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DEADLINE D5

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.

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1 INTRODUCTION

- 1 This submission provides comments on the Applicant's "9.89 Responses to the Examining Authority's ExQ1 Appendix A – 1, 2, 3" [REP4-188].
- 2 I first provide a section with updates on the legal and policy context since deadline D4.

2 PRIME MINISTER'S SPEECH ON NET ZERO ON 20TH SEPTEMBER 2023

- 3 The Prime Minister's speech¹ on Net Zero on 20th September 2023 allows the sale of petrol and diesel cars to continue until 2035, instead of 2030. This has impacts on both the carbon emissions and nitrogen deposition from the road transport system. Although the details need to be calculated, this new policy must be considered for the **increased** impacts of the scheme on both nitrogen deposition and on climate change, as discussed below.

2.1 Impact on GHG emissions

- 4 APP-153, 15.3.39 ("6.1 Environmental Statement Chapter 15 – Climate") states that emissions were calculated using the Emissions Factors Toolkit (EfT), version 11². This no longer provides a worst-case calculation for the operational emissions from the scheme in the 5th and 6th carbon budgets and beyond. Following the Prime Minister's policy change, the GHG emissions need recalculating with a revised version of the EfT toolkit.
- 5 The Prime Minister's policy change will also result in higher levels of nitrogen deposition. This will have increased impact of nitrogen deposition to sensitive ecosystems, and the applicant must update the relevant parts of the ES.

2.2 Impact on BCR

- 6 The additional emissions from the Prime Minister's policy change will have an impact on the BCR. The BCR for the LTC is already poor, and will become worse as a result of the policy changes when additional GHG costs are factored in.

2.3 Need for revised Risk Tables for the CBDP

- 7 I already notified the ExA that that the second NZS legal case has now gained permission for a full High Court hearing (CEPP, D4 submission, [REP4-361], section3) and that the Court has been made aware of the existence of undisclosed Risk Tables for the delivery risks of the CBDP.

¹ <https://www.gov.uk/government/speeches/pm-speech-on-net-zero-20-september-2023>

² Department for Environment, Food & Rural Affairs, 2021

- 8 As of writing, and since the Prime Minister’s announcement, a legal letter³ has been sent to the Net Zero Secretary, Claire Coutinho, suggesting that Good Law Project (“GLP”) is likely to challenge, in the High Court, the Government’s backsliding on Net Zero. Of relevance here is that GLP requests by September 28th disclosure of “the updated Risk Tables, and any overarching analysis of the risk to achieving the carbon budgets that reflects the new package of policies and proposals”.
- 9 In my September 18th D4 submission [REP4-MMM] on the LTC, I already indicated that the existing CBDP Risk Tables (ie: before the Prime Minister’s announcement) were important to the decision-making process as “there has been an assumption in recent DCO decisions that the delivery of NZS is fully secured when quite plainly it is not”. The revised Risks Tables are even more relevant to the decision making on the LTC given the proposed delay to eliminating fossil fuelled vehicles on UK roads.

3 COMMENTS ON 9.89 [REP4-188]

10 The applicant’s response to ExQ1_Q2.3.1 is covered in a stand-alone section below.

3.1 ExQ1_Q2.1.1 & ExQ1_Q2.1.2

11 I reserve the right to respond in more detail on these comments at a later deadline.

3.2 ExQ1_Q2.1.3 : Electrification

12 Following the Prime Minister’s policy change, the GHG emissions need recalculating with a revised version of the EFT toolkit. Having provided a new calculation of the GHGs, the applicant needs to revise the response to the question.

3.3 ExQ1_Q2.1.4 : Emissions Factor Toolkit

13 Following the Prime Minister’s policy change, the GHG emissions need recalculating with a revised version of the EFT toolkit. Having provided a new calculation of the GHGs, the applicant needs to revise the response to the question.

