindblom (Senior President of Tribunals), Lady Justice Andrews and Lord Justice Lewis:

Introduction

1. The question at the heart of this appeal is whether the Secretary of State for Business, Energy and Industrial Strategy erred in law by failing to carry out an "appropriate assessment" of the effects on European sites of the permanent supply of potable water to a proposed nuclear power station, either as part of the same project or cumulatively as a separate but connected project, under regulation 63 of the Conservation of Habitats and Species Regulations 2017 (S.I. 2017 No.1012) ("the Habitats Regulations").

2. The appeal is against the order of Holgate J. dated 22 June 2023 refusing an application by the appellant, Together Against Sizewell C Limited ("TASC"), for permission to apply for judicial review of the Sizewell C (Nuclear Generating Station) Order 2022 ("the Order") for the construction, operation, maintenance and decommissioning of a third nuclear power station at Sizewell on the Suffolk coast, known as "Sizewell C". TASC is a special purpose company, created by members of the local community to oppose the development of the power station.

3. The Order was made by the Secretary of State for Business, Energy and Industrial Strategy under section 114 of the Planning Act 2008 ("the 2008 Act") on 20 July 2022. The relevant statutory functions have since been transferred to the Secretary of State for Energy Security and Net Zero, who has therefore been the defendant in these proceedings and is now the first respondent in the appeal. We shall refer to both ministers simply as "the Secretary of State". The second respondent, Sizewell C Limited ("Sizewell C Ltd."), formerly NNB Generation Company (SZC) Limited, is the intending developer.

4. TASC issued the claim for judicial review of the Order on 30 August 2022. The matter first came before Kerr J. on the papers. He concluded that none of the grounds was arguable with a real prospect of success, and refused permission to proceed on 18 October 2022. TASC renewed its application, which became the subject of a "rolled-up" oral hearing before Holgate J. on 22 and 23 March 2023. On 22 June 2023, having reached the same conclusions as Kerr J., for reasons set out in a detailed reserved judgment, Holgate J. made an order refusing permission to proceed with the claim for judicial review on all seven of the grounds that were then pursued.

5. TASC sought permission to appeal against the order of Holgate J. on five of those grounds. By an order dated 8 September 2023, Coulson L.J. granted permission on two of them, which correspond with grounds 1 and 2 of the claim for judicial review. Both grounds concern the "appropriate assessment" of the means by which a permanent supply of potable water to the proposed power station will be provided. As the question of permission was inextricably linked to the substantive merits, Coulson L.J. directed that the proceedings in this court would be a "rolled-up" hearing, which would in effect consider whether the judge was wrong to refuse permission to apply for judicial review and, if so, immediately consider detailed submissions on the judicial review claim itself – the claim being retained in the Court of Appeal rather than remitted to the High Court for hearing. At the hearing of the appeal, we allowed

all parties to make their full detailed submissions on both permission to apply for judicial review and the substantive claim.

6. Both the Secretary of State and Sizewell C Ltd. contend that Holgate J. was right to hold that neither of the grounds of appeal is properly arguable. They have also filed respondent's notices under CPR r.52.13(2)(b), inviting the court to uphold the order of Holgate J. for additional reasons.

The main issues in the appeal

7. The appeal raises two main issues:

   (1) Was the Secretary of State wrong in law to treat the permanent supply of potable water, which was necessary for the operation of the power station, as not being part of the same project for the purposes of carrying out an appropriate assessment under the Habitats Regulations (ground 1)?

   (2) If the Secretary of State was right to regard the permanent water supply as a separate project, did he err in failing to carry out, under the Habitats Regulations, a cumulative assessment of its effects together with those of the power station itself (ground 2)?

8. For the reasons set out in this judgment, we agree with Holgate J.'s conclusions on both issues.

The Habitats Regulations

9. Regulation 63(1) of the Habitats Regulations provides:

> "(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which –
>
> (a) is likely to have a significant effect on a European site … (either alone or in combination with other plans or projects), and
>
> (b) is not directly connected with or necessary to the management of that site,
>
> must make an appropriate assessment of the implications of the plan or project for that site in view of that site's conservation objectives."

10. Regulation 63(5) states:

> "(5) In the light of the conclusions of the assessment, and subject to regulation 64, the competent authority may agree to the plan or project only after having

> ascertained that it will not adversely affect the integrity of the European site … ."

11. Regulation 64(1) provides:

> "(1) If the competent authority is satisfied that, there being no alternative solutions, the plan or project must be carried out for imperative reasons of overriding public interest ["IROPI"] … it may agree to the plan or project notwithstanding a negative assessment of the implications for the European site … ."

12. The "competent authority" in this case is the Secretary of State. It is common ground that a "national policy statement" designated under the 2008 Act is a "plan", and that a "nationally significant infrastructure project" for which development consent is applied for, also under the 2008 Act, is a "project" for the purposes of regulation 63(1) of the Habitats Regulations. What is in dispute in the present case is the ambit of the "project" that had to be assessed under those Regulations. There is no definition of the term "project" in the Habitats Regulations.

13. It is also common ground that the Sizewell C development is "likely to have a significant effect" on European sites, and therefore that an "appropriate assessment" was required to be carried out under regulation 63(1). An adverse effect on the integrity of two sites – the Minsmere-Walberswick SPA and the Minsmere-Walberswick Ramsar Site – could not be ruled out, in view of the possible impacts on the habitat of the Marsh Harrier (*Circus aeruginosus*), a species of marshland bird, by noise and visual disturbance from the construction of the proposed development.

The 2008 Act

14. Section 103 of the 2008 Act establishes the role of the Secretary of State to decide an application for an order granting development consent for a "nationally significant infrastructure project". The proposed Sizewell C development is a nationally significant infrastructure project for these purposes.

15. The relevant statutory framework for obtaining development consent for nationally significant infrastructure projects was described by Lord Hodge and Lord Sales in *R. (on the application of Friends of the Earth Ltd.) v Secretary of State for Transport* [2020] UKSC 52, [2021] PTSR 190, at paragraphs 19 to 38. It includes those provisions which govern the designation of a national policy statement under section 5 of the 2008 Act, following a process of consultation and an appraisal of sustainability and strategic environmental assessment ("SEA") under the Environmental Assessment of Plans and Programmes Regulations 2004 (SI/2004/1633).

16. Under section 104, the Secretary of State must have regard to any relevant national policy statement designated under section 5(1) (section 104(2)), and must decide the

application in accordance with it, subject to specified exceptions (section 104(3)). Under section 106(1)(b), he may disregard representations relating to the merits of policy set out in a national policy statement.

17. There are two relevant national policy statements in this case: EN-1, which is the Overarching National Policy Statement for Energy ("EN-1"), and EN-6, which is the National Policy Statement for Nuclear Power Generation ("EN-6"). Both were "designated" in July 2011. EN-1 sets out the approach to deciding applications for development consent (in paragraphs 3.1.1 to 3.1.4). Paragraph 3.5.1 of EN-1 acknowledges that there is "an urgent need for new electricity generation plant, including new nuclear power" to enable the United Kingdom to meet its energy and climate change objectives. EN-6 identifies the site at Sizewell, and seven other sites, as potentially suitable for a new nuclear power station.

18. Section 114 of the 2008 Act provides that the Secretary of State must either make an order granting development consent, or refuse development consent. Under section 61, he must decide whether a "Panel" (referred to in this judgment as "the examining authority") or a single person will be appointed by him to "handle" the application. Where a Panel has been appointed, section 74 requires it to undertake an examination of the application and produce a report to the Secretary of State on its findings and recommendations.

