**IN THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**
**PLANNING COURT**

**Claim No. AC-2024-LON-002305**

**IN THE MATTER OF AN APPLICATION FOR PERMISSION TO APPLY FOR JUDICIAL REVIEW**

**BETWEEN:**

**THE KING (on the application of TRANSPORT ACTION NETWORK LIMITED)**

**Claimant**

**and**

**SECRETARY OF STATE FOR TRANSPORT**

**Defendant**

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# DEFENDANT'S SUMMARY GROUNDS OF RESISTANCE

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## Introduction

1. By this claim, the Claimant seeks permission to bring a challenge to the Defendant's decision to designate the National Networks National Policy Statement ("**NNNPS 2024**") on 24 May 2024 ("**the Decision**"), following a review of a previous version pursuant to s.6 of the Planning Act 2008 ("**PA 2008**"). The Claimant requires permission to bring this challenge as a claim for judicial review pursuant to s.13 PA 2008.

2. The NNNPS 2024 sets the policy framework for determining applications for development consent for those national road, rail, and strategic rail freight interchange developments which qualify as Nationally Significant Infrastructure Projects ("**NSIP**"). NSIP road development affects the strategic road network ("**SRN**"), which comprises

motorways and some A roads. NSIP road development includes: building new roads and carrying out improvements to existing roads on the SRN.[1]

3. The NNNPS 2024 is a planning policy document and does not address, nor does it purport to address, transport policy and strategy more widely; nor does it set out, or purport to set out, all of the Secretary of State's policies for achieving decarbonisation of the transport sector and meeting statutory carbon budgets (which are covered by, among other things, the Transport Decarbonisation Plan ("**TDP**") and the Secretary of State for Energy Security and Net Zero's policies in the carbon budget delivery plan ("**CBDP**")). Many of the Claimant's proposed arguments are based on a fundamental misunderstanding of that basic point, and in any event amount to nothing more than disagreements with the merits of the policies contained in the NNNPS 2024, or the judgments made by the Secretary of State in formulating those policies which do not found any proper basis for a judicial review claim.

4. None of the grounds advanced by the Claimant is arguable and the Court is respectfully invited to refuse permission for this misconceived claim. In short:

   (1) Ground 1: there is no arguable basis for contending that the consultation conducted was unlawful. Responses from consultees advocating modal shift and demand management were considered and such points raised addressed in the Government Response to the Consultation ("**the Government Response**") and in the NNNPS 2024 itself. However, as is clear from a fair reading of the consultation documents, and is also explained in the Government Response, matters of general transport policy and taxation relating to such matters (such as road user charging) in terms of modal shift and demand management are addressed in other government policies and the Secretary of State was clearly entitled to regard them as outside the scope of the proposed NNNPS 2024.

   (2) Ground 2: this ground is based on a basic misunderstanding and/or mischaracterisation of the judgment of Sheldon J in *R (on the application of*

[1] Witness Statement of Dr Catherine Miller at **[60].**

*Friends of the Earth) v Secretary of State for Energy Security and Net Zero* [2024] EWHC 995. The Court in that case did not make any findings as to the delivery risk of the TDP. In designating the NNPS 2024, the Secretary of State considered delivery risk of the TDP, along with the decision in *Friends of the Earth* and reached a judgment that he could designate the NNNPS 2024. That was both a judgment he was entitled to reach and no arguable basis for challenging it has been identified. Further, there is no arguable basis for contending that there was some sort of unlawful failure to give reasons for not including policies on demand management and modal shift. Any duty to give reasons is a duty to give reasons for the policies in the NNNPS, which is what the Secretary of State has done, and not for the approach to other wider transport policy or strategy addressed elsewhere. Proper, adequate and intelligible reasons were given in the Government Response in any event.

(3) Ground 3: such minor changes to policies on the assessment of carbon emissions were obviously not material changes on any proper reading of them. They were simply included for clarity and to reflect the current legal position with regard to statutory carbon targets and a perfectly legitimate judgment was reached that the changes did not affect the outcome of the Appraisal of Sustainability ("**AoS**") (which incorporates strategic environmental assessment ("**SEA**")), as they obviously do not. There was no obligation to re-consult under the Planning Act 2008 and/or the SEA Regulations and the Secretary of State was entitled to designate the NNNPS 2024 without carrying out further consultation. Any contrary allegation is unarguable.