³ [REDACTED]

4 ExQ1_Q2.3.1 : Carbon and Climate Considerations: R (oao) Boswell v Secretary of State for Transport

14 The ExA's question is:

ExQ1 Q2.3.1 *What are the implications of the recent Boswell v Secretary of State for Transport High Court Judgement [2023] EWHC 1710 (Admin) in relation to the treatment of carbon and climate in NSIP decision-making for the A47 Blofield to North Burlingham, A47 North Tuddenham to Easton and A47/A11 Thickthorn Junction applications for the consideration of carbon and climate matters in the LTC Examination and decision?*

15 Below, I reproduce the applicant's response in full, broken down into sections, in blue and a different font. My responses/comments are in black font.

4.1 General background to the case and the judgement

16 In document 9.89, the Applicant has mischaracterised the *Boswell* case and has selectively quoted from the judgement (only quotes from paragraph 6 of the judgement are given by the applicant). To assist the ExA, I provide paragraphs 3 to 5 of the judgement below as further relevant background:

3. The Claimant, Dr Boswell is a scientist with a background in computer modelling of complex phenomena, including climate change. The thrust of his challenge is that the Secretary of State is under a legal duty to assess the cumulation of environmental effects with other existing and/or approved projects and he acted unlawfully in failing to meaningfully assess the combined carbon emissions from the three road schemes. The particular focus of Dr Boswell's criticism at the substantive hearing of the claim was that, in coming to his view about the carbon impacts, the Secretary of State did not consider it necessary to compare the combined carbon emissions from the three A47 schemes against the UK's national carbon budgets.

4. Dr Boswell calculates that, together, the carbon emissions from the three schemes in combination with other developments in the local area, amounts to 0.47% of the UK's 6th national carbon budget). Dr Boswell contends that using up almost half a percent of the UK's 6th carbon budget for relatively small schemes in a small area of Norfolk is significant and leaves very limited emission space for other sectors of the economy. Considerable amounts of carbon will need to be offset somewhere else in the economy if the road schemes are built.

5. The question for the Court is whether the approach adopted by the Secretary of State in assessing cumulative impacts breaches the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (2017/572). If it does, the Court must then decide whether a fallback position adopted by the Secretary of State, of assessing the cumulative impacts for the second and third road schemes, is

sufficient to correct any legal deficiency in the earlier decision making. {emphasis added}

17 Key points to note are:

- The case is about, and only about, whether the combined (or cumulative) carbon emissions from the three road schemes were lawfully assessed under the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (2017/572).
- The *Boswell* judgement notes at paragraph 45, quoted below, that all parties agreed that a cumulative assessment was necessary.

Whatever may have been the position earlier on in the proceedings, by the substantive hearing before me there was no challenge by the Secretary of State/National Highways to the proposition that the three schemes are related projects and a cumulative assessment was required. Before the Court, the core dispute between the parties was, on analysis, the adequacy of the assessment of cumulative impacts. .
{emphasis added}

- On the last sentence, my position remains that no lawful cumulative assessment had been conducted at all. On other words, there is no assessment at all, adequate or not, and this remains the basis of my claim.
- The Court was clear that the combined carbon emissions from the A47 schemes had not been compared against the UK's national carbon budgets, and the Secretary of State had not considered it necessary (*Boswell*, 3 above).
- Claims in 9.89 that I have asserted in *Boswell* that a particular form of cumulative assessment was required are false. The only point I have claimed is that some form of cumulative assessment was required, and the form chosen in the A47 scheme Environmental Statements cannot lawfully have been considered to be a cumulative assessment. In other words, no lawful cumulative assessment had been conducted at all.
- This is the issue of law which was under consideration in the *Boswell* High Court case, and I am now seeking permission to appeal the judgement on this issue of law.

4.2 Applicant's overview

Response:

In R (oao) Boswell v Secretary of State for Transport [2023] EWHC 1710 (Admin), the High Court held that the approach to assessment of the cumulative impacts of carbon emissions for three road schemes along the A47 in Broadland, Norfolk was consistent with the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (the EIA Regulations) and therefore lawful.

Central to the court's decision was the finding that the claimant's case was, '... on analysis, a challenge to the acceptability of the carbon impacts from the three road schemes' – which was 'not a matter for the courts' – rather than a challenge to the method of assessing those impacts. The Applicant considers this analysis to be true of the submissions made by Dr Boswell on behalf of Climate Emergency Policy and Planning (CEPP) in respect of this application.

