

**FAO: The Secretary of State for Transport**

Department for Transport  
Great Minster House  
33 Horseferry Road  
London  
SW1P 4DR

Date: 9 April 2020

First by email: Secretary of State

Copied to: Highways England

**URGENT**  
**PRE ACTION PROTOCOL LETTER FOR JUDICIAL REVIEW**

Dear Secretary of State,

**Re: Road Investment Strategy 2 (“RIS2”)**

**Introduction**

1. We write this letter on behalf of our client, Transport Action Network (“TAN”), in order to comply with the pre-action protocol for judicial review under the Civil Procedure Rules. If we do not receive a satisfactory response to this letter, we propose to advise our client to make an application for judicial review without further reference to you.
2. We are aware that judicial review is a remedy of last resort and write in the hope that this matter can be resolved without recourse to legal proceedings. We therefore outline at the end of this letter the steps which we ask you to take in order to avoid recourse to the court.
3. This letter sets out the factual and legal basis on which any claim would be pursued. Please be clear in your response in identifying any areas of factual and/or legal dispute and the basis for them so that the issues in dispute can be identified and if possible narrowed.
4. On 5 March 2020, TAN wrote to the Secretary of State to request him to pause the publication of *RIS2* and reconsider its environmental effects, in particular in respect of climate change. Regrettably, the Secretary of State refused to do

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so and proceeded to publish *RIS2* on 11 March 2020. At the time of writing, TAN has still not received a substantive response to that letter. In so far as your response to this letter leaves any points raised by TAN in its letter unanswered, please proceed to address those under separate cover.

## **The Parties**

5. The proposed Claimant is: Transport Action Network Ltd.
6. The proposed Defendant is: The Secretary of State for Transport (the "Secretary of State"), Department for Transport, Great Minster House, 33 Horseferry Road, London, SW1P 4DR.
7. The proposed Interested Party is: Highways England Company Ltd ("HE"), Bridge House, 1 Walnut Tree Close, Guildford, GU1 4LZ.

## **Aarhus Convention**

8. This proposed claim falls under the definition of an Aarhus Convention claim within the meaning of the CPR, and we proceed subject to the costs protection that brings, on the basis that the grounds of claim concern numerous pieces of environmental legislation, which are all elements of national law relating to the environment within the meaning of Article 9(3) of the Aarhus Convention.

## **Time-limit**

9. We are proceeding on the basis that the normal three month time-limit applies, and so you have the normal 14 days to respond. If you agree, please confirm so and that you will not take a point on delay, provided the proposed claim is issued within three months of the decision under challenge. However, if you disagree, please explain why and provide a substantive response to this letter within 7 days.

## **Decision under challenge**

10. The proposed claim challenges the lawfulness of the adoption and publication of *RIS2* by the Secretary of State on 11 March 2020 (the "Decision")<sup>1</sup>. Although *RIS2* was laid this year, it was developed in five steps over a multi-year timetable across designed to promote stability.

<sup>1</sup> <https://www.gov.uk/government/publications/road-investment-strategy-2-ris2-2020-to-2025>;  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/872252/road-investment-strategy-2-2020-2025.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/872252/road-investment-strategy-2-2020-2025.pdf);  
<https://www.gov.uk/government/collections/road-investment-strategy-post-2020>

11. In total, *RIS2* commits the Government to spend £27.4 billion towards investing in, and setting the strategic vision for, the Strategic Roads Network (“SRN”), including expanding it through additional road capacity with £14 billion earmarked for capital enhancements. It is noted that the total funding that HE will receive to deliver the outputs and outcomes determined by *RIS2* is greater than the original estimate of £25.3 billion set out in the Draft RIS. *RIS2* also sets the activities, results and standards which govern how that investment is spent by HE and how the SRN’s environmental impacts are managed.
12. It is also noted that the number of schemes committed to under *RIS2* by geographical area are as follows: North of England: 11, plus three smart motorway projects (to be confirmed by HE); Midlands: 6, plus one smart motorway project; East of England: 8, plus one smart motorway project; and South and West of England: 9, plus two smart motorway projects.

