With ever-increasing pressure to produce low carbon energy, the offshore renewables industry is growing at a rapid rate. However, with the currently lengthy process from pre-application to obtaining development consent in England, it can take a number of years from securing a Crown Estate lease to obtaining development consent. During this time, the offshore renewables industry is capable of making significant improvements to technology, producing more efficient and larger models. In order to accommodate for emerging new technology within pre-existing offshore renewable development consent applications, a planning approach conceived by case law – the Rochdale envelope approach – has been transplanted into the planning process for offshore renewables allowing developers to describe their project using general parameters that cater for uncertainties at the time of application. However, with little official guidance, developers have been left to advance the approach in such a way that suits their needs. This article will outline the problems of the current application of the Rochdale envelope approach, and will argue that, if left unchanged, these problems will significantly impede the applications of future developers wishing to construct. The article proposes recommendations to guarantee further development of the offshore renewables industry with fewer regulatory impediments.

Keywords: Rochdale Envelope; Offshore Wind Energy; EIA; Climate Change

Introduction

Over the past couple of decades, the renewable energy industry has experienced seismic growth and development, spurred on and incentivised by policymakers who are bound by international and European agreements all baying for a reduction in carbon emissions.\(^1\) As financial resources fuel the renewables industry, technological understanding has improved, allowing for more efficient energy generation. This rapid growth in technology is particularly stark in the case of offshore wind energy which has seen turbines more than double in size over a period of the past nine years.\(^2\) Unfortunately, as offshore wind developments grow larger, the planning

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and environmental impact assessment (EIA) documents grow longer. Consequently, it can take a number of years for a developer of a large-scale offshore wind farm in England to work through the data gathering and pre-application stages, through to obtaining development consent. During the time it takes for a developer to obtain this permission, the technology in the industry has continued marching on to create more efficient models – models that will be out of the developer’s reach unless they have included them in their original application for permission. In order to accommodate for emerging new technologies within pre-existing offshore wind development plans, a planning approach conceived by case law - the Rochdale envelope approach – has been transplanted into the planning process for offshore renewables allowing developers to describe their project using general parameters that cater for uncertainties at the time of application. The Rochdale envelope approach has been accepted by the English courts as meeting the EIA standards required by the European Union, however, in the twenty-five years after its conception, it has been left to develop under little guidance or scrutiny. Only diminutive guidance has been offered by the then Infrastructure Planning Commission (now Planning Inspectorate) in the UK, leaving developers free to advance the approach to suit their needs. This problem has been noticed within legal scholarship, with commentators suggesting that the application of this approach requires further attention and investigation. This article will focus on analysing the problems of the current application of the approach in the offshore renewables industry. The article will advocate that if left unchanged, these problems will continue to grow to a point where future proposed offshore renewables may not be able to obtain consent due to inaccurate predictions made by developers.

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3 To illustrate the size of these documents, the East Anglia ONE offshore wind farm’s environmental statement consisted of 32 chapters which were distributed over 6 volumes of information. These chapters can be individually viewed at the following website: ‘East Anglia ONE Offshore Windfarm’ (The Planning Inspectorate) <https://infrastructure.planninginspectorate.gov.uk/projects/eastern/east-anglia-one-offshore-windfarm/?ipsection=docs&stage=app&filter1=Environmental+Statement> accessed 29 March 2018.

4 For example, in the case of East Anglia ONE offshore wind farm it took five years from obtaining the site lease from the Crown Estate for the developers to prepare and submit their application, and ultimately obtain consent to develop.


who have come before them. To combat this, recommendations have been made to ensure that the growing problems associated with the use of the Rochdale envelope approach are not carried forward as the industry develops further.

This article will first introduce case law that conceived the Rochdale envelope approach, and illustrate how this approach has developed from the early millennium to the present day. This will then be followed by an analysis of the problems caused by the current use of the approach. These problems are threefold, namely that sparse official guidance has been provided meaning that developers remain uncertain as to where the boundaries of an appropriate Rochdale envelope lie. This then results in the problem of developers submitting wide and unrealistic envelopes which hinder the ability of stakeholders and the consenting authority to comment on the impact that the development will have on sensitive species. Finally, the problem of unrealistic applications putting unnecessary time and financial pressure on stakeholder engagement will be outlined. The article will conclude by making recommendations to ensure that these problems are avoided going forward, ultimately recommending that a report should be commissioned by the Planning Inspectorate to determine what an ‘appropriate use’ of the Rochdale envelope approach is regarded to be in the offshore renewables industry. The results of this report should then inform the following two recommendations from this research that the guidance provided to developers is improved upon, and that the criteria for accepting applications into the consenting process contain provisions on the envelopes that have been used by the developer to ensure that inappropriate uses of the envelope are not accepted into the process.

This article utilises the results of empirical data collection whereby stakeholders were asked about their views on the use of the Rochdale envelope approach in offshore renewable developments. The majority of respondents concluded that the current use of the approach is causing problems for future developments. The stakeholders’ views and concerns are relevant in determining the current problems in the use of the Rochdale envelope approach and drafting recommendations to solve them, therefore, there is a need to cross-reference between this research paper and the empirical data previously collected.

