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POST EXAMINATION CONSULTATION – 5TH OCTOBER 2023

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1 INTRODUCTION

1 I am responding to the Secretary of State’s letter of September 28th seeking comments from the Applicant and all Interested Parties. This submission responds to:

- Paragraphs 1, 2 and 3 of the SoS’s letter on the North Pennine Moors Special Area of Conservation (‘SAC’); and
- The applicant’s letter to the SoS of 22 September 2023 (referred to here as [NH_2023Sep22]) which comments on previous submissions from me (Climate Emergency Policy and Planning (CEPP)). Two main sections below respond to points in the applicant’s letter on (1) “GHG Emissions Contextualisation and IEMA Guidance Best Practice”, and (2) “Climate Policy Risk Assessment Data from the CCC 2023 Progress Report”.

1.1 Important notice of material being relevant to decision making

2 The information in this submission is provided to directly address and inform the SoS decision making process, and only that.

1.2 Availability of material to the Secretary of State personally

3 As this submission contains statements relating to how the SoS may reach a reasoned conclusion on the environmental impacts of the A66 project. **I respectfully request that this submission is placed in full before the Secretary of State, and/or a delegated decision minister, in person for her/himself to consider.**

2 NORTH PENNINE MOORS SPECIAL AREA OF CONSERVATION (‘SAC’)

4 The Secretary of State’s letter of September 28th states at paragraph 2:

“The Secretary of State also notes reference to potential mitigation measures in the form of speed restriction that are mentioned in paragraph 4.5 of Natural England’s response dated 8 September 2023. Noting that information to inform a derogation assessment may not be available until 27 October 2023, the Secretary of State requests details from National Highways and Natural England on what speed restrictions would be necessary to mitigate the impacts of the scheme on the North Pennine Moors SAC to enable a conclusion of no adverse impact on integrity. Should there be any other suitable mitigation measures, the Secretary of State would also welcome details of these.” {emphasis added}

5 CEPP notes that these are “potential” mitigation measures. It has to remain speculation only that even if such measures were proposed by the applicant that they could possibly provide sufficient mitigation.

- 6 It is CEPP’s position that, if speed reductions were to be proposed by the applicant at this stage, that insufficient information has been provided to justify any assertion that the reduction would provide satisfactory mitigation to maintain the overall ecological coherence of the Natura 2000 Network. In other words, a proposal to reduce speed limits would require “further information”, and this would be detailed information which would require further consultation as part of a revised environmental statement. This information is clearly a significant amount of information and would require a re-run of the traffic modelling so that any changes to nitrogen-based air pollutants from the A66 scheme, and the consequential impacts to nitrogen deposition on the SAC, could be quantified and reassessed. Further consultation would be required, once the new information and analysis had been provided by the applicant.
- 7 Given the further information and analysis required, and additional consultation rounds, CEPP submit that if the applicant now proposes a speed reduction as a potential mitigation, that in that event the SoS should suspend consideration of the application until the information has been provided and consulted on in accordance with Regulation 20(3) of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (“**2017 Regulations**”).
- 8 Suspending consideration of the application until the applicant has provided the necessary information, and for there to be a full consultation on a revised environmental statement, is necessary so that the Secretary of State can “*reach a reasoned conclusion on the significant effects of the proposed development on the environment, taking into account the examination referred to in sub-paragraph (a) and, where appropriate, any supplementary examination considered necessary;*” in accordance with Regulation 21(1)(b) of the 2017 Regulations.
- 9 With respect to paragraph 3 of the Secretary of State’s letter of September 28th, where the SoS requests “details and evidence of any consequential impacts that such measures could have on the underlying assessments and conclusions on the impacts of the scheme”, CEPP submit that the applicant should also provide:
- A recalculation of the economic benefit of the scheme, and the Benefit Cost ratio (BCR), based on the update to traffic modelling required as above. A speed reduction can be expected to reduce the supposed economic benefit of the scheme on reduced journey times.
 - Proposals for changes to the DCO which could possibly secure the proposed speed reductions. For example, how such speed reductions would be enforced, including necessary associated hard infrastructure, to ensure that the supposed mitigation benefits would actually, in reality, be delivered.

