

| Author Details | |
|---------------------------------------|---|
| Name | Dr Andrew Boswell |
| Position | Scientist and Consultant |
| Lower Thames Crossing Registration | 20034906 |
| Organisation | Climate Emergency Policy and Planning (CEPP) |
| Examination Principle Issues | Climate Change |

DEADLINE D4

In so far as the facts in this statement are within my knowledge, they are true. In so far as the facts in this statement are not within my direct knowledge, they are true to the best of my knowledge and belief.

Contents

| | | |
|---|---|---|
| DEADLINE D4..... | 1 | 1 |
| Contents | 1 | 1 |
| 1 INTRODUCTION..... | 2 | 2 |
| 2 ExQ1..... | 2 | 2 |
| 3 RECENT UPDATES: POLICY AND LEGAL FRAMEWORK..... | 2 | 2 |
| 3.1 The second NZS legal case: Delivery risk and policy gap in securing delivery of net zero, and the undisclosed Risk Tables 3 | | |
| 3.2 Material weight of the CCC Progress Report..... | 4 | 4 |
| 4 IEMA – POLICY GUIDANCE..... | 4 | 4 |
| 4.1 IEMA Contextualisation: sectoral reduction strategies..... | 5 | 5 |
| 4.2 Risk assessed sectoral reduction strategies: Industry and the 2030 NDC..... | 5 | 5 |
| 4.3 Risk assessed sectoral reduction strategies: Industry in the 5 th carbon budget..... | 6 | 6 |
| 4.4 Risk assessed sectoral reduction strategies: Domestic Transport in the 5 th and 6 th carbon budgets | 6 | 6 |
| 4.5 IEMA Contextualisation: Existing and emerging national and local policy or regulation..... | 7 | 7 |
| 4.6 IEMA summary | 8 | 8 |

1 INTRODUCTION

- 1 This submission briefly responds to the ExQ1 [PD-029].
- 2 I provide sections with updates on the legal and policy context since deadline D3.

2 ExQ1

- 3 I make no submission on the ExQ1. I will wait until the Applicant's and other party responses are available and then make submissions at a subsequent deadline as necessary.
- 4 With respect to Q2.3.1, I have no further update on REP-148/20-24 where I addressed the implications of the recent judgement *R (Boswell) v Secretary of State for Transport [2023] EWHC 1710 (Admin)*. As stated then, no evidence which I have made to date as an IP on the LTC application depends upon the success of my appeal of this judgement.

3 RECENT UPDATES: POLICY AND LEGAL FRAMEWORK

- 5 This section is provided as vital information which the SoS should consider when making a reasoned conclusion on the LTC relating to s104(4), s104(5) and s104(6) of the 2008 Planning Act. It is not provided as a generalised commentary, nor as a separate challenge to Government policy. It is provided as vital information for this DCO examination.
- 6 An important update since deadline D3 is that the second NZS legal case has now gained permission for a full High Court hearing. The issue of the risk assessment of climate policy delivery is a key issue before the Court. I have already laid out that the issue of the risk to delivery of UK climate targets is also a matter for the SoS decision on the LTC [REP1-323 and REP3-148/section 7]. The implications of the second NZS legal case and the LTC decision are therefore related, and I expand on this below.
- 7 I have tried below not to unnecessarily repeat previously submitted material – instead referring back to sections of previous submissions where possible – whilst keeping a logical flow including new points and issues.
- 8 REP1-323/section 2 gave background to the scale and logistical impact of Net Zero which is relevant to understanding overall circumstances in which the risk assessment of policy delivery exists. REP1-323/section 3 gave background to the revised Net Zero Strategy and the legal challenge.
- 9 On September 1st 2023, the claimants announced that they have been given permission to go to a full Judicial Review hearing in the High Court¹, and this now discussed.

¹ 'Not fit for purpose': Green groups secure High Court hearing over government's net zero plans, Business Green, Sept 1st 2023,

3.1 The second NZS legal case: Delivery risk and policy gap in securing delivery of net zero, and the undisclosed Risk Tables

10 At REP1-323/24-25, I provided background on how the Court had previously dealt with policy delivery risk in the first NZS legal judgement. In summary, the judge described risk to delivery as the critical issue.

