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Friends of the Earth England Wales and Northern Ireland written response to the Application by Highways England M4 Junctions 3 to 12 Smart Motorway

1. National Policy Statement for National Networks (NN NPS)

1.1.1 Paragraph 1.2 of the NN NPS requires that the Secretary of State decide this application in accordance with the NPS, unless to do so would breach any duty imposed under any legislation and/or international obligation. As the ExA is aware, the Government is responsible for fulfilling the requirements of the Ambient Air Quality Directive (2008/50). EU legal limits are absolute and must be met irrespective of cost, have to be met everywhere in a Zone (not just at certain receptors), and cannot be averaged across an Air Quality Zone (that is, an increase in one part of a Zone offset against improvement in another). Air pollution must not be worsened in three ways: a breach must not be caused; air already failing legal limits cannot be worsened or compliance delayed; and the non-deterioration principle applies: “*maintain the levels of those pollutants below the limit values and shall endeavour to preserve the best ambient air quality, compatible with sustainable development*”. This accords with the views both of the EU Commission (see clarification to Clean Air in London¹: and of Robert McCracken QC – see opinion for Clean Air in London of October 2015 (in particular paragraphs 42 and 49)².

1.1.2 We consider that the scheme is not compatible with the EU Ambient Air Quality Directive on the evidence available and must be refused. In summary this is on the basis that the scheme would be worsening breaches of NO₂ concentrations in AQMA areas which is significant (EPUK/IAQM Guidance, paragraph 7.11 <http://cleanair.london/legal/clean-air-in-london-obtains-qc-opinion-on-air-quality-law-including-at-heathrow/attachment/air-quality-planning-guidance-v1-1-2/>) and should lead to refusal (McCracken opinion, paragraph 3) – and indeed it seems that there are new locations where EU legal limits are breached, which would require refusal (McCracken paragraph 2). Further details below at paragraph 4.6.1.5. Further, these are expected to be underestimates due to traffic generation expected to be higher than predicted, and emissions worse than predicted (see below at paragraph 4.6.1.8). However as the baseline compliance dates for 2 of the Air Quality Zones have been revised (cited in the government’s draft new Air Quality plans, Table 2) the scheme baseline data must be re-done before it is possible to ascertain compliance or not with EU law.

1.3 We are concerned that the project would not deliver appropriate environmental and social benefits as required by the NNNPS, paragraph 3.3, which is that the Government expects applicants to avoid and mitigate environmental and social impacts in line with the principles set out in the NPPF and the Government’s planning guidance.

1.3.1 Relevant NPPF principles include (paragraph 17) “*support the transition to a low carbon future in a changing climate*”; and “*contribute to conserving and enhancing the natural environment and reducing*

1 http://cleanair.london/legal/europe-at-its-best-takes-legal-action-against-uk-at-its-worst-on-air-pollution/attachment/cal-269-letter-of-clarification-from-the-commission-190214_redacted/

2 http://cleanair.london/legal/clean-air-in-london-obtains-qc-opinion-on-air-quality-law-including-at-heathrow/attachment/cal-322-robert-mccracken-qc-opinion-for-cal_air-quality-directive-and-planning_signed-061015/

pollution.” The basic premise of this road expansion encourages private car use instead of enabling options to reduce private car use. Table 6.19 and Table 6.20 of Appendix 6 both show an increase in carbon emissions. The Committee on Climate Change has warned in its most recent report of the need to avoid “lock-in” to high carbon pathways. They have also recommended that the lessons from schemes to reduce travel demand should be applied and evaluated, recommendation 18, Table A.1

https://www.theccc.org.uk/wp-content/uploads/2015/06/6.738_CCC_ExecSummary_2015_FINAL_WEB_250615.pdf).

1.3.2 We further note that the applicant relies upon the NN NPS with regard to climate change impacts as follows (para 6.18.9): *“Paragraph 5.18 of the NN NPS states that an increase in CO₂ emissions is not a reason to refuse development consent, unless the increase was large enough to have a material impact on the ability of the Government to meet its carbon reduction targets. The regional assessment of the Scheme predicts that there will be an increase in CO₂ with the operation of the Scheme. However, as noted in the NN NPS (paragraph 3.8) the carbon emissions anticipated over the next 10-15 years from the strategic road building programme are considered to be small (less than 0.1% of annual carbon budget) and the increases associated with the Scheme are part of that small increase. The Scheme will therefore not affect the ability of the Government to meet its carbon reduction targets.”* Paragraph 3.8 of the NN NPS relies on policies for ULEVs and policies to meet the Government’s carbon budgets, and in addition references a figure from the ‘Investing in Britain’ policy document. However the Climate Change Committee’s most recent report to Government on progress (June 2015) states that: *“Without the impact of higher temperatures in 2014, therefore, there is limited evidence of progress reducing emissions outside the power sector.”* Emissions regulations for vehicles are specifically picked out as an area with “no certainty” over the next few years. Travel behaviour, and increased take up of low emission and electric vehicles are also singled out as areas where Government needs to take a role. We therefore consider it imperative that the contribution of the scheme to CO₂ emissions is properly investigated.