3 GHG EMISSIONS CONTEXTUALISATION AND IEMA GUIDANCE BEST PRACTICE

10 With respect to its assessment of the impacts of Greenhouse Gas emissions (“GHGs”) from the A66 scheme, the applicant purports to be following the IEMA guidance, and to be consistent with it. At [REP9-033]/2.3.3, the applicant states:

“In brief, the Applicant has set out in detail that the obligation to carry out an assessment of the likely significant effects of the Project on GHG emissions arises from the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (the EIA Regulations). In carrying out its assessment, the Applicant has had regard to the applicable law and policy tests, including under the Climate Change Act 2008, the Planning Act 2008 and the NNNPS, as well as Design Manual for Roads and Bridges (DMRB) LA 114 and IEMA Guide: Assessing Greenhouse Gas Emissions and Evaluating their Significance (2022) (hereafter “IEMA guidance”).”
{emphasis added}

11 However, the applicant is not correctly following the IEMA guidance in several respects now discussed.

3.1 Applicant’s “contextualisation” is a superficial tick-box exercise

12 Contextualisation is a core element of the IEMA approach to assessing significance. For example under section 5.3 “Six Steps of GHG emissions assessment”, the guidance states:

“The contextualisation of emissions and determination of significance is addressed in Section VI: Significance.”

13 This indicates that IEMA consider contextualisation to be an encompassing, and essential, part of significance assessment. Put plainly, “contextualisation of emissions” and “determination of significance” are two sides of the same coin, or two aspects of the same process, and cannot be separated. Then IEMA provide a whole section of the guidance at Section 6.4 “Contextualising a project’s carbon footprint” in the chapter “Section VI: Significance”, again indicating the importance of contextualisation as an integral part of significance assessment. This section runs to 2.5 pages (of 36 pages total) of the guidance, and starts with this paragraph:

“The context of a project’s carbon footprint determines whether it supports or undermines a trajectory towards net zero. Determining that trajectory and the position of a project within it, however, is the challenge for practitioners.”
{emphasis added}

14 Again, the guidance clearly states that it is the context of the project’s carbon footprint that determines compliance with a net zero trajectory. Many different modes (based on information/data sources) of contextualisation are laid out in IEMA Table 1 “Sources of

contextual information against which projects can be evaluated” and the guidance states “*It is good practice to draw on multiple sources of evidence when evaluating the context of GHG emissions associated with a project*”.

15 The diagram at IEMA Figure 6 “Good practice approaches for contextualising a project’s GHG emissions” lays out themes for contextualisation including Sector based, Local, National, Policy goals, and Performance standards.

16 There are options and choices to be made for contextualisation, and IEMA notes that the “*available contextual information base is rapidly developing*”. This changing knowledge landscape, including policy changes and updated policy assessment (eg the CCC 2023 Progress Report), does provide scope for the “*practitioner’s professional judgement*”.

17 In my submission to the SoS of September 8th, I highlighted “*sectoral reduction strategies*” (section 4.1 in that submission) and “*existing and emerging national and local policy or regulation*” (section 4.2) as being sources of contextual information which should be considered of relevance to the A66 project. These sources are both taken directly from IEMA Table 1 which lists sources of contextual information. Specifically, I drew the SoS’s attention to these sources of information.

18 Critically, IEMA also quite clearly state that determining whether a project supports or undermines a trajectory towards net zero is not solely down to a comparison with a national carbon budget. The guidance makes this clear in a subsequent paragraph where such a comparison is clearly labelled as just a starting point for context.

