

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

CO/8229/2011

**IN THE MATTER OF AN APPLICATION FOR PERMISSION TO APPLY FOR
JUDICIAL REVIEW**

B E T W E E N:

THE QUEEN

**on the application of
GREENPEACE LIMITED**

Claimant

and

SECRETARY OF STATE FOR ENERGY AND CLIMATE CHANGE

Defendant

CLAIMANT'S STATEMENT OF FACTS AND GROUNDS

References in square brackets are to page numbers in the Claimant's bundle

Introduction

1. The Claimant ("**Greenpeace**") applies for permission to apply for judicial review of the Defendant's ("**S/S**") decision of 19 July 2011 to designate, under section 5 of the Planning Act 2008 ("**PA 08**"), the National Policy Statement known as EN-6 ("**the NPS**") which sets out the national policy that is to govern the determination of future

applications for development orders to permit the building of new nuclear power stations (“**the Decision**”) [CB1/3/111].

Factual Background

The Fukushima disaster

2. At 3:41 p.m. local time on 11 March 2011, a tsunami arrived at the coast of Japan and hit Fukushima, the site of a coastally-situated nuclear power station known as Fukushima Daiichi. The cause of the tsunami was a major earthquake that had occurred a little under an hour earlier.
3. While the seriousness of the consequences of the tsunami for the safety of the nuclear power station were not immediately apparent, it resulted in a series of events that produced one of the world’s most serious nuclear disasters: a disaster that had, by 12 April 2011, become a “category 7” incident on the scale used by the International Atomic Energy Authority (the level that had previously been applied only to the 1986 disaster at Chernobyl). Although the level of threat to the surrounding population and environment has now reduced, an exclusion zone continues to be maintained and the containment operation is still ongoing. The clean-up operation will take many years.
4. Across the world, governments reacted to the Fukushima disaster by commissioning urgent reviews of the safety of their own civilian nuclear facilities to see what lessons could be learnt. In the United Kingdom, the task of undertaking that review was entrusted to Her Majesty’s Chief Inspector of Nuclear Installations, Dr Mike Weightman. Dr Weightman’s review is still ongoing and his final report is not expected until September 2011.
5. However, Dr Weightman has produced an interim report (“**the Interim Report**”) dated May 2011 in which he provided an initial analysis of the causes of the Fukushima disaster, expressed certain initial conclusions, and made a number of

recommendations as to actions that should be taken to improve UK nuclear safety [CB1/4/617-626].¹

6. As explained in the Interim Report², the sequence of events that followed the tsunami and produced such a serious disaster was as follows [CB1/4/619]:

“When the tsunami hit the site all AC electrical power to the cooling system for the reactor and the reactor fuel ponds was lost including that from backup diesel generators. Over the next few days several large explosions and fires occurred as a result of the fuel heating up, the fuel cladding reacting with water and steam and hydrogen being released. In addition, fuel element integrity was lost which led to a significant release of radioactivity into the environment.

The hydrogen explosions caused considerable damage to Reactor Units 1, 3 and 4. Reactor Unit 2 had an internal explosion that appeared to have breached the secondary containment. The site struggled to put cooling water into the reactors and the reactor fuel ponds, by previously untried and unplanned means, for over a week. Electrical supplies were gradually reconnected to the reactor buildings and a degree of control returned. Heavily contaminated water used to cool the reactors and spent fuel ponds collected in uncontained areas of the site and leaked out to sea. Eventually emergency measures were successful in curtailing the uncontrolled discharges.”

7. The conclusions has been drawn that, the cause of the disaster had little to do with any physical damage caused to the plant by the earthquake itself, but was due to the prolonged interruption of the electricity needed to maintain the supply of cooling water to the reactors.
8. The lack of cooling water led to overheating, which in turn caused explosions, resulting in the release of dangerous levels of radiation. Further radiation pollution resulted from the discharge into the environment of water pumped into the reactors in an attempt to stop the fires and cool them down.

¹ See Interim Report, Executive summary: “*While not all the circumstances of the accident in Japan are known there is sufficient information to develop initial lessons for the UK.*” [CB1/4/617]

² Interim Report, Executive summary [CB1/4/617-626].

The Weightman Interim Report

9. The Interim Report was published in May 2011. As explained in the Foreword [CB1/4/615]:

“This interim report responds to the request of the Secretary of State for Energy and Climate Change to examine the circumstances of the Fukushima accident to see what lessons could be learnt to enhance the safety of the UK nuclear industry. I was asked [on 14 March 2011] to provide an interim report to be available by the middle of May 2011 and a final report within six months. ...

... this interim report focuses on significant lessons for the safety of nuclear power stations operating in the UK and proposals to build new ones. It does not examine nuclear policy issues that are matters for politicians and outside my organisation’s competence and role. It looks at the evidence and facts, as far as they are known at the time, to establish technically based issues that relate to possible improvements in safety and regulation in the UK. ...”.

10. In the Executive Summary, the Interim Report Conclusions included the following [CB1/4/620]:

“The direct causes of the nuclear accident, a magnitude 9 earthquake and the associated 14 metre high tsunami, are far beyond the most extreme natural events that the UK would be expected to experience. ...

Nevertheless, severe events can occur from other causes and learning from events is fundamental to testing the robustness of, and enhancing where needed, the defence in depth provisions. For nuclear sites, it is incumbent on both the UK nuclear industry and on us as regulators, to seek to learn lessons and ensure all reasonably practicable steps are taken to enhance nuclear safety.”

11. The Interim Report Conclusions also included the following [CB1/4/621-622]:

“Questions have been raised as to whether there are any lessons for the existing siting policy and strategy for new nuclear reactors in the UK. There are two main aspects in relation to the Japanese accident: location of sites in areas subject to particular onerous natural hazards; and the ability to undertake precautionary counter measures such as evacuation. We have concluded that:

Conclusion 6: Flooding risks are unlikely to prevent construction of new nuclear power stations as potential development sites over the next few years. For sites with

a flooding risk, detailed consideration may require changes to plant layout and the provision of particular protection against flooding.”

12. The Interim Report also made a number of Recommendations [CB1/4/623-625]. These included the following recommendations, which were identified as relevant to the nuclear industry:

“Recommendation 10: The UK nuclear industry should initiate a review of flooding studies, including from tsunamis, in the light of the Japanese experience, to confirm the design basis and margin for flooding at UK nuclear sites, and whether there is a need to improve further site-specific flood risk assessments as part of the periodic safety review programme, and for any new reactors. This should include sea-level protection. ...