(4) Ground 4: There was no arguable error in the selection of alternatives for the purposes of the SEA Regulations. The alternatives that were assessed included policies aimed at reducing demand on the roads. There was no legal obligation (and none is identified) to include what the Claimant alleges to be another alternative (which is in any event vague and unspecified). To the extent that the Claimant is suggesting that further policies relating to "demand management" should have been included, those policies were not consistent with Government policy and the Secretary of State was entitled to conclude that such policies did

not meet the objectives of the NNNPS 2024, which included the objective of being consistent with Government environmental and transport policy.

(5) Ground 5: all relevant environmental targets were considered as part of the production of the AoS. This ground is therefore based on an incorrect factual basis and is hopeless. In any event, it is wholly unclear what further consideration the Claimant alleges ought to have taken place and/or why that would have made any difference to the assessment of the impacts of the NNNPS 2024, which is a non-spatial policy. The air quality and biodiversity impacts of individual road and rail schemes will be assessed pursuant to the policies in the NNNPS 2024 (which reflect the updated environmental targets).

5. For the reasons summarised above, and amplified briefly below, the Defendant therefore submits that permission should be refused in respect of all of the grounds advanced by the Claimant.

**Factual background**

6. The relevant factual background is set out in the statement of Dr Catherine Miller, served with these summary grounds of resistance. The draft NNNPS 2024, including the statement of need and its overall policy objectives, was prepared with input from Ministers and subject to an AOS incorporating the SEA requirements, habitats regulation assessment, public consultation, and Parliamentary Scrutiny, including an inquiry by the Transport Select Committee and a debate and vote in the House of Commons.

7. By way of summary chronology only:

(1) On 22 July 2021 the Defendant published a written ministerial statement announcing a review of the National Policy Statement for National Networks 2014 ("**NPSNN 2014**"). Among other things, it provided:

*"The current National policy statement (NPS) on national networks, the government's statement of strategic planning policy for major road and rail schemes, was written in 2014 – before the government's legal commitment to*

*net zero, the 10 point plan for a green industrial revolution, the new sixth carbon budget and most directly the new, more ambitious policies outlined in the transport decarbonisation plan.*

*While the NPS continues to remain in force, it is right that we review it in the light of these developments and update forecasts on which it is based to reflect more recent, post-pandemic conditions, once they are known.*

*The aim is to begin the review later this year and for it to be completed no later than spring 2023. This review will include a thorough examination of the modelling and forecasts that support the statement of need for development and the environmental, safety, resilience and local community considerations that planning decisions must take into account.*

*Reviewing the NPS will ensure that it remains fit for purpose in supporting the government's commitments for appropriate development of infrastructure for road, rail, and strategic rail freight interchanges."*

(2) Between January 2022 and April 2022, initial work took place, including discussions with Ministers as to the overall objectives of the NNNPS 2024 and the statement of need. Ministers were also briefed, and gave steers, on the scope of reasonable alternatives to be considered as part of the SEA.[2]

(3) Between 28 March 2022 and 2 May 2022, a scoping report for the purposes of SEA was subject to consultation with statutory consultees (eg Environment Agency, Natural England and Historic England), environmental groups and organisations, including the Claimant.

(4) A draft revised NNNPS, draft AoS and draft Habitats Regulation Assessment ("**HRA**") were published and consulted on between 14 March 2023 and 6 June 2023.

(5) The draft NNNPS was then updated in light of consultation responses and the report from Parliament's Transport Select Committee dated 20 October 2023. That revised NNNPS was published on 6 March 2024 and a debate in the House

[2] Witness Statement of Dr Catherine Miller at **[25 - 36].**

of Commons was held on 26 March 2024 in which the House of Commons approved the revised NNNPS. The AoS was also updated and published on 6 March 2024.