11 Following the recent permission for a full High Court hearing, a number of issues arise which are likely² to be taken before the Court, these include:

(A) Delivery risks have not been assessed in the CBDP for each policy and proposal as they should have been;

(B) The CBDP (at paragraph 26) is based on the assumption that all quantified policies and proposals will be delivered in full;

(C) The Statements of Facts and Grounds (SFG)³ from one of the claimants in the second NZS case describes that *‘in pre-action correspondence, the Secretary of State for Energy Security and Net Zero (“SSESNZ”) has revealed that he was, in fact, provided with analysis that set out in tables information about the delivery risk associated with each policy or proposal contained in the CBDP (“the Risk Tables”)*. These have not been published by SSESNZ to date.

12 **The important issue of the Risk Tables has not been before the LTC examination previously.** Points (B) and (C) are important in consideration of the LTC project and any subsequent decision on it. The recent practice of ministers has been to approve projects (for example recent roads DCO projects) based on the assumption that all quantified policies and proposals under the NZS will be delivered in full. That is, there has been an assumption in recent DCO decisions that the delivery of NZS is fully secured when quite plainly it is not. As far as the SoS decision making process for the LTC project, she/he must reach a reasoned conclusion based on the known risks to delivery of the NZS and CBDP, and based on the Risk Tables held by the Government.

13 There is an issue for the ExA that the Government so far has not disclosed the Risk Tables despite this data being essential for assessing the context of the LTC project in a properly risk-assessed consideration of the security of the delivery of the CBDP, as described below. In the absence of the Risk Tables in the public domain, I respectfully suggest that the ExA will need to highlight the matter of the Risk Tables, and their relevance to reaching a reasoned conclusion on climate impacts of the LTC, to the SoS. The relevant issues are laid out below.

² Based on Good Law Project press release, July 2023, “The Government is still failing on net zero, so we are taking them back to court”, and the Pre-Action Protocol (PAP) letter embedded within it at [REDACTED]

³ See [REDACTED]

14 The ExA does, however, have the risk assessment from the CCC in its 2023 Progress Report (REP1-323/section 4) which is also vital information with significant material weight.

3.2 *Material weight of the CCC Progress Report*

15 It should be noted that Holgate, J stated in the first Net Zero Strategy judgment:

[188] “... It is apparent that the CCC as an expert body scrutinises the work of the Secretary of State and his Department with great care and in depth. The CCA 2008 proceeds on the basis that the reports of the CCC will provide much assistance to Parliament.”

[215] “The role of the CCC is to give advice as an expert body rather than to opine on questions of law. But nonetheless the court should give considerable weight to their advice in December 2020 on the setting of CB6 that the Government’s net zero plans should include a “quantified set of policy proposals” and their criticism in October 2021 of the NZS for failing to quantify the effect of each policy and proposal on emissions reductions ([65]-[67] and [152] above).”

16 Whilst this is a planning decision, significant material weight should be given to the CCC and their 2023 Progress Report by the SoS in reaching a reasoned conclusion on the LTC with respect to section 104 of the 2008 Planning Act. It would be wrong, and challengeable, for the SoS to dismiss the CCC’s advice in its report as less than significant material weight.

4 IEMA – POLICY GUIDANCE

17 The applicant purports to follow the IEMA guidance (“**IEMA**”)⁴. At APP-153/15.3.71, the applicant says that the “*assessment of whether the GHG emissions have a material impact on the ability of the Government to meet the carbon reduction targets will include the following ... b. An evaluation against the IEMA guidance”.*

18 Also, the SoS has also purported to use and follow the IEMA guidance, and make IEMA significance assessments, in other recent DCO decisions.

19 At REP1-323/section 10, I gave contextualisation of the LTC with CBDDP surface transport and industrial residual emissions⁵. I now provide further background to this, framed within the advised methods for significance assessment found in the IEMA guidance.

⁴ “Assessing Greenhouse Gas Emissions and Evaluating their Significance”, IEMA, February 2022.

