IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT IN THE ADMINISTRATIVE COURT

Claim No. CO/3011/2021

BETWEEN:-

THE QUEEN
on the application of
TRANSPORT ACTION NETWORK LIMITED

Claimant

- and -

THE SECRETARY OF STATE
FOR TRANSPORT

Defendant

AMENDED STATEMENT OF FACTS AND GROUNDS

This Statement of Facts and Grounds has been amended pursuant to the Court's Order of 10 September 2021 ***[SB/2-3]****, which stayed the claim in order for the Defendant to respond to the Claimant's pre-action correspondence.*

Page references below are to the pages of the claim bundle. These are expressed as ***[CB/x/y]*** *where* ***x*** *is the page number and* ***y*** *is the paragraph number, where relevant. Page references to documents disclosed since the claim are contained in the Supplementary Bundle and expressed as* ***[SB/x/y]*** *where* ***x*** *is the page number and* ***y*** *is the paragraph number, where relevant.*

Please note that the Claimant considers that the Court should treat this claim as a 'Significant Planning Court' claim, as per PD54 of the CPR, because it: (i) raises important points of law in respect of national policy; and (ii) is likely to generate significant public interest owing to that fact.

Essential Reading

- *National Policy Statement for National Networks ("the NPS")(extracts)* ***[CB/88-193]***
- *Ministerial Submission and recommendation to review the NPS, dated 8 July 2021* ***[CB/234-244]***

- *Ministerial Submission and recommendation not to suspend the NPS, dated 15 July 2021* ***[CB/228-232]***
- *Decarbonising Transport: a Better, Greener Britain (DfT July 2021) pages 102-105* ***[CB/224-227]***

INTRODUCTION AND SUMMARY

1. As explained in the witness statement of Chris Todd **[CB/38-46]**, which the court is asked to read in full, the Claimant is an NGO which is concerned with the environmental impacts of the transport sector including, in particular, the impacts of the road transport sector on climate change.

2. From March 2020, the Claimant was pressing the Defendant to exercise the statutory powers (a) to review the existing (2014) National Networks National Policy Statement ("**the NPS**") and (b) to suspend the NPS pending that review **[CB/47-53]**.

3. The Claimant filed two previous claims (CO/4575/2020 and CO/1482/2021) for judicial review of previous decisions of the Defendant not to conduct such a review. Each of those claims became academic as a result of later decisions taken by the Defendant: (a) a second decision (not to conduct a review) taken in February 2021, and (b) a third decision announced on 14 July 2021, that it was after all appropriate to conduct a statutory review of the NPS ("**the Review**"; "**the Review Decision**").

4. The Review Decision was taken following consideration (in accordance with the statutory scheme, as below) of whether climate change targets and policy had become more stringent and whether that had been foreseen when the NPS was designated in 2014. These were considerations which, in its previous claims, the Claimant had alleged the Defendant had failed lawfully to address in his previous two decisions not to review.

5. It follows that the Claimant welcomed the Review Decision. However, the Claimant is very concerned that, even though the Defendant decided that the NPS must be reviewed, he nonetheless went on to decide that it should remain entirely in force (rather than being suspended in whole or part) during the period of the review, which is expected to take around 18 months. (The Defendant has stated that the review is expected to be completed 'no later than Spring 2023' **[CB/247]**). Some 20 major road schemes supported by the NPS could potentially receive development consent during the period of the review **[CB/245]** on the basis of a policy statement that the Defendant agrees needs to be reviewed. If approved, these road schemes would lock in high-carbon infrastructure for

decades, threatening the achievement of the updated climate change targets which triggered the Review.

6. Accordingly, the Claimant is now seeking permission to bring judicial review of the legality of decision of the Defendant, taken (the Claimant understands) on 21 July 2021 (as communicated to the Claimant by letter dated 22 July 2021 [CB/58-59]), not to suspend all or part of the NPS pending the Review ("**the Suspension Decision**").

7. In summary, the Suspension Decision was unlawful for any or all of the following reasons:

    (a) The Suspension Decision was not an open-minded (and therefore lawful) exercise of power to suspend, because the Defendant had already predetermined that question when, on 14 July 2021, he announced that the NPS would remain in force despite the Review ("**Ground 1**");

    (b) The Defendant considered the question of whether to suspend the NPS during the review:

        a. without, as he needed to do, lawfully considering whether the conditions precedent to the exercise of the power to suspend were met ("**Ground 2a**"); or

        b. (on the Defendant's contention in response that his purported exercise of the power to suspend implies satisfaction of those conditions) on the basis of advice from officials that the Review merely might (rather than would) lead to changes to the NPS; and therefore on a legally flawed basis ("**Ground 2b**");

    (c) In deciding that suspension was not required, the Defendant misdirected himself in law as to the basis on which planning inspectors could proceed to determine DCO applications if the NPS remained in force, and/or made likely unlawful decision-making by inspectors ("**Ground 3**");

    (d) The Defendant proceeded on the basis of a material mis-statement of (or misunderstanding of) his own published policy commitments on climate change (by proceeding on the basis that road transport emissions merely had to remain stable in the

medium term, when in fact his own published policy requires them to be reduced by well over 50%) ("**Ground 4**");

(e) The Defendant's assessment of whether to suspend part of the NPS, namely the climate change test and statement of need, was irrational ("**Ground 5**"); and/or

(f) The Defendant took into account an irrelevant consideration – the impact on 'private sector developers' of a suspension, when in fact there are no private sector road developers ("**Ground 6**").