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7 Between 2014 and 2016, empirical data was collected in the form of semi-structured interviews conducted with stakeholders involved in the consultation process for three offshore renewable energy developments: the MeyGen Ltd tidal array in the Pentland Firth in Scotland, the East Anglia ONE wind farm development off of the Suffolk Coast in England, and the North-West Lewis wave development off of the North-West coast in Lewis in Scotland. The sample of respondents was obtained using purposive sampling, and a total of twenty-one interviews were conducted with an 87.5% response rate. The categories of respondents included: the planning authority, developer, and interested parties (both statutory and non-statutory). A number of questions were asked relating to the integration of habitat protection into the planning processes for offshore renewable energy, including the following question: ‘was the use of the Rochdale envelope approach appropriate for this development to ensure appropriate environmental protection? If so, why?’ Eleven respondents in total answered this question, however this included two developers who have been omitted from this discussion, as the content of their responses allows for their identification. As agreed during the research project, the identities of all respondents have been protected using a coding system.

8 The full responses referred to in this article can be viewed on the following website: <https://rochdaleenvelopedata.wordpress.com/2018/01/31/interview-data-can-be-viewed-here/> accessed 29 March 2018.
The Making of the Rochdale Envelope Approach

The planning design mechanism known as the Rochdale envelope approach (also known as the ‘project envelope’ and ‘engineering envelope’) was conceived after consecutive judgments were delivered by Justice Sullivan in the Queen’s Bench Division of the High Court relating to planning permission for the Kingsway Business Park in Rochdale. Over twenty-five years after the battle for Kingsway took place in the courts, the business park is thriving with 58.4 hectares of plots currently occupied by a range of businesses, and a remaining 56.6 hectares out for tender. In addition to this significant development in the North West of England, the past twenty-five years has also witnessed the development of the Rochdale envelope approach in planning law. Whilst this intangible progression has faced significantly less public scrutiny, it has quietly developed into a significant method for developers to cater for much-needed flexibility in their applications. Following the introduction of Nationally Significant Infrastructure Projects (NSIPs) in 2008, the Rochdale envelope approach has slotted itself into the application processes of some of the largest developments being proposed in England. However, despite the important information that the Rochdale envelope applies to, limited guidance has been provided by the Planning Inspectorate.

The development of the eponymous mechanism began with the judicial review hearing of R v Rochdale Metropolitan Borough Council ex parte Tew and Others (Rochdale no 1) which challenged the decision of Rochdale Metropolitan Borough Council to grant outline planning permissions for the Kingsway Business Park, and for a spine road to service the business park. The case was brought before Justice Sullivan under five grounds; the second of which is most significant to analysing the development of the Rochdale envelope approach as it argued that the information provided by the developer to describe the development failed to meet the requirements of the Town and Country Planning (Assessment of Environmental Effects) Regulations (hereafter referred to as the TCP (EIA) Regulations). This ground was raised because the developer’s application for outline planning permission did not contain any information relating to the design, size or scale of the proposed development. Whilst addressing this ground, the purpose of environmental impact assessment was discussed in detail by Justice Sullivan, who used a summary from Lord Hoffman stating that ‘the purpose of the directive… is to ensure that planning decisions which may affect the environment are made on the basis of full information.’ During his efforts to define the purpose of EIA, Justice Sullivan re-affirmed that the process was not simply to ensure that a description of the development was available

9 R v Rochdale Metropolitan Borough Council ex parte Tew and Others (Rochdale no 1) [1999] 3 PLR 74; R v Rochdale Metropolitan Borough Council ex parte Milne (Rochdale no 2) [2001] Env LR 22.
11 Nationally Significant Infrastructure Projects were developed by the Planning Act 2008 to create a regulatory framework for large scale developments falling within five broad categories of energy, transport, water, waste water and waste. The overarching provisions relating to their governance can be found in Part 3 of the Act.
12 See Rochdale no 1 above n. 9.
to the consenting body, \(^\text{15}\) but also to ensure that this information was available during the public input stage of the process. \(^\text{16}\) After explaining the purpose and basic requirements of the TCP (EIA) Regulations, Justice Sullivan considered the problems that these regulations pose for urban development projects, such as business park developments. The particulars of these types of development remain uncertain for long periods of time, as it is not known from the outset which companies will lease the land, and what they will request to build upon it when they do. With this problem in mind, Justice Sullivan explained that, ‘thus applications for such projects have been placed in a legal straightjacket’ \(^\text{17}\) whereby they are obliged to describe a development that will still be evolving in ten years’ time. However, whilst sympathetic to the ‘legal straightjacket’ constraining the developer, Justice Sullivan allowed the second ground of the claimants’ case to succeed because the developer failed to provide the definitions needed to determine whether there would be a likely significant adverse effect on the environment. Whilst outline planning permission was sought in this case, this did not entitle the developer or decision maker to defer the description of likely significant effects and mitigation measures to a later stage in the process, as to do so ‘would not be in accordance with the terms of schedule three, would conflict with the public’s right to make an input into the environmental information and would, therefore, conflict with the underlying purpose of the directive.’ \(^\text{18}\) As a result of this, both of the outline planning permissions were quashed.

