doi:10.1093/jel/eqs027

Public Participation and Climate Change Infrastructure

Maria Lee, Chiara Armeni, Javier de Cendra, Sarah Chaytor, Simon Lock, Mark Maslin, Catherine Redgwell and Yvonne Rydin*

Abstract

This article explores the space for public participation during the consenting process for a nationally significant wind energy or carbon capture and storage infrastructure project. Legal obligations to provide opportunities for public involvement in these processes can be found in national, EU and international law. However, an examination of strategic planning policy suggests that in practice, very little will be up for discussion at this stage. This is consistent with a certain mistrust of the public in high-level policy discourse on the technological change thought necessary for climate change mitigation. Legally entrenched rights to participate, coupled with limited opportunities to influence, create the danger that participation becomes a simple bureaucratic hurdle, frustrating for all concerned.

Keywords: climate change, wind power, carbon capture and storage, infrastructure, technology, planning, public participation

1. Introduction

Technological innovation, including in large-scale 'supply side' infrastructure development, is expected to play a significant role in the move to a low

* All at University College London (for correspondence, maria.lee@ucl.ac.uk). This article was written within the UCL Governance of Climate Change Technologies Group 2011–12, which also consists of Jon Agar, Robert Lowe, Slava Mikhaylov, Tadj Oreszczyn, Christopher Rapley, Stefaan Simons, Melanie Smallman, Georgina Voss and Le-Yin Zhang. We are grateful to UCL Grand Challenges for supporting this group. We are grateful for the contributions of the participants at the *Going Low Carbon* event at UCL on 23 November 2011, and to Christopher Mayne for his research assistance.

carbon world. The turn to technological solutions to climate change is in part explained by the apparent implausibility of sufficiently timely and far reaching social, economic or behavioural change.[1] However, technological change necessarily involves complex questions around the distribution of costs and benefits, as well as divergent assumptions about risks and potential conflicts between deeply held values. It is difficult to promote technological change without some degree of public engagement, and public engagement in climate change technologies is the focus of this article. There are of course many 'climate change' technologies, at all levels of energy systems, set in a range of governance frameworks, and raising a variety of challenges. In this article, looking at the English context, we are concerned particularly with two technological interventions: wind energy and carbon capture and storage (CCS). These two technologies are thought to have considerable potential in the UK, indeed to be an essential part of the future energy mix. We would not want to suggest that public participation is necessarily 'anti'-development, but there are some well-known public concerns about these technologies, for example, around noise and visual intrusion associated with wind farms, and the effectiveness of CCS in climate mitigation, as well as the risks associated with it. These two technologies share some common features, as well as having some quite distinctive characteristics, as should come out of the discussion below.

We focus primarily on participatory opportunities for various 'publics'[2] at the stage of authorising individual projects. However, participation takes place at other phases of the development of a technology, including in policy making at the strategic level around 'plans and programmes'. We recognise the importance of participation at the strategic level, especially when participation at the project authorisation level is limited, and it is discussed in section 3.1 below. In addition, participation is of course multi-faceted, involving access to information and post-decision review as well as a more specific public engagement in the decision-making process itself.[3] Space precludes a detailed analysis of these multiple components of public participation, but we do not intend to understate their importance. In particular, again, limits on participation at the project stage are likely to emphasise the importance of legal review, both

1 This is implicit in much government policy, see, for example, HM Government *Carbon Plan* (December 2011). This plan is updated online, see <http://www.decc.gov.uk/en/content/cms/tackling/carbon_plan/carbon_plan.aspx> accessed 14 August 2012. Note also the establishment of a Technology Mechanism in Decision 1/CP.16 *The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention* (Cancun, 2010).

2 We have deliberately not defined the 'public' in this article, to avoid premature conclusions as to what sort of process might be required; we use the plural to reflect the heterogeneity of those who may participate.

3 Reflecting the three pillars of the Aarhus Convention, UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters 2161 UNTS 447.

of the relevant plans and programmes, on which such a lot rests, and of the final consenting decision; some of the relevant case law is discussed below.

In the next section, we will explore policy work on CCS and windfarms, and argue that the role of various publics is at least neglected,[4] if not dismissed, by key players in the national approach to governance of climate change technologies. It may be that the neglect of the 'public' by climate change policy makers is a deliberate, if unspoken (and untransparent), challenge to the orthodoxy that public participation is necessarily a 'good thing'. There is at least a real tension between the perceived urgency of action on climate change and the commitment in principle to public participation;[5] and arguably in some cases even incompatibility, if we agree that an adequate response to climate change through economic and social transformation is unlikely to be forthcoming. But the extent of legal obligations to allow for public participation makes any simple rejection of public participation problematic. In Section 3, we discuss the multiple requirements in English law for public participation in respect of wind and CCS technologies, specifically when those developments are (or are part of) a nationally significant infrastructure project (NSIP). In the light of the statutory requirements for public participation, the role of the public cannot easily be ignored or sidestepped by policy makers, and could usefully be considered in a more constructive way. Providing the 'public' with opportunities for participation, however, as the legislation does, tells us relatively little about the varied extent to which the public can contribute to and influence a decision.[6] In Section 4, we look more closely at the scope of participatory opportunities to shape outcomes in respect of windfarms and CCS projects. Contributions to decision making must generally be couched in terms that 'count' as 'good' reasons for a decision in that particular policy and legal context, if they are to have an influence.[7] For major wind and CCS infrastructure projects, as discussed in Section 4, the limitations on what counts as a good reason to challenge proposals, leaves very little space for participation. Limited formal participatory opportunities do not of course preclude less formal contributions to public debate. And over the longer term, 'repeat players'

4 From a different perspective, Energy and Climate Change Select Committee, *UK Energy Supply: Security or Independence?* (Eighth Report of Session 2010–12, HC 1065) observing that energy users 'are perhaps not as well understood as the technologies that make up the supply side of the system', 4.

5 In the context of adaptation, see Roger Few, Katrina Brown and Emma L Tompkins, 'Public Participation and Climate Change Adaptation: Avoiding the Illusion of Inclusion' (2007) 7 Climate Policy 46; in these circumstances, participation is always more likely to be about 'means', rather than an 'end' in itself.

6 See classically, Sheila Arnstein, 'A Ladder of Participation' (1969) 35 Journal of the American Planning Association 216.

7 Discussed in Maria Lee, 'Beyond Safety? The Broadening Scope of Risk Regulation' (2010) 63 Current Legal Problems 242.

may influence what counts as a good reason, as for example, in respect of roads policy in the 1980s and 1990s.[8] But in the short term, and for 'one-shot' participants concerned about a particular proposal, influence is limited.[9] Again, this might be a rejection of the assumption that public participation is a necessary part of the governance of technological development, in light of urgent timescales for achieving reductions in carbon emissions. But again, this cannot be a straightforward rejection since political and legal commitments to localism seem to suggest a continued, if not enhanced, role for at least some publics in at least some cases.[10]

So there are difficult, interesting and persistent questions to be asked about the role of the public in the massive technological and infrastructure changes anticipated by leading climate change policy makers.[11] Obligations to involve the public in decision making are written into legislation, and it seems unlikely that the public can be avoided. It is not the purpose of this article to dictate institutional solutions to the paradox that we identify, although it is important to note that we intend neither to advocate 'more' public involvement in decision making, nor to throw up our hands and conclude that public participation is simply not possible in this area. Some possibilities for, at the least, greater acknowledgement of the complexity of governance in this area, and for a more nuanced approach to the possible roles of publics in decision making are suggested by the observations we make in this article, and outlined more explicitly in our conclusions.

8 Susan Owens, 'Siting, Sustainable Development and Social Priorities' (2004) 7 Journal of Risk Research 101.

9 For the language of repeat players and one shotters, in the different but related context of legal rights, see Marc Galanter, 'Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 Law and Society Review 165.

10 For example, the role of neighbourhood planning in the Localism Act 2011. The Localism Act is not straightforward in this respect, however; for discussion, see Antonia Layard, 'The Localism Act 2011: What is "Local" and How Do We (Legally) Construct It?' (2012) 14 Environmental Law Review 134.

11 For a sense of the scale of the challenge, see Department of Energy and Climate Change, *2050 Pathways Analysis* (2010) <http://www.decc.gov.uk/assets/decc/What%20we%20do/A%20low%20carbon%20UK/2050/216-2050-pathways-analysis-report.pdf> accessed 6 August 2012; International Energy Agency, *World Energy Outlook* 2011 <http://www.worldenergyoutlook.org/> accessed 6 August 2012; Kevin Anderson and Alice Bows, 'Beyond "Dangerous" Climate Change: Emission Scenarios for a New World' (2011) 369 Philosophical Transactions of the Royal Society A 20. See generally the National Policy Statements for energy, discussed below. The Committee on Climate Change approach to carbon budgets (see *Meeting Carbon Budgets: 3rd Progress Report to Parliament* (June 2011); *The Fourth Carbon Budget: Reducing emissions through the 2020s* (December 2010); *Meeting Carbon Budgets: Ensuring a Low-Carbon Recovery* (Second Progress report to Parliament, June 2010), all available at <http://www.theccc.org.uk/reports> accessed 6 August 2012) require carbon emissions from electricity supply to be close to zero by the end of the 2020s.

