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Examination Principle Issues	• **Climate Change** • **Scope of Development and Environmental Impact Assessment** • **Benefit cost ratio (BCR) and case for scheme**

DEADLINE D10 SUBMISSION

I am an independent scientist and environmental consultant, working at the intersection of science, policy, and law, particularly relating to ecology and climate change. I work as a consultancy called Climate Emergency Policy and Planning (CEPP).

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.

SUMMARY

In its response to interested parties at D9, the applicant is in denial that the application contains no cumulative assessment of carbon emissions. This was spelt out at REP8-029 but the applicant has not seriously engaged with the issue in their D9 response.

Further, the applicant's response to interested parties at D9 refers to a recent decision by the SoS on the M54-M6 scheme, and the applicant seek to draw support from it. Both the applicant on the A57 examination, and the SoS decision on the M54-M6 scheme, make the assumption that the Net Zero Strategy will **inevitably** deliver its objectives. However, the Net Zero Strategy is currently under legal challenge in a case which has permission for full Judicial Review on the basis that Net Zero Strategy does not demonstrate that it is designed to secure its objectives (which are to meet the budgets and targets in the Climate Change Act). Therefore it is premature to rely on the proposition that the NZS will inevitably meet its objectives within the planning examination of the A57 scheme.

The proposition expands to six propositions relating to the NZS, TDP and NDC, each of which it is premature to rely upon. These propositions all fall on the basis that the Government has not demonstrated that the NZS will meet its objectives. The consequence for the A57 scheme is that issue such as the significance of the carbon emissions associated with the scheme cannot be determined as it is not inevitable that the NZS will deliver UK carbon budgets.

The issues are on top of the existing legitimacy issues with the Environment Statement which I have identified. These are that no cumulative carbon assessment has been made, and that the solus carbon assessment is based upon the wrong quantification which is an underestimate of the emissions.

I have been pleased to join with other interested parties in writing to the ExA at D10 to ask the ExA for the traffic model be independently assessed, including a full WebTAG compliant Transport Appraisal, and, once done, an assessment of the scheme's carbon emissions that meets legal, policy and guidance requirements. As I have previously stated, the volume of work involved requires that the examination is suspended under EIA Regulation 20.

It is my firm view that this step is required to make the Environmental Statement legitimate, such that the SoS can be satisfied that the material provided by the Applicant is sufficient for him to reach a reasoned conclusion on the significant effects of the proposed development on the environment, and that it meets legal, guidance and policy requirements.

Contents

1 INTRODUCTION

1.1 Deadline 10 (D10)

1 This is my submission for Deadline 10 which responds to "9.79 Applicant's comments on Deadline 8 submissions [REP9-027].

2 The applicant relies upon the recent decision letter by the SoS on M54-M6 scheme (decision letter referred to here as M54-M6-DL) and draws comparisons to the A57 scheme. Therefore, it is necessary to comment on that decision.

3 As background to commenting on M54-M6-DL, it is also necessary provide background on the current legal challenge to the Government, now with permission to proceed to a full Judicial Review hearing, against the Net Zero Strategy.

2 LEGAL CHALLENGE TO THE NET ZERO STRATEGY

2.1 Propositions of success

4 Before providing some background on the legal challenge to the Net Zero Strategy, I need to outline a number of propositions which occur in the Applicant's submissions to the examination. These are propositions or assertions which are unevidenced, but made as if they are a truth. In other words, each of these propositions, when invoked by the applicant, is no more than a statement of blind faith.

2.2 Proposition 1: the "overarching assertion of NZS success"

5 The applicant frequently uses proposition 1 (the "overarching assertion of NZS success") that the existence of the Net Zero Strategy document will ensure that national carbon budgets and targets are met, irrespective of what carbon increases are made in the transport sector by road schemes. This assertion amounts to saying "*because a policy document has been published and exists, future carbon budgets and targets will inevitably be achieved*".

6 For example at REP9-027/8.10.5, the applicant states:

> *"The carbon budgets are supported by the policy commitments in the Net Zero Strategy which add further detail as to how the carbon budget and NDC* ***will be achieved.****"* (emphasis added)

2.3 Proposition 2: scheme specific "subsidiary assertion of NZS success"

7 A further proposition (a scheme specific "subsidiary assertion of NZS success") follows from the overarching assertion. It follows because if, inevitably, the NZS "will be achieved", the scheme itself will not affect the UK's ability to meet the NZS delivery pathway (or the other associated targets like 68% reduction in emission by 2030 from 1990 levels in the NDC). For example, at REP9-027/12.6.2

> *"The Net Zero Strategy was published after the DCO was submitted, however National Highways has submitted responses during the examination that demonstrates that the Scheme does comply with this policy,* ***as it will not affect the UK's ability to meet the Net Zero Strategy delivery pathway*** *or the carbon reduction targets required by NPSNN paragraph 5.18".*

8 The overarching assertion that because the NZS exists, the delivery trajectories within it, will somehow, inevitably, one way or another, be met, **and** the subsidiary assertion that this means the scheme will not affect the UK's ability to meet the Net Zero Strategy delivery pathway **are both** unevidenced and unsubstantiated. Both are false.

2.4 Related propositions: TDP and NDC

9 There are related propositions for the TDP. **Proposition 3**, the "overarching assertion of TDP success", is the claim that because the TDP document exists, all the policies within it will be delivered, irrespective of what carbon increases are made in the transport sector by road schemes. **Proposition 4**, the "subsidiary assertion of TDP success": if, inevitably, the TDP will be achieved, the scheme itself will not affect the UK's ability to meet the TDP.

10 **Proposition 5**, the "overarching assertion of NDC success", is the claim that because the NZS and TDP will be delivered, irrespective of what carbon increases are made in the transport sector by road schemes, the UK's international commitment under the Paris agreement for 2030 will also be inevitably met. **Proposition 6**, the "subsidiary assertion of NDC success": if, inevitably, the NDC will be achieved, the scheme itself will not affect the UK's ability to meet the NDC and deliver to the international community.

2.5 Proposition 1 and the NZS legal challenge

11 Proposition 1, the "overarching assertion of NZS success", is now subject to a Judicial Review where the idea that because a policy document has been published and exists, future carbon budgets and target will inevitably be achieved, is central to the legal challenge. I now provide further details.

2.6 NZS legal challenge: permission granted

12 Three separate legal claims were made to the High Court by Friend of the Earth, ClientEarth and the Good Law Project, each seeking to challenge the publication on 19 October 2021 of the Net Zero Strategy Build Back Greener by the Secretary of State for Business, Energy and Industrial Strategy, in purported compliance with his duties under sections 13 and 14 of the Climate Change Act 2008.

13 At the application for permission to apply for judicial review (CPR 54.11, 54.12), the Honourable Mr Justice Cotter granted permission (on March 1st 2022) to apply for judicial review and observed "*the grounds advanced in this claim are arguable, with a realistic prospect of success, and merit investigation at a full hearing*". The three cases are to be

rolled into one hearing expected to take place in Autumn/Winter 2022. The permission judgment is given in Appendix A.