BACKGROUND

8. The Defendant has power to suspend an NPS pending review by virtue of s.11 Planning Act 2008 ("**PA 2008**").

9. By s.13(6) PA 2008, proceedings challenging a s.11 decision must be brought by way of judicial review and within six weeks of the date of the decision under challenge. This claim was brought within that period, albeit that the proceedings were then stayed by consent [**CB/86**] to allow the Defendant to respond to the Claimant's Pre-Action Protocol letter and to allow for this amendment of the Statement of Facts and Grounds in the light of that response.

The Review Decision

10. The Defendant announced the Review Decision on 14 July 2021 as part of the Transport Decarbonisation Plan ("**TDP**") – a major policy programme intended to place the transport sector on a path to net zero emission by 2050. The reasons given for the Review Decision in the TDP were as follows [**CB/225**]:

> "The current National Policy Statement (NPS) on National Networks, the Government's statement of strategic planning policy for major road and rail schemes, was written in 2014 – before the Government's legal commitment to net zero, the 10 Point Plan for a Green Industrial Revolution, the new Sixth Carbon Budget and most directly the new, more ambitious policies outlined in this document. While the NPS continues to remain in force, it is right that we review it in the light of these developments, and update forecasts on which it is based to reflect more recent, post-pandemic conditions, once they are known." [underlining added – see Ground 1 below]

11. Accordingly, the explanation for the trigger for the review (i.e. "these developments") was that the NPS "was written in 2014 – before the

Government's [2019] legal commitment to net zero, the 10 Point Plan for a Green Industrial Revolution, the new [2021] Sixth Carbon Budget and most directly the new, more ambitious policies outlined in this document."

The Suspension Decision

12. The Defendant wrote to the Claimant on the 15 July 2021 in relation to its previous claim (CO/1482/2021) informing it of the Review Decision and stating that the Secretary of State had not yet made a s.11 decision whether or not to suspend the NPS pending review [CB/54-55].

13. In response, the Claimant wrote to the Defendant on 16 July 2021 expressing a wish to be updated once a decision had been made [CB/56-57].

14. On 22 July 2021, the Defendant confirmed in a letter to the Claimant that the Secretary of State decided "yesterday" that it was not appropriate to suspend the NPS [CB/58-59].

15. Also on 22 July 2021, the Defendant published a Written Ministerial Statement ("the WMS") setting out both the Review Decision and that 21 July 2021 Suspension Decision [CB/246-247]:

> "While the NPS continues to remain in force, it is right that we review it in the light of these developments
> …
> While the review is undertaken, the NPS remains relevant government policy and has effect for the purposes of the Planning Act 2008. The NPS will, therefore, continue to provide a proper basis on which the Planning Inspectorate can examine, and the Secretary of State for Transport can make decisions on, applications for development consent."

16. The Claimant wrote to the Defendant on 23 July requesting that he provide all documentation that he had taken into account when making the Suspension Decision and, in particular, any Ministerial Submission presented to the Secretary of State in the process [CB/60].

17. The Claimant wrote again on the 30 July, 6 August and 9 August 2021, pressing the Defendant to provide any explanatory documents as soon as possible, in light of the statutory six-week timetable for issuing proceedings challenging the Suspension Decision [CB/61-65].

18. On Tuesday 17 August 2021, three and a half weeks after it was requested, the Defendant provided the Claimant with a ministerial submission dated 15 July

2021 ("**the 15 July Briefing**"), in which the Defendant was advised by his officials not to suspend the NPS pending review **[CB/228-232]**.

19. The Claimant sent a pre-action protocol letter ("**the PAP letter**") to the Defendant on 23 August 2021, giving reasons why the Suspension Decision appeared to be unlawful **[CB/72-83]**. The Parties subsequently agreed that the claim should be filed 'protectively' with a view to later amendment, and to give effect to that, the Court was invited to grant a stay pending a reply to the PAP letter.

20. Accordingly, the claim was filed on 1 September 2021 and the stay was granted on 10 September 2021 **[SB/2-3]**. The same day, the Defendant provided a response to the PAP letter [**SB/26-29**]. It declined to provide any of the documents requested in the PAP Letter. The Claimant repeated its request for disclosure in an email dated 14 September [**SB/30**], and the Defendant partially complied by letter dated 24 September 2021 [**SB/31-32**]. That further disclosure comprised minutes of the Review Decision [**SB/33]** and the Suspension Decision respectively [**SB/34-45**]. Importantly, the Defendant continues to refuse to disclose the 30 June 2021 briefing.