2. The Policy Context

It is possible to trace the development of a strong legal and political commitment to 'public participation' in technological and environmental decision making at EU, national and international level, from at least the 1990s, perhaps rather earlier in planning.[12] There are different possible rationales for public participation around technological change.[13] The involvement of publics may be seen as a way to achieve greater acceptance of technological change, part and parcel of promoting behavioural change, without which technological change is rarely efficient or effective.[14] This persuasive role applies in respect of technological developments that are considered self-evidently necessary; other rationales for public engagement imply greater humility about institutional capacity, some recognition of the fragility and asymmetry of expertise. In this respect, public participation may be seen as contributing to the substantive quality of a decision (although what makes a decision 'good' is likely to be contentious). Or alternatively, public participation may be part of good process and democratic legitimacy; citizens have a right to be involved in decisions that shape their world. In this respect, both representative and participatory forms of democracy are significant, and elected representatives do have a role in the infrastructure development discussed below.

At its most basic, broad participation may aim to improve decisions simply by increasing the information available to decision-makers, providing them with otherwise dispersed knowledge and expertise.[15] The decision maker might be exposed to local knowledge,[16] or to a wider range of perspectives on the problem, allowing the expression of environmental values alongside other priorities.[17] And dominant information and expertise might be contested through an open process. A more ambitious approach would aim for a collective problem solving forum, through deliberation and rational argument.[18] There are also diverse approaches to democratising regulatory decision

12 Of a range of possible sources, see Commission, 'White Paper on European Governance' COM (2001) 428 final; House of Lords Select Committee on Science and Technology, *Science and Society* (3rd Report of Session 1999–2000 HL-38); UK Sustainable Development Strategy, *A Better Quality of Life* (1999); and Aarhus Convention (n 3).

13 See for example Andy Stirling, '"Opening Up" and "Closing Down": Power, Participation and Pluralism in the Social Appraisal of Technology' (2008) 33 Science, Technology and Human Values 262; Brian Wynne, 'Public Engagement as a Means of Restoring Public Trust in Science – Hitting the Notes but Missing the Music?' (2006) 9 Community Genetics 211.

14 See for example Energy and Climate Change Select Committee, *Low Carbon Technologies in a Green Economy* (Fourth Report of Session 2009–10 HC-193).

15 On the fragmentation of knowledge and expertise in regulation, see Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World' (2001) 54 Current Legal Problems 103.

16 Frank Fischer, *Citizens, Experts, and the Environment: The Politics of Local Knowledge* (Duke University Press 2000); John Dryzek, *The Politics of the Earth* (2nd edn OUP 2005),

17 For example Graham Smith, *Deliberative Democracy and the Environment* (Routledge 2003).

18 Jenny Steele, 'Participation and Deliberation in Environmental Law: Exploring a Problem-solving Approach' (2001) 21 Oxford Journal of Legal Studies 415.

making through participation. Participation might amount to competition between, and aggregation of, different interests; or we might seek a 'thick', more deliberative approach to decision making.[19]

In terms of changing minds, participation is often seen as a tool by which to enhance environmental awareness,[20] an environmental reflection of the argument that deliberative democracy more generally raises democratic and civic awareness. In some cases, this implies potentially transformative long-term change, with the development of environmental protection values among participants.[21] And there is frequently an expectation that participation avoids conflict, reducing delays further along the consenting process and in implementation.[22]

Each of these approaches has value in different contexts; none is straightforward. The gap between the ideal of participation and its practice is not limited to climate change infrastructure. The frequent lack of participation by 'ordinary' lay publics undermines some of the more ambitious claims for public involvement. Technical and specialist information requires mediation if there is to be widespread participation.[23] There are considerable individual costs to participation (in terms of time, learning about the issues, for example), and those costs are certain and immediate, whilst the benefits are dispersed, likely to be small for any individual and both uncertain and delayed.[24] Furthermore, ideal deliberative conditions are immensely controversial theoretically, and almost impossibly difficult to implement. There are doubts about whether those called on to deliberate in the public interest will in fact be able to move beyond their own interests and preconceptions;[25] and concern that deliberation's call for reason can marginalise the unpopular, and disguise the exercise of power,[26] resonates strongly in environmental law. For example, assumptions about what is reasonable can lead to the dismissal of every other concern as 'irrational' or 'NIMBYism'. Not surprisingly given these challenges, alongside the enthusiasm we have seen over recent decades for public participation, we can also trace resistance to the sometimes messy and inconvenient

19 See Julia Black, 'Proceduralizing Regulation: Part I' (2000) 20 Oxford Journal of Legal Studies 597, and 'Proceduralizing Regulation: Part II' (2001) 21 Oxford Journal of Legal Studies 33.

20 See, for example, John Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (OUP 2000).

21 Jane Holder, *Environmental Assessment: The Regulation of Decision Making* (OUP 2004).

22 Yvonne Rydin, *Conflict, Consensus and Rationality in Environmental Planning: An Institutional Discourse Approach* (OUP 2003) explores the potential and the complexity of this.

23 Sheila Jasanoff, 'Transparency in Public Science: Purposes, Reasons, Limits' (2009) 69 Law and Contemporary Problems 21; Black (n 19).

24 Yvonne Rydin and Mark Pennington, 'Public Participation and Local Environmental Planning: The Collective Action Problem and the Potential of Social Capital' (2000) 5 Local Environment 153.

25 Cass Sunstein, 'Deliberative Trouble? Why Groups Go To Extremes' (2000) 110 Yale Law Journal 71.

26 See, for example, Black (n 19).

intervention of publics, and especially frustration at perceived delays to infrastructure development or technological innovation.[27]

In this article, we want to highlight the complexity of participation, and the limitations of legally protected rights to participate. For current purposes, we agree that people do have a democratic stake in decisions. But for that to be meaningful, given that the host community does not have a simple veto over climate change development, would require great effort from decision makers. Equally, lay publics and environmental interest groups do have potentially important practical contributions to make to decision making processes. But, as discussed below, the commitment of decision makers to authorising climate change infrastructure is apparently unshakeable by competing values, interests, knowledge or information. This might suggest that public participation is being used to persuade, perhaps even to transform, the participants' environmental values. But this is an extremely challenging and slow process, which requires considerably more careful thought than is apparent in the policy documents explored below. The contested nature of environmental values is moreover precisely one of the difficulties here—local landscape values, for example, versus global climate change mitigation.

The shifting legal and policy architecture applying to wind energy development and CCS is not only ambivalent towards the very notion of public participation in decision making, but has failed to grasp its complexity and potential. We focus in this section on the ways in which the Department for Energy and Climate Change (DECC) and the Committee on Climate Change (CCC) approach the governance of climate change technologies. This is of course selective, and there are many crucial actors in the policy making process, not least the Treasury, Department of Environment, Food and Rural Affairs (DEFRA) and the Department of Communities and Local Government (DCLG). But the roles of DECC and the CCC under the Climate Change Act 2008 put them centre stage. The climate change mitigation target in the Climate Change Act 2008 has been much discussed. Equally interesting for present purposes is the creation of certain policy making structures, in particular duties of carbon target (budget) setting, carbon accounting and reporting to Parliament.[28] Many of these new responsibilities are placed on the Secretary of State for Energy and Climate Change and the CCC, which (*inter alia*) advises the Secretary of State on the level and achievement of carbon budgets, and reports on progress.[29] Whilst climate change targets are sometimes dismissed as an empty gesture, we might interpret the Act as an effort to

27 On the ambivalence in the UK, see for example Alan Irwin, 'The Politics of Talk: Coming to Terms with the "New" Scientific Governance' (2006) 36 Social Studies of Science 299.

28 Climate Change Act 2008, ss 4–10, 26–27 and 14 and 56, respectively.

29 Climate Change Act 2008, pt 2. Mark Stallworthy, 'Legislating against Climate Change: A UK Perspective on a Sisyphean Challenge' (2009) 72 Modern Law Review 412.

institutionalise (even constitutionalise)[30] a commitment to climate change mitigation. The institutional significance of DECC and the CCC makes what they say about governance of climate change technologies crucial. It is not possible to be comprehensive even in respect of the policy work of these two actors, but we have tried to examine documents that focus on renewable energy and CCS technologies.[31] Whilst selective quotation can be dangerous, and neither the CCC nor DECC speak with a single voice, we attempt here to provide a sense of the policy background against which nationally significant climate change infrastructure is being developed.