⁵ In REP1-323, I also noted that the applicant had provided a “Contextualisation against the Carbon Budget Delivery Plan” on another scheme which used surface transport and industrial residual emissions.

4.1 IEMA Contextualisation: sectoral reduction strategies

- 20 IEMA places weight on “Contextualising a project’s carbon footprint” – a substantive sub-section (section 6.4) is given in the IEMA chapter on Significance on this.
- 21 On IEMA page 26, it is stated:
- "The starting point for context is therefore the percentage contribution to the national or devolved administration carbon budget as advised by the CCC. However, the contribution of most individual projects to national-level budgets will be small and so this context will have limited value."*
- 22 IEMA goes on at Table 1 on page 28 to provide "Sources of contextual information against which projects can be evaluated".
- 23 One context in the table is “Sectoral budgets or reduction strategies”. I acknowledge that CBDDP 19 states, referring to projected residual emissions, that “*these are only projections and should not be interpreted as hard sectoral policy targets.*”. However, I am not discussing projected residual emissions as hard sectoral targets (or “sectoral budgets”), but rather as policy frameworks (or “sectoral reduction strategies”) for contextualisation of the LTC emissions– this is also the approach at REP1-323/section 10.
- 24 IEMA is advising strongly that contextualisation should be done with sectoral reduction strategies, and this is exactly what the residual emissions, and the proposals and policies to meet them, are in the CBDDP. They are not hard targets, but they do provide a sectoral reduction strategy which provides a fertile and valuable source of the EIA contextualisation of infrastructure projects.
- 25 At REP3-148/section 5, I calculated ballpark annual construction emissions for the LTC, following the two-year delay and in the absence of annual data from the applicant. The construction emissions in 2030 can be expected to be of the order of 300,000 tCO₂e (ballpark). Repeating REP3-148/35 “*Given the current 8MtCO₂e shortfall on the UK NDC for 2030, this is a significant amount of carbon to budget for. The applicant has given no evidence for how first the 8MtCO₂e NDC shortfall can be eliminated, and then how an additional 300,000 tCO₂e can be accommodated, and still meet the NDC.*”

4.2 Risk assessed sectoral reduction strategies: Industry and the 2030 NDC

- 26 However the risk assessment of the sectoral reduction strategies is vital, and additional, component of the contextualisation too. REP1-323/Table 1 showed that with the CCC risk assessment only 1.1MtCO₂e per year of the emission reductions necessary to meet the Industry residual emissions had credible plans, and 22.9MtCO₂e per year remained to be secured, in the 5th carbon budget of which the NDC year 2030 is the central year.
- 27 Therefore, the context that the SoS must consider in reaching a reasoned conclusion on the LTC and the NDC is whether the additional 300,000 tCO₂e from LTC construction in 2030

can be justified given both a shortfall of 8MtCO₂e for the NDC at the national level, and a 22.9 MtCO₂e shortfall in securing the residual emissions for the Industry sector. The Risk Tables are required to assist a reasoned conclusion. For example, if the risk assessed shortfall to the proposals and policies for securing Industry residual emissions is 10MtCO₂e on the basis of the Risk Tables, then the additional 300,000 tCO₂e could not be credibly considered as not having a material impact on meeting the NDC. This in turn means that in approving the scheme the SoS would lead to the UK being in breach of its international obligations.

- 28 Given the very real challenges in delivering deep emissions cuts, it is entirely possible that the residual emissions shortfall could be substantive eg: 10MtCO₂e/yr when CCC have already determined that there is currently a 22.9 MtCO₂e/yr shortfall based on incomplete policy development to date.