Recommendation 17: The UK nuclear industry should undertake further work with the National Grid to establish the robustness and potential unavailability of off-site electrical supplies under severe hazard conditions. ...

Recommendation 22: The UK nuclear industry should review the provision of on-site emergency control, instrumentation and communication in the light of the circumstances of the Fukushima accident including long timescales, wide spread on and off-site disruption, and the environment on-site associated with a severe accident.

Recommendation 23: The UK nuclear industry, in conjunction with other organisations as necessary, should review the robustness of necessary off-site communications for severe accidents involving widespread disruption. ...”.

The National Policy Statements and the S/S’s decision

13. On 19 July 2011 (i.e. just a couple of months after the Interim Report, and before Dr Weightman’s final report had been written or published) the S/S designated six NPSs for Energy under section 5 PA. The first of them (known as “**EN-1**”) is the “Overarching Energy NPS”, and the sixth, EN-6, is the NPS for nuclear power generation. The other NPSs relate to other forms of electricity infrastructure and are outside the scope of this judicial review claim.

14. The NPS will serve as “*the primary basis*”³ for decisions taken by the Infrastructure Planning Commission (“**IPC**”) on applications for planning permission for the building of new nuclear power stations (which would, under the PA 08, be a “Nationally Significant Infrastructure Project”, or “NSIP”).
15. The NPS sets out conclusions/decisions on multiple matters relevant to the determination of any application for a development order to permit the building of new nuclear power stations. As further explained at paragraph 46 below, section 104(3) PA 08 provides that, where an NPS has been designated under section 5, an application for a development order for a NSIP “*must*” be decided “*in accordance with*” the NPS, subject only to certain narrow exceptions, such as where to do so would lead to the United Kingdom being in breach of its international obligations.
16. Accordingly, the result of the S/S’s decision to designate the NPS is to make its conclusions/decisions effectively binding in relation to any future application for a development order to permit the building of a new nuclear power station, unless and until that designation is withdrawn.⁴ Those conclusions/decisions are therefore likely to be determinative of crucial matters relevant to deciding such applications for years to come.
17. The conclusions/decisions set out in the NPS include, in particular:
- a) the identification of eight sites as being potentially suitable for the construction of new nuclear power stations;
 - b) that there are no “*alternative sites that meet the requirements of [the] NPS ... Further the Government considers that all of the sites listed in this NPS are required to be listed so that they are each available as a potential opportunity*”

³ EN-6, §1.2.1 [CB1/3/241].

⁴ EN-6, §1.6.1: “*This NPS will remain in force in its entirety unless withdrawn or suspended in whole or in part by the Secretary of State.*” [CB1/3/243]

for nuclear development subject to the IPC's consideration of the detailed proposals"⁵;

- c) therefore, that, where an application for a development order for a nuclear power station is made in respect of one of those sites, the IPC should, "*subject to any contrary legal requirement*", judge that application "*on its own merits and a comparison with any other listed site is unlikely to be important to its decision*".⁶
- d) "[T]o avoid unnecessary duplication and/or delay", the IPC should act on the basis that "*it should not duplicate the consideration of matters that are within the remit of the Nuclear Regulators*",⁷ i.e. the Environment Agency, the Office for Nuclear Regulation ("**ONR**") and the Department for Transport. Those matters are expressly deemed to include "*the Generic Design Assessment (GDA) [i.e. the review of the 'licensibility' of nuclear power station designs] and the site licensing and environmental permitting processes (including in respect of the management and disposal of radioactive waste, the permitting of cooling water discharges, etc)*".⁸
18. The NPS also sets out various "*Nuclear Impacts*" which set out policy for the IPC, in addition to the generic impacts set out in EN-1, for when it is considering an application for a new nuclear power station. These included flood risk, and human health and well-being.

19. In relation to flood risk, the NPS concluded that

⁵ EN-6, §2.5.4. [CB1/3/251]

⁶ EN-6, §2.5.5. [CB1/3/251]

⁷ EN-6, §2.7.3. [CB1/3/252]

⁸ EN-6, §2.7.4. [CB1/3/253]

- a) all of the eight sites listed in the NPS “*have the potential to be protected from the risks of flooding over their operational lifetime*” (even though some of them are located in areas with a “*high risk*” of flooding)⁹;
- b) those sites that are “*in lower flood risk zones [are] not reasonably available alternatives to those in higher flood risk zones*” (that conclusion being reached on the basis of the Government having already “*considered whether or not the objectives of [the NPS could] be met through reasonably available alternative sites in lower flood risk zones*”, and decided that “*all of the sites listed ... are required to be listed to allow sufficient flexibility to meet the urgent need for new nuclear power stations while enabling the IPC to refuse consent should it consider it appropriate to do so*”)¹⁰.

20. Section 5.7 of EN-1 sets out the Sequential Test and the Exception Test, which are tests directed at ensuring that, when considering a proposal for development, consideration should be given to alternative sites, and a preference accorded to sites situated in areas of low or medium flood risk. Development in flood risk areas should be permitted only where a reasonable alternative site is not available.

21. The Sequential Test and the Exception Test are set out in EN-1 because, in principle, they apply across all five energy NPSs. However, EN-6 expressly **excludes** those tests from applying in circumstances where the development being considered is a nuclear power station. Thus, it is in relation to the kind of energy plant development that has the greatest potential for harm to arise from an incident of flooding that the two tests are **not** to be considered.

22. In this regard, the NPS concluded that

⁹ EN-6, §3.6.14 [CB1/3/262]; also the site assessments at EN-6, Vol. II, for the following sites that are wholly or partially located on land with high flood risk: Bradwell, Hartlepool, Hinckley Point (partial), Oldbury (which is at particular risk of experiencing a ‘tsunami’-type event), Sizewell (partial) [CB1/3/304-581].