The impressive body of work produced by the CCC in a short period is dominated by economic analysis. Different options are costed, the carbon price and anticipated carbon prices play a big role, and the economic signals are central.[32] This is an important part of the picture. But in keeping with this approach, the consideration of governance issues by the CCC is largely taken up with the role of economic instruments as a means of incentivising the development and diffusion of climate change technologies. For example, the CCC *Renewable Energy Review* focusses primarily on incentivising investment.[33] DECC similarly, whilst taking a broader perspective on the governance context within which climate change technologies sit, also focusses a great deal of policy attention on the economics.[34] This is by no means an illegitimate approach to the governance of climate change technologies, and it is hardly a criticism to say that DECC has paid a great deal of attention to the way that

30 Aileen McHarg, 'Climate Change Constitutionalism? Lessons from the United Kingdom' (2011) 2 Climate Law 469.

31 We have considered the following documents for the purposes of this section: CCC, *Renewable Energy Review* (May 2011) <http://www.theccc.org.uk/reports> accessed 6 August 2012; the carbon budget documents (n 11). DECC, *Planning our Electric Future: A White Paper for Secure, Affordable and Low-Carbon Electricity* (July 2011) <http://www.decc.gov.uk/assets/decc/11/policy-legislation/emr/2176-emr-white-paper.pdf> accessed 6 August 2012; *UK Renewable Energy Roadmap* (July 2011); *4th Carbon Budget* (May 2011) <http://www.decc.gov.uk/en/content/cms/emissions/carbon_budgets/carbon_budgets.aspx> accessed 6 August 2012; *Art 4 Action Plan*; HM Government *Carbon Plan*, (n 1); *First Progress Report on the Promotion and Use of Energy from Renewable Sources for the United Kingdom: Article 22 of the Renewable Energy Directive 2009/28/EC* (no date) <http://www.decc.gov.uk/assets/decc/11/meeting-energy-demand/renewable-energy/3992-first-progress-report-on-the-promotion-and-use-of-.pdf> accessed 6 August 2012. DECC, *CCS Roadmap*: Supporting Deployment of Carbon Capture and Storage in the UK (April 2012); *Clean Coal: An Industrial Strategy for the Development of Carbon Capture and Storage Across the UK* (March 2010); *UK Carbon Capture and Storage (CCS) Commercial Scale Demonstration Programme: Delivering Projects 2–4 (further information)* (December 2010); *Towards Carbon Capture and Storage: Response to Consultation* (April 2009); *Carbon Capture Readiness—A Guidance Note for Section 36 of the Electricity Act 1989 Consent Applications* (November 2009); *A Framework for Developing Clean Coal* (April 2009); all available at <http://www.decc.gov.uk/publications/DirectoryListing.aspx?tags=2> accessed 6 August 2012.

32 ibid.

33 ibid.

34 ibid.

the electricity market affects climate change technologies.[35] But these economic instruments sit in a very complex world, and economic incentives are not the only influence on technological development.

DECC and the CCC are part of a government context that shows a certain rhetorical hostility to state action and regulation. DECC's 2010 *Renewable Energy Action Plan* refers to the need for government to 'get out of business's way', with 'the emphasis on regulation as a last, not a first, resort'.[36] De-regulatory rhetoric is hardly new, and does not always reflect the real state of regulation. Nor is government policy wholly in this vein. But this de-regulatory rhetoric is reflected in, or at least consistent with, the way in which DECC and the CCC represent spatial planning.

The *Overarching National Policy Statement for Energy (EN-1)*, a key part of the planning system as discussed below, describes the 'role of the planning system' as being 'to provide a framework which permits the construction of whatever Government – and players in the market responding to rules, incentives or signals from Government – have identified as the types of infrastructure we need in the places where it is acceptable in planning terms'.[37] Although the very same paragraph refers to the need to 'take account of the views of affected communities' (and of course communities may be in favour of these developments), this partial, and highly contentious, view of the planning system has the potential to shape decision making. Planning, and the role for people in planning, are sometimes quite explicitly represented as a barrier to progress, albeit without clearly explaining how they constitute such a barrier. The *Action Plan* for example describes 'the planning system' as a key 'barrier to delivery'.[38] More often the mistrust of planning is implicit. The solutions proffered by the CCC *Renewable Energy Review* to what is presented as the serious problem of lack of public support for onshore wind and transmission infrastructure are under-explored: we might focus our onshore wind developments in Scotland, where there is a higher historical rate of approval; or

35 *Planning our Electric Future* (n 31). And in an indication of the impossibility of characterising these documents in any generic way, this White Paper also discusses the role of Emissions Performance Standards for carbon emissions from power stations, a very different regulatory approach. Note also that the institutional complexity of the market mechanisms is explored, ch 4, ibid

36 (n 31) 4344. See also DECC, *Towards Carbon Capture and Storage* (n 31) <http://webarchive.nationalarchives.gov.uk/+/http://www.berr.gov.uk/files/file51115.pdf> accessed 6 August 2012, where Government accepted the suggestion of some respondents that if regulation is needed, it 'should be light touch' [3.9], [3.21].

37 DECC, *Overarching National Policy Statement for Energy (EN-1)* (2011) <http://www.decc.gov.uk/en/content/cms/meeting_energy/consents_planning/nps_en_infra/nps_en_infra.aspx> accessed 6 August 2012 [2.2.4].

38 (n 31). We might note that in the Government's *Draft Carbon plan* (March 2011), one of the six principles is to: '**Be inclusive:** Our efforts to cut greenhouse gas emissions should not be forced through top down by Government. We should make this change by enthusing our whole society, in line with our commitment to localism', [1.5]. This has completely disappeared from the December 2011 version. Both versions are available at <http://www.decc.gov.uk/en/content/cms/tackling/carbon_plan/carbon_plan.aspx> accessed 6 August 2012.

the UK might, somewhat euphemistically, place 'a greater emphasis of national priorities as implied by carbon budgets', presumably avoiding planning law, and people, entirely.[39] Even if avoiding planning might help put some low-carbon infrastructure in place quickly, it seems highly unlikely that it will contribute more generally to the move to a low-carbon economy.[40]

Of course the lengthy policy documents produced by DECC and the CCC are by no means single-mindedly 'anti'-regulation. DECC's *Renewable Energies Roadmap* recognises the need 'to ensure that projects have as many benefits and as few adverse impacts as possible in financial, economic and environmental terms'; but this is matched by concern that delays associated with planning, and the conditions attached to planning permissions, 'can have a significant impact on deployment'.[41] Similarly, DECC's 2012 *CCS Roadmap* recognises that lessons need to be learned from 'experience to date which suggests that community engagement begins early and goes beyond the requirements under the regulatory regime'.[42] Less positively, we might note that this is the only reference to publics in the entire 2012 set of CCS policy, and that there is no reference to engagement with local communities in the final action plan 2012–26.[43] Planning is also presented less negatively in DCLG's *National Planning Policy Framework*, albeit following a bitter row about a crudely pro-development consultation draft.[44]

The focus on economic rationality, and on people as a 'barrier' to development, sometimes come together, for example, in some very brief discussion of the 'community benefits' associated with infrastructure development. In respect of host communities, the CCC's *Renewable Energy Review* refers to the international experience of achieving 'community buy-in . . . through sharing financial benefits', mentioning benefit sharing through retention of business rates by local communities, and the voluntary 'Wind Protocol' whereby the industry commits sums to a 'community benefit fund'.[45] The DECC *Roadmap* also

39 (n 31) 107. See also the discussion of financial benefits to communities, text to (nn 45–47) below.

40 This seems to be recognised in respect of transport, *3rd Progress report* (n 11) 28.

41 (n 31) [3.2]. This document includes a 'planning and consenting section' on each of eight technologies. Given that the *Roadmap* is explicitly about how government will 'tackle the non-financial barriers to renewables deployment', [1.3], however, we might have hoped for more reflection on the role of publics in planning.

42 DECC, *CCS Roadmap* (n 31) [6.3].

43 This action plan sets out a timetable for action, with no time explicitly set aside for public participation, <http://www.decc.gov.uk/en/content/cms/emissions/ccs/facilitating/facilitating.aspx> accessed 6 August 2012.

44 DCLG, *National Planning Policy Framework* (2012), <http://www.communities.gov.uk/documents/planningandbuilding/pdf/2116950.pdf> accessed 6 August 2012. The NPPF is directed at local authorities and does not apply to NSIPs consented under the Planning Act 2008, although it may be a material consideration.

45 (n 31) 28. Renewable-UK, *A Community Commitment: The Benefits of Onshore Wind* (February 2011) http://www.bwea.com/pdf/publications/CommunityBenefits.pdf accessed 6 August 2012; Energy and Climate Change Select Committee (n 14), [56]; Aileen McHarg and Anita Ronne, 'Reducing Carbon-Based Electricity Generation: Is the Answer Blowing in the Wind?'

places a lot of faith in the 'powerful new incentive' whereby local communities are able to keep the business rates associated with development.[46] It also discusses employment and economic growth potential. DECC and the CCC are correct to identify the importance of the distributive issues around particular groups bearing burdens (either higher electricity costs, or hosting of unwelcome infrastructure) in the broader public interest. These mechanisms could turn out to be rather powerful, even going some way to ensuring a more practical approach to public participation which moves beyond a one-way institution-to-public dialogue. But the role of community benefits in incentivising the hosting of infrastructure is difficult and complicated, for communities as well as more conceptually,[47] and a deeper exploration is probably necessary.

The economics of technological development are important and planning is not perfect. The CCC presumably thinks that it is not their role to engage more fully with public participation; DECC would presumably want to refer to policy work carried out in other parts of government. Our point here is simply that the bigger governance questions need to be more thoroughly embedded in national policy work on climate change technologies, with a more integrated approach to governance. The fact that decisions on particular projects sit in a climate change policy context that is almost overwhelmingly concerned with economic signals might tell us something about how difficult it will be to fit perspectives that are not so expressed into a decision-making process. As suggested above, the disinclination to engage with questions of public participation may be part of a backlash against the strong (rhetorical) role for public participation in technological and environmental matters over recent years. Even the fact that the CCC has chosen to interpret its role in a highly technocratic way[48] is an interesting development to set against the apparent shift to more broadly based advisory bodies in DEFRA in recent years.[49] It is probably fair to say that, at least in environmental law, the original enthusiasm for public participation was inadequately reflective in some cases, not properly engaging with the complexities and challenges of

in Donald N Zillman and others (eds), *Beyond the Carbon Economy: Energy Law in Transition* (OUP 2007) 303.