4.3 Risk assessed sectoral reduction strategies: Industry in the 5th carbon budget

- 29 REP1-323/Table 1 showed the CCC risk assessed that only 5.5MtCO₂e of the emission reductions necessary to meet the Industry residual emissions over the 5-year 5CB had credible plans, and 114.8 MtCO₂e remained to be secured.
- 30 At REP3-148/section 5, I calculated ballpark annual construction emissions for the LTC, following the two-year delay and in the absence of annual data from the applicant. The four construction years (2028-2031) within the 5CB has a ballpark of 1,322,733 tCO₂e.
- 31 Therefore, the context that the SoS must consider in reaching a reasoned conclusion is whether the additional 1,322,733 tCO₂e from LTC construction in the 5CB can be justified given a 114.8 MtCO₂e shortfall in securing the residual emissions for the Industry sector. The Risk Tables are required to assist a reasoned conclusion. For example, if the risk assessed shortfall to the proposals and policies for securing Industry residual emissions is 50MtCO₂e on the basis of the Risk Tables, an additional 1,322,733 tCO₂e could not be credibly considered as not having a material impact on meeting the 5CB. This in turn means that in approving the scheme the SoS would be in breach of the statutory duty to meet the carbon budgets and be unlawful under the Climate Change Act.

4.4 Risk assessed sectoral reduction strategies: Domestic Transport in the 5th and 6th carbon budgets

- 32 REP3-148/30(F) noted very serious issues with meeting the Domestic Transport Residual Emissions in the CBDP. The scheme introduces very substantive new operation emissions into the 5th and 6th carbon budget periods, which according to the CCC Progress Report the surface transport sector has yet to secure shortfalls of 122.6 MtCO₂e of emission reductions in the 5CB and 228.6 MtCO₂e in the 6CB.
- 33 As above, the SoS must consider the risk assessment of these shortfalls when considering the operation emissions. For example, if the risk assessed shortfall to the proposals and policies for securing Domestic Transport residual emissions is 50MtCO₂e in the 5CB and

100MtCO₂e in the 6CB on the basis of the Risk Tables, the additional operational emissions could not be credibly considered as not having a material impact on meeting the 5CB and the 6CB/ This in turn means that in approving the scheme the SoS would be in breach of the statutory duty to meet the carbon budgets, and be unlawful under the Climate Change Act.

4.5 IEMA Contextualisation: Existing and emerging national and local policy or regulation

34 IEMA goes on at Table 1 on page 28 to provide another context “*Existing and emerging national and local policy or regulation*” and states an advantage of such contextualisation is that “*Policy should be compatible with the UK’s national GHG commitments and actions to achieve those*”.

35 The CBDP provides policy which the SoS has presented to parliament as “*compatible with the UK’s national GHG commitments and actions to achieve those*”, notwithstanding the identified shortfalls for the NDC and sixth carbon budget also presented to parliament in the CBDP, and the current legal case against the CBDP. And, the CCC Progress report provides the latest detailed analysis of progress, or lack of it, towards those sectoral reduction strategies. The judge in the first NZS legal case fully endorses, and legally approves, the critical expert role of the CCC by stating that their advice must be given “considerable weight”. Therefore all of this is relevant as existing and emerging national and local policy or regulation for IEMA contextualisation.

36 The point again, is that this is not general background material, but consideration of risk assessed data from the CBDP is vital information which the SoS must consider in reaching a reasoned conclusion on the LTC project.

4.6 IEMA summary

37 The applicant has adopted the IEMA guidance for significance assessment, but it has failed to apply the guidance for contextualising the GHG emissions from the project. Currently, it is not possible to reach a reasoned conclusion on the significance assessment because the applicant has not provided the contextualisation of genuinely considering if the large, additional GHG emissions can fit within the CBDP sectoral residual emissions, when these are properly risk assessed. Whilst the sectoral residual emissions are not considered a hard target, if the GHG emissions do not fit, then other sectors must make up the shortfall and there must also be a reasoned conclusion from the SoS of why this could possibly be acceptable in the wider context of delivering the whole CBDP.

38 In short, where large additional emissions are proposed for a project, the Secretary of State must address both the current failures to deliver on sectoral reduction strategies as identified in the CCC Progress report, the shortfalls in delivering existing national policy identified in the CBDP (ie the shortfalls for the NDC, and the 5CB and 6CB), and the risk to proposals and policies in the CBDP (her/his own Risk Tables), in making her/his significance assessment.

Dr Andrew Boswell,
Climate Emergency Policy and Planning, September 18th 2023