IN THE HIGH COURT OF JUSTICE **Claim No. CO/4575/2020**
QUEEN'S BENCH DIVISION
PLANNING COURT IN THE ADMINISTRATIVE COURT
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[1] ~~[2]~~

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*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.*

Essential Reading

- *National Policy Statement for National Networks* ***[CB/114-219]***
- *Letter from Transport Action Network requesting a review of the NPS* ***[CB/45-51]***
- *Pre-Action Protocol correspondence: 4th, 5th and 6th PAP letters and replies* ***[CB/70-72]; [CB/73-101]; [CB/102-105],*** *including Ministerial Submission and recommendation to review the NPS* ***[CB/306-318]***
- *Climate: IPCC Special Report Summary for Policymakers (extracts)* ***[CB/243-245];*** *DFT Report, 'Decarbonising Transport - Setting the challenge' (extracts)* ***[CB/256-263];*** *Climate Change Committee Report, 'Reducing UK emissions - 2020 Progress Report to Parliament' (extracts)* ***[CB/264-268]***
- *Air Quality: Public Health England report (extracts)* ***[CB/240-242]***
- *Natural capital: Green Book Review 2020 – findings and response (para 3.3)* ***[CB/319-322]***

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[1] This document has been amended in the light of the Ministerial Submission document (by which civil servants recommended that the Secretary of State initiate the review which the Claimant seeks) which was only provided to the Claimant immediately before the deadline for this claim.

~~[2] On the penultimate day of the six-week limitation period for issuing this claim, the Defendant provided the Claimant with the submission made to the Secretary of State by his officials for the purposes of the decision under challenge. That submission recommended that the Secretary of State should carry out a review of the NPS. The Claimant has no explanation of why the Secretary of State departed from the advice given by his officials. Given the very late provision of this information, the Claimant proposes to serve an Amended Statement of Facts and Grounds when the claim form is served on the Defendant.~~

- *Design: Highways England, 'The Road to Good Design'* ***[CB/227-239];*** *Building Better Building Beautiful Commission, Living with Beauty, promoting health, well-being and sustainable growth (extracts)* ***[CB/251-255].***

A. Introduction and summary of claim

1. As explained in the witness statement of Chris Todd **[CB/36-44]** 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 the impacts of the road transport sector on climate change, air quality and biodiversity.

2. The Claimant is seeking permission to bring judicial review of the decision of the Defendant, taken on 23 October 2020, not to review all or part of the National Networks National Policy Statement ("**the Decision**"; "**the NPS**").

3. The NPS was designated in 2014. Since that time there have been developments of great significance in law and policy relating to (i) climate change, (ii) air quality, (iii) valuing the natural environment (known as a 'natural capital' approach to policy and appraisal) and (iv) design. Moreover, the package of road schemes for which the NPS set the framework has crystallised with the setting of the First Roads Investment Strategy ("**RIS1**") in December 2014 and the Second Roads Investment Strategy ("**RIS2**") in March 2020, neither of which was subject to Strategic Environmental Assessment ("**SEA**").

4. The Defendant took the Decision without any form of public consultation or engagement. The Decision was initially communicated to the Claimant 12 days after being taken (or almost a third the way into the time period) without any reasons at all and the Defendant and has since provided only the barest explanation for the Decision in pre-action correspondence **[CB/69]**. On the day before the limitation period for issuing this challenge was due to expire, the Defendant provided the Claimant with the advice of his officials [**CB/306-318**], which was that it was appropriate to review the NPS, but no explanation of why he departed from that advice. On present information, the Claimant considers that the Decision was unlawful because:

    a. **Ground A:** the Defendant unlawfully failed to give reasons for the Decision in general, and in particular for choosing to depart from officials' advice; nor has he

even identified the considerations which led him to do so (let alone any documentary or other basis for them).

b. **Ground 1:** The Defendant accepted that the Paris Agreement on climate change, and the amendment in July 2019 of s.1 Climate Change Act 2008 ("**CCA 2008**") to provide for a target of at least a 100% reduction in the UK's net carbon account by 2050 ("**the Net Zero Target**"), were significant changes in circumstances which were unanticipated at the time of the publication of the NPS. However, he considered that the NPS would not have been materially different if those changes had been anticipated. That conclusion was irrational, and/or the Defendant failed to have regard to the desirability of mitigating climate change when making that assessment, in breach of his duty under s.10(3)(a) Planning Act 2008 ("**PA 2008**"). Alternatively, the Defendant unlawfully failed to give lawful reasons for that conclusion.

c. **Ground 2:** the Defendant also accepted that (i) changes in case law (and thus the understanding of what the law requires) and (ii) understanding about the risks of PM2.5 pollution since 2014 in relation to air quality, were significant changes in circumstances which were unanticipated at the time of the publication of the NPS. However, he considered that the NPS would not have been materially different if those changes had been anticipated. That conclusion was irrational, and/or meant that the Defendant was operating a policy that gave rise to an unacceptable risk of unlawful decision-making, because (i) the NPS stipulates a test for decision-makers on individual road schemes that is no longer consistent with the requirements of the law as now to be understood (in the light of that case law) and (ii) there is nothing in current NPS regarding the risks of PM 2.5 pollution. Alternatively, the Defendant unlawfully failed to give adequate reasons for reaching that conclusion.

d. **Ground 3:** the Defendant considered that since 2014, there had been no significant changes to policy in relation to the natural environment, and/or that such changes were anticipated at the time of designating the NPS. This conclusion was irrational and/or failed to take into account (i) the 25-year environment plan published in