46 (n 31) [3.26]. See also DECC, *First Progress Report* (n 31) 16.

47 See, for example, Noel Cass, Gordon Walker and Patrick Devine-Wright , 'Good Neighbours, Public Relations and Bribes: The Politics and Perceptions of Community Benefit Provision in Renewable Energy Development in the UK' (2010) 12 Journal of European Public Policy 255; Jennifer C Rogers and others, 'Public Perceptions of Opportunities for Community-based Renewable Energy Projects' (2008) 36 Energy Policy 4217.

48 It is not constrained by statute, s 10 Climate Change Act 2008.

49 See, for example, the membership of the Agriculture and Environment Biotechnology Commission <http://webarchive.nationalarchives.gov.uk/20100419143351/http://www.aebc.gov.uk/> accessed 6 August 2012; the Royal Commission on Environmental Pollution <http://webarchive.nationalarchives.gov.uk/20110322143804/http://www.rcep.org.uk> accessed 6 August 2012; and currently the Science Advisory Council <http://sac.defra.gov.uk/> accessed 6 August 2012.

participation.[50] So a backlash would not be terribly surprising. But those who apparently reject a central role for public participation are not engaging any more thoroughly with the complexities of participation. Moreover, this shift is hidden in a complex policy framework, rather than transparently acknowledged. And just as the policy commitment to participation was never wholehearted, but always ambivalent,[51] so too is the backlash, in particular when we bear in mind legal and political commitments to enhanced public participation in decision making in other areas.[52]

3. The Legal Requirements

The core decision-making framework for infrastructure development and removal is found in planning law, supplemented by environmental assessment. Both CCS (and the generating facilities and other infrastructure with which it is associated) and wind energy development (and associated infrastructure) require planning permission. There is a long history of public participation in planning law. And whilst planners are faced with almost perpetual legal change, provision for public participation has tended to increase over time, with domestic law reinforced by the EU and international legal context.

Frustration with planning processes, perceived by some to be slow and inefficient, is reflected in the new approach to NSIPs, which are the focus of this article, under the Planning Act 2008. A generating station over 50 MW (100 MW offshore[53]) is a NSIP, as is certain associated infrastructure.[54] Whilst CCS projects are not listed as NSIPs under the Act, EU law and national policy impose 'carbon capture readiness' obligations on power stations with a generating capacity of 300 MW or more, and CCS on at least 300 MW of the proposed generating capacity of new coal-fired power stations (or significant extensions to existing plant).[55] How this 'technology forcing' regulation (a requirement for a technology that has not yet been fully demonstrated) will play out remains to be seen, but for present purposes, this brings most CCS within the bounds of the Planning Act.

50 See the discussion in Maria Lee and Carolyn Abbot, 'The Usual Suspects? Public Participation under the Aarhus Convention' (2003) 66 Modern Law Review 80.

51 Irwin (n 27).

52 (n 10). The Ministerial Foreword to the NPPF (n 44) (applying to projects that are not NSIPs) describes planning as a 'collective enterprise'.

53 UK territorial waters are up to 12 nautical miles from the coast, with functional jurisdiction extended beyond, to the international law maximum of 200 nautical miles, including for the 'renewable energy zone', s 8(4) Energy Act 2004.

54 Planning Act 2008, pt 3.

55 Directive 2010/75/EU on industrial emissions (integrated pollution prevention and control) [2010] OJ L334/17, art 36; *EN-1* (n 37), [4.7]. For detailed discussion, see Chiara Armeni, *Case Studies on the Implementation of Directive 2009/31/EC on the Geological Storage of Carbon Dioxide: United Kingdom* (UCL 2011), <http://www.ucl.ac.uk/cclp/pdf/CCLPEUCaseStudies Project-UnitedKingdom.pdf> accessed 6 August 2012.

During parliamentary debate on the then Planning Bill, much was made by ministers of the three opportunities for public participation on NSIPs: participation during the drafting of the National Policy Statement (NPS) that sets the policy context for individual project applications; participation during the developer's pre-application consultation; and participation during the examination of the application.[56] We are most concerned here with the latter two stages. Applications for development consent are considered by the National Infrastructure Directorate, part of the Planning Inspectorate, which makes recommendations to the Secretary of State. The Secretary of State takes the final decision. Smaller developments are decided by local planning authorities onshore, or by the Marine Management Organisation offshore.

We are not suggesting that local communities will necessarily resist the developments sought by government. But public participation can provide an input into planning decision making that is different from other planning considerations. In the cases we are concerned with here, those planning considerations are found primarily in the NPSs discussed below, as well as in other policy and cases decided through the appeals system and judicial review. These considerations may overlap with public concerns, but are even then likely to be couched in different languages and rationales. Furthermore, the public may have concerns about a development proposal that cannot be captured within the range of acceptable planning considerations. Thus, a matrix along the lines of Table 1 can be envisaged. The point here is that a range of possible combinations of planning considerations and public views may arise; these are not predetermined by the extent of attempts to engage the public.

3.1 Policy and Plan Making

Whilst we focus on the individual project authorisation stage, the opportunities for earlier public participation on the NPSs are clearly crucial, particularly if they are used to justify reduced participation around the authorisation of particular developments. Decisions on whether or not to grant consent to a NSIP must, subject to important provisos discussed below, be made in accordance with the appropriate NPS. Other plans and guidance (such as the wider DECC policy framework for developing 'clean' coal,[57] the Marine Policy Statement,[58] and Crown Estate 'leasing rounds' for offshore wind farms

56 For example, Hansard 10 December 2007: Column 28, Hazel Blears MP.
57 (n 31).
58 DEFRA, *Marine Policy Statement* (March 2011) <http://www.defra.gov.uk/news/2011/03/18/marine-policy-statement/> accessed 6 August 2012.

Table 1. Public participation and planning considerations

	Public participation supports development	**Public participation opposes development**
Planning considerations support development	Unproblematic approval of project	Charge of NIMBYism and selfish rejection of project in public interest
Planning considerations oppose development	Charge of community self-interest in promoting project	Unproblematic rejection of project

and CCS[59]) will be relevant in decision making, and have in many cases been subject to their own consultation mechanisms. But the energy NPSs (the 'overarching' statement (*EN-1*), the fossil fuel statement (*EN-2*) and the renewables statement (*EN-3*))[60] are central in subsequent applications for wind or CCS development. The NPSs for energy cover both onshore and offshore issues. CO_2 storage is expected to take place 'almost exclusively' offshore,[61] and there is a policy preference for offshore wind over onshore developments.[62]

A number of legal provisions demand opportunities for public participation during the drawing up of strategic level policy in NPSs, although as discussed below, these opportunities are rarely taken up by lay publics. The Strategic Environmental Assessment (SEA) Directive applies to all plans and programmes[63] in sectors including energy if those plans or programmes 'set the framework for' projects subject to assessment under either the Environmental Impact Assessment (EIA) Directive, or require assessment under the Habitats Directive.[64] Whilst the difference of opinion over the application of SEA to the airports NPS was left unresolved in *R (on the application of Hillingdon LBC) v Secretary of State for Transport* there is certainly a strong legal case that it

59 Windfarms and associated infrastructure need a lease from the Crown Estate, which owns all the seabed up to 12 nautical miles and has vested sovereign rights to explore and exploit the natural resources of the UK continental Shelf.

60 *EN-1* (n 37); DECC, *National Policy Statement for Fossil Fuel Electricity Generating Infrastructure (EN-2)* (2011); *National Policy Statement on Renewable Energy Infrastructures (EN-3)* (2011), all available at <http://www.decc.gov.uk/en/content/cms/meeting_energy/consents_planning/nps_en_infra/nps_en_infra.aspx> accessed 6 August 2012.

61 (n 58) [3.3.31], Towards CCS [5.6]. Note that this is explicitly due to concerns about 'public anxiety', see DECC, *CCS Roadmap* (n 31) [3.3].

62 See discussion in Claire Haggett, 'Over the Sea and Far Away? A Consideration of the Planning, Politics and Public Perception of Offshore Wind Farms' (2008) 10 Journal of Environmental Policy & Planning 289; Karen Scott, 'Tilting at Offshore Windmills: Regulating Wind Farm Development Within The Renewable Energy Zone' (2006) 18 Journal of Environmental Law 89.

63 Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment [2001] OJ L197/30, art 2(a). SEA applies to a plan or programme adopted or prepared by an 'authority' and 'required by legislation, regulation or administrative provisions'.