2.7 NZS legal challenge: relevant grounds claimed

14 The Friends of the Earth press release on 2nd March (provided at Appendix B) gives their Ground 1 as:

> *"**Ground 1** – BEIS failed to include in the NZS the basic information required to give effect to section 14 of the CCA, including: the basis for concluding that the proposals and policies would meet the carbon budgets; a quantified estimate for emissions reductions from each proposal and policy; and, the relevant timescales for their implementation and effect."* (underline emphasis added)

15 Good Law Project (GLP) have provided their Pre-action protocol ("PAP") letter of 22nd December 2021 on-line, and read-only (meaning that it is not easily reproducible). It is best that the full letter is read at

[redacted]

However, some highlighted screen clip sections have been provided in Appendix C, for additional reference. Key paragraphs are PAP/7 and PAP/16 which I transcribe sections of here:

> *"However, as explained further below, the Strategy is unlawful because it does not discharge the Secretary of State's duties under ss 13 and 14. That is because it does not set out policies and proposals for meeting the CB6. Rather it identifies the pathway that UK emissions will need to be on to meet the CB6 and then sets out a series of actions that will need to happen for that to occur,* ***but does not present a set of policies or proposals that have been designed so as to bring about the change which will be necessary to meet the CB6. Merely listing ambitions and discussing possible pathways does not meet the duties under ss. 13 and 14.***"
>
> *"Nonetheless, for the Secretary of State to be able lawfully to conclude that the proposals and policies will enable the carbon budgets to be met,* ***he must assess their collective effect on GHG emissions, and assure himself that they will (on his best estimates) bring about the necessary reductions. There is no indication in the Strategy that such an assessment has been made of the proposals and the policies it contains.***" (**bold** emphasis added)

16 The relevance to the applicant and the A57 scheme is that it is the "***collective effect*** *on GHG emissions*" of the proposals and policies in the NZS which the applicant frequently relies upon (eg: at REP9-027/8.10.5) to make their overarching assertion (proposition 1) that because the NZS exists, the delivery trajectories within it, and UK carbon budgets and targets, will somehow, one way or another, be met. The proposition 2 subsidiary assertion which is that the scheme will not affect the UK's ability to meet the Net Zero Strategy delivery pathway relies upon the first overarching assertion. If the overarching assertion is unproven, or false as

effectively contended by the claimants in the NZS case, then there is no way of knowing if the subsidiary assertion is true.

17 Therefore, the basis of the overarching assertion, and therefore also the subsidiary, scheme specific, assertion, is now under legal challenge. And the Court has said that the case merits investigation at a full JR hearing. If the scheme's timetable proceeds as currently planned, with the ExA's recommendation report due around August 16th 2022, then the outcome of the NZS legal case will be unknown. **I respectfully suggest that, in this situation, that it would be premature for the ExA to give weight to both the Applicant's overarching assertion and subsidiary assertion with respect to the NZS (propositions 1 and 2), and by implication, the same assertions for the TDP and NDC (propositions 3, 4, 5 and 6).**

3 TRANSPORT DECARBONISATION PLAN

18 The same shortcomings apply to the Transport Decarbonisation Plan. Despite the NZS' lack of quantification of policies, and any evidence that it is designed to secure the carbon budgets, the NZS does, at least, provides a refinement of the TDP trajectory (annual lower and upper bound carbon reductions for every year from 2020 to 2037 were given at REP9-039/10 based upon the government spreadsheet). The TDP is a vaguer document than even the NZS in terms of carbon quantification and validation of the policies within it. As I have previously pointed out, NZS Figure 21 is a refinement of TDP Figure 2 [REP8-029/29], and there is also linkage between the TDP policies and the NZS in this sense.

19 In the same way, that the applicant makes the overarching assertion and subsidiary assertion for the NZS, it does so for the TDP too. That is, the applicant frequently makes the assertion (the "overarching assertion of TDP success") that the existence of the TDP will ensure that national carbon budgets and targets are met, irrespective of what carbon increases are made in the transport sector by road schemes. And, the scheme specific "subsidiary assertion of TDP success", based on this is that because the TDP will inevitably be achieved, the scheme itself will not affect the UK's ability to meet the TDP delivery trajectory (or the other associated carbon targets like 68% reduction in emission by 2030 from 1990 levels in the NDC).

For example, REP9-027/9.79.24, the applicant states:

> *"Furthermore, the net GHG emissions are not significant and are small when compared to the UK carbon budgets, as over time it is the commitments within the TDP that <u>will ensure</u> that operational emissions are reduced."* (emphasis added)

It is worth noting that the applicant's statement is vague and does not give any proof or quantification of the emissions reduction.

20 It is also worth noting that the applicant says nothing about **<u>how</u>** the scheme would contribute to achieving the TDP, only these quotes in REP9-027 provide any narrative on the necessary policies. And, from the quotes, the scheme and the TDP are clearly considered as existing in disjointed policy spaces: the scheme is black-box doing one thing (including increasing

emissions) whilst the TDP is another black-box doing something different (trying to reduce emissions).

> *"The TDP intends to cut traffic growth through other measures, such as those to improve walking and cycling infrastructure and behavioural changes to facilitate a modal shift."* (REP9-027 8.10.5, 9.79.50)

> *"The Transport Decarbonisation Plan (TDP) also commits to accelerating the rollout of electric vehicles and EV infrastructure such as charging points. In the TDP the Government is relying heavily on new fuels and technology to meet its ambition."* (REP9-027 8.10.3)

21 I note the applicant does refer to its response to ExQ2/8.8 in REP6-017 on encouraging active travel. However, this is not about how the scheme itself would contribute to the TDP (it increases emissions, and does **not** contribute to the TDP), but how some add-ons, helpful but relatively tokenistic, may be provided. Most of these would be expected anyway, like replacement connections for footpaths severed by the scheme.

4 NATIONAL DETERMINED CONTRIBUTION (NDC)

22 At REP9-027/8.10.5, the applicant makes this statement:

> *"The comparison against carbon budgets in the ES is appropriate as these are the only legislated carbon targets. The carbon budgets are supported by the policy commitments in the Net Zero Strategy which add further detail as to how the carbon budget and NDC will be achieved."* (emphasis added)

23 The statement effectively combines propositions 1 and 5 as a statement of blind faith. When applied to the scheme itself, propositions 2 and 6 are also claimed.

24 However, as stated, the NDC depends upon the NZS being successfully delivered, and the Government have not demonstrated that the NZS is designed to secure its objectives, as being challenged in the NZS legal case.

25 In summary, the government has not provided the quantified evidence that either the TDP or the NZS are designed to secure delivery of their carbon reduction objectives, nor the UK international obligations under its NDC and the Paris Agreement.

5 DECISION ON M54-M6 SCHEME

26 In REP9-027, the applicant relies upon the recent decision by the SoS on M54-M6 scheme (M54-M6-DL) and draws comparisons to the A57 scheme.

27 I make some preliminary without prejudice comments on this below.

5.1 Illegitimate reliance on the inevitable success of the TDP and the NZS (Propositions 1, 2, 3, and 4)

28 At M54-M6-DL/31, the Secretary of State declares the "*background"* against which the Secretary of State has considered the Proposed Development:

> *"The Secretary of State considers that the majority of operational emissions related to the scheme result from vehicle usage and that the Transport Decarbonisation Plan includes a range of non-planning policies which will help to reduce carbon emissions over the transport network as a whole over time (including polices to decarbonise vehicles and radically reduce vehicle emissions) and help to ensure that carbon reduction commitments are met. Beyond transport, Government's wider policies around net zero such as 'The Net Zero Strategy: Build Back Greener' ("Net Zero Strategy"), published by Government in October 2021 sets out policies and proposals for decarbonising all sectors of the UK economy to meet the net zero target by 2050. It is against this background that the Secretary of State has considered the Proposed Development."* (underline emphasis added)

29 It is clear from this statement, the SoS is predicating his decision on the basis of both overarching assertion and subsidiary assertion of success for both the TDP and NZS. However, it remains to be tested in Court whether the overarching assertion for NZS success is legitimate. I believe that it is not legitimate.

30 If the overarching assertion for NZS success is not legitimate, then the overarching assertion for the TDP success can not be legitimate either. And the subsidiary scheme-specific assertions for the NZS and TDP are also not legitimate as a consequence.

