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Examination Principle Issues	<b>Climate Change</b>

## DEADLINE D6

**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 the ExA with an update on the *Boswell* legal case which was subject of the ExA’s question ExQ1\_Q2.3.1.

### **2 UPDATE ON *R (Boswell) v Secretary of State for Transport [2023] EWHC 1710***

2 On October 18th 2023, Lord Justice Coulson granted permission for the case to proceed to the Court of Appeal, which could potentially overturn the Thornton J judgement, noting in his Order that the appeal court case ‘*has a real prospect of success*’. Coulson, LJ’s order is appended at Appendix A. I will keep the ExA and parties informed when a date for the Appeal hearing has been agreed. It is unlikely that a judgement will be available before the examination closes on 20th December 2023.

3 The applicant has commented on the legal case *R (Boswell) v Secretary of State for Transport [2023] EWHC 1710* in the Applicant’s “9.89 Responses to the Examining Authority’s ExQ1 Appendix A – 1, 2, 3” [REP4-188]. I responded to this in [REP5-115], section 4, where I noted:

- (A) the Applicant has mischaracterised the *Boswell* case (see [REP5-115]/4.2) and has selectively quoted from the judgement - the case is **not** a challenge to the “*acceptability of the carbon impacts from the three road schemes*”. As explained, it is solely concerned with whether any lawful cumulative assessment has been conducted at all.
- (B) The Applicant describes (see [REP5-115]/4.3) 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. As this is the only assessment made of GHGs, no cumulative assessment has been made. Thus the Applicant has assisted in demonstrating that they have carried out no cumulative assessment of the GHG effects.
- (C) In lieu of carrying out the required cumulative assessment, the applicant argues that comparing the solus enumeration of carbon emissions with national carbon budgets makes the comparison “inherently cumulative” (see [REP5-115]/4.4): my position remains that this is false.
- (D) The applicant reveals (see [REP5-115]/4.5) that for the LTC, it 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. Again, the Applicant assists in demonstrating that they have carried out no cumulative assessment of the GHG effects.
- (E) The applicant refers to a non-existent method of cumulative assessment (which it falsely purports that I advocate) in its comments. The applicant misses the point that my argument remains that categorically, there is no assessment of the impact of cumulative carbon emissions in the LTC ES (see [REP5-115]/4.6).
- (F) As the Judge noted, there was no challenge to the use of the national carbon budget as the denominator (i.e. the benchmark) in a comparison for assessment (see [REP5-115]/4.7).
- (G) The Applicant describes (see [REP5-115]/4.8) 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 In [REP4-188], the Applicant concluded with this huge generalisation statement (and see [REP5-115]/4.9):

*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}

- 5 The applicant is no longer in the position to make these claims, and especially the underlined claim on the basis on the Thornton, J judgement.
- 6 Further, I have raised the issue of the assessment of cumulative carbon emissions, at the heart of the *Boswell* case, from the outset of the DCO Examination. For example:

(A) my relevant representation of 16th February 2023<sup>1</sup> stated:

*“(4) Significance of GHGs in Chapter 15 is assessed solely on “scheme-only” (DS-DM) estimates [percentage figures in Table 15.17]. This does not comply with the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 which require that the applicant must provide the cumulative impacts of the project and other existing and/or approved projects. The section “Intra-project effects” under section 15.7 does not address this issue because the intra-project effects are expressed in both the DS and DM forecasts, and are subtracted out before the assessment based upon DS-DM.*

{Emphasis added}

(B) I stated REP3-148, I stated at 22 and 23:

*“22 I have done forensic analysis of the EIA Climate Change chapters provided by the applicant on a number of schemes: a common approach is used on all the DCO road applications. My analysis looks at how the numbers move “through the system” from the traffic modelling outputs to the tables published in the ES. The analysis has been both scientific and legal. In scientific terms, I remain completely convinced that no assessment of the climate change impacts of the cumulative carbon emissions associated with the scheme has been made in Chapter 15 for the LTC.*

*23 With respect to legal matters, my lawyers and I have used the same forensic analysis to examine each step in the processing of the data and the presentation in the tables, and any assessment made, and also the associated decision-making process by the Secretary of State, against the relevant law and case law. On the basis of this, my lawyers have applied (on July 28th*

