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DEADLINE D5 (incl ExQ2)

In so far as the facts in this statement are within my knowledge, they are true. In so far as the facts in this statement are not within my direct knowledge, they are true to the best of my knowledge and belief.

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1 INTRODUCTION

- 1 This document provides recent updates on the policy and legal framework including the Prime Minister’s speech on Net Zero on 20th September 2023.
- 2 Notification of a potential issue in the modelling is provided.
- 3 In order to respond to the applicant’s submissions at deadline 4, the IEMA guidance is revisited, and then I rebut the applicant’s purported assessment of the M3J9 against the Carbon Budget Delivery Plan (CBDP). This also responds to ExQ2/Q6.2.3.
- 4 I then respond to some other questions from ExQ2.
- 5 This flow has been designed to provide the explanations required in the right sequence with minimal repetition of material previously submitted.

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

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

2.1 Impact on GHG emissions

7 REP2-027, 14.5.23 ("*Environmental Statement Chapter 14 Climate*") states that emissions were calculated using the Emissions Factors Toolkit (EfT), version 11² for construction emissions and operation emissions [REP2-027, 14.5.25]. This no longer provides a worst-case calculation for the emissions from the scheme in the 5th and 6th carbon budgets and beyond. Following the Prime Minister's policy change, the emissions need recalculating with a revised version of the EfT toolkit.

2.2 Impact on BCR

8 The additional emissions from the Prime Minister's policy change will have an impact on the BCR. The BCR for the M3J9 is already poor, and will become worse as a result of the policy changes when additional GHG costs are factored in.

3 RECENT UPDATES: POLICY AND LEGAL FRAMEWORK

3.1 Delivery risk and policy gap in securing delivery of net zero, and the undisclosed Risk Tables

9 There is now additional information, the existence of which has become apparent since my last submission at D4.

10 On July 7th 2023, Friends of the Earth, ClientEarth and Good Law Project, the same claimants as in the first NZS legal case, announced that they are taking the Government to court for the second time in under two years ("**the second NZS legal case**") because of "*the Government's failure to include a proper assessment of the delivery risks associated with the policies and proposals in the Carbon Budget Delivery Plan*"³. On September 1st 2023, these claimants announced that they have been given permission to go to a full Judicial Review hearing in the High Court⁴.

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

² Department for Environment, Food & Rural Affairs, 2021

³ Good Law Project press release, July 2023, "The Government is still failing on net zero, so we are taking them back to court", https://actions.goodlawproject.org/net_zero_2

⁴ 'Not fit for purpose': Green groups secure High Court hearing over government's net zero plans, Business Green, Sept 1st 2023, <https://www.businessgreen.com/news/4123909/fit-purpose-green-secure-court-hearing-governments-net-zero-plans>

- 11 In relation to securing the NZS, I have previously highlighted what the Court said in the first NZS legal case judgment⁵ on delivery risk and policy gap.
- 12 As background, in the first NZS legal case judgement, Holgate J. recorded the NZS's acknowledgement that the delivery pathways to achieve the 6th Carbon Budget are highly ambitious and face considerable delivery challenges and recorded that achievement was subject to a wide uncertainty range. The judge noted at paragraphs 204 and 211 that in approving the Net Zero Strategy, "*one obviously material consideration which the Secretary of State must take into account is risk to the delivery of individual proposals and policies and to the achievement of the carbon budgets and the 2050 net zero target.*" In finding the NZS unlawful, the judge described risk to delivery as the critical issue when concluding that the information provided to the Minister when reporting on the NZS was insufficient to enable him to discharge his reporting obligations under section 14 of the Climate Change Act 2008.
- 13 Critically at paragraph 249 the judge says:
- "... the ability to meet the statutory targets depends upon the contributions made by a multiplicity of proposals and policies adopted by the Secretary of State. This is obviously material to the risk of delivery. It is critical to any assessment by Parliament, and by the public, of how the statutory targets are likely to be met, by what means and with what implications."*
- 14 With the new PUB and CBDP, a number of issues arise which are likely⁶ to be taken before the Court in the now permissioned case, these include:
- (A) Delivery risks have not been assessed in the CBDP for each policy and proposal as they should have been;
 - (B) The CBDP (at paragraph 26) is based on the assumption that all quantified policies and proposals will be delivered in full;
 - (C) The Statements of Facts and Grounds (SFG)⁷ from one of the claimants in the second NZS case describes that '*in pre-action correspondence, the Secretary of State for Energy Security and Net Zero ("SSESNZ") has revealed that he was, in fact, provided with analysis that set out in tables information about the delivery risk associated with each policy or proposal contained in the CBDP ("the Risk Tables")*'. These have not been published by SSESNZ to date.