The Water Industry Act 1991

19. Section 37(1) of the Water Industry Act 1991 imposes a general duty on a water undertaker to develop and maintain an efficient and economical system of water supply within its area. There is a concomitant duty to ensure that the necessary arrangements have been made for providing supplies of water to premises in that area and to persons who demand them, and to carry out all necessary maintenance, improvements and extensions to the water undertaker's water mains and other pipes to enable it to fulfil its statutory duties.

20. Under section 37A, a water undertaker is required to plan to meet the demand for water within its area by means of a water resources management plan. Section 37A(6)(c) establishes that water undertakers must publish water resources management plans "not later than the end of the period of five years beginning with the date when the plan … was last published".

21. Section 55 requires the water undertaker to take steps to provide a water supply when requested to do so by the owner or occupier of premises in the area for non-domestic purposes, subject to certain conditions. The terms and conditions of such supply are to be determined by agreement between the parties, or in default by OFWAT, according to what appears to be reasonable (section 56). Section 55(3)(b) contains a proviso that the water undertaker shall not be required to take steps to provide a new supply to any premises under section 55 if this would put at risk its ability to meet any of its existing or probable future obligations to supply water for domestic or other purposes.

22. It is not in dispute that a water resources management plan is a "plan" for the purposes of regulation 63(1) of the Habitats Regulations. Any such plan is subject to

its own independent environmental assessments, including under the Habitats Regulations.

23. The "water undertaker" for the purposes of sections 37A and 55 of the Water Industry Act 1991 is Northumbrian Water Limited ("NWL"). Under section 37A, NWL is preparing its Water Resources Management Plan 2024 ("WRMP24") to set its strategy for meeting water demand for Essex and Suffolk in the period from 2025 to 2050.

Background facts

24. Sizewell C Ltd. made its application for a development consent order on 27 May 2020. It was unable at that time to identify a permanent supply of potable water for the proposed power station, but maintained that this would become clear when a water resources management plan had been prepared by NWL. It was envisaged that NWL would supply the potable water through its local subsidiary, Essex & Suffolk Water.

25. An examination was held between 14 April and 14 October 2021. In July 2021 Sizewell C Ltd. provided an initial "Water Supply Strategy Report" in which it stated that the supply of potable water for the construction and operation of Sizewell C would come from NWL's existing supply headroom. However, NWL told the examining authority that they would not be able to meet the demand from that headroom, and that additional infrastructure would likely take until September 2026 (at the earliest) to deliver. In response, Sizewell C Ltd. proposed the construction of a temporary desalination plant to supply potable water during the early construction phase.

26. Water supply was discussed at the examining authority's "Issue Specific Hearing 11" on 14 September 2021. NWL explained that the required review of its ongoing modelling work to understand whether there was a sustainable source of water supply was unlikely to be complete by the close of the examination. Natural England ("NE") said that it was unable to advise whether adverse effects on designated sites could be ruled out as a result of the necessary water infrastructure. In response to a question by the examining authority, the Office for Nuclear Regulation stated that Sizewell C could not fulfil its Licence Conditions, and thus could not begin operation, without a permanent potable water supply.

27. On 25 February 2022 the examining authority submitted its "Report on Findings and Conclusions and Recommendation" to the Secretary of State. The report stated (in paragraphs 5.11.286 and 5.11.287):

> "5.11.286 … In the ExA's view, the Applicant's stance … does not address the need to fully consider the cumulative assessment of the environmental effects of the proposed water supply solution that is fundamental to the operation of the Proposed Development.
>
> 5.11.287 The ExA agrees with NE, that it is unable to undertake a meaningful assessment of potential effects arising from the chosen solution for operational supply in combination with the Proposed Development from the evidence

> presented to the Examination. Accordingly, the ExA considers it has not been provided with sufficient information or certainty on the issue of permanent water supply."

28. In its conclusions on water supply it observed that that "there was still no certainty as to where the permanent water supply would be sourced from and how the necessary water would be transferred to the Proposed Development" (paragraph 5.11.290). It stated (in paragraph 5.11.292):

> "5.11.292 In these circumstances we have to consider the possibility that a sustainable water supply may not be able to be identified. That being the case it is clear from what the ONR have set out there remains a possibility that the Proposed Development may not be able to operate."

and (in paragraphs 5.11.294 and 5.11.295):

> "5.11.294 No cumulative effects assessment has been provided in respect of the other potential solutions outlined by the Applicant and NWL. The Applicant's position is that any water supply would be delivered under a separate statutory regime and as such any environmental assessment required would be undertaken as part of that process. The concerns expressed by NE about the implications for the HRA are discussed in more detail in Chapter 6 of this report. The ExA accepts the position reached by NE that the water supply is a fundamental component of the operational Proposed Development.
>
> 5.11.295 Taking into account that the Applicant has not identified a permanent water supply solution at the close of the Examination, we are not able to recommend that the DCO should be granted without greater clarity about a sustainable water supply solution and any consequential environmental effects."

29. It therefore suggested that the Secretary of State might consult Sizewell C Ltd., NWL, the Environment Agency and other interested parties "to identify whether there has been progress on the identification and assessment of effects of a sustainable permanent water supply for the Proposed Development, prior to making a decision on the application for the DCO" (paragraph 5.11.296).

30. In its conclusions on the planning balance and the case for development consent, the examining authority said (in paragraphs 7.5.7 and 7.5.8):

> "7.5.7 … For the reasons we have explained in section 5.11 of Chapter 5 of this Report, the ExA prefers the position of NE to that of the Applicant on this matter. We consider that even if the Proposed Development and the water supply are considered to be two separate projects, the cumulative effects associated with it should be assessed at this stage.

> 7.5.8 … [For] the reasons we have explained, we consider that greater clarity is required at this stage in relation to the provision of a permanent sustainable water supply solution and the consequential cumulative environmental effects. Therefore, we are unable to recommend that this application be approved without additional information and reassurance on the provision of a permanent water supply. The ExA regards this as an important matter of such magnitude that it should not be left unresolved to a future date."

31. On the "Habitats Regulations Assessment", under the heading "Likely Significant Effects", it said this (in paragraph 7.6.3):

> "7.6.3 In view of the uncertainty around the permanent water supply solution, the ExA cannot preclude the potential identification of LSE on European sites and qualifying features during construction and operation of the Proposed Development, either alone (if considering the solution such as the preferred pipeline/transfer main as part of the project) or in combination with solutions such as the preferred pipeline/transfer main."

32. In section 10 of its report, where it summarised its findings and conclusions, the examining authority said (in paragraph 10.2.19):

> "10.2.19 … With the exception of the permanent sustainable water supply issue, the ExA finds that the potential benefits of the Proposed Development including the contribution that the Proposed Development would make to satisfying the urgent need for low-carbon electricity generating infrastructure of this type would strongly outweigh the potential adverse impacts. However, the ExA concludes in relation to the water supply strategy that in the light of the issues which remained unresolved at the close of the Examination, we cannot recommend that the application as it stands should be granted development consent."

33. It recommended (in paragraph 10.3.1) that "unless the outstanding water supply strategy can be resolved and sufficient information provided to enable the Secretary of State carry out his obligations under the Habitats Regulations, the case for an Order granting development consent for the application is not made out".