¹⁰ EN-6, §§3.6.9 - 3.6.10. [CB1/3/261]

- a) “the IPC should not conduct the Sequential Test for any of the listed sites”,¹¹ but in considering the applicant’s flood risk assessment, should (only) “need to be satisfied that a sequential approach has been applied at the site level to ensure that, where possible, critical infrastructure is located in the lowest flood risk areas within the site”¹² (emphasis added); and
- b) the second limb of the Exception Test (which would normally permit development on land that is not “developable, previously developed land” only where there are “no reasonable alternative sites on developable, previously developed land”: see §5.7.16 of EN-1 [CB1/3/204]) is not to be applied to new nuclear development.¹³

23. In relation to human health and well-being, the NPS concluded that

“[s]afety systems in place in the designs of new nuclear power stations and compliance with the UK’s robust legislative and regulatory regime mean that the risk of radiological health detriment posed by nuclear power stations (both during normal operation and as a result of an unplanned release) is very small”.¹⁴

24. The only reference to Dr Weightman’s Interim Report (or to the Fukushima disaster at all) appeared on page 13 of the NPS. In paragraph 2.7.4 [CB1/3/253], it is stated that

“Certain matters are for consideration of the Nuclear Regulators and the IPC should not duplicate consideration of these matters itself. Such matters include the Generic Design Assessment (GDA) and the site licensing and environmental permitting processes (including in respect of the management and disposal of radioactive waste, the permitting of cooling water discharges, etc)^{fn33}.”

^{fn33} This includes matters arising from the reports by HM Chief Inspector of Nuclear Installations, Dr Mike Weightman, on the implications of the Japanese earthquake and tsunami for the UK nuclear industry. The interim report was published in May

¹¹ EN-6, §3.6.9. [CB1/3/261]

¹² EN-6, §3.6.11. [CB1/3/261]

¹³ EN-6, §3.6.13. [CB1/3/261]

¹⁴ EN-6, §3.12.4. [CB1/3/269]

2011. Dr Weightman has also confirmed that the ONR's advice on the SSA and NPS has not changed. Dr Weightman's report focuses on issues relevant to the nuclear licensing and regulatory regimes and are therefore primarily within the regulators' remit."

25. At paragraph 4.2.2 of the NPS, the S/S identified the "*range of sources that the Government used in coming to its decision as to which sites are potentially suitable for the purposes of the NPS*" [CB1/3/273]. This "*range of sources*" did not include the Interim Report.

Correspondence between Dr Weightman and the Government

26. On 15 April 2011, Mark Higson, Chief Executive of the Office for Nuclear Development at the Department of Energy and Climate Change wrote to Dr Weightman [CB1/4/599] indicating that the Government was reviewing the National Policy Statements before proceeding with ratification, and asked him to consider various matters set out in an Annex to that letter. Those matters included the strategic suitability of sites and "flood risk, tsunami and storm surge". As regards the latter, Dr Weightman was asked the following questions:

"(vii) The regulatory advice on the strategic suitability of nominated sites in relation to extreme flooding, tsunami and storm surge was based on risk estimates that were considered valid at the time. Do you consider that this strategic level advice remains valid?

(viii) New sites in Flood Zone 3 have been considered potentially suitable from a nuclear safety standpoint. Do you consider that this remains a valid position?"

27. Dr Weightman replied to this letter on 17 May 2011 [CB1/4/607]. He indicated that "*the points of concern are all addressed in my interim report*", but he thought it would be helpful to respond to the Government's letter separately as this would allow him to address each of the points raised. His response to issue (vii) was as follows:

"Risks in relation to nuclear site inundation are considered in the interim report (e.g. annex F). With regard to tsunamis, extreme flooding and storm surge, our discussions with experts in this field, and the advice from our fellow regulators in the

Environment Agency, give us no reason to believe that our past approach to the assessment of risks and hazards from such events is not still valid. **The interim report does, however, make recommendations for the industry to review such matters to ensure that site specific data is kept up to date**".

(emphasis added)

28. As regards Issue (viii), Dr Weightman stated as follows:

"This matter was discussed in the interim report (paras 370-375), which concludes (Conclusion 6) that, from a nuclear safety standpoint, a risk of flooding of potential development sites should not in itself prevent construction of new nuclear power stations. In the context of the development period up to 2025 covered by the draft nuclear NPS, and possibly beyond, we see no reason in principle, why it should prove impracticable by design to accommodate such flooding as might be experienced on a particular UK location such as a Flood Zone 3. The issue will be encompassed by the flooding design basis, and for proposed new nuclear power stations in the UK this will be subject to detailed regulatory scrutiny by ONR and the Environment Agency."

29. On 25 May 2011, the Environment Agency responded to a letter from the S/S of 11 May 2011 regarding how it was responding to the events at Fukushima in Japan [CB1/4/723]. The Environment Agency stated that

"In light of the Fukushima event we have considered our previous advice that we provided to DECC during the Strategic Siting Assessment process for the development of the Nuclear National Policy Statement. We consider that our existing advice, that the nominated sites could potentially be protected from flooding, remains valid."

Evidence

30. A full description of the factual background to this case, which is summarized above, is set out in the witness statement of John Sauven, Executive Director of Greenpeace, dated 26 August 2011[CB1/1/49] and in the correspondence, reports and other documents exhibited to that statement.

Relevant legislation

31. The PA 08 followed the Government's publication of the White Paper, *Planning for a Sustainable Future* ("the White Paper") in May 2007.[CB/2/5821] As the White Paper explained, the Government was concerned about the time being taken for planning and other consents to be obtained to permit the construction of NSIPs such as airports, motorways and power stations.¹⁵ The PA 08 seeks to speed up the planning consent process for NSIPs by making fundamental changes to the planning regime (and certain other consent regimes: see PA, section 33(1)), creating what is effectively a special planning regime for NSIPs.
32. This special planning regime consists essentially of two elements: (i) the designation by central government of NPSs setting out national policy in relation to particular kinds of development; and (ii) applications for development consent orders for individual NSIPs, which applications will, in most cases, be decided by an independent body, the IPC, which will be obliged to decide those applications in accordance with the relevant NPSs.¹⁶
33. This is the first case in which a court has been asked specifically to consider the law relating to NPSs.
34. The provisions of the PA 08 that are of particular significance for present purposes are set out, insofar as relevant, in the following paragraphs.

¹⁵ The White Paper, §1.20.[CB2/5/826]

¹⁶ The government has announced that the Infrastructure Planning Commission (IPC) is to be abolished and replaced by a new Major Infrastructure Planning Unit (MIPU). MIPU will be part of the Planning Inspectorate. It is envisaged that the S/S will be the final decision maker. The Decentralisation and Localism Bill will introduce the necessary legislation to replace the IPC. It is expected that the Bill will become law in 2011. Until the new legislation is in place, the IPC will continue in its present role.

When the IPC is abolished, transitional provisions will ensure that applications for NSIPs under consideration, will be taken over by MIPU without interruption. The government has announced that on-going applications will **not** have to be re-started.