Just over a year after the judgment of Rochdale no 1, a second judicial review proceeding of \textit{R v Rochdale Metropolitan Borough Council ex parte Milne} (Rochdale no 2) \(^\text{19}\) was heard in the High Court before Justice Sullivan, in what he termed to be, ‘round two of the battle for Kingsway Park’. \(^\text{20}\) This case concerned a revised application from the developer that had received planning permission. The claimant argued that the developer’s actions had once again not met the requirements of the EIA Directives, \(^\text{21}\) and subsequently the TCP (EIA) Regulations, because whilst they had provided information on the size and scale of the development, they had not provided details of the design. Mr Howell QC, representing the claimant, argued that in order to satisfy the requirements of the EIA Directive, all of the details of the project had to be described at the outset, and that ‘one should not be influenced by the “commercial imperative” for there to be a measure of flexibility in applications for industrial estate developments.’ \(^\text{22}\) This argument was rejected by Justice Sullivan who revisited the concept of developing projects which are not fixed at the outset: ‘if a particular kind of project... is expected to evolve over a number of years depending on market demand, there is no reason why “a description of the project” for the purposes of the directive should not recognise that

\(^{15}\) This judgment was delivered around the time of Berkeley v Secretary of State for the Environment, Transport and the Regions [2001] Env LR 16 which signified a turning point for EIA case law where Lord Hoffman confirmed that ‘the Directive requires not merely that the planning authority should have the necessary information, but that it should have been obtained by means of a particular procedure, namely that of an EIA’ at [316].

\(^{16}\) See Rochdale no 1 above n. 9 at 20-23.

\(^{17}\) Ibid. at 28.

\(^{18}\) Ibid. at 29.

\(^{19}\) See Rochdale no 2 above n. 9.

\(^{20}\) Ibid. at 410.


\(^{22}\) See Rochdale no 2 above n. 9 at 423.
reality’. He stressed that the ultimate purpose of EIA is to ensure that the implications of the development on the environment are taken into account at the outset. Returning to his previous analogy of the legal straightjacket that had been forced on developments of this kind, he concluded that, ‘the directive did not envisage that the “straightjacket” would be drawn so tightly as to suffocate such projects.’ Ultimately, Justice Sullivan was satisfied that the revised information submitted by the developer was sufficient to enable an assessment of the likely environmental impacts of the development. This information was clearly distinguished from ‘full’ design information in his judgment with an example that whilst design details such as building colours may be left to the reserved matters stage, and the decisions made may be visually intrusive, they will not change the determination of whether the development had a likely significant effect on the environment. Consequently, Justice Sullivan declared ‘the respondents the victors in round two’ and dismissed the application for judicial review.

Rochdale no 2 was appealed by the claimants in the Court of Appeal, where Lord Justice Pill and Lord Justice Chadwick refused the appeal, re-affirming the boundaries drawn in Rochdale no 2. Whilst the purpose of the Directive was outlined again with reference to a case not previously discussed, no new interpretations were made in the appeal case. However, Lord Justice Pill concisely summarised the role of the courts when determining whether adequate descriptions of developments have been provided to comply with the purpose of EIA:

> There is no blueprint which requires a particular amount of information to be supplied. What is necessary depends on the nature of the project and whether, given the wording of Article 2 of the Directive, enough information is supplied to enable the decision-making body to assess the effect of a particular project upon the environment. I agree with Sullivan J that the court cannot place itself in the position of reconsidering the detailed factual matters considered by the local planning authority. Equally, I accept that the court does have a role and there may be cases where the court can and should intervene and hold that no reasonable local authority could have been satisfied with the amount of information with which it was supplied in the circumstances of the particular case.

From the parameters set in the Rochdale cases, the Rochdale envelope has subsequently emerged, and has been described by the Infrastructure Planning Commission (IPC) as ‘an acknowledged way of dealing with an application comprising EIA development where details of a project have not been resolved at the time when the application is submitted.’ In its current form, the approach flexibly allows developers to describe their proposed development by using parameters for aspects that are not certain at the time of application. One commonly used method of outlining development parameters is to use maximum and minimum descriptions – so for example for a wind turbine, a maximum and minimum blade tip height:

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23 Ibid. at 430.
24 Ibid.
25 Ibid. at 438.
26 Ibid. at 440.
27 R v Rochdale Metropolitan Borough Council (Rochdale no 3) [2002] WL 31441253.
29 See Rochdale no 3 above n. 27 at [33].
30 See ‘Using the ‘Rochdale Envelope’ above n. 5 at 14.
may fall within the Rochdale envelope for that development. This effectively caters for the assessment of the best and worst-case development scenarios in terms of environmental impact assessment.

Whilst the Rochdale envelope approach is now regularly used in conjunction with EIA in planning applications in England through methods of providing maximum and minimum descriptions as outlined above, the approach and methods for implementing it have largely been left to developers to interpret and test with their applications. In national guidance, the approach was first alluded to in the UK’s Overarching National Policy Statement for Energy, although not expressly named. It then received an express mention in EN-3, the National Policy Statement for Renewable Energy Infrastructure, however no effort was made in this policy document to flesh out or define the parameters of the approach. The most comprehensive guidance that has been provided by the IPC to date is Advice Note 9 which was published in 2011 after requests for clarification had been received by developers, particularly those developing offshore wind farms. The guidance is aimed at developers of NSIPs who are looking to incorporate the approach into their applications for Development Consent Order (DCO) under the Planning Act 2008. Wright argues that whilst this guidance provides a confirmation for developers of their option to use the approach, it does little more than describe the Rochdale envelope as set out by case law. This is perhaps an overly critical outlook on the guidance, as it does provide suggestions of using maximum and minimum descriptions to define the parameters of development, and illustrates this suggestion with practical examples from the offshore wind energy industry. However, aside from this limited advice aimed at developers applying for DCOs, the boundaries of the Rochdale envelope approach are largely left to the interpretation of developers, and are enforced by the planning authority who has the authority to request further information from a developer, or ultimately refuse the application. On the one hand, this wide-range afforded to developers allows for flexibility and technological development, but on the other, it causes difficulty for stakeholders in the consultation process as outlined further below.