64 Directive 2011/92 on the assessment of the effects of certain public and private projects on the environment (codification) [2012] OJ L26/2; Directive 1992/43 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7.

should be subject to SEA.[65] The current NPSs on *energy* explicitly state that the SEA is incorporated into the appraisal of sustainability required under the Planning Act.[66] The sustainability appraisal introduces social and economic impacts into the assessment. The SEA Directive is the primary mechanism by which the EU implements the 'plans and programmes' requirements in Article 7 of the influential Aarhus Convention on *Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*,[67] which requires arrangements 'for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public'. Plans and programmes are not defined in the SEA Directive or the Convention, but they are distinguished in the Convention from 'policies', which are subject to less hard edged requirements: 'to the extent appropriate, each party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment'.[68]

The SEA Directive requires the production of an 'environmental report', in which 'the likely significant effects on the environment' of implementation of the plan or programme have to be 'identified, described and evaluated', as must 'reasonable alternatives'.[69] Both the draft plan or programme and the environmental report are made available to the public, which is to be given 'an early and effective opportunity within appropriate time frames to express their opinion . . . before the adoption of the plan or programme or its submission to the legislative procedure'.[70] Environmental interest groups are part of the 'public', and beyond that, the public must be identified by the relevant public authority, but 'including the public affected by, or having an interest in, the decision making'.[71] The environmental report and the opinions expressed 'shall be taken into account during the preparation of the plan or programme'.[72] A requirement for a statement of reasons (including not only a summary of how the environmental report and the results of consultations have been taken into account, but also a summary of how environmental

65 *R (on the application of Hillingdon LBC) v Secretary of State for Transport* [2010] EWHC 626 (Admin); Meyric Lewis and Ned Westaway, 'Public Participation in UK CCS Planning and Consent Procedures' in Ian Havercroft, Richard Macrory and Richard Stewart (eds), *Carbon Capture and Storage: Emerging Legal and Regulatory Issues* (Hart Publishing 2011).

66 *EN-1* (n 37) [1.7.1].

67 (n 3). See also text at (n 113) below.

68 Art 7. See the discussion of *R (on the application of Greenpeace) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin), text at (n 77) below. Art 8 applies to 'executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment': 'each party shall strive to promote effective public participation at an appropriate stage, and while options are still open'.

69 (n 63) art 5.

70 art 6.

71 ibid.

72 art 8.

considerations have been 'integrated' into the plan or programme[73]) provides a potentially stronger form of accountability than simply a direction to take environmental considerations into account.

Whilst SEA focuses on environmental impacts, broader concerns are covered by the Planning Act. In addition to the sustainability appraisal, NPSs are subject to parliamentary approval, as well as public consultation and publicity 'as the Secretary of State thinks appropriate'. Any identification of a location 'as suitable (or potentially suitable) for a specified development' means that 'appropriate steps' must be taken to 'publicise the proposal'.[74]

Although we are primarily concerned in this article with the individual project authorisation stage, the opportunities for earlier public participation on the NPSs are clearly crucial, particularly if they are used to justify reduced participation around the authorisation of particular developments. Simply providing opportunities for public participation at the higher level does not substitute for opportunities for participation at the project level (even if one agrees that there are *other* good reasons for limiting that later participatory exercise). At the very least, the participatory 'constituency' will change at the different levels of participation. The non-specialist public will rarely be engaged by large scale debates, which are to some degree abstract. The real life conflicts and distributive impacts (eg the amenity effects of wind farms) become apparent the closer we get to a real development, as does what a lay person might contribute.[75] Public participation at the strategic level (in particular) cannot be a passive exercise on the part of the relevant institution, and if it is, it should be no surprise when there is little response.

The increased significance of the NPSs probably increases the likelihood of objectors challenging them through the courts. This is not the place for a detailed discussion of access to justice,[76] but we should note that 'high level' policy making is in principle susceptible to judicial review. *R (on the application of Greenpeace) v Secretary of State for Trade and Industry* famously led to the quashing of government's nuclear policy because of the procedural flaws in the consultation process.[77] The Court used the Aarhus Convention in support: 'given the importance of the decision under challenge . . . it is difficult to see how a promise of anything less than "the fullest public consultation" would

73 art 9.

74 Planning Act 2008, ss 5, 7 and 9 and Localism Act 2011, s 130. The Infrastructure Planning (National Policy Statement Consultation) Regulations 2009, SI 2009/1302 prescribe the statutory consultees for NPSs.

75 Olivia Woolley, 'Trouble on the Horizon? Addressing Place-based Values in Planning for Offshore Wind Energy' (2010) 22 Journal of Environmental Law 223, argues for deliberation at a strategic level, but advocating a regional or local process, rather than a national process.

76 See also Aarhus Convention, art 9, although this is the least developed pillar under the Convention: Catherine Redgwell, 'Access to Environmental Justice' in Francesco Francioni (ed), *Access to Justice as a Human Right* (OUP 2007).

77 (n 68). The cases discussed below, Section 4, consider the revisiting of high-level policy in a decision on a particular project.

have been consistent with the Government's obligations under the Aarhus Convention'.[78] Whether Aarhus could have borne the weight of this challenge without the assistance of common law principles (in particular the doctrine of 'legitimate expectations' as well as general administrative law principles on participation) has to be doubtful.[79] Furthermore, the Court acknowledges the enormous practical difficulties in challenging the consultation process applying to such a high level policy, given the frequent absence of statutory or other procedural rules, and the difficulty of establishing procedural impropriety or *Wednesbury* irrationality (a decision so unreasonable that no reasonable public authority would have reached it).[80] In the case of NPSs, statutory procedural rules in the Planning Act 2008 or the SEA Directive are perhaps the most likely ground of challenge.

3.2 Development Consents

The final development consent decision for a NSIP is taken by the Secretary of State. This responsibility was moved from the appointed Infrastructure Planning Commission (IPC) to the Secretary of State by the Localism Act 2011. The DECC *Roadmap* implies that replacing the IPC 'with a democratically accountable system' will enhance approval rates;[81] in contrast, the CCC is apparently concerned that this political input will slow things down.[82] Furthermore, the Secretary of State's role may not be universally welcomed. In particular, it may be seen as inherently politicised, both in terms of party politics and connections to vested interests. In any event, the Secretary of State's final consenting responsibility has been explained and justified in terms of democratic accountability.[83] Concerns about the locus of the final decision-taking on NSIPs puts considerable emphasis on the process by which views are gathered and heard before this point. We review the legal obligations below, but should note also the norms (established in the early days of the IPC) adopted within the National Infrastructure Directorate of the Planning Inspectorate, which makes recommendations to the Secretary of State. Of particular interest is the use of the internet in promoting openness and transparency. The presumption is a commitment to 'proactively publishing

78 [51].
79 Karen Morrow, 'On Winning the Battle but Losing the War . . . (on the Application of Greenpeace Ltd) v Secretary of State for Trade and Industry [2007] EWHC 311' (2008) Environmental Law Review 65.
80 [54].
81 (n 31) [3.2]. DECC is referring to Parliamentary approval of NPSs as well as the role of the Secretary of State. See also the DECC, *First Progress Report* (n 31) 17.
82 For example, *Meeting Carbon Budgets* (2010) (n 11) 16, the change 'should be managed in a way which avoids creating further uncertainty'.
83 Hansard, HC Public Bill Committee, 18th Sitting, 1 March 2011: column 730.

information', and, publishing 'all documents submitted to us in connection with applications'.[84]

The Planning Act imposes various consultation obligations on the applicant for a particular project, in advance of the application. The applicant has to consult a number of statutory consultees, including local authorities.[85] The developer has to notify the Secretary of State of its intention to apply for authorisation 'on or before' the start of that consultation.[86] The applicant has to set out how it proposes to consult 'people living in the vicinity of the land' in a 'statement of community consultation', on which local authorities are consulted; the Statement has to be published, and the applicant must 'carry out consultation' accordingly.[87] The proposed application also has to be publicised.[88] The applicant must 'have regard to any relevant responses' to the consultations when drawing up the final application for consent, which must be accompanied by a 'consultation report' setting out what has been done.[89] Guidance from the National Infrastructure Directorate requires 'a robust and detailed report', with contributions listed, and responses explained.[90]

Local authorities are given a further opportunity to comment once an application is made, and to submit a 'local impact report'.[91] The applicant must also publicise the application,[92] and non-statutory consultees who wish to contribute to the examination of the application must register with the National Infrastructure Directorate, to become an 'interested party'.[93]

Participation under EIA, which since 2003 implements the most detailed provisions of the Aarhus Convention,[94] will also be the responsibility of the applicant, offshore and onshore. EIA is in part a highly technical process, requiring the developer to provide information on the environmental effects of a

84 Subject to the proviso of information that 'would be likely to damage the effective conduct of the Planning Inspectorate's statutory functions or the conduct of its business', and 'any draft or working documents which are incomplete and potentially inaccurate or misleading.' See <http://infrastructure.planningportal.gov.uk/application-process/frequently--asked-questions/> accessed 6 August 2012

85 ss 42–43. Note also the Planning Inspectorate's non-statutory 'outreach' role, Planning Inspectorate Advice Note 2: *Working Together on Nationally Significant Infrastructure Projects* (2012) <http://infrastructure.planningportal.gov.uk/legislation-and-advice/advice-notes/> accessed 6 August 2012.

86 s 46.

87 s 47.

88 s 48.

89 s 37.

90 See also IPC, *IPC Guidance Note 1 on pre-application stages* (2011) <http://infrastructure.independent.gov.uk/wp-content/uploads/2010/04/IPC-pre-app-guidance-note-1.pdf> accessed 6 August 2012.

91 s 56. A 'local impact report' is a report in writing giving details of the likely impact of the proposed development on the authority's area (or any part of that area), s 60.

92 s 48.

