



Response to:

**The Examining Authority's request for
views on the RIS2 High Court
Judgement and other issues**

for

**A428 Black Cat to Caxton Gibbet
Improvement Scheme Examination 2021**

1 Introduction

- 1.1 Transport Action Network (TAN) briefly appeared at the Issue Specific Hearing (ISH) 3 held on Friday, 24 September 2021 to speak on the following:

9. Sustainability effects, in particular economic effects

a. Consideration of the lifetime greenhouse gas emissions of the Proposed Development. What are the implications of the Proposed Development for net zero carbon emissions by 2050?

b. Consideration of commuting routes that would inform consumer user benefits

c. Implications for the Proposed Development of the announcement of the cancellation of the Oxford Cambridge Expressway in March 2021. How is the evidence that informed that decision different from the evidence supporting the Proposed Development?

- 1.2 In the event, only 9a was discussed and then only briefly, focussing mostly on the outcome in the High Court of the legal action on the second Roads Investment Strategy. TAN agreed to follow up its appearance with a note addressing the points raised by it and others under 9a, setting out the reasons why it felt that the significance of the carbon emissions arising from the new road were being wrongly dismissed. Also, that the requirements of the Environmental Impact Assessment (EIA) Regulations have not been fulfilled and that this needs to be done to give a greater understanding as to the true impact of the new road.
- 1.3 TAN is awaiting National Highways submissions on 9b and 9c before commenting on these.

2 Implications of legal judgement on RIS2

- 2.1 At ISH3 the Examining Authority (ExA) asked whether it was sustainable to maintain that the carbon emissions could be described as having no significance. National Highways replied that it was and used the judgement in our court case on the second Roads Investment Programme (RIS2) that was heard in June 2021 to justify their position. They claim that the judge had ruled that the emissions of the whole roads programme were indeed insignificant and therefore that must apply to any road scheme within the programme. This we argue is a misinterpretation of the judgement and the assertions by National Highways are wrong on several counts.

- 2.2 First, on 16 August 2021, TAN submitted an application to the Court of Appeal for permission to appeal the RIS2 judgment. The key grounds of appeal are that the Court: (i) took a flawed approach to the Secretary of State’s analysis of greenhouse gas (GHG) emissions and its de minimis conclusion (an almost identical argument relied on here by the Applicant); (ii) misdirected itself as to, and/or unlawfully failed to apply, the meaning and requirements of s.3(5) of the Infrastructure Act 2015 in assessing whether the Secretary of State had discharged his statutory duty to have regard to the effect on the environment of (what he was approving in) RIS2, including that: (a) the Court had wrongly held that the Secretary of State was not required to consider the overall effect of RIS2 on climate change targets; and (b) the Court simply failed to address the pressing nature of the carbon budgets in deciding whether they were material to that exercise; and (ii) took a flawed approach to the materiality of the Paris Agreement, specifically that it had erred in its analysis of the Supreme Court’s decision in the Heathrow third runway litigation, and its effect on the Court of Appeal’s finding about the obvious materiality of the Paris Agreement to the designation of the Airports National Policy Statement.
- 2.3 Second, the ExA’s role during a public inquiry is to assess the merits of the application. This must, of course, be conducted in a lawful manner. However, it should be noted that such a role is distinctly different to that of an Administrative Court applying the principles of judicial review.
- 2.4 Third, the case turned on the carbon targets in place at the time of the decision to “set” RIS2 in March 2020 [even if post-decision facts were relevant to what could be considered de minimis]. That was before the decisions to increase national carbon reduction targets to 68% by 2030 and 78% by 2035, effectively halving the time to reach the previous 80% by 2050 target. Indeed, the national emissions forecasts for 2040 that RIS1 was assessed against are no longer lawful. Decisions taken on road schemes now are taken against different and far more challenging medium-term carbon targets.
- 2.5 Finally, in any event, the DfT’s Transport Decarbonisation Plan acknowledges both the uncertainty and difficulty in meeting net zero by 2050, in particular as its core and high bound projections for land transport (let alone aviation or shipping) are too high for this target:

“In our decarbonising transport projections, lower bound emissions for land transport reach zero by 2050. This could be driven by a natural decline in petrol and diesel vehicle use as those markets, and associated infrastructure provision, decline over time. However, reaching the point of actual zero emissions may

require additional measures beyond those identified here to support the final transition to fully zero emission surface transport.” (p44)

- 2.6 Crucially though, it fails to consider whether the measures set out are adequate to meet the more challenging medium-term targets. Moreover, these projections ignore wider carbon impacts of transport, ignoring the construction of larger roads and manufacture of electric cars, and assume that lower carbon fuels are zero carbon.