31 It would be premature to make any reliance on overarching or subsidiary assertions of success for the NZS and TDP on the A57 scheme.

5.2 Illegitimate reliance on the inevitable success of meeting the UK NDC (Propositions 5 and 6)

32 At M54-M6-DL/37, the Secretary of State extends the overarching assertion of NZS success to an assertion of inevitable success in the UK meeting its NDC target of 68% carbon emissions reduction by 2030 compared to 1990:

> *"With regard to the Paris Agreement, the UK announced its Nationally Determined Contribution ("NDC") in December 2020. NDCs are commitments made by the*

> *Parties (including the UK) under the Paris Agreement. Each Party's NDC shows how it intends to reduce its greenhouse gas emissions to meet the temperature goal of the Paris Agreement. The UK's NDC commits it to reduce net GHG emissions by at least 68% by 2030 compared to 1990. This represents an increase of ambition on the fifth carbon budget, which covers the period 2028-2032. The Net Zero Strategy: Build Back Greener, published by Government in October 2021, sets out how the UK will therefore need to overachieve on the fifth carbon budget to meet its international climate targets and **stay on track** for the sixth carbon budget. This strategy sets out the action Government will take **to keep the** UK on track for meeting the UK's carbon budgets and 2030 NDC and establishes the UK's longer-term pathway towards net zero by 2050. The Secretary of State is content that consenting the Proposed Development will not impact on the delivery of this strategy and will not lead to a breach of the UK's international obligations in relation to the Paris Agreement or any domestic enactments or duties."* (emphasis added)

As the assertion of the inevitable success in the UK meeting its NDC target of 68% carbon emissions reduction by 2030 compared to 1990 is based upon the overarching assertion of NZS success which is illegitimate, it too is illegitimate. **From the evidence that the Government has made available, it is clear that the delivery of the NZS is not secured, and therefore, neither is the delivery of the NDC secured.**

33 The bolded statements "stay on track" and "keep the UK on track" are perplexing as they do not agree with the assessment of the Government's advisors the Climate Change Committee who have advised that the UK is "off track" for meeting the 4th, 5th and 6th carbon budgets (see Appendix D).

34 The applicant quotes M54-M6-DL/37 at REP9-027/8.10.4 and goes on to say at 8.10.5:

> "*The comparison against carbon budgets in the ES is appropriate as these are the only legislated carbon targets. The carbon budgets are supported by the policy commitments in the Net Zero Strategy which add further detail as to how the carbon budget and NDC will be achieved. However, the indicative pathways for sectors in the Net Zero Strategy are not targets.*" (underline emphasis added)

Notwithstanding whether the NZS provides sectorial targets or not, the underlined sentence is just another formulation of the overarching assertion of NZS success. This is under Judicial Review, and I do not accept that it is legitimate. The applicant uses the underlined sentence to support making their comparison against national economy-wide carbon budgets. The fact that the Government has not demonstrated that the NZS objectives will be secured, means that the assessment comparison can not be trusted either.

5.3 Negative weight for increasing carbon emissions in the planning balance

35 The applicant has relied upon M54-M6-DL/54 in responding to parties in REP9-027. For example at REP9-027/9.79.19, the applicant states:

> *"The M54 Road Link Decision Letter concludes at paragraph 54:*
>
> > *Given that the scheme will increase carbon emissions, it is given negative weight in the planning balance. However, the Secretary of State considers that weight also needs to be given to the Transport Decarbonisation Plan that will mean operational emissions reduce over time and that in relation to climate change adaption the Proposed Development attracts positive weight in the planning balance.*
>
> *The Applicant considers this to be relevant to this DCO application as the Scheme is comparable to the M54 Road Link, and the approach to the assessment (including the cumulative assessment) is consistent."* (underline emphasis added)

36 There are a number of issues with this. First, as above the SoS has already declared at M54-M6-DL/31, the background for the decision, and as in the previous section, the SoS is assuming the overarching assertion of success for the NZS and for the TDP (ie: Propositions 1, 2 3, and 4). I do not agree that these assertions are legitimate.

Second, the SoS then claims that weight needs to be given to the TDP. However, in terms of meeting national carbon budgets and targets, the Government have not demonstrated the overarching assertion of success for the TDP or NZS. Therefore, no weight can be given to the TDP against the negative impact of increasing emissions.

Third, the SoS claims positive weight should be given to climate adaptation. However, greenhouse gas emissions and the vulnerability of the project to climate change are specified as two distinct environmental factors, or receptors in the EIA Regulations (eg: see EIA Regulation Schedule 4 (4) and Schedule 4 (5)(f)). Therefore they are not transmutable environmental factors.

The seriousness of the negative weight of increasing carbon emissions can only be balanced against full security in delivering the carbon budgets and targets. However, neither the NZS or TDP has been quantitatively demonstrated to be designed to secure the carbon budgets and targets. Failure to meet carbon budgets and targets cannot be balanced by the notion, even if true, that the particular scheme may be slightly more robust against the physical impacts of climate change.

37 The result of this is that the A57 scheme will increase emissions, and this has negative weight in the planning balance. There is currently no legitimate way to demonstrate positive planning weight for carbon emissions.

5.4 IEMA guidance

38 M54-M6-DL/32-35 discuss the latest IEMA guidance. There are a number of issues.

39 Just as the applicant selectively quotes IEMA, the SoS does so too. The IEMA guidance at section 6.4 on "Contextualising a project's carbon footprint" has been ignored. As I describe at REP8-029/4.1, IEMA say 1) assessment of a project's carbon emissions against the carbon budget for the entire UK economy **is only a starting point of limited value** 2) local policies and budgets and targets should be used. This latter point is also in line with the EIA guidance (which itself is material guidance to the NN NPS as the NN NPS invokes the EIA Regulations) [REP9-039/2.3].

The SoS decision at M54-M6-DL does not identify that local and regional assessment of carbon emissions has not been done, and therefore that the Application for that scheme is not consistent with the IEMA guidance.

40 M54-M6-DL/33 correctly quotes the IEMA guidance with respect to "significance" that "*that GHG emissions have a combined environmental effect that is approaching a scientifically defined environmental limit and as such any GHG emission or reductions in these might be considered significant.*" However, the SoS then does not take the logical step that this statement from IEMA implies that securing the delivery of the NZS, TDP and NDC are vital. Simply we are near to the limit of carbon emissions which may be generated (the "remaining global carbon budget" in the scientific jargon). Instead the SoS assumes propositions 1-6, and therefore concludes that GHG emissions from the project are not significant. However, as propositions 1 -6 are false, the conclusion cannot depend upon them and is also false.

41 At REP9-027/8.8.4, the applicant states with respect to M54-M6-DL/32-35:

> *"The Applicant considers this to be relevant to this DCO application as the Scheme is comparable to the M54 to M6 and the approach to the assessment (including the cumulative assessment) is consistent, including accounting for construction and operational greenhouse gases and making comparison to UK carbon budgets in line with the NSPNN. The conclusion of our assessment is that the Scheme's contribution to overall carbon levels is very low and that its contribution will not have a material impact on the ability of Government to meet its legally binding carbon reduction targets."* (underline emphasis added)

42 Note, I do not accept that a cumulative assessment has been made (see later on the applicant's denial concerning this vital issue).

43 As above, the underlined conclusion for the A57 scheme is premised on M54-M6-DL/32-35 in which the IEMA guidance has been selectively quoted, and IEMA advice for local and regional assessment ignored, and on propositions 1-6. The applicant's conclusion can not therefore be accepted.