January 2018 (ii) updated Green Book guidance published in 2018 on assessing and valuing effects on the natural environment and (iii) *Enabling a natural capital approach: guidance*, published by the Department for Environment, Food and Rural Affairs in January 2020. Alternatively, the Defendant unlawfully failed to give reasons for reaching that conclusion.

e. **Ground 4**: the Defendant (on his own account) failed to consider whether since 2014, there had been any significant changes to policy in relation to design. This unlawfully failed to take into account (i) Highways England's ("**HE**") ten principles of good road design, or (ii) *Living with beauty: report of the Building Better, Building Beautiful Commission*, and/or failed to have regard to achieving good design, in breach of his duty under s.10(3)(b) Planning Act 2008.

f. **Ground 5:** the NPS was subject to SEA when originally designated, but then only at a high level, because it did not then identify any particular locations for development. The road schemes for which the NPS sets the framework are now contained in RIS2, but their effects have never been subject to SEA: no SEA was carried out as part of the process of setting RIS2, in part because the NPS had been subject to SEA. That lacuna in the assessment framework made it appropriate for the Defendant to review the NPS, as part of which an updated and more specific SEA could be carried. The Defendant failed to take account of this factor.

B. Facts

The NPS

5. The NPS was designated in December 2014. It 'sets 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/120/1.1]**. 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.

6. Section 2 of the NPS set out the Defendant's assessment of need for capacity enhancements of national networks. Paragraphs 2.12 - 2.27 in particular addressed the 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. Paragraph 2.21 **[CB/128]** considered three options for meeting this need – maintaining the existing network, managing demand through non-fiscal measures, and modal shift – but concluded that these options were insufficient to meet the identified need. Accordingly, paragraph 2.23 **[CB/130]** set out 'wider Government policy' of supporting enhancements to the SRN, including 'implementing "smart motorways"[3] to increase capacity', and 'dualling of single carriageway strategic trunk roads and additional lanes on existing dual carriageways to increase capacity'. Paragraph 2.27 **[CB/130]** also envisaged that new road alignments and corresponding links […] may be needed to support increased capacity and connectivity'.

7. Section 3 of the NPS set out wider Government policy, including 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/140/3.6]** 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 and air quality policies **[CB/140/3.8].**

8. Section 4 addressed Assessment Principles. Paragraph 4.2 **[CB/145]** acknowledged that

> "Subject to the detailed policies and protections in this NPS, and the legal constraints set out in the Planning Act, there is a presumption in favour of granting development consent for national networks NSIPs that fall within the need for infrastructure established in this NPS."

9. Sections 4.28 to 4.35 **[CB/151]** deal with criteria for good design, but do not set any specific tests in relation to good design.

[3] Where the hard shoulder is transformed into a permanent additional running lane and traffic flow is moderated by the use of variable speed limits.

10. Section 5 **[CB/162]**, although titled 'Generic Impacts', sets out specific tests for the grant or refusal of development consent in respect of various environmental factors, including air quality, climate change and biodiversity impacts.

11. In respect of air quality, the decision-making tests are set out at 5.12-5.13 **[CB/164]**:

> "5.12 The Secretary of State must give air quality considerations substantial weight where, after taking into account mitigation, a project would lead to a significant air quality impact in relation to EIA and / or where they lead to a deterioration in air quality in a zone/agglomeration.
>
> 5.13 The Secretary of State should refuse consent where, after taking into account mitigation, the air quality impacts of the scheme will:
>
> - result in a zone/agglomeration which is currently reported as being compliant with the Air Quality Directive becoming non-compliant; or
> - affect the ability of a non-compliant area to achieve compliance within the most recent timescales reported to the European Commission at the time of the decision."

12. In respect of climate change, the NPS refers to the now out of date statutory target of an 80% reduction in carbon emissions by 2050 **[CB/164/5.16]** and carbon budgets set in line with that target. Paragraph 5.17 asserts 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 goes on to set out the decision-making test by reference to this '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/165]**

13. Paragraphs 5.20 to 5.38 deal with biodiversity. They refer to Government policy on biodiversity, contained in the Natural Environment White Paper (December 2012)

[CB/166/5.20] and Government strategy on biodiversity, contained in *Biodiversity 2020: A Strategy for England's wildlife and ecosystem services* (August 2011) **[CB/166/5.24]**. Other than in relation to specific designated sites and protected species, the decision-making principles and tests are extremely generic: 'As a general principle […] development should avoid significant harm to biodiversity […] interests' **[CB/167/5.25]**; 'In taking decisions, the Secretary of State should ensure that appropriate weight is attached to […] biodiversity […] interests within the wider environment.' **[CB/167/5.26]**

14. An Appraisal of Sustainability ("**AoS**") **[CB/109]** was published alongside the NPS. The AoS was to discharge the requirement to carry out SEA. The AoS process began in 2008 **[CB/113/4.0.1]** and an AoS scoping report was issued in March 2009[4]. This was then subject to consultation with relevant agencies in 2009, 2011 and 2013 **[CB/113/4.0.3].**

15. Given that the NPS was a high-level document that did not identify locations at which road development would be brought forward **[CB/147/4.13],** the AoS was necessarily also a very high-level assessment, as acknowledged at paragraph 1.0.2:

> "This AoS has been undertaken at the same high level as the NN NPS and does not seek to appraise specific schemes in specific locations. The conclusions it draws are therefore generic in nature and should not be interpreted as being the Government's view on the sustainability or otherwise of particular transport projects. Impacts have not been weighted and no assessment has been made of their relative importance" **[CB/112]**

Developments since the NPS

The Paris Agreement

16. In December 2015 the parties to the United Nations Framework Agreement on Climate Change ("**UNFCCC**") adopted the Paris Agreement. The UK ratified the Paris Agreement in November 2016.

