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Friends of the Earth England Wales and Northern Ireland summary of oral submission to Environmental Hearing on M4 Junctions 3 to 12 Smart Motorway

Jenny Bates and Naomi Luhde-Thompson represented Friends of the Earth at the hearing on 17 November. This summary comprises (a) a note of new points made at the hearing on environmental issues which were not already set out in our written representations and (b) a brief response to the arguments of the applicant's counsel concerning the risk that certain of our arguments were calling into question the validity of the National Networks NPS.

1. Recent changes to emissions standards in UK

1.1 Friends of the Earth made the point that that the EU Council of Ministers agreed on 28th October 2015 on standards for EU Real Driving Emissions (RDE) which are expected to undermine the assumptions made by HE in relation to this scheme.

1.2 The agreement was reached in order to address the discrepancy in emissions between laboratory tests and NOx emissions found in real world driving.

1.3 However the new standards would allow new types of Euro 6 diesel cars to emit more than double the Euro 6 NOx emissions limit from 2017 to 2020, and 50% more after 2020, thereby de facto increasing the standard of Euro 6 from 80mg/km to 120 mg/km. We made reference to a press release during the hearing which is available via the following link: http://europa.eu/rapid/press-release_IP-15-5945_en.htm

2 Legal opinion of Robert McCracken QC - issues

2.1 With reference to the legal opinion of Robert McCracken QC concerning air pollution, the opinion and a link to it, were referred to both in Friends of the Earth's Deadline II submission of 8th October (paragraph 1.1.11[1]) and in Friends of the Earth's written representations of 5 November (paragraph 1)[2].

2.3 During the hearing, the applicant's counsel appeared to criticise the opinion of Robert McCracken QC on the basis that it has the effect of calling the National Networks NPS into question, which is not permissible in the context of the examination. Friends of the Earth reminds the Examining Authority that its duty to decide the application in accordance with the NPS does not apply where to do so would render the UK in breach of its international obligations[3]. In this case, it is far from clear that the NN NPS reflects the current state of the

1 http://infrastructure.planninginspectorate.gov.uk/wp-

2 See - 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/

3 Planning Act 2008, section 104(4).

law on air quality as clarified by the UK Supreme Court[4] and the EU Court of Justice[5] recently in the Clientearth case. There are a number of reasons for this.

2.4 First, NN NPS overlooks the public health implications of allowing the emission of yet further harmful pollutants (in areas which are already in breach of the Directive), where these do not affect the longstop date set out in the Article 23 plan for bringing an area back into compliance. The Directive is absolutely clear (from the outset) that its purpose is to protect human health by stamping out precisely such emissions[6]. Article 1(1), for example, describes the subject matter of the Directive as:

> "defining and establishing objectives for ambient air quality designed to avoid, prevent or reduce harmful effects on human health and the environment as a whole".

The EU Commission has made clear that it regards an established breach of Article 13 as resulting in a "clear and grave hazard to human health" and such a set of circumstances applies in a number of areas which the development will affect[7]. Permitting the emission of further damaging pollutants in such areas conflicts with the underlying purpose of the Directive.

2.5 Friends of the Earth argues that where a development will, as in this case, give rise to emissions which are material and not trivial[8] in areas already in breach[9], the Directive requires that the application be refused. Friends of the Earth believes that this threshold for emissions (neither trivial nor immaterial) is appropriate, since it accommodates the precautionary and binding nature of the limit values set out in the Directive. We believe it is also supported by recent EUCJ case law (in a related field - groundwater protection) in which the court found that where just one of the several elements prescribed in EU groundwater legislation deteriorated (by just one class), a deterioration in overall status of groundwater occurred[10]. Reasoning by analogy, we argue that the Examining Authority must adopt a similarly precautionary approach in respect of changes to emissions levels as previously specified.

2.6 Second, the courts have made clear that the core duty in the Directive is that contained in Article 13, namely to ensure that limit values are met[11] – not the deferral or derogation provisions set out in Articles 22 and 23[12]. Yet the argument in NN NPS that development may go ahead provided the longstop date for compliance in the Article 23 plan is still met runs the risk of reversing this hierarchy – placing greater emphasis on compliance with the plan than on complying with the central Article 13 duty.