(6) The revised NNNPS was further considered by the expert consultants appointed by Government to carry out the AoS and they concluded that none of the amendments made following consultation would make a material difference to the results of the AoS overall and that the AoS scores for environmental impacts were also unlikely to change.[3]

(7) Ministers were briefed on the final version of the NNNPS, including the conclusions of the AoS, before a decision to designate was made. A briefing on 6 March 2024 attached an Environmental Principles Policy Statement assessment ("**EPPS**") which explained that, with regard to carbon emissions, Ministers could rely on the TDP to deliver reductions in carbon emissions in the transport sector and that carbon budgets were still the main mechanism for delivery of the UK's commitments on net zero and climate change objectives. The EPPS included specific reference to the carbon assessment carried out for the purposes of preparing the Third Road Investment Strategy ("RIS3"), which sets the funding for improvements to the strategic road network, including NSIP development. The most recent RIS3 assessment carried out in October 2023 concludes that the carbon emissions resulting from scheme development, and the additional traffic from the capacity that this creates, form only a small proportion of the overall SRN tailpipe carbon emissions, and the existing (and future predicted) baseline traffic forms the vast majority of emissions now and in future years.

(8) Ministers were briefed again on 23 April 2024 and officials recommended that Ministers decide to designate the NNNPS 2024.

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[3] Witness Statement of Dr Catherine Miller at **[73].**

(9) Following the judgment in *R (on the application of Friends of the Earth) v Secretary of State for Energy Security and Net Zero* [2024] EWHC 995, Ministers were briefed again on 13 May 2024 (updating an earlier submission on 23 April 2024) and advised that there remained high confidence in delivery of the TDP, that carbon emissions from the construction and operation of the strategic road network represented a small proportion of overall UK domestic emissions and the NNNPS 2024 contained policies ensuring carbon emissions are reduced as far as possible and consent should be refused where an individual scheme has an impact on compliance with carbon budgets. Officials advised that the judgment in *Friends of the Earth* was not a reason to pause designation of the NNNPS 2024.

(10) The NNNPS 2024 was designated as a National Policy Statement on 24 May 2024.

8. Further detail is set out in response to each of the grounds of challenge below.

## Legal framework

### *Planning Act 2008*

9. The PA 2008 sets the framework for granting development consent for NSIPs. Part 2 governs the preparation and publication of national policy statements ("**NPS**"). Section 5(1) PA 2008 gives the Secretary of State the power to designate a statement as an NPS for the purposes of the PA 2008. The background to the PA 2008 and the process for designating NPSs was set out in *R (on the application of Friends of the Earth Ltd) v Heathrow Airport Ltd* [2020] UKSC 52 at [19]-[38].

10. Section 5(3) provides that an NPS may only be designated if an appraisal of the sustainability of the policy in the statement has been carried out. Section 5(4) provides that an NPS can only be designated under s.5(1) if the consultation and publicity requirements in s.7, and the parliamentary requirements in s.9, have been complied with.

11. Section 5(7) requires an NPS to "give reasons for the policy set out in the statement". The reasons "*must (in particular) include an explanation of how the policy… takes account of Government policy relating to the mitigation of, and adaptation to, climate change*": s.5(8). The reasons required are the rationale for making the policy; there is neither a requirement to provide reasons for making a specific decision (including for rejecting points made in the consultation), nor a requirement to refer to every relevant consideration taken into account: *R (on the application of Spurrier) v Secretary of State for Transport* [2019] EWHC 1070 at [115]-[123].

12. Review of existing designated NPSs is provided for in s.6 PA 2008. After such a review the Secretary of State must either amend the relevant statement, withdraw the statement's designation, or leave the statement as it is: s.6(5). Section 6(7) provides that an NPS may only be amended if the consultation and publicity requirements in s.7, and parliamentary requirements in s.9, have been complied with in relation to the proposed amendment.

13. Consultation is provided for in s.7 PA 2008. The Secretary of State is required to carry out such consultation and publicity as they think appropriate and must also consult such persons and such descriptions of persons as may be prescribed. Section 7(6) requires the Secretary of State to have regard to the responses to the consultation and publicity in deciding whether to proceed with the proposal.