[4] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/263112/annex-e-scoping-report.pdf

17. The Paris Agreement aims to strengthen the global response to climate change, including by limiting warming 'to well below 2°C above pre-industrial levels' and pursuing efforts to limit the increase to 1.5°C (Art. 2.1) **[CB/378]**. To achieve this temperature goal, by Art.4(1) of the Paris Agreement **[CB/379]**, Parties are to aim to reach global peaking of emissions as soon as possible, recognizing that peaking will take longer for developing countries. Thereafter, Parties are to undertake rapid emissions reductions in accordance with best available science, in order to achieve net zero global emissions in the second half of this century. The Paris Agreement is the first truly global climate change treaty. It sets significantly more ambitious goals than any previous multilateral climate change agreement, and is the first agreement to set specific temperature-based goals.

18. At the same time as adopting the Paris Agreement, the Parties to the UNFCCC invited the Intergovernmental Panel on Climate Change ("**IPCC**") to report on the implications of the target of 1.5°C

The IPCC Special Report

19. In October 2018, IPCC produces its Special Report on Global Warming of 1.5°C ("**the Special Report**"). The Special Report identified very significant additional impacts of warming of 2°C, as compared to 1.5°C. It went on to analyse the global emissions trajectories that will be necessary to limit warming to the two thresholds. It found that holding warming to 1.5°C with no or limited overshoot requires global net anthropogenic CO_2 emissions to decline by about 45% from 2010 levels by 2030, and to reach net zero around 2050 **[CB/245/C.1]**. However, the Special report also stressed that limiting global warming requires limiting total cumulative greenhouse gas emissions; that is, staying within a carbon budget **[CB/245/C.1.3]**. This, rather than the emissions level at a given date, is the primary determinant of how much human-induced warming will occur, as the climate system responds to total cumulative emissions.

The Climate Change Act 2008

20. Section 1 of the Climate Change Act 2008 ("**the CCA**"), as amended by The Climate Change Act 2008 (2050 Target Amendment) Order 2019 ("**the 2019 Order**"), requires the UK Government to reduce net emissions of 'targeted greenhouse gases' to zero by 2050 ("**the Net Zero Target**") **[CB/369]**.

21. The 2019 Order was made following the advice of the Committee on Climate Change ("**CCC**"), given in May 2019, that the target specified in s.1 CCA 2008 should be increased from an 80% reduction to a 100% reduction ("**the Net Zero Advice**") **[CB/246-250]**.

22. Sections 4 to 10 of the CCA 2008 create a scheme of five-yearly carbon budgets. At present, the Secretary of State has legislated for the amounts of such carbon budgets up to and including the fifth carbon budget, which covers the period 2028-2032. All existing carbon budgets were set before the Net Zero Target was adopted; that is, at a time when the target under s.1 CCA was for an 80% reduction in emissions relative to 1990 levels. The CCC has advised that the fourth and fifth carbon budgets are 'therefore are likely to be too loose' **[CB/249]**.

23. In 2017, the Secretary of State published the Clean Growth, which contains policies and proposals intended to meet the fourth and fifth carbon budgets. However, as the CCC has stated in the Net Zero Advice, the Clean Growth Strategy 'does not fully close the policy gap to the UK's existing carbon budgets' and its intentions 'still need to be backed up by detailed policy designs in many cases', so that overall, 'policy is not yet on track to meeting those budgets' **[CB/248; CB/250]**.

24. In March 2020, the Defendant published *Decarbonising Transport: Setting the Challenge,* as a first step towards developing policies to achieve a zero-carbon transport sector. The report recognised that emissions from road transport have barely declined since 1990, because 'progress through regulation to improve the efficiency of new passenger cars has been largely offset by their increased use' **[CB/261/1.10]**. On the basis of current policies, the Defendant predicted a slow reduction in overall domestic transport emissions, resulting in an excess of approximately 80 MtCO2 in 2050, relative to scenarios compliant with the Net Zero Target **[CB/263/Fig 18]**. More immediately, the Defendant forecasts an excess relative to compliance with the fifth carbon budget:

> "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 CO2e between this and DfT's current projection in 2032) **[CB/262/4.5]**

25. Specifically, the Defendant recognised in Setting the Challenge that demand management would have to play a more significant role in reaching Net Zero. In the Ministerial Foreword **[CB/258]** he said:

> "Public transport and active travel will be the natural first choice for our daily activities. We will use our cars less"

26. The first of the 'strategic priorities' for a Net Zero transport policy **[CB/260]** was said to be

> "Accelerating modal shift to public and active transport
>
> • Help make public transport and active travel the natural first choice for daily activities
>
> • Support fewer car trips through a coherent, convenient and cost-effective public network; and explore how we might use cars differently in future"

27. In its June 2020 Progress Report, the CCC commented **[CB/267]** that:

> "Surface transport has emerged as the single highest emitting sector in the UK since 2015, and the current trend is off track to contribute as required to meeting the fourth and fifth carbon budgets and Net Zero."

28. The CCC also advised that the Government should build on the increase in home-working during the Covid-19 pandemic by enabling a longer-term shift in transport patterns through a shift in investment, for instance: 'higher investment in resilient digital technology including 5G and fibre broadband should […] be prioritised over strengthening the roads network' **[CB/268].**

28a. On 3 December 2020, the CCC advised the Government to adopt a target of a 68% reduction in GHG emissions from 1990 levels by 2030, as part of its Nationally Determined Contribution ("**NDC**") under the Paris Agreement. That target is significantly more stringent than the implied target of a 57% reduction, which can be derived from the existing fifth carbon budget [**CB/323**]. On 3 December 2020, the Government accepted this advice [**CB/327**].