3 Significance of carbon emissions

- 3.1 National Highways continue to point to paragraph 5.18 in the National Policy Statement for National Networks (NPSNN) as additional justification for their position to disregard carbon emissions or label them as insignificant. However, what they fail to highlight is that the NPSNN also says the following:

Paragraph 4.15:

*“The Directive specifically requires an environmental impact assessment to identify, describe and assess effects on human beings, fauna and flora, soil, water, air, **climate**, the landscape, material assets and cultural heritage, and the interaction between them. Schedule 4 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 sets out the information that should be included in the environmental statement including **a description of the likely significant effects of the proposed project on the environment, covering the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the project, and also the measures envisaged for avoiding or mitigating significant adverse effects.**”*
[our emphasis]

Paragraph 4.17

“The Examining Authority should consider how significant cumulative effects and the interrelationship between effects might as a whole affect the environment, even though they may be acceptable when considered on an individual basis with mitigation measures in place.”

In paragraph 5.17 states:

*“Where the development is subject to EIA, any Environmental Statement will need to describe an assessment of any likely significant **climate** factors in accordance with the requirements in the EIA directive.”* [our emphasis]

- 3.2 It should be noted that the EIA regulations do not define significance for climate or indeed anything else as shown from the EIA guidance reproduced here¹:

“1.4.1 Legal framework of significant effects

The EIA Directive stipulates that ‘significant’ effects must be considered when it comes to assessing the effects (or impacts) on the environment. The concept of significance considers whether or not a Project’s impact could be determined to be unacceptable in its environmental and social contexts. The assessment of significance relies on informed, expert judgement about what is important, desirable or acceptable with regards to changes triggered by the Project in question.

*This limits the assessment to those impacts that are likely to have a significant or important enough impact on the environment to merit the costs of assessment, review, and decision-making. While the concept of significant effects is referred to several times throughout the EIA Directive (see the box below), **no clear definition is provided**, and significance has to be assessed in light of the Project’s specific circumstances...” [our emphasis]*

- 3.3 It is also worth noting that the guidance also states²:

*“At the same time, **significance determinations should not be the exclusive prerogative of ‘experts’ or ‘specialists’**: significance should be defined in a way that reflects what is valued in the environment by regulators and by public and private stakeholders. A common approach used in EIA is the application of a multi-criteria analysis. Common criteria used to evaluate significance include the magnitude of the predicted effect and the sensitivity of the receiving environment:” [our emphasis]*

- 3.4 This would indicate that an issue of great public concern, such as climate change, should be considered as a significant impact, regardless of any arguments about numerical magnitude.
- 3.5 Additionally, the guidance does not say that carbon emissions, or indeed any other metric, should only be assessed against the UK’s (or any other national) budgets or inventories. That would be highly inappropriate as it would rule out considering most things as having significant impact on any rational basis. It is also worth stressing that

¹ Paragraph 1.4.1, pages 47-48, Environmental Impact Assessment of Projects: Guidance on the preparation of the Environmental Impact Assessment Report – European Union, 2017

² Paragraph 1.4.2, page 49, Environmental Impact Assessment of Projects: Guidance on the preparation of the Environmental Impact Assessment Report – European Union, 2017

carbon emissions are the only metric to be evaluated in this way in the NPSNN or indeed anywhere else as far as we are aware. As we showed in our response to the written questions [REP1-097], if you assess the economic benefits in this way, these come out at an even smaller percentage compared to UK GDP. On that basis the economic benefits of the scheme should be dismissed as insignificant which would severely undermine the case for the new road.

- 3.6 Finally, it is worth pointing out that paragraph 5.18 of the NPSNN does not rule out carbon emissions being significant. Its wording states that:

*“...unless the increase in carbon emissions resulting from the proposed scheme are **so significant...**”* [our emphasis].

