Case Name: *R (HyNot Limited) v Secretary of State for Energy Security and Net Zero and Anor [2025] EWHC 2644 (Admin).*

Full case: Read Here

Commentary: This case concerned a challenge to a Carbon Capture and Storage (**"CCS"**) development under the Irish Sea. CCS is a process whereby emissions are captured before reaching the atmosphere and redirected to depleted reservoirs or aquifers to be stored. This is an application for permission to judicially review.

The Claimant is a company limited by guarantee which was incorporated just one day before the claim was filed. Their name, "HyNot", speaks to their opposition to the HyNet Cluster which includes infrastructure for both the transport and capture of carbon dioxide and the production and transport of hydrogen by underground pipelines and storage. Only the transport and capture of carbon dioxide relate to the decisions under challenge.

On the one hand, the Claimant views CCS as problematic because it redirects investment away from proven climate solutions and towards efforts which inherently rely upon the continued extraction and usage of fossil fuels. On the other hand, government policy regards CCS as a "necessity, not an option" for the pathway to net-zero, and the proposed infrastructure development is of national significance insofar as it is viewed as critical for net zero and that it promises to substantially boost the local and national economies.

The Claimant sought to advance three grounds of challenge. First, the Claimant submitted that there was no sufficient assessment of the risks from major accidents and disasters (**"MAD"**) posed by the Development, and/or there was no sufficient consultation with the public as to those MAD risks, relying upon ***R (Finch) v Surrey County Council*** [2024] UKSC 30. Second, the Claimant suggested that the Secretary of State failed to properly assess the cumulative effects of the Development on climate change. Third, the Claimant contended that the Secretary of State failed to comply with the Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001 (**"the Habitats Regulations"**) by failing to provide cogent reasons for rejecting the advice from the two expert statutory nature consultation bodies (**"SNCBs"**).

In refusing permission to apply for judicial review, Saini J concluded that all three grounds of appeal were unarguable. Saini J also noted that in any event, the Claimant did not bring the application "promptly", pursuant to the requirements of CPR r.54.5(1)(a), and accordingly, permission would have been refused irrespective of his conclusions on the advanced grounds of challenge. Obiter, Saini J also thought that there was "substantial force" behind the counsel for the Secretary of State's contention that the Claimant needed to satisfy the heightened test of reasonably good prospects of success, owing to the urgency, permission hearing length, substantial written and oral submissions, and that the claim "substantially affects" the interests of the third party (the Developer). [70]

The Decisions

The Claimant challenges two decisions made by the Secretary of State, namely **(1)** the decision to grant consent for storage permit applications which pertain to the Development under the Offshore Oil and Gas Exploration, Production, Unloading and Storage (Environmental Impact Assessment) Regulations 2020 (**"Offshore EIA Regulations"**); and **(2)** the decision made by the Oil and Gas Authority (trading as the North Sea Transition Authority) (**"NSTA"**), the Second Defendant to this application, to grant consent for the development of three geological gas storage sites in the Liverpool Bay Area and under the East Irish Sea (**"the Development"**, and together, **"the Decision"**).

Ground One: Major Accidents and Disasters

There are two limbs to ground one. First, the failure to assess the MAD risks of the Development, and second, the failure to properly consult the public on the MAD risks.

Ground (1)(a): failure to properly assess the risks of MAD.

Counsel for the Claimant advanced four sub-points in relation to this limb of Ground One. First, it was submitted that there had been no proper assessment of all MAD risks of the development in the Environmental Statement (**"ES"**), and there were insufficient attempts to gather information to set out all MAD risks, expected impacts of the project and what mitigation would be relied upon to satisfy the standard of "as low as reasonably possible".

Schedule 6 to the Offshore EIA Regulations sets out the obligation to include an assessment of the likely significant effects of the proposal on the environment, and that must cover the expected risk of effects of the major accidents and disasters (paragraph 5(c) to that schedule). Paragraph 6(d) to Schedule 6 also requires a description of the mitigation measures envisaged.

Saini J remembered the principle in ***R (Gathercole) v Suffolk CC*** [2021] PTSR 359 at [52]-[55] that decisions relating to the inclusion of information in the ES, and the nature and the level of detail included, are within the exclusive jurisdiction of the Secretary of State to decide as a matter of his judgment; and that following ***R (Suffolk Energy Action Solutions SPV Ltd) v SSESNZ*** [2023] EWHC 1786 at [57]-[71], the level of information included in the ES should be judged as a whole. The decision of what is sufficient to satisfy the Offshore EIA Regulations is therefore subject only to *Wednesbury* review.

It was also thought that ***Finch*** has not altered these principles, remembering that Lord Legatt recognised that generally, the scope of an Environmental Impact Assessment is

one of "evaluative judgment" and that the court will not interfere unless the decision is irrational. (See ***Finch*** at [56] and [77]-[78])

Ultimately, Saini J noted that MAD risks had been considered in the EIA process, and there was no obligation upon the Secretary of State to assess all of the MAD risks, and it was a matter of judgment for the Secretary of State what MAD risks to scope out. It was thought that it would be unarguable to suggest that the Secretary of State had ignored the assessment of MAD risks.

