

TWEEN BRIDGE WIND FARM

CLOSING SUBMISSIONS ON BEHALF OF DONCASTER MBC

PROLOGUE

1. It was Christmas time at the University of Neitherherenorthere and the professor of planning law decided to play an end of term parlour game with his senior students so he set them this question:

“Who can think of the worst imaginable place to locate a wind farm in the context of contemporary law and policy?”

2. The contest was won by a student called Leon who had a conceptual cast of mind. He thought of the air above the wind farm in his proposal, the ground upon which it stood and the ground below and he ingeniously devised problems which concerned all three categories. He did not confine himself to local impacts (though these were many and various). He devised problems which were so severe as to have

regional, national and international dimensions. He anticipated that other students would suggest a wind farm which might inhibit the growth of a local employment provider. So he made his local employment provider massive, and suggested the number of jobs at stake was massive and located his proposed wind farm in an area of such extreme social and economic deprivation that it warranted objective 1 status at the European level.

3. It then occurred to him that his proposal would be dismissed as unrealistic because it would obviously and fatally conflict with criteria based policy set out in RSS. So he posited a situation in which RPB had misunderstood PPS22 and had not proposed any such RSS policy in the mistaken belief that this was really the responsibility of the LDF.
4. It then occurred to him that his proposal would be dismissed as unrealistic because such a site would immediately be ruled out in the roughest of rough sieves. This was a real problem for him and he agonised over the solution. In the end he decided to brazen it out and adopt a route one answer to this problem. He posited a situation in which the Applicant simply bypassed the site selection stage and proposed a single site without any regard at all to alternative possibilities.

5. The night before he was due to make his presentation Leon was troubled by the planning balance. He had created a situation in which the balance was overwhelmingly tilted against the grant of consent but nevertheless there still remained a balance of sort. So, in a masterstroke, he took away the only thing to be said for the wind farm. He devised a scenario in which alternative arrangements would have to be made regarding other interests as a direct consequence of the grant of consent for his wind farm as a result of which hundreds of thousands of tons of CO² would be pumped into the atmosphere. Thus he was left not with a planning balance but simply with the undiluted impact of a project which created massive harm to the public interest.

6. Leon triumphed. By unanimous agreement this truly was the worst wind farm proposal that anyone could think of even in their wildest imaginations.

He called his proposal: Tween Bridge.

INTRODUCTION

1. Tween Bridge is the wrong application, brought forward at the wrong time, in the wrong location and utilising an incorrect methodology. It is the wrong application because it is too big. It massively exceeds the Need in Doncaster (and South Yorkshire) for on shore wind energy. By reason of its size it unnecessarily multiplies the adverse visual impacts, it threatens the annex I species, it sterilises millions of tons of coal and it threatens the expansion of the airport and associated economic recovery. A smaller wind farm would not give rise to these adverse effects or would not cause them to the same extent and that might make the balance of considerations appear more favourable but the harm caused by this application manifestly exceeds its benefit.
2. It is brought forward at the wrong time because the requisite RSS policy is not in place to direct the location of wind farms in the manner prescribed by PPS22. To grant consent now for one of the biggest wind farms ever proposed in England would deprive any future locational criteria of any meaning or substance and would thereby make such a policy pointless. It is in the wrong location because it intrudes horribly on the special qualities of Thorne Moor which create a wonderful and spiritual sense of remoteness and

tranquillity. It may disrupt or interfere with the efficient operation of the airport leading to catastrophic consequences for economic regeneration, it will conflict with SPA interests and imperatives, and it will sterilise millions of tons of otherwise workable coal reserves leading to loss of employment opportunities for miners and unnecessary CO² emissions as alternative sources of supply are acquired. The application utilises an incorrect methodology because it fails to consider the question of alternative sites in breach of legal, policy and good practice requirements. The Applicants cannot therefore rule out the possibility that the essential Need to provide on shore renewable wind energy cannot be provided in a different location which will cause less harm to all public interests. Indeed the evidence available to the Inquiry suggests it is entirely possible to meet Doncaster's target in alternative locations in areas which are much less harmful to the public interest.

3. At various points throughout the Inquiry the Applicants have tried to suggest that the SOS should grant consent for a first phase of 9 turbines with the development of the second stage deferred pending further investigations. This indicates that the Applicants have failed to correctly or properly assess the impacts of their scheme before presenting it to SOS and they are ignorant of the likely effects of 22. More fundamental however is the fact that this is a proposal for 22

turbines and consent is sought in this application for all 22 whether phased or otherwise. It is therefore not open to the Applicants to undertake to build only 9 pending further investigations because the proposal invites a full grant of consent for all 22 at this stage. The Applicants seek an unqualified right to build all 22 in any event regardless of the outcome of any further investigations. The application therefore stands or falls on a proper assessment of the global impacts of all 22. This is the approach urged by Mr Clarke¹ and any other approach would be unlawful.

4. These matters are discussed by reference to the following issues:
 - (i) whether the proposal is premature
 - (ii) whether there is a Need for this proposal and the relevance of alternative sites
 - (iii) whether the proposal will harm Airport interests
 - (iv) whether the landscape impact of the proposal is acceptable
 - (v) whether the proposal will sterilise important coal reserves;

¹ xx AC

- (vi) whether the grant of consent would conflict with the Habitats Directive.

- (vii) Whether the benefits of this proposal have been accurately stated.