Air Pollution and Air Quality Legislation

29. The Air Quality Standards Regulations 2010 ("**the AQ Regulations**") implement Directive 2008/50/EC ("**the AQ Directive**"). The AQ Directive and Regulations aim to ensure that air pollution is reduced 'to levels which minimise harmful effects on human health' **[CB/358/1].** It establishes 'limit values' for a basket of air pollutants, which are reproduced as Sch. 2 to the AQ regulations. Regulation 17 **[CB/372]** confers duties on the Secretary of State in relation to these limit values, as follows:

> "(1) The Secretary of State must ensure that levels of sulphur dioxide, nitrogen dioxide, benzene, carbon monoxide, lead and particulate matter do not exceed the limit values set out in Schedule 2.
>
> (2) In zones where levels of the pollutants mentioned in paragraph (1) are below the limit values set out in Schedule 2, the Secretary of State must ensure that levels are maintained below those limit values and must endeavour to maintain the best ambient air quality compatible with sustainable development."

30. The remedy for a breach of reg.17(1) is the requirement, imposed by reg 26, to draw up an air quality plan (*R (Shirley) v Secretary of State for Housing, Communities and Local Government* [2019] EWCA Civ 22). Reg 26(1) **[CB/373]** provides that

> "(1) Where the levels of sulphur dioxide, nitrogen dioxide, benzene, carbon monoxide, lead and PM10 in ambient air exceed any of the limit values in Schedule 2 […], the Secretary of State must draw up and implement an air quality plan so as to achieve that limit value or target value.
> (2) The air quality plan must include measures intended to ensure compliance with any relevant limit value within the shortest possible time."

31. Since 2010, air quality in the UK has exceeded the limit values at a large number of monitoring sites. The UK Government has produced a series of Air Quality Plans pursuant to reg. 26, but these have been subject to intervention by the courts on three occasions in

the **ClientEarth** series of cases, on the basis that they do not achieve compliance 'within the shortest possible time'.

32. The result of the **ClientEarth** litigation has been the development, since 2014, of a body of case-law explaining the nature of the obligation under reg. 26. The court has stressed that reg. 26 contains a three-fold requirement to (a) aim to achieve compliance by the soonest date possible, (b) choose a route to that objective which reduces exposure as quickly as possible, and (c) take steps which mean meeting the value limits is not just possible, but likely (see **R (ClientEarth (No.2)) v Secretary of State for the Environment Food and Rural Affairs** [2016] EWHC 2740 (Admin) at ¶95 **[CB/405/95]**; and **R (ClientEarth (No.3)) v Secretary of State for the Environment Food and Rural Affairs [2018] EWHC 315** (Admin) at ¶73 **[CB/429/73]**). The second of those requirements has been clearly identified as a distinct but integral element of the obligation to ensure compliance within the shortest possible time (see **R (ClientEarth (No.2)) v Secretary of State for the Environment Food and Rural Affairs** [2016] EWHC 2740 (Admin) at ¶52 and ¶72 **[CB/397/52; CB/400/72]**; and **R (ClientEarth (No.2)) v Secretary of State for the Environment Food and Rural Affairs** [2017] EWHC (Admin) 1966, at ¶10 **[CB/409/10]**). Furthermore, the Secretary of State is required to maintain the best air quality compatible with sustainable development in those areas where there are no exceedances.

33. On 22 May 2018, Public Health England ("**PHE**") published a study on the health costs associated with particulate air pollution, and estimated that, between 2017 and 2025, the total cost to the NHS and social care of air pollution in England will be £1.60 billion for PM2.5 and NO2 combined (£1.54 billion for PM2.5 and £60.81 million for NO2) **[CB/242]**. Roadside particulate levels have not declined since 2015 **[CB/297]**, and as a result PHE has recommended adopting a "net health gain" test and "hierarchy of interventions" in national policy **[CB/271]**.

Policy relating to natural capital

34. Since 2014, there have been significant developments in Government policy on biodiversity, and in particular on the approach to evaluating 'natural capital' and incorporating these valuations in policy and project appraisal. In particular:

    a. In January 2018, the 25-year environment plan **[CB/220-226]** heralded a new approach to long-term decision-making, that would ensure that the full value of natural capital was incorporated;

    b. In 2018 HM Treasury published updated guidance on assessing and valuing effects on the natural environment; and

    c. In January 2020, the Department for Environment, Food and Rural Affairs published *Enabling a natural capital approach: guidance*, providing a range of tools to decision-makers to enable them to assess the potential effects of a policy or project on natural capital.

35. In November 2020, HM Treasury published *Green Book Review 2020 – findings and response* **[CB/319]**. Paragraph 3.3 reviewed the developments described above, that had taken place over the previous two years, and commented that they amount to 'a significant step forward in incorporating environmental impacts into appraisal' **[CB/322/3.3]**.

Good Design

36. In January 2018, HE published *The Road to Good Design* **[CB/227-239],** which set out (for the first time) ten principles of good road design. The report called for a shift ion design culture and stated that the ten principles 'will help us place good design at the heart of everything we do, and ensure our roads better serve the people who use them and the environments through which they pass.' **[CB/231]**.