## **Potential Grounds of Claim**

### Ground 1A: Climate Change

#### *Legal Framework*

13. It is stated in mandatory terms under s. 3(5)(a) of the Infrastructure Act 2015 that, in setting or varying a Road Investment Strategy, the Secretary of State must have regard, in particular, to the effect of the Strategy on the environment (underline added).
14. On 12 December 2015, the UK Government signed the Paris Agreement, which was concluded as an agreement within the United Nations Framework Convention on Climate Change (the “UNFCCC”). The Paris Agreement enshrines a firm commitment to restricting the increase in the global average temperature to “well below 2°C above pre-industrial levels and [to pursue] efforts to limit the temperature increase to 1.5°C above pre-industrial levels” (Art. 2(1)(a)), as well as an aspiration to achieve net zero greenhouse gas emissions during the second half of the 21<sup>st</sup> century – a “balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century” (Art. 4(1)). It requires each state to determine its own contribution to this target (Art. 4(2) and (3)).
15. The Secretary of State (as a branch of the UK Government) is under a duty to ensure that the net UK carbon account for the year 2050 is at least 100% lower than the 1990 baseline (s. 1(1) of the Climate Change Act 2008) (“Net Zero Target”, which was enshrined into law as of 26 June 2019).

16. The UK Government is also under a duty to set amounts for the net UK carbon account for each five year period (the “Carbon Budgets”) and to ensure that the net UK carbon account for a budgetary period does not exceed the carbon budget (s. 4 of the CCA 2008). The Carbon Budgets must be set by 2050 to a level which accords with the Net Zero Target (s. 5(1)(b)).
17. In Friends of the Earth Ltd v Secretary of State for Transport [2020] EWCA Civ 214 it was held that, in setting planning policy of national significance, climate change considerations, including the Paris Agreement, were so obviously material that they had to be taken into account (at [237]).

## Argument

18. The Secretary of State’s intention is that *RIS2* will contribute to “achieving net gains for the environment and contributing to a wider climate change strategy” (p. 12). According to the UK Government’s own statistics, transport is now the largest sector for UK greenhouse gas emissions (27%), of which road transport accounts for over 90%<sup>2</sup>. According to an independent review commissioned by CPRE of HE Post-Opening Project Evaluations, the methodology used by HE to assess scheme emissions was seriously flawed, as schemes opening between 2002 and 2010 had by 2014 increased CO2 emissions from the SRN by 1.2Mt, equivalent to 3% of total annual emissions from the SRN<sup>3</sup>. In response to a Freedom of Information Request made by TAN<sup>4</sup>, the Department of Transport disclosed data confirming that the combined additional carbon created by five key schemes funded under *RIS2*<sup>5</sup> alone amounts over the next 60 years to approximately 10 million tonnes.
19. However, the Secretary of State has failed to discharge its duty under s. 3(5)(a) of the IA 2015, because while he has considered climate change he has not lawfully taken into account the Net Zero Target before publishing *RIS2*. As the Committee on Climate Change (“CCC”) stated in its May 2019 advice<sup>6</sup> “challenges that have so far been out of scope must now be confronted”, such as traffic reduction, and that the “target is not credible unless policy is ramped up significantly”. Consequently, he has not had proper or lawful regard the effect of *RIS2* on the environment.

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/739460/road-to-zero.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/739460/road-to-zero.pdf) (p. 7)

<sup>3</sup> <https://www.cpre.org.uk/wp-content/uploads/2019/11/TfQLZ-TheImpactofRoadProjectsinEngland2017.pdf> (p. 55)

<sup>4</sup> [https://www.whatdotheyknow.com/request/appraisal\\_summary\\_tables](https://www.whatdotheyknow.com/request/appraisal_summary_tables)

<sup>5</sup> Lower Thames Crossing; A27 Arundel; A417 Missing Link; A303 Amesbury to Berwick Down (Stonehenge); A5036 Port of Liverpool access

<sup>6</sup> <https://www.theccc.org.uk/wp-content/uploads/2019/05/Net-Zero-The-UKs-contribution-to-stopping-global-warming.pdf>