93 s 102(1)(e); PI Advice Note 8: *How to Get Involved in the Planning Process* (2012) <http://infrastructure.planningportal.gov.uk/wp-content/uploads/2012/04/Advice-note-8.1v4.pdf> accessed 6 August 2012.

94 (n 3).

project[95] and under the *Overarching National Policy Statement for Energy (EN-1)*, also information on social and economic effects.[96] This information, and a non-technical summary, must be 'made available to the public within a reasonable time in order to give the public concerned the opportunity to express an opinion before the development consent is granted'.[97] The results of consultations and the information gathered 'must be taken into consideration' in the decision-making, an obligation reinforced by the requirement to publish the reasoning on the final decision and mitigation measures.[98] The procedural rights granted to the public through EIA are enforceable, and a reasonably familiar ground for judicial review of planning decisions. The courts have emphasised both the 'right to a fully informed decision on the substantive issue', as well as the importance of an 'inclusive and democratic procedure'.[99]

One of the controversial elements of the Planning Act was the end of the public inquiry for major infrastructure projects. The institution of the planning inquiry has been much criticised for delay, expense and formality, but to others it is an opportunity for a full and public testing of the issues.[100] The starting point for examination of the NSIP application is that decisions are made on written materials.[101] Provision is made for hearings when the National Infrastructure Directorate considers it necessary, or if an interested party requests such a hearing.[102] The hearings are primarily an opportunity for statements to be made, since hearings are likely to proceed without cross examination.[103] Any cross examination that does occur can be by the Directorate, rather than representatives of the interested parties.[104] The National Infrastructure Directorate does have considerable discretion in respect of the process it follows, with potential for inclusive and open processes. One of the purposes of the Planning Act 2008 was to reduce the time taken for development consent (albeit in the absence of discussion of when a good, thoughtful process around important developments becomes pathological delay).[105]

95 Directive 2011/92 (n 64) art 5(1). The information required is set out in art 5(3) and Annex IV. Where projects may have transboundary impacts, see also the information required by art 4 and Appendix II of the UNECE Convention on Environmental Impact Assessment in a Transboundary Context 1991, 1989 UNTS 309.

96 (n 55) [4.2.2].

97 (n 64) art 6.

98 arts 6(2), 8, 9.

99 *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603 (HL) 15 (Lord Hoffmann).

100 For example, Keith Lindblom and Richard Honey, 'Planning for a New Generation of Power Stations' (2007) Journal of Planning and Environmental Law 843.

101 s 90.

102 ss 91–93. An interested party includes local authorities and those whose property will be affected, as well as those who register (n 93).

103 s 94.

104 s 97.

105 The attribution of delay under the old regime to public participation, or to 'objectors', has been resisted. See Phil Michaels, 'The Planning Bill: A Perspective from Friends of the Earth' (2008) 20 Environmental Law & Management 275; Lindblom and Honey (n 100).

Both renewable energy and CCS are the subject of specific EU Directives. Whilst the CCS Directive does not require Member States to permit CCS in their territories,[106] the Renewable Energy Directive requires the share of energy from renewable sources (not limited to wind) in the UK to reach 15% by 2020.[107] It is now utterly orthodox for EU environmental legislation to require 'public participation' of some sort in its implementation in the Member State.[108] Neither the Renewable Energy Directive nor the CCS Directive requires opportunities to be provided for public participation. The Renewable Energy Directive does recognise in its non-legally binding preamble that we are faced with more than a technological challenge: 'Public support is necessary to reach the Community's objectives with regard to the expansion of electricity produced from renewable energy sources'.[109] The phrase immediately following, however, suggests the dominance of an economic approach at EU as well as national level: 'in particular for as long as electricity prices in the internal market do not reflect the full environmental and social costs and benefits of energy sources used'.[110] The only reference to the public in the CCS Directive is to the need for 'public awareness measures'.[111] Public participation has been left to existing mechanisms, which as well as environmental assessment, in respect of CCS include the Industrial Emissions Directive (IED).[112] The Renewable Energy Directive has however recently been found to be non-compliant with Article 7 of the Aarhus Convention by the Aarhus Compliance Committee, specifically with respect to the adoption and overview of national renewable energy action plans (in this case, by Ireland). The Committee has recommended, inter alia, that the EU 'adopt a proper legislative framework for implementing article 7 of the Convention with respect to the adoption of [National Renewable Energy Action Plans].'[113]

106 Directive 2009/31/EC on the geological storage of carbon dioxide [2009] OJ L140/114.
107 (n 36) art 3.
108 For example, Directive 2000/60/EC establishing a framework for the community action in the field of water policy [2000] OJ L 327/1.
109 Recital 27.
110 (n 36), recital 27. Recital 90 provides that the Directive should be implemented in accordance with the Aarhus Convention 'in particular' with art 6 on activities.
111 Recital 11. EU legislation on access to environmental information is also applies, recital 21 and art 26.
112 Directive 2010/75/EU on industrial emissions (integrated pollution prevention and control) [2010] OJ L334/17, arts 24 and 25.
113 *Findings and recommendations with regard to communication ACCC/C/2010/54 concerning compliance by the EU [draft],* <http://www.unece.org/fileadmin/DAM/env/pp/compliance/C201054/Correspondence%20with%20Party%20concerned/C-54.EU.Draft.Findings29Apr12.doc> accessed 6 August 2012. These remain draft findings, pending adoption by the Compliance Committee.

4. The Relationship Between Policy and Participation in Project Authorisation

A legal command to allow for public participation in an authorisation process, such as those discussed in Section 3.2, tells us little about what public participation will consist of, or what it might contribute to the decision. But the legal and policy background to a decision always contributes to the shaping of the ways in which public participation might affect a decision. So, for example, the legal framing of a decision around a highly technical risk assessment paradigm (perhaps because of the demands of EU or international trade law) will make it difficult to embrace external perspectives that are framed in different terms.[114] 'Repeat players', including environmental interest groups as well as industry, may be able to use their experience and expertise to construct their contributions in the most fitting way. Whether the economic framing of climate change technologies discussed above will shape the potential for public participation remains to be seen. But the special status granted to NPSs under the Planning Act 2008 certainly will. So the primary purpose of the current section is to explore the extent to which national policy (as set out in the NPS) limits discretion of decision makers in their evaluation of individual applications for consent. In the absence of much room for manoeuvre, there is little that the public can really contribute at that stage; if the decision maker has a free hand to base its decision on a full range of interests, values and technical information, then at least in theory, the public can contribute a great deal.

We return to the NPS below, but the relationship between policy and projects is not a new question, and has been the subject of discussion since at least the 1957 Franks Report.[115] Even statutory intervention is not entirely new, for example, the turn to 'plan led development' in the 1980s enhanced the status of local development planning.[116] The well-known House of Lords decision in *Bushell*[117] involved a challenge, by objectors to a road scheme, to the inspector's refusal to allow them to cross examine on the *need* for motorway developments. The legislation did not address the scope of the inquiry. The Minister had determined that government motorway policy was not for discussion at inquiries, but was a matter on which he was answerable to parliament.[118] Famously, Lord Diplock said that '"policy" as descriptive of departmental decisions to pursue a particular course of conduct is a protean word', and distinguished a decision to construct a nationwide network of motorways

114 Lee (n 7).

115 Sir Oliver Franks, *Report of the Committee on Administrative Tribunals and Enquiries* (Cmnd 218 1957). And more recent non-statutory efforts to 'streamline' the process (strengthening the role of national policy before the 2008 Act) are discussed in *R (Wandsworth) v Secretary of State for Transport* [2005] EWHC 20.

116 Town and Country Planning Act 1990, s 54A.

117 *Bushell v Secretary of State for the Environment* [1981] AC 75 (HL).

118 ibid 97–98.

(subject to parliamentary debate rather than 'separate investigations in each of scores of local inquiries'), from 'the selection of the exact line to be followed through a particular locality' (properly subject to a local inquiry).[119] These two examples were presented as very clear extremes. Even the dissenting opinion of Lord Edmund-Davies accepts that it is 'beyond doubt that the inspector could – and should – disallow questions relating to the merits of government policy'. [120]

This protection of a particular sort of policy survives in principle, and *Bushell* was applied in *Barbone v Secretary of State for Transport,* the Stansted judicial review. In that case it was held that the applicants 'were in reality calling into question the Government's judgment of national economic policy', and that the planning inquiry is not the 'appropriate forum for such a debate'.[121] But the extremes identified by Lord Diplock are perhaps no longer quite as self-evident as they appeared in *Bushell*. Carnwath LJ in *Hillingdon v Secretary of State for Transport*, referring to *Bushell,* rejected the proposition that 'there is a clear "no-go area" at any planning inquiry defined by what is termed "policy in the traditional planning sense" '.[122] Whilst understandably avoiding some of the difficult questions about precisely what is left for debate in the context of firm central policy on a matter, Carnwath LJ in *Hillingdon* recognised the inevitable dynamism of policy. Policy evolves, and is influenced from many directions: '[i]t is a trite proposition in administrative law that policy cannot be set in stone. It must be open to reconsideration in the light of changing circumstances'.[123] In *Greenpeace v Secretary of State for Trade and Industry,* Sullivan J reminded us of the blurred line between policy that can, and policy that cannot, be challenged in consent decisions on particular projects. Even if:

> the need for new nuclear power might not be altogether precluded at the inquiry . . . the inspector would inevitably be considering the issue, and the extent to which he would be prepared to permit detailed oral evidence to be given about it, against the background of a clear "in principle" decision by government.[124]

119 ibid 98.
120 ibid 115.
121 *Barbone v Secretary of State for Transport* [2009] EWHC 463. The objectors wanted to open up for re-consideration the gap in the balance of payments in respect of tourism. The Court held that the policy in favour of expanding Stansted 'is founded on the Government's judgment that the balance of national socio-economic advantage favours such a policy and that one of the many matters taken into account when reaching that judgment was the so-called "tourism deficit" ', [49].
122 (n 65). This case involved a challenge (on, *inter alia,* climate change grounds) to the consultation process around the expansion of Heathrow.
123 ibid [51].
124 ibid [53].

