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## DEADLINE D9A

**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 D9A.....	1
Contents .....	1
1 INTRODUCTION.....	2
2 POSITION STATEMENT (D9A): <i>R (Boswell) v Secretary of State for Transport [2023] EWHC 1710</i> .....	2
3 FURTHER REVISION TO CARBON AND ENERGY MANAGEMENT PLAN (CEMP).....	3
3.1 Differences between CEMP v3.0 and v4.0.....	3
4 RESPONSES TO APPLICANT’S RESPONSES IN [REP9-276] .....	3
4.1 Security of the Carbon and Energy Management Plan and the Project’s carbon limit and the use of the carbon limit as reasonable worst case for EIA.....	3
4.2 Robustness of the emissions quantification, basis for emission savings and risk assessment of carbon limit.....	4
4.3 Failure to remain within the secured carbon limit and corrective actions.....	5
4.4 Non-legality of using CEMP based data for EIA assessment.....	7
4.4.1 Notification of error in Environmental Statement following revised Carbon and Energy Management Plan .....	7
4.5 Hydrogen.....	7
4.6 Tyndall Centre Budgets.....	8
5 CLOSING SUMMARY .....	8
5.1 Greenhouse Gas emissions from the scheme .....	8
5.2 Carbon and Energy Management Plan (CEMP).....	10
5.3 Information withheld by the applicant.....	10

## 1 INTRODUCTION

- 1 This submission provides the ExA with the rolling position statement on the *Boswell* legal case as requested in the ExA's question ExQ3\_Q2.1.1.
- 2 As of writing the examination library document has not been updated with the deadline D9 documents, so I do not have relevant document codes. I refer to:

(A) "7.19 Carbon and Energy Management Plan, v4.0" as [REP9-239]; and

(B) "9.214 Applicant's comments on Interested Parties' submissions at Deadline 8" as [REP9-276]; and

(C) "9.188 Post-event submissions, including written submission of oral comments, for ISH12" as [REP8-111]; and

(D) My deadline D9 submission as [REP9-301].

- 3 This submission responds to the applicant's responds to [REP9-239], [REP8-111] and [REP9-276].

- 4 A closing summary statement is provided in the final section.

## 2 POSITION STATEMENT (D9A): *R (Boswell) v Secretary of State for Transport [2023] EWHC 1710*

- 5 This section is the rolling position statement on the *Boswell* appeal case as requested in the ExA's question ExQ3\_Q2.1.1.

- 6 "Nil return"

### 3 FURTHER REVISION TO CARBON AND ENERGY MANAGEMENT PLAN (CEMP)

7 I note that the applicant has provided a further revision to the Carbon and Energy Management Plan (“CEMP” [REP9-239]), now at v4.0.

#### 3.1 Differences between CEMP v3.0 and v4.0

8 The only significant difference between v3.0 and v4.0 is that the definitions of “Construction” and “Operation”. It is noted that the part of the removed definition of “Construction” states “*Activity on and/or offsite required to implement the Project.*”

9 The ExA is requested to note this.

10 I request that ExA requests that the the Applicant explains why these definitions have been removed.

11 I will refer to the removal of these definitions later.

### 4 RESPONSES TO APPLICANT’S RESPONSES IN [REP9-276]

12 Section 2 of [REP9-276] “9.214 Applicant's comments on Interested Parties' submissions at Deadline 8” is in response to my submission [REP8-174]. I will follow the applicant’s headings for clarity.

13 In general, I do not accept the applicant’s submissions in [REP9-276] in the whole. However, rather than answer every point which often would mean referring back to previous submission which I have made, I make best effort below to just respond to emphasise points and add new material (and therefore to avoid circular arguments).