34. In a letter dated 18 March 2022 the Secretary of State requested further information from Sizewell C Ltd., the Environment Agency, NE and the Office for Nuclear Regulation. Referring to a letter from NWL's solicitor dated 23 February 2022, which said that NWL was unable to meet the required demand for water supply from existing resources, he asked Sizewell C Ltd. to explain what progress was being made to securing a permanent water supply. He said (in paragraphs 3.3 and 3.4 of his letter):

> "3.3 The Applicant should confirm if it would be possible for the proposed temporary desalination plant to permanently meet the full water supply demand

> for the lifetime of the proposed Development should no alternative water supply solution be identified. The response should include any further information that will assist the Secretary of State in understanding the water supply strategy for the lifetime of the proposed Development.
>
> 3.4 The information provided should be sufficiently detailed to enable the Secretary of State to understand and reach a reasoned conclusion on the cumulative environmental effects, including for Habitats Regulations purposes, of the different permanent water supply solutions."

35. In its letter in response, dated 8 April 2022, Sizewell C Ltd. relied on NWL's duty under the Water Industry Act 1991 to identify, through WRMP24, new water resources to meet the forecast demand for its region, including the proposed power station. It said that "the Secretary of State can be reassured … that good progress is being made to identify alternative supplies that are sustainable through NWL's [WRMP24] process" (paragraph 2.1.2). It continued (in paragraph 2.1.8):

> "2.1.8 NWL is obliged to plan for and supply the water required for the long-term operation of [the nuclear power station] and [NWL has provided] helpful confirmation that the necessary process is in place. In particular, the supply requirements for Sizewell C are included within the demand forecast on which NWL's [WRMP24] will be based."

36. Work on the draft of WRMP24 was "well advanced". WRMP24 would "be subject to a fully integrated environmental appraisal, including Strategic Environmental Assessment (SEA) and where necessary, Habitats Regulations Assessment" (paragraph 2.1.9). And "options for supplementing the region's water supply [were] being actively considered as part of the [WRMP24] process" (paragraph 2.1.10). It was "for that process to identify and determine the environmental acceptability of those options and the Secretary of State may make a decision on the DCO confident that the duty will be effectively satisfied" (paragraph 2.1.11).

37. Sizewell C Ltd. concluded (in paragraphs 2.1.15 and 2.1.16):

> "2.1.15 This background should provide more than sufficient comfort both for [Sizewell], but also for the Secretary of State, that NWL will be in accordance with the statutory scheme plan to deliver the required infrastructure (so far as it is possible) to provide a long-term supply to [the nuclear power station].
>
> 2.1.16 It is because the long-term planning of water supply is the subject of separate statutory provisions and processes that the identification of the source of Sizewell's long-term supply cannot be known at this stage. Indeed, the source may well change during the lifetime of the power station as the undertaker develops and manages its water resources in response to changing demand and other considerations. For the same reasons, and because on the evidence the source of supply is unlikely to be a constraint to the construction

> and operation of the new power station, the source does not need to be known for the purposes of the DCO."

38. In answer to the question about the possibility of using the proposed desalination plant to provide a permanent potable water supply, Sizewell C Ltd. said (in paragraphs 2.1.20, 2.2.1 and 2.2.3):

> "2.1.20 If it were to become apparent that there was any risk of NWL being unable to provide the supply, there are a range of actions open to [Sizewell C Ltd.].
>
> …
>
> 2.2.1 There is no "in principle" difficulty with the supply of water from desalination being made permanent.
>
> …
>
> 2.2.3 In the unlikely event that [NWL] is unable to meet Sizewell C's water supply demand, it would be possible for [Sizewell C Ltd.] to permanently meet the full water supply demand for the lifetime of the proposed Development using a desalination plant."

39. On 25 April 2022 the Secretary of State invited comments from interested parties on those responses. In its letter in reply dated 23 May 2022, TASC raised objections to a permanent desalination plant but offered no comments on the prospect of WRMP24 identifying a means of supplying water to the power station. It maintained its position that the lack of a guaranteed permanent water supply meant that not all significant environmental effects were being assessed at the development consent stage.

The Secretary of State's decision letter

40. In his decision letter, dated 20 July 2022, the Secretary of State set out his conclusions on this topic and the reasons for them under the heading "The Secretary of State's Consideration of Water Supply". Addressing the specific question of long-term water supply to the power station he stated (in paragraph 4.44):

> "4.44… in addition to demand management options, NWL is appraising other options that include (but are not limited to): an import from Anglian Water; nitrate removal at Barsham [Water Treatment Works]; effluent reuse and desalination; and longer term (post-2035) winter storage reservoirs. The Secretary of State considers that these represent potentially viable solutions for the water supply strategy as would the fall back of the Applicant's own permanent desalination plant if those solutions cannot be used. The Secretary of State is therefore content that if consent is granted for the development,

> there is a reasonable level of certainty that a permanent water supply solution can be found before the first reactor is commissioned."

41. He went on to say (in paragraph 4.49):

> "4.49 The Secretary of State considers that the Proposed Development and the WRMP24 process for the sourcing of water are separate projects. This is evident from their separate ownership and because they are subject to distinct and asynchronous determination processes. The Secretary of State also considers that these projects are stand-alone, given that NWL has a duty to undertake its WRMP24 regardless of whether or not the Proposed Development proceeds."

42. The Secretary of State expressly disagreed with the examining authority's view that even if the water supply was considered to be a separate project the cumulative effects associated with it should be assessed before development consent was granted for the nuclear power station. On this question he said (in paragraph 4.50):

> "4.50 The Secretary of State has considered the ExA's view [ER 7.5.7] that, even if the Proposed Development and the water supply are considered to be two separate projects, the cumulative effects associated with it should be assessed at this stage. As set out below, the Secretary of State has considered the cumulative assessment of the proposed pipeline from the North/Central WRZ and agrees with the Applicant's assessment that the pipeline is not likely to give rise to new or significant effects to those already identified in the ES. In addition, the Secretary of State agrees with the Applicant that the detail of the potential environmental impacts (including cumulative impacts) associated with the proposed permanent water supply to be provided by NWL will be sufficiently assessed and that the WRMP24 process is the appropriate means of undertaking that assessment. The Secretary of State agrees that further detailed assessment cannot be undertaken by the Applicant at this stage as the preferred option for long-term supply is not yet known given the current status of the separate WRMP24 process, which falls to be considered as a separate plan or project. The Secretary of State considers that it is because the long-term planning of water supply is subject to separate statutory provisions and processes … the identification of the source of the Proposed Development's long-term water supply cannot be known by the Applicant at this stage."

43. The Secretary of State noted (in paragraph 4.51) that Sizewell C Ltd.'s "original and preferred water supply connection was a direct link from Barsham" and that information had been supplied about the cumulative effects of this option. He continued (in paragraph 4.52):

> "4.52 The Secretary of State is satisfied that, based on current knowledge, there are no additional cumulative impacts if the Barsham pipeline were to be

pursued. The Secretary of State has considered the information provided by the Applicant on cumulative effects and does not agree with the ExA's criticisms and considers that there is sufficient information on which he can base his conclusion."

44. He reached the following further conclusions (in paragraphs 4.55 to 4.60):

"4.55 … While noting that the ultimate source of supply has yet to be identified by NWL, the Secretary of State considers that the information provided demonstrates sufficiently, in principle, the viability of a mains connection pipeline to the Proposed Development if some or all of the supply were able to come from that location.

4.56 The Secretary of State is satisfied that if NWL, through the regulatory processes associated with the WRMP24, put forwards a solution to the supply of potable water supply (sic) which requires a change to the pipeline connection to the Proposed Development (once it has established where it will source the water for the Proposed Development from) any such solution will be subject to its own environmental assessments, including those under the [Habitats Regulations Assessment].

4.57 The Secretary of State notes that any such pipeline or connection will be applied for separately to the proposed development once there is certainty around its route and specification.