Using the Rochdale Envelope Approach in Offshore Wind Farm Applications

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31 Ibid. at 13.
35 See Using the ‘Rochdale Envelope’ above n. 5 at 13.
36 For NSIP offshore wind farm developments, further information can be requested by the Secretary of State under s 20 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017, No. 572) and the DCO can be refused under s 114(1)(b) Planning Act 2008.
The Rochdale judgments were made at a time when England had no operational offshore wind farms. As outlined above, the judgment related to the development of a business park; an urban development which required flexibility as the development plans progressed. However today, perhaps one of the most appropriate uses of the Rochdale envelope approach lies with offshore renewable energy. Due to ever-increasing demand to cut carbon emissions, the Crown Estate has responded by leasing vast areas of England’s seabed to potential offshore wind farm developers. The third leasing round contained two of the largest seabed areas that England has so far tended to developers for the Dogger Bank and East Anglia offshore wind farms. If you gaze a short way into the distance of this industry, you will also find plans for floating offshore wind farms. The boom in this area of energy production shows no sign of slowing. However, in-fitting with many areas of technological advancement, the technology develops quicker than paperwork is able to keep up. This is the case for offshore wind farms – undertaking data gathering through to compiling an application, and working through the development consent process can take a number of years, after which time the technology for wind farms has enhanced to provide more efficient energy production. Therefore developers submitting a proposal for a set number of wind turbines may find that a few years after they have undergone the pre-application and application processes, technological advancements then mean that they could build a wind farm with fewer turbines that are capable of matching the same power output. This technological advancement is one of the reasons why the use of the Rochdale envelope approach has been advocated as a necessary mechanism by a number of commentators.

Wind turbine sizes are currently undergoing rapid growth and have more than doubled in size from 2007 to 2016, with predictions suggesting that this growth is set to continue with suggestions that the world’s largest wind turbine may double in size again before 2024. As the turbines continue to grow, and the Crown Estate continues to lease new areas of seabed of varying depths, the methods with which turbines are fixed to the seabed will also need to

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39 Current projections claim that the Dogger Bank wind farm will produce up to 4,800 MW and the East Anglia wind farm development will produce up to 3,614 MW. By way of comparison, Drax power station in North Yorkshire produces a power output of 4,000 MW and supplies around 7% of the UK’s electricity needs.
41 Technological advancement has been focussed on in this article as it is so prevalent in the wind industry, however it is not the only reason why a developer may wish to use the Rochdale envelope approach in an application. Flexibility is often sought at the application stage to cater for the fact that financing and procurement stages are dealt with after consent has been obtained.
42 Wright above n. 8; Voormolen, Junginger, van Sark above n. 8; Wright et al. above n 8.
43 ‘World’s largest wind turbines may double in size before 2024’ above n. 4.
44 Until the 1st April 2017, the Crown Estate was responsible for site leasing in UK waters, however following recommendations from the Smith Commission Report, the responsibility
develop. Current fixings include gravity foundations, monopile foundations, tripod and jacket foundations. Deciding on which turbine size and foundation method to use some four to eight years ahead of the deployment date is a near-impossible task for developers. Thus, explaining why all of the applications for offshore wind farm developments in English waters from round three of the Crown Estate’s offshore wind leasing round made use of the Rochdale envelope approach to describe the parameters of construction methods that were yet to be decided upon.\textsuperscript{45}

For example, in examining the non-technical summary for the East Anglia ONE offshore wind farm,\textsuperscript{46} one does not need to be an expert in wind farm development to see that the description parameters are fairly wide. With three different potential foundation types, three different potential sizes of turbine, and potential variations in the numbers of offshore collector stations, and offshore convertor stations, it would appear that only a few concrete decisions have been made with regards to the offshore infrastructure in terms of capacity and quantity. Whilst the above factors are interrelated, many combinations of development remain within the criteria. However, when considered in conjunction with the timeline for this development, the description of the parameters for this wind farm seems entirely reasonable.\textsuperscript{47} In this case, the developer was awarded rights to develop on the seabed in 2009, and the application for consent containing the above information was submitted in 2012. In 2014 the development was consented, the developer then received their contract for difference\textsuperscript{48} in 2015, and pre-construction works began in 2017. The story of this development has thus far taken eight years to unfold.

\textsuperscript{45} The round three developments in English waters that used the Rochdale envelope approach are: East Anglia, Dogger Bank, Hornsea, Rampion, and Navitus Bay. The proposed Atlantic Array was dropped by the developer in 2013, therefore the application documentation cannot be accessed.


