STRATEGIC REGIONAL WATER RESOURCE SOLUTIONS GUIDANCE FOR RAPID GATE 2, & ITS IMPLICATIONS FOR THE GATE 2 SUBMISSION OF THE SOUTH EAST STRATEGIC RESERVOIR OPTION (SESRO).

SUBMISSION BY EAST HENDRED PARISH COUNCIL.

1. STRATEGIC REGIONAL WATER RESOURCE SOLUTIONS GUIDANCE FOR GATE 2, FEBRUARY 2022.

1.1 The Parish Council welcomes the additional guidance in Section 6 on Environment Assessment, not included in the June 2021 Strategic Regional Water Resource solutions: Guidance for 2021.

1.2 This requires in section 6.3 an indexed initial environmental appraisal in addition to the strategic scale work undertaken to date.

2. THE GATE ONE DECISION FOR THE SOUTH EAST RESERVOIR OPTION.

2.1 The Parish Council welcomes the requirement to assess the risks from landscape impacts & engagement within the Areas of Outstanding Natural Beauty (AONB).

2.2 It seeks a visual & landscape assessment covering the c.40km distance between the North Wessex Downs AONB at White Horse Hill along the Ridgeway National Trail to the Chilterns AONB at Lewknor (M40), based on views from these locations of the Didcot Power Station Cooling Towers, a similar height to the proposed Abingdon Reservoir, see map.

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3. THE INFRASTRUCTURE PLANNING (ENVIRONMENTAL IMPACT ASSESSMENT) REGULATIONS.

3.1 The Parish Council also seeks additional guidance that includes compliance with the Infrastructure Planning (Environmental Impact Assessment) Regulations.

3.2 Reg.3 defines applicants as persons proposing to apply for a Development Consent Order, which Thames Water intend to do.

3.3 Reg. 4 prevents the granting of consent without an environmental impact assessment (EIA).

3.4 Reg. 5 describes the environmental impact assessment (EIA) process.

3.5 Reg. 14 requires descriptions of the specific characteristics of reasonable alternatives, & the reason for the chosen option, taking account of environmental effects.

4. CASE LAW ON LEGAL POWERS OF PUBLIC BODIES IN DECISION-MAKING.

THE CRITERIA FOR THE NEED FOR AN ASSESSMENT OF ALTERNATIVE OPTIONS FOR NATIONAL INFRASTRUCTURE PROJECTS AGAINST ALL POLICY & LEGAL REQUIREMENTS, e.g. in assessing a national water transfer network project against a new reservoir at Abingdon.

4.1 The High Court decision, Ref: EWHC 2161, on 30th July 2021, found that the Sec of State for Transport had acted unlawfully in granting the Development Consent Order for the A303 Amesbury to Berwick Down (Stonehenge Tunnel), see attachment below.

4.2 This was on the grounds that an assessment of alternative options against all policy & legal requirements was not carried out, (paragraphs 268-290).

4.3 This judgement effects the legal powers of public bodies in decision-making where:

i) There is a significant adverse environmental impact, e.g. on AONBs.

ii) There are large scale engineering works,

iii) There has been strong criticism & objections,

iv) There is a clear planning objection to development identified by the District & County Councils,

v) The promoter concluded that carrying out an options appraisal made it unnecessary to consider the merits of alternatives,

vi) The alternatives meet the same need or demand requirement,

vii) Where compliance with taking environmental information into account, does not address the specific obligation to compare the relative merits of alternative options,