- 3.7 Not only does this allow for carbon emissions associated with a new road to be described as significant, it even suggests that it expects that to be the case by the use of the word ‘so’. From this it is clear that National Highways have misunderstood the wording in the NPSNN and its higher test of ‘so significant’.

4 Missing indirect greenhouse gas emissions

- 4.1 The EIA guidance also has a specific section on climate change mitigation³ which states:

“The EIA should include an assessment of the direct and indirect greenhouse gas emissions of the Project...”

- 4.2 Clearly National Highways have failed to fully assess the direct and indirect emissions from the new road as we outlined in REP1-097. This is likely to have caused an underestimate of the emissions in the short – medium term. They claim that cumulative emissions are accommodated in their transport modelling but that only goes so far to address cumulative emissions.
- 4.3 It does not address the missing indirect emissions and wider cumulative emissions that this road will help generate.

³ Paragraph 1.3.2, page 39, Environmental Impact Assessment of Projects: Guidance on the preparation of the Environmental Impact Assessment Report – European Union, 2017

5 The missing local and regional context

5.1 Introduction

5.1.1 The EIA guidance also has a specific section on climate change mitigation⁴ which states:

“The assessment should take relevant greenhouse gas reduction targets at the national, regional, and local levels into account, where available.”

5.1.2 Slightly more detail was given in earlier EIA guidance⁵ which states:

“The complexity of climate change and biodiversity should not deter you from analysing direct and indirect impacts the proposed project could have on trends in key issues.”

and

*“Judging an impact’s magnitude and significance must be context-specific. For an individual project — e.g. a road project — **the contribution to GHGs may be insignificant on the global scale, but may well be significant on the local/regional scale, in terms of its contribution to set GHG-reduction targets.**”*
[our emphasis]

5.1.3 National Highways have failed to provide any assessments as to how the new road’s emissions will impact on any local and regional targets. They have only estimated some of the carbon emissions linked to the new road and then only assessed these totals at a UK level. The guidance clearly states that they should do more than this, but this aspect of the assessment appears to be completely missing.

5.2 The Geography

5.2.1 This road scheme lies within four borough and district authorities: Bedford Borough Council, Central Bedfordshire Council, Huntingdonshire District Council, South Cambridgeshire District Council, which lie within the counties of Bedfordshire and Cambridgeshire and wholly within the area covered by England’s Economic Heartland (EEH) shadow sub-national transport body.

⁴ Paragraph 1.3.2, page 39, Environmental Impact Assessment of Projects: Guidance on the preparation of the Environmental Impact Assessment Report – European Union, 2017

⁵ Paragraph 4.4.2, page 40, Guidance on Integrating Climate Change and Biodiversity into Environmental Impact Assessment – European Union, 2013

5.3 Regional context

5.3.1 EEH has set itself the challenge of reaching net-zero for transport by 2040⁶ and highlights that the region must:

“Address the carbon impact of our transport system, where emissions are currently higher and growing faster than the national average”⁷

and

“Reduce reliance on the private car in a region where average journeys are longer, and car use higher than the national average.”

5.3.2 Going into more detail EEH gives an indication of the scale of the challenge⁸:

*“Transport-related emissions are a particular challenge, rising 10% between 2012-2017, compared to 5% nationally. In 2017 transport emissions equated to 47% of the Heartland’s total carbon dioxide emissions, compared with 37% nationally. And with transport emissions increasing at a faster rate than elsewhere (9.4% between 2012 and 2017 compared to the UK average of 4.9%) there is a clear need for action. **More generally, the current approach to the delivery and management of the transport system is unsustainable**, as demonstrated by the number of Air Quality Management Areas declared within the region. These figures reflect the fact that across the Heartland people are more likely to travel longer distances to work than the national average, and with over 67% of the workplace population travelling to work by car (compared to 60% nationally). They highlight the importance of seizing the opportunity created by changes arising from more flexible work patterns.” [our emphasis]*

5.3.3 As far as we are aware, National Highways have not demonstrated how increasing car use along the A428 corridor is helping with any of the above objectives in a region that already suffers from excessive car use and has ambitious carbon reduction targets. As EEH have highlighted, the current approach to transport provision is unsustainable and we would include road building within that.