⁵ R (Friends of the Earth) v Secretary of State for Business Energy and Industrial Strategy [2022] EWHC 1841 (Admin)

⁶ Based on Good Law Project press release, July 2023, "The Government is still failing on net zero, so we are taking them back to court", and the Pre-Action Protocol (PAP) letter embedded within it at https://actions.goodlawproject.org/net_zero_2

⁷ See <https://goodlawproject.org/crowdfunder/net-zero-2> and link within to SFG at <https://gplive.org/NZ2-SFG>

- 15 The points are important in consideration of the M3J9 project and any subsequent decision on it. The recent practice of ministers has been to approve projects (for example, recent roads DCO projects) based on the assumption that all quantified policies and proposals under the NZS will be delivered in full. That is, there has been an assumption in recent DCO decisions that the delivery of NZS is fully secured when quite plainly it is not. As far as the SoS decision making process for the M3J9 project, she/he must reach a reasoned conclusion based on the known risks to delivery of the NZS and CBDP, based on the Risk Tables held by the Government.
- 16 With respect to being able to make a risk based reasoned conclusion on the GHGs from the M3J9, I have previously submitted information of the CCC's 2023 Progress Report and generated a table of relevant benchmarks. This was provided in my WR [errata version, REP4-043, Table 1].
- 17 It is acknowledged that the (Climate Change Act 2008) section 14 CBDP Risk Tables have not been disclosed by the Government (itself considered unlawful by a claimant in the second NZS legal case, now going to full High Court hearing) so may not be available to the applicant. The issue remains that the SoS must consider risk to policy delivery, with the assistance of her/his own Risk Tables for Industry and surface Transport, the CCC Progress Report information of sectoral risk as summarised in REP4-043/Table1], in order to reach a reasoned conclusion about the GHG emissions from the M3J9 project.

3.2 *Material weight of the CCC Progress Report*

- 18 This is a new submission on the material weight to be accorded to the work of the CCC relevant at this point. It should be noted that Holgate, J stated in the first Net Zero Strategy judgment:

[188] "... It is apparent that the CCC as an expert body scrutinises the work of the Secretary of State and his Department with great care and in depth. The CCA 2008 proceeds on the basis that the reports of the CCC will provide much assistance to Parliament."

[215] "The role of the CCC is to give advice as an expert body rather than to opine on questions of law. But nonetheless the court should give considerable weight to their advice in December 2020 on the setting of CB6 that the Government's net zero plans should include a "quantified set of policy proposals" and their criticism in October 2021 of the NZS for failing to quantify the effect of each policy and proposal on emissions reductions ([65]-[67] and [152] above)."

- 19 Whilst this is a planning decision, significant material weight should be given to the CCC and their 2023 Progress Report by the SoS in reaching a reasoned conclusion on the M3J9 with respect to section 104 of the 2008 Planning Act. It would be wrong, and challengeable, for the SoS to dismiss the CCC's advice in its report as less than significant material weight.

4 NOTIFICATION OF POTENTIAL ISSUE – VARIABLE DEMAND MODELLING FOR HGVS AND LGVS

- 20 A further modelling issue has recently come to light which may impact the GHG assessment. It is not clear if heavy good vehicles (“**HGVs**”) and light goods vehicles (“**LGVs**”) are being treated in the Variable Demand Model as being subject to any variable demand, or whether they are fixed. If they were fixed then the origins, destinations, numbers and total mileage of HGVs and LGVs are modelled as exactly the same with and without the M3J9 throughout the appraisal period. This would skew the proportion of LGVs and HGVs in the models downwards over time compared to the proportion of cars, so that the VDM modelling does not reflect forecast reality. The effect would be that the DS is smaller than it should be.
- 21 APP-166 “Transport Assessment Report” provides the growth rates in the core scenario.
- 22 However, Table 5-6, “2047 VDM demand impact – 2047 Do-Minimum forecast” and Table 7-1, “2047 VDM demand impact – 2047 Do-Something forecast” only shows user classes of car use. It is therefore not transparent to the examination what the DM and DS data is for LGVs and HGVs. This makes it impossible to determine what the variable demand effects on LGVs and HGV are, and whether they are being correctly modelled.
- 23 Correct modelling would show increases over time reflecting the forecast reality on the ground for LGV and HGV demand from the M3J9.
- 24 If LGV and HGV demand were to be fixed, rather than reflecting projected reality on the ground, then the consequences of this are that actual growth of LGV and HGV demand:
- (A) is not reflected correctly in the tables, based on the VDM model, estimating GHGs in Chapter 14 of the Environmental Statement. Emissions from LGVs and HGVs (especially heavy emitting vehicles) of carbon would be underestimated in the DS figures; and
 - (B) the impacts of LGVs and HGVs would not be properly assessed for traffic and air quality impacts.
- 25 I request respectfully that the ExA asks the applicant to clarify this matter.