4.58 … [The] Secretary of State does not have detailed information as to the route or specification of the pipeline that would convey water to the Proposed Development given that it is subject to the outcome of the WRMP24 process which has not yet been completed. However, the Secretary of State considers that he has sufficient information for the purposes of taking a decision on the Proposed Development to conclude that there is the potential for a viable connection to be provided in principle. The Secretary of State considers that if the pipeline connects to a supply at Barsham it is not likely to give rise to significant environmental effects additional to those already identified in the Environmental Statement, but this will also fall to be re-examined and be subject to assessment once any such pipeline connection is finalised. If a different solution is required, then any such different solution will need to be the subject of its own assessment in due course.

4.59 The Secretary of State notes that … it is not possible for the Applicant to provide more specific details regarding the route or specification of the pipeline, or other connection, that will provide the Proposed Development with a connection to the water main or water supply at this stage, and notes that such a pipeline or alternative connection does not form part of the Application. This is due to the fact that the specific details of the route remain unknown until NWL identifies the source of the water that the pipeline will connect the Proposed Development to. The Secretary of State considers that such a pipeline or alternative connection cannot be subject to more detailed assessment as part of this Application given it is subject to WRMP24 … . The Secretary of State

> agrees that in light of the present state of knowledge, it is not possible for the Applicant to conduct any meaningful assessment of any different solution to emerge from the WRMP24 process but that any such different solution will necessarily be subject to its own assessment before it can proceed.
>
> 4.60 … [A] decision-maker should work on the assumption that relevant environmental regulatory regimes, including the abstraction licencing regime regulating activities that take water from the water environment, will be properly applied and enforced by the relevant regulator, and that a decision-maker should not seek to duplicate these regimes… The Secretary of State notes… that it is not always possible for all aspects of a proposal to be settled in precise detail. The fact that there is a lack of detailed information available regarding the source of a permanent water supply via NWL means that it is not possible for the Applicant to have assessed the effect, including the cumulative effects of all of the potential means of conveying water to the Proposed Development. The [water resources management plan] process is conducted by the water company and is not something that the Applicant can dictate. If (and only if) the [water resources management plan] process fails to provide a solution, the Applicant will have to consider its own permanent desalination plant."

45. While acknowledging that a permanent desalination plant was not Sizewell C Ltd.'s preferred means of supplying water to the power station, the Secretary of State also dealt with the concerns raised about this option (in paragraphs 4.61 and 4.62):

> "4.61 The Secretary of State notes the concerns raised by IPs regarding the prospect of a permanent desalination plant. The Secretary of State agrees with the Applicant that further detailed assessment of the impacts associated with a permanent desalination plant would be required if the Applicant were ultimately to pursue this option as part of its water supply strategy which is not the current intention. *The Secretary of State has not requested further detailed assessment from the Applicant of this option given that it does not form part of the Proposed Development and the Applicant's position is that a bespoke permanent desalination plant for the Proposed Development is unlikely to be required.* The Secretary of State notes the Applicant's position that a permanent desalination plant is not likely to generate any materially new or materially different significant environmental effects on the marine environment … and on the terrestrial environment … . The Secretary of State has also considered the concerns raised by IPs regarding the fact that the Applicant had previously discounted desalination from its water supply options. The Secretary of State notes that the revision 1.0 of the Applicant's Water Supply Strategy produced in May 2020 noted that benefits of desalination include potentially short lead times with equipment available for hire, and that it could be useful for temporary top-ups or in times of drought. The limitations of desalination were listed as 'desalinated water being aggressive in pipe network and may require remineralisation'.
>
> 4.62 The Secretary of State acknowledges … that the Applicant's conclusion in January 2021, in Appendix 2.2.D Water Supply Strategy of the ES Addendum

> Volume 3 Chapter 2, was to discount the installation of a modular desalination plant on the MDS and the abstraction of seawater for treatment and notes that the Applicant also stated in the same document that Essex and Suffolk Water had 'identified means to provide a viable supply of potable water to Sizewell C' with this option referred to as 'transfer of surplus potable water via a new pipeline from Barsham'. This reflected the Applicant's position that a new mains pipeline is preferable to a permanent desalination plant." (emphasis added)

46. Amplifying what he had already said on the means of supplying water to the power station, he then said:

> "4.63 … The Secretary of State considers that if, contrary to expectation, the Applicant were to seek to provide water from a permanent desalination plant, that would require its own consent and would be subject to further detailed assessment at that stage before it could proceed. Accordingly, for essentially the same reasons as identified above in respect of the other potential solutions to the supply water strategy (sic), the Secretary of State does not consider it necessary for the effects of any such solution to be assessed in more detail as a permanent desalination plant does not form part of the Proposed Development and the Applicant is not relying on it as an integral part of the Proposed Development."

47. Turning to the Habitats Regulations, the Secretary of State said (in paragraphs 4.65 and 4.66):

> "4.65 In relation to the Habitats Regulations, the Secretary of State does not agree with Natural England that the source of any permanent water supply is, in itself, integral to the application. There will need to be a permanent water supply solution and the Secretary of State is satisfied that such a solution can be found before the first reactor is commissioned. However, the Secretary of State does not consider that the source of that supply is an integral part of this application. There is no current certainty as to the final source of the permanent water supply, which does not need to be in place until the early 2030s. The Applicant has carried out a cumulative assessment of the potential pipeline route from Barsham/the North/Central WRZ which identifies that this will result in no new or different significant cumulative effects. However, it is not currently known whether this or some other means of connecting the development to the water supply network will be required and this is something that will only become known through the [Water Industry National Environment Programme] process. The Secretary of State agrees with the position of the Applicant that an assessment of the Habitats Regulations implications of the proposed permanent water supply solution will be undertaken by NWL. The Secretary of State does not agree with NE that any such assessment is likely to miss or underplay any effects of any kind, including any cumulative or in-combination effects.

> 4.66 In the unlikely event that NWL can find no solution, then the Applicant has confirmed that it would seek to take forward its own solution of the construction of a permanent desalination plant. As already noted, this in itself would require a further application, either to amend the DCO or for another form of planning consent and such an application would similarly trigger the requirement for the necessary environmental assessments including any required under the Habitats Regulations. Such assessment would consider the proposed permanent water supply solution in combination with the Proposed Development and address any cumulative effects."

48. In his "Overall Conclusion on Water Supply" he said (in paragraphs 4.67 to 4.69):

> "4.67 … The Secretary of State is… satisfied that a long-term water supply is viable and that any proposed water supply solution to be supplied by NWL will be properly assessed under the WRMP24 process and/or other relevant regulatory regimes and considers that no further information is required regarding the proposed water supply solution for a decision to be taken on the Application.
>
> 4.68 The Secretary of State therefore disagrees with the ExA's conclusions on this matter and considers that the uncertainty over the permanent water supply strategy is not a barrier to granting consent to the Proposed Development.
>
> 4.69 The Secretary of State considers that the matter of the water supply does not weigh for or against the Order being made, and attributes this matter neutral weight in the overall planning balance."

49. Having satisfied himself that there was no impediment to his doing so, and in disagreement with the examining authority's recommendation, the Secretary of State concluded that development consent for the power station should be granted, and he duly made the Order (paragraph 7.15, under the heading "The Secretary of State's Consideration of the Planning Balance").

The judgment of Holgate J.

