

9 July 2021

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VIA ELECTRONIC MAIL TO:

manstonairport@planninginspectorate.gov.uk

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Our Ref: L3034.0001/LC/WJ/SK

FAO: Manston Airport Case Team

The Planning Inspectorate
Temple Quay House
Temple Quay
Bristol
BS1 6PN

Dear Sir or Madam,

Re. Manston Airport

1. We write on behalf of our clients: (1) the Good Law Project Limited, a not-for-profit organisation that brings strategic litigation on matters of public interest; (2) Dale Vince, the founder of Ecotricity, a renewable energy company; and (3) George Monbiot, a journalist and campaigner on the environment.
2. By way of background, our clients have recently concluded their claim for judicial review (CO/1832/2020) against the Secretary of State for Business, Energy and Industrial Strategy following his concession in a recent White Paper to review the Energy National Policy Statements. Since December, they have been engaged in pre-action correspondence with the Secretary of State regarding the need to suspend and/or review the Airports National Policy Statement ("**ANPS**"). Our clients' position is that the Secretary of State is legally obliged to consider whether it is appropriate to suspend and review the ANPS. In this regard, our clients say that the conditions for review and suspension under sections 6(3) and 11(2) and (3) of the PA 2008 are met in that there have been significant changes of circumstances on the basis of which the ANPS was designated which were not anticipated at the time and which would, if they had been anticipated, have resulted in a materially different policy, notably:
 - a. the significant changes in the science and domestic policy on Climate Change since designation of the ANPS in June 2018 and not envisaged at the time; and
 - b. the impact of Covid-19, particularly on the likelihood of a need for additional capacity for airports.

3. In his statement of matters dated 11 June 2021 in relation to the proposed development and reopening of Manston Airport in Thanet, Kent (the “**Development**”), the Secretary of State has invited representations, *inter alia*, on:
- a. the extent to which current national or local policies (including any changes since 9 July 2020 such as, but not limited to, the re-instatement of the ANPS) inform the level of need for the services that the Development would provide and the benefits that would be achieved from the Development;
 - b. whether the quantitative need for the Development has been affected by any changes since 9 July 2019, and if so, a description of any such changes and the impacts on the level of need from those changes (such as, but not limited to, changes in demand for air freight, changes of capacity at other airports, locational requirements for air freight and the effects of Brexit and/or Covid); and
 - c. the extent to which the Secretary of State should, in his re-determination of the application, have regard to the sixth carbon budget (covering the years between 2033 – 2037) which will include emissions from international aviation.
4. As a result of recommendations in the sixth carbon budget, emissions from international aviation will soon be included within the statutory targets for the sixth carbon budget period. The Carbon Budget Order 2021 (SI 2021/750) sets a total quantum of carbon emissions consistent with the new trajectory of 100% reduction in emissions against the 1990 baseline by 2050, as now required by section 1 to the Climate Change Act 2008. The new Carbon Budget Order 2021 (SI 2021/750) came into force on 24 June 2021 and commits to reduce emissions by 78% by 2035 compared to 1990 levels.
5. The Government has also announced that the carbon budget will, for the first time, incorporate the UK’s share of international aviation emissions. The explanatory memorandum to the Carbon Budget Order says:
- “7.4 Emissions from international aviation and shipping will count towards emissions from sources in the United Kingdom for the purposes of the sixth carbon budget. They will be formally included by regulations under section 30 of the Act”*
6. In answer to a parliamentary question on 11 May 2021 about regulations under section 30, Lord Callanan on 25 May 2021 confirmed:

“We have committed to include international aviation and shipping emissions in the Sixth Carbon Budget and will bring forward legislative proposals in due course”¹

¹ [Written questions and answers - UK Parliament](#)

7. In the introduction to its latest progress report to Parliament, the Climate Change Committee identified that there is a significant policy gap and that the Government has been “too slow to follow [climate promises] with delivery”. They further note that, with every month of inaction, it is “harder for the UK to get on track”.
8. There have, accordingly, been significant changes of circumstance since the ANPS was designated and since July 2019. The question for the Secretary of State is how to address these.
9. As to the role of the Secretary of State in determining the Manston Airport application, the Supreme Court has helpfully clarified in the Heathrow judgment at paragraph 98 that:

“The ANPS requires that the scheme be assessed against the carbon reduction targets in place at the time when a DCO application is determined: para 5.82 of the ANPS which we have set out in para 87 above. There is therefore no question of the NWR [the proposed North-West runway] Scheme being assessed in future against outdated emissions targets.”