As regards the acceptability of the Project's carbon impacts, the Applicant has set out within the Application how the Project represents a step change in approach for a road scheme of this scale, in terms of the scope and nature of the measures which it is committing to deliver to reduce emissions during the construction and operation of the Project. Together with the policies which the Government has set out in its Transport Decarbonisation Plans, these measures ensure that the Project is aligned with a trajectory to net zero and that the Project's emissions would not therefore be significant, in accordance with relevant guidance. {emphasis added}

18 The above overview from the Applicant mischaracterises the *Boswell* case. The case is **not** a challenge to the “*acceptability of the carbon impacts from the three road schemes*”. As explained above, it is solely concerned with whether any lawful cumulative assessment has been conducted at all. Therefore, it is also false inference of the applicant to claim that my submissions on the LTC amount to a challenge to the acceptability of the carbon impacts from the scheme. My submissions on the LTC relate to whether the environmental statement and information before the ExA provides the necessary and vital information for the Secretary of State to make a lawful decision on the LTC, in particular on the matter of whether the SoS will be able to make a reasoned conclusion on the LTC relating to s104(4), s104(5) and s104(6) of the 2008 Planning Act.

19 With respect to the Applicant's final paragraph above:

- The applicant has not set out mitigation measures to reduce the operational emissions from the LTC scheme. Further, these are subject to very wide-ranging influences which are not under the applicant's control as has been aptly demonstrated by the Prime Minister's statement of September 20th which is announced policy changes that act against the mitigation of the operational emissions in the LTC (by delaying the phase out of fossil fuelled vehicles).

- The applicant cannot in all seriousness claim that the project aligns with a trajectory towards net zero. My previous submissions have laid out why the assumption in recent DCO decisions that the delivery of NZS is fully secured is false, and that for 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 (updated for the recent policy changes from the Prime Minister).

4.3 *Applicant's comments on judgment 6(i)*

Turning to the detailed reasons for the court's rejection of the claimant's case in Boswell, the court confirmed that:

'The question of what impacts should be addressed cumulatively; how the cumulative impacts might occur; whether the effects are likely to be significant and if so, how they should be assessed are all matters of evaluative judgement for the Secretary of State' (para 6(i) of the judgement).

Applicant's comment:

In Environmental Statement (ES) Chapter 15: Climate, the Applicant has assessed the cumulative effects of the Project in terms of greenhouse gas (GHG) emissions (see Section 15.7). The approach reported in the ES is consistent with that taken for other projects on the strategic road network, including the three A47 schemes considered in Boswell. The assessment compares the net GHG emissions of the Project during construction and operation against the national carbon budgets. Net GHG emissions are calculated by deducting the 'do-minimum' scenario, which presents the GHG emissions of the road network without the Project over the appraisal period and accounts for traffic growth and for traffic generated by developments classed as near certain or more than likely within the study area over the appraisal period, from the 'do-something' scenario, which includes GHG emissions from both construction and operation of the Project.

In Boswell, Dr Boswell argued that the correct method of assessing the cumulative effects of each of the A47 schemes in terms of GHG emissions, was to deduct from the 'do-minimum' scenario the GHG emissions of the other A47 schemes. This approach would necessarily result in the reporting of a higher figure for cumulative GHG emissions in relation to each scheme. Dr Boswell on behalf of CEPP has also argued that this approach should be taken in relation to the application for the Project [REP1-323]. The Applicant understands Dr Boswell to be suggesting that, to arrive at a figure which represents the Project's cumulative GHG emissions, traffic generated by other developments within the study area over the appraisal period should be ignored in the 'do-minimum' scenario.