20. The Secretary of State has not turned his mind to the relevant question of the extent to which *RIS2* is compatible with the Net Zero Target, and in particular the forthcoming Carbon Budgets, which are not mentioned at all in *RIS2*. Neither has the Secretary of State considered whether *RIS2* is in line with the Paris Agreement: the Paris Agreement is not mentioned at all in *RIS2*. These errors flowed from the fact that the research phase documents<sup>7</sup> that informed the publication of *RIS2* were either completed prior to, or based on assumptions and data predating, the Net Zero Target coming into force.
21. *RIS2* states that: “The UK’s first Transport Decarbonisation Plan, due to be completed later this year, will bring together a bold and ambitious programme of coordinated action needed to reach net zero emissions by 2050” (p. 26). On 26 March 2020, the Secretary of State published an outline of the steps that would be taken before the Decarbonisation Plan is published<sup>8</sup> (the “Decarbonisation Plan Consultation”), while recognising: “the challenge we need to meet to reduce transport emissions and ensuring we reach net zero transport emissions by 2050”<sup>9</sup>.
22. However, the Decarbonisation Plan Consultation states that:

“Transport has a huge role to play in the economy reaching net zero. The scale of the challenge demands a step change in both the breadth and scale of ambition and we have a duty to act quickly and decisively to reduce emissions.” (p. 3)

“DfT projects transport emissions to fall steadily as a result of the existing firm and funded policies, but that the speed of reduction is much slower than what is likely to be needed if transport is to fully play its part in contributing to our legal obligations” (para. 4.4)

...it is clear from figure 18 that the UK must go much further in reducing domestic transport emissions than currently projected if we are to meet the emission levels set out in the 2032 Clean Growth Strategy scenario (there is an estimated gap of 16Mt CO<sub>2</sub>e between this and DfT’s current projection in 2032), and to meet our legal obligation to reach net zero GHG emissions by 2050” (para. 4.5)

<sup>7</sup> <https://www.gov.uk/government/collections/road-investment-strategy-post-2020>

<sup>8</sup>

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/876251/decarbonising-transport-setting-the-challenge.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/876251/decarbonising-transport-setting-the-challenge.pdf)

<sup>9</sup> <https://www.gov.uk/government/publications/creating-the-transport-decarbonisation-plan>

23. To say the very least, it was apparent to the Secretary of State that it was far from certain that the increased CO<sub>2</sub> emissions caused by the SRN expansion funded under *RIS2* would be compatible with the Net Zero Target; or, in particular, the Carbon Budgets. On the contrary, the Secretary of State's own research indicated that there was a very significant gap of 16Mt CO<sub>2</sub>e in 2032 between emissions on current policies and emissions on the required trajectory to meet the Fifth Carbon Budget.
24. As far as our clients understand the 'Tackling Emissions' section of *RIS2* (pp. 26-28), the intention of the Secretary of State is to provide additional road capacity to reduce the rate at which congestion increases due to the expected increase in road traffic, even before fully considering the even greater increase arising from an earlier switch to EVs, which are cheaper to drive. Since EVs will be "zero emission" by 2050 – the reasoning seems to run – any number of them can be compatible with the Net Zero Target for 2050. Even though *RIS2* notes measures to support modal shift (p. 27), these are focused on shorter distance journeys rather than the longer distance ones the SRN predominantly caters for. These factors are contrary to the Decarbonisation Plan Consultation, which (rightly) proposes using cars less in order to meet the Net Zero Target. If nothing else, this surely represented such a fundamental change in circumstances that the preparation process for *RIS2* should have been reopened<sup>10</sup>.
25. Furthermore, since the sale of new conventional cars and vans is currently only to be ended in 2040 (and with the consultation on bringing that date forward, proposing an alternative date of 2035), it is obvious that providing additional road capacity will increase emissions from road transport in the short to medium term, making it all but impossible to meet the UK's statutory obligations in relation to the Fifth Carbon Budget. In short, by treating (in the context of *RIS2*) EVs as a silver bullet in meeting the 2050 obligations, the Secretary of State has unlawfully failed to consider his medium-term statutory obligations relating to Carbon Budgets.
26. For similar reasons, by adopting the approach that he did in *RIS2* of focussing on the ability of EVs to deliver the Net Zero Target in 2050, the Secretary of State unlawfully failed to take into account the UK's commitments and objectives under the Paris Agreement. Importantly, the Paris Agreement sets temperature-based goals for the mitigation of climate change. What is important in assessing the UK's contribution to meeting a temperature-based goal is not the level of UK emissions in a given year such as 2050, but the UK's cumulative emissions up to that date. Put another way, the shape of the emissions curve to 2050 is important, because the