35. The power to designate a NPS is provided in section 5:

“5 National Policy Statements

(1) The Secretary of State may designate a statement as a national policy statement for the purposes of this Act if the statement—

(a) is issued by the Secretary of State, and

(b) sets out national policy in relation to one or more specified descriptions of development.

(2) In this Act “national policy statement” means a statement designated under subsection (1) as a national policy statement for the purposes of this Act.

(3) Before designating a statement as a national policy statement for the purposes of this Act the Secretary of State must carry out an appraisal of the sustainability of the policy set out in the statement.

(4) A statement may be designated as a national policy statement for the purposes of this Act **only if the consultation and publicity requirements set out in section 7, and the parliamentary requirements set out in section 9, have been complied with** in relation to it.

(5) The policy set out in a national policy statement may in particular—

(a) set out, in relation to a specified description of development, the amount, type or size of development of that description which is appropriate nationally or for a specified area;

(b) set out criteria to be applied in deciding whether a location is suitable (or potentially suitable) for a specified description of development;

(c) set out the relative weight to be given to specified criteria;

(d) identify one or more locations as suitable (or potentially suitable) or unsuitable for a specified description of development;

(e) identify one or more statutory undertakers as appropriate persons to carry out a specified description of development;

(f) set out circumstances in which it is appropriate for a specified type of action to be taken to mitigate the impact of a specified description of development.

(6) If a national policy statement sets out policy in relation to a particular description of development, the statement must set out criteria to be taken into account in the design of that description of development.

(7) A national policy statement must give reasons for the policy set out in the statement.

...

(9) The Secretary of State must—

(a) arrange for the publication of a national policy statement, and

(b) lay a national policy statement before Parliament.

...”

36. Section 7 sets out the consultation and publicity requirements referred to in section 5(4):

“7 Consultation and publicity

(1) This section sets out the consultation and publicity requirements referred to in sections 5(4) and 6(7).

(2) The Secretary of State **must carry out such consultation, and arrange for such publicity, as the Secretary of State thinks appropriate in relation to the proposal.**

This is subject to subsections (4) and (5).

(3) In this section “the proposal” means—

(a) the statement that the Secretary of State proposes to designate as a national policy statement for the purposes of this Act, or

(b) (as the case may be) the proposed amendment.

(4) The Secretary of State must consult such persons, and such descriptions of persons, as may be prescribed.

(5) If the policy set out in the proposal identifies one or more locations as suitable (or potentially suitable) for a specified description of development, the Secretary of State must ensure that appropriate steps are taken to publicise the proposal.

(6) The Secretary of State **must have regard to the responses to the consultation and publicity in deciding whether to proceed with the proposal.**”

37. Section 14 identifies those projects that are NSIPs. Section 14(1)(a) includes amongst the list of such projects “*the construction or extension of a generating station*”. Pursuant to section 15(1) and (2), a proposed on-shore generating station in England and Wales falls within that category if it is, when constructed, expected to have a capacity of more than 50 megawatts. (A typical nuclear power station would qualify as an NSIP.)

38. Section 31 (headed “*When development consent is required*”) provides that:

“Consent under this Act (“development consent”) is required for development to the extent that the development is or forms part of a [NSIP].”

39. Pursuant to section 32 (“*Meaning of “development”*”), “development” has the same meaning as it has in the Town and Country Planning Act 1990 (subject only to certain exceptions that are not significant for present purposes).

40. Section 33 (“*Effect of requirement for development consent on other consent regimes*”) lists the other consent regimes that are displaced by the development consent regime for NSIPs:

“(1) To the extent that development consent is required for development, none of the following is required to be obtained for the development or given in relation to it--

- (a) planning permission;

(b) consent under section 10(1), 11(1) or 12(1) of the Green Belt (London and Home Counties) Act 1938 (c xciii) (erection of buildings and construction of sewer main pipes, watercourses and electric lines etc on Green Belt land);

...

(h) consent under section 36 or 37 of the Electricity Act 1989 (c 29) (construction etc of generating stations and installation of overhead lines);

....

[A number of other consent regimes are also listed which are not relevant for present purposes.]”

41. Section 37 (“*Applications for orders granting development consent*”) provides, in sub-sections (1) and (2) together provide that an order granting development consent may be made only if an application is made for it, and that applications for such consent must be made to the IPC.

42. Section 61 (“*Initial choice of Panel or single Commissioner*”) provides, in sub section (2), that the IPC’s chairman is to decide whether the application is to be handled by a Panel of commissioners or a single commissioner.

43. Pursuant to section 74(1) (which applies where the application is handled by a Panel), in circumstances where a NPS has effect in relation to the proposed development, the function of the Panel is not to make recommendations to the Secretary of State, but is to examine and decide the application for itself:

“74 Panel to decide, or make recommendation in respect of, application

(1) Where a national policy statement has effect in relation to development of the description to which the application relates, **the Panel has the functions of—**

- (a) examining the application, and
- (b) **deciding the application.**

- (2) In any other case, the Panel has the functions of—
- (a) examining the application, and
 - (b) making a report to the Secretary of State on the application setting out—
 - (i) the Panel's findings and conclusions in respect of the application, and
 - (ii) the Panel's recommendation as to the decision to be made on the application.”

44. Similar provision is made in section 83(2) (which applies where the application is handled by a single commissioner), providing that “*if a national policy statement has effect in relation to development of the description to which the application relates*”, then the commissioner is to report his findings and recommendation to the IPC, rather than to the Secretary of State. Pursuant to sections 84 and 85, such a report must be referred by the IPC to its Council for decision.

45. Section 104 provides as follows:

“104 Decisions of Panel and Council

(1) This section applies in relation to an application for an order granting development consent if the decision-maker is a Panel or the Council.

(2) In deciding the application the Panel or Council must **have regard to--**

(a) **any national policy statement which has effect in relation to development of the description to which the application relates (a "relevant national policy statement"),**

(aa) the appropriate marine policy documents (if any), determined in accordance with section 59 of the Marine and Coastal Access Act 2009,]

(b) any local impact report (within the meaning given by section 60(3)) submitted to the Commission before the deadline specified in a notice under section 60(2),

(c) any matters prescribed in relation to development of the description to which the application relates, and

(d) any other matters which the Panel or Council thinks are both important and relevant to its decision.

(3) The Panel or Council **must decide the application in accordance with any relevant national policy statement, except to the extent that one or more of subsections (4) to (8) applies.**

(4) This subsection applies if the Panel or Council is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the United Kingdom being in breach of any of its international obligations.