As noted above, the Applicant has undertaken its carbon assessments for the Project in a manner which is consistent with that taken for other projects on the strategic road network, including the three A47 schemes considered in Boswell. The rationale for this approach is set out in Section 15.7 of the ES. The Secretary of State has confirmed that the Applicant's approach is valid across a number of applications for development consent, including most recently the decision letters for the A47 Wansford to Sutton Development Consent Order and the A57 Link Roads Development Consent Order. The High Court has also now confirmed in Boswell that this approach is lawful. In the Applicant's view, these are matters to which the Examining Authority and Secretary of State should have regard in examining and determining the Application. {emphasis added}

- 20 In the first paragraph above, Applicant describes how scheme-only operational emissions have been calculated ('net GHG emissions') for the LTC project and compared against the national carbon budgets. This is a solus assessment of the emissions, and not a cumulative assessment. And as this is the only assessment made of GHGs, no cumulative assessment has been made.
- 21 As above, I have not asserted in *Boswell* that a particular form of cumulative assessment is required. I have only claimed that no cumulative assessment was done. So the statement that I have "*argued that the correct method ...*" is a mischaracterisation of my claim.
- 22 Further the applicant's claim that I argued that a "correct method" of mine should be used on the LTC project is also false. At [REP1-323]/97, I wrote "*I wish to emphasise that my position remains that categorically, there is no assessment of the impact of cumulative carbon emissions in the ES.*" That remains my position.
- 23 I have not proposed any method for assessing the cumulative emissions of the LTC project. I have merely pointed out the applicant has not carried out such an assessment by any method.
- 24 With respect the final paragraph and final sentence quoting above, I am now seeking permission to appeal the *Boswell* judgement on this issue of law.

4.4 Applicant's comments on judgment 6(ii)

'The carbon emissions from each road scheme were calculated and compared against the UK's national carbon budget' (*para 6(ii) of the judgement*).

Applicant's comment:

The Applicant has calculated and compared Project emissions during construction and operation against the UK's national carbon budgets. In Boswell, the court accepted that the carbon budgets were, in effect, cumulative, being targets for the reduction of greenhouse gas (GHG) emissions for the whole of the UK economy and society rather than targets for any given sector. For that reason, an assessment of the Project's emissions against the UK's national carbon budgets was an (or, indeed, one) acceptable and lawful form of cumulative assessment.

- 25 I submit that comparing scheme-only GHG emissions against the national carbon budget does not comprise an assessment of cumulative GHG emissions. The applicant argues that comparing with national carbon budgets makes the comparison "inherently cumulative". However, this is false as the statutory emissions within each carbon budget are not a, predicted, factual account of cumulative emissions for all sources in the UK at the time of the budget. The carbon budgets are a statutory target for the UK's net carbon account, which may or may not be achieved. And as described elsewhere, delivery of the carbon budgets is currently subject to significant, unknown and undisclosed risks.

4.5 Applicant's comments on judgment 6(iii)

'Consideration was given to the cumulative impacts of carbon emissions from the three road schemes. A figure was produced for the combined emissions from the three schemes (and other local schemes), thereby satisfying the requirement of Schedule 4 paragraph 5 of the Regulations for a 'description' of the likely significant effects of the development on the environment resulting from the cumulation of effects with other existing and/or approved projects. The figure produced was not however assessed for significance against the UK's national carbon budgets. This was a matter of evaluative judgement for the Secretary of State.' (*para 6(iii) of the judgement*).

Applicant's comment:

In Table 15.16 of ES Chapter 15: Climate [APP-153], the Applicant has presented the 'Do Something' figure for GHG emissions with the Project. As explained in Table 15.3 of ES Chapter 15, the future baseline in the Do Something scenario accounts for traffic growth, and for traffic generated by developments (new housing and other developments such as employment, retail and leisure sites) classed as near certain or more than likely (as defined by Transport Analysis Guidance (TAG) Unit M4) within the study area between 2030 and 2045 as well as the full 60-year appraisal period. Per the decision in Boswell, the figures presented in Table 15.16 of ES Chapter 15 therefore satisfy the requirement of Schedule 4, paragraph 5 of the EIA Regulations for a 'description' of the likely significant effects of the development on

the environment resulting from the cumulation of effects with other existing and/or approved projects.