“The starting point for context is therefore the percentage contribution to the national or devolved administration carbon budget as advised by the CCC.”
{emphasis added}

19 The applicant quite specifically has not followed the guidance. In its Deadline 8 Submission on Climate Matters [REP8-076] where the applicant provides its “contextualisation” of the project with the CBDP, it does not mention the IEMA guidance. So the contextualisation in **REP8-076** is clearly not intended to be part of an IEMA compliant process. This is affirmed in [NH_2023Sep22]/page 6 where it states:

“The Applicant notes that it has provided a contextualisation of the Project’s Greenhouse Gas (GHG) emissions against the CBDP for information only ...”
{emphasis added}

20 As the applicant’s contextualisation is for information only, it is clearly not part of any significance assessment, nor part of an IEMA compliant significance assessment. Further on, the applicant writes:

“It is not to be taken as an assessment of significant since such an assessment is to be undertaken against a trajectory to net zero (see guidance from the Institute of

Environmental Management and Assessment (IEMA)). The only adopted trajectory to net zero is that comprised in the Carbon Budgets.” {emphasis added}

21 The point here is that IEMA are advising that it is the context as a whole (which includes the comparison with national carbon budgets as a starting point, but only as a starting point) which determines whether the projects carbon footprint supports or undermines a trajectory towards net zero.

22 The applicant is treating its contextualisation exercise as a superficial tick-box exercise “just for information”. This is in direct opposition to the IEMA guidance which says that it is the context of a project’s carbon footprint determines whether it supports or undermines a trajectory towards net zero.

23 The Secretary of State must now consider the following in making her/his reasoned conclusion on the GHG impacts from the scheme:

- data sources for contextualisation provided by “sectoral reduction strategies” and “existing and emerging national and local policy or regulation”;
- that the applicant has only supplied a comparison with national carbon budgets (ie the applicant has done no further contextualisation as part of its significance assessment).

24 I submit that when the SoS considers these points that s/he will **not** be able to reasonably conclude that the environmental statement and its significance assessment complies with the IEMA guidance.

25 Should the SoS claim in a subsequent decision letter on the A66 that s/he is following the IEMA guidance, or “aligns with the IEMA guidance”, on significance assessment, then she/he must provide full reasoning of how IEMA has been followed, including the data sources (as per IEMA Table 1) and the contextualisations made of the project.

3.2 Applicant’s contextualisation ignores policy delivery risk in the CBDP

26 The applicant states further down [NH_2023Sep22]/page 6:

“For the reasons provided in detail in its Deadline 8 Submission on Climate Matters [REP8-076], the Applicant considers that its contextualisation, including the consideration of the CBDP, is robust.”

- 27 Notwithstanding whether the applicant’s “contextualisation” is robust or not, it is, on its own submission, not part of its significance assessment, so it is essentially irrelevant.
- 28 Providing a contextualisation that, by the applicant’s own submission, forms no part of the significance assessment is in fact a pointless exercise. This is because it provides no useable information for the assessment of the environmental impacts from the likely significant effects of the GHGs from the project which is the relevant purpose of the 2017 Regulations.
- 29 The key thrust of my submissions to the SoS is that, even if the applicant had properly integrated its CBDP contextualisation into the significance assessment (which it has not by its own submission), the contextualisation cannot be robust as it has taken no account of policy delivery risk to the proposals and policies in the CBDP (see section 3.3 of my submission to the SoS of Sept 8th).
- 30 As the Government has provided no robust risk assessment of the CBDP including not disclosing its own Risk Tables (and these issues are now due to be heard in the High Court), I have suggested in my previous submissions that the risk analysis in the CCC 2023 Progress Report can be taken to provide, at least some of, the necessary context. And I suggest this as an indicative suggestion, not as a formal alternative contextualisation, see below.
- 31 I also repeat, as it is important, 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.” {emphasis added}*
- 32 It is important to note that I am not providing an alternative contextualisation, nor claiming that the indicative forms of contextualisation, which I have discussed in my submissions, are the only forms which legitimately follow the IEMA guidance. The task of contextualisation remains with the Applicant. *What I am submitting is that the current significance assessment by the applicant does not follow the IEMA guidance, nor comprise an IEMA compliant significance assessment, for the reasons given.*
- 33 Should the SoS claim in a subsequent decision letter on the A66 that s/he is following the IEMA guidance, or “aligns with the IEMA guidance”, on significance assessment, then she/he must provide full reasoning of how IEMA has been followed, including the data sources (as per IEMA Table 1) and the contextualisations made of the project.
- 34 This also goes beyond compliance or alignment with the IEMA guidance to matters of law. The impacts of the GHGs from the A66 must also be considered in the context of a full risk assessment of the delivery risks to the carbon budgets and the UK’s international climate obligations, as laid out in previous submissions.