(5) This subsection applies if the Panel or Council is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the Panel or Council, or the Commission, being in breach of any duty imposed on it by or under any enactment.

(6) This subsection applies if the Panel or Council is satisfied that deciding the application in accordance with any relevant national policy statement would be unlawful by virtue of any enactment.

(7) This subsection applies if the Panel or Council is satisfied that the adverse impact of the proposed development would outweigh its benefits.

(8) This subsection applies if the Panel or Council is satisfied that any condition prescribed for deciding an application otherwise than in accordance with a national policy statement is met.

(9) For the avoidance of doubt, the fact that any relevant national policy statement identifies a location as suitable (or potentially suitable) for a particular description of development does not prevent one or more of subsections (4) to (8) from applying.”

46. Thus, pursuant to section 104(3), the IPC is required to take its decision “*in accordance with*” the NPS, subject only to the four specific exceptions in subsections (5) to (8).¹⁷

¹⁷ As to the narrowness of the exception in sub-section (7), it is relevant to note the intention set out in the White Paper as to the impact of the NPS and the extent to which the IPC should be bound by it. See, e.g., the White Paper, §2.13(c): “*In taking the decision, [the IPC] would operate within the framework of the relevant [NPS], although this would not be the only consideration. [The IPC] would approve any application for development consent for a [NSIP] which had the main aims consistent with the relevant [NPS] unless adverse local consequences outweighed the benefits, including national benefits identified in*

47. Section 106 allows the IPC to disregard any representations that relate to the merits of the policy set out in the NPS:

“106 Matters that may be disregarded when deciding application

(1) In deciding an application for an order granting development consent, the decision-maker may disregard representations if the decision-maker considers that the representations--

(a) are vexatious or frivolous,

(b) **relate to the merits of policy set out in a national policy statement**, or

(c) relate to compensation for compulsory acquisition of land or of an interest in or right over land.

(2) In this section **"representation" includes evidence.**”

48. The PA 08 prescribes a fixed timetable for dealing with applications (subject to a power to extend time). Pursuant to section 98, the Panel (or the single commissioner) is required to complete the examination phase within 6 months, with the decision of the Panel (or the Council) to follow within 3 months thereafter.

49. Pursuant to section 108, the Secretary of State has power to suspend the examination and decision of a development consent application in relation to which an NPS has effect, if *“the Secretary of State thinks that, as a result of a change in circumstances since the [NPS] was first published or (if later) ... last reviewed, all or part of the [NPS] should be reviewed before the application is decided”*.

50. In addition, section 109 makes provision for certain situations where there has been a significant change in circumstances since the publication or last review of the NPS, but the Secretary of State is satisfied that there is an urgent need to decide the development consent application without waiting for the NPS to be reviewed. Pursuant to section 109, if there has been: (i) such a *“significant change in any*

the policy statement. Adverse local consequences, for these purposes would be those incompatible with relevant EC and domestic law, including human rights legislation.”

circumstances on the basis of which any policy set out in the [NPS was decided]”; (ii) “the change was not anticipated at that time”; (iii) “if the change had been anticipated at that time, the relevant policy would have been materially different”; and (iv) “if the relevant policy was materially it would be likely to have a material effect on the decision on the application”, but (v) “there is an urgent need in the national interest for the application to be decided before the [NPS] is reviewed”, then the Secretary of State has a power of “intervention”.

51. Pursuant to sections 109, 112 and 113, “intervention” can take the form of directing that the application be referred to the Secretary of State, and then either directing the IPC to examine such matters as he may specify, or conducting an examination himself.

Ground 1: Failure to take into account relevant considerations

52. Where a decision maker has refused or failed to take into account relevant considerations in reaching his decision, the court may set aside that decision: ***R (Alconbury Developments Limited) v Secretary of State for the Environment, Transport and the Regions [2003] 2 AC 295*** per Lord Slynn at [50].

53. Moreover, in the present case, section 6 PA 08 requires that the S/S must review a National Policy Statement “*whenever the Secretary of State thinks it appropriate to do so*”. In determining whether such a review is appropriate, the S/S must consider whether

“(a) since the time when the statement was first published or (if later) last reviewed, there has been a significant change in any circumstances on the basis of which any of the policy set out in the statement was decided,

(b) the change was not anticipated at that time, and

(c) if the change had been anticipated at that time, any of the policy set out in the statement would have been materially different.”

54. By analogy, it must also be incumbent on the S/S to review the policies set out in a National Policy Statement if, shortly before it is designated, there has been a significant change in circumstances such as the Fukushima disaster and/or the issues raised by the Interim Report, which might make a material difference to those policies.
55. In the present case, in reaching the Decision, the S/S unlawfully refused or failed to take into account certain relevant considerations arising from the Fukushima disaster and/or Dr Weightman's Interim Report which were capable of having made a difference to the Decision.
56. Alternatively, the S/S unlawfully failed to review the NPS before it was designated even though there had been there had been a significant change in circumstances on the basis of which certain policies set out in the statement were decided and which, if the change had been taken into account, those policies would have been materially different.
57. These relevant considerations and/or significant changes in circumstances related in particular to flood risk, off-site electrical supplies, and on-site emergency controls.

Ground 1(a): Flood risk

58. As explained at paragraph 7-8 above, the essential cause of the Fukushima disaster appears to have been that the influx of water in and around the power station site resulted in an interruption to the supply of mains-supplied electricity needed for cooling and also damaged the on-site diesel generators that were intended to provide back-up power if mains electricity was not available.
59. The risk of flooding to a nuclear site is therefore of particular importance from the point of view of nuclear safety because of the potential for the flooding to impede the supply of mains and/or back-up electricity and to undermine other aspects of the

plant's operation and safety systems, including the on-site storage of spent fuel and nuclear waste.

60. These issues were highlighted in various submissions made to Dr Weightman by bodies and individuals involved in the nuclear industry: see paragraphs 66 of the statement of John Sauven.

61. The Interim Report included the following conclusions and recommendations [CB1/4/622-624]:

“Conclusion 6: Flooding risks are unlikely to prevent construction of new nuclear power stations at potential development sites in the UK over the next few years. **For sites with a flooding risk, detailed consideration may require** changes to plant layout and **the provision of particular protection against flooding.**”

“Recommendation 10: The UK nuclear industry should **initiate a review of flooding studies**, including from tsunamis, in light of the Japanese experience, **to confirm the design basis and margins for flooding at UK nuclear sites**, and **whether there is a need to improve further site-specific flood risk assessments** as part of the periodic safety review programme, and **for any new reactors**. This should include sea-level protection.”