10. The same reasoning obviously applies to the Manston Airport DCO.
11. The ANPS suggests at 5.82 that up-to-date carbon targets can be taken into account in the making of a DCO decision. However, at paragraph 132 of the Supreme Court’s judgment in *R (on the application of Friends of the Earth Ltd and others) v Heathrow Airport Ltd* [2020] UKSC 52, the Supreme Court noted that there may be circumstances in which inconsistencies could arise between the ANPS and the UK’s climate change obligations, and that this may warrant a review and amendment of the ANPS (rather than mental acrobatics by the Inspectorate or Secretary of State to reconcile the inconsistency).

*“...the ANPS itself indicated at para 5.82 that the up-to-date carbon targets under the CCA 2008, which would reflect developing science and any change in the UK’s international obligations under the Paris Agreement, would be taken into account at the stage of considering whether a DCO should be granted. That was a necessary step before the NWR Scheme could proceed. **Moreover, as observed by the Divisional Court, there was scope for the Secretary of State to amend the ANPS under section 6 of the PA 2008, should that prove to be necessary if it emerged in the future that there was any inconsistency between the ANPS and the UK’s obligations under the Paris Agreement.**”* (our emphasis)

12. Our clients have invited the Secretary of State to commit to considering a review and suspension of the ANPS and have submitted to the Secretary of State that he is obliged to consider a review pursuant to section 6 of the Planning Act 2008.
13. In the absence of review of the ANPS, the Inspectorate and the Secretary of State are put in a very difficult position in the determination of the Manston Airport application. Our clients

consider that the failure to review the ANPS is itself unlawful and they await a final response in pre-action correspondence on the point from the Secretary of State. Absent a suspension and review of the ANPS, we can only suggest that the Inspectorate and Secretary of State attempt to reconcile the incompatibility of the ANPS with legislative targets by giving no weight to any support for the expansion of aviation in the ANPS. The failure of the ANPS to take account of the binding commitments in section 1 of the CCA 2008, the Carbon Budget Order 2021, the sixth carbon budget and in forthcoming statutory instruments makes that inevitable. While that is unsatisfactory, and perhaps even unworkable, our clients can see no other way to navigate through the problem created by the failure of the Secretary of State to review and suspend the ANPS.

14. We would note that the bind in which the Inspectorate is placed also involves careful navigation of the statutory scheme. By section 106 of the Planning Act 2008, the Secretary of State must disregard representations relating to the merits of the ANPS. On its face that seems to require the Secretary of State to disregard this representation since it relates to the merits of the ANPS. However, in truth this representation simply points out that the ANPS is inconsistent with legal obligations, and the Secretary of State is not entitled to disregard legal obligations:

- a. by section 104(3) of the Planning Act 2008, the Secretary of State must decide the application in accordance with the ANPS unless one of the subparagraphs (4)-(8) applies;
- b. section 104(4) allows the Secretary of State to disregard the ANPS if he is satisfied that deciding the application in accordance with it would breach any international obligations. That would encompass the Paris Agreement;
- c. section 104(6) allows the Secretary of State to disregard the ANPS if he is satisfied it would be unlawful. That in our view admits the Secretary of State to take account of the matters set out above; and
- d. section 104(7) allows the Secretary of State to disregard the ANPS where the adverse impacts of a development would outweigh its benefits.

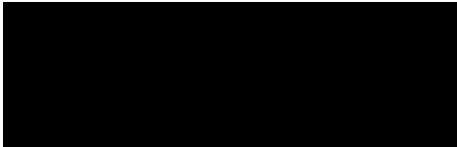
15. We therefore submit that the DCO application should be determined without weight being given to any support for expansion of aviation in the ANPS. The application should be refused on the basis that:

- a. confirming the DCO would, absent any coherent strategy for reducing emissions, including from aviation in accordance with the binding commitments set out above, be likely to breach the commitments under the Paris Agreement;
- b. confirming the DCO on the basis of giving weight to the ANPS would be unlawful and absent the ANPS there is no coherent framework for reduction of carbon emissions such

that a development likely to engender increases in emissions cannot be seen as consistent with statutory commitments to reduction; and

- c. the adverse impacts on climate change from allowing the development in the absence of a coherent strategy for meeting the UK's binding commitments, outweigh the benefits.

Yours faithfully,



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