⁶ Page 3, Connecting People, Transforming Journeys: Regional Transport Strategy: Summary – England’s Economic Heartland, February 2021

⁷ Page 4, Connecting People, Transforming Journeys: Regional Transport Strategy: Summary – England’s Economic Heartland, February 2021

⁸ Paragraph 63, page 22, Connecting People, Transforming Journeys: Regional Transport Strategy – England’s Economic Heartland, February 2021

5.3.4 Furthermore, the first policy of EEH's Transport Strategy is⁹:

"In identifying future investment requirements we will prioritise those which contribute to a reduction in car journeys in line with the recommendations delivered by the UK Climate Assembly: to facilitate a reduction in the number of private car journeys by a minimum of 5% per decade (of total traffic flow compared with 2019)"

5.3.5 Again, we have not come across any explanation as to how this road will contribute to this traffic reduction target. Indeed, in a region already challenged by higher than average car use, increasing car use, as this road will do, will make things worse. This will make the situation even more challenging and undermine the ability of the region to achieve its traffic reduction target and to achieving net-zero by 2040.

5.3.6 Additionally, with traffic reduction a key target, this undermines the economic case for this road, which is already marginal. Without traffic growth, much of the basis for the road falls away. Given that traffic levels are closely linked to user carbon emissions, this is a relevant consideration here.

5.3.7 Finally, if traffic reduction is a key aim of the region, then this should have been modelled as part of the baseline. Not only will that affect the economic case for the road, potentially it would also significantly increase the emissions from the new road, especially if traffic is as predicted, meaning that induced traffic would be much higher than currently acknowledged.

5.4 Local context

5.4.1 Both Bedford Borough Council¹⁰ and South Cambridgeshire District Council¹¹ have declared a climate emergency and set targets, while Cambridgeshire County Council has accepted there is a climate emergency¹². The other two councils don't appear to have declared a climate emergency or set any targets.

5.4.2 Bedford Borough Council wants to become carbon neutral by 2030, which is an incredibly challenging target and one likely to be undermined by building this road. Approximately a quarter of the road lies within Bedford, so around a quarter of the emissions generated by it should be allocated to the borough. These then need to be

⁹ Policy 1, page 30, Connecting People, Transforming Journeys: Regional Transport Strategy – England's Economic Heartland, February 2021

¹⁰ Article from Bedford Independent, 6 March, 2019

¹¹ Climate Emergency UK website

¹² Page 14, Council minutes of Full Council meeting on 14 May 2019

looked at in the context of the local carbon emissions and how they will affect the borough's ability to meet its target.

5.4.3 South Cambridgeshire District Council declared a climate emergency in November 2019 and in May 2020 announced it wanted to halve carbon emissions by 50% by 2030 and to net-zero by 2050. Similar to Bedford above, National Highways needs to assess emissions generated by the road within South Cambridgeshire and how these might be affects its local targets.

5.5 Need for more environmental assessment

5.5.1 The Environmental Statement clearly does not fulfil the EU EIA guidance as set out above and therefore National Highways needs to properly assess this project's climate emissions against local and regional targets.

6 Other significant assessments

6.1 As we raised at ISH3, in the summary of significant environmental effects [APP-085], Table 16-1, pages 2 & 3, during construction the impact on cultural heritage is deemed to be moderate adverse on two Grade II listed milestones and one Grade II listed milepost and large adverse on a grade II listed building. In England, there are around 400,000 listed buildings¹³, meaning that the number of listed buildings affected by this scheme is 0.001% of all England's total. Therefore, as a proportion of the UK's listed built heritage it will be even smaller.

6.2 As a reminder, from APP-083, additional carbon dioxide emissions from the road's construction and use represent 0.012% on the UK's 4th carbon budget, 0.012% in the 5th carbon budget and 0.023% in the 6th carbon budget and these are all likely underestimates as explained in our previous response to the ExA's first round of written questions [REP1-097]. These are at least an order of magnitude more than the heritage impact or indeed the economic benefit.