I. Whether the proposal is premature?

5. National Policy on Prematurity is now to be found in paras 17 and 18 of the Companion Guide to PPS1: The Planning System General Principles². For reasons discussed below this is a case in which the proposed development is so substantial that granting consent could prejudice the RSS by predetermining decisions about scale and location of new development which is addressed in RSS.

6. On a technical note the advice in para 17 refers only to a DPD and RSS is not a DPD. This is resolved by the use of the conditional “usually” in paragraph 18 which implies that there are circumstances in which the concept has application beyond DPDs. As the locational criteria in RSS is intended to have a direct bearing on development control decisions this is such an occasion.

7. The RSS for Yorkshire and Humberside is currently being prepared but it is wholly devoid of any criteria based policies which guide the location of wind farms at the strategic level. This is in direct contravention of SOS advise in PPS22³. Mr Clarke agreed this was

² CD/52

³ CD/59 para 7

so.⁴. The function of such criteria is to identify those parts of a region or sub-region which are considered most appropriate to accommodate renewable energy developments and, as such, the absence of such locational criteria is of direct and immediate relevance to the SOS consideration of this application. The importance of criteria-based policies is further emphasised in the companion guide to PPS22⁵ which explains that such policies provide the link with targets so as to provide at a strategic level a happy compromise between Need and environmental harm. The National Policy then requires that the regional framework thus set out is further refined at the local level through LDFs⁶

8. There is a wider importance to this framework which makes it essential that it is strictly observed; that is to do with public participation in the planning process. The importance of actively engaging the community at every stage of the plan making process is seen in national policy as an essential constituent of sustainable development.⁷ The wider community has expressed massive interest in this application and those like it. It is therefore essential that their

⁴ xx AC

⁵ CD/60 para 2.16

⁶ CD/59 paras 6 and 7

⁷ Cd/53 para 40-44

right to engage with the plan making process is not frustrated by the premature grant of consent for a proposal which renders their contribution to the debate about regional policy irrelevant and pointless.

9. With this background in mind the Council drew the attention of the Regional Planning Body to the absence of a criteria based policy in RSS. Their response was confused and ill-informed. In their first letter the RPB appear to think that the relevant locational criteria for Yorkshire and Humberside are already set out in PPS22⁸. When this error was drawn to their attention they responded with a letter which confused targets with locational criteria⁹.

10. It is clear that more work has to be done at the regional level to direct the location of wind farms. The RSS is under review and that work is therefore currently being undertaken. To grant consent at this stage for a massive wind farm of the type proposed at Tween Bridge would entirely undermine the process of selecting appropriate criteria. The prematurity principle is engaged and it would be entirely appropriate for the SOS to reject this proposal for that reason.

⁸ Doyle Proof App AD6 page 2

⁹ See Doyle ref Proof AD10

II. Need and Alternatives

11. There is a general and inchoate need to increase the sum of renewable energy in order to combat the adverse effects of climate change.

There is an equally general need to avoid harmful development in the open countryside as an objective of national policy because the countryside is thought worthy of protection for its own sake. Reliance on such general issues is therefore of limited assistance in understanding whether this application meets an identified Need for renewable energy. The guidance concerning targets provides the proper framework for a meaningful discussion of Need.

12. Targets are the mechanism introduced by PPS22 for reconciling the essentially conflicting objectives set out above. The oft repeated fallacy of those promoting wind farms is that targets may be ignored if they are exceeded because they are not intended to act as a ceiling.¹⁰ This ignores the fact that the advice is subject to "...the capacity of the environment in the region for further renewable energy developments"¹¹ If there is no further capacity then there is no justification for exceeding the target. The target itself provides an indication of the capacity of the receiving environment for renewable

¹⁰ See CD/59 para 2

¹¹ CD/59 para 3

energy developments. That explains why some areas have a higher target than others. The relevant targets therefore provide a clear indication of the Need for a proposal in any given area.

13. Happily there is a large measure of agreement concerning targets for Yorkshire and Humberside, South Yorkshire and Doncaster. Mr Clarke provides an A3 table which summarises the position¹². The entire South Yorkshire target to 2010 is 47mw and Doncaster's disaggregated share of that target is 10mw for on-shore wind. There are figures in the Draft RSS to which the applicant objected at the EIP. Nevertheless they provide the best and most up to date account of Need in the light of prevailing policy.

14. The report of the Panel into the RSS was published in March 2007. The Panel noted that E.O.N. objected to the targets for both Yorkshire and Humberside on the grounds that the plan is contrary to national policy to maximise energy from renewable sources. A similar argument to that advanced by E.O.N. at this Inquiry! EON's objection was comprehensively rejected by the Panel and the draft figures were confirmed.¹³ Great weight should now attach to these figures since they have been recently reviewed by an authoritative

¹² EON/21 Appendix EON/CC/23

¹³ 6.31

body on the basis of all the background policy material relied upon by E.O.N as providing encouragement for the provision of renewable energy and on the basis of a recent empirical study.

15. It becomes immediately clear that there is no need for the current proposal because it exceeds Doncaster's target by 600% assuming zero contribution from elsewhere in Doncaster and it well exceeds the entire South Yorkshire target even assuming zero contribution from the other districts. The proposal is massively out of scale by reference to the established Need. Doncaster's target to 2021 is 15mw for on-shore wind. In view of the current interest in developing wind farms elsewhere in Doncaster (Marr and Hampole) and the positive encouragement of such development in regional and national policy it is reasonable to expect that that target may be met (and exceeded) without Tween Bridge.