\textsuperscript{48} The Contract for Difference (CfD) process provides the financial security for developers who bid for financial backing from the Low Carbon Contract Company (LCCC). In order to apply for CfD, developers need to satisfy set criteria, which include securing the appropriate planning permission and/or development consents as outlined above. The Contract for Difference application process does not have a flexible deadline to allow developers to make a CfD application after they have taken their time to finish their environmental assessments – one deadline is set for all developers to meet. This often means that developers feel forced to undertake their environmental assessments in a time-pressured manner in order to allow them to apply for CfD. After all, without obtaining the financial backing for the development, the ability of the developer to be able to continue with the development is significantly reduced.
The issue of delay in development consent has long been a problem in many industries, however it is important to note that the consenting process for nationally significant infrastructure projects was overhauled by the Planning Act 2008 to coordinate multiple consents and provide a set timeframe for development consents. The examination and decision-making stage of the process is now restricted to a twelve month period, however as shown by the East Anglia ONE wind farm application, the pre-application stage can add many more years on to the time taken before consent is awarded. Research by Marshall and Cowell into the timeframes has shown that the pre-application stage of development can range from 9 to 44 months, with a mean of 20.6 months – much longer than it previously took under the Electricity Act 1989 consent because many of these issues would have been considered post-consent. From this research, Marshall and Cowell conclude that the 2008 changes to the process have not reduced the overall time taken for a developer to obtain consent, but have instead shifted the time taken from the examination and decision making stages to the pre-application stage.

Whilst the East Anglia ONE offshore wind farm has been used here to provide an example of the practical application of the Rochdale envelope approach, it has not been used to negatively reflect upon the developer or their application. On the contrary, this case study provides an example of an appropriate use of the Rochdale envelope approach which was endorsed by the stakeholders who engaged with the developer’s application, as well as by the Secretary of State for Energy and Climate Change who ultimately consented to the development subject to conditions. No negative responses were received from the statutory and non-statutory stakeholders who were interviewed when asked, ‘was appropriate mitigation offered by the developer in their application?’ However, despite the fact that the developer has used the Rochdale envelope approach with care and consideration in this instance, this case study can still exemplify the problems that ultimately arise out of using this practice.

The emerging problems of the current use of the Rochdale envelope approach in the offshore renewable energy industry and recommendations for change

From observations of the increased, and largely unguided application of the Rochdale envelope approach in the offshore renewable energy industry, three problems can be identified. These include the overriding concern that the unregulated use of the approach has led to developers implementing a ‘not environmentally worse than’ approach to their applications. This approach arises when a developer uses a Rochdale envelope for various elements of their development, and all of the worse case scenarios from each envelope are added together to make an overall ‘not environmentally worse than’ figure/scenario to be assessed. The use of this approach then results in two additional problems. Firstly that cumulative and in-combination impact assessment will become less reliable as a result, potentially leading to future development failing to obtain consent due to these calculations. Secondly, the use of the ‘not environmentally worse than’ approach can lead to time and financial concerns for stakeholders.

50 Under s 114 of the Planning Act 2008, Development Consent Orders (DCOs) are used to grant permission for NSIPs. Section 120 of the Act outlines what may be included in a DCO, including requirements and conditions under subsections 1 and 2. The DCO and associated conditions for the East Anglia ONE wind farm can be viewed in the East Anglia ONE Offshore Wind Farm Order 2014 (SI 2014, No. 1599).
51 A total of seven respondents were asked this question. Around three quarters answered yes to the question, and the remainder said that it was too early to say at the time of interview.
who intend to consult on the environmental statement. These concerns are detailed below, followed by three recommendations that can help to alleviate these problems. The first recommends that a report is commissioned by the Planning Inspectorate to determine what an ‘appropriate use’ of the Rochdale envelope approach is regarded to be in the offshore renewables industry. The results of this report should then inform the following two recommendations from this research which advocate providing additional guidance to developers on the parameters of the use of the approach, and adding a quality check to the PINS acceptance process whereby inappropriate uses of the Rochdale envelope approach will not be accepted into the process until they have been rectified.

Perhaps the most troublesome of problems of the current use of the Rochdale envelope approach is the fact that its parameters are poorly defined and left to developers to use at their discretion. Aside from the brief guidance provided to offshore wind farm developers in Advice Note Nine as outlined above, very little guidance or analysis of this planning technique can be found from official sources or otherwise. This concern has been raised by Lonsdale et al. who argue that whilst the amended EIA Directive requires that the environmental statement is prepared by competent experts, the lack of official guidance on the Rochdale envelope approach could still result in problems of unrealistic applications which follow a ‘not environmentally worse then’ approach. As guidance is currently limited, developers must interpret as they see appropriate, and learn from other development applications that have received consent with the IEMA EIA Quality Mark. If a developer then misinterprets the guidance, it is left to the process of stakeholder scrutiny and the consenting body who are tasked with reviewing the application to flag up whether the developer’s use of the Rochdale envelope approach is inappropriate. The decision-making process can then be challenged using judicial review on the basis outlined by Lord Justice Pill above. When considering the elements of the PINS process holistically, the stakeholder scrutiny and consenting elements of the process ensure that environmental statements are reviewed by multiple parties, meaning that errors in the application of the Rochdale envelope approach are likely to be spotted before consent is awarded. However, as stakeholders are provided with their main opportunity to consult on the various combinations resulting from a developer’s use of the Rochdale envelope approach during the ‘examination phase’ of the PINS process (stage four out of six), any exaggerated use of the approach by a developer has the potential to result in significant costs for