14. Section 6A PA 2008 provides that the consultation and publicity requirements set out in s.7 are to be treated as having been complied with in relation to a statement or proposed amendment if:

> "*(a) they have been complied with in relation to a different statement or proposed amendment ("the earlier proposal"),*
>
> *(b)the final proposal is a modified version of the earlier proposal, and*
>
> *(c)the Secretary of State thinks that the modifications do not materially affect the policy as set out in the earlier proposal.*"

15. The functions in ss.5 and 6 must be exercised "*with the objective of contributing to the achievement of sustainable development*": s.10(2). In doing so, the Secretary of State

"*must (in particular) have regard to the desirability of – (1) mitigating, and adapting to, climate change; (b) achieving good design*": s.10(3).

***SEA***

16. The Environmental Assessment of Plans and Programmes Regulations 2004 ("**SEA Regulations**") require environmental assessment of plans and programmes which set the framework for future development consent of certain types of projects. Regulation 9 of the SEA Regulations requires the responsible authority to determine whether the plan or programme is likely to have significant environmental effects (see regs.5(4)(b) and 9(1)).

17. Before the plan or programme is adopted, account must be taken of the Environmental Report for the plan or programme and opinions expressed by consultation bodies and public consultees. The Environmental Report is required to identify, describe and evaluate the likely significant effects on the environment of: (a) implementing the plan or programme; and (b) reasonable alternatives taking into account the objectives and geographical scope of the plan (see reg.12(2) of the SEA Regulations).

18. A failure to describe a likely significant effect does not result in the document failing to qualify as an Environmental Report. The test is whether the report is so deficient that it cannot reasonably be described as an Environmental Report: *R (Blewett) v Derbyshire CC* [2003] EWHC 2775 (Admin). The question of what to include, and the level of detail, are all matters of evaluation for the decision-maker subject to *Wednesbury* principles (*Spurrier* at [434]).

***Challenges to policy***

19. The Courts will not trespass into the merits of a particular policy, save on irrationality grounds. A challenge to planning judgment on the grounds of irrationality is a "particularly daunting task" (see *Newsmith Stainless Steel Ltd v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC 74 (Admin)); the principles in *Newsmith* were held to apply to challenges to NPSs in *Spurrier* at [172]).

20. In *R v Ministry of Defence ex parte Smith* [1996] QB 517 at p.556B Thomas Bingham MR held:

> *"The greater the policy content of a decision, and the more remote the subject matter of a decision from ordinary judicial experience, the more hesitant the court must necessarily be in holding a decision to be irrational. That is good law and, like most good law, common sense. Where decisions of a policy laden, esoteric or security-based nature are in issue even greater caution than normal must be shown in applying the test, but the test itself is sufficiently flexible to cover all situations."*

21. The standard of review that the Court will adopt depends on the particular strand of policy that is being challenged, the nature of any right or interest it seeks to protect, the process by which the decision under challenge was reached, and the nature of the ground of challenge (*Spurrier* at [151]). As was held in *Spurrier* at [168]:

> *"However, we stress that the degree of scrutiny will necessarily be dependent upon the circumstances of the particular challenge. Some of the issues raised in respect of some of the grounds of challenge (e.g. noise impact issues) have been specifically addressed in the Parliamentary process, notably in the report of the Transport Committee ("Airports National Policy Statement" HC 548 - 23 March 2018) and the Secretary of State's published response to that report (Cm 9624 - June 2018). Moreover, they have formed part of an overall judgment which has involved balancing those considerations against the national economic interest. We see the force in the proposition that the court should apply "considerable caution" when reviewing such matters (see paragraph 161 above)."*

22. An enhanced margin of appreciation applied in matters of scientific and technical judgment: *R (Mott) v Environment Agency* [2016] EWCA Civ 564. This is true of political judgment: e.g. *Spurrier* at paras [149] and [176]-[179].

