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## Environmental Law News From the London Office

### UK Wind Power Developments

There have been various developments in relation to UK on and offshore wind power over the summer.

#### Lease Extensions

On 6 July 2009, the Crown Estate announced plans to offer operators of Round 1 and 2 offshore wind farms the opportunity to extend their leases to a maximum of 50 years to allow them to plan for future “repowering” of projects with new turbines.

#### Site Area Extensions

Then on 29 July 2009, the Crown Estate announced that it also plans to give Round 1 and 2 operators the chance to apply for extensions to their existing site area. This offer applies to any Round 1 or 2 project that is already operational, under construction, consented but awaiting construction or currently awaiting a decision on the grant of the necessary statutory consents. The aim is to try and deliver additional electricity generation capacity

in a relatively short timescale from sites that already have a grid connection (and thereby try to assist the UK to meet its 15 per cent by 2020 renewable energy target).

Developers have until **9 September 2009** to register their interest in extending their site area. This will then be followed by a detailed application process.

### Licenses for submarine transmission cables

On 27 July 2009, a consultation was launched on a technical change to offshore wind licensing requirements necessitated by the new regulatory regime for offshore electricity transmission which is expected to go live in mid-2010.

Under the new regime, responsibility for submarine transmission cables above 132kV connecting to wind farms will pass from the wind farm operator to new Offshore Transmission Owners (OFTOs) to be selected by competitive tenders run by Ofgem (the first of which is now running). Without the proposed amendments, a licensing gap exists because current legislation would not allow the regulator (the Marine and Fisheries Agency (MFA)) to impose marine environmental protection conditions on the OFTO in respect of the installation of such cables.

Defra proposes to amend the relevant legislation so that new OFTOs will also be required to

obtain a licence (under Part II of the Food and Environment Protection Act 1985 (FEPA)) in their own right in order to install submarine electricity transmission cables above 132 kilovolts (kV) connected to offshore wind farms. FEPA licences may impose environmental protection conditions lasting for up to three years after installation of the cables. Ultimately, these arrangements will be superseded by regulations to be made under the forthcoming Marine and Coastal Access Act. The consultation closes on **26 October 2009**.

### Guidance on siting of onshore wind farms

Also in July, Natural England (NE) published for consultation draft guidance on the siting of **onshore** wind farms.

NE is one of the consultation bodies in England for proposals for major energy infrastructure developments that will be decided by the new Infrastructure Planning Commission from 2010 (see our April 2009 Newsletter). It may object if it takes the

view that an application for a wind farm is likely to cause unacceptable harm to a protected site, species or landscape, or that a developer has provided insufficient information about the likely environmental impacts of a proposed wind farm. It therefore plays an important role in the government's plans to encourage more wind power development and the UK's ability to meet its renewable energy targets.

The draft guidance proposes a criteria-based approach for identifying where and how onshore wind farms can be sited in England. NE will expect opportunities to avoid, reduce or minimise potential impacts through good site selection, responsive design and other mitigation measures to be identified in the environmental impact assessment.

The final version of the guidance is expected to be published this autumn. The consultation closes on **2 September 2009**.

**The Derbyshire Dales case**

On 17 July 2009, the High Court of England & Wales handed down an important ruling for the future of wind power development in the UK in the case of *Derbyshire Dales District Council & Another v Secretary of State for Communities and Local Government and Another*.

The case involved an application for planning permission for the erection of four wind turbines, a substation and ancillary equipment close to the boundary of the UK's Peak District National Park.

The local planning authority refused planning permission in July 2007 and the developer appealed. In September 2008, a planning inspector allowed the appeal and granted permission. The planning authority in turn appealed on the grounds that the inspector had erred in law. It argued that the inspector should have considered whether the need for the wind energy development could be met on some other site which

might cause less harm. It also argued that regional targets for renewable energy were not relevant to individual planning applications.

Generally speaking, the law states that the fact that alternative land exists that might be more suitable for a development does not justify refusing permission for the land that is the subject of the application. However, if there are clear planning objections to development on a particular site, it may be relevant and indeed necessary to consider whether there is a more appropriate site elsewhere. This is especially likely where the development is expected to have significant adverse effects and the main argument in support of the development is that the need for the development outweighs its planning disadvantages.