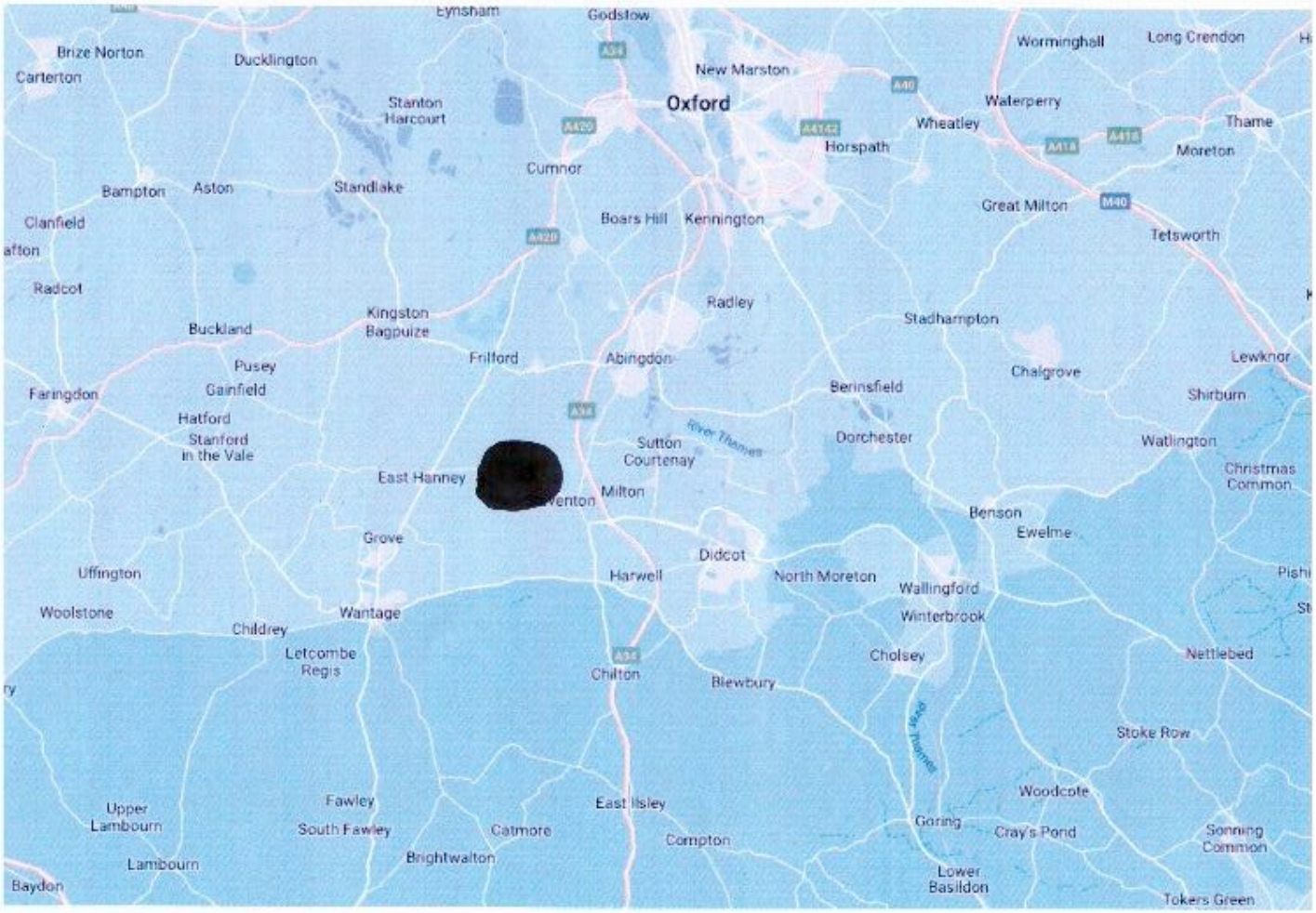
viii) It is no answer to say the proposed scheme complies with guidance because this does not override the Common Law Principles where alternative options are an obvious material consideration.

4.4 The Parish Council seeks clarification as to why the EIA Regulations for Infrastructure Planning & the Case Law above should not apply in this case.

APPENDICES

1. **Map of area sought for Visual & Landscape Assessment on the North Wessex Downs & Chilterns AONBs, based on views from this area of Didcot Power Station Cooling Towers, a similar height & location to the proposed Abingdon Reservoir.**

2. **Case Law: The judgement in the High Court Case, ref: EWHC 2161, 30th July 2021 setting out the legal powers of public bodies in decision-making on Development Consent Order submissions.**


Eynsham
Godstow
Brize Norton
Carterton
Ducklington
New Marston
Oxford
Worminghall
Long Crendon
Stanton Harcourt
Waterperry
Wheatley
Thame
Horspath
Moreton
Cumnor
Bampton
Aston
Standlake
Great Milton
Clanfield
Boars Hill
Kennington
Tetsworth
Radcot
Radley
Stadhampton
Kingston Bagpuize
Buckland
Frilford
Abingdon
Lewknor
Pusey
Chalgrove
Faringdon
Gainfield
Berinsfield
Shirburn
Hatford
Stanford in the Vale
Sutton Courtenay
River Thames
Dorchester
Watlington
East Hanney
Milton
Christmas Common
Benson
Ewelme
Grove
Didcot
Uffington
Harwell
North Moreton
Wallingford
Woolstone
Wantage
Winterbrook
Childrey
Letcombe Regis
Cholsey
Nettlebed
Chilton
Blewbury
Stoke Row
Woodcote
Upper Lambourn
Fawley
East Ilsley
Goring
South Fawley
Catmore
Cray's Pond
Sonning Common
Compton
Lambourn
Brightwalton
Lower Basildon
Baydon
Tokers Green