5 IEMA

26 The applicant purports to follow the IEMA guidance (“IEMA”). The SoS has also purported to use and follow the IEMA guidance, and make IEMA significance assessments, in other recent DCO decisions. It is both practical for a reasoned conclusion of the GHG emissions of the M3J9 to follow the advice in the IEMA guidance.

5.1 IEMA Contextualisation: sectoral reduction strategies

27 IEMA places weight on “Contextualising a project’s carbon footprint” – a substantive subsection (section 6.4) is given in the IEMA chapter on Significance on this.

28 On IEMA page 26, it is stated:

"The starting point for context is therefore the percentage contribution to the national or devolved administration carbon budget as advised by the CCC. However, the contribution of most individual projects to national-level budgets will be small and so this context will have limited value."

29 IEMA goes on at Table 1 on page 28 to provide "Sources of contextual information against which projects can be evaluated".

30 One context in the table is “Sectoral budgets or reduction strategies”. I acknowledge CBDP 19 referring to projected residual emissions, “*These are only projections and should not be interpreted as hard sectoral policy targets.*”.

31 However, IEMA is advising strongly that contextualisation should be done with sectoral reduction strategies, and this is exactly what the residual emissions (and the proposals and policies to meet them) are in the CBDP. They are not hard targets, but they do provide a sectoral reduction strategy which provides a fertile and valuable source of contextualisation. The applicant has not done this.

32 The SoS must reach a reasoned conclusion on the GHG emissions from the M3J9, and the additional emissions which they add to the atmosphere, and to the Industry and Surface Transport sectors of the CBDP. To do this, it is necessary to consider the construction and operation emissions, respectively, in the context of the sectoral reduction strategies (ie IEMA contextualisation) in the Industry and Surface Transport sectors of the CBDP. The outcomes of these sectors are given by the sectoral residual emissions data and provides quantitative data for the first part of the contextualisation. However, a second vital part of the contextualisation must involve explicitly evaluating the M3J9 with the risks to those sectors as assessed by the CCC in its progress report and by the CBDP Risk Tables held by the Government.

5.2 IEMA Contextualisation: Existing and emerging national and local policy or regulation

- 33 IEMA goes on at Table 1 on page 28 to provide another context “Existing and emerging national and local policy or regulation” and states an advantage of such contextualisation is that “Policy should be compatible with the UK’s national GHG commitments and actions to achieve those”.
- 34 The CBDP provides policy which the SoS has presented to parliament as "compatible with the UK’s national GHG commitments and actions to achieve those", notwithstanding the identified shortfalls for the NDC and sixth carbon budget also presented to parliament in the CBDP, and the current legal case against the CBDP. And, the CCC Progress report provides the latest detailed analysis of progress, or lack of it, towards those sectoral reduction strategies. The judge in the first NZS legal case fully endorses, and legally approves, the critical expert role of the CCC by stating that their advice must be given “considerable weight”.
- 35 Further, the risk to delivery of the CBDP was so great that in July 2023 campaigners took the strategy to Court for a second time (the second NZS legal case), particular on the issue the risk to policy delivery not being satisfactorily assessed in the CBDP, and this case now has permission for a full High Court hearing. It has emerged in the pre-action protocol correspondence that the Government have produced Risk Tables for the proposals and policies in the CBDP but failed to publish them under section 14 of the Climate Change Act⁸.
- 36 The point again, is that this is not general background material, but is vital information which the SoS must consider in reaching a reasoned conclusion on the M3J9 project. In this case, it is not just a matter of considering if there is sufficient emissions space to meet the residual emissions for the Industry and domestic Transport sectors as they are published in the CBDP. The SoS must first take into account the risk to delivering the residual emissions, which may be determined from her/his own CBDP Risk Tables, and the even more restricted emissions space that it imposes for any project coming forward. Second, the SoS must consider if the risk-assessed residual emissions provide, or do not provide, emissions space to construct and operate the M3J9.