- 26 The applicant's comment above reveals that for the LTC, the applicant has **only** produced a description of the cumulative effects of the project. The applicant has **not** undertaken a cumulative assessment of the impacts of the project on climate change based on that description. (As above, the assessment which the applicant has carried out is a solus assessment).

4.6 Applicant's comments on judgment 6(iv)

'The Secretary of State's reasons for not comparing the combined emissions against the national target were, broadly speaking, threefold: 1) there is no single prescribed approach to assessing the cumulative impacts of carbon emissions; 2) the approach to assessing the cumulative impact of carbon emissions differs from that of other environmental impacts because carbon impacts are not geographically limited to a local area and 3) the appropriate basis for assessing the significance of the emissions was to compare them against the UK's national carbon budgets' (*para 6(iv) of the judgement*).

Applicant's comment:

The Applicant's approach of assessing Project emissions against the national carbon budgets is sound and lawful. The Applicant has not presented its assessments on the alternative basis argued for in Boswell, which would as noted be to omit traffic growth unrelated to the Project and / or traffic generated by future developments in the calculation of the do-minimum scenario, nor has it prepared such an assessment for the Project notwithstanding Dr Boswell's submissions (on behalf of CEPP) to that effect. Given the decision in Boswell, the Applicant does not consider that those submissions should carry weight in the decision to grant or refuse consent for the Project.

- 27 As above, I have not asserted in *Boswell* that a particular form of cumulative assessment is required. I have only claimed that no cumulative assessment was done. So the statement that the applicant has "*not presented its assessments on the alternative basis argued for in Boswell*" is referring to something that does not exist, as I have not argued for any such 'alternative basis', and is therefore false. With respect to cumulative emissions, my argument remains that categorically, there is no assessment of the impact of cumulative carbon emissions in the LTC ES.

4.7 *Applicant's comments on judgment 6(v)*

'Recent caselaw confirms that, on the basis of current policy and law, it is permissible for a decision maker to look at the scale of carbon emissions relative to a national target. The proposition that the impact of carbon emissions is not limited to a geographical boundary is a scientific assessment to which the Court should afford respect' (*para 6(v) of the judgement*).

Applicant's comment:

As explained above, the approach of comparing the Project's emissions against national carbon budgets is compliant with the EIA Regulations and therefore lawful according to the decision in Boswell. Accordingly, the Examining Authority and Secretary of State are entitled to conclude that the approach adopted by the Applicant in this case, which involves the same comparison between the Project's emissions during construction and operation against the national carbon budgets, is sufficient and appropriate as a matter of law.

28 The applicant has failed to reproduce paragraph 79 of the *Boswell* judgment:

"The decision makers chose to assess the significance of carbon emission against a national target (UK carbon budgets). Other benchmarks were considered but discounted. The benchmark for the assessment of significance was a matter of judgement for the decision maker and was not challenged before the Court."
{emphasis added}

29 As the Judge noted above, there was no challenge to the use of the national carbon budget as the denominator (i.e. the benchmark) in a comparison for assessment. My challenge/claim remains, very simply and as above, that comparing scheme-only GHG emissions against the national carbon budget does not comprise an assessment of the impacts of cumulative GHG emissions.

4.8 *Applicant's comments on judgment 6(vi)*

'Accordingly, there is a logical coherence to the Secretary of State's decision not to compare the combined carbon emissions from local road schemes against the UK's national carbon budget, when those carbon emissions do not have a local geographic limit. Independent guidance counsels against the arbitrary cumulation of projects in these circumstances.' (*para 6(vi) of the judgement*).

Applicant's comment:

The Applicant has not sought to compare the combined emissions from multiple local road or other schemes, including the Project. Such an approach would, as explained by the court in Boswell, be arbitrary. Dr Boswell on behalf of CEPP appears to suggest [REP1-323] that this means '... categorically, there is no assessment of the impact of cumulative carbon emissions in the ES'. However, it must be recognised that those submissions did not find favour and were rejected in Boswell.