21. This document is the Amended (in the light of the PAP response) Statement of Facts and Grounds as now being served on the Defendant.

LEGAL FRAMEWORK

Planning Act 2008

22. The Planning Act 2008 establishes a planning regime for Nationally Significant Infrastructure Projects ("**NSIPs**") (as defined in Part 3 of PA 2008). The Secretary of State has a broad power to designate an NPS under s.5 PA 2008 **[CB/248]**, establishing national policy for different types of development.

23. Part 4 PA 2008 establishes that 'development consent' is required for NSIPs and Part 5 establishes a regime for the granting of development consent.

24. By s.104(3) PA 2008 **[CB/256]**, within Part 5, where an NPS has effect, the Secretary of State must determine an application for development consent in accordance with the NPS, unless one of the exceptions listed in s.104(4) to (8) applies. Accordingly, any NPS has a very significant influence on the planning process in respect of the developments to which it applies.

25. By s. 6(1) of the PA 2008, the Secretary of State "must review the NPS whenever he thinks it appropriate to do so". A review may relate to all or part of a national policy statement: s. 6(2) [CB/250].

26. Section 6(3) says this:

> "In deciding when to review a national policy statement the Secretary of State must consider whether—
>
> (a) since the time when the statement was first published or (if later) last reviewed, there has been a significant change in any circumstances on the basis of which any of the policy set out in the statement was decided,
>
> (b) the change was not anticipated at that time, and
>
> (c) if the change had been anticipated at that time, any of the policy set out in the statement would have been materially different." [underlining added]

27. Section 6(4) follows the same pattern, other than in referring to parts of a national policy statement.

28. Accordingly, the questions posed by section 6(3) and section 6(4) are mandatory considerations ("must consider whether") in making a decision whether to initiate a review under section 6(1), but they are no more than that.

29. It follows that the section 6(1) power can lawfully be exercised by a decision to initiate a review whatever conclusion has been reached on each of the actual section 6(3) and 6(4) sub-questions, provided they have each been lawfully considered.

30. In other words (as indeed happened here – see below) a review can be initiated even if (for example) the Secretary of State has not definitely decided that the NPS in question would have been different if the change in contemplation had been anticipated at the time it was made, provided he has addressed that question.

31. The Secretary of State has a further power, by s.11(4) PA 2008, to suspend all or part of an NPS during a section 6 review [CB/253]:

"The Secretary of State may suspend the operation of all or any part of the national policy statement until a review of the statement or the relevant part has been completed."

32. However, by operation of s.11(1), that s.11(4) power only arises where the conditions in either s.11(2) (relating to the whole of the NPS) of s.11(3) (relating to part of the NPS) are met.

33. Textually, the conditions are expressed in identical terms to the mandatory considerations in s.6(3) and (4)). In other words, the same matters (being a series of questions) that are mandatory considerations when deciding whether to review, are necessary pre--conditions for the exercise of the Secretary of State's power to suspend. If, but only if, the trigger conditions are met, the Secretary of State then has a discretion whether to review.

34. The condition in s.11(3) (relating to review of part of the NPS) is as follows:

    (a) since the time when the relevant part was first published or (if later) last reviewed, there has been a significant change in any circumstances on the basis of which any of the policy set out in the relevant part was decided;

    (b) the change was not anticipated at that time; and

    (c) if the change had been anticipated at that time, any of the policy set out in the relevant part would have been materially different. [underlining added]

35. Accordingly, while the questions posed by section 11(3) and section 11(4) track those set out in sections 6(3) and 6(4) respectively, their role in decision-making is quite different.

36. In particular, when it comes to the section 6(1) decision (on whether or not to review), those questions take effect merely as mandatory material considerations: they are factors to be taken into account; and, as explained above (and as happened here), the section 6(1) power can be exercised whatever answer has been reached to the section 6(1) questions, provided the matters they address have been considered.

37. But the legal position is entirely different for the section 11(4) power to suspend. In particular, the section 11(4) power to suspend only actually arises at all if the questions have not only been asked (and the answer considered), but also have been answered in a particular way (i.e. positively).

38. Thus, the power of full/part suspension only arises if (in relation to the whole/part): (a) there has been a significant change; (b) it was not anticipated; and (c) the NPS would have been different if the change had been anticipated. The significance of all that in the present case is addressed in Ground 3 below.

39. The other aspect of PA 2008 which matters for this claim is the way in which it prescribes the status of an NPS in later decision-making. In particular, where an NPS has effect, by s.104(3) PA 2008 an application for a Development Consent Order ("DCO") must be decided in accordance with the NPS, unless one of the conditions in s.104(3) PA 2008 is met. Those conditions are that the Secretary of State is satisfied that:

> "…
>
> (4) […] deciding the application in accordance with any relevant national policy statement would lead to the United Kingdom being in breach of any of its international obligations.
>
> (5) […] deciding the application in accordance with any relevant national policy statement would lead to the Secretary of State being in breach of any duty imposed on the Secretary of State by or under any enactment.
>
> (6) […] deciding the application in accordance with any relevant national policy statement would be unlawful by virtue of any enactment.
>
> (7) […] the adverse impact of the proposed development would out-weigh its benefits.
>
> (8) […] any condition prescribed for deciding an application otherwise than in accordance with a national policy statement is met."