(emphasis added)

62. In relation to Conclusion 6, it is clear that, for sites with a flooding risk, it might be necessary to give detailed consideration to “*the provision of particular protection against flooding*”.

63. In relation to Recommendation 10, it is apparent from the Interim Report that there are doubts as to the adequacy and reliability of the Environment Agency's flood risk assessments as predictors of the risk of flooding *to particular sites* (rather than merely the general risk of flooding to the area around the site).

64. As Dr Weightman highlighted in his letter to the Government of 17 May 2011 [CB1/4/607], the risks of flood inundation are set out *inter alia* in Annex F to his Interim Report. Annex F stated as follows [CB1/4/704-705]:

“Flood Risk Assessments for Areas around Nuclear Licensed Sites

SEPA and the Environment Agency hold **high level information** as to the potential flood hazard posed to nuclear locations across England, Scotland and Wales from fluvial (river), coastal and surface water sources. This is sufficient to provide **a first indication** of those areas potentially susceptible to flooding but **not sufficient to provide a detailed quantitative assessment of the potential risk to an individual location**. This information can be used to give an indication of potential impacts on supporting infrastructure such as road access/egress (see below) or transmission lines etc. ...

Summary and Recommendation

Strategic level flood risk information can be derived from existing data held by the Environment Agency and SEPA. It **indicates the potential for flooding to occur in the near vicinity of nuclear sites, but does not describe the specific risk to a facility because the detailed specific likelihood and consequences of flooding have not been assessed. Detailed site specific flood risk assessment can be carried out but these would require detailed knowledge of the site and of the risk management and operational arrangements that it has implemented and would take into account the potential impacts of climate change over the remaining lifetime of the site.**

ONR requires licensees to take into account external hazards, including natural hazards such as flooding, within their safety cases and to review these safety cases on a regular basis. **The Environment Agency and SEPA have recommended that they work with the Office for Nuclear Regulation to review whether there is a need to improve further the integration of site-specific flood risk assessments for areas on and off-site as part of the periodic safety review programme.”**

(emphasis added)

65. The Interim Report thus highlighted:

- a) the need for detailed consideration to be undertaken of the flood risks relevant to specific sites;
- b) the concern that the Environment Agency’s flood risk assessments were not fit for that purpose as they did not describe “*the specific risk to a facility because the detailed specific likelihood and consequences of flooding have not been assessed*”;

- c) the need for detailed consideration of what particular protections against flooding are appropriate to protect nuclear sites;
- d) the need for the nuclear industry to initiate a review of flooding studies, in light of the Japanese experience, to confirm the design basis and margins for flooding at UK nuclear sites, and whether there is a need to improve further site-specific flood risk assessments; and
- e) the need for the regulators to review whether there is a need to improve further the integration of site-specific flood risk assessments for areas on and off-site.

66. It was evident from the Interim Report that further consideration of site-specific flood risks and protective measures was needed. Plainly, the extent to which it is possible to provide the particular protection that is necessary to control nuclear-related risks on a particular site is (highly) relevant to any determination of whether or not the site: (a) has the potential to be protected from the risks of flooding over its operational lifetime; and (b) is an appropriate site for the development.

67. Moreover, the Interim Report made it clear that the Environment Agency's flood risk assessments on which the relevant conclusion in the NPS was expressly based¹⁸ were considered, or at least suspected, of not being fit for the purpose of understanding the flood risk pertaining to individual nuclear sites.

68. However, despite these concerns, the S/S nevertheless designated the NPS, which includes a conclusion, binding upon the IPC, that all eight sites "*have the potential to be protected from the risks of flooding over their operational lifetime*".

69. The S/S could and should have waited at least until Dr Weightman's final report was available *before* reaching the conclusion that all eight sites "*have the potential to be*

¹⁸ See, e.g., EN-6, Vol. II, §§C.2.27 – C.2.31 & C.2.42 [CB1/3/311-312&314].

protected from the risks of flooding over their operational lifetime". As noted above, the NPS is a policy that is intended to govern infrastructure planning decisions in relation to new nuclear generation sites for years to come. Furthermore, a new nuclear power station will take a number of years to build and will then have an estimated service length of 60 years. Spent fuel storage on site could continue until well into the next century. See paragraphs 66 of the statement of John Sauven.

70. Had the S/S taken these relevant considerations into account, he might not have reached the conclusion that that all eight sites – including certain sites in high flood risk areas - *"have the potential to be protected from the risks of flooding over their operational lifetime"*.
71. More particularly, as indicated above, the NPS prohibits the IPC from carrying out the Sequential Test and the Exception Test as regards flood risk when considering an application for development consent for a nuclear power station (contrary to the general approach set out in EN-1). The result of this is that the NPS effectively precludes the IPC from taking account of comparisons between the designated sites as to which of them would represent the safer option, and whether a proposed development on one site should not be permitted because another of the eight sites represents a preferable alternative. Thus, the NPS operates to prevent a comparison between the eight designated sites which is directed at reducing flood-related risks to the minimum.
72. The IPC will be unable to refuse development consent for a nuclear power station on any of these eight sites on the basis that the danger of flood risk on that particular site is such when compared with the other sites that another site would be a preferable (and less risky) alternative.
73. Given the potentially devastating effects resulting from flooding of the site of a nuclear power station, as vividly illustrated by the Fukushima disaster, this is a serious and significant fetter on the ability of the IPC to fully and properly consider the applications that it receives for the development of nuclear power stations.

74. However, it would appear that the Government considered that the concerns outlined in Annex F of the Interim Report and Recommendation 10 were relevant only to regulatory scrutiny by the ONR and the Environment Agency and by the IPC in its consideration of flood risk on particular sites (rather than any comparative assessment of flood risk).

75. In paragraph 3.102 of the *Government Response to Consultation on the Revised Draft National Policy Statements for Energy Infrastructure* [CB2/5/1172], it was stated that

“Amongst other findings, Dr Weightman has recommended that the UK nuclear industry should initiate a review of flooding studies, including from tsunamis, to confirm the design basis and margins for flooding at UK nuclear sites. Outcomes from this review will be reflected within the flooding design basis which the interim report sets out will be subject to detailed regulatory scrutiny by ONR and the EA as part of consideration of the safety case for a site. This does not change the guidance within EN-6, which already reflects at paragraph 3.7.15 that the IPC should consult the advice of the nuclear regulators as part of its consideration of flood risk”.