52 See Lonsdale et al. above n. 6 at 134.
53 In their article, Bond, Fischer and Fothergill have analysed the efficacy of the IEMA EIA Quality Mark which aims to ensure the continuous improvement of EIA by certifying the quality of the environmental statements received, and ensuring that they adhere to better standards than the statutory minimum. Whilst analysing whether the quality of environmental statements are improving as a result of the scheme is a difficult thing to assess due to the multitude of subjective factors present relating to quality, their article concludes that the IEMA EIA Quality Mark is helping to improve the quality of EIAs undertaken in the UK. However, the continuation of this scheme is heavily dependent upon organisations continuing to fund the scheme. The citation for this article is as follows: A. Bond, T.B. Fischer, J. Fothergill, ‘Progressing quality control in environmental impact assessment beyond legislative compliance: An evaluation of the IEMA EIA Quality Mark certification scheme’ (2017) 63 EIA Review 160.
54 See below n. 61 for an outline of the full PINS timeframe. However, whilst the examination is the main opportunity for stakeholders to comment on the final Rochdale envelope that has been put forward by the developer in their application, the pre-application phase of the process also allows for dialogue between the developer and stakeholders.
all of the parties involved. This includes the developer who may have to alter or provide additional information in a short period of time within the examination phase, and also stakeholders who are required to assess multiple worst-case scenarios from the use of the Rochdale envelope, combined with their cumulative impacts. This can be costly to stakeholders both in terms of time and resources. It is not in the interests of any party in the process to allow a developer to submit an application with a description of their development that does not comply with the purpose of EIA. This is particularly poigniant with respect to renewable energy whereby additional national commitments to international and European agreements on carbon reduction are at play. It seems contradictory to the commitments made by the UK towards the Paris Agreement, as well as the European Union’s 20-20-20 targets, if the Planning Inspectorate in England fails to provide potential developers for large renewables with the detailed guidance that they need to ensure that their carbon neutral technology can be installed without causing significant environmental damage.

Tied to the above-mentioned problem of developers erring on the side of caution and creating a wide and unrealistic envelope for their development is the subsequent problems that this causes for the assessment of cumulative and in-combination impacts. If eight developers are granted a licence to develop in an area of water, and they all use a wide Rochdale envelope with excessive predictions of the worst-case scenario of the impact of their developments, this will provide an incredibly unrealistic outlook of the environmental impact that these combined developments will cause on the environment. EIA, coupled with Appropriate Assessment, requires developers to consider the cumulative impact that their development will have on sensitive species and habitats. It will be the case that certain species can only tolerate a certain level of development. The worst-case estimation approach could ultimately result in later planning applications being refused as certain species will have already hit their toleration limit based on the worst-case projections that have been submitted by developers. In reality, these figures do not always provide a true representation of what will be built, but can nevertheless

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55 Cumulative impacts are the multiple impacts on a species or habitat from a proposed development, combined with the surrounding developments which are operational. In-combination impacts are the multiple impacts on a species or habitat from a proposed development, combined with other planned developments and projects which are not yet operational.

56 Under article 6(3) Council Directive 92/43/EEC (OJ L206/7 22.7.93) on the conservation of natural habitats and of wild fauna and flora (‘the Habitats Directive’) Member States are required to ensure that an Appropriate Assessment is undertaken for ‘any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects’. The assessment should predict and highlight the implications that the development will have on the protected areas, and highlight appropriate mitigation for the impacts. If it is found that the development: (1) will have a negative impact on the site (2) and there is no alternative solutions, and (3) the development must be carried out for imperative reasons of overriding public interest, the ‘Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected.’ If such a development falls within the first and second criteria, but does not need to be undertaken for imperative reasons of overriding public interest, the application must be refused.

57 An example of such sensitive species that was raised in the empirical research was the harbour porpoise. The following article provides a useful assessment of the difficulties associated with protecting the harbour porpoise: E. Pinn, ‘Protected areas for harbour porpoise, but at what cost to their conservation?’ (2016) 18(2) Env L Rev 97.
bar following developers from being able to develop in an area as the toleration limits have been met by a combination of worst-case projections. A closer examination of the Navitus Bay and Rampion applications show that where previous developments have been built out in a less damaging way, cumulative and in-combination impacts have been assessed using the built figures, rather than the worst-case figures provided for in the applications. However, large developments which are currently applying for consent will have their worst-case scenarios judged against the worst-case scenarios of the surrounding developments which are also aiming to obtain consent.

This ultimately leads to a ‘race to the water’ phenomenon which is currently unfolding in round three offshore wind developments as developers aim to be amongst the first to submit their applications to ensure that the environment still holds ‘capacity’ for their impacts. This problem has been raised by stakeholders who have referred to the race to the water phenomenon, as well as others suggesting that the first developments to the water are not always the best in terms of their environmental impact, however they are blocking developments with fewer impacts from applying due to capacity issues. Wright also raises this issue for the Rochdale envelope approach and refers to the case study of Centrica’s Docking Shoal offshore wind farm which failed to obtain consent to develop in the North Sea, as two projects which were already under development in the area had used worst-case scenario modelling to show that the combined impacts of the developments would have a significant impact upon the Sandwich Tern population. Whilst this development application was made before the introduction of the