40. Where no NPS has effect, a DCO application must be decided in accordance with s.105(2) PA 2008, which provides that:

> "In deciding the application the Secretary of State must have regard to—
>
> (a) any local impact report (within the meaning given by section 60(3)) submitted to the Secretary of State before the deadline specified in a notice under section 60(2),
>
> (b) any matters prescribed in relation to development of the description to which the application relates, and

(c) any other matters which the Secretary of State thinks are both important and relevant to the Secretary of State's decision."

Those provisions are relevant to Ground 4 below.

The Climate Change Act 2008

41. Section 1 of the Climate Change Act 2008 ("**the CCA**") requires the UK Government to reduce net emissions of 'targeted greenhouse gases' to zero by 2050 ("**the Net Zero Target**") **[CB/259]**. The Net Zero Target was adopted in 2019, following the advice of the Committee on Climate Change ("**CCC**") that the s.1 target should be increased from the previous 80% reduction to a 100% reduction.

42. Sections 4 to 10 of the CCA 2008 create a scheme of five-yearly carbon budgets **[CB/260-264]**. On 23 June 2021, the UK Government legislated to set the Sixth Carbon Budget, covering the period 2033-2038, at a level that was in line with the advice of the CCC.

43. Although carbon budgets cover five-year periods and do not set targets for individual years, it is possible to derive from them the approximate maximum level of Greenhouse Gas ("**GHG**") emissions in a given year that is compatible with achieving them. In this way, the Sixth Carbon Budget implies a 'target' for 2035 of approximately a 78% reduction on 1990 levels of GHG emissions. The UK Government has also set its Nationally Determined Contribution, required under the Paris Agreement, that mandates a 68% reduction on 1990 levels of GHG emissions by 2030.

THE NATIONAL POLICY STATEMENT AS DESIGNATED IN 2014

44. The NPS was designated in December 2014. When designated, it 'set[s] out the need for, and Government's policies to deliver, development of nationally significant infrastructure projects (NSIPs) on the national road and rail networks in England.' **[CB/94/1.1]**. It was intended to be used by the Defendant as 'the primary basis for making decisions on development consent applications' for road and rail NSIPs in England.

45. Section 2 of the NPS set out the Defendant's assessment at the time of a need for capacity enhancements of national networks. Paragraphs 2.12 - 2.27, in particular, stated a need for development of the Strategic Road Network ("**SRN**"), which was said to arise in order to ease congestion that was forecast to increase significantly to 2040 **[CB/100-104]**.

46. Paragraph 2.21 [CB/102] considered three options for meeting this need – maintaining the existing network, managing demand through non-fiscal measures (ruling out fiscal measures such as national road pricing), and modal shift – but concluded that these options were insufficient to meet the identified need.

47. Accordingly, paragraph 2.23 [CB/104] set out 'wider Government policy' of supporting enhancements to the SRN, including 'implementing "smart motorways" to increase capacity', and 'dualling of single carriageway strategic trunk roads and additional lanes on existing dual carriageways to increase capacity'. (Smart motorways are where the hard shoulder is transformed into a permanent additional running lane and traffic flow is moderated by the use of variable speed limits).

48. Section 3 of the NPS set out Government policy at the time on the environmental impacts of road development. It acknowledged that 'Transport will play an important part in meeting the Government's legally binding carbon targets and other environmental targets' [CB/114/3.6] but went on to assert that 'The impact of road development on aggregate levels of emissions is likely to be very small', when set against projected reductions from other climate change policies [CB/114/3.8].

49. Section 5 [CB/136], although titled 'Generic Impacts', actually set out specific tests for the grant or refusal of development consent for individual schemes by reference to various environmental factors.

50. In respect to climate change, the NPS referred to the then (but now out of date since June 2019) statutory target of only an 80% reduction in carbon emissions by 2050 (now set at 100%) [CB/138/5.16] and carbon budgets (i.e. the steps to be secured on the way to 2050) set in line with that (now out of date) 80% target.

51. Paragraph 5.17 said (in that context) that it is 'very unlikely that the impact of a road project will, in isolation, affect the ability of Government to meet its carbon reduction plan targets', and paragraph 5.18 went on to set out the decision-making test by reference to that 'very unlikely event':

> "any increase in carbon emissions is not a reason to refuse development consent, unless the increase in carbon emissions resulting from the proposed scheme are so significant that it would have a material impact on the ability of Government to meet its carbon reduction targets." [CB/139]

Accordingly, the approach in 5.18 was directly premised on the conclusion set out in 5.17. The particular importance of those linked paragraphs is considered under Ground 3 below.

THE SUSPENSION DECISION

52. In replying to the PAP, letter, the Secretary of State explained that the Suspension Decision was taken on the basis that he accepted the recommendation made to him in the 15 July 2021 Briefing (including its Annexes).