76. However, Dr Weightman’s Recommendation 10 was also relevant to the S/S’s decision (contained in the NPS) to designate all eight sites as having “*the potential to be protected from the risks of flooding over their operational lifetime*” and to prohibit the IPC from carrying out the Sequential Test and the Exception Test as regards flood risk when considering an application for development consent for a nuclear power station. Such a decision should not have been made without explicit and detailed consideration of the matters set out in paragraphs 64-67 above, but the S/S failed to take such relevant considerations into account in reaching that decision.

77. It is no answer to these points for the S/S to say that any new nuclear build will also have to be authorised by the ONR, which will look at the safety case.

- a) The NPS includes an express binding conclusion that all eight sites “*have the potential to be protected from the risks of flooding over their operational lifetime*”, notwithstanding that a number of those sites are in areas of high

flood risk. If such a binding conclusion is to be reached, it must be arrived at having taken all relevant considerations into account.

- b) The NPS identifies those eight sites as being suitable to the exclusion of other potential sites. Had the S/S taken into account the relevant considerations outlined above, some of those eight sites – in particular those in areas of high flooding risk – might also have been excluded. It is therefore not open to the S/S to contend that the finding that the eight listed sites “*have the potential to be protected from the risks of flooding over their operational lifetime*” was somehow an irrelevant or unimportant part of the overall set of policies and binding conclusions set out in the NPS.
- c) Further, as noted above, the NPS requires that, where a development application is being considered in relation to a particular site, that site must be considered on its own merits by the IPC, but prohibits the IPC from carrying out the Sequential Test and the Exception Test as regards flood risk when considering an application for development consent for a nuclear power station. Thus, the NPS operates to prevent a comparison between those sites which is directed at reducing flood-related risks to the minimum, and the conclusion that all eight listed sites “*have the potential to be protected from the risks of flooding over their operational lifetime*” therefore implicitly assumes that the difference in risk levels is insignificant so that there is no need to take account of it.
- d) If that assessment is wrong, it is impossible to have confidence that the flaw will be corrected by anything that is to be done by the ONR, because the ONR’s task is to ensure that the design and operation of authorised nuclear facilities is such as to keep risks “*as low as reasonably practicable*” (“ALARP”), but it is unlikely that the ONR will refuse to grant an authorisation because of a comparison with the flood-related risks of an alternative development site. As noted above, the NPS expressly excludes the Sequential Test and the Exception Test from being applied by the IPC in

relation to proposals for nuclear new-build, and there is no basis for assuming that those tests will be applied by the ONR instead.

Ground 1(b): Off-site electrical supplies

78. As indicated above, the NPS expressly excludes the Sequential Test and the Exception Test from applying in circumstances where the development being considered is a nuclear power station. Although reference to the Sequential Test and the Exception Test in the NPS appears to be concerned specifically or predominantly with flooding risks, the S/S has also excluded (or, at the very least, strongly discouraged) the IPC from making *any* comparative analysis, as between the eight sites, when considering an application for a development order for a nuclear new-build [CB1/3/261].
79. The exclusion will therefore also operate to prevent the IPC from taking account of comparisons between the eight sites in relation also to other factors relevant to the relative degree of nuclear accident risk associated with each site.
80. An example of such factors is factors relating to the security and diversity of mains supplies and other electricity sources for powering the plant. As noted above, the interruption of electricity supply was a key factor in the Fukushima disaster. Further, as set out in the statement of John Sauven at paragraphs 66 and 73-76 :
- a) current ONR-approved designs for new nuclear reactors permit the building of nuclear plants that make provision for alternatives to mains electricity supply interruption that are capable of filling the breach only for a short period of time and could not safely be relied upon to cope with prolonged mains supply interruption; and
 - b) geographical location is significant to the security and diversity of mains supply, and accordingly there will be significant variations between the eight

listed sites in terms of the degree of risk of their suffering a prolonged period of mains supply interruption.

81. Recommendation 17 of the Interim Report states that “*the UK nuclear industry should undertake further work with the National Grid to establish the robustness and potential unavailability of off-site electrical supplies under severe hazard conditions*”. That further work has not yet been done.

82. Nor has the S/S considered the question of availability of off-site electricity supplies within the NPS (or, as far as Greenpeace can establish, anywhere else). For the S/S to nevertheless proceed to take a decision, particularly following the Fukushima disaster, which precludes comparisons being made between the relative merits of the eight sites, including by reference to that question, is tantamount to his excluding a vital consideration that he has not even himself had any regard to.

83. The S/S therefore failed to take into account a relevant consideration in reaching the Decision. Had the S/S taken into account “*the robustness and potential unavailability of off-site electrical supplies under severe hazard conditions*”, he might not have reached the Decision to identify all eight sites in the NPS as suitable for the construction of new nuclear power stations.

Ground 1(c): On-site emergency controls

84. As indicated above, one of the conclusions reached by the S/S in the NPS was that

“[s]afety systems in place in the designs of new nuclear power stations and compliance with the UK’s robust legislative and regulatory regime mean that the risk of radiological health detriment posed by nuclear power stations (both during normal operation and as a result of an unplanned release) is very small”¹⁹.

85. This was a conclusion on “Nuclear Impact” setting out policy for the IPC for when it is considering an application for a new nuclear power station. As explained above,

¹⁹ EN-6, §3.12.4. [CB1/3/269]

the conclusion is effectively binding in relation to any future application for a development order to permit the building of a new nuclear power station.

86. However, in the Interim Report at paragraph 419 [CB1/4/685], Dr Weightman commented as follows:

“In the UK, emergency control and indication centres are situated on nuclear power plant sites and are intended to be robust during accidents. However, they have limited capabilities for severe accidents and given the circumstances of the Fukushima accident we consider a review should be undertaken.”

87. The Interim Report therefore made the following recommendations [CB1/4/685]:

“**Recommendation 22:** The UK nuclear industry should review the provision of on-site emergency control, instrumentation and communication in the light of the circumstances of the Fukushima accident including long timescales, wide spread on and off-site disruption, and the environment on-site associated with a severe accident.

Recommendation 23: The UK nuclear industry, in conjunction with other organisations as necessary, should review the robustness of necessary off-site communications for severe accidents involving widespread disruption. ...”.