**Response to the Grounds of Challenge**

***Ground 1: Alleged unlawful consultation***

23. The Claimant alleges that consultation responses that advocated for policies on demand management and modal shift where not conscientiously considered and that it was

wrong for the Government Response to the Consultation ("**the Government Response**") to reject calls for these policies on the basis that they were outside of the scope of the NNNPS. This ground is unarguable, and the Claimant's allegations are based on an unfair reading of the documents and a basic misapplication of the law.

24. Consultation responses advocating for modal shift and demand management were directed at a range of other policy areas, including road pricing (see e.g., TAN's consultation response at p.7 **[CB/612]**). As it happens, such responses were conscientiously considered and reasons for rejecting them set out in the Government Response at 2.9-2.12. 2.21 and 2.50. The Government Response should be read fairly and as a whole. It is clear from the Government Response that the reasons for rejecting modal shift and demand management were that the NNNPS 2024 is not a general transport strategy and has the particular purpose of setting the framework for NSIP development rather than general transport strategy. This is explained in paragraph of the Government Response at 2.9:

> *"We welcome the valuable comments received through the consultation process, which raised a number of important comments and concerns. A number of these concerns related to the role of the NNNPS and its ability to address wider transport concerns such as modal shift and public transport. The NNNPS's purpose and function is to provide guidance and clarity about existing government policy to support and inform decisions about applications for the development of NSIPs on the road and rail networks and SRFIs. The NNNPS is not a vehicle for setting out a new transport strategy. Wider questions concerning the overarching transport strategy are therefore beyond the scope of this consultation."* [4]

At 2.11:

> "*A number of respondents argued that the government needs to reduce car kilometres travelled in order to achieve net zero. It is not the policy of government to reduce demand for travel. People should enjoy fair access to jobs, education, health, shopping, recreation, friends and family and government wants to facilitate that, not restrict it. The government is addressing carbon emissions from road transport through the measures announced in the Transport Decarbonisation Plan 2021, primarily the transition to EVs, which has now been taken forward by the enactment of the Zero Emission Vehicle mandate…*"

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[4] Further, as explained in the witness statement of Dr Catherine Miller at **[31]**, road charging is a taxation matter for HM Treasury.

And 2.21

> "*As with question 4, many respondents commented on matters outside the scope of the NNNPS, such as the need for an overarching transport strategy, encouraging modal shift, and investment priorities. These are not matters for the NNNPS. Some respondents called for the draft NNNPS to adopt a spatial strategy, identifying locations for development. The Government believes that it would be inappropriate for the NNNPS to identify specific locations for investment. This is because decisions around specific locations are determined by separate investment processes, such as the national rail and road investment decision-making.*"

25. It is clear to any reasonable reader that the scope of the consultation was on the fitness for purpose of the NNNPS 2024 as a planning policy document setting the framework for decision-making on NSIP development (see *R (Stephenson) v Secretary of State for Housing, Communities and Local Government* [2019] PTSR 2209) rather than other policies or strategies of a more general scope. The Claimant quotes part of the consultation description at **SFG/32**, but then fails properly to engage with what that description says, where consultees were asked: "*whether* [the draft NNNPS] *provides a suitable framework to support decision making for nationally significant infrastructure road, rail and strategic rail freight interchange projects*". The consultation did not invite responses on general transport policy and that is outside the scope of the NNNPS in any event. Accordingly, there is no arguable basis for alleging that there has been any error or unfairness at common law or under the PA 2008.

26. As to the allegation at **SFG/39** that the Defendant cannot have conscientiously considered the responses dealing with modal shift and demand management, this is incorrect. The Defendant gave proper and conscientious consideration to those responses by reference to the scope and purpose of the NNNPS 2024:

(1) As to demand management, it was clearly explained in the Government Response why the requests to include demand management had been rejected (see above). Further, is it important context (which is not referred to by the Claimant) that the requests to include demand management upon which the

Claimant relies were high-level and did not propose specific policies that ought to have been included in the NNNPS 2024 anyway.[5]

(2) As to modal shift on the road network (which appears to be the Claimant's complaint), the NNNPS 2024 also expressly recognises that there are limitations on the extent to which modal shift can be achieved on the SRN, given the nature of the journeys undertaken (see paragraphs 3.42-3.45). Reasons for not including modal shift policies within the NNNPS were therefore included in the NNNPS 2024 itself.