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<sup>1</sup> As on PINS website at <https://infrastructure.planninginspectorate.gov.uk/projects/south-east/lower-thames-crossing/?ipcsection=relreps&relrep=50751>

*2023) with what we submit is an arguable case for permission to appeal the Boswell judgement above”.*

{Emphasis added}

- 7 Lord Justice Coulson’s Order confirms that it is an arguable case.
- 8 It remains my position that categorically, there is no assessment of the climate change impact of cumulative carbon emissions in the ES. The arguments in terms of the presentation of data, and the assessment which is actually made (not a cumulative assessment) are identical in the LTC Environmental Statement as with the *Boswell* case. As stated in my RR, the carbon emissions from other related and locally committed development are expressed in both the DS and DM forecasts; however, these carbon emissions are subtracted out before the significance assessment which is based solely upon a carbon emissions figure based on the DS-DM subtraction.
- 9 No evidence which I have provided on the LTC application, except the above on there being no lawful assessment of cumulative carbon emissions, depends upon the success of my appeal.
- 10 With Lord Justice Coulson’s permission to appeal, the ExA must take note of the fact that this issue remains live and has yet to be resolved by the Courts: it now will not be resolved before the close of the examination. Further, the judgment of Thornton J cannot be relied upon to support any assertion by the applicant or any parties whilst the matter is still being resolved by the Court of Appeal.

**Dr Andrew Boswell,  
Climate Emergency Policy and Planning, October 31<sup>st</sup> 2023**

- 3 **APPENDIX A: ORDER made by the Rt. Hon. Lord Justice Coulson, 18<sup>th</sup> OCTOBER 2023 (page 1 of 2 only)**

First Appeal

PTA Template 269C1 - First Appeal



IN THE COURT OF APPEAL, CIVIL DIVISION

REF: CA-2023-001482



R (Boswell) –v– Secretary of State for Transport & Arr

CA-2023-001482

**ORDER made by the Rt. Hon. Lord Justice Coulson**

On consideration of the appellant's notice and accompanying documents, but without an oral hearing, in respect of an application for permission to appeal

**Decision:**

Permission to appeal: **GRANTED**

For the avoidance of doubt, the Court of Appeal will **NOT** determine for itself the so-called "secondary issue".

**Reasons**

1 The appellant's grounds set out what the appellant describes as "a single ground of appeal". The judge may well have been right in her conclusion but I consider that the contrary case making up this single ground has a real prospect of success.

2 That view is further confirmed by the following: i) Holgate J granted JR permission, so recognised the arguability of this point; ii) the judge herself described parts of the relevant assessment as "unhelpfully expressed"; and iii) the judgment in relation to the assessment of combined carbon emissions has potentially wide implications.

2 I refuse to grant permission for the appellant to raise what the skeleton argument describes as the "secondary issue". This is not raised in the Grounds of Appeal because the judge made no determination upon it. In the circumstances, and in particular in the absence of any first instance determination of the issue, it would not be appropriate for the Court of Appeal to determine the point *de novo*. Furthermore, that would inevitably cause additional work, additional cost and potential delay before the appeal on the principal point is heard and resolved.

3 Accordingly, I grant permission to appeal on the so-called "primary issue" only.

**Information for or directions to the parties**

**Mediation:** Where permission has been granted or the application adjourned:

Does the case fall within the Court of Appeal Mediation Scheme (CAMS) automatic pilot categories (see below)? NO

Pilot categories:

- |  |  |
|--|--|
| <ul style="list-style-type: none"><li>• All cases involving a litigant in person (other than immigration and family appeals)</li><li>• Personal injury and clinical negligence cases;</li><li>• All other professional negligence cases;</li><li>• Small contract cases below £500,000 in judgment (or claim) value, but not where principal issue is non-contractual;</li></ul> | <ul style="list-style-type: none"><li>• Boundary disputes;</li><li>• Inheritance disputes.</li><li>• EAT Appeals</li><li>• Residential landlord and tenant appeals</li></ul> |
|--|--|

If yes, is there any reason not to refer to CAMS mediation under the pilot? NO

If yes, please give reason:

Non-pilot cases: Do you wish to make a recommendation for mediation? NO

**Where permission has been granted, or the application adjourned**

- a) time estimate (excluding judgment)
- b) any expedition

Signed: BY THE COURT

Date: 17 October 2023