37. In January 2020, the Building Better, Building Beautiful Commission published *Living with Beauty: promoting health, well-being and sustainable growth* **[CB/251]** an independent report commissioned by the Secretary of State for Housing, Communities and Local Government. The report noted that: "[e]very sector of the industry has told us, and our

specialist working group and wider research has confirmed, that overly car-dominated places tend to be less attractive or popular places in which to spend time." **[CB/253]**

RIS1 and RIS2

38. Section 3(1) of the IA 2015 empowers the Defendant to set a Road Investment Strategy ("**RIS**"). RIS1 was set in December 2014 and covered the period 2015-2020. RIS2 was set in March 2020 and covers the period 2021-2025.

39. Pages 93 to 106 of RIS2 contain a list of all the specific schemes that the Defendant expects Highways England to take forward. A significant number of these are 'capital enhancements'; that is, new roads and increasing the capacity of existing roads.

40. Neither RIS1 nor RIS2 was subject to SEA. In response to separate litigation by the Claimant alleging an unlawful failure to carry out SEA of RIS2, the Defendant has stated that SEA of RIS2 is unnecessary, *inter alia*, because it is the NPS that sets the framework for development consent, and the NPS has been subject to SEA **[CB/290/57-63]**. But, encompassing RIS2 schemes, as it now does, that has not happened.

The Decision

41. On 5 March 2020, the Claimant wrote to the Defendant to request him to review the NPS **[CB/45]**. The Claimant received no substantive response to that letter for several months. Accordingly, the Claimant sent the first pre-action letter on 2 July 2020 **[CB/52]**, asking the Defendant to make a lawful decision as to whether or not to review the relevant parts of the NPS. The Defendant replied on 16 July 2020 **[CB/57]**, confirming that a submission would be made to the Minister by the end of September 2020 for a decision on whether to review the NPS. Further correspondence followed to clarify the timescale for the decision and whether a decision would also be taken whether to suspend the NPS.

42. On 4 November 2020, the Defendant wrote to Claimant to confirm that, on 23 October 2020, he had made a decision that it is not appropriate to review the NPS at this time, either in whole or in part (the "**Decision**") **[CB/69]**. The full extent of the explanation for the Decision provided on 4 November 2020 was as follows:

> "The Secretary of State made this decision pursuant to his duty under section 6(1) of the Planning Act 2008, having regard to the matters in subsections 6(3) and 6(4) of the Act."

43. On the same day, the Claimant sent a fourth pre-action letter **[CB/70]**, informing the Defendant that it was minded to issue a claim for judicial review of the Decision, and requesting disclosure of (a) all documents seen and considered by the Defendant for the purposes of making the Decision; and (b) an explanation of the reasons for the Decision.

44. The Defendant sent a response on 13 November 2020 **[CB/71]**, in which he identified eight areas in which he had considered whether there had been a change of circumstances. He did not explain the outcome of those considerations, other than to say that 'grounds have not been made out which indicate that a review of the NPS is appropriate at this stage'. He went on to refer to 'potential changes to the NSIP regime' as one other factor influencing the Decision.

45. In default of any proper disclosure or explanation, and in light of the need to issue any challenge promptly and in any event within six weeks of the Decision, the Claimant was obliged to send a fifth pre-action protocol letter on 16 November 2020 **[CB/73]**, setting out its proposed grounds of challenge and repeating its request for disclosure of relevant documents and proper explanation of the Decision.

46. The Defendant replied on 23 November 2020 **[CB/98]**. He declined to give any further disclosure but expanded slightly on his explanation for the Decision:

> "In our letter of 13 November 2020, it was explained that in determining not to review the NNNPS, the Secretary of State had considered in particular whether there have been relevant changes in circumstance in the following areas: (1) road traffic and congestion forecasts as they relate to the NNNPS's Statement of Need; (2) the UK legislating in 2019 for a 'net zero' 2050 target; (3) the Paris Agreement; (4) air quality (including PM2.5, the effectiveness of current NO2 criteria, and changes in case law); (5) technology; (6) natural capital; (7) the application to local road schemes; and (8) rail and SRFI policy changes. These matters were each

considered against the criteria in s. 6(3). It was concluded that the first four of these matters amounted to significant changes in circumstances which were unanticipated at the time of the publication of the NNNPS, but that (save in respect of the first matter where it was concluded that the position was unclear), the NNNPS would not have been materially different if the changes had been anticipated. It was also explained that in making the decision to not review the NNNPS at this time, the Secretary of State had regard to the desirability of mitigating, and adapting to, climate change and achieving good design, as required by s. 10(3)."

47. In addition, the Defendant again stated that he had taken into account the fact 'that potential changes to the NSIP regime are being considered by Government' in determining that it was not an appropriate time to review the NPS.

48. ~~The Claimant has received no other reasons for the Decision and has not been provided with any of the documents it requested from the Defendant.~~ On 3 December 2020, the day before the limitation period for issuing this challenge was due to expire, the Defendant provided the Claimant with the written advice of his officials, which was that it was appropriate to review the NPS, but no explanation of why he departed from that advice **[CB/104-105]; [CB/306-318]**. In a letter dated 10 December 2020 **[CB/108]**, the Defendant has confirmed that it considers that he does not need to provide any other explanation for the Decision, including any record of his reasons for departing from his officials advice, or the information which he considered in deciding to do so.

C. Legal Framework

Planning Act 2008

49. The Planning Act 2008 establishes a planning regime for 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/359]**, establishing national policy for different types of development. Part 4 PA 2008 establishes that 'development consent' is required for NSIPs and Part 5 establishes a regime for the granting of development consent. By s.104(3) PA 2008 **[CB/367]**, 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.