#### 4.1 Security of the Carbon and Energy Management Plan and the Project’s carbon limit and the use of the carbon limit as reasonable worst case for EIA

14 The applicant attempts to posit in this section that because there are DCO Requirements which require certain things to happen at certain points that full decarbonisation as claimed by the CEMP can be proved to be secured. I wish to emphasise, in addition to what I have already said, that these DCO Requirements only provide additional administrative steps in an oversight process. They do not provide public scrutiny, and there is no guarantee that there will be adequate checking of the full decarbonisation being claimed as they do not ensure in any evidence-based that the full decarbonisation being claimed in the CEMP is achieved.

15 For example, approval in writing by the Secretary of State (SoS) of the second iteration CEMP provides no scientific guarantee that the claimed decarbonisation is achievable. It amounts to no more than an administrative sign-off step.

16 This whole section of the [REP9-276] response is flawed by placing dependence on these process administrative steps to substitute for rigorous evidence-based proof.

**4.2 *Robustness of the emissions quantification, basis for emission savings and risk assessment of carbon limit***

17 The applicant is referred to my analysis provided in my deadline D9 response [REP9-301] which was not available when it wrote this section. I show the CEMP v3.0 proposals to be very shaky, unproven and untrustworthy. The applicant does help their case by referring me to the updated CEMP v3.0 as the extent of inconsistencies and errors uncovered in it led me to have to make a statement of "no confidence" in competence of those involved in the CEMP production [REP9-301/section 3.11].

18 The applicant refers to Requirement 16 of Schedule 2 of the draft DCO which requires that *"no part of the authorised development must commence until the Carbon and Energy Management Plan (Second Iteration) for that part has been submitted to and approved in writing by the Secretary of State (SoS)"*. I have already referred to this being an administrative step, and not a reliable method to prove the decarbonisation being claimed.

19 A further point is that there is no consultation to the public of the second iteration CEMP. The veracity of the CEMP is a matter of public concern. Several IPs have raised the matter at this examination. In totality, we have raised serious concerns. It is wholly unacceptable that the CEMP should then proceed through administrative steps without further public scrutiny and without the opportunity of the public to be able to comment. Material weight should be given to the lack of public scrutiny for further versions and iterations of the CEMP, and particularly in validating the claims being made for decarbonisation.

20 The applicant says it has *"also undertaken activities to assure the carbon quantification and verify its internal carbon management system."* The internal carbon management system is exactly that, and it is a black box which the public and IPs are unable to scrutinise. As laid out in previous submissions [REFS], this is not just unacceptable, it means that there can be no public scrutiny of the claimed decarbonisation.

21 The Applicant claims that *"[t]he measures adopted by the Applicant therefore demonstrate that there is no basis for CEPP's claims that the carbon commitments contained in the draft DCO have not been subject to a robust risk assessment."* The problem for the applicant here is that it has not disclosed any such risk assessment. Instead, it relies upon a description of the administrative and quality management processes in the CEMP to masquerade as a risk assessment. I do not accept that the descriptions in the CEMP of quality management processes amount to a risk assessment.

22 The applicant concludes this section *"for the reasons set out above, the carbon quantification can accordingly be considered to be comprehensive, robust, representative of industry best practice and appropriate to use within the Environmental Impact*

*Assessment.*” I disagree that the robustness of the CEMP has been proven as the applicant has not been able to show how it would secure the decarbonisation claimed in the CEMP.

- 23 Further, the applicant has designated the Project as a ‘pathfinder’ project. This alone suggests that it is experimental and will have higher risk levels than standard practice. It is therefore not “representative of industry best practice”: by the applicant’s own designation it is trying to go beyond best practice. That comes with risks to delivery which the applicant is not acknowledging. As already described in my other submissions, this higher element of risk, and the lack of proof of decarbonisation delivery, means the output of the CEMP as CBN04 is not a trustworthy figure to transfer into the EIA Assessment: it does not provide a “reasonable worst case”, and nor has the modelling, or forecasting, of the figure been subject to proper validation. The EIA assessment of GHGs which relies on the CEMP must be considered unlawful.

