

M3 Junction 9 Improvement Project

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Friends of the Earth Ltd; Ors v Secretary of State for Energy Security and Net Zero [2024] EWHC 995 (Admin)

Winchester Friends of the Earth was an objector to this scheme at the DCO Examination last year. We believe that the recent judgment on the government's Net Zero Strategy is relevant to any decision to be made on this scheme by the Secretary of State for Transport.

Essentially the position of the Applicant at the examination was that the carbon emissions consequent upon the scheme, both in construction and over the operating lifetime, were not significant against the nation's total carbon emissions, regardless of the fact that they were not even consistent with the Transport Decarbonisation Strategy. This position, that no amount of straws can ever break the camel's back, was always irrational.

The DfT's wider contention has been that the government's commitments under the Paris Agreement signified only an overall commitment but did not signify that a single sector of the economy (in this case Transport) need follow the overall Net Zero trajectory, if failure in one sector could be compensating by over achievement in other sectors. We believe that the recent judgment puts paid to this contention as irrational, both in concept and in the light of evidence of decarbonisation achievements.

The Secretary of State will of course have the full judgment from Justice Sheldon. We give, as an Appendix, a summary of the judgment provided by national Friends of the Earth.

As we understand the judgment, the position of the Applicant for the M3J9 scheme, that the carbon emissions of the scheme are insignificant to the Department's likelihood of meeting its Net Zero duty, must now be considered irrational.

We ask, in the first instance, that the Secretary of State require of the Applicant how the proposed scheme will take account of the Sheldon judgment. Secondly, we ask that the Secretary of State withholds any decision on this DCO until he is evidentially satisfied that

any under-delivery of Net Zero policies related to this scheme is compensated by over-delivery of projects elsewhere within the transport sector.

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Convenor

Winchester Friends of the Earth

APPENDIX – Summary of judgment by Justice Sheldon 3rd May 2024

Mr Justice Sheldon gave judgment on 3 May 2024. Of the 5 grounds of challenge, the judge allowed the first 3, brought by Friends of the Earth and ClientEarth, and the fourth, brought by Friends of the Earth. While the remaining ground brought by Friends of the Earth and Good Law Project was found to be arguable, it was ultimately dismissed.

Grounds 1 to 3 (delivery in full)

Grounds 1-3 concerned the duty under section 13(1) of the Act, and the judgment deals with them all together. The judge ruled the Secretary of State was not provided with, and so failed to consider, key materials on the risk to the delivery of individual policies and proposals in the plan. That meant “the Secretary of State made an irrational decision...[as] there was an unexplained evidential gap...The Secretary of State’s decision under section 13 was based on reasoning which was simply not justified by the evidence” (Judgment, paragraph 126).

This was a significant finding, as it’s notoriously difficult for claimants to overcome the high bar of showing a defendant has acted irrationally.

A key piece of evidence was the advice given to the Secretary of State by his officials and the assumption of delivery in full (see above) when signing off on the plan. There was a dispute between the parties about what that advice actually meant. The judge sided with Friends of the Earth’s and ClientEarth’s interpretation, holding that a reasonable Secretary of State would have understood the advice as meaning that the carbon budgets (and the 2030 target) would be met only **if all planned policies were delivered in full** (Judgment, paragraph 118). Yet this was not borne out by the facts: it was not expected that all of the policies would in reality be rolled out and achieve all of their estimated emissions cuts.

The judge emphasised the important implications of this finding: “It is not possible to ascertain from the materials presented to the Secretary of State which of the proposals and policies would not be delivered at all, or in full” (Judgment, paragraph 128). Further, the Secretary of State “could not work out... whether and which of the quantified policies were likely to miss the target by a small or a large amount, and he could not evaluate for himself whether, and if so the extent to which, any shortfall from the policies that under-delivered would be compensated for by those policies that over-delivered.”

The judge maintained that even if he was wrong about the Secretary of State’s understanding of the ‘delivery in full’ assumption, the decision (to adopt the policies for the purpose of section 13) was still not lawful. This was because the Secretary of State was not provided with sufficient information as to the “obviously material consideration of risk to the individual policies and proposals”; “the information provided was incomplete” (Judgment, paragraphs 131 and 133).

Crucially, the judge also stressed that “this evaluation had to be made by the Secretary of State personally: he could not simply rely on the opinions of his officials” (Judgment, paragraph 128).

Ground 4 (sustainable development)

The judge agreed with Friends of the Earth that the Secretary of State had breached the sustainable development duty under section 13(3). He held that “sustainable development” is not a term defined under the Climate Change Act. The judgment references the Divisional

Court in [Friends of the Earth's case challenging the Airport National Policy Statement](#), that it's an "uncontroversial concept", which has been defined to mean "meeting the needs of the present without compromising the ability of future generations to meet their needs."

The judge did not address Friends of the Earth's sub-ground relating to the international 2030 target. However, in relation to the s.13(3) duty, the judge held that "it connotes a degree of certainty that a particular outcome will eventuate" and rejected the government's arguments to the contrary.

He also rejected the government's argument that s.13(3) was "merely ancillary" to s.13(1), holding instead that the two duties were driving at different outcomes. Section 13(1) is concerned with adopting policies in order to meet our carbon budgets, whereas section 13(3) is concerned with ensuring that the policies which are adopted also contribute to sustainable development. The judge agreed with Friends of the Earth that the Secretary of State had applied an incorrect and lower test in their assessment of the plan. They had breached s.13(3) by making an assessment that the policies were "likely" to contribute to sustainable development. This was not enough. The judge held: "On no reasonable view could it be said that "likely" means "must"" (Judgment, paragraphs 145 and 149-151.)

Ground 5 (duty to report on proposal and policies)

This was the only ground that did not succeed (although the judge still considered it to be arguable). The judge held that the plan itself did not need to include risk information on the individual policies.