50. Holgate J. set out the factual and legal background and summarised the grounds of challenge to the Order before addressing each of those grounds in turn. On the first ground of the claim, he said (at paragraph 70) that "[the] question of what is the project in any particular case is a matter of judgment for the decision-maker, here the Secretary of State", and "[that] judgment may only be challenged in this court on *Wednesbury* principles". He cited a number of authorities for that proposition, including *Bowen-West v Secretary of State for Communities and Local Government* (2012) Env. L.R. 22 and the recent decision of this court in *R. (on the application of Ashchurch Parish Council) v Tewksbury Borough Council* [2023] PTSR 1377. The issue in this case was "whether [the Secretary of State] took into account any

consideration which was legally irrelevant and, if not, whether his judgment was otherwise irrational".

51. The judge first considered (at paragraph 72) the acknowledgment in *R. (on the application of Larkfleet Limited) v South Kesteven District Council* [2016] Env. L.R. 4, that the mere fact of two sets of proposed works having a cumulative effect on the environment did not make them a single project, although their cumulative effects might still need to be assessed. In that case the court had also warned that a local planning authority should be "astute to ensure that a developer has not sliced up what is in reality one project in order to try to make it easier to obtain planning permission for the first part of the project and thereby get a foot in the door in relation to the remainder" – a process referred to as "salami-slicing". However, Holgate J. concluded (at paragraph 77) that this was not such a case.

52. Holgate J. referred (in paragraph 73 of his judgment) to the list of factors adumbrated by Lang J. in her second judgment in *R. (on the application of Wingfield) v Canterbury County Council* [2019] EWHC 1975 (Admin) (at paragraph 64) which may be taken into account in determining the extent of a "project". He noted that Lang J. had made it clear that those factors were not exhaustive, and that the weight to be given to them will depend on the circumstances of each case and is a matter for the decision maker. He pointed out (at paragraph 74) that one of those factors, "functional interdependence", would normally mean that each part of the development is dependent on the other.

53. He referred (at paragraph 77) to the fact that it had been initially assumed or believed that NWL would meet its obligations under the Water Industry Act 1991 by providing a permanent water supply at Barsham and a transfer main to Saxmundham. The provision of that infrastructure by NWL was therefore not included in Sizewell C Ltd.'s application for development consent. It was only later that the present uncertainty emerged about the form that the long term supply of potable water would take. Sizewell C Ltd. was not "keeping its options open" by refusing to commit to a permanent desalination plant. It had "made it plain that it wishes to rely upon the solution that NWL says it will be able to deliver through the WRMP24 process and not upon permanent desalination on-site". But the Secretary of State's decision "[recognised] that in the unlikely event of NWL being unable to provide a solution, [Sizewell C Ltd.] would seek to provide a desalination plant (DL 4.66)" .

54. Holgate J. rejected TASC's argument that the Secretary of State had taken into account immaterial considerations, which he summarised (at paragraph 78) – an argument it had sought to base on the judgment of Andrews L.J. in *Ashchurch*. In this case, unlike *Ashchurch*, the Secretary of State had expressly considered whether a particular matter (here, the provision of a permanent water supply) formed an integral part of the Sizewell C development and had concluded it did not (paragraph 86). He was entitled to take into account the fact that the permanent water supply was not part of the application for development consent and "would be dealt with under a subsequent, separate process and … subject to an integrated environmental assessment". There was "no basis upon which [his] evaluative judgment can be said to be irrational" (paragraph 90).

55. In the judge's view TASC's argument had much wider implications. Its consequence "would be that where a new supply has yet to be identified by the relevant utility

company, decisions on those development projects would have to be delayed until the company is able to define and decide upon a proposal". That approach "would lead to sclerosis in the planning system which it is the objective of the legislation and case law to avoid" (paragraph 91).

56. As for the complaint that a permanent desalination plant was not treated as part of the Sizewell C project, Holgate J. said there was "no obligation to assess a hypothetical scheme (*Preston New Road Action Group v Secretary of State for Communities and Local Government* [2018] Env. L.R. 18] at [75])". Sizewell C Ltd. considered a permanent desalination plant was unlikely to be necessary and was "not currently proposing that option". The Secretary of State's conclusion that such a plant was not an integral part of the Sizewell C project "cannot be faulted" (paragraph 92).

57. On the second ground, Holgate J. said it was "well-established that a decision-maker may rationally reach the conclusion that the consideration of cumulative impacts from a subsequent development which is inchoate may be deferred to a later consent stage" (paragraph 97). There was no merit in the argument that deferring the consideration of cumulative impacts to a subsequent consent stage would cause the application of the IROPI test to be "distorted, biased or watered down in some way" (paragraph 102). Here the "cumulative impact [would] have to be assessed properly in accordance with the legislation without any bias or distortion". The "benefits" of the power station "could not be taken into account in a future IROPI assessment without also taking into account the disbenefits" (paragraph 103). A "section 55 agreement" was expected to be signed in early 2024, after the WRMP24 process, in which "the integrated environment assessment will have been carried out" (paragraph 104).

Did the Secretary of State err in failing to undertake an "appropriate assessment" of the effects of the "project" on European sites, including the permanent supply of potable water (ground 1)?

58. Mr David Wolfe K.C., for TASC, accepted in the course of argument that we are not concerned here with a case of "salami-slicing" in the proper sense of that expression in this legal context. In its true sense in the context of environmental impact assessment and Habitats Regulations assessment, the concept of "salami-slicing", or "project-splitting", involves the deliberate dividing of a single project into individual parts in an attempt to avoid the need for environmental impact assessment of the whole (see the leading judgment in *Preston New Road Action Group*, at paragraph 69, and the judgment of Lang J. in *Wingfield*, at paragraphs 51 and 71).

59. As is clear in the relevant European and domestic case law, and as Holgate J. acknowledged, a distinction must be drawn between, on the one hand, cases where "salami-slicing" or "project-splitting" has been attempted and an assessment avoided, and, on the other, cases such as this where an assessment has been carried out but the legal adequacy of that assessment itself is called into question (see the judgment of Laws L.J. in *Bowen-West*, at paragraph 32).

60. A further principle, also well established, is that two connected projects may proceed separately, and their cumulative effects be assessed, whether under the EIA Regulations or under the Habitats Regulations, either in two stages or at the second,

but as soon as those cumulative effects can be identified for meaningful assessment (see the judgment of Sales L.J., as he then was, in *Larkfleet*, at paragraphs 36 to 38, and also his judgment in *R. (on the application of Forest of Dean (Friends of the Earth)) v Forest of Dean District Council*, [2015] PTSR 1460 at paragraphs 13 to 19). A "staged approach" to assessment is, in principle, legitimate and will prevent what has been described as "sclerosis in the planning system" (see the judgment of Sales L.J. in *Forest of Dean District Council*, at paragraph 18).

61. In some cases this will be the obvious and only realistic course to take. It can enable the first project to receive the permission or consent it requires, without preventing or prejudicing a proper assessment of likely cumulative effects. If done correctly, it can ensure that a cumulative assessment of the two projects is undertaken in accordance with the legislative requirements, any suitable mitigation proposed, and a decision taken either to refuse or permit the second project to proceed. It can overcome the risk of an incomplete and unreliable cumulative assessment being produced at the first stage, when the first project is being considered and the second is still uncertain in its form and timing (see the judgment of Holgate J. in *Pearce v Secretary of State for BEIS* [2021] EWHC 326, at paragraph 117). It can prevent unnecessary delay for decision-makers, developers and third parties. And it can be adopted without compromising the "precautionary approach" (see the opinion of Advocate General Kokott in *Commission v United Kingdom* (Case - 6/04) [2005] ECR I-9017).