53. Since the Defendant has not identified any other reasoning for his decision than that set out in the briefing (which his duty of candour would have required had there been any other reasoning), the Court should proceed on the basis that he followed the recommendation for the reasons set out in that briefing; and that, for the purposes of that decision he took into account, and only took into account, the matters provided with that briefing.

54. The Annexes included (at Annex B) an earlier briefing from officials dated 8 July 2021 ("**the 8 July Briefing**") **[CB/234-244]**, which was the briefing which had recommended a review of the NPS and been the basis for the Review Decision. The 15 July Briefing referred to it extensively.

GROUNDS OF CHALLENGE

Ground 1: Predetermination

55. As explained above, the Defendant has explained the Suspension Decision as having been taken on 22 July 2021. That is the decision challenged here.

56. To be lawful, that decision plainly needed to have been made on an open-minded basis and not be vitiated by pre-determination.

57. However, here, the TDP (which included an announcement of the Review Decision, as noted above) had already explained the Defendant's intention that the NPS would 'continue to remain in force' pending review; that is, it would not be suspended.

58. It follows that the Suspension Decision was vitiated by pre-determination.

59. The Defendant has claimed, in reply to the PAP letter, that the statement in the TDP should be read as meaning that the NPS remained in force only pending a decision regarding suspension [**SB/27/6**]. That claim does not stand scrutiny:

(a) It is inherently unlikely that the Defendant would have included in a long-term policy document such as the TDP an intention intended to have a currency of only a few days.

(b) The point in the TDP to the effect that the NPS would continue to remain in force must be read in the context of the rest of that sentence in the TDP (as above), which was entirely dealing with events that will happen during the course of the Review (such as updating of forecasts). On any fair reading the point about the NPS continuing to remain in force also referred to that timescale.

(c) The same wording was used in the WMS, after the Suspension Decision, as was used in the TDP, before the Suspension Decision, indicating that both were referring to the period pending Review.

(d) The 8 July Briefing which recommended initiating the Review identified (in relation to possible suspension pending Review) 'a risk of disruption in the short term due to uncertainty while the review takes place' (paragraph 8) before stating [CB/235]:

> "The main means of mitigating this is to provide as much certainty to industry as possible on the timescales and process for the review, as well as the status of the NPS namely that it remains extant and fully effective in decision making. We recommend you do this by laying a Written Ministerial Statement at or shortly after the point of publication of the TDP." [underling added]

That is consistent with, and only consistent with, the point being made in the TDP being about the status of the NPS pending Review, not merely pending an (imminent) further decision on suspension.

(e) The 'Summary Note to Private Secretary' appended to the 8 July Briefing for the Review decision repeated this theme, stressing the need 'to clarify the status of the current NPS and the timeframe for a review, to the industry and public at large to effectively de-risk pipeline schemes' [CB/236/3]. It proposed that a Written Ministerial Statement be published on 14 July 2021, alongside the TDP, which would have stated 'The statement continues to provide an appropriate framework for the Planning Inspectorate to make planning decisions in relation to national road and rail infrastructure development and it is important to ensure the Statement continues to execute this function effectively.'

[CB/239]. This text was partially reproduced in the WMS on 22 July 2021.

(f) Accordingly, it is plain from the unequivocal advice given to the Defendant on 8 July 2021, and the statement in the TDP that the decision at the time was that the NPS would remain in force, such that a decision not to suspend had already been taken by the Defendant prior to the date of the Suspension Decision. Although, on 8 July 2021 officials urged the Defendant not to 'hav[e] a view on suspension or not of the NPS' (Note to Private Secretary [CB/236/4]), that cannot disguise the fact that the Defendant had taken a clear position on the point before 14 July 2021. Tellingly, the subsequent 15 July Briefing did not give any reasons in favour of suspension (as would have been the case to inform an open-minded decision). This is because it was not weighing the pros and cons of the possible courses of action, rather it was giving effect to a view that had already been taken.

(g) On 13 July 2021, having accepted the advice to announce a review, the Defendant solicited further advice on how to minimise "the chilling effect on road building and completion by 2023" [SB/33]. Given that he had settled on that objective prior to publication of the TDP, it is highly unlikely that any statements contained in the TDP can be reasonably interpreted as meaning that the NPS would only remain in force pending a decision regarding suspension.

60. It follows that the Suspension Decision relied on by the Defendant as being the operative decision was not reached on the basis of an open-minded exercise of the review discretion. Rather, that decision had been unlawfully pre-determined.

Ground 2(a) and 2(b): Unlawful approach to PA 2008 s11(2) and 11(3)

61. By operation of s.11(1), the s.11(3) power to suspend pending review only arises if the answers to each of the questions posed by the limbs of s.11(2) or s.11(3), as the case may be, are answers "yes".

62. The 15 July Briefing did not state whether officials were advising the Defendant to proceed on the basis that the conditions in s.11(2) and/or 11(3) had or had not been met in that way. That matters because, as above, unless those conditions are met, the section 11(1) power does not arise.