<sup>10</sup>

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/321529/setting-roads-investment-strategy.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/321529/setting-roads-investment-strategy.pdf) (paras. 5.12-5.13)

area under the curve represents the total contribution to warming. Therefore, near-term emission increases (or slower reduction rates) are harmful and may be inconsistent with the temperature goals of the Paris Agreement, even if they are ultimately compatible with achieving the Net Zero Target in 2050.

27. Moreover, the intragenerational equity requirement of the Paris Agreement under Article 4 expressly recognises the circumstances of developing countries, and acknowledges that peaking in temperatures will be later for those countries, so developed countries (like the UK) need to make allowances for this to happen and leave room for the later peaking on GHG emissions from those countries.
28. None of this was considered by the Secretary of State in adopting *RIS2*, and his failure to do so was unlawful, because the Paris Agreement and its implications were obviously a material part of his statutory obligation to have regard to the effect of *RIS2* on the environment.

## Ground 1B: Climate Change

### *Legal Framework*

29. A legitimate expectation may arise from government practice that consideration would be given to a particular approach before a decision is taken or a policy is adopted (see: *Paponette v Attorney General of Trinidad and Tobago* [2010] UKPC 32). Such representation must be clear, unambiguous and devoid of relevant qualification (see: *R. (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61).

### *Argument*

30. Although HE has a metric in place to assess its own carbon emissions (e.g. from construction, maintenance and patrols) it has not yet developed the equivalent for assessing the carbon emissions from the use of the SRN by road users. *RIS1* was published in December 2014 and promised to find ways to measure this<sup>11</sup>:

“The Government recognises the challenge of assessing the environmental impact of the network. We will work with them, industry and other stakeholders to develop better ways to establish a meaningful way to measure the better outcomes that need to be

<sup>11</sup>

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/396487/141209\\_Strategic\\_Business\\_Plan\\_Final.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/396487/141209_Strategic_Business_Plan_Final.pdf)

achieved. However, this plan clearly demonstrates our commitment to working with partners to make significant progress over the next five years.” (p. 35)

31. By March 2015, HE promised to develop a way to record carbon emissions from road users by 2016 and then implement it from 2020<sup>12</sup>:

“We will also develop a new indicator to determine what vehicle emission levels are from our customers' use of the strategic road network. We will develop the appropriate methodology and complete this work by March 2016.” (p. 45)

32. In the same Delivery Plan, HE committed to doing so through developing metrics covering broader environmental performance, including carbon dioxide and other greenhouse gas emissions arising from the use of the network (p. 74) (the “User Metric”).

33. In January 2019, HE’s Operational Metrics Manual<sup>13</sup> still included the same requirement on HE to develop metrics covering broader environmental performance, including: “Carbon dioxide, and other greenhouse gas emissions arising from the use of the network.”

34. In its advice for the *RIS* efficiency review, the Office for Rail and Road (the “ORR”) stated in respect of performance indicators (“PIs”) that:

“Highways England also proposed PIs associated with SRN user carbon emissions. There is not yet any historical data available for this measure, but as an untargeted PI, there are no issues concerning deliverability and we support including it in the performance specification.” (para. 10.64)<sup>14</sup>

35. However, despite a clear, unambiguous and unqualified promise by the Secretary of State to consider the User Metric as part of HE’s assessment of its carbon impact, *RIS2* did not mandate a User Metric as part of HE’s Key Performance Indicators, rather it stated that:

“Highways England carbon emissions Target:

<sup>12</sup>

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/424467/DSP2036-184\\_Highways\\_England\\_Delivery\\_Plan\\_FINAL\\_low\\_res\\_280415.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/424467/DSP2036-184_Highways_England_Delivery_Plan_FINAL_low_res_280415.pdf)

<sup>13</sup>

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/775149/Operational\\_Metrics\\_Manual.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/775149/Operational_Metrics_Manual.pdf) (p. 241)

<sup>14</sup> <https://orr.gov.uk/highways-monitor/publications/benchmarking-highways-englands-performance-and-efficiency>



Reduce Highways England's carbon emissions as a result of electricity consumption, fuel use and other day-to-day operational activities during RP2, to levels defined by baselining and target setting activities in 2020-21." (p. 63)

36. Nowhere has the Secretary of State attempted to justify, let alone acknowledge, this departure from what was promised. Consequently, such a breach of legitimate expectation vitiates the *RIS2*.