6 APPLICANT'S RESPONSE TO CEPP IN REP9-027

6.1 Applicant is in denial about there being no cumulative carbon assessment

44 At REP9-029/8.13 and 8.14, the applicant makes a response to section 7 of my REP8-029. Section 7 comprises bullet points 47-106 (ie 60 bullet points) and provides a detailed and structured response to the applicant's REP5-026. At 8.14.1, the applicant makes a response to the preceding bullets 40-46, and at 8.14.2 refers back to previous documents from the applicant. At 8.14.3, the applicant then jumps to the 10 questions posed at paragraph 97 about the so-called sensitivity test. Essentially, the applicant makes no engagement with bullet points 47-96.

45 Put simply, the applicant has not provided any meaningful response to bullets 47-96, which cover the substance of my response in REP5-026 on there being no cumulative carbon assessment by the applicant. Crucially, the applicant has not responded to sections 7.1, 7.2, 7.3, 7.4, 7.5, 7.6, 7.7 and 7.8 which relate to whether the environmental statement includes a quantification and assessment of the cumulative carbon emissions of the scheme which is compliant with the EIA Regulations.

46 As the applicant has not responded to these sections, I can only conclude that they are in denial that the environmental statement **does not** include a quantification and assessment of the cumulative carbon emissions of the scheme which is compliant with the EIA Regulations.

6.2 Applicant is not engaging with arguments made

47 In the response at REP9-027/8.12 to REP8-029/40-46, the applicant states at 8.12.4 that their method is supported by PINS Advice Note 17. However, as above, the Applicant has totally failed to engage with REP8-029/75-81 where I show that Planning Inspectorate's Advice Note 17 gives no support to the applicant's claims in REP5-026, and accordingly the ExA should also inevitably conclude that no weight can be applied to the note in this context.

48 At REP9-027/8.12.4, the applicant also refers to "cumulative traffic assessments". This is just a rephrase for the traffic model being "inherently cumulative" as used in REP5-026 and elsewhere. The applicant has failed to engage with the question posed at REP8-029/51 about the following notion:

> ***'If** the traffic model contains all known road and land developments in the study **area**, **then** it follows that any combination of data, and any differentiation of that data (eg DS-DM), extracted from the traffic model must also be "inherently cumulative".'* (typographical correction on original in red)

49 By "cumulative traffic assessment", the applicant means "*all known road and land developments in the study area*". My answer to is this notion is that **it is false**. The applicant's claims that it has done a cumulative carbon assessment which is EIA compliant is predicated on this notion always being true. The applicant fails to respond on this point.

50 At REP9-027/8.12.4, the applicant says its approach "is consistent with other comparable DCO and EIA assessment". The issues with the applicant's approach have only been put forward in the form in which I am putting them forward for approximately the last nine months. That the applicant has not been challenged before nine months ago, does not make their approach right, it just means it has not previously been challenged in this form.

51 At REP9-027/8.12.4, the applicant says its approach "*.. is supported by PINS Advice Note 17 and DMRB LA 104, which support cumulative traffic assessments, and are approaches that are recognised as an industry standards*". I have dealt with PINS Advice Note 17 and "cumulative traffic assessments" above. In terms of "industry standards", I recognised the value in running traffic assessments with all known road and land-based development in them at REP8-029/7.5. I referred to this model architecture in REP8-029 as performance orientated. I then pointed out that a complementary "EIA Regs compliance oriented" architecture is required, for the correct solus quantification, and for the cumulative quantification of carbon emissions from the scheme in combination with other developments.

52 Whilst I was sympathetic to professional sensitivities in REP8-029, I will now be more direct. I regret to say that the industry standards have not caught up with the requirements of quantifying and assessing carbon emissions. For far too long, carbon emissions were seen as and treated as a sub-set of air quality (which they are not!). Carbon emission quantification was added onto existing traffic models architecture without asking the question "is this the right approach for this environmental factor?". Continuing in denial of this will not help the applicant, nor the industry.

53 The issue of DMRB and DMRB LA 104 remains.

6.3 The applicant does not follow the DMRB

54 DMRB LA 104 is clear how cumulative assessment should be done. First it provides a definition of "cumulative effects" on page 7:

> *"Impacts that result from incremental changes caused by other present or reasonably foreseeable actions together with the project.*
>
> *NOTE: For the purposes of this guidance, a cumulative impact can arise as the result of:*
>
> *a) the combined impact of a number of different environmental factors specific impacts from a single project on a single receptor/resource; and/or*
>
> *b)* ***the combined impact of a number of different projects*** *within the vicinity (in combination with the environmental impact assessment project) on a single receptor/resource."* (emphasis added)

55 The receptor in question here is greenhouse gas emissions under EIA Regulations Schedule 4.

56 Then under the "Cumulative effects" section of DMRB LA 104:

> *3.19 EIAs must include cumulative effects in accordance with the requirements of the EIA Directive 2014/52/EU [Ref 1.N].*
>
> *3.20 Non-statutory environmental assessments shall include cumulative effects.*
>
> *3.21 Environmental assessments shall assess cumulative effects which include those from:*
>
> *1) a single project (e.g. numerous different effects impacting a single receptor); and*
>
> *2) **different projects (together with the project being assessed)**.*
>
> *3.21.1 Cumulative effects should be assessed when the conclusions of individual environmental factor assessments have been reached and reported.*
>
> *3.21.2 **The assessment of cumulative effects should report on:***
>
> ***1) roads projects which have been confirmed for delivery over a similar timeframe;***
>
> ***2) other development projects with valid planning permissions or consent orders, and for which EIA is a requirement; and***
>
> ***3) proposals in adopted development plans with a clear identified programme for delivery.***
>
> *3.22 The assessment of cumulative effects shall:*
>
> *1) establish the zone of influence of the project together with other projects;*
>
> *2) establish a list of projects which have the potential to result in cumulative impacts; and*
>
> *3) obtain further information and detail on the list of identified projects to support further assessment."*

57 It is quite clear from both the definition, and the summary definition at 3.21 that the meaning of the "different projects", or cumulative quantification and assessment, is that the carbon emissions of all the relevant developments in the study area under 3.21.2 and 3.22 should be summed together.

58 The applicant is **correct** that the architecture of its DS traffic model potentially provides this. The applicant is **incorrect** that its selected architecture for its DS-DM quantification, based on the outputs of this model, provides a cumulative quantification or assessment. This is an

example of where the notion at REP8-029/51 does not hold true. This has all been explained in REP8-029, sections 7.1, 7.2, 7.3, 7.4, 7.5, 7.6, 7.7 and 7.8 but the applicant has decided not to engage with the issue.

59 In summary, the applicant has not followed DMRB LA 104, nor complied with it with respect to making an EIA Regulations compliant cumulative assessment of carbon emissions. The applicant has not only not followed its own industry guidance, it has also not met the legal requirements of the EIA Regulations.

60 The applicant's statement at REP9-027/8.12.4 is wrong on all counts as outlined above.

61 These comments on DMRB are in addition to my comments at REP9-039/2.9 where I addressed the ExA's question at EV-039/Item 6/g), and REP9-039/2.10 where I addressed the ExA's question at EV-039/Item 6/h). On the latter on how much weight can be given to the DMRB, there is now a preceding question "how will the applicant make their carbon assessment compliant with the DMRB LA 104 requirements for cumulative assessment?". The DMRB is consistent with the NN NPS and the EIA regulations here. The issue is that applicant complies with none of them.

6.4 M54-M6-DL does not support the applicant

62 At REP9-027/8.12.5, the applicant quotes M54-M6-DL/45-46. The quoted paragraphs do not help the applicant. They do not address the issues above of non-compliance with the DMRB, non-compliance with the EIA Regulations, no support from PINS Advice Note 17, and industry practice which need to be resolved.