63. At paragraph 6 [CB/228], the 15 July Briefing referred back to the assessment against the conditions in s.6(3) and (4) that was set out in the 8 July Briefing. The

8 July Briefing had stated (for the purposes of section 6(1)) that 'we now believe that parts of the NNNPS now trigger the three considerations set out in the Planning Act'.

64. Annex B of the 8 July Briefing [CB/240-244] set out the analysis which underpinned that recommendation (and, as above, are therefore to be taken to be the basis on which the Secretary of State proceeded). That analysis (and those conclusions) was said to apply for both s.6 and s.11 purposes. It referred to a series of "events" (including change in traffic levels, net zero, the Paris Agreement, setting of Carbon Budget 6) and analysed for each whether there had been a significant change in circumstances, whether it had been unanticipated at NPS designation and whether the policy would have been materially different – i.e. the considerations raised by both s.6 and s.11. In relation to some events, the analysis concluded there had been a change which had not been anticipated. For many of those, it was said that the change would not have made a difference but for others (change in forecasts, setting of Carbon budget 6 and TDP) the answer was only "possibly YES".

65. That had been legally sufficient for the purposes of the section 6(1) exercise, because all that had required (as above) was the taking into account of the considerations set out in sections 6(2) and 6(3). Accordingly, it had not mattered for that purpose whether officials considered (and the Secretary of State then decided) that (for example) policy would (or merely might) have been materially different had the relevant changes been anticipated. All that mattered for section 6(1) was that (on their advice) he considered that issue.

66. But that was not legally adequate for the purposes of a s.11(4) suspension decision, because the Defendant's suspension power only arises if the s.11(2) or (3) questions are answered positively. That in turn required the Defendant to determine whether the NPS would have been materially different (and not merely ask whether it might have been).

67. Accordingly, the Defendant unlawfully failed to consider whether the section 11(2) and 11(3) conditions were met: Ground 2a.

68. In response to the PAP letter, the Defendant now contends [SB/27/9] that it can be inferred, from his evaluation of whether to suspend the NPS pending review, that the trigger conditions were in fact satisfied by positive answers to those questions.

69. But, if that is right, it makes the Secretary of State's position worse not better by highlighting the confusion of his briefing (and therefore his confusion). In particular, it means that the Secretary of State then approached the s.11(4)

discretion on a flawed basis because the advice to him (in Annex B of the 8 July 2021 briefing) was only to the effect that the trigger conditions were possibly met. There is plainly a significant difference between deciding whether to suspend pending review in circumstances where it is merely said that the review might lead to a change in the NPS, and making that decision recognising that it has already been properly decided that the review will lead to a change in the NPS. The Secretary of State did the former. That means that he will have misdirected himself as to, and thus underestimated (or at least not properly understood), the importance of the three unanticipated changes in circumstance on which he was being asked to base his decision. Put another way, he unlawfully failed to take into account that the review will lead to changes to the NPS: Ground 2b.

Ground 3: Misdirection of law as to the basis on which DCO inspectors could proceed and/or risk of unlawful decision-making by DCO inspectors

70. The 15 July Briefing recapped the Defendant's earlier decision to review the NPS (paragraph 6): 'in the light of updated traffic forecasts and the policy framework provided by the TDP, which could potentially impact on the statement of need or section on carbon emission in particular' [CB/228]. These are crucial elements of the NPS that affect the fundamental desirability of proceeding with individual schemes.

71. Paragraph 7 went on to consider (in support of a decision not to suspend) the way in which planning inspectors would continue to apply the NPS during the period of review, as follows:

> "Whilst it is considered appropriate to undertake a review of the NNNPS, the statement continues to provide an appropriate framework for the Planning Inspectorate (PINS) in determining applications for development consent in relation to national road and rail infrastructure development. In particular, where traffic volumes have been reforecast (as was the case in 2018), or policy has evolved - including climate change / emissions considerations, Planning Inspectors have already been considering these changed elements when making individual Development Consent Order (DCO) decisions and could continue to do so in the light of the TDP through guidance to Planning Inspectors during the period of the review. However, there hasn't been an opportunity for the Planning Inspectorate to consider the TDP in decisions yet." [CB/228-229]

72. In other words, so it was being said, even with the NPS remaining in force pending review, Planning Inspectors would nonetheless be proceeding on the

basis of the changed traffic forecasts and changed climate change/emissions considerations (i.e. not acting in accordance with the NPS).

73. There is no lawful basis on which planning inspectors could both (i) continue to decide DCOs in accordance with the (now admittedly out-of-date) NPS, as they are required to do by s.104 PA 2008 and (ii) as the Secretary of State contemplates, make an updated assessment of (or proceed on the basis of the updated assessment or approach to) the matters in question.

74. There is, in particular, no basis on which inspectors could consistently (and therefore lawfully) apply any of the provisions listed in s.104(4) to (8) PA 2008 in order to allow them to depart from the policy in the NPS, as the Secretary of State assumed for the purposes of the Suspension Decision. And that is all the more obviously the case where, as here, the Secretary of State has positively decided not to suspend the NPS.