#### 4.3 *Failure to remain within the secured carbon limit and corrective actions*

- 24 The applicant discusses my response to its claims at ISH12 on “*the use of contract defects to remedy contractual emission targets not being achieved*” [REP9-276/top of PDFp9]. However, the clear outcome of the ISH12 exchange (as noted in REP8-174/28(G) ) was that applicant was making a claim that such contract defects (relating to decarbonisation) was “very unlikely”. As a result of the perceived unlikeliness, the applicant appeared not to have considered what to do if a decarbonisation failure did occur. At ISH12, the applicant was unable to give any reassurance as to how any contracted decarbonisation lost through a contract defect would be secured.
- 25 Now the applicant appears to be retrofitting two different and new arguments. The emergence of these new arguments, of course, indicates that the applicant now acknowledges that in reality such an experimental “pathfinder” project will encounter failures (contracts defects relating to decarbonisation), and in fact they are likely to occur.
- 26 The first retrofit argument is that, where at ISH12 the applicant did not raise “compensation”, it is now doing so, stating “*Corrective actions would in the first place comprise the identification of alternative carbon reduction measures or, if not feasible for a specific material or activity, compensation by achieving gains elsewhere.*”
- 27 This retrofitting statement appears to be drafted as a “catch all” which would somehow secure any lost contracted decarbonisation by “corrective action”. However, the details of what this corrective action would be are sparse to say the least.
- 28 Breaking this down, there appears to be two options for corrective action: (1) finding alternative carbon reduction measures for a specific material or activity, and (2) compensation by achieving gains elsewhere, which I now take in turn.
- 29 Finding alternative carbon reduction measures for any specific material or activity would be very difficult, not least because for many materials only one decarbonisation option exists

in the first place. If that measure has failed to fully deliver the decarbonisation claimed for it, then, by definition, there would not be any other options to deliver it.

- 30 “Compensation by achieving gains elsewhere” is a completely vague statement and leaves more questions than answers:
- (A) Does “elsewhere” mean from within one of the other project decarbonisation measures (as at CEMP v4.0, Table D.3)? If so, as these measures have already been quantity surveyed with their estimated carbon footprint, how can they produce more decarbonisation to make up for contract defects.
  - (B) Or does “elsewhere” mean contracting decarbonisation from some carbon offsetting scheme from outside the construction project?
- 31 **This latter option would be a fundamental change of the model of the pathfinder project, and the CEMP within it.** The project, until now, has been framed as purely addressing decarbonisation within the construction project, and its processes and activities.
- 32 The definition of “construction” has been removed from the CEMP v4.: this is also an apparent deletion in the CEMP of the construction project being comprised of “[a]ctivity on and/or offsite required to implement the Project”. This may suggest, that in a new realism, the applicant is now admitting that contract defects relating to decarbonisation are likely to happen, and therefore the applicant is now considering carbon offsetting from “elsewhere” or in other words outside of the construction project as compensation measures.
- 33 The applicant must make clear if this is the case or not, as first it would fundamentally change the concept of the CEMP, and, secondly, offsetting has many downsides including that offsetting schemes frequently are unable to prove that they deliver the carbon reductions which they claim. If offsetting is to be used, then how will the applicant prove that it has made up the carbon reduction shortfall being reported?
- 34 The second retrofit argument is the applicant is claiming that its claimed decarbonisation in the CEMP to date “*has already achieved a reduction without pushing into the realms of highly innovative solutions*” [REP8-111/4.11.9], and that if there are contract defects, then there will be some pool of other techniques to try to make up the difference. This argument is flawed for two reasons – first that the project also claims to be a ‘pathfinder’ project which as above implies it being an experimental project. The applicant can’t have it both ways and claim that the project is innovative and ‘pathfinder’, and then say it has not pushed into highly innovated realms. Second, as above, for many materials only one option exists in the first place, so if the dial of innovation can be turned up using that option to sufficiently deliver the claimed decarbonisation, then there is nowhere else to go – one can’t turn the dial up further as that is what has already failed.
- 35 The only conclusion from the lack of answers to all these questions, once again, is that CEMP is unsecured.