16. In the course of the Inquiry as well as receiving an application from Marr, the Council has a Scoping Report for an EIA for a windfarm of 20mw at Hampole, which is wholly within Doncaster's administrative boundary.¹⁴ (NB It is not without significance that the Landscape Contribution to that report as written by Jeffrey Stephenson¹⁵ who

¹⁴ See DMBC/C/26(28/3)

¹⁵ See page 8

provides assurance that the landscape assessment will be carried out in accordance with established good practice from GLVIA – see below)

17. This of course provides a grave evidential problem for the applicants because it clearly indicates there is no Need in Doncaster for a development of this scale. Their first attempt at dealing with this is to refer to Need at the regional level (and the national level). The former is derived from a study commissioned by the GOYH¹⁶ which Mr Clarke agrees should be accorded weight because it was produced independently, by an expert body for the purpose of prescribing targets at the regional sub-regional and district level¹⁷. It is unhelpful to consider regional targets without also considering regional capacity. The report notes: “...*the geographical context leads to relatively abundant opportunities for wind and biomass energy sources.*”¹⁸ Thus the region as a whole has massive capacity and different parts of the region have higher capacity than others. It is therefore, in the Council’s submission, unhelpful to look simply at the regional target when assessing this application as that understates the abundant capacity to accommodate wind farms elsewhere in the region and the

¹⁶ CD/148-CD/86

¹⁷ xx AC

¹⁸ EON/2/1 para 4.13

constraints in Doncaster. In this context the report notes with regard to Doncaster:

“It’s largely built up area constrains the opportunities for medium and large scale wind farm developments”¹⁹

18. A medium wind farm is anything greater than 5 turbines. The report considers Doncaster is suitable for applications of up to 4 turbines. Contrast this with the 22 on offer at Tween Bridge and the 4 on offer at Marr.

19. The report then considers Doncaster’s constraints more particularly:

“Whilst the presence of the airport at Finningly and the high sensitivity areas of Thorne Moors and Hatfield Moors do present significant constraints to wind farm development in the east of the district there could be opportunities for more small wind farm developments within Doncaster...”²⁰

20. The constraints within Doncaster are then given expression by its more limited target compared to other districts in the region.²¹

¹⁹ CD86 page 46

²⁰ CD86 Page 30

²¹ CD86 Table 4 page 22

21. The Applicants then complained that some targets had been scaled back to be seen to be equitable so they might be politically more palatable in some districts. Mr Clarke accepted that approach had not been adopted so far as Doncaster was concerned and so its only relevance is that it understates the capacity in other parts of the region.
22. In the Council's submission the conclusions which flow from this discussion are that:
- (i) Targets are essential to understanding the extent of Need;
 - (ii) Targets for Doncaster and South Yorkshire have been deliberately set to recognise the environmental constraints of the sub-region and district to accommodate wind energy proposals;
 - (iii) The type of wind farm considered appropriate to meet the target in Doncaster is "small" having regard to those constraints;
 - (iv) The Tween Bridge proposal massively exceeds both the target and the size threshold;

- (v) The Tween Bridge proposal cannot be justified by reference to an established Need.

- (vi) The evidence indicates that the need to 2021 is already capable of being met in Doncaster by sites of an appropriate scale such as those at Marr and Hampole.

Alternative Sites

23. Mr Clarke is commendably forthright and dogmatic in presenting EON's case on this issue:

“...the potential presence of other suitable sites for a wind farm within Doncaster, North Lincolnshire or the Yorkshire and Humber region generally is not a basis for the refusal of this proposal” ²²

24. He re-iterated this point in evidence. ²³

25. The question here is whether he is right?

26. The discussion of alternative sites begins from the agreed starting point that the Applicants have made no attempt to consider this matter at all whether in their ES or in evidence presented to the Inquiry. In contrast, this Inquiry has heard, at different points, about the approach adopted by the Applicants at Keadby, Whinash, Scout Moor, Little Cheyne Court ²⁴ and numerous other smaller proposals. In every such

²² EON/2/1 page 24 para 3.2

²³ xx AC

²⁴ CD/111

case the Applicants have presented evidence of a site selection process to explain why alternative sites were not thought appropriate for that proposal. Tween Bridge stands out as the only one where that approach has not been followed.

THE LAW

27. We adopt and rely upon Annex I to the opening submissions as an accurate statement of the relevant legal principles.²⁵ There are four questions of fact which determine whether the presence or absence of alternative sites become a legally material question for the Inquiry to engage with:

- (i) the presence of a clear public convenience or advantage in the proposals under consideration;
- (ii) the existence of inevitable and adverse effects or disadvantages to the public, or to some section of the public, in the proposals;

²⁵ DMBC/0/1

- (iii) the existence of an alternative site for the same project which would not have these effects or would not have them to the same degree; and
- (iv) a situation in which there could only be one permission granted for such development ,or at least only a very limited number of such permissions.

28. Mr Clarke was asked about each of these and he confirmed that they were all present in this case.²⁶

29. EON have responded to these submissions with a document of their own²⁷ in which they appear to place reliance on a decision of the High Court in 1999. The first point to note is that this pre-dates the Court of Appeal's decision by four years in Scott and is at a lower tier. It cannot therefore alter the statement of principle set out by Laws LJ and quoted in paragraph 1 of DMBC/0/1.