75. As it happens, Inspectors have in practice tried (but struggled lawfully) to apply both updated forecasts and carbon budgets in the context of the policy in the existing NPS when determining DCO applications. In the instance of the A38 Derby Junctions scheme, the resulting decision was withdrawn by the Defendant when challenged and the DCO quashed. The problem has also led to delays in extant DCO processes, such as M25 Junction 10/A3 Wisley and the M54-M6 Link Road, where the Defendant has had to ask for further information on carbon emissions after Examinations have closed.

76. Paragraph 7 of the Briefing went on to note that there have been no instances yet of inspectors considering the implications of the TDP [CB/229]. It is the TDP in particular, with its emphasis on emissions reductions for the transport sector specifically, which was identified as game-changing in the 8 July Briefing (even though these reductions were materially mis-stated – see Ground 4 below).

77. As the assessment table in Annex B of that Briefing correctly recognised [CB/242], the impact of TDP's emissions commitments 'invites a reconsideration of the assumption in paragraph 5.17 of the NPS that "it is very unlikely that the impact of a road project will, in isolation, affect the ability of government to meet its carbon reduction targets."' [CB/242] In other words, the paragraph 5.17 test is no longer reliable. The Claimant obviously agrees with that. But if paragraph 5.17 is now unsafe, then that will lead to flawed applications of the test set out in paragraph 5.18 of the NPS, thus creating illegality of the kind identified by the Supreme Court in R (A) v Secretary of State for the Home Department [2021] UKSC 37 at [46].

78. A similar problem arises in relation to the setting of the (new) Sixth Carbon Budget. The 8 July Briefing (Annex B) noted that it will force a radical shift in the approach to tackling road emissions compared with the position in 2014, because the road sector will be allocated a specific budget in the forthcoming Government plan to deliver the Sixth Carbon Budget:

> "The sixth carbon budget requires Government to publish a delivery plan, and the agreed approach is that it will contain sector shares for emissions reductions. This is clearly a significant change of circumstances. The level of the budget and targets for each sector of the economy was unforeseen at the time of designation in 2014." [CB/241]

(That plan must be published in law 'as soon as reasonably practicable' after setting a budget (s.14(1) CCA 2008), and which on any view must (politically speaking) be published ahead of the 26th meeting of the UN Climate Change Conference of the Parties (COP26) in November 2021, in order to give credibility to the UK as host of that conference.)

79. There is no lawful basis on which Inspectors could lawfully apply both the '2014 approach' to road emissions set out in the NPS and the '2021 approach' to road emissions demanded by the Sixth Carbon Budget. And yet the Suspension Decision proceeds on the basis that they can and will make decisions on the basis of both the 6th Carbon Budget and the unsuspended NPS.

80. Accordingly, the Decision was based on an error of law by the Defendant and/or would lead to unlawful decision-making by inspectors. Contrary to what the Defendant has since suggested, those things cannot be mitigated by guidance since any such guidance would need to direct inspectors to ignore the out-dated (but extant, given the Suspension Decision) parts of the NPS – which it cannot lawfully do. Although the minute of the Suspension Decision refers to guidance [SB/35], no such guidance has been disclosed by the Defendant (indeed, to the Claimant's knowledge, none exists in the public domain), and it is not even clear whether such guidance was prepared prior to, or taken into account as part of, the Suspension Decision. However, in any event, the Defendant has not identified any basis in law (nor is there one) how such guidance could displace the statutory obligations in relation to the extant NPS, as above.

Ground 4: Decision based on a misunderstanding of policy

81. The 8 July Briefing told the Secretary of State (and he therefore proceeded on the basis that) the TDP 'specifically commits to keeping road emissions stable in the medium term.' (Annex B, comment against 'Transport Decarbonisation Plan – no increase in emissions' [CB/241-242])

82. The Claimant is unable to locate the 'commitment' referred to in Annex B within the TDP, which refers instead to 'the opportunity for a reduction, or at least a stabilisation, in traffic more widely' [CB/219, 212], underlining added] – rather than a stabilisation of emissions.

83. But in any event, the "commitment" referred to in the 8 July briefing (and therefore acted on by the Defendant for the purposes of the Suspension Decision) is in stark contrast to figures 9 and 10 on pages 104 and 105 of TDP [CB/226-227], which give projected trajectories of car and van emissions respectively on a path to Net Zero, and are said to be based on 'a Decarbonising Transport policy scenario including the ambitious set of car and van policies listed above, alongside savings from mode shift and low carbon fuels policy.' It is clear from these figures that such emissions will need to do much more than remain "stable" (as the Briefing asserted). Rather, they will need to decline by well over 50% by 2035.[1]

84. In his response to the PAP letter, the Defendant has not been able to explain the inconsistency. He too cannot locate the commitment claimed by the Briefing to have been made in the TDP. Nor has the Defendant made any attempt to explain how the claimed commitment could be reconciled with the steep emissions reductions that are required by the Sixth Carbon Budget and apparently accepted in the TDP. The Defendant's response is simply that 'keeping emissions stable in the medium term despite historic increases in traffic does require substantial policy changes' [SB/28/13]. This perpetuates the error, because it is no more than an explanation of the supposed 'commitment', which is nowhere to be found in the TDP.