#### 4.4 *Non-legality of using CEMP based data for EIA assessment*

- 36 The applicant claims “[t]here is no valid basis for CEPP’s claim that schedule 4, paragraph 6 of the Infrastructure Planning (EIA) Regulations 2017 has been breached by the Applicant.”
- 37 To avoid circular arguments and repeating material, I simply submit that I do not accept that this section responds to my position in [REP8-174] on the legality of the EIA assessment using data output from the CEMP. I beg to disagree with this entire section.

##### 4.4.1 *Notification of error in Environmental Statement following revised Carbon and Energy Management Plan*

- 38 The Planning Act 2008 sets out an inquisitorial approach to the examination of applications. Not admitting errors, and thus preventing the inquisitorial process to move on, in this case by the exchange of written documents, is obstructive.
- 39 Having been on a number of DCO examinations where National Highways is the applicant, I have become used to this applicant taking an apparent approach of never admitting to its errors. It is a really regrettable situation. It is always a tedious “modus operandi” to encounter. More importantly, and quite often, as in this case, is it is purely obstructive to prevent discussion continuing, and the resolution of the issue at hand.
- 40 In the example here, the applicant states “[t]he Applicant will not comment on the speculative assessment presented by CEPP”. This is ridiculous: where I laid out the error in question, I never referred to it as an “assessment”. I just produced a simple chart at [REP8-174/Table 1] which showed the evolution of applicant’s construction emissions figures in the Environmental Statement, and with a little narrative quite clearly showed the applicant’s error. The applicant is just playing games, obstructive games, with this statement. If the applicant demonstrates that my narrative was incorrect, and there is no error, then the examination including myself would accept that. It appears that applicant is unable to do that, so it just says it will not comment. It is an unacceptable position and an obstruction to the inquisitorial approach of the examination.

#### 4.5 *Hydrogen*

- 41 It is helpful that the Applicant states that “[t]he GHG emissions quantification supporting the DCO application has not accounted for any use of hydrogen”.
- 42 The applicant is invited to explain how it is going to decarbonise diesel use by 131,255 tCO<sub>2</sub>e, as from the CEMP Plate D.3 data [REP9-301/46]. This is not still clear from the CEMP v4.0, and the ExA is requested to note this.

#### 4.6 Tyndall Centre Budgets

- 43 The applicant's response is predicated that Tyndall Centre Budgets can only be a local assessment. However, the Tyndall budgets may also be applied at (the regional and) the national level.
- 44 It would be useful for the applicant to contextualise the carbon emissions for the LTC scheme within the science-based carbon budgets from the Tyndall Centre at a national level, especially as these are respected science-based carbon budgets. I respectfully invite the ExA to request the applicant to do so.
- 45 It should be noted that the IEMA guidance which the applicant and SoS, in other recent DCO decisions, purports to follow mentions Tyndall Centre budgets in these contexts:
- (A) IEMA PDFp6, Footnote 9: *“The pace of reduction should align with a credible 1.5°C transition scenario (for example Science Based Targets Initiative Net Zero or Tyndall Centre aligned carbon budget)”*
  - (B) IEMA PDFp28 under “6.4 Contextualising a project's carbon footprint” : *“Researchers at the Tyndall Centre at the University of Manchester have proposed local authority scale carbon budgets that are compatible with the UK's commitments under the Paris Agreement”*. As above, these may be merely summed across all local authority areas for a national level budget, and the software readily facilitates this.
  - (C) IEMA, Table 1 *“Sources of contextual information against which projects can be evaluated”*. Tyndall budgets are mentioned under contextualising “National or devolved administration carbon budget and NDC”, again the Tyndall budgets are readily available at the national level.