In both the Rampion and Navitus Bay applications, the cumulative and in-combination impacts of previously constructed developments were considered based on the figures that had been built. Amongst other impacts, the impact on the Greater Black-Backed Gulls was considered in the Rampion application, with the conclusion that the cumulative impact of the Rampion application combined with surrounding wind farms had the potential to have a significant impact on the species, however the assessment concluded that the additional mortality would not affect the population in the long term. The Secretary of State’s assessment of this can be found at section 25 of the decision letter at ‘Rampion Offshore Wind Farm Decision Letter’ (Department of Energy & Climate Change) <https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010032/EN010032-001699-Rampion%20Decision%20and%20Statement%20of%20Reasons.pdf> accessed 29 March 2018. In the Navitus Bay application, the mortality from earlier projects was recalculated with a higher avoidance rate. The Navitus Bay application was ultimately rejected due to the significant adverse effect that the development would have, and the subsequent interference with a designated World Heritage Site. This decision was regarded by the media to be a controversial political decision, however the process of assessing the cumulative environmental impacts was not a source of contention. A discussion of the mortality rates used in the Navitus Bay application can be reviewed in the ‘Examining Authority’s Report of Findings and Conclusions’ (The Planning Inspectorate) <https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010024/EN010024-000043-Examining%20Authority%20Recommendation%20Report%20-%20%20Main%20Report.pdf> accessed 29 March 2018.

See Wright above n. 6 at 14-15.
PINS process, it provided the industry with a warning that cumulative impacts from sensitive species can result in the rejection of applications.\footnote{The original application for the Centrica Docking Shoal wind farm was submitted on the 9\textsuperscript{th} December 2008 under s 36 Electricity Act 1989, with an amended application made on the 19\textsuperscript{th} August 2011. The amended application reduced the number of turbines requested to an initial phase of 100MW in order to reduce the predicted impacts of the development on the Sandwich Tern. The concern for the Secretary of State when deciding to refuse Docking Shoal, was the impact that the development would have when combined with two other developments at Race Bank and Dudgeon. It was agreed that the overall acceptable mortality rate of the Sandwich Tern that could be tolerated by the combined developments was 94 birds. This then provided two options for the Secretary of State: to consent to the Race Bank and Dudgeon developments with no phased restrictions, or to consent to Race Bank, Dudgeon, and Docking Shoal with phased building consents. The Secretary of State ultimately arrived at the conclusion at 6.2 of the consent letter that ‘refusal of consent for Docking Shoal (and consenting Race Bank and Dudgeon to their full capacities) would be more efficient overall in terms of implementing UK renewable energy generation policies in a way that is consistent with the environmental protection obligations imposed on the Secretary of State by the Habitats Regulations, than granting consent to the proposed Development with restrictions on first phase build (and with similar restrictions for Race Bank and Dudgeon)’. The Secretary of State’s decision letter on Docking Shoal can be reviewed at: ‘Consent Letter’ (Energy Infrastructure) <https://itportal.beis.gov.uk/EIP/pages/projects/Docking.htm> accessed 29 March 2018.} The third key problem with the current application of the Rochdale envelope approach is the impact that it has upon stakeholder engagement. This problem interlinks with both of the above-mentioned issues, as stakeholder issues are a natural consequence of applications of varying quality being received from developers. This also means that stakeholders will have a difficult time in providing representations for the most complicated environmental impacts of a development. As demonstrated in the above application for the East Anglia ONE offshore wind farm, appropriate uses of the Rochdale envelope approach result in a vast number of combinations that need to be considered in the consultation process – this number of combinations has the potential to rise significantly for a development application that has not been correctly compiled. This means that stakeholders are effectively consulting upon multiple potential development outcomes within one application leading to problems of not enough staff members or volunteers, not enough money to dedicate to consultation, and not enough time. In England, the DCO application process is sometimes referred to within the industry as ‘the PINS process’ and is subject to an extremely strict timetable once the application has been submitted.\footnote{The majority of the process is overseen and assessed by the Planning Inspectorate, who then makes a recommendation to the Secretary of State. The assessment stages of obtaining development consent are subject to a strict timetable. Once the application has been received, the Planning Inspectorate has 28 days to confirm whether it meets the application requirements and to confirm whether it will be considered per s 55(2) of the Planning Act 2008. The pre-examination stage will then last for three months to allow the public to register their interest and submit written representations for the development, this concludes with a preliminary meeting which is chaired by an Inspector. The Planning Inspector then has six months to carry out the examinations which consist of inviting those who have made a written representation to provide further details, and holding an examination hearing which explains how questions and issues have been considered. Following the examination period,
mean that more time is spent on the pre-application stage of the process where a dialogue between the developer and stakeholders can take place. The PINS timetable then allows for a three-month pre-examination stage whereby stakeholders have the opportunity to review and consult upon the developer’s environmental statement. This is then followed by a six-month period whereby the Planning Inspectorate may invite stakeholders to provide further details on their written representations.

To return to our case study example of the East Anglia ONE offshore wind farm, it is important to note that the environmental statement for that development consisted of thirty-two chapters which were broken down into three volumes indicating the immense amount of information that stakeholders are presented with for each application. Of course, stakeholders who are consulting upon a specific element of the environmental statement, for example the ornithological impacts of the development, will only refer to the relevant provisions. However, the increased use of the Rochdale envelope approach has been a cause for complaint by stakeholders. Some stakeholders have argued that the strict PINS timetable, combined with the increased number of development combinations being submitted by developers, means that they are not able to provide a proper assessment of the environmental impacts that these developments pose.