50. Section 6 PA 2008 **[CB/361]** provides for review by the Secretary of State of an NPS, in the following terms:

> **"Review**
>
> (1) The Secretary of State must review each national policy statement whenever the Secretary of State thinks it appropriate to do so.
>
> (2) A review may relate to all or part of a national policy statement.
>
> (3) 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.
>
> […][5]
>
> (5) After completing a review of all or part of a national policy statement the Secretary of State must do one of the following—
>
> (a) amend the statement;
>
> (b) withdraw the statement's designation as a national policy statement;
>
> (c) leave the statement as it is.
>
> (6) Before amending a national policy statement the Secretary of State must carry out an appraisal of the sustainability of the policy set out in the proposed amendment."

[5] S.6(4) replicates the considerations in s.6(3), where what is being considered is review of <u>part</u> of the NPS

51. Section 10(2) PA 2008 **[CB/363]** sets a target duty in relation to sustainable development that applies both when designating an NPS under s.5, or reviewing or considering whether to review an NPS under s.6. Section 10(3) specifies mandatory considerations relating to climate change to which the Secretary of State must have regard when discharging that duty:

> **"Sustainable development**
> (1) This section applies to the Secretary of State's functions under sections 5 and 6.
> (2) The Secretary of State must, in exercising those functions, do so with the objective of contributing to the achievement of sustainable development.
> (3) For the purposes of subsection (2) the Secretary of State must (in particular) have regard to the desirability of—
> *(a)* mitigating […] climate change […]"
> *(b)* achieving good design.

52. Section 13 PA 2008 **[CB/365]** provides for legal challenges relating to an NPS. Section 13(2) expressly provides that a decision of the Secretary of State not to carry out a review of all or part of a national policy statement is amendable to judicial review, and sets a six-week limitation period for such a challenge.

<u>The Strategic Environmental Assessment Regime</u>

53. Directive 2001/42/EC (the "**SEA Directive**"), implemented in domestic law through the Environmental Assessment of Plans and Programmes Regulations 2004 (the "**SEA Regulations**").

54. Under reg. 5(1) **[CB/356]**, an SEA shall be carried out for all relevant 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. Articles 6 and 7 of the Directive provide for consultation on the draft environmental report, Article 8 for its incorporation into decision-making on the plan or programme and Article 9 for information be provided to the public about the integration of environmental considerations.

55. Article 10 provides for on-going monitoring of any significant environmental effects identified as a result of the SEA process.

D. Grounds

Ground A – general failure to give reasons

55a. Grounds 1-3 below allege unlawful failure by the Defendant to give reasons for specific conclusions that underpinned the Decision not to review the NPS. However, the Defendant's failure to give reasons (or even to identify the considerations (if any) he took into account in departing from the advice of officials, or any documentary materials supporting any of that) relates to the Decision overall. The Defendant's duty to explain (or at least identify the basis of) his decision is clear where, as here, he has departed from his officials' advice. Such a departure was aberrant in the circumstances, and fairness required a reasoned explanation (**R v Higher Education Funding Council ex p Institute of Dental Surgery** [1994] 1 WLR 242 at ¶263B). The Claimants have been presented, on the one hand, with official reasoning in support of a review, and on the other, with a decision by the Defendant not to review the NPS, with no explanation of why, or on the basis of what information or considerations, he chose to depart from his officials' advice. In pre-action correspondence the Defendant has even presented forthcoming changes to the NSIP regime as a reason not to review the NPS [**CB/100/12**], when his officials regarded them as a reason to review the NPS [**CB/307/13**]; nothing has been identified as a consideration supporting the opposite view, if indeed that view was taken by the Secretary of State (as opposed to being a reason provided by officials later to try and bolster the Secretary of State's divergent view[6]). These divergences cry out for explanation, and the Defendant's failure to give any such explanation (or even identify the considerations he took into account) was accordingly unlawful.

Ground 1: Climate Change

56. The Defendant has explained that he accepted that the Paris Agreement (one aspect of which is the Net Zero target) amounted to a significant change in circumstances which were

[6] Akin to the position where the officers of a local planning authority are retrospectively asked to draft reasons for a committee's decision to depart from their recommendation

unanticipated at the time of the designation of the NPS. However, he apparently nonetheless concluded that the NPS would not have been materially different if the changes that agreement brought had been anticipated. In relation to the latter conclusion ~~is unexplained~~, the Defendant's officials took the view that "other policy instruments remain more effective and appropriate for eliminating road transport emissions – most notably the approach to encouraging electric vehicle use laid out in the Road to Zero strategy and any policies outlined in the forthcoming Transport Decarbonisation Plan" [**CB/313**]. In the absence of any explanation of the Defendant's own reasoning, the Claimant assumes he adopted the reasoning of his officials, but avers that ~~it~~ that reasoning was irrational, or alternatively reached without having the necessary regard to the desirability of mitigating climate change, as part of the objective of contributing to sustainable development.