4. Environment

4.1.5 Friends of the Earth support the ExA’s concern that requirement 8 allows for modification of the CEMP at any time without the requirement to seek the agreement of the LPA and without reference to the ES.

4.1.5.1 We would support a modification to this part to ensure that the affected LPA must be consulted and amendments agreed with due regard to the ES.

4.6.1 The ExA refers to the NN NPS para 5.13 which states: **“The Secretary of State should refuse consent where, after taking into account mitigation, the air quality impacts of the scheme will affect the ability of a non-compliant area to achieve compliance within the most recent timescales reported to the European Commission at the time of the decision”** and asks whether, having regard to the final judgement of the Supreme Court in the “ClientEarth” case, the assessment of air quality impacts set out in the ES indicate that the scheme would comply with this requirement of the NNPNS.

4.6.1.1 This approach is used by the applicant in the methodology in ES chapter 6 paragraph 6.2.65, and under compliance risk assessment at 6.15.6, and finally referred to in the summary at 6.18.8

4.6.1.2 We do not consider that the NN NPS is consistent with EU law in this respect. We refer to the McCracken opinion, paragraph 59. What cannot be the case is that a scheme which would worsen air pollution should only be refused if it would delay compliance of that Air Quality Zone – that is, if somewhere else in the relevant Zone would be worse. Clearly action could be taken to address the other location (eg traffic could be banned from Marylebone Road, or wherever), leaving the scheme then the worst in Zone. It cannot be the intention or will of the EU to allow worsening of air pollution “under the cover” of somewhere even worse. Article 13 of the Air Quality Directive makes clear that Member States must ensure that emissions remain within limit values “throughout their zones and agglomerations”. Since the development will materially worsen air quality in areas which are already in breach of air quality legislation within the locality of the development, it seems clear that the application must be refused.

4.6.1.3 With regard to the section of NN NPS paragraph 5.13 “within the most recent timescales reported to the European Commission at the time of the decision”, the government consultation Air Quality plans refers to new baseline compliance date estimates for some zones: “Note this assessment differs from data submitted to the Commission in September 2013. To ensure we use best available evidence the 2013 assessment has

been updated to take account of latest emission factors. This data will be resubmitted in “due course” (Overview document Table 2). This includes revised dates for 2 Zones relevant for this scheme. It is these dates which should be the relevant dates. It could be argued further that since the EU court has clarified that legal limits for NO₂ must be met in the shortest time possible, and that it was for the UK Courts to order the government to ensure this is achieved, and in turn the UK Supreme Court ruling in April 2015 indeed ordered the UK government to prepare new plans by the end of the year to achieve compliance in the shortest time possible (<https://www.supremecourt.uk/cases/uksc-2012-0179.html> April 2015), it is the shortest possible time that is relevant to the phrase “most recent timescales” in the NN-NPS.

4.6.1.4 The implications of the Supreme Court ruling are in turn that whereas if limits were being met in an Air Quality Zone, a scheme which was fully mitigated, produced no net emissions and was Air Quality Neutral as required by the London Plan could be acceptable – however with the special measures the UK is under following the Supreme Court ruling, in relevant areas at the appropriate time, if limits are to be met in the shortest time possible, then with a pollution generating scheme any appropriate mitigation measures proposed for a scheme should be adopted anyway, but the scheme itself should not be allowed to add any extra pollution.

4.6.1.5 It seems clear at Appendix 6 of the ES that the results show unacceptable increases in concentrations of NO₂. Increases in traffic on the M4 is cited at paragraphs 6.18.8, 6.9.15, 6.10.17. Paragraph 6.15.5 shows the applicant recognises an increase in NO₂ concentration in an area predicted to be non-compliant in Defra’s plan by 2020 and 2022 (although the receptor N353 is not cited elsewhere in Chapter 6 of the ES). Indeed Table 6.21 cites receptors where concentrations already above the objective would be worsened or a new exceedance created (7 of medium magnitude and 11 of small). Also, although these do not seem to be listed with the above, there are a number of Junction sections where worsening of levels which would already exceed limits would occur. For instance for Junction 11-10 a medium increase is reported, and this is reported at locations (paragraph 6.6.9) where concentrations were exceeded in the baseline (paragraph 6.6.5). Also the off scheme section Junctions 3-1 also shows an increase, apparently at locations (paragraph 6.14.25) where concentrations were exceeded in the baseline (paragraph 6.14.16). With these sections wholly within AQMAs (6.6.1 and 6.14.2 respectively), this must be seen as significant under EPUK/IAQM Guidance, paragraph 7.11, and in turn should be require refusal (McCracken opinion, paragraph 3).