30. Furthermore, the decision relied upon by EON does not purport to express a principle but rather to indicate that the relevance of

²⁶ xx AC

²⁷ EON/0/6

Alternative Sites depends upon the approach to that issue taken at the individual Inquiry in question:

*“...it is not for the Court to determine in advance and at large whether the consideration of possible alternative sites, or alternative solutions, is or is not a material consideration which must be taken into account. It depends on whether this issue is raised, either by the relevant policy, or as a principal important controversial issue. It may then become a material consideration, which the decision-maker must examine, with reasons for his conclusions on this topic” [emphasis added]*²⁸

31. The question of alternative sites has been raised by the Council as a principal important controversial issue so even on the formulation relied upon by EON the question of Alternative Sites is a material consideration at this Inquiry.

32. Mr Clarke is therefore wrong in his dogmatic and forthright assertion quoted above. Alternative sites are a material consideration at this Inquiry and the Applicants have failed to address the issue. The question is: What are the consequences?

²⁸ EON/0/6/ See discussion under ground 2

33. Our first submission is that this omission is legally fatal to this application. The SOS is required to have regard to Alternative sites as a material consideration but there is no evidence before the Inquiry which will enable him to consider that matter. In the context of S70(2)TCPA 1990 he is therefore unable to discharge his statutory duty.
34. If we are wrong about that, then the Applicant is in a similar position to the Applicant at Whinash. In that case the Inspector assessed the application on this basis, having found an inadequate consideration of alternative sites:

*“Accordingly, the scheme falls to be assessed on merit without...any claim to being the best or least damaging location arising from a further comparative assessment”.*²⁹

35. In evidential terms this makes it impossible for the Applicants to justify the harm caused by their application on the basis that such harm is an inevitable concomitant of satisfying the need for renewable energy . In other words, the SOS cannot discount the possibility that the need may be met elsewhere without causing this degree of harm.

²⁹ CD/111/d page 85 para 15.11

This point must weigh heavily against the proposal in any planning balance.

36. The Council's third submission is that the Applicant's failure to consider alternative sites reflects a serious failure to apply a widely accepted good practice methodology. This is to be found in the GLVIA³⁰ which requires such an exercise as an essential constituent of minimising or mitigating harm. In answer to the Applicant's complaint that there is no end to the search and that the exercise is not therefore practicable we say:

- (i) The GLVIA offers case study examples of the methodology which Mr Stevenson agreed were applicable;³¹
- (ii) The Inspector at Whinash thought the administrative boundaries were a sensible place at which to draw the line³² and Mr Cooper agreed the same approach for Doncaster³³

³⁰ CD/121

³¹ xx AC

³² CD/111/d/para 15.11

³³ X-in-chief AC

- (iii) All the other wind farm applications referred to above managed the exercise without difficulty.

37. It is not incumbent on the Council to suggest any alternative site as a matter of Law.³⁴ However the Council's evidence in this case extends to the identification of a fully worked up application within Doncaster at which the current Need may be met.³⁵ This adds substantially to the weight to be accorded to this issue. It is not an abstract concern about possibilities elsewhere. This is a case in which at least one clear alternative site has been identified and a further application noted.

38. The conclusions we invite on this issue are:

- (i) In this case alternative sites are a material consideration;
- (ii) The Applicants have failed to address this issue in the mistaken belief that they did not have to do so;
- (iii) The SOS is therefore unable to make a lawful decision in this case – S.70(2) TCPA 1990;

³⁴ See Rhodes v. MHLG IBID

³⁵ See DMBC/01/24 Marr – see also Hampole

- (iv) Alternatively, Tween Bridge cannot claim to be the best or least damaging location for a wind farm in Doncaster or the sub-region and the harm caused by this application is not inevitable;

- (v) Other sites exist as real possibilities which can meet the need in a less damaging manner.

III. Whether the proposal will harm Airport interests

39. Mr Clarke agreed that his proof of evidence comprised an artificially one-sided argument³⁶. This explains why it overlooked the substantial support in Development Plan Policy for the growth and development of the Airport³⁷. The same applies to the substantial support for that objective from emerging RSS in both the economic development and transportation chapters.³⁸

40. The Airport is the jewel in the crown of Doncaster's attempts to recover from the devastating economic and social impacts of post-industrial decline. The evidence of Mr Nicol³⁹ reflects the huge importance of this interest from the Council's point of view because it reflects the beneficial impact of the Airport on every index of consideration that matters.

41. In our submission this should cause the SOS to adopt a highly precautionary approach to any proposal which will or might adversely impact on the operation and/or future growth of the Airport.