5.3 IEMA summary

- 37 The applicant has adopted the IEMA guidance for significance assessment. Currently, it is not possible to reach a reasoned conclusion on the significance assessment because the applicant has not provided the contextualisation of genuinely considering if the large, additional GHG emissions can fit within the CBDP sectoral residual emissions, when it is properly risk assessed. Whilst the sectoral residual emissions are not considered a hard target, if the GHG emissions do not fit, then other sectors must make up the shortfall and

⁸ See <https://gplive.org/NZ2-SFG>

there must also be a reasoned conclusion of why this could possibly be acceptable in the wider context of delivering the whole CBDP.

38 In short, where large additional emissions are proposed for a project, the Secretary of State must address both the current failures to deliver on sectoral reduction strategies as identified in the CCC Progress report, the shortfalls in delivering existing national policy identified in the CBDP (ie the shortfalls for the NDC and the 6CB), and the risk to proposals and policies in the CBDP (her/his own Risk Tables), in making her/his significance assessment. These each form vital contextualisation for the large carbon footprint from the M3J9 project each year.

6 COMMENTS ON REP4-037, APPENDIX A

39 Appendix A of REP4-037 purports to be a contextualisation of the M3 J9 against the Carbon Budget Delivery Plan (CBDP).

40 The fundamental problem with the applicant's contextualisation is that it makes these assumptions:

(A) That the CBDP will be delivered in full (ie 100% delivery of all policies and proposals in the CBDP). The assumption is implicit in the comparison being made in REP3-037, Table A3 where the M3J9 (purported) emissions are compared with the CBDP for the 4CB, 5CB and 6CB.

(B) That the 'Industry' residual emissions and the 'Domestic Transport' residual emissions will be delivered in full (ie 100% delivery of all policies and proposals for these sectors in the CBDP).

41 The assumptions are manifestly and clearly false based on all the evidence available today. The CCC 2023 Progress Report lays out very clearly how such assumptions are very far from the truth, and I summarised that for all parties in my WR. The Prime Minister's statement of September 20th has made the deviation from 100% secured budgets and sector residual emissions even greater, although it has yet to be enumerated. Risk Tables held by the Government clearly could throw further light on the matter beyond the CCC Progress Report, but ministers insist on withholding the data.

42 The assumptions above, made by the applicant, are the counterpart of the false assumption made by ministers approving road projects, and which I have highlighted in my WR [errata version REP4-043 bullet 29]:

“... as the recent practice of DfT ministers has been to approve road projects also based on the assumption that all quantified policies and proposals under the NZS will be delivered in full That is, there has been an assumption in recent road DCO decisions that the delivery of NZS is fully secured when quite clearly it is not.”

43 The minister should not be led astray by the applicant's false assumptions.

44 I now provide the remedy to this very flawed approach.

6.1 Remedy to the falsehoods of assuming that climate policy is 100% secured

45 Much of the remedy was provided in my WR [errata version, REP4-043/102-139]. However, it has been misunderstood, probably deliberately, by the applicant in its response at [REP4-037]. I now re-explain it and extend it to make it clearer concerning the reasoning that is required for the Secretary of State to take.

6.2 Relevance of data to SoS decision making process specifically on the M3J9 scheme

46 First, I wish to note that it would be an error to characterise the information in this submission, or any of my submissions, as being general and not relevant to the SoS decision making process. **The information here is provided to directly address and inform the SoS decision making process.**

47 The applicant makes this error when it states in REP4-037 page 21 in stating "*Sections 2-6 provides a critique of Government policy*". The material presented in my WR was not presented for the purpose of making a critique of Government policy. It was presented with the purpose to provide vital information, like the information here, to directly address and inform the SoS's decision making process.

48 It would be a mischaracterisation is to consider that the information provided (in my WR or in this submission) is outside of the scope of the Secretary of State's decision making on the M3J9 scheme under the Planning Act 2008 ("the 2008 Planning Act"). Quite the contrary, the information is provided to directly address and inform the SoS decision making process. The purpose of providing the information on the CBDP and other documents is/was that it is vital information relating to whether there can be confidence that the M3J9 is consistent with the CBDP.