## Ground 2: Air Quality

### *Legal Framework*

37. Directive 2008/50/EC (the "AQ Directive"), implemented in domestic law through the Air Quality Standards Regulations 2010 (the "2010 Regulations"), aims to ensure that air pollution is reduced "to levels which minimise harmful effects on human health" (Recital 1). Pursuant to reg. 17 of the 2010 Regulations, the Secretary of State is under a duty to ensure that levels of certain pollutants (including sulphur dioxide, nitrogen dioxide, benzene, carbon monoxide, lead and particulate matter): (i) do not exceed the limit values (as set out in Schedule 2); and (ii) in zones where levels are below those limits, are maintained below those limit values, and must endeavour to maintain the best ambient air quality compatible with sustainable development.

### *Argument*

38. By publishing *RIS2* in the absence of any evidence that can demonstrate levels of those pollutants will not exceed limit values and/or levels in zones currently below those limit values will be maintained, the Secretary of State has not satisfied his legal duties.
39. In its *Road To Zero* policy, the Secretary of State has acknowledged that road transport is one of the biggest contributors to poor air quality in some of the UK's towns and cities<sup>15</sup>. It has set a target that all new cars and vans are to be effectively zero emission by 2040, and that by 2050 almost every car and van is to be zero emission" (p. 8).
40. This comes after data audited by the environmental NGO Friends of the Earth in February 2019 showed that 1,758 sites across England, Wales and Northern Ireland are in breach of the annual Air Quality Objective for Nitrogen Dioxide (NO<sub>2</sub>) levels.

41. *RIS2* states that it is:

“a fully-integrated part of this wider effort to reach net zero emissions. As a result of these measures, we also expect that all locations within Highways England’s control will meet air quality targets before the end of *RIS2*, and emissions of the key pollutants will keep falling” (p. 27)

42. *RIS2* aims to:

“On air quality, work to identify and implement measures to address NO<sub>2</sub> exceedances on the SRN and supporting the work of local authorities to develop and implement their clean air plans, where there are interactions with the SRN.” (p. 30)

“We will hold Highways England to account on its environmental performance with challenging targets...Air Quality Ambition to eliminate all NO<sub>2</sub> links in exceedance during RP2, supported by the delivery of a programme of activity to eliminate those links in exceedance within Highways England’s control. In addition, Highways England will investigate and assess incorporating into new and existing contracts air quality standards for supply chain vehicles.” (p. 30)

43. *RIS2* places the following obligations on HE:

“We also expect Highways England to make further progress on improving air quality around the network. During RP2, Highways England will be subject to a KPI measuring the number of network links which are in exceedance of the legal NO<sub>2</sub> limits agreed with the Department and based on the Pollution Climate Mapping model. The target will be to reduce these agreed links in exceedance to zero in the shortest possible time. This will be delivered through the programme of work already agreed. The findings of phase 3 of this programme will be published shortly and will set out the measures Highways England has identified to address NO<sub>2</sub> pollution levels in the shortest possible time.” (p. 62)

“Air quality Target: Bring links agreed with the Department and based on the Pollution Control Mapping model into compliance with legal NO<sub>2</sub> limits in the shortest possible time.” (p. 63)

44. What is notably missing from the above passages, is any evidence that the road expansion schemes funded by *RIS2* will not cause levels of those

pollutants to exceed limit values and/or will not jeopardise the maintenance of levels in compliant zones. And what is included in the above passages falls woefully short of discharging the Secretary of State's duties, given that: (a) the air quality obligations on HE apply only to areas under its control; (b) in any event, measures in areas under its control will only address exceedances of NO<sub>2</sub> on the SRN, which neither covers the other pollutants nor current levels below the limit values that could either become exceedances or materially worse; and (c) not all network links which are in exceedance of the NO<sub>2</sub> limit values will be reduced, only those agreed between the Secretary of State and HE.