63 M54-M6-DL/45 starts:

> *"The Secretary of State considers that as there is no single prescribed approach to assessing the cumulative impacts of carbon emissions, there are a number of ways such an assessment can acceptably be undertaken and that this does not necessarily need to be done at RIS level."* (underline emphasis added)

The applicant may seek comfort from the underlined sentence. However, the point is that no cumulative carbon assessment has been done at all, so whether a prescribed approach has been followed is academic.

64 The point made here is in addition to the general points in section 5 on how the M54-M6 decision letter does not support the applicant's case.

7 CONCLUSIONS

.

65 I have been pleased to join with other interested parties in writing to the ExA at D10 to ask the ExA for the traffic model be independently assessed, including a full WebTAG compliant Transport Appraisal, and, once done, an assessment of the scheme's carbon emissions that meets legal, policy and guidance requirements. As I have previously stated, the volume of work involved requires that the examination is suspended under EIA Regulation 20.

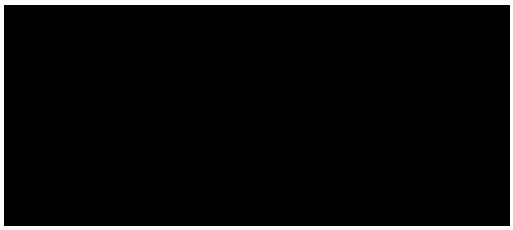
66 It is my firm view that this step is required to make the Environmental Statement legitimate, such that the SoS can be satisfied that the material provided by the Applicant is sufficient for him to reach a reasoned conclusion on the significant effects of the proposed development on the environment, and that it meets legal, guidance and policy requirements.

67 Otherwise, the scheme must be rejected on three grounds:

- NH have not followed guidance and have failed to supply all the relevant and necessary information. For carbon emissions, the critical issues have been outlined here and in my other referenced submissions.

- From the data IPs have (as opposed to the modelling) the adverse effects of the scheme are very substantial and the benefits unproven.

- Data that has been provided suggests a major adverse impact on Greater Manchester which has been minimised in the modelling due to the deliberate choices made.



Dr Andrew Boswell,
Climate Emergency Policy and Planning, May 5th, 2022

8 APPENDIX A: NET ZERO STRATEGY LEGAL CHALLENGE, PERMISSION ORDER, MARCH 1st 2022

Supplied as separate document

9 APPENDIX B: NET ZERO STRATEGY LEGAL CHALLENGE, FRIENDS OF THE EARTH BRIEFING, MARCH 2ND 2022

Supplied as separate document

10 APPENDIX C: NET ZERO STRATEGY LEGAL CHALLENGE, KEY EXTRACTS, GOOD LAW PROJECT PAP LETTER, DECEMBER 22nd 2021

Supplied as separate document

11 APPENDIX D: Climate Change Committee, Advice on reducing the UK's emissions

Downloaded from [redacted] May 5th, 2022

Supplied as separate document

In the High Court of Justice
Queen's Bench Division
Administrative Court

CO/199/2022

In the matter of an application for judicial review

THE QUEEN

on the application of

GOOD LAW PROJECT

Claimant

-and-

SECRETARY OF STATE FOR BUSINESS ENERGY AND INDUSTRIAL STRATEGY

Defendant

Notification of the Judge's decision on the application for permission to apply for judicial review (CPR 54.11, 54.12)

Following consideration of the documents lodged by the Claimant and the Acknowledgement of service filed by the Defendant

ORDER by the Honourable Mr Justice Cotter

1. The application for permission to apply for judicial review is granted.

2. The application for specific disclosure is refused

3. The application is to be listed for 1.5 days the parties to provide a written time estimate within 10 days of service of this order if they disagree with this direction.

4. The claim is an Aarhus Convention Claim and the limits upon recoverable costs set out in CPR45.43 (2) (b) and (3) and (4) shall apply to the parties save that the limit for the recoverable costs against the Defendant shall be £55,000 in total in respect of the three claims CO/199/2022, CO/163/2022 and CO/126/2022

5. Liberty to apply to vary or set aside paragraphs 2 and 4 of this order, any application to be made within 10 days of the date of this order.

Observations

The claims CO/199/2022, CO/163/2022 and CO/126/2022 each seek to challenge the publication on 19 October 2021 of the Net Zero Strategy;

Build Back Greener by the Secretary of State for Business, Energy and Industrial Strategy, in purported compliance with his duties under sections 13 and 14 of the Climate Change Act 2008.

Both the grounds advanced in this claim are arguable, with a realistic prospect of success, and merit investigation at a full hearing.

It is necessary for the three claims to be managed in a proportionate and cost effective matter given the significant degree of overlap between the grounds advanced.

The defendant should address the all the grounds in the three cases within a single set of detailed grounds

The time estimate of 1.5 days is based on the requirement that the Claimants liaise as to the presentation of the claims. There should be a single skeleton argument to cover

CO/199/2022 both grounds

CO/163/2022 both grounds and

CO/126/2022 grounds one, two and three

Ground 4 in CO/126/2022 can be addressed in an additional short skeleton

As for disclosure, given the issues in dispute between the parties essentially concern statutory interpretation, in particular whether a section 14 report is required to contain a quantification of expected emissions reductions, I am not satisfied, at this stage, of the need for specific disclosure. However in preparation of the full grounds of defence and evidence the Defendant should consider the need to provide any information prepared and/or presented to and/or otherwise relied on by the Defendant other than set out within the report (in particular in support of the assertion that regard was had to a quantitative assessment of quantification and timescales and/or the emission savings from some of the individual proposals and policies and also any argument under s31(3C) and s31(2A) of the Senior Courts Act 1981).

The claim is unarguably an Aarhus Convention Claim and the limits upon recoverable costs set out in CPR45.43 (2) (b) and (3) and (4) shall apply to the parties. However given the scope of the challenge (with substantial co-operation between the Claimants) and the matters set out in the application in CO/163/2022 in relation to the expense to the Claimant, it is necessary and just that the limit for the recoverable costs against the Defendant should be increased to £55,000 in total in respect of the three claims CO/199/2022, CO/163/2022 and CO/126/2022.

Case Management Directions

1. The claims CO/199/2022, CO/163/2022 and CO/126/2022 shall be managed and heard together and these case management directions apply to each of the cases

2. The Defendant and any other person served with the Claim Form who wishes to contest the claim or support it on additional grounds shall, within 35 days of the date of service of this Order, file and serve (a) Detailed Grounds for contesting the claim or supporting it on additional grounds, and (b) any written evidence that is to be relied on. As set out above there should be a single document to address the three claims. For the avoidance of doubt, a party who has filed and served Summary Grounds pursuant to CPR 54.8 may comply with (a) above by filing and serving a document which states that those Summary Grounds shall stand as the Detailed Grounds required by CPR 54.14.

3. Any application by the Claimant to serve evidence in reply shall be filed and served within 21 days of the date on which the Defendant serves evidence pursuant to 1(b) above.

4. The parties shall agree the contents of the hearing bundle and must file it with the Court not less than 4 weeks before the date of the hearing of the judicial review. Careful consideration should be given to limiting the content to what is necessary. The further Permission Bundle of some 2,814 pages in CO/163/2022 referred to only incidentally in the SFG or the witness statement far exceeds what is necessary for the Court to determine the application.

5. An electronic version of the bundle shall be prepared and lodged in accordance with the Guidance on the Administrative Court website. The parties shall, if requested by the Court lodge 2 hard-copy versions of the hearing bundle.