 England and Wales High Court (Administrative Court) Decisions

Cite as: [2021] WLR(D) 434, [2021] EWHC 2161 (Admin)

 Neutral Citation Number: [2021] EWHC 2161 (Admin)

IN THE HIGH COURT OF JUSTICE QUEEN'S BENCH

DIVISION PLANNING COURT

Case No: C0/4844/2020

Royal Courts of Justice Strand, London, WC2A 2LL

Date: 30/07/2021

Claimant

Defendant

Before :
THE HON. MR JUSTICE HOLGATE Between :

The Queen on the application of SAVE STONEHENGE WORLD HERITAGE SITE LIMITED
- and -
SECRETARY OF STATE FOR TRANSPORT

- and –

(1) HIGHWAYS ENGLAND
(2) HISTORIC BUILDINGS AND MONUMENTS COMMISSION FOR ENGLAND ("HISTORIC ENGLAND")

Interested Parties

268. The principles on whether alternative sites or options may permissibly be taken into account or whether, going further, they are an "obviously material consideration" which must be taken into account, are well-established and need only be summarised here.

269. The analysis by Simon Brown J (as he then was) in ***Trusthouse Forte v Secretary of State for the Environment*** **(1987)** 53 P & CR 293 at 299-300 has subsequently been endorsed in several authorities. First, land may be developed in any way which is acceptable for planning purposes. The fact that other land exists upon which the development proposed would be yet more acceptable for such purposes would not justify the refusal of planning permission for that proposal. But, secondly, where there are clear planning objections to development upon a particular site then "it may well be relevant and indeed necessary" to consider where there is a more appropriate site elsewhere. "This is particularly so where the development is bound to have significant adverse effects and where the major argument advanced in support of the application is that the need for the development outweighs the planning disadvantages inherent in it." Examples of this second situation may include infrastructure projects of national importance. The judge added that even in some cases which have these characteristics, it may not be necessary to consider alternatives if the environmental impact is relatively slight and the objections not especially strong.

270. The Court of Appeal approved a similar set of principles in *R* ***(Mount Cook Land Limited) v Westminster City Council*** [2017] PTSR 1166 at [30]. Thus, in the absence of conflict with planning policy and/or other planning harm, the relative advantages of alternative uses on the application site or of the same use on alternative sites are normally irrelevant. In those "exceptional circumstances" where alternatives might be relevant, vague or inchoate schemes, or which have no real possibility of coming about, are either irrelevant, or where relevant, should be given little or no weight.

271. Essentially the same approach was set out by the Court of Appeal in ***R (Jones) v North Warwickshire Borough Council*** [2001] PLCR 31 at [22] to [30]. At [30] Laws LJ stated:-

"..... it seems to me that all these materials broadly point to a general proposition, which is that consideration of alternative sites would only be relevant to a planning application in exceptional circumstances. Generally speaking—and I lay down no fixed rule, any more than did Oliver L.J. or Simon Brown J.—such circumstances will particularly arise where the proposed development, though desirable in itself, involves on the site proposed such conspicuous adverse effects that the possibility of an alternative site lacking such drawbacks necessarily itself becomes, in the mind of a reasonable local authority, a relevant planning consideration upon the application in question."

272. **In *Derbyshire Dales District Council v Secretary of State for Communities and Local*** *Government* [2010] 1 P&CR 19 Carnwath LJ emphasised the need to draw a distinction between two categories of legal error: first, where it is said that the decision-maker erred by taking alternatives into account and second, where it is said that he had erred by failing to take them into account ([17] and [35]). In the second category an error of law cannot arise unless there was a legal or policy requirement to take alternatives into account, or such alternatives were an "obviously material" consideration in the case so that it was irrational not to take them into account ([16] to [28]).

273. In ***R (Langley Park School for Girls Governing Body) v Bromley London Borough Council*** [2009] EWCA Civ 734 the Court of Appeal was concerned with alternative options within the same area of land as the application site, rather than alternative sites for the same development. In that case it was necessary for the decision-maker to consider whether the openness and visual amenity of Metropolitan Open Land ("MOL") would be harmed by a proposal to erect new school buildings. MOL policy is very similar to that applied within a Green Belt. The local planning authority did not take into account the claimant's contention that the proposed buildings could be located in a less open part of the application site resulting in less harm to the MOL.