62. None of this undermines the principle expressed by the Court of Justice of the European Union in its judgment in *Inter-Environnement Wallonie ASBL v Conseil des Ministres* (C-411/17) [2020] Env. L.R. 9 (at paragraph 143), that an "appropriate assessment" for the purposes of article 6(3) of the Habitats Directive must be carried out before the relevant authority permits the plan or project to go ahead, even though there are several further steps in the consent procedure. As the court in that case emphasised, this assessment "should, in principle, be carried out as soon as the effects which the project in question is likely to have on a protected site are sufficiently identifiable". But the corollary of this, as both respondents submitted, is that where the cumulative effects in question are not yet capable of being sufficiently identified for proper assessment at the consenting stage for the first project because the second is still unidentified, the assessment of cumulative effects can lawfully await the consenting stage for that second project.

63. Mr Wolfe's main argument on this issue was essentially that the Secretary of State ought to have regarded the water supply, whether in the form of a permanent desalination plant or some other measures yet to be decided upon by NWL, as composing an indivisible part of the same project. The Secretary of State's failure to recognise this, and to insist on an assessment of the whole project, was an error of law. Holgate J. was wrong to conclude that there is no principle under the habitats legislation compelling a decision-maker to undertake assessment at the "earliest possible stage". The permanent supply of water was "functionally interdependent" with the power station, which could not be licensed to operate without it. Holgate J. had confused Sizewell C Ltd.'s need for a permanent supply of water to the power station with the statutory obligation of NWL to provide a supply of water to the area for which it was responsible as water undertaker. In doing so, he had disregarded the additional infrastructure and, possibly, abstraction that would not have been required

in the absence of the power station, and the effects that it would have on European sites.

64. Prominent in Mr Wolfe's argument was his submission that, both at the time of the examination and when the Secretary of State made his decision, it was possible to identify a permanent supply of potable water to the power station, in the form of a permanent desalination plant. This could have been built on land within Sizewell C Ltd.'s control. The Secretary of State's reliance on "separate ownership", in paragraph 4.49 of the decision letter, was misplaced. The fact that a permanent desalination plant was not included in the application for a development consent order was also immaterial, as was the fact that this was not Sizewell C Ltd.'s preferred option. It could not be right, as a matter of law, that a developer is able to gain development consent on the basis of an inadequate assessment under regulation 63 of the Habitats Regulations simply by declining to commit itself to implementing a particular proposal as part of its project.

65. Mr Wolfe also argued that Holgate J. should not have been concerned by the "wider implications" of TASC's challenge, and the risk of "sclerosis in the planning system". TASC's challenge went only to the unlawful failure to assess, under the Habitats Regulations, the effects on European sites of the water supply necessary for the operation of the proposed power station, and no wider than that.

66. Opposing that argument, Mr James Strachan K.C., for the Secretary of State, and Mr Hereward Phillpot K.C., for Sizewell C Ltd., submitted that on application of the appropriate *Wednesbury* principles it was reasonably open to the Secretary of State to conclude that the means by which NWL would eventually perform its own statutory obligations, under the Water Industry Act 1991, to provide a permanent supply of potable water to the power station by 2035 was not part of Sizewell C Ltd.'s project. Even if – as Mr Wolfe had contemplated in his written argument – the identity of the project was ultimately a matter of fact for the court to decide for itself, the same answer emerges, because it was beyond doubt that the means by which potable water is supplied to the site was not part of the project the Secretary of State was considering. It was not included in the application for a development consent order. And it would not be possible to identify and assess it until NWL had formulated and promoted its own proposals under the Water Industry Act 1991, which would, anyway, engage the Habitats Regulations.

67. No definition of a "project" is to be found either in the Habitats Directive or in the Habitats Regulations. It is agreed however, and we accept, that there is no material difference in the meaning of this concept between the legislation for environmental impact assessment and that for the assessment of the effects on European sites, and that case law concerning the former illuminates the latter (see the judgment of the CJEU in *Inter-Environnement Wallonie*, at paragraphs 122 to 124).

68. Nor, as we understand it, was there ultimately any real dispute about the correct approach for the court to adopt when it has to consider whether a decision-maker has fallen into error either in determining the nature and scope of a particular project or ascertaining whether two or more developments are properly to be regarded as forming a single project. As Mr Strachan and Mr Phillpot submitted, relevant case law is consistent and clear on the principle that these questions are not matters of law for the court but of fact and evaluative judgment for the decision-maker itself, subject to

review by the court on a conventional *Wednesbury* basis (see the judgment of Andrews L.J. in *Ashchurch*, at paragraphs 81, 83, 100 or 105, the judgment of Sales L.J. in *Smyth v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174; [2015] PTSR 1417, at paragraph 80, and the judgment of Laws L.J. in *Bowen-West*, at paragraphs 39 to 42, echoed in decisions of the Planning Court; see, for example, the judgment of Lang J. in *Wingfield*, at paragraph 63).

69. A parallel principle applies, with the endorsement of the Supreme Court, to the exercise by the decision-maker of its discretion on the information to be included in an environmental report under article 5(2) and (3) of the SEA Directive (see the judgment of Lord Hodge and Lord Sales in *Friends of the Earth* at paragraphs 142 to 148, approving the reasoning of Sullivan J., as he then was, on the approach to challenges asserting inadequacy in an environmental statement under the EIA Directive, in *R. (on the application of Blewett) v Derbyshire County Council* [2004] Env. L.R. 29, at paragraphs 32 to 41).

70. What constitutes the relevant project, as a matter of fact and the decision-maker's evaluative – or planning – judgment, will always depend on the facts and circumstances of the particular case. And it is not possible to state any hard and fast rules governing a decision-maker's exercise of judgment. That exercise of judgment carries a wide range of discretion. There are, however, three general points to be made about it.

71. First, as we have said, the decision-maker must be alert to the mischief of "salami-slicing", or "project-splitting" being resorted to in an attempt to evade the requisite assessment. Secondly however, in a case where two or more separate developments with some physical or functional connection to each other are being promoted through different or successive processes, the likelihood or even certainty of their having cumulative effects on the environment, or on a specific habitat, does not mean that they necessarily compose a single project. The effects may be cumulative, but the projects themselves separate and different. And thirdly, without seeking to prescribe the method by which a decision-maker should judge the nature and scope of a project, or the existence or absence of a single project rather than two or more, it is possible to identify several factors capable of influencing such an exercise. As Lang J. suggested in *Wingfield* (at paragraphs 64 and 73 of her judgment), without contradiction by this court in *Ashchurch* (see the judgment of Andrews L.J., at paragraph 81), the relevant considerations can include "common ownership", "functional interdependence", the question of whether the project stands on its own and would be promoted independently of other development, and the question of "simultaneous determination". As Holgate J. rightly acknowledged, whether one or more of these potentially relevant factors is especially significant, and the weight it should be given, are for the decision-maker to assess, on the facts of the case in hand.

72. In *Ashchurch* the outcome turned very much on the peculiar facts. The bridge in question had been dealt with separately from the housing development it was intended to serve, and the local planning authority had failed to confront the question of whether this was a single project (see the judgment of Andrews L.J., at paragraph 96). In this case, however, as Holgate J. recognised (in paragraphs 79 to 87 of his judgment), the circumstances are quite different. We are not concerned here with proposed infrastructure integral to a development of housing, but with a water undertaker's future provision of water to a power station in performing its own

statutory duty to do so. The means by which this would be done were still uncertain when the decision on development consent was made, and would remain so for some time. A meaningful assessment of its effects could not yet be made.