The High Court (per Lord Justice Carnwath) dismissed the local planning authority's appeal.



Provisions in the National Parks and Access to the Countryside Act 1949 (NPACA 1949) and relevant planning policies required that special regard should be paid to protecting the National Park. However, there was no express or implied obligation to consider alternative sites.

The key planning policy statement (PPS22) states that proposals must demonstrate how environmental and social impacts have been minimised through “careful consideration of location.” The court accepted that this might require a developer to demonstrate the particular merits of the chosen site. However, it did not mean that in every case the person determining the application had to review potential alternatives. This was a matter of planning judgment.

In addition, the planning guidance set out in the PPS1 supplement requires regional planning bodies to set regional targets for renewable energy generation

in line with PPS22, and ensure these are consistent with the government’s national targets.

The inspector had interpreted this as meaning that an individual proposal should not automatically be refused if the target had been met or allowed due to a shortfall. However, he had also concluded that regional targets **must** be a relevant consideration when considering individual planning applications. The court found no legal objection to the inspector’s approach. The case shows that renewable energy targets can work in favour of the applicant for planning permission.

### **The Risks Of Urban Brownfield Redevelopment**

**The “Corby birth defects” case**  
On 29 July 2009, the High Court handed down judgment in the so-called *Corby Toxic Waste* case.

The judgment of Mr Justice Akenhead, which runs to over 200 pages, makes grim reading. It deals with claims

by a class of children, born between 1986 and 1999, who allege that they all suffered serious birth defects because their mothers, who lived close to the sites whilst pregnant, were exposed to toxic materials as a result of Corby Borough Council's (CBC) remediation program in respect of 680 acres of heavily contaminated land acquired by CBC from British Steel in the early 1980s.

The claimants alleged exposure through ingestion or inhalation of airborne particles of cadmium, chromium, nickel, dioxins and polycyclic aromatic hydrocarbons (PAHs) released as contaminated dust during "dig and dump" remedial works performed by CBC between 1983 and 1997.

The evidence revealed that basic environmental protection measures, such as dust suppression, wheel washing and covering of lorries taking contaminated material along public roads to landfill, had not been implemented.

The court found there was a statistically significant cluster of birth defects between 1989 and 1999 and that CBC was in principle liable in public nuisance, negligence and breach of statutory duty, subject to each claimant proving causation and particular damage at a future hearing.

CBC was found to have owed a duty of care both to the then unborn claimants, and their mothers, in tort, to exercise reasonable care and skill in the execution of the works to avoid foreseeable injury or birth defects to them, and to have been in clear breach of that duty.

#### **Comment**

Clearly the failings of CBC were extreme, as tragically were the consequences of those failings. The Corby reclamation was a massive remediation exercise carried out without basic protection measures in close proximity to a large urban population over many years. For all these reasons, the case has been seen by many commentators

as a "one-off" and obviously one hopes that it is.

However, large scale urban regeneration of brownfield sites is still common in the UK and likely to remain so as pressure to provide housing for an ever growing population continues. The facts of this case provide a stark reminder of why environmental protection measures are imposed under relevant environmental legislation and as a condition of redevelopment planning permission, and of the importance of allocating and managing environmental risk correctly as part of any transaction involving contaminated land.

#### **Climate Change**

##### **Slow progress is made in latest post-2012 climate change negotiations**

The existing international agreement on climate change, the Kyoto Protocol, runs out in 2012 and there is as yet no successor regime in place. All hopes are currently pinned on a new international



agreement being concluded at the conference and meeting of the nations that are party to the UN Framework Convention on Climate Change (UNFCCC) taking place in Copenhagen this coming December. Unless such an agreement is reached, there is a very real prospect of the international community not being able to conclude and implement a new regime before the international carbon markets are plunged into a legal vacuum come 1 January 2013.

That is why frantic preparatory discussions (they arguably cannot yet truly be called negotiations) are currently being undertaken at an international level to ensure that the Copenhagen talks are a "success." A number of negotiating sessions have already taken place this year, the most recent of which occurred in Bonn between 10 and 14 August 2009. These talks are no small affair. The recent Bonn talks involved some 2,400 delegates from almost every nation.

