

**Case Name:** *EFW Group Ltd v Secretary of State for Business, Energy And Industrial Strategy* [2021] EWHC 2697 (Admin) (08 October 2021)

**Full case:** [Click Here](#)

**Commentary:** This case concerned an unsuccessful application for judicial review of a decision not to grant a development consent order ('DCO') for one of two proposals for energy from waste development.

The first proposal, Wheelebrator Kemsley K3 ('K3'), sought to increase the generating capacity of the pre-existing plant at Kemsley, Kent (the 'Kemsley plant') from 49.9MW to 75MW and increase total waste tonnage throughput from 550,000 to 657,000. No physical works were required. The increase in capacity to over 50MW resulted in the proposal falling within the definition of a nationally significant infrastructure project ('NSIP'), thus requiring a DCO for development.

The second proposal, Wheelebrator Kemsley North ('WKN'), was for a new waste-to-energy facility capable of processing 390,000 tonnes of waste and generating 42MW of electricity. Due to the generating capacity of WKN being less than 50MW, WKN did not fall within the definition of an NSIP. However, the Secretary of State issued a direction under section 35 of the Planning Act 2008 (the 'Act') to require a DCO for the development of WKN due to the proximity of WKN to the Kemsley plant. Both K3 and WKN were therefore considered as part of the same application for a DCO.

The examining authority ('ExA') determined that as K3 was an NSIP, section 104 of the Act applied and the application must be determined in accordance with any relevant national policy statement ('NPS'). As WKN was not an NSIP, section 105 of the Act applied and the application need not be determined in accordance with the relevant NPS, although compliance may be a consideration.

The ExA concluded that as K3 complied with the relevant NPS, consent should be granted but as WKN was inconsistent with the applicable local plan (due to non-compliance with the waste hierarchy) consent should not be granted.

The Secretary of State considered that the ExA's report erred in its application of the Act as section 104 required the single DCO application to be treated as a whole and more weight should be given to the relevant NPS in respect of WKN. Despite the ExA's alleged error, the Secretary of State determined that the DCO should not be granted for WKN due to non-compliance with the local plan. The Secretary of State followed the ExA's recommendation and granted consent for K3.

In relation to the judicial review proceedings, the applicant submitted that as section 104 of the Act applied to the DCO application as a whole, the Secretary of State failed to apply the presumption in favour of granting consent to applications which complied with the relevant NPS. The applicant also submitted that the section 35 direction had the effect of bringing WKN within the scope of section 104 of the Act.

The Court held that the Secretary of State's section 35 direction did not bring WKN within the scope of section 104 of the Act. Section 35 of the Act has the effect of bringing proposed development within the DCO consenting framework, but not the effect of turning a development into an NSIP. Section 105 of the Act applies to specific aspects of

an application in relation to which an NPS does not apply.

The Court held that the Secretary of State made an error of law in determining the DCO application within section 104 of the Act. WKN should have been assessed in accordance with section 105 of the Act as it was not an NSIP. Despite this error in law, the Court was satisfied that the applicant was not entitled to relief as the Secretary of State's decision would have been the same if the law had been correctly applied

*Case summary prepared by Matt Speed*