³⁶ xx AC

³⁷ See CD/35 "*Objectives and Development Priorities*"

³⁸ See CD/33 Policy S2, T36 paragraphs 2.39, 2.46, 4.59

³⁹ DSA 2/1

42. This is the basis upon which Doncaster objects to the Keadby application. If, upon the consideration of the radar evidence, the SOS is left in any doubt at all about the consequences for the future growth and development of the Airport arising from the Keadby application then the Council invites a rejection of that application. This is because there is no room for doubt in view of the importance of the airport to the sub-regional economy. If a benign decision is made in favour of Keadby and it subsequently transpires that Keadby is more harmful to the airport than anticipated, the consequences for the sub-regional economy could be catastrophic.
43. The same, of course, applies to Tween Bridge.
44. Beyond making these points the Council defers to the Airport to advance the case in this regard, noting that the Council has sought and obtained independent expert advice to confirm the case advanced by the Airport.⁴⁰

⁴⁰ CD/27-31 inclusive

IV. Whether the landscape impact of the proposal is acceptable

“An Iron fist inside a velvet glove”

45. It is all a question of judgment. For Mr Stephenson this proposed wind farm can do no harm. He was like an indulgent parent of an errant child. Thus, he felt able to assert that the wind farm’s visual impact was wholly positive whether viewed from near or far.⁴¹ Similarly, no harmful effects on landscape character arose from planting one of the biggest wind farms every proposed in an area otherwise largely devoid of manmade structures.⁴² Similarly, the wilderness area of Thorne Moors would suffer no negative impact at all from the 22 turbines at 125m to blade tip height 300m away at the closest point⁴³ and no harm at all would arise from cumulative effects.⁴⁴

46. He may be right and he may be wrong. But what cannot be denied is that this is an extreme position for him to adopt. If SOS takes a more balanced approach and recognises the presence of some harm to some

⁴¹ EON/6/1 para 10.35

⁴² EON/6/1 11.42 – 11.52

⁴³ EON/6/1 para 14.16

⁴⁴ EON/6/1 12.46 and 12.60

landscape interests then that would necessarily involve departing from, and thereby rejecting, Mr Stephenson's evidence in this case. At Whinash the SOS also rejected Mr Stephenson's evidence about impacts finding them too rosy and sentimental. His [the SOS's] view there was that a unified and delicate landscape would be brutalised and fractured by the imposition of these tall manmade structures. We invite a similar judgment in this case, noting that it is ultimately a question of judgment.

47. There is, however, some objective material that may be drawn to the attention of the SOS when reaching a view about the extent of the harm to landscape interests caused by this proposal. PPS22 para 20 advises that harm arises from the interplay of the number of turbines, their height and the type of landscape into which it is proposed to introduce them. The greater the height and number, the greater the harm – obviously.
48. In this case the height is equal to the highest ever proposed in England. The number is greater than most. From its nature the Tween Bridge application has a high potential to cause harm.
49. It does, in fact, cause immense harm because of the sensitivity of the receiving landscape which offers a sense of tranquillity, remoteness

and solitude undisturbed by any material presence of built development. The introduction of these large vertical structures will impress themselves on the landscape and brutalise it, removing those aspects which are integral to its present quality.

50. Mr Stephenson says the range of maximum visual impact is up to 5.5km from the wind farm ⁴⁵. This includes the substantial settlements of Thorne and Crowle. In addition, the Government has just acquired the rights of peat extraction in order to remove the industrial presence and further enhance the sense of remoteness. The wind farm will frustrate these objectives.
51. Here, more than anywhere else, the Applicants' evidence suffered for the want of comparative locations. But there is material before the Inquiry which enables the more sensitive parts of Doncaster to be identified.
52. The Marr ES does what every other major wind farm application does: A Sieve assessment. That document finds that the eastern part of the borough is constrained by, among other things, the presence of the Moors.

⁴⁵ EON/6/1 para 10.6

53. Those conclusions are supported by the Doncaster Landscape Strategy⁴⁶. This is an independent, expert and contemporary study of the landscape capacity in Doncaster to accommodate, among other things, wind farms.
54. It assumes a wind farm of ten turbines of 100m height⁴⁷. It then concludes that the landscape in and around Thorne and Hatfield Moors has a capacity of “*Low to None*” to accommodate a wind farm of even this diminutive stature when compared to the monster on offer in the Tween Bridge application.⁴⁸
55. There was then an embarrassing spectacle of the Applicants trying to suggest that a rough, region wide landscape study should take precedence over this careful study of the District. That suggestion is dealt with in the summary:

“[The significant constraints] *are drawn at the strategic scale, they are not intended to give guidance for either local plans or individual applications*”⁴⁹

⁴⁶ CD/123

⁴⁷ CD/123 page 2 of 199

⁴⁸ CD/123 Section G2 page 166

⁴⁹ CD/83 page 20

In those circumstances it cannot possibly be suggested that the general regional overview should exceed the specific study of Doncaster.

56. Mr Stephenson agreed that this document (CD/123) strongly militates against a grant of consent.
57. In general we commend the approach of the Inspector and SOS at Whinash when faced with a similar scheme and similar landscape arguments.⁵⁰
58. Mr Stephenson offered the same suit of arguments; PPS22 urgency, landscape impacts through climate change, Decision Letters (eg. Cullingford) where it was said turbines make a positive contribution, valency, permeability, Landscape on Loan; etc.
59. The SOS politely listened to these arguments and rejected the scheme because it was too much, too big and the landscape too sensitive and would suffer substantial adverse change to its character. Similar judgments, supported by similar reasoning would be appropriate in this case.