27. Ground 1 is without any merit and unarguable. Permission should be refused.

***Ground 2: Alleged unlawful failure to provide reasons***

28. Ground 2 is an allegation that (a) the Secretary of State could not rationally have concluded that direct demand management ("**DDM**") and modal shift could be excluded from the NNNPS 2024 because there was no basis to be confident that the "*CBDP policies in the TDP*" would be delivered in full; and (b) reasons were needed to explain how DDM could be excluded notwithstanding the judgment in *Friends of the Earth v Secretary of State for Energy Security and Net Zero* [2024] EWHC 995. This ground is similarly without any merit, and is premised on a basic misreading and/or misapplication of the conclusions of Sheldon J in the *Friends of the Earth* judgment.

29. As to (a), the Claimant is simply incorrect to assert at **SFG/46** that the Defendant has "*no evidential basis for concluding that the TDP policies would be delivered in full*". First, this is not what Sheldon J determined in *Friends of the Earth*. That case was not a challenge to the TDP, nor any of the policies in the TDP. Sheldon J expressed no view on delivery risks of TDP policies. The judgment is instead concerned with whether the Secretary of State for Energy Security and Net Zero had sufficient information to ascertain the delivery risk of policies and proposals set out Carbon Budget Delivery

[5] See e.g. TAN's response, which stated: "*The current NNNPS at least in table 1 set out options for addressing need, which needs to be retained, albeit with changes to accept the need for demand management through road space reallocation (such as bus lanes) and road pricing*."

Plan ("**CBDP**") for the purposes of s.13 of the Climate Change Act 2008 (which cover all sectors, not just transport).

30. Second, and in direct contradiction of the Claimant's assertions anyway, the CBDP itself identifies TDP as one of the policies where there is in fact a "reasonable to high level of confidence that the proposed policy package will deliver in line with what is needed to enable carbon budgets to be met" (CBDP Appendix D para 37). Nothing in *Friends of the Earth* affects that conclusion; nor does that case exclude or purport to exclude from the Defendant's consideration the underlying facts which led to that conclusion.

31. Third, and in any event, the allegation is misconceived because delivery risk in respect of the TDP and the effect of *Friends of the Earth* was a matter to which the Defendant had specific regard when designating the NNNPS 2024. The Defendant was provided with a summary of the outcome in *Friends of the Earth*, and was provided with information specifically addressing delivery risk for the TDP. The ministerial submission set out an entirely lawful evaluative judgment:

> *"Officials do not consider that the designation of the NNNPS needs to be paused as a consequence of the CBDP judgment. The CBDP records that there is a reasonable to high level of confidence that the policy package in the Transport Decarbonisation Plan will deliver in line with what is needed to enable carbon budgets to be met. In addition, since the CBDP was published, the ZEV mandate has come into force. DfT has committed to reviewing progress against its CBDP pathway every 5 years and to consider as necessary additional options to support delivery of UK carbon budget targets. Carbon emissions from construction and operation of the strategic road network represent a small proportion of overall UK domestic emissions. The NNNPS includes policies directed at ensuring that carbon emissions are reduced as far as possible and, in the event that an individual scheme has a material impact on government's ability to meet carbon budgets, says that it should be refused. The NNNPS does not identify specific schemes or a quantum of development to come forward. Road Investment Strategy 3 will identify the final balance of the scheme portfolio. Advice on the draft RIS3 sent to Ministers on 17 October 2023 included an assessment of the carbon impacts of the schemes which could form the basis of the portfolio, and further carbon analysis will be shared with Ministers before a final decision on RIS3 is made."*

32. This point was also made at para 2.11 of the Consultation Response in respect of consultees calling for demand management and modal shift.

33. Any assessment of delivery risk of the TDP is quintessentially an evaluative judgment, and ultimately a matter for the Defendant. The Defendant assessed and considered it when designating the NNNPS 2024. That decision in respect of the TDP is a matter of judgment for the Defendant and cannot be challenged otherwise than on *Wednesbury* grounds and no such arguable ground is advanced.