85. The 8 July Briefing (and therefore the Suspension Decision) proceeded on the basis of a material misstatement of the medium-term emissions trajectory identified in the TDP.

86. That mattered because the 8 July Briefing (and therefore the Secretary of State) failed to appreciate (or at the very least significantly understated) the urgency of reducing road transport emissions, and accordingly the 15 July Briefing and the Suspension Decision which it informed proceeded on an erroneous understanding of the Defendant's own policy was likewise flawed for the same reason and to the same effect.

[1] 2035 and/or the Sixth Carbon Budget period is identified with the 'medium term' on pages 6 [CB/219] and 29 [CB/222] of TDP.

Ground 5: Unlawful assessment of whether to suspend part of the NPS

87. As above, the Defendant has a power to suspend 'all or any part' of an NPS (s.11(4)). His consideration of those needed to be lawful, including rational.

88. The final sentence of paragraph 7 of the Briefing apparently considered whether to suspend (i) the Statement of Need and/or (ii) the 'sections on carbon emissions aspects of wider Government policy'. That was the entirety of the material before the Defendant on the question of part-suspension [CB/229].

Statement of Need

89. On that basis, and that basis only, suspension of the Statement of Need was then rejected in paragraph 7 (and therefore by the Secretary of State) on the explained basis that 'the Statement of Need cuts across much of the policy the NPS contains'.

90. However, that statement ignored the fact that the Statement of Need contains two distinct sections setting out the 'need' for road and rail respectively, so that it, if desired, would have been straightforward to suspend the road section only (although in fact the policies in the TDP indicate a greater need for rail, due to the need for modal shift to lower-carbon forms of transport).

91. Moreover, the reasoning given is circular and merely recognises that the aspects of the NPS in relation to road schemes that are out of date are fundamental ones. If anything, it is an argument in favour of suspending the whole NPS (or at least those parts of it that deal with roads), not of refusing to suspend part of it.

Carbon Emissions

92. By contrast, no reasoning whatsoever was given in support of a decision not to suspend the carbon emissions sections of the NPS.

93. As set out above under Ground 3, these sections will cause particular difficulty for planning inspectors if they remain in force. It would be straightforward to suspend them while leaving in force other parts of the NPS.

94. But no consideration at all was given to that question; or, at least, no reasons were given for not doing so.

Overall

95. Accordingly, the Defendant's decision not to suspend parts of the NPS – namely (i) the Statement of Need and/or (ii) the 'sections on carbon emissions aspects of wider Government policy' – was irrational.

Ground 6: taking account of irrelevant consideration – 'private sector developers'

96. Paragraph 8 of the 15 July briefing set out a positive case for not suspending the NPS, which is said to be avoiding 'market chilling':

> "Scheme sponsors and private sector developers value long-term certainty within the planning regime and NPSs supports this. Keeping the current NNNPS in place during the review period will mitigate market chilling as a result of developer hesitancy." [CB/229]

97. However, there are no 'private sector developers' in the road sector. In the majority of cases, the sole scheme sponsor and developer in relation to road schemes brought forward under the NPS is National Highways (formerly Highways England), a company wholly owned by the Department for Transport, of which the Defendant himself is the sole shareholder.

98. There is therefore no risk of market chilling in relation to road development, since there is no market to chill. Annex C to the 15 July briefing appears to recognise as much, where it contrasts the position in the rail sector, and states that as rail schemes 'are private sector led may be more susceptible to delay' [CB/245].

99. The Claimant does not understand how this can be a reference to the need to protect the supply chain in the road sector in the long term (as asserted by the Defendant in pre-action correspondence), because: (i) actors in the supply chain are not 'developers'; (ii) a revised NPS is expected in approximately 18 months, so any disruption would be short term; (iii) certainty for the supply chain would, if anything, be greater if 2014 policy, which is inconsistent with 2021 policy, is not suspended (see para 75 above); and (iv) there is already a substantial backlog in road and bridge maintenance and renewal, which could maintain supply chain activity.

100. Accordingly, in placing reliance on this factor in relation to potential suspension of the parts of the NPS that related to roads, the Defendant misdirected himself in law and/or took into account an irrelevant consideration and/or proceeded on the basis of a material error of fact.

RELIEF

101. For the reasons set out above, the Suspension Decision was unlawful.

102. The Claimant seeks permission for an expedited judicial review challenge to the Suspension Decision.

103. In that challenge, the Claimant seeks:

a. A declaration that the Decision was unlawful; and

b. An order requiring the Defendant to give lawful consideration to whether to suspend the NPS for the period of the Review;

c. Such other or further relief as the Court considers appropriate; and

d. Costs.

DAVID WOLFE QC
PETER LOCKLEY

29 September 2021