57. The Paris Agreement not only sets more ambitious goals than previous international agreements, it sets temperature-based goals for the first time. As explained, by the IPCC Special Report, achieving these goals requires rapid reductions in emissions (as part of reducing total cumulative emissions), alongside and on the way to, reaching net zero emissions. The Government's adoption of a target of a 68% reduction in GHG emissions by 2030, as the UK's fair contribution towards achieving the objectives of the Paris Agreement, is a clear demonstration of this. Although the adoption of this specific target post-dates the Decision, the underlying rationale for it - that Paris requires more ambitious near-term targets than previously – has long been obvious. However, the Defendant's officials appears to have simply equated the Paris Agreement with the Net Zero target for 2050 [**CB/317**] which amounts to a misdirection (or error of fact) as to the meaning and requirements of the Paris Agreement. Had the Defendant appreciated this, in discharge of his duty under s.10(3) PA 2008 to have regard to the desirability of mitigating climate change, he would have been bound to consider that the NPS would have been different if this change had been anticipated. The NPS would necessarily have more strongly promoted demand management and modal shift, which achieve near-term reductions in GHG emissions, and less strongly (if at all) promoted road capacity increases, which add to GHG emissions in the near term (through construction as well as additional road traffic), in the

period before full electrification of the vehicle fleet. To conclude otherwise was irrational and/or failed to have regard to the desirability of mitigating climate change.

57a. The Defendant's failure to review the NPS to give greater prominence to demand management measures was particularly marked, given that the Defendant's officials considered that advances in technology since 2014 had made this a newly attractive option, that potentially warranted review of the NPS. They stated that 'It is also possible that the NNNPS could need to be updated to reflect the opportunities offered by emerging technologies, including dynamic demand management based on real-time information.' [**CB/307/10**]

58. As to the Net Zero Target: in the absence of any explanation of the Defendant's own reasoning, the Claimant assumes the Defendant adopted his officials' advice. Their conclusion that the NPS would have been materially the same had the Defendant anticipated that the 2050 reduction target set by s.1 CCA would be tightened to 100% ~~appears~~ is irrational. As above, the NPS would have been bound to focus more strongly on measures to reduce emissions, including in the short term (i.e. not merely directed towards 2050), not measures that increase emissions (by whatever amount). The Net Zero Target and the linked obligation for rapid emissions reductions) required greater levels of action than that implied by the carbon budgets which have been set for the fourth budget period (2023-2027) and the fifth budget period (2028-2032) (which were set pre-Paris) – as demonstrated by the adoption of a more stringent target for 2030 **[CB/327]** – and a more stringent sixth carbon budget (for 2033-2037) will now be set than if the change had not taken place. The Defendant himself has acknowledged, in Setting the Challenge, that demand management and using cars less will have a more significant role to play in a transport policy that ~~h~~is compatible with Net Zero. Again, therefore, in this scenario, near-term and mid-term emission reduction measures could only have played a greater role in the NPS. To conclude otherwise was irrational and/or failed to have regard to the desirability of mitigating climate change.

59. It is accepted that the Defendant retained a discretion under s.6(1) PA 2008 as to whether it was appropriate to review the NPS, regardless of the outcome of his analysis of the

mandatory factors in s.6(3) PA 2008 **[CB/361]**. However, he cannot have exercised that discretion lawfully if his analysis of the mandatory factors was vitiated by error.

60. Alternatively, the Defendant has acted unfairly by his failure to give reasons for the Decision. That unfairness has been compounded by (i) the failure to consult or invite representations or publicly seek any advice on whether changes to climate policy make it appropriate to review the NPS and (ii) the Defendant's subsequent refusal to disclose any information or documents relevant to the Decision. The Defendant has taken an opaque decision whether to review the NPS, instead of conducting an open review of the NPS, one possible outcome of which would have been to leave the NPS as it is (s.6(5)(c) PA 2008) – an outcome recognised by officials, who considered that emerging policy changes "make a review advisable to consider whether changes are required to the NNNPS" [**CB/307/8, emphasis added**].

61. As originally communicated on 4 November 2020, no reasons at all were given. That was plainly unfair to the Claimant, who had no basis whatsoever to assess the substantive lawfulness of the Decision and to consider whether to seek permission for judicial review as provided for by s.13(2) PA 2008. The very sparse reasons ultimately provided in response to repeated pre-action correspondence have not cured that unfairness: the Claimant still does not know ~~has no idea~~ how, or why, or on the basis of what information, the Defendant reached the conclusions that are challenged under this Ground. Even now that it has been provided with a record of officials' advice, the Claimant can still only guess at the Defendant's reasoning in relation to climate change issues. Given that there is a statutory time limit of six weeks from the date of the decision for challenging decisions of this nature, and that the Defendant did not inform the Claimant of the Decision until nearly two weeks into that period, the Defendant's approach amounts to fundamental procedural unfairness that renders the Decision unlawful.

62. What is procedurally fair in the context of environmental decision-making is conditioned by the obligations and objectives of the Aarhus Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters **[CB/331-355]**. It is a fundamental precept of the Aarhus Convention, recorded in its recitals, that 'in the field of the environment, improved access to information and public participation in

decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns.' In light of this objective, Article 7 of the Convention, which provides for public participation in the preparation of plans and programmes (such as the NPS) should be read purposively to extend to public participation in decisions whether to review such plans or programmes. Moreover, Articles 9(2) and (4) require the provision of fair and effective judicial review procedures for decisions subject to the provisions of Article 7. An essential part of a fair review procure is the provision of sufficient information for the claimant to understand the decision that has been taken.

Ground 2: Air Quality

63. The Defendant also accepted that developments in relation to air quality, including developments in case law, were significant changes in circumstances which were unanticipated at the time of the publication of the NPS. However, he again apparently considered (assuming he followed his officials' advice) that the NPS would not have been materially different if those changes had been anticipated. ~~In the absence of any proper explanation,~~ t The Claimant avers that that conclusion was irrational. This is because the NPS sets specific tests for the decision-maker in relation to air quality, but those tests have been superseded by the changes to case law which the Defendant recognises as significant.