6. The Claimant must file and serve a skeleton argument not less than 21 days before the date of the hearing of the judicial review. As set out above there should be a single skeleton argument to cover the grounds in CO/199/2022 and CO/163/2022 and grounds one, two and three in CO/126/2022. Ground 4 in CO/126/2022 can be addressed in an additional short skeleton

7. The Defendant and any Interested Party must each file and serve a single skeleton Argument to cover all grounds in the three claims not less than 14 days before the date of the hearing of the judicial review.

8. The parties shall agree the contents of a bundle containing the authorities to be referred to at the hearing. An electronic version of the bundle shall be prepared in accordance with the Guidance on the Administrative Court website. The parties shall if requested by the Court, prepare a hard-copy version of the authorities bundle. The electronic version of the bundle and if requested, the hard copy version of the bundle, shall be lodged with the Court not less than 3 days before the date of the hearing of the judicial review.

Case NOT suitable for hearing by a Deputy High Court Judge

[redacted]

Signed Mr Justice Cotter

The date of service of this order is calculated from the date in the section below

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For completion by the Administrative Court Office

Sent / Handed to

either the Claimant, and the Defendant [and the Interested Party]

or the Claimant's, and the Defendant's, [and the Interested Party's] solicitors

Date: 01/03/2022

Solicitors: BAKER MCKENZIE LLP
Ref No.

Notes for the Claimant

To continue the proceedings a fee is payable.

For details of the current fee please refer to the Administrative Court fees table at [redacted]

Failure to pay the fee or submit a certified application for fee remission may result in the claim being struck out.

The form to make an application for remission of a court fee can be obtained from the Justice website [redacted]

You are reminded of your obligation to reconsider the merits of your claim on receipt of the defendant's evidence.

BRIEFING – NEW LEGAL CASE
Net Zero Strategy and Heat and Building Strategy
The Climate Change Act 2008

NOTICE: This briefing contains a summary of a Friends of the Earth legal case, which was filed on 12 January 2022 in the High Court. A copy of our press release is also enclosed.

PURPOSE: This briefing is provided for your information, but you can also contact us.

KEY POINTS

- Friends of the Earth is taking the Government to court, alleging it has breached the Climate Change Act 2008 (CCA). The CCA was devised by Friends of the Earth, and came into force following its hugely successful [redacted] campaign.
- In this court case, Friends of the Earth is challenging two government strategies, published together in October 2021:
  - the Net Zero Strategy (NZS), which is the Government's economy-wide decarbonisation strategy. We will argue that Secretary of State for Business Energy and Industrial Strategy (Kwasi Kwarteng) has failed to comply with his duties under the CCA.
  - the Heat and Buildings Strategy (HBS), on the basis that no assessment was done of its impact on protected groups, as required by the Equality Act 2010.
- On 1 March 2022, the High Court granted Friends of the Earth permission to proceed on all of its grounds.

WHY IS FRIENDS OF THE EARTH BRINGING THIS CASE?

- We're bringing the case because a rapid and fair transition to a safer future is not yet guaranteed and the Government strategies do not match what is needed.
  - The NZS contains some ambitious targets, and *theoretical* pathways, but lacks the detail needed to assess whether or not the proposed policies can deliver the emissions reductions set by the carbon budgets under the CCA. The lack of that basic working-out is inexcusable in the context of a climate emergency and, we say, unlawful.
  - The lack of this essential information also does not allow Parliament and the public to hold the Government to account because we cannot assess how good or bad the Net Zero plan is. This defeats the purpose of the CCA legally requiring the government to present a report that sets out how it will meet the carbon budgets.
  - The HBS was never assessed for its impact on the more vulnerable and protected groups in society, under the Equality Act 2010. It's not possible to plan for the fair or just transition that is needed if you do not consider the possible disproportionate impact on vulnerable groups.

- The alleged legal failures are very serious given the urgency of the climate crisis and the need for a just and fair transition that is inclusive. That's vital, because we know that both the causes and effects of climate breakdown are not distributed fairly – with those doing least to cause it often the hardest hit.

- Inequalities should be at the forefront of policy-makers' minds when designing the climate transition. For example, in heat and buildings, we know that the impacts of fuel poverty affect some worse than others. A report[1] by Friends of the Earth in November 2021, found that people of colour are twice as likely to be living in areas of fuel poverty than white people. It also found that areas with high numbers of disabled residents were more likely to be rated in the worst category of fuel poverty.

- But the Government's strategy for our homes and heating didn't consider protected groups, such as age, race and disability when setting out policy for the future.

- Transitioning to a zero-carbon economy is an opportunity to redress existing inequalities and secure a safer, fairer future for all. But this can only be achieved by designing policy with marginalised or vulnerable people in mind. Otherwise we risk not only missing this opportunity, but exacerbating the inequalities that already exist. That risk is heightened when the Government does not – as here – identify and consider their specific needs, as required by the Equality Act 2010.

THE LEGAL CASE

We filed our case on 12 January 2022, and permission to proceed was granted by the High Court on 1 March 2022. The judge concluded that all of our grounds have a realistic prospect of success, and merit investigation at a full hearing.

We anticipate that this legal challenge could be a landmark climate case against the Government.

We are challenging the Government on the basis that:

Ground 1 – BEIS failed to include in the NZS the basic information required to give effect to section 14 of the CCA, including: the basis for concluding that the proposals and policies would meet the carbon budgets; a quantified estimate for emissions reductions from each proposal and policy; and, the relevant timescales for their implementation and effect.

Ground 2 – BEIS misunderstood the statutory objective when preparing policies and proposals for section 13 CCA.

Ground 3 – BEIS did not have the information necessary to enable the conclusion to be made that the policies and proposals under s13 would enable the carbon budgets to be met.

[1] [redacted]

Ground 4 – BEIS failed to discharge the 'public sector equality duty' and did not assess the HBS strategy against the particular needs of protected groups, such as age, race, sex and disability.[2]

The environmental charity ClientEarth[3] and the not-for-profit campaign organisation the Good Law Project have also filed separate challenges in relation to the NZS. Their claims have also been granted permission to proceed.

Friends of the Earth was the first party to file its case, and is the only party challenging the Heat and Buildings Strategy as well.

WHAT WE HOPE TO ACHIEVE

- A Net Zero Strategy that contains a more credible and worked out plan that shows we will meet the carbon budgets set in law.
- Greater transparency, so the Government can be held accountable for any shortfall.
- Strengthen the operation of the CCA.
- Force the Government to consider the most vulnerable in society and how best to meet their need in the transition to Net Zero, particularly with regards to the HBS.

NEXT STEPS

- We will now be preparing our case for the substantive hearing, and will be coordinating with ClientEarth and the Good Law Project.
- We estimate that the hearing could take place in Autumn/Winter 2022.

FURTHER INFORMATION

For any further information about the legal case please contact Katie de Kauwe [redacted]@foe.co.uk; or Will Rundle [redacted]@foe.co.uk.

Case documentation will be legally privileged and may not be disclosable.

If you wish to help us amplify what we are doing and campaign with us, please contact Tony Bosworth [redacted]@foe.co.uk .

For press work or enquiries please contact our press team media@foe.co.uk

2 March 2022
Friends of the Earth

[2] [redacted]

[3] ClientEarth are claiming breach of the Climate Change Act 2008. ClientEarth lawyers will also argue that failing to have sufficient policies in place for meeting carbon budgets is not compatible with human rights law. They argue this would exacerbate the already severe risks posed to today's young people and future generations, including by risking the need for more drastic measures in future.