It was secondly suggested by counsel for the Claimant that the risks of MAD should have been assessed cumulatively in light of the effects of the "wider project". Counsel for the Claimant's third sub-point suggested that a material change to the Keuper Underground Gas Storage Facility and the Hydrogen Pipeline as part of the wider project should have been scoped into that cumulative assessment.

The bounds of ***Finch*** were tested here. Reference was made to the Claimant's consultation response which signalled the failure to consider the "downstream effect of hydrogen leakage due to the project as a whole". Saini J opined that any attempt to identify the cumulative risks of the wider project "would require an exercise going beyond even speculation and conjecture." [43](b)

Fourthly, counsel for the Claimant suggested that there should have been an assessment of the flood risk at the Point of Ayr Terminal. Saini J remembered that MAD risks were assessed in the Decision and that mitigation measures were described, and therefore a rational approach had been taken. Accordingly, Ground 1(a) was thought to be untenable.

Ground 1(b): failure to properly consult the public about the MAD risks of the Development.

Counsel for the Claimant contended that the failure to consult the public as to the MAD risks constituted a breach of regulation 12(3) of the Offshore EIA Regulations, which rendered the Decision unlawful because that decision needed to take account of representations received as a part of that consultation. Saini J judged that the Secretary of State complied with that duty by providing the Developer a notice on the 12 November 2024. It was not the case that Regulation 12(3) required the publication of all of documents in full after the service of the relevant notice. Moreover, no proper challenge to the notice was brought at the proper time, that being the 12 November 2024.

Counsel for the Claimant also suggested that the further MAD risks information provided required an unlawful "paper chase", relying upon ***Berkeley v SSETR*** [2001] 2 AC 603 (HL). Saini J thought that the facts of ***Berkeley*** were, extreme such that the documents produced were disparate to the extent that they were only traceable by someone with "a good deal of energy and persistence". The technical nature of the provided documents

and the fact that they were unordered did not come close to a tenable "paper chase" argument, thought Saini J.

Ground Two: Failure to Consider the Cumulative Effects on Climate Change

Counsel for the Claimant advanced the submission that failure to consider the cumulative effects of the entirety of the HyNet cluster, and the confinement of the ES to the scope of just two aspects, rendered the decision unlawful. Notably, it was submitted that it was irrational not to scope in the HyNet Hydrogen Production Plants.

First, applying ***Preston New Road Action Group v SSCLG*** [2018] EWCA Civ 9, Saini J noted that it was crucial that the courts focus on the likely significant effects on the environment of the specific project under challenge, and that "indirect, secondary, cumulative … effects of the project" cannot be stretched to include effects that are not effects of the project at all, nor is there an obligation to assess the impacts of hypothetical activities which it is associated with. Applying ***R (Frack Free Ryedale) v North Yorkshire CC*** [2016] EWHC 3303 (Admin) at [39], it was considered wrong in principle to conflate a project with other projects which form part of the larger network. Ultimately, Saini J concluded:

> "… emissions deriving from hydrogen production are not effects of the offshore carbon transportation and storage Development, whether indirect, secondary, or cumulative. That is a matter of causation." [54]

It remains that the nature and scale of the emissions which the Claimant sought to scope in is unknown, and would involve "just the sort of speculation or conjecture disapproved in ***Finch.***" [55] Accordingly, Saini J concluded that this Ground was untenable.

Ground Three: Failure to Comply with the Habitats Regulations

The Claimant advanced several points in relation to the third ground, but there are two issues discussed in the judgement of Saini J which were advanced in oral submissions and two points advanced in the Statement of Facts and Grounds but not advanced in oral submissions. The main submission by the claimant will be dealt with in this summary only, for brevity.

Failure to provide cogent reasons for not accepting the advice of the SNCBs.

The Claimant's contention was that the Secretary of State failed to take into account or clearly differ from the representations made by the two SNCBs, and in doing so, failed to comply with the Regulations Habitats Regulations. Saini J pointed to the table under section 16 of the OPRED appropriate assessment, which contained a clear statement of

how the Secretary of State had taken into account the advice from the SNCBs. Accordingly, this argument was thought to be untenable.

Promptness (CPR 54.5(1)(a))

The Decision was taken on the 17 March 2025 and the claim was filed three months later to the day, on the 17 May 2025, and only in a "protective" capacity (it did not include any pleaded case). Whilst the 6-week time limit found in the Planning Acts to challenge permission for Nationally Significant Infrastructure Projects did not apply because the Development proposed to take place within the territorial waters of the UK, Saini J thought that those timescales were "indicative" of the need to act "very speedily indeed". [67]

Saini J noted that in any event, he would have refused permission because the claim was not brought promptly.

Case summary prepared by Adam Choudhury