64. In particular, paragraph 5.13 of the NPS states that the Defendant should refuse consent where a scheme 'would affect the ability of a non-compliant area to achieve compliance within the most recent timescales reported to the European Commission at the time of the decision' (emphasis added) **[CB/164/5.13]**. This falls well short of the requirement, as explained by the courts in the **ClientEarth** litigation, to achieve compliance within the shortest time possible, choosing a route that reduces exposure as quickly as possible. Although that requirement applies in terms to an Air Quality Plan under reg.26, it is irrational for the Defendant to maintain a decision-making test that did not conform to the requirements of the Government's Air Quality Plan.

65. In the alternative, the Defendant failed to appreciate that maintaining the existing air quality tests in NPS gave rise to an unacceptable risk of unlawful decision-making. By continuing to apply the existing, insufficiently stringent tests, the Defendant was permitting the continuation of a policy that gave rise to a systemic risk of decisions unlawfully granting development consent to individual applications.

66. Furthermore, in the period since 2014, new scientific evidence had emerged about the huge health costs of PM2.5 pollution, to which road traffic is a major contributor. The Claimant understands that the Defendant regarded these as significant changes in a relevant matter, but concluded that the NPS would not have been different had they been anticipated. This conclusion appears irrational. The NPS makes no mention of PM2.5 pollution, and it is inconceivable that it would simply have ignored an environmental and public health impact, the costs of which are estimated to exceed £1.5 billion **[CB/242]**. Moreover, electric vehicles (which the NPS promoted as solution to NO_2 and carbon emissions) are not a solution to PM2.5 emissions, which (the Defendant's officials noted), are produced from "braking, tyre wear and abrasion of the road surface as well as internal combustion so would not be eliminated" by electric vehicles [**CB/307/9**]. New policies are therefore needed to tackle these emissions, particularly in light of clauses in the draft Environment Bill which, if enacted, would require the government to set legally-binding targets for PM2.5 by October 2022, meaning (officials concluded) that the NPS 'could need to be updated as a result' [**CB/307/9**].

67. Alternatively, the Defendant unlawfully failed to give reasons for reaching the conclusion challenged under Ground 2 The Claimant still does not know how, or why, or on the basis of what information the Defendant reached that conclusion (beyond assuming he followed his officials' advice). Further, the Defendant unlawfully failed to give reasons for his assessment that a review of the NPS was not appropriate. or how he reached that assessment, which ran contrary to officials' view on the importance of scientific and policy developments in relation to PM2.5. Paragraphs 60-62 are repeated.

Ground 3: Natural Capital

68. The Defendant considered that since 2014, there had been no significant changes to policy in relation to the natural environment, and/or that such changes were anticipated at the time of designating the NPS. That conclusion was irrational and/or failed to take into account the 25-year Environment Plan which pledged to adopt a natural capital approach to decision-making for the first time, and/or guidance on incorporating natural capital into appraisal which HM Treasury has recently assessed as 'a significant step forward' in accounting for environmental factors in decision-making, as set out in paragraphs 34-35 above.

69. Moreover, had the Defendant lawfully considered these matters, he would have been bound to conclude that the NPS would have been different had the changes been anticipated. In place of the highly generic biodiversity tests at paragraph 5.25 and 5.26 **[CB/167]**, it would have required more specific quantification of biodiversity impact under the natural capital approach.

70. Alternatively, the Defendant unlawfully failed to give reasons for reaching the conclusion challenged under Ground 3. The Claimant still does not know how, or why, or on the basis of what information the Defendant reached that conclusion. The Claimant does not know what account the Defendant took of his officials' advice that "A review would also offer an opportunity to consider the position in relation to biodiversity net gain and natural capital within environmental impact assessments" **[CB/307/11].** Paragraphs 60-62 above are repeated.

Ground 4: Good Design

71. By his own account (and confirmed by the record of officials' advice), the Defendant did not consider whether since 2014, there had been any significant changes to policy in relation to good design: this was simply not one of the factors which he analysed. It follows that he cannot therefore have discharged his duty under s.10(3)(b) PA 2008 **[CB/363]** to have regard to the desirability of achieving good design, as part of contributing to sustainable development. Moreover, this failure led him to take no account of two important and relevant developments in the field of good design since 2014: (i) Highways England's ("**HE**") ten principles of good road design, and (ii) *Living with beauty: report of*

the Building Better, Building Beautiful Commission. Both of these reports made relevant recommendations in relation to road design that might have been incorporated into any revised NPS. This was therefore a relevant factor in favour of a review which the Defendant simply failed to take into account, in breach of his statutory duty.

Ground 5: SEA

72. The NPS is a plan or programme that sets the framework for the grant of development consent for a package of road schemes, which will have significant effects on the environment. It was therefore subject to SEA when designated, but at a very high level, because it did not identify any particular locations for development. The specific road schemes for which the NPS sets the framework have now been identified and are contained in RIS2, but their effects have never been subject to SEA. No SEA was carried out during the process of setting RIS2, in part because the NPS had been subject to SEA – but there has to be SEA at some point of the plan or projects embodied in that set of schemes.

73. That lacuna in the assessment framework made it necessary for the Defendant to review the NPS, in order to carry out an SEA of what is now contemplated, which would have been a mandatory requirement had any changes to the NPS been proposed (s.6(6) PA 2008 **[CB/361]**). The Defendant failed to take account of this factor in the exercise of his discretion.

Conclusion

74. For the reasons above, the Decision was unlawful. The Claimant seeks permission for a judicial review challenge to the Decision not to review any part of the NPS.

75. 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 review the NPS.

DAVID WOLFE QC

PETER LOCKLEY

4 10 December 2020