The more developed understanding of decision making in technologically complex areas makes the line drawn between judgment and fact in *Bushell* somewhat contentious.[125] Similarly, the suggestion that determining traffic need is far too 'esoteric' for non-experts to 'form a useful judgment as to [the] merits'[126] is not as straightforward 30-plus years later.

So the role of policy in consenting major infrastructure projects has then always been contentious, and at least some courts recognise the complexity of the issues. Whatever the formal legal position, and the space allowed for debate in formal fora, these broader issues could in any event be the subject of less formal debate, where the local and the national will not easily be separated.

Turning back to the Planning Act 2008, the consultation prior to the formal application for development consent is not at all constrained by law or policy. If publics convince developers (or their funders or shareholders) to withdraw, or to radically change the proposal, so be it. Applicants have to set out their response to public input in their Consultation Report, providing some degree of accountability.[127] This institutional provision for pre-application public participation *potentially* provides significant scope for the public to shape their locality.[128] The DCLG guidance does make reference to people 'owning' decisions that shape their lives, and shaping their communities.[129] Instrumental considerations dominate the guidance, however. DCLG suggests that the central concern of these provisions is to improve the application, allowing 'for shorter and more efficient examinations', resolving local 'misunderstandings', gathering information, considering mitigating measures and supporting 'wider strategic or local objectives'.[130] In any event, the level and type of engagement is likely to vary with context, including for example the (perceived) urgency of development, familiarity with the issues and the area, and identification of stakeholders.[131] Part of the context is formed by the subsequent consenting process. The applicant's understanding of the limited role, in final consenting decisions, of issues that might be raised by local communities (eg around noise or visual amenity, discussed below) is likely to shape its response to those issues.

125 *Bushell* (n 117). Lord Edmund-Davies defines policy as something that relies on 'the exercise of political judgment', as opposed to matters of fact and expertise, 115.

126 ibid 99.

127 (n 89).

128 Planning Inspectorate Advice Note 8.1: *How the process works* (2012) <http://infrastructure.planningportal.gov.uk/legislation-and-advice/advice-notes/> accessed 6 August 2012 also describes the re-application stage as the best time to influence a project.

129 DCLG guidance. <http://www.communities.gov.uk/documents/planningandbuilding/pdf/guidancepreapplication.pdf> accessed 6 August 2012, [8], [9], [29].

130 ibid [29].

131 Richard Bull, Judith Petts and James Evans, 'The Importance of Context for Effective Public Engagement: Learning from the Governance of Waste' (2010) 53 Journal of Environmental Planning and Management 991.

Various aspects of the legislation build public participation at the consenting stage around the 'local', including this pre-application consultation of 'people living in the vicinity of the land'[132] and the preparation of a local impact assessment.[133] And identifying the local may not always be straightforward, for example, in the inclusion of all relevant communities in the full chain of a CCS project, which includes capture, transport and storage.[134] DCLG approaches the 'vicinity' of a project 'from a broad perspective', addressing 'those who work in or otherwise use the area, as well as those who live there'.[135] Consultation involves 'judgement', and applicants will need to satisfy the Directorate 'that in making this judgement they have acted reasonably'.[136]

In principle, the advance consultation requirements apply to offshore developments. Turning to offshore development has been in part to sidestep 'local' concern (to avoid people), and any tendency in high-level policy discourse to downplay the role of publics in decision making is arguably exacerbated in offshore locations where the 'public' is not readily identifiable. Similar concerns will however sometimes arise as in onshore development.[137] When we look for a 'local' community, we might find communities that are not only socially but also geographically diverse.[138] And even if there really is no 'local' community for offshore development, this does not mean that there are no issues around public participation. Moreover, there are international legal obligations in respect of consultation, though these tend to focus on transboundary impacts and consultation with other affected States.[139]

Central to the importance of identifying the 'local' is the assumption that the national interest has already been dealt with in the NPS, and the deliberate exclusion of further disagreement about the wider national interest. An application for permission for a nationally significant infrastructure project will prima facie be decided in accordance with the NPS.[140] The decision makers 'may . . . disregard' certain material, including material that 'relate[s] to the merits of policy set out in a national policy statement'.[141] Regard must be had, in addition to the NPS, to any 'local impact report' submitted in respect of the application, and 'any other matters which the Secretary of State thinks are

132 s 47.
133 s 60. The 'local impact report' is relatively undefined (n 91), although see Planning Inspectorate Advice Note 1: *Local Impact Reports* (2012) < http://infrastructure.planningportal.gov.uk/legislation-and-advice/advice-notes/> accessed 6 August 2012. Local authorities are not under an obligation to consult on the local impact report, nor to pass on all contributions made to them.
134 DCLG guidance (n 129) on 'long linear schemes' [46].
135 ibid [50]; there is no expectation that the consultation will take place outside the vicinity [53].
136 ibid [53].
137 See the discussion in Woolley (n 75).
138 For example, around the Wash, with north Norfolk and south and east Lincolnshire.
139 For example, Espoo Convention (n 95) art 5.
140 Planning Act 2008, ss 104 and 105 as amended by s 49 Localism Act 2011.
141 ss 87(3)(b) and 106(1)(b); PI Advice Note 8.1 (n 128).

both important and relevant to its decision'.[142] And then the Secretary of State 'must' decide the application in accordance with the NPS, save in certain situations, first of all where to do so would breach legal obligations; and secondly, if he 'is satisfied that the adverse impact of the proposed development would outweigh its benefits'.[143]

In law then, there is some real flexibility around the role of the NPS: the decision maker 'may', but is not *required*, to disregard representations about the merits of the NPS; any relevant matter can be taken into account; and the 'adverse impact' proviso is in principle very open. In formal legal terms, we might argue that the decision remains open to be shaped by those consulted during the EIA and planning processes. But the philosophy of the Planning Act is to emphasise strategic policy making over discretion in respect of individual projects, to avoid a situation where policy questions 'are addressed from scratch in each individual application'.[144] This is plausible in many respects, but it is difficult to maintain, involving the identification of 'no go' areas, in the words of Carnwath LJ above. Furthermore, the policy itself emphasises the certainty provided by NPSs.[145] Decision makers are instructed in *EN-1* to assess applications 'on the basis that the government has demonstrated that there is a need for these types of infrastructure and that the scale and urgency of that need is as described'.[146] 'Substantial weight' should be given to the contribution that projects would make to meeting this need', albeit 'proportionate to the anticipated extent of the project's actual contribution' to satisfying that need. And *EN-1* suggests that it will not be easy to tip the balance on 'adverse impact', since it acknowledges that 'it will not be possible to develop the necessary amounts of such infrastructure without some significant residual adverse impacts'. [147]

The Planning Act 2008 allows for a decision contrary to the NPS, if to do otherwise would lead to a breach of the law. We might expect a fairly straightforward public contribution to a decision to take the form of an argument that a particular approach to a project would breach legal requirements. In fact, this might turn out to be rather difficult. Where legislation sets clear (generally numerical) ambient standards, as for certain aspects of air quality, breach of those standards would preclude planning permission.[148] That is surprisingly rare. So, for example, the Habitats Directive imposes stringent substantive (as opposed to procedural) obligations, the breach of which will lead to a refusal of consent.[149] But this is complicated: allowing a project that will 'adversely affect the integrity' of a protected site will breach the Directive,

142 And matters prescribed in respect of the particular type of development, s 104.
143 s104(7).
144 DCLG, *Planning for a Sustainable Future* (Cm 7120 2007), [1.17].
145 Eg DECC, *Planning our Electric Future* (n 31) [1.10–1.12].
146 *EN-1* (n 37) [3.1.3].
147 ibid [3.1.4], [3.2.3]
148 ibid [5.2.10].
149 ibid [5.3.17].

unless the project must go ahead for 'for imperative reasons of overriding public interest', *and* there are no alternative solutions, *and* the Member State takes appropriate 'compensatory measures'.[150] This is glossed in *EN-3* as follows: 'the designation of an area as Natura 2000 site does not necessarily restrict the construction or operation of offshore windfarms in or near that area'.[151] True, but rather dismissive of the very demanding legal requirements.[152]

The detailed consideration in the NPSs of how particular issues might feed into a final decision on a project tells us a great deal about the potential influence of publics who participate in decision making. 'Landscape and visual' issues are important public concerns about windfarms. But the NPSs tell us that they will not have much impact on the final decision.[153] For example, in National Parks, the Broads and Areas of Outstanding Natural Beauty, '[t]he conservation of the natural beauty of the landscape and countryside should be given substantial weight'; but consent can be granted 'in exceptional circumstances'.[154] The 'exceptional' nature of the circumstances does not read like a terribly demanding proviso, requiring that the development should be 'in the public interest' and that the decision maker should assess the need for the development (including 'in terms of national considerations, and the impact of consenting or not consenting it upon the local economy').[155] *Local* landscape designations are not in themselves a valid reason to refuse consent, 'as this may unduly restrict acceptable development'.[156] Nor should a consent be refused 'solely on the ground of an adverse effects on the seascape or visual amenity'.[157] The relative lack of responsiveness to visual (and noise)[158] impacts is confirmed by the Assessment of Sustainability of *EN-3*. It considers reasonable alternatives (as required by the SEA Directive), including a policy

150 art 6.