6.3 We know National Highways didn't like this comparison, because it shows up how ridiculous the carbon test is. However, they do have a small point in that these are specific assets that are being impacted, whereas carbon is not. It is a universal pollutant, not geographically defined, and more like money in that sense. A better comparison might be landscape impact or soil loss, which are both defined as suffering significant impacts from the project. However, neither of these two metrics are assessed, then compared to a national quantity before being dismissed as insignificant because they are only a very tiny percentage of the UK total. If they were, then it would be very likely that the development would be classified as having no significant impact on any environmental asset. That cannot have been the intention of the EIA regulations. Given it is only the NPSNN that has brought this ridiculous test forward, to dismiss the carbon emissions as insignificant, as NH has done, means that the ES is not compliant with the EIA regulations.

6.4 As can be seen from the extracts of the NPSNN listed above (paras 4.15 and 4.17) there is a need to fully consider all of the various impacts arising from the

¹³ Historic England's website

development, indirect and cumulative, local, regional and national and that together these might become significant when considered together, compared to when considered in isolation. We have already highlighted in our response to the written questions [REP1-097], how there are various aspects of the current carbon emissions assessment that are unclear, missing or wrong and are likely an underestimate in the short – medium term.

6.5 As we have already set out in our response to Q 1.4.1.2 [REP1-097], the NPSNN is accepted as being out of date and in need of review on need and climate grounds. Significant changes have happened since 2014 when the NPSNN was published:

- May 2019 - a climate emergency was declared by Parliament
- December 2020 - UK's Nationally Determined Contribution (NDC) of a 68% reduction in emissions by 2030 on 1990 levels as part of the UK's contribution to the Paris Agreement was set
- June 2021 - the new and much tougher targets set by the adoption of the 6th carbon budget in June 2021 (78% reduction in emissions by 2035 on 1990 levels)

6.6 It would appear irrational to dismiss carbon emissions of any substantial magnitude as having no significance as NH maintains in table 16-1, page 9, APP-085. The additional emissions at over 200,000 ktCO₂e for each of the 4th, 5th and 6th carbon budgets, which are likely to be an underestimate, are equivalent to the annual carbon emissions from a small town of 20,000 people. This is not an amount of carbon dioxide of 'no significance', regardless of whether it is felt that on its own it is enough to "materially impact on the ability of Government to meet its carbon reduction targets".

7 National Highways response to written questions

7.1 Q1.4.1.1a – National Highways have not answered this question about the cumulative impact of the RIS2 schemes in terms of Greenhouse Gas (GHG) emissions. Instead they have just talked about local cumulative impacts. They say they have satisfied consideration of the cumulative effects under the EIA regulations but they do not assess a lot of indirect emissions associated with the road as we set out in REP1-097.

7.2 Q1.4.1.1b – National Highways doesn't answer this question, talking of RIS in the singular, rather than the plural as the question states.

7.3 Q1.4.1.1c – This answer assumes that the calculated emissions during the 6th carbon budget are accurate or an overestimate. As we've stated in REP1-097 they are likely to

be an underestimate as many aspects are not assessed. Another factor is that no consideration is given to the regional target for traffic reduction and how this might play into the baseline traffic and hence emissions projections. If this traffic reduction target was incorporated in the baseline scenario, and traffic on the new A428 was as predicted then the induced traffic from the new road would be considerably higher than being acknowledged currently.

- 7.4 Q1.4.1.1e – National Highways do not appear to have considered any demand management measures to lower emissions or to support the regional traffic reduction target. Given user emissions make up a considerable part of overall emissions, this would seem to be a considerable oversight.
- 7.5 Q1.4.1.2b – We are not convinced by National Highways statement that it has conformed to approved practice when calculating construction emissions. These should include clearance and land use change emissions as they are effectively part of construction but there is nowhere showing how they have been calculated. They will result in significant emissions at the start of the process and shouldn't be hidden by being displayed as an overall negative amount due to future claimed sequestration. We make this point in REP1-097 and request that the modelling showing how this has been calculated is put before the examination.
- 7.6 Q1.4.1.2c – The DfT's Transport Decarbonisation Plan might be ambitious but it is far from actually enabling the change it talks about, notwithstanding there are questions as to whether it goes far enough, quickly enough. As Lord Deben, chair of the Committee on Climate Change has said in the same speech that he also challenged the spending on RIS2¹⁴:

“the Government must be congratulated on its targets and attacked on the basis it has not delivered on the mechanisms for delivering those targets.”