35 It is on the basis that the assessment of the impacts of the GHG emissions for A66 has **not** been made in the context of a full risk assessment of UK climate policy delivery that I submit that that the applicant’s environmental statement, including its significance assessment, does not provide the necessary information for the SoS to reach a reasoned conclusion 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 latter is the thrust of my submissions to the SoS of September 8th and September 22nd, and the SoS is referred back to those.

3.3 Applicant’s professional judgement is not IEMA compliant

36 The applicant states:

‘ The specific context for an individual project and the contribution it makes must be established through the professional judgment of an appropriately qualified practitioner drawing on the available guidance, policy and scientific evidence [35]’; and, “It is down to the practitioner’s professional judgement how best to contextualise a projects GHG impact”’. {reference 35 added}

37 Whilst it may down to the practitioner’s professional judgement how best to contextualise a project’s GHG impact, this does not mean that their judgement is above challenge (both technically and legally), nor that their judgement aligns with the IEMA guidance.

38 The point here is that the professional judgement exercised by the applicant (or the applicant’s consultants) has been to provide no contextualisation for the project beyond what IEMA refers to as the starting place. The only additional contextualisation provided has been specifically stated as not being part of the significance assessment, and therefore is irrelevant, and pointless. I submit that **no** professional judgement has been exercised to produce a legitimate and meaningful context for the project which complies with the IEMA guidance. It is not a matter of whether the judgement is correct, it is whether it has been applied at all, in the context of IEMA compliant significance assessment.

39 The decision maker is the Secretary of State. In recent DCO decisions on road schemes, the SoS has purported to follow the IEMA guidance. For example, on the A38 Derby Junctions, the decision letter (17th August 2023) states that he “*considers that the approach outlined in paragraph 112 aligns with the approach to significance set out in the most recent IEMA Guidance*”.

40 The Secretary of State must make their own decision on how alignment with IEMA may be reached. The applicant’s current approach does not align because:

- The contextualisation carried out has been made as superficial tick-box exercise, and the applicant has specifically stated that it is not part of the significance assessment, or an IEMA compliant significance assessment;

- Contextualisation, for significance assessment, has not been advanced beyond the IEMA stating point;
- Recent advice from the CCC on the risk to the delivery of UK climate policy has not been taken into account (see below);
- The risks to policy delivery of the CBDP has not been considered, at all, in the contextualisation – even the Government’s own CBDP Risk Tables have not been taken into account¹.

41 It is also noted that the applicant removed the reference to IEMA footnote/reference 35 in the above quote (which I have reinserted into the quote above at the start of this sub-section). IEMA Footnote 35 reads:

“At the time of publication, the applicable evidence is that provided by the IPCC and UNFCCC, supporting the commitments defined in the Paris Agreement, and in the UK that provided by the CCC with regard to GHG budgets and policies that are compatible with the UK’s Paris Agreement commitments. Evidence will continue to be developed, for example, through the IPCC’s Sixth Assessment Report, future international treaty negotiations and further advice of the CCC or other expert bodies, and the practitioner must evaluate the prevailing evidence at the time.”

42 This emphasises IEMA’s view that the CCC advice is a matter that the applicant’s professional consultants should take into account in contextualising a project. The applicant has not done so for the A66 project, and the applicant also appears to reject my suggestion that CCC risk assessment of the “sectoral reduction strategies” (an IEMA source for contextualisation) should be made. The applicant’s professional consultant does not align to the IEMA guidance in this respect, and the applicant does not follow IEMA footnote 35 in attempting to dismiss my suggestions of the relevance, and material weight, of CCC risk assessments.

43 Such risk assessment from the CCC 2023 Progress Report is discussed next.

¹ Whilst the applicant may not have access to these Risk Tables, it is now public domain knowledge that these CBDP Risk Tables exist, and the applicant is obliged to take account of this.