⁵⁰ CD/111/d

60. Overall, we invite the following conclusions:

- (i) The bigger and more numerous the turbines the more likely they will create harm;
- (ii) Tween Bridge involves the biggest turbines ever proposed in England in almost the most numerous configuration;
- (iii) The receiving landscape is a highly sensitive, tranquil, desolate and remote wilderness which is highly susceptible to adverse change arising from the proposed wind farm;
- (iv) A wind farm of the size and scale proposed at Tween Bridge introduced into a landscape of this sensitivity is likely to cause massive adverse harm to landscape interests.
- (v) The various arguments deployed by the Applicants have all been heard before in similar circumstances but the judgment of overwhelming harm has prevailed.

V. Whether the proposal will sterilise important coal reserves

61. This issue provides a yet further indication (if such were required) that the Tween Bridge application is in the wrong place. The discussion of this part of the Inquiry was materially advanced by the very excellent Mr Wilshaw whose evidence was rational, informed and important. He agreed that the amount of coal at stake in this discussion was about 25m tonnes⁵¹ and that the application for this windfarm had been brought forward in ignorance of the fact that it might be conceivably won. He also agreed that, so far as he was aware, the same disadvantage did not arise at Marr or Hampole or anywhere else in Doncaster.

62. In short, the parties agree that the difficulty arises from the prospect of mining causing subsidence which may tilt the windfarm turbines out of alignment and adversely affect their operation. The range of tilt to be expected is between 32mm (Wilshaw) and 450mm (Munby) against a tolerance of 45mm (Wilshaw). The range therefore is either just within the limits of tolerance or massively in excess. The question for the SOS is not who is right and who is wrong in this technical disagreement, but, rather, what will be the likely approach of

⁵¹ ??? unless otherwise stated

a commercial decision maker when faced with that dichotomy. The problem is exacerbated by the fact that there is no precedent anywhere that Mr Wilshaw is aware of in which mining is taking place under an operational windfarm.

63. In these circumstances a considered decision maker would not touch it with a barge pole. This is not the Council's speculation but the clear statement of Mr Budge⁵². To be fair Mr Budge's statement was qualified by a provision for him to be compensated. However, both Mr Wilshaw and Mr Fraser QC⁵³ made it clear that not only would EON reject any such demand for compensation but that they, themselves, would demand compensation from Mr Budge. There is therefore an impasse with no obvious solution and the judgement we invite is that the commercial operator would leave the resource untouched. It cannot be said that the sterilisation is merely temporary since EON can (and probably will) apply to extend the life of the windfarm at the end of that period.

64. The sterilisation of 25m tonnes of coal is a serious disadvantage of this proposal which does not apply elsewhere at other potential windfarm locations.

⁵² Budge rebuttal App. 4

⁵³ EON/C/1/C09/1 para 26

65. There was then a disparate series of small points raised by EON to muddy the waters which may be briefly dealt with in this way:

(i) Budge may not obtain the rights

answer: UK Coal have advised that he has been pursuing those rights for some time and for reasons unrelated to this Inquiry. The market has been told it is “highly likely” he will succeed in acquiring them⁵⁴.

(ii) It may not be economical to run a road 11km underground.

Answer: Mr Budge estimates the 36m tonnes at Thorne to have a value of £1.5 billion⁵⁵. This will buy a lot of roadway especially when added to the value of the balance of Thorne’s reserves.

(iii) The windfarm area will be sterilised in any event by a pillar of support for the nature conservation area.⁵⁶

⁵⁴ Budge rebuttal App. 1 p.5

⁵⁵ Budge proof 9.4

⁵⁶ See EON/D/17

Answer: The only polite thing we can think of to say about this suggestion is that Mr Wilshaw abandoned the suggestion in cross examination.

Conclusion

The coal sterilisation debate reflects another lamentable consequence of EON's methodology which is to vigorously pursue a site solely on grounds of wind speed and without taking any or any proper regard other interests of vital importance to the public interest

VI. Whether it is permissible to grant consent in the light of the Habitats

Directive

66. It is the common currency of the planning process to balance competing and conflicting interests and to make assessments and arrive at judgments based on probabilities and likelihoods. An intellectual shift is required when considering a case which has a potential adverse impact on an internationally designated site under the Habitats Directive. At this point the decision maker is looking for certainty. Probability is not good enough. The ECJ in Waddenzee put the matter in this way:

“It is therefore apparent that the plan or project in question may be granted authorisation only on the condition that the competent national authorities are convinced that it will not adversely affect the integrity of the site concerned”⁵⁷

67. Furthermore, the burden of proof is cast firmly on the party seeking consent for the plan or project. He must supply the decision maker with enough clear evidence of an absence of harm to allow the decision maker to assert that he is certain there will be no adverse effect on the relevant interest.
68. The material presented to the Inquiry by EON does not come within a country mile of meeting this exacting standard.

The structure of decision making

69. Regulations 48, 49 and 53 together embody in English Law the requirements of Article 6(3) and (4) of the Habitats Directive for considering proposals which may affect a European site. They indicate a sequence of steps to be taken by the competent authority

⁵⁷ DMBC/0/11 page 298, para 56

(the Secretary of State) in respect of each European site – in this case, the Thorne Moor SPA. Those steps comprise:

- (1) Under Reg 48(1)(b), consider whether the project is directly connected with or necessary to management of the site.
- (2) Under Reg 48(1)(a), consider whether the project is likely to have a significant effect on the site, either alone or in combination with other plans or projects (*the significance test*).
- (3) Under Reg 48(1), make an appropriate assessment of the implications for the site in view of its current conservation objectives.
- (4) Pursuant to Regs 48(5) and (6), consider whether the project will adversely affect the integrity of the site, having regard to the manner in which it is proposed to be carried out, and any conditions or restrictions subject to which that authorisation might be given (*the integrity test*).
- (5) In accordance with Reg 48(5), but subject to Reg 49, reject the project unless it is ascertained that it will not adversely affect the integrity of that site.