Sullivan LJ referred to the second principle in ***Trusthouse Forte*** and said that it must apply with equal, if not greater, force where the alternative suggested relates to different siting within the same application site rather than a different site altogether ([45 to 46]). He added that no "exceptional circumstances" had to be shown in such a case ([40]).

274. At [52-53] Sullivan LJ stated:-

"52. It does not follow that in every case the "mere" possibility that an alternative scheme might do less harm must be given no weight. In the **Trusthouse Forte** case the Secretary of State was entitled to conclude that the normal forces of supply and demand would operate to meet the need for hotel accommodation on another site in the Bristol area even though no specific alternative site had been identified. There is no "one size fits all" rule. The starting point must be the extent of the harm in planning terms (conflict with policy etc.) that would be caused by the application. If little or no harm would be caused by granting permission there would be no need to consider whether the harm (or the lack of it) might be avoided. The less the harm the more likely it would be (all other things being equal) that the local planning authority would need to be thoroughly persuaded of the merits of avoiding or reducing it by adopting an alternative scheme. At the other end of the spectrum, if a local planning authority considered that a proposed development would do really serious harm it would be entitled to refuse planning permission if it had not been persuaded by the applicant that there was no possibility, whether by adopting an alternative scheme, or otherwise, of avoiding or reducing that harm.

53.Where any particular application falls within this spectrum; whether there is a need to consider the possibility of avoiding or reducing the planning harm that would be caused by a particular proposal; and if so, how far evidence in support of that possibility, or the lack of it, should have been worked up in detail by the objectors or the applicant for permission; are all matters of planning judgment for the local planning authority. In the present case the members were not asked to make that judgment.

They were effectively told at the onset that they could ignore Point (b), and did so simply because the application for planning permission did not include the alternative siting for which the objectors were contending, and the members were considering the merits of that application."

275. The decision cited by Mr Taylor QC in ***First Secretary of State v Sainsbury's Supermarkets*** *Limited* [2007] EWCA Civ 1083 is entirely consistent with the principles set out above. In that case, the Secretary of State did in fact take the alternative scheme promoted by Sainsbury's into account. He did not treat it as irrelevant. He decided that it should be given little weight, which was a matter of judgment and not irrational ([30 and 32]). Accordingly, that was not a case, like the present one [3], where the error of law under consideration fell within the second of the two categories identified by Carnwath LJ in ***Derbyshire Dales District Council*** (see [272] above).

276.The wider issue which the Court of Appeal went on to address at [33] to [38] of the *Sainsbury's* case does not arise in our case, namely must *planning permission be refused* for a proposal which is judged to be "acceptable" because there is an alternative scheme which is considered to be more acceptable. True enough, the decision on acceptability in that case was a balanced judgment which had regard to harm to heritage assets, but that was undoubtedly an example of the first principle stated in ***Trusthouse Forte*** (see [269] above). The court did not have to consider the second principle, which is concerned with whether a decision-maker may be obliged to take an alternative *into account.* Indeed, in the present case, there is no issue about whether alternatives for the western cutting should have been taken into account. As I have said, the issue here is narrower and case-specific. Was the SST entitled to go no further, in substance, than the approach set out in paragraph 4.27 of the NPSNN and PR 5.4.71?

277. In my judgment the clear and firm answer to that question is no. The relevant circumstances of the present case are wholly exceptional. In this case the relative merits of the alternative tunnel options compared to the western cutting and portals were an obviously material consideration which the SST was required to assess. It was irrational not to do so. This was not merely a relevant consideration which the SST could choose whether or not to take into account [4]. I reach this conclusion for a number of reasons, the cumulative effect of which I judge to be overwhelming.

278**. First,** the designation of the WHS is a declaration that the asset has "outstanding universal value" for the cultural heritage of the world as well as the UK. There is a duty to protect and conserve the asset (article 4 of the Convention) and there is the objective *inter alia* to take effective and active measures for its "protection, conservation, presentation and rehabilitation" (article 5). The NPSNN treats a World Heritage Site as an asset of "the highest significance" (para. 5.131).

279. **Second,** the SST accepted the specific findings of the Panel on the harm to the settings of designated heritage assets (e.g. scheduled ancient monuments) that would be caused by the western cutting in the proposed scheme. He also accepted the Panel's specific findings that OUV attributes, integrity and authenticity of the WHS would be harmed by that proposal. The Panel concluded that that overall impact would be "significantly adverse", the SST repeated that (DL 28) and did not disagree (see [137], [139] and [144] above).