4 CLIMATE POLICY RISK ASSESSMENT DATA FROM THE CCC 2023 PROGRESS REPORT

44 The applicant states at [NH_2023Sep22]/page 6:

“The Applicant also notes that CEPP’s submission includes, at section 3.11, a Table 1 entitled “Summary of relevant benchmarks”. The source of this table is not provided. The Applicant and its advisers have also not been able to identify the figures in the table. Accordingly, the Applicant knows of no rational basis that has been presented for these figures.”

45 First, I should make clear that these benchmarks have been provided, indicatively, as sources of contextual information for the two contextualisation sources “sectoral reduction strategies” and “existing and emerging national and local policy or regulation” from IEMA Table 1.

46 Further, these benchmarks are not provided as a particular form of contextualisation, which I claim to be the only viable contextualisation which is compliant with the IEMA guidance. I am merely submitting that some form of contextualisation for significance assessment is required to be IEMA compliant, and the applicant, as above, has not provided it.

47 In the situation of no IEMA compliant significance assessment currently existing, my benchmarks are submitted as serious, but indicative, sources of contextual information. I use them for my own assessment (of “Major Adverse”) in my previous submissions. However, the point is that for the applicant to be IEMA compliant, it is down to the applicant to provide a legitimate and IEMA compliant significance assessment and contextualisation, and it has not done so.

48 I now explain the source of the CEPP benchmarks. Just for context, I reproduce below the benchmark table from my submission of September 22nd. This updated the benchmarks, previously provided in my September 8th submission, to include the Land-Use sector (because of the SAC issue as explained in my September 22nd submission).

49 In fact, the provenance of the data was provided in my September 8th submission, although the applicant appears not to have understood this. The data was explained in my September 8th submission as being from:

- CBDP, Table 2, as stated in my Table 1 itself for these rows “Domestic Transport Residual Emissions (DTRE, CBDP, Table 2) - 5 years” [row B_2], “Industry Residual Emissions (IRE, CBDP, Table 2) - 5 years” [row B_7], and “Agriculture and LULUCF (AGRE, CBDP, Table 2) - 5 years” [row B-12];
- and as stated in the footnotes under my Table 1: data for figures in the CCC spreadsheet “Progress in reducing emissions - 2023 Report to Parliament - Charts and data” which accompanied the 2023 Progress Report and was provided at this

URL: [REDACTED]

50 For the latter data, the sourcing of data is canonical for each sector, so I will illustrate the precise steps just for the Surface Transport sector. The same process is followed for Industry and Land Use sectors. First, here is the table, as submitted on September 22nd:

Code	tCO2e	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
B_2	Domestic Transport Residual Emissions (DTRE, CBDP, Table 2) - 5 years	546,000,000	422,000,000	254,000,000
B_3	Surface Transport (Credible plans - CCC) - Annual average	9,164,654	16,600,000	28,700,000
B_4	Surface Transport (To Be Secured - CCC) - Annual average	3,955,384	24,520,000	45,730,000
B_5	Surface Transport (Credible plans - CCC) - 5 years	45,823,269	83,000,000	143,500,000
B_6	Surface Transport (To Be Secured - CCC) - 5 years	19,776,919	122,600,000	228,650,000
B_7	Industry Residual Emissions (IRE, CBDP, Table 2) - 5 years	340,000,000	207,000,000	111,000,000
B_8	Industry (Credible plans - CCC) - Annual average	1,243,741	1,100,000	1,100,000
B_9	Industry (To Be Secured - CCC) - Annual average	2,301,741	22,973,854	39,148,353
B_10	Industry (Credible plans - CCC) - 5 years	6,218,707	5,500,000	5,500,000
B_11	Industry (To Be Secured - CCC) - 5 years	11,508,707	114,869,270	195,741,764
B_12	Agriculture and LULUCF (AGRE, CBDP, Table 2) - 5 years	231,000,000	207,000,000	183,000,000
B_13	Land-Use (Credible plans - CCC) - Annual average	0	0	0
B_14	Land-Use (To Be Secured - CCC) - Annual average	3,339,975	8,223,839	13,559,524
B_15	Land-Use (Credible plans - CCC) - 5 years	0	0	0
B_16	Land-Use (To Be Secured - CCC) - 5 years	16,699,875	41,119,194	67,797,621

Table 1: Summary of relevant benchmarks

51 The CCC Spreadsheet Tab “Figure 4.10” provides the data behind Figure 4.10² of the CCC 2023 Progress Report. The relevant part of the spreadsheet Tab is reproduced below.