151 (n 60) [2.6.69]. Note that there is detailed consideration of a range of specific biodiversity impacts in *EN-1*.

152 For discussion of the hard cases in Natura 2000 sites, see Andrew LR Jackson, 'Renewable Energy vs. Biodiversity: Policy Conflicts and the Future of nature conservation' (2011) 21 Global Environmental Change 1195, who takes the view that certain large energy infrastructure projects would be unlawful under the Natura 2000 regime. Other biodiversity interests are also discussed in *EN-1*: for example, consent should 'normally' not be granted if it would have an adverse effect on a site of special scientific interest, whilst local or regional designations should receive 'due consideration', but 'should not be used in themselves to refuse development consent', *EN-1* (n 37) [5.3.11], [5.3.13].

153 Similarly for noise, on which the most intrusive response suggested is that 'In certain situations, and only when all other forms of noise mitigation have been exhausted, it may be appropriate for the IPC to consider requiring noise mitigation through improved sound insulation to dwellings', ibid [5.11.13].

154 ibid [5.9.10]

155 ibid [5.9.10], references omitted. 'Inappropriate development' is also prohibited in the greenbelt save in 'very special circumstances'; whilst renewable energy projects will be inappropriate development, the wider environmental benefits may constitute 'very special circumstances', DCLG, *National Planning Policy Framework* (n 44) [91].

156 *EN-1* (n 37) [5.9.14].

157 ibid [2.6.208]

158 (n 153).

that would be 'less tolerant of the adverse visual, noise and shadow flicker impacts of onshore windfarms', but dismisses them because fewer windfarms would be consented, with negative impacts on energy security and greenhouse gas emissions.[159]

Any public concerns that CCS might inappropriately enable continued investment in fossil fuels are also apparently pre-judged by *EN-1*.[160] *EN-1* refers to non-planning policies such as the EU emissions trading scheme, and concludes that 'CO_2 emissions are not reasons to prohibit the consenting of projects which use these technologies'.[161] Challenges to the role of CCS, whether it is properly understood or properly regulated, are also not welcome: 'the importance placed by the government on demonstrating CCS, and the potential deployment of this technology beyond the demonstration stage', should be taken into account in considering application for consent of CCS projects and associated infrastructure.[162]

The point that we are making here is not that the conclusions reached in the NPSs are necessarily wrong (that negative impact on seascapes should lead to the refusal of consent, for example). This is in any event not an attempt to address all of the issues that might be put before the National Infrastructure Directorate and the Secretary of State. But this discussion does indicate the limits on what might be contributed to a decision by public participation. Any participant wanting to influence a decision will need to shape their contribution carefully, and the opportunities to alter significantly any proposal seem very limited. Even identifying better alternative locations is likely to be of limited impact:

> where (as in the case of renewables) legislation imposes a specific quantitative target for particular technologies . . . [the Secretary of State] should not reject an application for development on one site simply because fewer adverse impacts would result from developing similar infrastructure on another suitable site, and [he] should have regard as appropriate to the possibility that all suitable sites for energy infrastructure of the type proposed may be needed for future proposals.[163]

159 Appraisal of Sustainability for the revised draft National Policy Statement for Renewable Energy Infrastructure (*EN-3*): Non-Technical Summary (2010), <http://www.decc.gov.uk/assets/decc/11/meeting-energy-demand/consents-planning/nps2011/1922-app-of-sustain-for-revised-draft-en3.pdf> accessed 6 August 2012 [1.7.3 (a)].

160 A concern apparent on the face of the CCS Directive (n 55): 'This technology should not serve as an incentive to increase the share of fossil fuel power plants. Its development should not lead to a reduction of efforts to support energy saving policies, renewable energies and other safe and sustainable low carbon technologies, both in research and financial terms', Recital 4.

161 *EN-1* (n 37) [5.2.2].

162 ibid [3.6.5]

163 ibid [4.4.3]. This explicitly applies even with respect to development in a protected area.

5. Conclusions

In this article, we have traced the legal and policy opportunities for public participation in decisions on whether or not to authorise nationally significant wind energy and CCS projects. We have focused here on NSIPs; smaller projects, decided by local planning authorities (or the Marine Management Organisation), may raise different issues, although the NPSs are also likely to be a material consideration in local planning.

Legal opportunities for public participation at this level can be found in both the Planning Act 2008 and EU legislation. The legal requirements are not especially demanding or ambitious, but at the minimum, consultation is required, and account is to be taken of the responses. We also examined the legal and policy framework within which those decisions on authorisation are taken. That framework is very tightly drawn around strategic policy decisions already taken in the NPSs, leaving decision makers on individual projects with relatively limited scope for manoeuvre. There is actually likely to be little that participating publics can contribute to the final decision: noise, aesthetics, protected sites, alternative sites, concern about the effectiveness and adequate regulation of new technologies, are all more or less out of bounds. This leads us to our first, and rather worrying, conclusion. There is a danger that we may find ourselves in the worst possible situation. Frustration on the part of publics with legally required participation processes results in less engagement by affected communities and increases the superficiality of those processes; policy makers are also frustrated and resort to tick box bureaucratic exercises rather than seeking genuine opportunities for the public to influence development. This risks becoming a self-perpetuating vicious circle.

This sense that there is a hollowness in participatory exercises at the consenting stage for major projects is reinforced by the very low expectations for public participation in the high level policy discourse on climate change, examined in Section 2 of this article. We might conclude from the discussion here that ideals of public engagement are less in favour than they once were. As suggested above, those ideals were always rather problematic in the reality of implementation; and the notion that ubiquitous public participation would straightforwardly make the world a better place was always perhaps a little naïve and unreflective. To some extent then, if we see a retreat, that is only to be expected. The concern is if the retreat also suffers from a degree of naivety and lack of reflection. Because if the intention really is to abandon 'publics', that is a difficult and complicated exercise. In any event, the legal obligations of participation around wind farms and CCS projects mean that public participation can neither be avoided nor ignored. These legal obligations can be dealt with in a minimalist way, but lip service without influence is likely to store up problems.

Institutional solutions to the problems we have identified are not straightforward. Urging 'more' public participation in respect of major infrastructure projects is not only politically unrealistic, but ignores the real dilemmas associated with participation on major infrastructure that has been identified as necessary through potentially robust parliamentary processes. Genuinely devolved decision making, where local people make final decisions about development in their own area is relatively rare, and not something we endorse across the board for nationally significant wind or CCS projects. Greater deliberative engagement is an important possibility, but whilst deliberative forms of involvement are typically deep, and highly valued by those involved, they are also narrow in the sense that few are able to take part. In that respect, they would not on their own meet legislative demands for public participation. Consultation is the default option, with positive potential, but often leads to frustration, and an associated reluctance to take part, precisely because of a suspicion (in this case not unreasonable) that the views expressed will have no influence. Representative decision making is another alternative, and is the traditional solution (alongside more participatory mechanisms) in planning, where many decisions are made by locally elected councillors. To some extent, this is what was at stake when the final decision on NSIPs was shifted from the IPC to the Secretary of State, since the government of which the decision maker is a member was popularly elected. The legitimacy of representative decision making in this respect cannot be taken for granted.[164] And the legitimacy of the decision-making process and associated institutions is one of the keys to people feeling that their concerns and doubts have been taken seriously, making the detail of participatory processes very important.

For nationally significant wind and CCS projects, consultation is likely to be a necessary part of the solution. But it is important that the key policy makers engage more fully with the role of the public in consultation, rather than just fulfilling the minimum statutory requirements. Precisely what is open to consultation needs to be very clear, if cynicism towards publics is not to breed cynicism within publics. Participation should not be promoted as a ' "bottom-up" process of decision making . . . if the most fundamental decision has already been made'.[165] It may be that the approach discussed in the previous section is overly prescriptive and more could be left open than is currently the case. It should in any event at least be made clear to those invited to participate in decision making that only the 'how' is open to debate, not the 'whether', along with an explanation of why that is the case. The legitimacy of decisions in this 'how-not-whether' framework demands credibility in climate change efforts more generally, if the local area is not to be perceived as simply a symbolic sacrifice. This question of credibility raises further challenging

164 (nn 82–83).
165 Few and others (n 5) 56.

questions of trust in decision makers—both national and local—associated ultimately with democratic engagement at both these levels. Equally, addressing the uneven distribution of the costs and benefits associated with major infrastructure projects will need much more careful thought. But what is clear is that a backlash against public participation is no more straightforward than was the initial enthusiasm. Policy makers cannot afford to neglect this issue.