Friends of the Earth Press Release
Embargoed until 00.01 Wednesday 12th January 2022

"Shocking" and "lacklustre" commitments not enough: Friends of the Earth takes government to court over weak and inadequate climate strategies

- The Net Zero Strategy (NZS), published in October 2021, does not comply with requirements under the Climate Change Act 2008 [1]
- The Heat and Buildings Strategy, published at the same time and referred to in the NZS, did not consider impact on legally protected groups under the Equality Act 2010

Friends of the Earth is taking the government to court over two of its woefully inadequate climate strategies, and is filing papers today [2]. The Judicial Review, brought to the High Court by the environmental campaign group, will challenge both the government's Net Zero Strategy (NZS) and its Heat and Buildings Strategy. It will do so on the basis that the NZS does not comply with the Climate Change Act 2008, which Friends of the Earth was central to devising and securing. The group also contends that the Heat and Buildings Strategy should have considered the impacts of its policies on protected groups, as part of ensuring a fair energy transition where climate action aligns with social responsibility.

Friends of the Earth claims the pathways to reach net zero in the NZS are theoretical, because they are not supported by government policy which shows how they can be fulfilled. This means that the Net Zero Strategy is not lawful, and crucially, does not allow parliament and members of the public to hold government accountable for any failures.

Friends of the Earth also claims that the government totally failed to consider the impact of its Heat and Buildings Strategy, published at the same time as the NZS, on protected groups. Factors such as age (both the elderly and the very young who will live with the greatest future climate impacts), sex, race, and disability can make people more vulnerable to climate impacts. This unaddressed inequality needs transparency and political accountability.

A refusal so far to disclose its equality impact assessment for the Net Zero Strategy has raised similar concerns.

The environmental group is concerned that people in these groups can be unfairly and disproportionately impacted by a badly planned transition to low carbon living. Yet the government has not identified and considered their specific needs as required by the Equality Act 2010.

Previous government research has shown that more than three million people live in fuel poverty across England. Those considered fuel poor are typically people on a low income and living in poorly insulated homes.

[redacted] [3] that people of colour are twice as likely to be living in fuel poverty as white people, while areas identified by the government as having a high number of residents with disabilities or other health needs are more likely to be rated in the worst category for fuel poverty.

The government did not consider these factors which is why the environment group is today taking legal action.

The need for a fair and just transition away from reliance on damaging fossil fuels makes these collective legal failures all the more serious.

Katie de Kauwe, lawyer at Friends of the Earth, said: "With characteristic sleight of hand the government has set out an imaginary pathway for reducing carbon emissions but no credible plan to deliver it.

“A rapid and fair transition to a safer future requires a plan that shows how much greenhouse gas reduction the chosen policies will achieve, and by when. That the plan for achieving net zero is published without this information in it is very worrying, and we believe is unlawful.

“We know that those who do least to cause climate breakdown are too often the hardest hit. Climate action must be based on reversing these inequalities, by designing the transition with the most vulnerable in mind. Not even considering the implications of the Heat and Building Strategy on groups such as older and disabled people, and people of colour and ethnic minorities is quite shocking, given these groups are disproportionately impacted by fuel poverty, for example.

“Housing is a good example because people who need to consume the smallest amount of energy due to cost find themselves trapped in reliance on gas heating in cold, leaky homes. And now people across the country are facing an energy price crisis, with gas prices expected to double compared to just two years ago.

“The bottom line is that the government’s vision for net zero doesn’t match the lacklustre policy that is supposed to make it possible. We are very concerned at the potential consequences of such a strategy for people in this country, and across the world, given the climate emergency. This is why we are taking this legal action today.”

Rowan Smith, solicitor at Leigh Day, said: “Under the Climate Change Act 2008, the Secretary of State has a legal obligation to set out how the UK will actually meet carbon reduction targets. Friends of the Earth considers that the Net Zero Strategy lacks the vital information to give effect to that duty, and so any conclusion, that targets will be achieved on the basis of the policies put forward, is unlawful. Friends of the Earth is concerned that this places future generations at a particular disadvantage, because current mistakes are harder to rectify the closer we get to 2050. That is why this legal challenge is so important.” ENDS

For more information and interview requests contact the Friends of the Earth press office on 020 7566 1649 or email media@foe.co.uk.

Notes to editors
[1] Secretary of State for BEIS – Kwasi Kwarteng to produce policies that will enable the carbon budgets to be met (sections 13 and 14 of the Climate Change Act).
[2] Friends of the Earth Limited today filed papers in the High Court challenging the government’s Net Zero Strategy on the basis that it has breached the Climate Change Act 2008, an act which Friends of the Earth campaigned for through its [redacted] The organisation is also challenging the government’s Heat and Buildings Strategy and is arguing that it has not complied with the Equality Act 2010, as it did not assess the impacts of this strategy on protected groups, such as disabled people and the elderly, people of colour and other ethnic minorities.
[3] Analysis by Friends of the Earth in November 2021 mapped out regional differences in fuel poverty across England. Its findings included that (i) people of colour are twice as likely to be living in fuel poverty as white people and (ii) that areas identified as having a high number of disabled residents, or people with other health needs, are more likely to be rated in the worst category for fuel poverty.

- Friends of the Earth is being represented by David Wolfe QC of Matrix Chambers and Catherine Dobson of 39 Essex Chambers, and by the law firm Leigh Day LLP.
- ClientEarth have also announced a legal case today challenging the lawfulness of the Net Zero Strategy. In addition to claiming breach of the Climate Change Act 2008, ClientEarth lawyers argue that failing to have sufficient policies in place for meeting carbon budgets is not compatible with human rights law. They argue this would exacerbate the already severe risks posed to today’s young people and future generations, including by risking the need for more drastic measures in future.
- **About Friends of the Earth:** Friends of the Earth is an international community dedicated to the protection of the natural world and the wellbeing of everyone in it. We bring together more than two million people in 75 countries, combining people power all over the world to transform local actions into global impact. For more information visit: [redacted] follow us at @friends_earth, or like our Facebook page. Save paper and send an e-card today by visiting [redacted]

The full PAP letter is at

[redacted]

This document contains keys section as quoted in my Deadline 10 submission

Readers are advised to read the full letter at the link above.

Baker McKenzie.

Baker & McKenzie LLP

100 New Bridge Street
London EC4V 6JA
United Kingdom

[redacted]

Asia Pacific
Bangkok
Beijing
Brisbane

22 December 2021

LETTER BEFORE CLAIM: PROPOSED JUDICIAL REVIEW OF THE NET ZERO STRATEGY

1. This letter is a formal letter before claim written in accordance with the Pre-action Protocol for Judicial Review under the Civil Procedure Rules.

The proposed claimant

2. The proposed claimant is Good Law Project.

Details of the matter being challenged

4. The publication on 19 October 2021 of the Net Zero Strategy ("**the Strategy**") by the Secretary of State for Business, Energy and Industrial Strategy, in purported compliance with his duties under sections 13 and 14 of the Climate Change Act 2008.