73. With the three general points we have mentioned in mind, and in agreement with Holgate J., we cannot fault the Secretary of State's exercise of his own judgment on the nature and scope of the project before him and its relationship to the future project for the supply of potable water to the power station. His findings and conclusions on this question were lawful. His exercise of judgment upon it was not irrational. He did not take into account immaterial considerations. Nor did he err in law in any other way.

74. No criticism can be made of the Secretary of State's conclusion that the proposed development of the power station itself and the relevant parts of WRMP24, once published, were different projects, which did not have to be dealt with together in a single "appropriate assessment" complying with regulation 63 of the Habitats Regulations. The Secretary of State's conclusions in paragraphs 4.49, 4.65 and 4.66 of his decision letter, are legally impeccable. There is no force in the contention that he was wrong to conclude as he did. That contention demonstrates a disagreement with the Secretary of State's exercise of judgment, as decision-maker, on the facts before him. It does not demonstrate, however, that he erred in law in that exercise of judgment. Nor does it indicate irrationality or any other unlawfulness in his conclusions. On this we agree with the judge. He was satisfied that, in the circumstances of this case, the ultimate means, or "source", of the permanent supply of potable water to the power station was not part of the project that was properly under consideration at this stage, and for which an "appropriate assessment" was required under the Habitats Regulations.

75. Like the judge, we think the factors that obviously weighed with the Secretary of State in ascertaining the nature and scope of that project were all lawfully taken into account by him. They correspond to the approach suggested by Lang J. in *Wingfield* (at paragraph 64), which we think was essentially sound. On the facts here they seem valid and persuasive considerations, clearly bearing on the identity of the project. They reflect good sense. When taken together they are, we think, compelling.

76. It was plainly a relevant factor that no particular system of permanent water supply, whether provided by NWL as water undertaker, or in the form of a desalination plant, or some other infrastructure, had been actively proposed or committed to in the application for a development consent order. There was no legal compulsion on Sizewell C Ltd. to promote in its application any particular form of water supply. Its project was not deficient for the lack of such a proposal, or incapable of being the subject of a lawful "appropriate assessment" under the Habitats Regulations. The Secretary of State's conclusions in paragraph 4.59 of the decision letter do not betray any legal error.

77. It was also relevant that the site of the proposed power station did not extend to the land that would or might be affected by the provision of water infrastructure. The land and land ownership were separate. The Secretary of State was entitled, and in our view right, to take this consideration into account, as he did in paragraph 4.49. His reference to "separate ownership" in this context was apt. If it was meant to convey

the idea of separate responsibilities, which is not what the Secretary of State actually said, that would not have been incorrect.

78. As for "functional interdependence", though the Secretary of State did not use that expression, he rightly recognised, in the same paragraph, that the proposed development of the power station and the WRMP24 process for the "sourcing of water" as "separate projects" were "subject to distinct and asynchronous determination processes". He emphasised that "these projects are stand-alone, given that NWL has a duty to undertake its WRMP24 regardless of whether or not the Proposed Development proceeds". The fact that the development consent process for the power station under the 2008 Act was, both statutorily and in its timescale, a different process from the preparation by NWL of a water resources management plan under the Water Industry Act 1991 was clearly relevant, and significant. But this is not merely to say that the two procedures were under different legislative regimes. It is also to recognise that the provision of a supply of water to the power station was only one part of a much broader undertaking by NWL to provide water to meet demand in the area of Essex and Suffolk for which it had statutory responsibility. That broader undertaking required it to perform various functions under the Water Industry Act 1991, including the specific obligation to prepare a water resources management plan. The carrying out of those statutory functions was obligatory for it as a water undertaker, regardless of whether development consent was granted for the power station. As one sees in paragraph 4.49 of the decision letter, the Secretary of State was conscious of this, and its relevance as a factor that went against the provision of a permanent water supply by NWL being regarded as part of the same project as the power station itself.

79. The preparation of the water resources management plan by NWL as water undertaker was going to be subject to assessment under both the Habitats Regulations and the legislative scheme for environmental impact assessment. But this had not yet happened. At the time of the Secretary of State's decision on the application for a development consent order, it was still not certain what the permanent supply of potable water to the power station in 2035 would be. It remained open to NWL to select its own desired option for supplying water to the power station, which it might later decide to replace with another. And Sizewell C Ltd., from the perspective of the operator of the power station, might have no distinct preference of its own, so long as the chosen option was effective and reliable.

80. All this was clearly in the Secretary of State's mind when he made his decision. He did not misdirect himself in having regard to the separate statutory processes and the uncertainties surrounding the outcome of the water resources management plan process when he treated the power station and the water supply as separate projects. On the contrary, he was unquestionably right to do so.

81. There was no inevitable link between the two projects. The power station could be built before a permanent supply of water was in place. It was always understood that its operation was going to require a permanent supply of potable water, which could involve water being supplied either by a utility company – NWL as water undertaker – or by some other means if that turned out to be necessary. This did not mean, however, that the method of water supply ultimately chosen by NWL, whatever it might be, was integral to the project of constructing the power station. It could properly be seen as extrinsic to that project.

82. Mr Wolfe put great emphasis on the likelihood of a permanent desalination plant being developed and operated by Sizewell C Ltd.. In our view, however, his argument gains no strength from that. Far from being a firm proposal, such development was not proposed at all. Sizewell C Ltd. had misgivings about its limitations, and would only resort to it as a fall-back in default of a mains supply. Its intention was to rely on the water resources management plan process instead. This had been made clear in the exchanges that took place after the examining authority had submitted its report to the Secretary of State. Permanent desalination was not expected to be the means of supplying water to the power station. It was not part of the project. The application for a development consent order did not include it. Development consent was not granted for it. Paragraphs 4.61 to 4.63 of the Secretary of State's decision letter accurately record the position. His conclusion in paragraph 4.63 that further, more detailed assessment of a permanent desalination plant was unnecessary is both unsurprising and, in our view, perfectly lawful.

83. We share Holgate J.'s concern that the approach contended for by Mr Wolfe could produce "sclerosis in the planning system". It would seem to imply that, as a general rule, the infrastructure that might later be used by a utility company to supply water, electricity, gas or sewerage to a major development would fall to be considered as part of the development itself, with the potential consequence that decision-making on that development would have to await the utility company's own choice of its preferred means of supply. We do not find persuasive Mr Wolfe's submission that Sizewell C's need for a permanent supply of water can be distinguished from the comparable requirements of other development for such services.

84. Standing back from the submissions made on either side, we can see no justification for an argument that in this case the rigour of "appropriate assessment" under the Habitats Regulations has been unlawfully avoided by the Secretary of State's treatment of the power station development itself and the arrangements yet to be made for the permanent supply of water to the power station as separate projects. What one sees here is a realistic and legitimate use of the "staged approach" approved by this court in *Larkfleet* and *Forest of Dean District Council* and by Advocate General Kokott in *Commission v United Kingdom*. It should be remembered that in the process of designating EN-1 and EN-6 as national policy statements, which necessarily preceded the development consent process, Sizewell, as a location for the development of a third nuclear power station, had already undergone assessment under the Habitats Regulations. The power station project has itself been subject to an "appropriate assessment" under regulation 63, in which all "sufficiently identifiable" effects were assessed as soon as they realistically could be assessed, among them the effects of a pipeline to Barsham. Whatever means of supplying water to the site is decided upon by NWL in the WRMP24 process will also be subject to the "appropriate assessment" regime, entailing – if necessary – cumulative assessment of the effects on European sites.