280. **Third,** the western cutting involves large scale civil engineering works, as described by the Panel. The harm described by the Panel would be permanent and irreversible.

281**. Fourth,** the western cutting has attracted strong criticism from the WHC and interested parties at the Examination, as well as in findings by the Panel which the SST has accepted. These criticisms are reinforced by the protection given to the WHS by the objectives of Articles 4 and 5 of the Convention, the more specific heritage policies contained in the NPSNN and by regulation 3 of the 2010 Regulations.

282. **Fifth,** this is not a case where no harm would be caused to heritage assets (see *Bramshill* at [78]). The SST proceeded on the basis that the heritage benefits of the scheme, in particular the benefits to the OUV of the WHS, did not outweigh the harm that would be caused to heritage assets. The scheme would not produce an overall net benefit for the WHS. In that sense, it is not acceptable *per se*. The acceptability of the scheme depended upon the SST deciding that the heritage harm (and in the overall balancing exercise *all* disbenefits) were outweighed by the need for the new road and *all* its other benefits. This case fell fairly and squarely within the exceptional category of cases identified in, for example, *Trusthouse Forte*, where an assessment of relevant alternatives to the western cutting was required (see [269] above).

283. The submission of Mr. Strachan QC that the SST has decided that the proposed scheme is "acceptable" so that the general principle applies that alternatives are irrelevant is untenable. The case law makes it clear that that principle does not apply where the scheme proposed would cause significant planning harm, as here, and the grant of consent *depends* upon its adverse impacts being outweighed by need and other benefits (as in para. 5.134 of the NPSNN).

284. I reach that conclusion without having to rely upon the points on which the claimant has succeeded under ground 1(iv). But the additional effect of that legal error is that the planning balance was not struck lawfully and so, for that separate reason, the basis upon which Mr. Strachan QC says that the SST found the scheme to be acceptable collapses.

285**. Sixth,** it has been accepted in this case that alternatives should be considered in accordance with paragraphs 4.26 and 4.27 of the NPSNN. But the Panel and the SST misdirected themselves in concluding that the carrying out of the options appraisal for the purposes of the RIS made it unnecessary for them to consider the merits of alternatives for themselves. IP1's view that the tunnel alternatives would provide only "minimal benefit" in heritage terms was predicated on its assessments that no substantial harm would be caused to any designated heritage asset and that the scheme would

have slightly *beneficial* (not adverse) effects on the OUV attributes, integrity and authenticity of the WHS. The fact that the SST accepted that there would be net harm to the OUV attributes, integrity and authenticity of the WHS (see [139] and [144] above) made it irrational or logically impossible for him to treat IP1's options appraisal as making it unnecessary for him to consider the relative merits of the tunnel alternatives. The options testing by IP1 dealt with those heritage impacts on a basis which is inconsistent with that adopted by the SST.

286. **Seventh,** there is no dispute that the tunnel alternatives are located within the application site for the DCO. They involve the use of essentially the same route and certainly not a completely different site or route. Accordingly, as Sullivan LJ pointed out in *Langley Park* (see [246] above), the second principle in *Trusthouse Forte* applies with equal, if not greater force.

287. **Eighth,** it is no answer for the defendant to say that DL 11 records that the SST has had regard to the "environmental information" as defined in regulation 3(1) of the EIA Regulations 2017. Compliance with a requirement to take information into account does not address the specific obligation in the circumstances of this case to compare the relative merits of the alternative tunnel options.

288. **Ninth,** it is no answer for the defendant to say that in DL 85 the SST found that the proposed scheme was in accordance with the NPSNN and so s.104(7) of the PA 2008 may not be used as a "back door" for challenging the policy in paragraph 4.27 of the NPSNN. I have previously explained why paragraph 4.27 does not override paragraph 4.26 of the NPSNN, and does not disapply the common law principles on when alternatives are an obviously material consideration. But in addition the SST's finding that the proposal accords with the NPSNN for the purposes of s.104(3) of the PA 2008 is vitiated (a) by the legal error upheld underground 1(iv) and, in any event, (b) by the legal impossibility of the SST deciding the application in accordance with paragraph 4.27 of the NPSNN.

289. I should add for completeness that neither the Panel nor the SST suggested that the extended tunnel options need not be considered because they were too vague or inchoate. That suggestion has not been raised in submissions.

290. For all these reasons, I uphold ground 5(iii) of this challenge.

Conclusions

291. The court upholds two freestanding grounds of challenge, 1(iv) and 5(iii). Permission is granted to the claimant to apply for judicial review in relation to those grounds.