- (6) If the project fails the integrity test, consider, in accordance with Reg 49(1), whether one is satisfied that there is no alternative solution; if not so satisfied, reject the project, but if so satisfied, proceed to steps 7 and 8.
- (7) Consider, in accordance with Reg 49(1), but subject to Step 6, whether one is satisfied that the project must be carried out for imperative reasons of overriding public interest.
- (8) Consider whether one can secure that compensatory measures are taken which would be necessary to secure the overall coherence of Natura 2000 (i.e. the entire network of European sites) is protected.

70. As regards step 2, the significance test acts as a coarse filter, directing attention to those effects which may require further assessment.

“Likely significant effect” is regarded as any effect that may reasonably be predicted as a consequence of a plan or project that may affect the conservation objectives of the features for which the site was designated, but excluding trivial or inconsequential effects. There is no concern at this stage to judge whether a likely effect would be adverse or beneficial. In the Waddenzee case, the ECJ concluded that

any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects.

71. If the Tween Bridge proposal fails the significance (step 2) and integrity (step 4) tests then the proposal must be rejected in accordance with Reg 48(5) (step 5). This is because the saving provisions of Reg 49 require it to be demonstrated that there is no alternative solution (such as building a smaller wind farm on an alternative site) so Reg 49 has no application in this case since the Applicants have, by their own assertion, not followed this approach.

The questions are simply:

- (i) whether there will be a significant effect on the site; and, if so

- (ii) whether the project will adversely affect the integrity of the site.

The significance test

72. The conservation objective at stake in this Inquiry is the Nightjar. The question is therefore refined to whether the proposal will have a significant effect on the Nightjar population of Thorne Moor.
73. The Nightjar is a sphinx, surrounded by an enigma and wrapped in a puzzle.
74. The most important thing to know about the Nightjar is that we don't know very much about the Nightjar. The depth of ignorance under which the Inquiry is labouring is nobody's fault. The Applicants have done their best to speculate, surmise, extrapolate and hypothesise from the limited empirical data available and, to be sure, they have done a decent job. But the sum of all the information they have been able to ascertain takes them no further than being able to express their best judgment on the basis of probabilities and likelihoods.
75. This became clear in the re-examination of the very excellent Mr Lowther whose evidence was clear, thoughtful, rational and measured. He was asked:

“Can you form a conclusion about the barrier effect on the Nightjar?”

and he replied:

“Not a firm conclusion”.

He was then asked whether the barrier effect will cause significant harm to the Nightjar and he replied:

“No. It is not likely to cause significant harm” [emphasis added]⁵⁸

76. Thus, the highest the Applicant’s evidence goes is to speculate about probabilities. This is not a sufficient evidential basis for the SOS to grant an authorisation for the plan or project within the framework of the Habitats Directive set out above.

77. The wind farm can have a significant effect (step 2) on the Nightjar population by:

- i. Bird strike
- ii. Barrier effect
- iii. Disturbance.

78. After some initial reluctance Mr Lowther agreed these were all influenced by the proximity of the wind farm to the SPA⁵⁹. Mr

⁵⁸ Indeed, this is the part of the Inquiry in which I scored my notebook down to Australia

Norman agreed and this is why he was able to assert with confidence that Keadby at 4.7km distance, would not have an adverse effect.⁶⁰

79. The other factor which has a vital impact on the question of significant effect concerns the position of the wind farm vis-à-vis the route of the Nightjar to and from the SPA. Mr Norman was able to suggest there would be no significant effect because Keady was to the North East of the SPA whilst the transit point was to the South.⁶¹ One of the few areas of consensus between the experts is that the Nightjar transit the SPA to and from the South.⁶² The briefest examination of the Tween Bridge proposal compared to the SPA⁶³ reveals that the wind farm is hard up against the whole of the southern boundary. It occupies the best position to cause the maximum impact on the Nightjar population.

80. With these points in mind a further important area of agreement was reached, namely: Nightjar will die as a consequence of a grant of

⁵⁹ xx AC

⁶⁰ RES 8.3. para 1.2

⁶¹ RES/8/1/ para 6.1

⁶² See Norman 161d, Lawther EON/7/1 para 5.30, McCarthy CD/6 Vol II Appendix 7.5 page 12

⁶³ For example CD/16 Vol II Fig. 8.1

consent. Mr Lowther agreed with Mr Norman's statement in his proof at paragraph 6.1.⁶⁴

81. It is important not to forget the interests of the general public who are a vital, if unseen, participant in these technical discussions. One person listening to this exchange said:

“However there was one witness statement and subsequent cross-examination which I found so disturbing that I felt physically sick. Mr Lowther and Mr Crean agreed that Nightjar would die in the turbine blades but the argument between them was how many or what percentage”.⁶⁵

82. The only question is therefore how many Nightjar will die if consent is granted. Mr Lowther asserted that a 1% mortality rate would equate to a significant effect and as the population consists in 60 breeding pairs a kill rate of one to two per year would be significant. Mr Nowacki increased this to two to three⁶⁶ which provides a range.