The issue

The Climate Change Act Framework

6. The Climate Change Act 2008 ("**CCA 2008**") is central to the UK's efforts to tackle climate change. It creates a scheme of legally binding targets to reduce emissions of greenhouse gases ("**GHG**"), together with five-yearly carbon budgets which are to be set by the Secretary of State and approved by Parliament with a view to meeting the targets. The Secretary of State is also required by the CCA 2008 to formulate and publish policies and proposals to meet the carbon budgets. In more detail:

    a. Section 1 CCA 2008, as amended by The Climate Change Act (2050 Target Amendment) Order 2019, requires the UK Government to reduce net emissions of 'targeted greenhouse gases' to zero by 2050 ("**the Net Zero Target**").

    b. Sections 4 to 10 of the CCA 2008 create a scheme of five-yearly "carbon budgets" which must be set by the Secretary of State by specified dates, and approved by Parliament, and which establish the maximum allowable GHG emissions over each five-year budget period.

    c. At present, the Secretary of State has legislated for the amounts of such carbon budgets up to and including the sixth carbon budget ("**CB6**"), which covers the period 2033-2037. The CB6 is set at a level that effectively equates to a 78% reduction by 2035 compared to 1990 levels.

d. Sections 13 and 14 of the CCA 2008 impose linked duties on the Secretary of State respectively to prepare and to report on policies and proposals for meeting the legislated budgets:

> ***13 Duty to prepare proposals and policies for meeting carbon budgets***
>
> *(1) The Secretary of State must prepare such proposals and policies as the Secretary of State considers will enable the carbon budgets that have been set under this Act to be met.*
>
> *(2) The proposals and policies must be prepared with a view to meeting—*
>
> *(a) the target in section 1 (the target for 2050) [...]*
>
> ***14 Duty to report on proposals and policies for meeting carbon budgets***
>
> *(1) As soon as is reasonably practicable after making an order setting the carbon budget for a budgetary period, the Secretary of State must lay before Parliament a report setting out proposals and policies for meeting the carbon budgets for the current and future budgetary periods up to and including that period.*
>
> *(2) The report must, in particular, set out—*
>
> *(a) the Secretary of State's current proposals and policies under section 13, and*
>
> *(b) the time-scales over which those proposals and policies are expected to take effect.*

7. The Strategy contains the policies and proposals that the Secretary of State has prepared in relation to the CB6 (and preceding carbon budgets) and the Net Zero Target. It states on its face that it is 'Presented to Parliament pursuant to Section 14 of the Climate Change Act 2008'. However, as explained further below, the Strategy is unlawful because it does not discharge the Secretary of State's duties under ss. 13 and 14. That is because it does not set out policies and proposals for meeting the CB6. Rather it identifies the pathway that UK emissions will need to be on to meet the CB6 and then sets out a series of actions that will need to happen for that to occur, but does not present a set of policies or proposals that have been designed so as to bring about the change which will be necessary to meet the CB6. Merely listing ambitions and discussing possible pathways does not meet the duties under ss.13 and 14.

Proposed Ground of Challenge

14. The Strategy fails to meet the duties in s.14 CCA 2008, and the policies and proposals it contains fail to meet the duties in s.13 CCA 2008.

Nature of the duties under s.13 and s.14 CCA 2008

15. By s. 13(1) CCA, the Secretary of State must prepare such proposals and policies as the Secretary of State considers will enable the carbon budgets that have been set under the CCA 2008 to be met. The underlined words emphasise the high degree of confidence as to the outcome that the Secretary of State must achieve in his own mind in order to discharge the duty. The Claimant accepts, of course, that the words 'as the Secretary of State considers' confer on the decision-maker a degree of latitude in his assessment of the effect of the proposals and policies. But that does not relieve him of the duty to make an assessment, so as to assure himself that the proposals and policies will enable the budgets to be met.

16. Such an assessment will involve projections and estimates of the effect of the proposals and policies. Clearly, certainty as to the outcome is not possible or demanded by the CCA 2008. Nonetheless, for the Secretary of State to be able lawfully to conclude that the proposals and policies will enable the carbon budgets to be met, he must assess their collective effect on GHG emissions, and assure himself that they will (on his best estimates) bring about the necessary reductions. There is no indication in the Strategy that such an assessment has been made of the proposals and policies it contains.

The Strategy and its proposals and policies do not discharge the s.13 and s.14 duties

22. The Strategy fails entirely to seek to quantify the emissions reductions which each proposal and policy is expected to achieve. It is for that reason unlawful, as it is not a set of policies and proposals for meeting the CB6.

23. Indeed the Strategy, in its own methodological statements, does not even purport to be a set of proposals and policies for meeting the CB6. It is avowedly more aspirational than that. For example:

> *6. To show how we will meet our climate targets, including legislated carbon budgets up to and including the sixth carbon budget, the Net Zero Strategy contains both an indicative delivery pathway and illustrative 2050 net zero scenarios. The pathway, which stretches to the end of the Sixth Carbon Budget period in 2037, provides an indicative trajectory of emissions reductions which we aim to achieve through the Strategy and through delivery of the policies and proposals outlined.*
>
> [page 306, underlining added]

Aiming to achieve an indicative trajectory of emissions reductions is not the same as, and falls far short of, considering that the policies and proposals set out in the Strategy will, or even are likely to, enable particular targets to be met.

34. We note that the Government's statutory advisers on climate change, the CCC, have advanced the same criticism of the Strategy as that set out above:

> *However, the Government has not quantified the effect of each policy and proposal on emissions. So while the Government has proposed a set of ambitions that align well to the emissions targets, it is not clear how the mix of policies will deliver on those ambitions – albeit in theory they could. This makes it hard to assess the risks attached to the plans and how best to manage these.*[6]

35. For the reasons above, the Secretary of State has failed to discharge his duties under both s.13 and s.14 CCA 2008, and the Strategy is unlawful as a result.

Our expertise

Advice on reducing the UK's emissions

How the CCC advises on UK emissions targets

We assess the latest greenhouse gas emissions data to judge whether the UK is on course to meet its carbon budgets. We report progress to the UK Parliament and Parliaments in Scotland and Wales annually, and to Northern Ireland on request.

- UK emissions were 48% below 1990 levels in 2020 (This reduction reflects the impact COVID-19 had on emissions in 2020, much of which is not expected to be permanent. The fall in emissions between 2019 and 1990 was 40%).
- The first carbon budget (2008 to 2012) was met, as was the second (2013 to 2017) and the UK is on track to outperform the third (2018 to 2022). However, it is not on track to meet the fourth (2023 to 2027) or the fifth (2028-2032). To meet future carbon budgets and the Net Zero target for 2050 will require governments to introduce more challenging measures.
- Through the Climate Change Act, the UK government has committed to reduce emissions by at least **100% of 1990 levels (Net Zero) by 2050**.

As a signatory to the Paris Agreement, the UK has committed to contribute to global emission reductions to limit global temperature rise to well below 2°C and to pursue efforts towards 1.5°C above pre-industrial levels.

Carbon budgets

The Climate Change Act requires the UK government to set legally-binding 'carbon budgets' which act as stepping stones towards the 2050 target. A carbon budget is a cap on the amount of greenhouse gases emitted in the UK over a five-year period. Budgets must be set at least 12 years in advance to allow policy-makers, businesses and individuals enough time to prepare. The CCC advises on the appropriate level of each carbon budget. Once accepted by Government, the respective budgets are legislated by Parliament. The budgets describe the cost-effective pathway to achieving the UK's long-term climate change objectives. They also take into account a range of other factors including scientific knowledge, technology, economic and social circumstances, amongst others.

The first five carbon budgets have been put into law and run up to 2032. The UK is currently in the third carbon budget period (2018 to 2022). The Committee has published its advice on the Sixth Carbon Budget and Government legislated for this in June 2021.

Budget	Carbon budget level	Reduction below 1990 levels	Met?
1st carbon budget (2008 to 2012)	3,018 MtCO2e	25%	Yes
2nd carbon budget	2,782	31%	Yes

(2013 to 2017)	MtCO2e		
3rd carbon budget (2018 to 2022)	2,544 MtCO2e	37% by 2020	On track
4th carbon budget (2023 to 2027)	1,950 MtCO2e	51% by 2025	Off track
5th carbon budget (2028 to 2032)	1,725 MtCO2e	57% by 2030	Off track
6th carbon budget (2033 to 2037)	965 MtCO2e	78% by 2035	Off track
Net Zero Target		At least 100% by 2050	

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