49 The wider context here is that a reasoned consideration of the GHGs from the M3J9 project and how they comply with the risk-assessed delivery of the CBDP (and the NDC and the sixth carbon budget) is very much a live issue for the SoS in her/his decision-making, under section 104 of the 2008 Planning Act. The SoS must reach conclusions as to whether approving the scheme would lead to the UK being in breach of its international obligations (s104(4)); in breach of any statutory duty (s104(5)); or be unlawful (s104(6)). The latest evidence, and risk analysis of the CBDP, is required to be able to make a reasoned conclusion on these matters, and the material submitted is provided to assist the SoS in reaching those conclusions.

50 A failure to address whether the emissions from the M3J9 scheme fits reasonably within the relevant sectoral reduction strategies in the CBDP, and give reasons, would amount to a breach of statutory duty under section 104(5); alternatively a failure to give an adequately

‘reasoned conclusion’ under regulation 21 of the EIA Regulations, including in respect of the up-to-date position and/or a breach of the public law duty to give reasons.

6.3 Data for contextualising a reasoned conclusion on GHG emissions

- 51 Table 1 below provides a resume of the known relevant data and the context for the SoS decision.
- 52 It should also be noted that there are large additional emissions proposed for the M3J9 project. The M3J9 project has not been included in assumptions for the Carbon Budget Delivery Plan, and therefore the emissions from it are additional emissions that somehow must be contained within the CBDP.
- 53 The CBDP provided sectoral reduction strategies in terms of policies and proposed, and sectoral residual emissions. The CCC Progress Report identified current failures to provide 100% secured delivery policies on the sectoral reduction strategies.
- 54 The September 20th policy change from the Prime Minister increased the risks, already substantial, to providing 100% secured delivery policies.
- 55 The Government has its own CBDP Risk Tables, which would provide further contextual information.
- 56 Each of the above form vital contextualisation for the large carbon footprint from the M3J9 project and are summarised below.
- 57 The table below merges data previously presented in tables in my WR [errata version, REP4-043] with the new unknown and undisclosed data.

	tCO ₂ e	Fourth (2023 to 2027)	Fifth (2028 to 2032)	Sixth (2033 to 2037)
B_1	National Budget - 5 years	1,950,000,000	1,725,000,000	965,000,000
CONS	Construction emissions	37,070 ⁹		
B_7	Industry Residual Emissions (IRE, CDBP, Table 2) - 5 years	340,000,000	207,000,000	111,000,000
B_11	Industry (To Be Secured - CCC) - 5 years	11,508,707	114,869,270	195,741,764
	Additional "To Be Secured" after PM's statement	UNKNOWN ¹⁰	UNKNOWN	UNKNOWN
	Risk Table viable reductions	UNDISCLOSED ¹¹	UNDISCLOSED	UNDISCLOSED
SOL_2	Solus Operational emission	3,411 ¹²	18,427	20,714
CUMU_1	Cumulative Traffic Model (DS) Road Users	4,161,194 ¹³	20,198,802	19,186,855
B_2	Domestic Transport Residual Emissions (DTRE, CDBP, Table 2) - 5 years	546,000,000	422,000,000	254,000,000
B_6	Surface Transport (To Be Secured - CCC) - 5 years	19,776,919	122,600,000	228,650,000
	Additional "To Be Secured" after PM's statement	UNKNOWN	UNKNOWN	UNKNOWN
	Risk Table viable reductions	UNDISCLOSED	UNDISCLOSED	UNDISCLOSED

Table 1: Summary of relevant data

⁹ As from REP4-043, Table 3 "Table 3: Contextualisation: Construction emissions"

¹⁰ The CCC has said that it is looking at the numbers after the Prime Minister statement. Currently the additional shortfalls in decarbonisation are "UNKNOWN".

¹¹ The Government has not yet disclosed the Risk Tables either for the CDBP as published on March 30th 2023, or for the CDBP as amended by the Prime Minister's statement of September 20th 2023

¹² As from REP4-043, Table 4 "Table 4: Contextualisation: Operation emissions"

¹³ As from REP4-043, Table 4 "Table 4: Contextualisation: Operation emissions"

6.4 Full list of contextualisations required of emission type vs budget or target

58 There are a number of combinations of contextualisations required for emissions type (eg: Construction) against budget (eg: 4CB) with which the data in the table assists with. These are contextualisation of the emissions of each emission type with the sectoral reduction strategy for that emission type as recommended by the IEMA guidance. It is crucial to note that this is not applying the data as hard targets, but using the data for contextualisation to inform significance assessment and decision making.