However, those negotiations ended with little real progress: "If we continue at this rate, we are not going to make it," said UN climate chief Yvo de Boer, at a press conference on the last day. There are now only 15 days of negotiations left before Copenhagen, one meeting in Bangkok in September and another in Barcelona in November. Certainly as Copenhagen approaches with so little consensus having been reached, it seems ever more likely that if a deal is concluded in Copenhagen, it will be very much a framework agreement with much of the detail still unresolved.

The main problem is that the current negotiations are far more ambitious and controversial than Kyoto. By way of comparison, the text being discussed prior to agreement of the existing Kyoto Protocol in 1997 was only 30 pages long. The current negotiating text alone stretches to over 200 pages and contains more than 2,000 sets of square brackets, not to mention all the various tables of position, guides,

matrices, “non-papers,” “non-non-papers” and other texts accompanying it. At present there is a palpable lack of trust and it seems the delegates cannot even agree on how to organize the talks and manage the texts administratively, with heated arguments about the size and remit of negotiating groups, what languages the texts should be translated into and so forth.

There are, however, understandable reasons why these talks are proving so difficult. Crucially, unlike under Kyoto, developed nations (existing Annex 1 countries) are demanding real emissions reduction commitments for the first time from the world’s major developing nations, such as China and India. Those countries in turn are demanding far more stringent emissions reduction commitments by the developed world, as well as commitments by the latter to inject vast amounts of cash and technology to assist the developing world in “doing its bit” to combat climate change.

Against that overall backdrop, the complexity of these negotiations is a severe test of the delegates’, physical and mental strength. For example, the commitments being offered by developed nations are all different, and are measured against different baselines based on differing assumptions: comparing them and assessing their real value is a mammoth task in itself. Agreement needs to be reached on whether measures such as switching to nuclear power, or implementing carbon capture and storage should count towards national targets, whether international aviation and shipping should be covered by the new regime, the prioritization of adaptation over mitigatory measures, funding for developing nations: whether efforts should be provided by public or private finance or a combination of the two, how much funding is needed, on what terms it will be given and whether new international institutions should be set up for such purpose, whether, if carbon reduction technology is to be transferred to the world’s

poorer nations, wholesale reform of intellectual property protection laws is required and so on.

The stakes are high, and countries’ willingness to accept the costs of combating global warming are not being helped by the financial impact of global recession. At present it seems, perhaps understandably, a great deal of posturing and little compromise is taking place. The talks resume in Bangkok on 28 September 2009.

#### **Emergency zero-rating for trading in carbon credits**

Earlier this month, a number of individuals were arrested in connection with a large scale carbon credit VAT fraud (see <http://www.guardian.co.uk/business/feedarticle/8664781>). The fraudsters are alleged to have purchased credits in VAT free transactions outside the UK and then fraudulently charged VAT on the on-supply of such credits and not accounted to HMRC for the VAT received. In a directly related development, on 31 July 2009 the UK’s Value Added Tax (Emissions



Allowances) Order 2009 came into force, incorporating changes to existing VAT legislation that mean that the supply of an emissions allowance in the UK is now zero-rated from 31 July 2009.

From that date, no input tax now arises on such a supply; thus significantly reducing the opportunity for what is known as “missing trader fraud.” Similar measures have been taken by France and the Netherlands.

In relation to pre-31 July 2009 transactions, the tax authorities in the UK will continue to look into every part of a carbon credit transaction chain to see

whether missing trader fraud has occurred and whether other members of the chain could have known that it was occurring. Where it can be objectively shown that a trader knew or ought to have known that, by making his purchase, he was participating in a transaction connected with VAT fraud, the tax authorities can refuse to allow him the right to deduct input tax, unless the trader in question can show that he took every precaution which could reasonably be required of him to ensure that his transactions were not connected with fraud. There was concern that the prospect of being caught up in such an

investigation was undermining legitimate carbon trading, particularly with new customers.

The introduction of zero-rating in the UK is intended to be an interim measure pending an EU-wide solution, which is expected to be proposed by the Commission later this year. This may well take the form of a “reverse charge” mechanism (similar to the one already in place in the UK to combat missing trader fraud in relation to mobile phones and computer chips) whereby it is the purchaser, not the seller, who is liable to account to the tax authorities for the VAT.

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