2.7. Third, given the UK is in breach of its duties under the Directive, it is arguable that the duty to comply with Article 13 is not limited to taking steps under Article 23 of the Directive in any event. It is arguable that

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4 R (on the application of ClientEarth) (Appellant) v Secretary of State for the Environment, Food and Rural Affairs (Respondent) [2015] UKSC 28 & [2013] UKSC 25 - https://www.supremecourt.uk/cases/uksc-2012-0179.html

5 Case C-404/13: judgment of 14 November 2014.

6 See for example recitals 1, 2, 3 and 12 of the 2008 Directive. The definition of many of the key concepts in the Directive make express reference to the aim to protect human health eg: "limit value", "target value", "alert threshold", "information threshold" etc

7 See para 87 of EU Commission written observations submitted to the Supreme Court in relation to the Clientearth litigation (para 87): http://documents.clientearth.org/wp-content/uploads/library/2013-12-05-ec-written-observations-ce-vs-uk-air-quality-dec-2013-ext-en.pdf

8 See for example impacts on Junctions 11 – 10 described by the applicant as "medium"

9 See the areas identified in paragraphs 2 and 3 of FoE's written representations of 5 November.

10 Bund für Umwelt und Naturschutz Deutschland eV v Bundesrepublik Deutschland: 1st July 2015 (ECJ) Case: C□461/13 http://curia.europa.eu/juris/riverweser

11 See the judgment of Lord Carnwath *supra* (29 April 2015) at para 29.

12 *Ibid*, para 27.

Article 23 gives partial expression to the wider duty of “sincere cooperation” in Article 4(3) of the Treaty on the Functioning of the European Union[13]. It follows that the steps which the UK is required to take to bring itself back into compliance are not limited merely to adopting the plan. To the extent that the NN NPS purports to green light developments that do not jeopardise compliance with the date set out in the plan, it may conflict with leading case law in this respect also.

3. **Climate Change**

3.1 Friends of the Earth submitted in response to the ExA questions on “G: Other Matters”, that the consideration of climate change issues had not been adequately addressed. The National Policy Statement for National Networks at paragraph 4.37 states that "Climate change mitigation is essential to minimise the most dangerous impacts of climate change" and at paragraph 5.18 "The Government has an overarching national carbon reduction strategy (as set out in the Carbon Plan 2011) which is a credible plan for meeting carbon budgets. It includes a range of non-planning policies which will, subject to the occurrence of the very unlikely event described above, ensure that any carbon increases from road development do not compromise its overall carbon reduction commitments. The Government is legally required to meet this plan. Therefore, any increase in carbon emissions is not a reason to refuse development consent, unless the increase in carbon emissions resulting from the proposed scheme are so significant that it would have a material impact on the ability of Government to meet its carbon reduction targets."

3.2 The Carbon Plan 2011 is footnoted to include its successor documents. The Government has committed to producing an updated plan in 2016. In the intervening period, the evidence is that the impact of the scheme in the context of traffic is more significant, given the failure to act to reduce emissions in terms of transport infrastructure. This evidence is in the form of the Committee on Climate Change's progress report to Government which points out a number of salient issues. In June 2015 the Committee on Climate Change published a progress report on 'Reducing emissions and preparing for climate change'. The report noted that there had been minimal change in transport emissions, and even a 1% increase. This report had the following points to make on transport:

> "Targeted and coordinated actions to adapt to climate change and reduce emissions are needed. In many areas, action that supports both emissions reduction and adaptation will be more efficient than considering each issue in isolation. This includes decisions about:
>
> 1. Investment in infrastructure, including decisions to build or expand electricity, water, transport and other networks. "

3.3 In addition the report at page 11 points out that the need for infrastructure decisions to avoid high carbon lock in: "Infrastructure: Make decisions that help reduce emissions and improve the resilience of infrastructure networks and services during periods of extreme weather. A range of infrastructure decisions to be made this Parliament could have significant impacts. Foremost amongst these is the need for carbon capture and storage (CCS). Others include requirements for infrastructure support for heat networks and electric vehicles. Decisions taken now need to avoid ‘lock-in’ to high carbon pathways and vulnerability to climate change risks."

3.4 The point is that emissions from transport are not falling as they should. There is policy uncertainty around the support for ULEVs, the weakening of Euro 6, and the need to reduce private car emissions in order to achieve the radical reductions in emissions required by the Climate Change.

3.5 The project will increase carbon emission as evidenced at table 6.19 (Appendix 6 - Air Quality) the scheme is acknowledged to increase emissions at the opening year (2022) regional assessment. In the design year (2037), table 6.20 the scheme also shows an increase.

3.6 In context, the opening year 2022 and design year 2037 fall roughly within the carbon budget for 2023 - 2027. In meeting 4th carbon budget, an emissions reduction is required of 50% by 2025 on the baseline year (1990). We therefore do not see how the M4 scheme as promoted by the applicant is compatible with the

13 *Ibid*, para 19.

level of emissions reduction required, particularly with reference to a) the policy uncertainty around technology and b) current progress in reducing transport emissions.

- Ends -