- 30 The applicant has laid out in its comments under 6(i) above how it has constructed “Do Minimum” and “Do Something” scenarios of the project with the GHG emissions from “*the road network without the Project over the appraisal period and accounts for traffic growth and for traffic generated by developments classed as near certain or more than likely within the study area over the appraisal period*” being in the “Do Minimum” scenario. This construction of the “Do Minimum” and “Do Something” scenarios is **not** arbitrary and depends upon detailed analysis as laid out by the applicant in its application (for example, by the applicant’s production of a longlist of developments [APP-483] and a shortlist of developments [APP-484]).
- 31 As submitted above, the Applicant describes in its comments above how scheme-only operational emissions have been calculated (‘net GHG emissions’) for the LTC project and compared against the national carbon budgets. This is a solus assessment of the emissions, and not a cumulative assessment. And as this is the only assessment made of GHGs, no cumulative assessment has been made.

4.9 Applicant’s comments on judgment 6(vii)

‘Dr Boswell’s concerns about the limited value of the exercise undertaken, of assessing the significance of an individual development project against national carbon target, is acknowledged in independent guidance and in recent caselaw. However, on the state of present scientific knowledge, such an approach cannot be considered unlawful. Dr Boswell’s case is, on analysis, a challenge to the acceptability of the carbon impacts from the three road schemes. Acceptability of impact is not a matter for the Courts, who must be astute to avoid being drawn in the arena of the merits of climate decision making’ (*para 6(vii) of the judgement*).

Applicant’s comment:

Dr Boswell on behalf of CEPP continues to raise concerns regarding the assessment undertaken by the Applicant in relation to this application. It should, however, be noted that those same concerns were ultimately rejected by the court in Boswell, which confirmed that the ‘approach cannot be considered unlawful’. As explained above, the Applicant considers that the submissions made by Dr Boswell in this case can again be characterised as a challenge to the acceptability of the carbon impacts from the Project, which are matters for the decision maker to evaluate on a case by case basis. The Applicant has set out in detail within the application the reasons why the carbon emissions of the Project are consistent with the Government’s ability to meet its binding carbon reduction targets and therefore acceptable, having regard to the extensive mitigation measures secured by the application for the Project together with the wider impact of Government policies to reduce road user emissions over time.

In summary, therefore, the Applicant considers that the Examining Authority and Secretary of State can proceed with confidence on the basis that the approach to the cumulative assessment of carbon emissions undertaken in the Application, which is reported in ES Chapter 15: Climate [APP-153], complies with the EIA

Regulations and is lawful. Submissions by Interested Parties seeking to question or cast doubt upon the assessment approach must be treated with a high degree of caution following the decision in Boswell. {emphasis added}

- 32 The above overview from the Applicant mischaracterises the *Boswell* case. The case is not a challenge to the “*acceptability of the carbon impacts from the three road schemes*”. As explained above, it is solely concerned with whether lawful cumulative assessment has been conducted at all. Therefore, it is also false inference of the applicant to claim that my submissions on the LTC amount to a challenge to the acceptability of the carbon impacts from the scheme. My submissions relate to whether the environmental statement and information before the ExA provides the necessary and vital information for the Secretary of State to make a lawful decision on the significance of the GHGs from the LTC, and in particular on the matter of whether the SoS will be able to make a reasoned conclusion on the GHGs from the LTC relating to s104(4), s104(5) and s104(6) of the 2008 Planning Act.
- 33 Further, the applicant makes a huge generalisation in the final underlined sentence above. The *Boswell* case is only about whether lawful cumulative assessment has been conducted at all. It has no bearing on:
- Any matter raised in my own submissions, except the single matter of whether a lawful cumulative assessment has been conducted at all. As this issue is only a small part of my submissions on the LTC, there are a large number of other issues raised, relating to GHGs from the scheme, which do not rely on the *Boswell* judgement at all.
 - Any matter raised in submissions from other IPs, except the single matter of whether a lawful cumulative assessment has been conducted at all. My own reading of the submissions from others is that there are a large number of other issues raised by these IPs, relating to GHGs from the scheme, which do not rely on the *Boswell* judgement at all.

Dr Andrew Boswell,
Climate Emergency Policy and Planning, October 3rd 2023