59 These are the combinations:

1. Construction : 4th carbon budget (example below)
2. Operation: 4th, 5th and 6th carbon budgets
3. Operation: annual comparison for 2030 and impact on NDC

60 Combinations 1 and 2 are explored below as examples. It should be noted that the highest significance for any combination will be the overall significance rating. For example, if combination1 is “Major Adverse”, then the whole scheme must “Major Adverse”.

6.5 Example of applying data: Combination 1: Construction : 4th carbon budget

61 For the case of the Construction emissions, the 37,070 tCO₂e in the 4th carbon budget must be considered in the context of that 11,508,707 tCO₂e of required emissions savings to meet the residual emissions for the sector are currently unsecured in the 4th carbon budget. Whilst this is not about meeting a hard sectoral target, the Secretary of State must reach a reasoned conclusion that that these carbon emissions may be found within the sectoral reduction strategy for Industry, and must provide his/her reasoning.

62 The IEMA guidance significance criteria for “Major Adverse” is:

“the project’s GHG impacts are not mitigated or are only compliant with do-minimum standards set through regulation, and do not provide further reductions required by existing local and national policy for projects of this type. A project with major adverse effects is locking in emissions and does not make a meaningful contribution to the UK’s trajectory towards net zero.”

63 If the SoS is unable to give adequate reasons about how these M3J9 carbon emissions may be found within the sectoral reduction strategy for Industry for these carbon budgets, then his/her only conclusion must be that the M3J9 scheme is “Major Adverse”. Reasons why the scheme is extremely likely to be “Major Adverse” include:

- (A) With a shortfall of 11,508,707 tCO₂e of required emissions savings in the 4th carbon budget, adding further emissions is extremely likely to still leave a shortfall in meeting the residual emissions for the Industry sector, and so the scheme does not assist in making a meaningful contribution to the UK’s

trajectory towards net zero. There is very little time to correct that shortfall identified by the CCC as we are already in the 4CB which started in January.

- (B) The project’s GHGs do not provide further emissions reductions required by existing local and national policy for projects of this type – the GHGs most likely contribute to an already large overshoot of the sectoral reduction strategy;

6.6 Example of applying data: Combination 2: Operation: 6th carbon budgets

64 For the case of the Operation emissions, I consider the 6th carbon budget. The solus operational emissions of 20,714 tCO₂e and the Cumulative Traffic Model (DS) Road Users operational emissions of 19,186,855 must be considered in the context of 228,650,000 tCO₂e of required emissions savings to meet the residual emissions for the sector are currently unsecured in the 6th carbon budget. Whilst this is not about meeting a hard sectoral target, the Secretary of State must reach a reasoned conclusion that that these carbon emissions may be found within the sectoral reduction strategy for domestic Transport, and must provide his/her reasoning.

65 The IEMA guidance significance criteria for “Major Adverse” has been given above.

66 If the SoS is unable to give adequate about how these M3J9 operation carbon emissions may be found within the sectoral reduction strategy for domestic Transport for these carbon budgets, then his/her only conclusion must be that the M3J9 scheme is “Major Adverse”. Reasons why the scheme is extremely likely to be “Major Adverse” include:

- (A) With a shortfall of 228,650,000 tCO₂e of required emissions savings in the 6th carbon budget, adding further emissions is extremely likely to still leave a shortfall in meeting the residual emissions for the domestic Transport sector, and so the scheme does not assist in making a meaningful contribution to the UK’s trajectory towards net zero.
- (B) The project’s GHGs do not provide further emissions reductions required by existing local and national policy for projects of this type – the GHGs most likely contribute to an already large overshoot of the sectoral reduction strategy;
- (C) Further the emissions are locked-in: once the scheme is opened and the projected additional emissions are generated, they cannot be stopped from happening.

67 It should be noted that the decision-making process must depend upon the latest data recalculated for the Prime Minister policy change as shown by ‘Additional “To Be Secured” after PM’s statement’ in the above Table.

68 In each of the three combinations given above, a failure to address whether the relevant emission type from the M3J9 scheme fit reasonably within the relevant sectoral reduction strategy, and give reasons, would amount to a breach of UK international obligations under section 104(4) [for the NDC], or a breach of statutory duty under section 104(5) [for the

carbon budgets]; alternatively a failure to give an adequately ‘reasoned conclusion’ under regulation 21 of the EIA Regulations, including in respect of the up to date position and/or a breach of the public law duty to give reasons.