- 7.7 Therefore, to rely upon the TDP delivering the change required is problematic.

8 Conclusions

- 8.1 There is no doubt that this project will increase carbon emissions at the very time we need to be taking urgent action to reduce them. These are significant, even if they don't on their own derail the Government's ability to meet the UK's carbon budgets. However, there is a substantial amount of information missing from the

¹⁴ Comments made by Lord Deben at Greener Transport Solutions webinar: Not the journey but the destination: how our whole economy needs to change, 8th September 2021 – at 20:03 minutes

Environmental Statement which needs to be addressed and which potentially has significant implications for the need for the development.

8.2 The key issues are summarised below:

1. National Highways is wrong to try and use a legal ruling on procedure to dismiss significant environmental impacts
2. National Highways has misread the NPSNN which allows for new roads to have significant carbon emissions. Indeed, it would be hard for it to rule out carbon as never being significant, especially as EIA guidance does not define significance but also says that it should not be just in the gift of experts.
3. Many indirect carbon emissions are missing from the Environmental Statement. Even if deemed less significant than user emissions, the cumulative impact of the many emissions that are missed off could be significant when considered together and need to be assessed.
4. Contrary to EIA guidance, no assessment has been made on the impact of the road scheme on local and regional targets and this needs to be done.
5. National Highways has not fully answered the questions posed to it on carbon emissions.
6. The baseline traffic model doesn't appear to take into account the regional target to reduce car traffic by 5% per decade.
7. Clearance and land-use emissions are wrong as stated in REP1-097 and no detail is provided as to how they are calculated. This should be put before the examination.

Annex 1

Corrected transcript from Issue Specific Hearing 3, session 4

This transcript has been generated by TAN from the recording [EV-047], after it found the official transcript [EV-052] to be inaccurate.

Asterisks indicate where the recording wasn't clear enough to determine the exact wording.

59.27 minutes

Examining Inspector

Well, the question was within the context that I gave you, which includes the fact that for individual projects, our individual points of activities are increasing greenhouse gas emissions. We are therefore greenhouse gas emissions for the country are increasing. Given this and the 60 year lifespan of the proposed developments, which would take it well past 2050 and net zero carbon emissions for the United Kingdom and that there is still considerable uncertainty at present as to how do you the UK will reach this zero carbon by 2050, zero carbon figure by 2050. Can a conclusion of no significant effects, which is what's in the environmental statement in respect of climate be sustained? I'm asking the question in light of that context that I provided you.

1:00:19

Mr Chris Landsborough for National Highways

Yes, it can be sustained. I suppose it relates to the cumulative effects of the scheme with other existing and approved projects, as compared with the methodology for the environmental statement through the inclusion of the scheme with other local economic developments. And that's presented within the traffic model on transport *second* supply. *Other factors that support it*, it was determined that the recent case of a Transport Action Network versus the Secretary of State for Transport and Highways England company limited in relation to the judgement reached regarding the entirety of the carbon emissions for all schemes within the RIS2 framework. They concluded that they see no reason to question the judgement reached by the DFT that the various measures of carbon emissions from RIS2 on the whole were legally insignificant, or even de minimus, when related to appropriate comparators for assessing the effects of climate change objectives. Therefore, the High Court has concluded that the total carbon emissions from the schemes listed, including this one, is legally insignificant in the context of appropriate comparators for the assessment of the effect of climate change objectives. Accordingly, National Highways do not consider the

GHG emissions on account of this scheme alone, including on a cumulative basis over the 60 year period, to have any significant effect on the climate or the UK's ability to comply with its carbon budgets. In addition, cumulative emissions are taken account as a consideration both during the calculation construction emissions and for the traffic model used as the basis for calculating user emissions.

4 November 2021

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Transport Action Network provides free support to people and groups pressing for more sustainable transport in their area and opposing cuts to bus services, damaging road schemes and large unsustainable developments

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