## 5 CLOSING SUMMARY

46 I provide here a closing summary of the main points from my submissions.

### 5.1 Greenhouse Gas emissions from the scheme

47 In particular:

- (A) The EIA assessment of the GHG emissions from the scheme must take account of the risks to the delivery of the UK Climate budgets and targets.
- (B) As part of reaching a reasoned conclusion on the GHG emissions from the scheme, the decision maker must consider if the risks to the delivery of the UK climate budgets and targets are compounded by the GHG emissions from the scheme.



- (C) As the emissions from both construction and operation emissions, and these emissions combined, are large, and as the risks to the delivery of the carbon budgets and targets are unknown, the Secretary of State cannot reach a reasoned conclusion on the carbon “decision making” test at NNNPS 5.18.
- (D) The Secretary of State is then obliged under Planning Act 2008 section 104(3) to consider if subsections (of s104) (4)-(8) apply.
- (E) In considering section 104, there is:
- a potential breach with very high probability in international obligations, as the current figures in the UK Carbon Budget Delivery Plan (CBDP) show that the UK Nationally Determined Contribution (NDC) will not be achieved: the scheme’s construction emissions can only compound such a breach.
  - a potential breach with very high probability of statutory duty and/or following the law from construction emissions in the 5<sup>th</sup> carbon budget, as the delivery of the 5<sup>th</sup> carbon budget is not guaranteed by the CBDP, and scheme’s construction emissions can only compound such a breach.
  - a potential breach with very high probability of statutory duty and/or following the law from operation emissions in the 5<sup>th</sup> and 6<sup>th</sup> carbon budgets, as the delivery of the 5<sup>th</sup> and 6<sup>th</sup> carbon budgets is not guaranteed by the CBDP, and scheme’s operation emissions can only compound such a breach.
- (F) The scheme’s GHG emissions show the GHGs to be “Major Adverse” against IEMA significant thresholds, when using IEMA based contextualisations using the IEMA sources of “sectoral reduction strategies” and “existing and emerging national and local policy or regulation”, for these scenarios:
- The construction emissions as additional emissions in the Industry sector for the NDC year of 2030.
  - The construction emissions as additional emissions in the Industry sector for the 5<sup>th</sup> carbon budget.
  - The operation emissions as additional emissions in the Domestic Transport for the 5<sup>th</sup> and 6<sup>th</sup> carbon budgets.
- (G) In all cases above, the enumerated data used for the applicant EIA assessment is not a reasonable worst case for these reasons:
- The operation emissions have been enumerated for the scheme only (solus), and enumerations of cumulative emissions have not been provided as required by the EIA Regulations.

- The construction emissions are based on an input from the Carbon and Energy Management Plan (CEMP) which itself is based on claimed decarbonisations which have not been fully secured.

## 5.2 Carbon and Energy Management Plan (CEMP)

48 In particular:

- (A) The CEMP is not secure, and no robust risk assessment has been provided by applicant of its security.
- (B) The data derived from the CEMP (ie the CBN04 of 1.44 MtCO<sub>2</sub>e figure) cannot be reliably used as a reasonable worst case for the EIA assessment of the construction emissions.
- (C) The DCO and CEMP, and in particular CBN04, is not a legally binding agreement in terms of securing decarbonisation.
- (D) Major inconsistencies, errors and anomalies remain the CEMP with respect to:
  - Land Use Change (LUC) emissions ;
  - Diesel emissions ;
  - The role of hydrogen ;
  - Corrective action on contract defects relating to decarbonisation and failure to remain within the claimed secured carbon limit (CBN04) ;
  - What “*Compensation by achieving gains elsewhere*” means and the extent to which the applicant is contemplating using carbon offsetting schemes from outside the construction project.

## 5.3 Information withheld by the applicant

49 Considerable information has been withheld by the applicant including:

- (A) The inner workings of the CEMP “black box”;
- (B) Risk assessment of the inner workings of the CEMP;
- (C) What genuine carbon reductions can be made by substituting hydrogen for diesel.

<END OF DOCUMENT>