To date, the problems of the Rochdale envelope approach have received very little attention from commentators, and its use has largely gone unquestioned. The reason for this is that the negative impacts of glutinous usage of the approach are still unfolding – particularly within Round Three of offshore wind farm developments where overall development sizes have increased significantly. We currently stand in a time where some of the largest renewables developments that England has ever seen are battling to obtain consent. As Wright has testified above with the Centrica Docking Shoal case study, cumulative impacts on sensitive species have resulted in permission being denied to a development in the past. If we continue to ignore this problem then we will find that our most ambitious efforts to increase carbon neutral energy production will be thwarted by poor planning practice that allows for development consent to be determined using exaggerated worst-case scenarios. However, it is not too late to take action to ensure that this planning approach is constrained so that it does not cause problems for environmental impact assessment in future developments.

the Planning Inspector has three months to compile a report to the Secretary of State, who then has an additional three months to review the report and make a decision on the application. If the application is accepted, an order granting development consent will be produced which will outline any conditions imposed upon the development consent.


63 The majority of respondents referred to the necessary evil of the Rochdale envelope approach. For example, S3 stated, ‘it makes it a lot more difficult for us’ (August 2014), and S1 put forward a similar position stating, ‘that’s quite a difficult one for us because they put forward a range of different options – it just means that we have to consider those different impacts as well in our appraisal. So, it’s better for us if the project can be refined as much as possible when the application is submitted so that our advice can be as detailed as possible’ (July 2014). To view the full responses to this interview question, see above n. 8.
The first action that is recommended from this research is for a report to be commissioned into the use of the Rochdale envelope approach. The following two recommendations in this research relate to providing guidance, and specific measures to restrict the use of the approach, however both of these recommendations aim to ensure the ‘appropriate’ use of the Rochdale envelope approach. Therefore, before attempting to implement measures to ensure that the approach is used appropriately, it is essential that the Planning Inspectorate takes the time to assess what it feels an ‘appropriate’ use of the approach is. Previous guidance discussed above does little more than explain what the approach is in broad terms, therefore this proposed report would be the first opportunity for the Planning Inspectorate to focus on how it feels this approach should be used by developers. It is suggested that the report on the approach should be commissioned exploring its current use, and obtaining views from stakeholders on what the ‘appropriate’ use of the approach is. This should be informed by developers, and statutory and non-statutory consultees who have experience in consulting on applications that use the Rochdale envelope approach. Such a report will provide a holistic view on the current use of the approach, along with perceived views on how the approach should be used. This should provide a useful starting point to then consider methods to ensure that the ‘appropriate’ use of the approach is used by developers.

After a report has been undertaken to assess the ‘appropriate’ use of the approach, the Planning Inspectorate should then aim to provide further support and guidance to developers on the use of the approach. One method of support that could be introduced for developers is to encourage a dialogue on the appropriate use of the approach in the pre-application stage on a case by case basis. This method would alleviate stakeholder issues that arise later on in the PINS process, however this is a resource-intensive recommendation on the part of the Planning Inspectorate. An alternative form of support could be issued to all developers in the form of detailed guidance based on the outcomes of the assessment of the ‘appropriate’ use of the approach. This advice might require that the Rochdale envelope is only permitted on certain aspects of an offshore wind development and/or enforce certain parameters that a developer is not allowed to exceed. Such parameters could relate to, for example, the number of foundation types allowed to be submitted in the application, or a size/capacity range.

The final recommendation to ensure that developers use the Rochdale envelope approach in an ‘appropriate’ way is to add to the criteria for accepting applications into the PINS process to insert a brief assessment of whether the developer has used an appropriate (as defined in the above mentioned report) Rochdale envelope in their application. At present when applying to the PINS process, developers are required to submit, amongst other documents, their environmental statement, and screening and scoping opinions (if applied for). The environmental statement must, as a minimum, conform with schedule four of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017. However, no additional requirements relating to the quality of the environmental statement can be found in the application form. In addition to this, none of the requirements upon the Secretary of State relating to the acceptance of the applications refers to the way in which the Rochdale envelope has been used. By inserting provisions relating to whether the Rochdale envelope approach

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66 Planning Act 2008, s 55(3).
has been used appropriately, a pre-emptive assessment stage will be added to the process to pick out any problems before the six-month examination period begins. This will save the time and resources of stakeholders, and will also benefit developers by ensuring that they can provide the necessary information for their application before the PINS timeframe begins.

Conclusion

To conclude, our current use of the Rochdale envelope approach is quietly storing up problems for future developers in the offshore wind industry. From judicial interpretation of EIA requirements over twenty-five years ago, the Rochdale envelope approach has arisen and found popularity amongst developers who are coping with the continuing rapid growth of technology. This approach is essential to ensure that the lengthy process from data gathering through to obtaining development consent does not prevent developers from using the most efficient and updated technology in their developments. However, since its conception, developers have been free to develop and expand the approach with little guidance from policymakers leading to a number of issues. At best these issues have caused a time and financial nuisance for stakeholders who have been tasked with consulting on the multi-development proposals put forward, but at worst, the use of exaggerated worst-case scenarios could result in developments being refused permission due to cumulative impact predictions made on combined worst-case forecasts. It is essential that action is taken now to regulate the use of the Rochdale envelope approach to ensure realistic forecasts are provided by developers to prevent future developments from being barred for capacity reasons. To target the crux of the problem, the Planning Inspectorate should commission a report into the ‘appropriate’ use of the approach. The findings of this report should then be used to issue further guidance and add to the acceptance requirements to ensure that developers are sticking to an ‘appropriate’ use of the approach in their applications.