6.7 “Major Adverse” scheme

69 As above the scheme, the scheme is “Major Adverse” on the current evidence on the IEMA guidance for GHG emissions. The SoS must provide reasoning, and explanation, as to how any other conclusion could possibly be reached for each of the three cases above on the basis of whether the relevant emissions can fit reasonably within the relevant sectoral reduction strategy.

70 Please note that I have submitted from the outset of the examination that the scheme was “Major Adverse” (eg: see my WR REP4-043).

6.8 Further comments on REP4-037

71 The applicant writes:

“The written representation makes reference to IEMA Guidance significance thresholds (paragraph 130), however there is no defined threshold within IEMA guidance by which a certain volume of greenhouse gas emissions from a project will lead to a significant effect, nor does it define what can be considered as ‘sufficient emission space in the Carbon Budgets’. This is for the Government to determine.”

72 First of all on the word “threshold” – I was not referring to a numerical defined value but rather the point, based on a reasoned approach, at which the transition from one significance rating to another occurs (eg: between “Moderate Adverse” and “Major Adverse”). My explanation above may assist as it works from the definition of “Major Adverse” and provides reasoning, with two examples, why that is the correct significance rating for the M3J9.

73 Second “sufficient emission space” may not be an IEMA term but I explained it, and it is straightforward in its meaning – the applicant perversely refused to understand it. Even so, my explanation above may assist as it works by a reasoned argument from the IEMA definition of “Major Adverse”, and whether additional emissions can be generated by the M3J9, when there are such large shortfalls on secured policy for the relevant sectors, and still contribute to a meaningful contribution to the UK’s trajectory towards net zero.

74 Third, “*This is for the Government to determine*”. Precisely so: this has been my very point throughout the above discussion. I have laid out what must be in the SoS’s mind when considering whether the scheme fits reasonably with the relevant sectoral reduction strategies in the CBDP as part of making that determination. The SoS is required to reach a reasoned conclusion or risk breaching Planning Act 2008 section 104, and/or regulation 21 of the EIA Regulations, and/or the public law duty to give reasons.

75 The applicant then writes:

“The Applicant therefore disagrees on the written representation conclusion that effects are Major Adverse. The conclusions of Chapter 14 (Climate) of the Environmental Statement (ES) (6.1, Rev 2) remain as previously identified ... “

76 However, the applicant disagrees by not engaging with any of the arguments presented in my WR, and just reverting to what it said in the Environmental Statement. Further, the applicant is missing the point that it purports to follow the IEMA guidance but it has not done so:

1. Its late “contextualisation against the CBDP” is flawed for the reasons given at the top of this section.
2. It has not made any contextualisation using sectoral reduction strategies (recommended by IEMA), or using “Existing and emerging national and local policy or regulation” which would involve considering the risk to policy delivery (recommended by IEMA).

7 RESPONSES TO EXQ2

7.1 Q6.2.3, Carbon Plan(s)

77 My response is given in the previous section.

7.2 Q6.2.21, Mitigation

78 The ExA request I clarify my statement “*No amount of mitigation or offsetting is going to bring this assessment down to the level of “minor adverse”*”.

79 My response to Q6.2.3 in the previous section helps provide the context for my response.

80 I have laid out how both the Industry sector (from construction) and the domestic Transport sector (from operation) have large proposed emissions reductions which are heavily risked. The “To Be Secured” figures from the CCC 2023 Progress Report have been presented in Table 1, and these have just been made worse by the Prime Minister’s statement. Any additional emissions must be assessed against these large projected shortfalls in policy delivery.

81 Time is short. Making up shortfalls such as 228,650,000 tCO₂e for surface transport in the 6th Carbon Budget starting in 2033, just 10 years away is not going to happen easily, nor overnight. When all the risks are considered, including the ones laid out in this submission, it is actually highly unlikely.

82 The scheme adds additional emissions both from construction and operation. The only mitigation that would make these emissions contribute to meeting CBDP (and the NDC and

carbon budgets for which it is the plan) would be to reduce both construction and operation of the scheme to zero. That is the only way to remove additional emissions. And in the situation that the CBDP is so heavily risked against delivery, removing all additional emissions from a new project is the only genuine way for that project to contribute to the CBDP.