	CB4 average (2023-2027)	CB5 average (2028-2032)	CB6 average (2033-2037)
Residual emissions for plot	99.9	75.3	44.2
Unexplained emissions reductions	0	0	0
Credible plans	9.16465378	16.60020366	28.70673659
Some risks	0.722	10.81	30.3
Significant risks	3.225383833	8.953737467	8.426005039
Insufficient plans	0.008	4.758	7
Government pathway	99.9	75.3	44.2
Baseline	113.6	116.8	118.8

Figure 1: Extract from CCC Progress Report 2023, “Fig 4.10” spreadsheet tab

52 These figures are for an average year in each 5-year carbon budget (ie they are annual figures).

53 Row B_3 “Surface Transport (Credible plans - CCC) - Annual average” is taken from the “Credible Plans” line from the CCC data. For example, for the 4CB, “9.16465378” has been taken from the spreadsheet and converted to tCO₂ e(from MtCO₂e) as displayed in row B_3 as 9,164,654 in my Table 1.

54 Row B_4 “Surface Transport (To Be Secured - CCC) - Annual average” is the sum of the “to be secured” emissions reductions, this is the sum of the CCC categories: “Some risks”, “Significant risks” and “Insufficient plans”. For example, for the 6CB: 30.3 + 8.426005039 + 7 = 45.73 (MtCO₂e). This is displayed in my table as 45,730,000 when converted to tCO₂e.

55 The corresponding 5-year figures for each whole 5-year carbon budgets, are given at rows B_5 and B_6. These are merely the annual figures multiplied by 5.

56 The same is done for the Industry sector (based on CCC Progress Report Figure 6.5 and CCC spreadsheet tab “Figure 6.5”) and the Land Use sector (based on CCC Progress Report Figure 9.9b and CCC spreadsheet tab “Figure 9.9”).

57 Table 2 in my September 22nd submission tabulated the known data, and the unknown and undisclosed data. That submission also noted that the “To be secured” data needed updated following the Prime Minister’s statement on net zero of September 20th.

58 I also gave an example of applying the data for contextualisation for the A66 construction emissions in the 4CB and 5CB. The key test being given at paragraph 61 of that submission

² This was reproduced as Figure 6 “CCC Progress Report 2023, Fig 4.10 reproduced” of my Sept 8th submission.

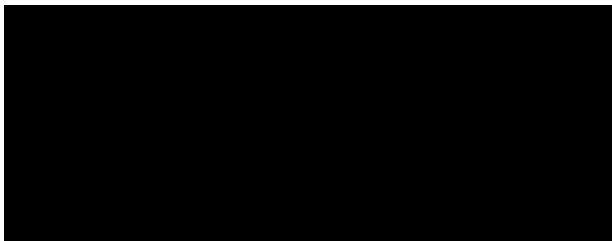
which concluded that “*the [construction] GHGs [are] most likely contribute to an already large overshoot of the [Industry] sectoral reduction strategy*”.

59 This referred to one case “Construction : 4th and 5th carbon budgets” from six possible cases given (paragraph 57 of September 22nd submission), each of which requires testing to full contextualise the A66 project in terms of the delivery risk to the UK climate policy.

60 As a result of my consultation submissions, this data is now before the SoS, and it cannot be ignored. The issue remains for the Secretary of State to reach a reasoned conclusion on this data. And as I submitted, in the September 22nd submission:

“In each of the six combinations given above, a failure to address whether the relevant emission type from the A66 schemes fit[s] 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.” {typos corrected}

5 SIGNED



Dr Andrew Boswell,
Climate Emergency Policy and Planning, October 5th, 2023