4.6.1.6 Further, the 2 scheme sections referred to above appear to have receptors which are listed as having concentrations above legal limits in the ‘with scheme’ (paragraphs 6.6.9 and 6.14.25), that are not listed as having concentrations above legal limits in the baseline scenarios (paragraphs 6.6.5 and 6.14.16). If that is so, it implies breaches being caused, which would clearly require refusal (McCracken paragraph 2). However paragraphs 6.15.6 and 6.18.8 imply that the scheme would not result in a compliant Zone becoming non-compliant. We thus call on the ExA to satisfy itself that there would on the evidence provided not be new breaches caused.

4.6.1.7 In any event, the baseline information has changed, and material pertaining to this proposal must be updated. The Defra consultation on its Air Quality plans included revised baseline compliance dates for some Air Quality Zones. <https://consult.defra.gov.uk/airquality/draft-aq-plans> - see the Overview document, Table 2. The Greater London Zone the baseline compliance date has been brought forward from ‘sometime after 2030’ to ‘by 2030’, and Defra expects compliance ‘by 2025’ with their plans. For the South East Zone the baseline compliance date has been brought forward from ‘by 2025’ to ‘by 2020’ (with ‘by 2020’ also being the date Defra expects compliance with their plans). This means that baseline information on air quality prepared for the ES which forms the basis of the scheme proposals is out of date (eg as referenced in ES section 6.2, and the first paragraph of the text with Table 6.21). The changed compliance dates could have various impacts which could include an area which would now be compliant being taken over limits with the scheme. The entire air quality baseline of the scheme needs to be re-done.

4.6.1.8 There is concern however that the results presented do not accurately reflect the levels of emissions and concentrations that would result from the scheme. First assessments of induced traffic are likely to be an under-estimate (we refer the ExA to the WR of Campaign for Better Transport/CBT). In addition we note that the modelling relies upon the following assumption (at paragraph 6.2.57): “A key element of the local operational detailed assessment is the rate of improvement in air quality over time as cleaner vehicles enter the national vehicle fleet” (and also referred to at paragraph 6.4.1). However the technical advice note referred to in 6.2.57 used for vehicle emissions factors was we understand updated, and that used for compliance risk assessment (referred to in paragraph 6.2.65) has been suspended (we refer the ExA to the WR of CBT). There has been known discrepancy between laboratory testing and real-world emissions, and

there has been the recent revelations of the VW 'cheat' devices. A full assessment would have to be made to ascertain robust and reliable information on impacts of the scheme on emissions and concentrations.

4.6.1.9 We also refer the ExA to the Climate Change Committee's 2015 report to Government which highlighted that transport emissions have continued to rise, but policy uncertainty remains around vehicle emissions both in terms of policy and practice. There is an acknowledged policy gap as to how the carbon budget will be met in 2023-27 which is the period directly consequent to the predicted start date of this development.

4.6.7 The ExA requests further information on an assessment of local air quality effects provided for the design year with and without the scheme.

4.6.7.1 In the table at 6.2 of Appendix 6 the Background pollution map estimates, estimates are provided for 2013 and 2022, but not for 2037 Design year. We support the ExA's request as above.

7.1 The ExA asks whether the scheme complies with the need to be designed to minimise social and environmental impacts and improve quality of life in accordance with para 3.2 of the NNNPS.

7.1.1 Friends of the Earth point to the issue of air quality in particular. Recent figures for premature deaths due to NO₂ pollution now add to those for particulate pollution, meaning a greater impact on the health of citizens should be taken into account. A figure of 23,500 extra annual premature deaths from Nitrogen Dioxide (NO₂) for the UK has been estimated by Defra and included with the government's draft Air Quality Plans (<https://consult.defra.gov.uk/airquality/draft-aq-plans> - see the Overview document, paragraph 8). With this added to the existing figure of 29,000 annual premature deaths due to particulate air pollution (Committee on the Medical Effects of Air Pollutants/COMEAP <https://www.gov.uk/government/publications/comeap-mortality-effects-of-long-term-exposure-to-particulate-air-pollution-in-the-uk>) brings the total to 52,500 premature deaths a year for the UK.

7.1.2 For London a figure of nearly 10,000 premature deaths a year from NO₂ has been set out by the Mayor: <http://www.london.gov.uk/media/mayor-press-releases/2015/07/london-becomes-first-world-city-to-quantify-the-health-effects>.

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