83 I see no evidence that the discussion between Winchester City Council and the applicant will lead to migration of that scale. Further the technology does not exist to deliver mitigation to genuine zero emissions for construction and operation. Therefore, I consider that WCC's mission is wishful thinking, even if it may be well intentioned.

84 My statement would have been clearer expressed as “No amount of *realistic* mitigation or offsetting is going to bring this assessment down to the level of “minor adverse””.

7.3 Q6.2.14, Assessment

85 Sub-question (v) is “Please comment on the omission of certain factors such as PM2.5 pollution.” I submit that it would be helpful to see the responses to Q3.2.1, Q3.2.2 and Q3.2.3 before commenting.

7.4 Q16.2.4, Combined appraisal

86 The question is “*In the Combined Modelling and Appraisal Report, paragraph 5.5.8 and table 5-8 [REP1-025] state that there will be indirect tax benefit over the 60-year appraisal period of £5.66m including vehicle operating costs but specifically related to fuel tax revenues. In light of the 2030 ban on new petrol and diesel car sales and the Office of Budget Responsibility's assessment of direct fuel duty income reductions, can the applicant detail how this predicted reduction in fuel duty has been accounted for in the economic appraisal. Please also give full details of how the £5.66m benefit has been built up.*”

87 This is clearly affected by the Prime Minister's statement on the 2030 ban.

7.5 Q16.2.5, Combined appraisal

88 The question is “*Q16.1.14 of ExQ [PD-008] requested details of the risk allowances made in the scheme estimate in the absence of using optimism bias. This was not detailed in the Applicants response [REP2-051], therefore please provide an explanation to how WebTag adopts the Treasury Green Book required approach to risk and optimism bias and provide the ExA with detailed information of how the current scheme estimate sufficiently includes for full costs of the proposed project, including the percentage of risk allowance that contributes to the scheme cost that has been used in the economic appraisal and BCR assessment.*”

89 Optimism bias is an essential element in the economic appraisal as TAG Unit A1.2. Quantified Risk Assessments (QRA) have been used in other submissions where these have been established as equal to, or are greater than, the optimism bias appropriate percentage.

As a minimum, the application should give a comparison between the QRA and optimism bias figures. Inflation as noted in REP2-051 is separate to risk.

7.6 Q16.2.6, Combined appraisal

90 The question is “Please explain why, in paragraph 5.4.1 of the Combined Modelling and Appraisal Report [REP1-025], the economic appraisal scheme cost excludes spend to date (prior to 2022). Please also reference the answer to ExQ Q14.1.13 [REP2-051] which stated that all the pre-construction activity costs have been included in ‘preparation costs’; which seems to contradict the ES.”

91 It has become standard practice in economic appraisals to exclude costs incurred up to the date of the assessment as ‘sunk’ costs. Subsequent appraisals for schemes progressively increase the value of costs excluded at each successive date as the expenditure to date progressively increases. The explanation given in other submissions is that all costs to date are sunk costs as paragraph 2.3.3 in TAG Unit A1.2. The wording of the paragraph is:

“Only the costs which will be incurred subsequent to the economic appraisal and the decision to go ahead should be considered. ‘Sunk’ costs, which represent expenditure incurred prior to the scheme appraisal and which cannot be retrieved, should not be included.”

92 When it has been questioned if the wording is definitive in referring to the appraisal at the decision to go ahead and not all successive appraisals, but this reasoning has been rejected by the DfT. However, the interpretation by DfT of paragraph 2.3.3 is clearly at conflict with paragraph 2.3.1 and 2.3.4 which prescribe what should be considered as investment costs in economic appraisals. These are listed in Table 1 under paragraph 2.3.4 and include:

“Project Management, Consulting engineers` fees, agent authorities fees, actual costs of pursuing alternative routes (if any) in the early stages of the scheme, Design costs, Public Consultation, Public Inquiry, gaining statutory powers or other licences and consents, compensation, the cost of any surveys carried out during scheme preparation, the costs associated with obtaining statutory orders, and on site Supervision and Testing”

93 These are all excluded from this submission as expenditure to date. It is disturbing to think that the DfT believes that the Benefit Cost Ratio (BCR) of a scheme will improve simply because greater values of investment expenditure are disregarded as sunk costs. The ExA is respectfully requested to determine whether the preparation and administration expenditure should be classified as sunk costs and excluded from the BCR calculations in the economic appraisal.

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