⁶⁴ AC xx

⁶⁵ DHC/1 13th Feb 2007

⁶⁶ UF xx

83. The evidence also provides a range. Mr Lowther posits one death every seven years and the Keadby Supplementary ES suggests 22.10 deaths per annum.⁶⁷
84. The width of these estimates underlines the uncertainty of this process.
85. Mr Lowther agreed it would be sensible to take a worst case assessment (even if the Keady worst case overstates the kill rate by a factor of 10 it would still equate to a significant effect).
86. Mr Lowther produced an assessment of the effects on Nightjar and cumulative assessments⁶⁸ based on a Scottish Natural Heritage model which was not shown to the Inquiry. Mr Lowther fairly accepted that that model had not been validated, was crude and should not be considered in isolation. In that assessment he assumed an avoidance rate of 95% even though there exist no precedents where observation could assist its estimation. He also assumed a flight speed of 8m/s even though Mr Baxter noted a range between 3.7-9.7m/s⁶⁹. Taking a

⁶⁷ IBID, paragraph 7.2.41 Table 7.8

⁶⁸ CD/20

⁶⁹ EON 8/1/ para 22

high end flight speed would mean that they would pass through the danger area more quickly which would tend to understate the kill rate.

87. So far as barrier effect was concerned Mr Norman concluded:

“The absence of data on the interaction between Nightjars and wind farms cannot support the notion that such impacts could not occur”⁷⁰

88. The Applicants tried to supplement this information (for obvious reasons) by carrying out radar assessments which concluded no Nightjar flew above 3m in the period of study. Mr Baxter was fair enough to confess the limitations of the study.⁷¹ He also agreed it was a limited study of only 8 nights which did not embrace emigration or immigration and that further study would lead to a more certain outcome. He further accepted that his study was probably confined to feeding activities and that it did not include courtship (were 25m had been observed), fly-catching (12 metres) or direct pursuit (10 metres).⁷² NB There is no evidence to suggest these are maximum heights.

⁷⁰ CD/20/page 16

⁷¹ EON 8.1 paragraph 9 and 16

⁷² Keady Supp ES IBID McCarthy page 4

89. Overall the Council submits:

- (i) The evidence is in a state of uncertainty in view of the important gaps in empirical data;
- (ii) The kill rate ranges between 0.09p.a. and 22.10p.a. It would be inappropriate to take the Applicant's estimate as that applies assumptions too favourable to them.
- (iii) A more realistic, albeit worst case, assessment is greater than the Applicant's bottom end although probably not as high as 22 p.a. On any view, greater than 2 kills p.a.
- (iv) This equates to more than 1% of the population and the plan or project will have a significant effect (step 2).

90. There are no conditions or restrictions which would further limit the kill rate. Thus, if the SOS agrees with the Council's submissions concerning step 2 it must follow that the plan or project fails the integrity test (step 4).

91. For reasons set out above, this leads to a mandatory rejection of the proposal in accordance with Reg 48(5).

(VII) Whether the benefits of this proposal have been accurately stated

92. The foundation of the policy to promote windfarms is the need to address climate change by limiting the production of CO² emissions. In support of this objective the Applicants began the Inquiry by asserting that the grant of consent for this windfarm would avoid the production of certain quantities expressed in tonnes.

93. However, as the Inquiry proceeded it became clear that their figure was a gross figure which failed to take account of the CO² emissions that would be produced as a direct result of granting consent for this windfarm but which would not otherwise be produced. A correct assessment of the alleged benefits of this windfarm would involve subtracting the “Emissions” from the “Savings” to then enable the SOS to decide if there is still a benefit and, if so, the extent of that benefit. The material presented to the Inquiry by EON does not allow that comparison to be expressed in reliable statistical terms. The SOS must therefore form a judgment.

94. Mr Budge explained that the Power Park for which consent has been granted would be fed by coal from Thorne. In view of the windfarm the 25m tonnes which will be sterilised will have to be found from elsewhere. The consensus between the experts is that it would be imported from Russia.
95. EON were asked (repeatedly) to provide a calculation of the amount of CO² which would be emitted by transporting 25m tonnes of coal from Russia to the Power Park next door to Thorne. What they came up with (after 5 weeks) was an exercise in obfuscation and confusion which failed to illuminate the question. The SOS must therefore form an overall judgment as to the CO² emissions which may be produced by:
- (i) mining 1 tonne of coal in, say, the Don Basin or the Urals;
 - (ii) transporting it to Murmansk;
 - (iii) shipping it to Immingham;
 - (iv) Transferring it by rail to the Power Park.

96. That figure, whatever it may be, should then be multiplied by 25 million in order to arrive at the likely sum of CO² emissions that will be pumped into the atmosphere as a direct and immediate consequence of granting consent for this windfarm.
97. It is a shame that EON declined the invitation to attach a precise figure to that calculation so the SOS is left having to make the best judgment possible in the circumstances.
98. The only thing which may be said with certainty is that the gross figure relied upon by EON is an incorrect statement of the benefits. Beyond that it is not possible to say whether the emissions exceed the benefits and therefore whether the proposal promotes the objectives of wind energy policy in PPS22.

CONCLUSION

99. For all these reasons the council respectfully suggests that permission ought not to be granted to Keadby or Tween Bridge. Both applications should be rejected.

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5th June 2007
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