45. Properly applied, reg. 17 of the 2010 Regulations prohibits the material worsening of air quality anywhere across the SRN and across roads with exceedances that feed into the SRN, which means that *RIS2* cannot cause any new breaches of the limits or the slowing down of any progress already made to reducing levels below the limit values. Regrettably, the Secretary of State has both failed to adequately assure himself that such material worsening of air quality will not be a consequence of the schemes funded by *RIS2* going ahead, and to consider whether compliance with emission limits will not be jeopardised by *RIS2*. As such, the Secretary of State has breached his air quality duties.

## Strategic Environmental Assessment ("SEA")

### *Legal Framework*

46. Directive 2001/42/EC (the "SEA Directive"), implemented in domestic law through the Environmental Assessment of Plans and Programmes Regulations 2004 (the "2004 Regulations") recognises that SEA is an:

"important tool for integrating environmental considerations into the preparation and adoption of certain plans and programmes which are likely to have significant effects on the environment in the Member States, because it ensures that such effects of implementing plans and programmes are taken into account during their preparation and before their adoption" (Recital 4)

47. Reg. 2(1) of the 2004 Regs describes plans and programmes that are caught by SEA requirements as those which: (a) are subject to preparation or adoption by an authority at national, regional or local level; or (b) are prepared by an authority for adoption, through a legislative procedure by Parliament or Government; and, in either case (c) are required by legislative, regulatory or administrative provisions.

48. Under reg. 5(1), an SEA shall be carried out for all plans and programmes (before their adoption or submission to the legislative procedure) that are:  
(a) prepared for transport; and (b) set the framework for future development consent of projects listed in Annex I or II to Directive 2011/92/EU.
49. Under s. 3(6) of the IA 2015, the Secretary of State and the HE must comply with *RIS2*. Under s. 3(7), as HE did not have a Road Investment Strategy in place at the time the IA 2015 came into force, the Secretary of State was under a mandatory duty to set the strategy as soon as reasonably practicable.
50. In Friends of the Earth v Secretary of State for Housing, Communities and Local Government [2019] EWHC 518 (Admin) it was held that the two key factors determining whether an SEA is required are: (i) is the plan or programme required by legislative, regulatory or administrative provisions?; and (ii) if so, does the plan or programme set the framework for future development consent?

## Argument

51. It is submitted that the Secretary of State was under a legal requirement to carry out an SEA before the *RIS2* was adopted. As such, the Secretary of State was required to identify, describe and evaluate the likely significant effects on the environment of both implementing *RIS2* and reasonable alternatives to it (reg. 12(2)). These steps, including an evaluation of cumulative effects (such as the carbon impact of the significant greenfield house building programme that *RIS2* will facilitate) and reasonable alternatives (such as investing in sustainable transport that in turn unlocks compact, public transport orientated housing, instead of increasing road capacity), were not taken in breach of the 2004 Regs.
52. *RIS2* is obviously a plan or programme, given that: it was adopted by the Secretary of State after being laid in Parliament; and also for the following reasons.
53. By the Secretary of State's own admission, it is recognised that *RIS2* is likely to have significant effects on the environment:

“...the development and operation of the SRN has environmental impacts, both in the immediate vicinity of the network and further afield. These influences on the environment are multifaceted, but include effects on noise, carbon dioxide and other greenhouse gas emissions, air quality, and biodiversity.” (p. 61)

54. It is clear that *RIS2* is required by law (see: s. 3 of the IA 2005). It is nevertheless required in the sense that it regulates funding commitments in relation to road building of this kind.
55. It is also clear, from the following excerpts, that *RIS2* sets a framework for future operations, maintenance and development consent:

“This second Road Investment Strategy (*RIS2*) sets a long-term strategic vision for the network. With that vision in mind, it then: specifies the performance standards Highways England must meet; lists planned enhancement schemes we expect to be built; and states the funding that we will make available during the second Road Period (RP2), covering the financial years 2020/21 to 2024/25.”

(p. 3)

“A RIS is built around a series of investment commitments to specific infrastructure projects”

“A RIS makes clear and accountable promises about which projects are expected to proceed and by when. This process for planning strategic road investment is amongst the most transparent and explicit in the world.”

