

Case Name: *Together Against Sizewell C Ltd, R (On the Application Of) v Secretary of State for Energy Security and Net Zero & Anor* [2023] EWCA Civ 1517 (20 December 2023)

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Commentary: This was an unsuccessful appeal by Together Against Sizewell C Ltd (the “Appellant”) against a decision by the High Court refusing permission to apply for judicial review of the decision by the Secretary of State (the “Respondent”) to grant a development consent order for a third nuclear power station at Sizewell on the Suffolk coast (“Sizewell C”).

Background

The key fact for the purposes of this appeal is that at the time when development consent was granted, the permanent supply of potable water, which is necessary for the operation of Sizewell C, was not identified. This was because the applicant (“Sizewell C Ltd”) maintained that this would become clear once a water resource management plan was prepared by the statutory water undertaker for that area, Northumbrian Water Limited (“NWL”).

NWL have a number of statutory duties as water undertaker, including to ensure that the necessary arrangements have been made to provide sufficient water supply to premises in the area. NWL are also required to produce and publish water resources management plan every 5 years. NWL is preparing its Water Resources Management Plan 2024 (“WRMP24”) for the 2025 to 2050 period. It was agreed by all parties that the WRMP24 would be subject to the “appropriate assessment” under Regulation 63 of the Conservation of Habitats and Species Regulations 2017 (the “Habitats Regulations”) in any event.

In his decision to grant development consent to Sizewell C, the Respondent concluded that the water sourcing process was a separate project to Sizewell C itself, as the two projects are in separate ownership, would be subject to “*distinct and asynchronous determination processes*”, and are stand-alone, as NWL has a statutory duty to undertake the WRMP24 in any event.

The Appellant sought permission to bring a claim for judicial review against the Respondent’s decision to grant development consent, which was ultimately refused at a rolled-up hearing. The Appellant subsequently sought permission to appeal from the Court of Appeal on five grounds, two of which were granted permission.

Under the first ground, the Appellant argued that the Respondent was wrong in law to treat the permanent supply of water to Sizewell C as not being part of the same project as Sizewell C for the purposes of carrying out an “appropriate assessment” under the Habitat Regulations (“Ground 1”).

Under the second ground, the Appellant argued that even if the Respondent was right to regard the permanent water supply as a separate project, he erred in failing to carry out a cumulative assessment of its effects together with those of Sizewell C itself, as per the Habitats Regulations (“Ground 2”).

Ground 1

The Court dismissed Ground 1. The Court accepted, firstly, that there was no material difference between the meaning of a “project” under the Habitat Regulations and environmental impact assessment regulations and, secondly, that the principle adopted in previous cases that determining the nature and scope of a project, including whether two or more developments are to be regarded as one project, is a matter for the decision-maker to determine, which can only be subject to judicial review by the court on the grounds of irrationality or other unlawfulness. The Court, although seeking not to be prescriptive, endorsed the factors identified in the *Wingfield* case (please see our Town Library summary [here](#)) as capable of influencing this exercise of judgment.

The Court found no irrationality or any other unlawfulness in the Respondent’s decision, noting not only that he was entitled to reach this decision, but the Court would have reached the same conclusion.

It should also be noted that the Court rejected an argument that the Respondent unlawfully avoided appropriate assessment under the Habitats Regulations and saw the approach taken as a realistic and legitimate use of the “staged approach” previously approved in case law.

Ground 2

Ground 2 was dismissed by the Court for a number of reasons. These reasons included that it is well established that the consideration of cumulative impacts arising from a subsequent development that is still inchoate may be deferred to a later consent stage. Given that insufficient information was available as to the water supply, the decision to defer assessment by the Respondent was rational and lawful.

The Court rejected the argument that no proper assessment of the impacts would be carried out at the later stage because the construction of Sizewell C would result in the inevitable approval of the water supply proposal. There was no evidential basis for assuming that regulators would fail to carry out their statutory duties to assess the adverse effects of the water supply. The Court also rejected the argument that deferral was irrational because of a risk of Sizewell C not being operational in the absence of a water supply, as there was a reasonable level of certainty a permanent water supply would be provided and further the alternatives would still be subject to appropriate

assessment.

Accordingly, the appeal was dismissed.

Case summary prepared by Chatura Saravanan