85. For those reasons, we consider that the judge was right to reject Mr Wolfe's submissions on this issue and there is no reason for us to reach a different conclusion in the light of the submissions made on appeal. The contention that the Secretary of State lapsed into public law error in treating the power station proposed in the application before him as the project with which he was dealing is, in our view, untenable.

86. The Secretary of State did not mistake the true nature and scope of the project before him. He did not differentiate artificially, or incorrectly, between that project and the separate project that would be embodied in the provision of a permanent supply of potable water to the power station. He was entitled in law, and in our opinion clearly right, to regard them as two separate projects. We agree with the analysis to this effect set out by Holgate J. in his judgment.

87. Our conclusion here is, we think, consistent with the ample case law bearing on this issue. We acknowledge that in *Larkfleet* Sales L.J. was prepared to contemplate the court taking upon itself the task of ascertaining what the project was (see paragraphs 45 to 51 of his judgment). But he plainly favoured a conventional *Wednesbury* approach (see paragraphs 40 to 44). And as we have said, this court has consistently done so since. If, however, we were wrong to approach the matter on that basis, and ought instead to have seen it as a matter of law for the court, we would have had no hesitation in coming to the same conclusion. We would then have held for ourselves that on the facts of this case the project was indeed the power station development alone and did not extend to any proposals for the permanent supply of potable water.

Did the Secretary of State err in failing to carry out a cumulative assessment of the effects of the power station and the permanent supply of water to it (ground 2)?

88. Mr Wolfe's argument on this ground was put forward in the alternative to his submissions on ground 1. The thrust of it was that, even if the water supply was not part of the same project as the power station, the Secretary of State erred in law in failing to conduct a cumulative assessment of the effects of the power station and the water supply on European sites. It was wrong in principle to grant development consent for the power station without first carrying out a cumulative assessment of the effects of that development together with those of the water supply necessary for its operation.

89. Holgate J. was wrong, submitted Mr Wolfe, to hold that the inchoate nature of a proposal excused cumulative assessment. This was not a case in which the first project was independent of the second and was not going to have harmful effects on a European site, so that any such effects could properly be considered at the later stage. The judge should have accepted that TASC's "foot in the door" argument was cogent. If a cumulative assessment had been carried out, as it ought to have been, when the development consent order application was being determined, it might have led to a refusal of consent. Although it would be possible to carry out a cumulative assessment when the water supply proposal was being considered, this would only be done after the power station had gained consent. This would create the strongest possible IROPI justification for the proposed water supply. It was unrealistic to think that the requisite approval for the water supply would then be withheld.

90. Further, or alternatively, Mr Wolfe submitted that it would be contrary to the Habitats Regulations to assess the water supply separately and at a later stage. If the water supply was not approved at that later stage, the power station would have been partially or wholly constructed, with the environmental damage that this would entail, but would not be capable of being operated. What was required by the Habitats

Regulations was an assessment of the power station together with the desalination plant as a possible water supply.

91. We reject that argument, for these reasons – which reflect some of our discussion of ground 1.

92. First, as the judge correctly noted (in paragraph 99 of his judgment), ground 2 is predicated on the fact that the provision of the permanent water supply does not form part of the Sizewell C project. It is a different, and separate, project.

93. Secondly, as the judge rightly observed (at paragraph 97), it is well established that a decision-maker may rationally reach the conclusion that the consideration of cumulative impacts arising from a subsequent development that is still inchoate may be deferred to a later consent stage (see the judgment of Sales L.J., with which the other members of the court agreed, in *Forest of Dean District Council* (at paragraphs 10 to 13), and also his judgment in *Larkfleet* (at paragraphs 37 to 38), again with the agreement of the other members of the court).

94. Thirdly, the decision of the Secretary of State to defer assessment of the impacts of the provision of a permanent water supply to a later stage was a rational, lawful decision. There was insufficient detailed information on the precise means by which a permanent water supply would be provided. NWL was appraising different options and there was a reasonable level of certainty that it would identify a permanent water supply before the first reactor was commissioned (see paragraph 4.44 of the Secretary of State's decision letter). However, there was insufficient detailed information available as to where new sources of water would be available and how the water would be conveyed to the power station. The permanent water supply would, once identified, be subject to its own assessment. That, as the judge correctly held (at paragraph 98), was a rational approach.

95. Fourthly, we do not accept Mr Wolfe's submission that there would be no proper assessment of the impacts of the permanent water supply at that later stage, and that the necessary approval would inevitably be granted, because, by then, the power station would be under construction. There is no evidential basis for assuming or inferring that the relevant regulators would fail to carry out their statutory duties to assess whether the permanent water supply would adversely affect the integrity of a European site and, if so, whether there were IROPI which justified approval. As the judge observed (at paragraph 102 of his judgment), if the benefits of granting consent for the permanent water supply were said to include the overall benefits of the power station being operational, the harms of the Sizewell C project would also have to be included in the assessment. Any failure by relevant regulators to interpret or apply the Habitats Regulations correctly would, of course, be susceptible of legal challenge.

96. Fifthly, there is no proper basis for considering that the decision to defer assessment of the permanent water supply was irrational because of the risk that the power station might be partially or wholly constructed but not be capable of operation in the absence of approval for a permanent water supply. On the facts, such a prospect was speculative and theoretical. NWL was aware of its statutory duties to supply water and was in the process of appraising options for ensuring that a permanent water supply was available for the power station. There was a reasonable level of certainty that this would result in a permanent water supply being provided. Failing that, there

were other options including the possibility of a permanent desalination plant, which, subject to the requirement for appropriate assessment in regulation 63, could provide a satisfactory solution. That was, in our view, a rational approach on the material before the Secretary of State.

97. As a matter of law – to repeat what we have said on ground 1 – the Secretary of State was entitled when assessing the impacts of granting consent for Sizewell C to defer assessment of the impact of a separate project, such as the provision of a permanent water supply, if it was not reasonably possible to assess those at that earlier stage. The argument presented for TASC, in effect, amounts to a reversal of the legal position and would a require a decision on the earlier project to be delayed until the details of a different project became available so that both projects could be assessed together. That is not the current law. The observations of Sales L.J. in *Larkfleet* on the Environmental Impact Assessment Directive apply equally to the Habitats Regulations. The aim is to ensure appropriate scrutiny under the Habitats Regulations to protect European sites whilst avoiding undue delay in the operation of the planning system (see the judgment of Sales L.J. in *Forest of Dean District Council*, a paragraph 13). Such delay, and a disproportionate interference with the public interest and the rights and interests of landowners and developers, would be likely to occur if the position were that the impacts of every related project had to be definitively assessed before any of them could be allowed to proceed.

98. Finally, as we have concluded on ground 1, the Habitats Regulations did not require an appropriate assessment of a permanent desalination plant as a potential permanent water supply before development consent was granted for the power station. The desalination plant was not part of the project. It was unlikely to form a project in its own right at a later stage. It was purely a "fall-back" option for meeting the unexpected scenario that NWL would not come up with a suitable means of supply. In those circumstances there was no need for the Secretary of State as competent authority to assess the effects it might have if it were ever proposed in the future.

Conclusion

99. We do not consider that the judge erred in refusing to grant permission to apply for judicial review, on either ground. He correctly concluded that the Secretary of State was entitled in this case to regard the project as the power station, and that the provision of a permanent water supply was not part of that project but formed a different and separate project. He was right to conclude that it was rational for the Secretary of State to defer appropriate assessment of the impact of the permanent water supply under regulation 63 of the Habitats Regulations to a later stage, because the information necessary for a proper assessment was not available at the time of his decision on the application for development consent for the power station. We therefore dismiss this appeal.