



The NEC unveils new climate change clause

By Christopher Hallam and Charlotte Eccles

Issues relating to climate change and the push to net, or absolute zero, are now part of our daily news and discourse and industries across the globe are considering how they can adapt to the new reality. The NEC has thrown its hat into the ring with a new optional clause (X29) setting out provisions which attempt to make construction greener and cleaner. The clause is being published on a consultative basis and welcomes representations from across the industry on the principles, the drafting and the terminology used. In line with the general ethos of the NEC, the clause seeks to create a balance of risk sharing and incentivisation between contractor and employer; one which is likely to be needed across the industry if we are to achieve significant carbon reductions.

We are living on the verge of a climate emergency and the built environment accounts for over a third of UK carbon emissions. That's not a statistic we can be proud of, but every cloud has a silver lining. For construction it's the huge opportunity to innovate and reinvent the industry, and in doing so make a massive contribution to the drive to net, or even absolute, zero.

There have already been some tangible successes. Last year, Mayfield, a significant Manchester urban development scheme, carried out the first commercial concrete pour: a graphene enriched concrete with a carbon footprint around 33% lower than regular concrete.

That's a good start, but the industry has much more to do. In particular, it has not yet widely adopted climate wording or targets in its contractual arrangements, save for very specialist projects. The NEC4 Contract hopes that it can change this and has published, on a consultative basis, a new optional sustainability clause: X29. It includes:

- a requirement to include 'Climate Change Requirements' in the Scope. A failure to meet these will be a Defect.
- the inclusion of a Performance Table which incentivises the contractor's performance of certain targets. These aren't explicitly linked to the Climate Change Requirements and so may well be different targets. The Performance Table is capable of being adjusted through compensation events.
- the need for an early warning to be provided where it is considered that the 'Climate Change Requirements' cannot be met.
- an obligation for a 'Climate Change Execution Plan' to be produced and updated from time to time.
- a requirement for the Scope to set out the extent to which the Climate Change Requirements are disclosable e.g. to enable an organisation to confirm it has met its climate targets.
- the ability for the Contractor to propose changes which reduce the impact of the project on the climate – either during the build or the future use of the project.

The NEC is not the only organisation seeking to use legal drafting to tackle climate change. The Chancery Lane Project, a worldwide pro-bono venture, publishes net-zero aligned clauses to be used across a range of commercial contracts. These could be adapted with further bespoke drafting where the requirement is for absolute zero.

The construction clauses range from a requirement to design projects to withstand climate change, to off-setting carbon emissions, to provisions similar



to the NEC clause, i.e. rewarding a contractor for compliance with required targets.

Whilst all this is undoubtedly positive and a great step in the right direction, thought needs to be given to how these provisions will sit within the current working practices of the industry.

The typical approach over recent decades has been to pass risk down to the supply chain. This model is becoming increasingly unworkable not least because of the market and pricing instability currently being experienced, particularly for commodities and shipping; all making it more difficult to price effectively. At the launch of X29, NEC has been clear that its intention is not for contractors to bear all the risk of reducing carbon emissions but for this to be a wider project goal.

This makes sense – construction’s carbon emissions cannot be solved by the supply chain alone and the NEC drafting attempts to drive this behaviour. For example, setting down Climate Change Requirements requires consideration at all stages of the procurement process and by all stakeholders as to what the climate impact of the project is likely to be and what steps can be taken to address this, as well as where the costs for this sit. It will also require all parties to monitor and record the progress of the project as against the requirements and targets.

Further, the early stages of transition will almost certainly require novel solutions and methods of working. There is a question mark over how this will fit into the common design and build structure with single point responsibility. A contractor may be deterred from using an untested, but potentially carbon saving, method of working if it is concerned about taking on liability for cutting edge technology.

There’s been a huge drive in recent years for construction to be more collaborative, and to promote the benefits of this for more equitable risk management and better project outcomes. Climate change, the ultimate global risk, may provide a perfect demonstration of the possible benefits.

The consultation period for the NEC’s clause X29 closes on 13 May and representations from the whole of the industry are being sought. If you would like advice on the clause, the consultation period or how climate change clauses may be applied to your project, contact Chris Hallam, Charlotte Eccles or your usual CMS contact.

This article was written by CMS Partner Christopher Hallam and Senior Associate Charlotte Eccles and was first published on CMS Law-Now on 13 April 2022 available here: <https://www.cms-lawnow.com/ealerts/2022/04/the-nec-unveils-new-climate-change-clause>.

ABOUT THE AUTHORS

CMS Law-Now™



Christopher Hallam | Partner

Chris specialises in construction, engineering and infrastructure projects and has advised on some of the most high profile projects to have been procured in the UK.

He has particular expertise advising on the construction and engineering aspects of complicated projects including in the PFI and PPP arena. Chris has extensive experience of construction procurement and support businesses with their strategy and contractual approach, to ensure that the best commercial model is adopted. He has extensive experience negotiating and drafting EPC/D&B contracts across various sectors and is fully cognisant of the requirements of the various stakeholders, in particular the project funders. His experience of working with the construction supply chain means he also understands the issues that will be of most concern to them – allowing time to be spent more efficiently and effectively on what really matters.



Charlotte Eccles | Senior Associate

Charlotte is a Senior Associate in CMS’s Construction and Engineering team. Charlotte has a range of experience covering mainly non-contentious work and advises a variety of clients including developers, government bodies, pharmaceutical companies and institutional clients. Charlotte has experience of drafting, advising and negotiating the full range of project documentation including amendments to bespoke and standard form building contracts (including JCT, NEC, IChemE), appointments, collateral warranties and surety documents. She has a particular interest in sustainable construction and advises clients on ‘sustainability’ clauses for project documentation.