88. The capabilities and robustness of emergency control and indication centres at nuclear power plants were clearly relevant considerations for the S/S in reaching the Decision, in particular in reaching the conclusion that “*the risk of radiological health detriment posed by nuclear power stations (both during normal operation and as a result of an unplanned release) is very small*” (emphasis added).²⁰ However, the S/S failed to take such considerations into account. Had the S/S taken such considerations into account, he might well not have reached that conclusion.

Ground 2: Failure properly to consult

89. Section 7 of the PA 2008 requires the S/S to consult on any National Policy Statement before it is designated.

²⁰ EN-6, §3.12.4. [CB1/3/269]

90. Moreover, as was made clear in *Greenpeace Ltd v Secretary of State for Trade and Industry* [2007] EWHC 311, [2007] Env. L.R. 29, per Sullivan J at [49],

“Whatever the position may be in other policy areas, in the development of policy in the environmental field consultation is no longer a privilege to be granted or withheld at will by the executive.”

91. The Government is a signatory to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (“the Aarhus Convention”), which by Article 7, requires the UK to “*endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.*”

92. A proper consultation process may include the disclosure of and consultation on new material of which a decision maker becomes aware during the course of a decision making process. In *Greenpeace* (supra), Sullivan J said at [61]

“the overriding requirement that any consultation must be fair is not in doubt. What is fair, and in particular whether fairness demands that new material which has not been available during the consultation period should be made available to consultees so that they have an opportunity to deal with it before a decision is taken, must depend upon the particular circumstances of the case”.

93. Similarly, in the Court of Appeal judgment in *Edwards v Environment Agency* [2006] EWCA Civ 877 (which was upheld by the House of Lords on appeal), Auld LJ said at [103]

“In general, in a statutory decision-making process, once public consultation has taken place, the rules of natural justice do not, ... require a decision-maker to disclose its own thought processes for criticism before reaching its decision. However, if, ... a decision-maker, in the course of decision-making, becomes aware of some internal material or a factor of potential significance to the decision to be made, fairness may demand that the party or parties concerned should be given an opportunity to deal with it.”

94. Moreover, as explained above, section 6 PA 08 requires that the S/S must review a National Policy Statement where there has been a significant change in any

circumstances on the basis of which any of the policy set out in the statement was decided, the change was not anticipated at that time, and, if the change had been anticipated at that time, any of the policy set out in the statement would have been materially different.

95. If a review were carried out under section 6 of the PA 08 and the S/S proposed to amend a National Policy Statement as a result, then he would be obliged to carry out consultation under sections 6(7) and 7 of the PA 08.

96. By analogy, it must also be incumbent on the S/S to carry out consultation if, shortly before a National Policy Statement is designated, there has been a significant change in circumstances such as the Fukushima disaster and/or the issues raised by the Interim Report, which might make a material difference to those policies.

97. In the present case, public consultation on the NPS took place between November 2009 and February 2010. As indicated above, the Fukushima disaster occurred on 11 March 2011. Dr Weightman produced his Interim Report in May 2011 containing an initial analysis of the causes of the Fukushima disaster, expressing certain initial conclusions, and making a number of recommendations as to actions that should be taken to improve UK nuclear safety [CB/1/4/613]. However, the S/S carried out no further public consultation on the issues raised by the Fukushima disaster and/or the Interim Report before making the Decision to designate the NPS on 19 July 2011.

98. As explained above, the Interim Report contained a number of conclusions and recommendations, in particular those relating to flood risk, off-site electrical supplies, and on-site emergency controls which, if they had been considered by the S/S, might have altered the Decision.

99. In those particular circumstances, fairness demanded that the issues raised by the Fukushima disaster and/or the Interim Report, including those relating to flood risk, off-site electrical supplies, and on-site emergency controls (concerning both on-site impacts and off-site impacts), should have been put out to further public consultation.

100. This was particularly the case as, in contrast with the general position as set out in EN-1, the NPS expressly excluded the IPC from carrying out the Sequential Test and the Exception Test. Thus, the NPS effectively precludes the IPC from taking account of comparisons between the sites as to which of them would represent the safer options, and whether a proposed development on one site should not be permitted because another of the eight sites represents a preferable alternative.

101. The S/S unlawfully failed to carry out further public consultation. This procedural breach denied Greenpeace and other actual and potential consultees an adequate and/or proper opportunity to put their case to the Government on these substantive issues: see paragraphs 61-72 of the statement of John Sauven.

Pre-action protocol

102. The S/S designated the NPS on 19 July 2011, shortly before the start of the summer vacation. Legal challenges to an NPS are governed by section 13(1) of the 2008 Planning Act, which provides as follows:

“(1) A court may entertain proceedings for questioning a national policy statement or anything done, or omitted to be done, by the Secretary of State in the course of preparing such a statement only if—

(a) the proceedings are brought by a claim for judicial review, and

(b) the claim form is filed during the period of 6 weeks beginning with—

(i) the day on which the statement is designated as a national policy statement for the purposes of this Act, or

(ii) (if later) the day on which the statement is published.”

103. On 16 August 2011, Greenpeace’s solicitors sent a letter before claim to the S/S in line with the judicial review pre-action protocol [CB1/2/73]. A draft of Greenpeace’s Statement of Facts and Grounds setting out the detail of its proposed challenge at that stage was attached to the letter. Moreover, in that letter, attention

was drawn to the fact that Greenpeace's claim had to be filed by Friday 26 August and requested that the S/S provide a response by Monday 22 August.

104. By letter of 22 August 2011, the S/S's solicitors stated that they were "*not in position to respond [to the letter before claim] this week. We will respond substantively as soon as we are able to*" [CB/1/2/107]. However, the letter stated that the S/S did not consider that there was merit in any of the criticisms set out in the draft claim and drew attention to a number of attached documents.

105. In the light of the S/S's response of 22 August 2011, Greenpeace reserves the right to amend this Statement of Facts and Grounds insofar as necessary when the S/S responds substantively to its claim.

Conclusion

106. In all the circumstances, Greenpeace submits that the Court should order the following relief:

107. The relief being sought is as follows:

- a) A declaration that the S/S has acted unlawfully, by reason of the matters set out under Ground 1 and/or Ground 2 above, in deciding to designate the NPS under section 5 of the PA 08.
- b) A quashing order to quash the Decision.
- c) Such other relief as the Court may think just.
- d) Costs.

KASSIE SMITH
ALAN BATES
Monckton Chambers

26 August 2011