“*RIS2* is built around a structure of commitments that expect projects to enter construction by 1 April 2025. The progress against this is monitored by the Department for Transport and ORR, with regular updates to Parliament.”

“We are committing funding to deliver the schemes named in *RIS2* on the assumption that they continue to demonstrate a strong business case and secure the necessary planning consents.”

“We will hold Highways England to account on the delivery on the commitments set out in *RIS2*, but also on their ability to identify schemes that no longer meet the above tests and therefore need to be substantially reconsidered. Given the degree of analysis and design work already completed for *RIS2* schemes, however, we would expect these circumstances to be minimal.”

(pp. 91-92)

“The route strategies in particular can help with the prioritisation of interventions in a local area...The route strategy process provides

the evidence to identify the best solutions and prioritising those for inclusion in a future RIS pipeline”

Just as the new projects announced in *RIS2* have been under development during the period covered by *RIS1*, the projects that will be promised in *RIS3* need to enter development between now and 2025. This will involve proposals for the next RIS going through the early stages of the development process. The development process is not a commitment to construct particular projects. Many proposals are likely to gather views from stakeholders and local people who might be affected by a potential proposal, including through a non-statutory consultation. For front-runners, this process could include taking a proposal to a full planning inquiry before the publication of the next RIS. New proposals need to consider a wide range of impacts: not only what can be promised with certainty, but also where a proposal has the potential to support wider and more ambitious local plans for development. We will expect STBs to play an active role in articulating the benefits of proposals being examined in their area.” (p. 113)

“Government will commit to the delivery of successful proposals through the publication of *RIS3*.” (p.114)

“The development of *RIS2* has used this tool to consider what can be done at some of the most difficult points on the network, and the findings have led to *RIS2* committing to complex projects.

“In some cases, strategic studies can be expected not to create a proposal for infrastructure, but to identify opportunities where wide-ranging local development can cohere around plans for a single piece of infrastructure. The first generation of strategic studies have already created an ambitious programme of forward work, which will affect Highways England’s forward plans into *RIS3* and *RIS4*”

(p. 116)

56. Based on the above, it is inescapable that *RIS2* will set the framework for future development consent of a project listed in the EIA Directive, given that (at a minimum) it stipulates a locational and funding framework for the schemes that will be taken forward, and in doing so influences those schemes to such an extent that future decision-making process are constrained and curtailed from considering alternatives to those schemes.
57. Accordingly, the Secretary of State was under a legal duty to carry out an SEA before *RIS2* was adopted and his failure to do so was unlawful.

## **Steps required to be taken**

58. For the reasons given above, we consider that *RIS2* is legally flawed. As such, we request that the Secretary of State immediately suspends its operation and undertakes to revising it once the flaws we have identified have been remedied. If the Secretary of State refuses to do so, then we shall advise our client to issue a claim for judicial review without further notice to you. We may apply for interim relief if such a claim is issued.

## **Information requested**

59. When responding, please disclose the following information under the Secretary of State's duty of candour:
- a. Any documentation showing how the Net Zero Target was addressed through updates to Highways England's Regional Transport Models and Environmental Outcome Model;
  - b. Any additional advice from the Highways Monitor subsequent to the Net Zero Target regarding any need to modify the draft *RIS2* or draft Strategic Business Plan as a result; and
  - c. Any documents regarding the need to reopen *RIS2* (pursuant to paragraphs 6.37-6.42 of the Highways England Licence) as a result of the Net Zero Target, advice from the Committee on Climate Change or the judgment in Friends of the Earth Ltd v Secretary of State for Transport.

## **Deadline for a response**

60. As requested above, we ask the Secretary of State to confirm within the next 7 days that he agrees that the time-limit for issuing a claim against the *RIS2* is the normal three months. Assuming the Secretary of State agrees, we request that he provides a substantive response within the normal 14 days. If he does not agree to that proposal, then we shall advise our client to issue the claim within six weeks of the publication of *RIS2*.
61. Please ensure that any response is sent to both Rowan Smith (solicitor) and Lewis Hadler (paralegal), using the details in our letterhead, who are dealing with this matter.

Yours faithfully,

**Leigh Day**