34. As to the allegation that proper reasons were not delivered in respect of rejecting DDM and modal shift as part of the NNNPS 2024, the basic starting point for the allegation is misconceived. The statutory requirement in relation to the NNNPS designation is to give reasons for the policy, not reasons for policy options that have been rejected (*Spurrier* at [112]-[123]). Those reasons can be brief and there is no requirement to set out the Secretary of State's thinking on each and every material consideration that may have been considered.

35. But in any event, this ground of challenge is without any merit anyway quite apart from the point of principle already identified. It is clear from the NNNPS 2024 itself, the Government Response and Government Response to the Transport Select Committee that the Defendant complied with the requirement to have regard to the desirability of mitigating and adapting to climate change in s.10(3)(a) PA 2008 and that the NNNPS 2024 was revised with the objective of contributing to the achievement of sustainable development (see **SFG/47**). The NNNPS 2024 contains an explanation as to how it has taken into account Government policy relating to the mitigation of, and adaptation to, climate change as is required by s.5(8) PA 2008 in sections 2 and 3 (see, in particular, para 2.19-2.30 and 3.17 (government policy on climate change); 2.31, 3.9-3.16 (policy on adaptation); 3.34-3.37 (road); and, 3.66-3.68 (rail)).

***Ground 3: Alleged unlawful failure to re-consult following material changes to the draft NNNPS***

*Ground 3A: Alleged Breach of ss. 6(7), 6A and 7 PA 2008*

36. The Claimant alleges that there is a material difference between the carbon emissions policies in the consultation version of the draft NNNPS and the adopted NNNPS 2024, such that those differences ought to have been consulted on again pursuant to s.6A Planning Act 2008. The Claimant's contentions are without any merit and unarguable on a proper application of the relevant legal principles, and also on the facts because the changes were properly considered not to be material.

37. As set out above under the legal framework, s.6A does not require the Secretary of State to carry out further consultation where he has consulted on an earlier version of the proposal and he considers that the modifications do not materially affect the policy as set out in the earlier proposal. It is therefore a matter of judgment as to whether any changes are "material".

38. The changes made to (1) the policy on the assessment of a Scheme's carbon emissions and the question of when consent should be refused; and (2) references to regional and sectoral targets were self-evidently not material, but more fundamentally were ones that the Secretary of State was lawfully entitled to conclude did not materially affect the policy. As explained in the statement of Catherine Miller, the changes were made in light of responses to the consultation and the process of Parliamentary Scrutiny. As to each aspect of the policy:

    (1) The Secretary of State explained in the Government Response to the Transport Select Committee Report that the 'materiality test' in paragraph 5.18 of the 2014 NPSNN was reinstated into the adopted version of the NNNPS 2024 '*for added clarity*' (see p.9). A draft of the Government Response to the Transport Select Committee was considered by the Secretary of State before the NNNPS 2024 was adopted and therefore formed part of his consideration as to the materiality of the changes. The inclusion of text referring to a material impact on compliance with carbon budgets was, in any event, not a significant change to the relevant carbon emissions policies. This was also the finding of the Hon. Mr Justice Holgate (as he then was) in *R (on the application of Save Stonehenge World Heritage Site Ltd) v Secretary of State for Transport* [2024] EWHC 339 at 225, the interpretation of policy being a matter for the Court. The Post-

Adoption Statement at section 5 also makes clear that the changes to the NNNPS 2024 following the consultation did not materially alter the results of the original AoS. There was therefore no need to re-consult and the Secretary of State, advised by officials, was entitled to conclude that the changes were not material.

(2) As to regional/sectoral targets, the original text of the consultation draft NNNPS stated:

*"Having regard to current knowledge, a carbon management plan should be produced as part of the Development Consent Order submission and include:*

*…*

*where there are residual emissions, the level of emissions and the impact of those on national and international efforts to limit climate change, both alone and where relevant in combination with other developments at a regional or national level, or sector level, if statutory sectoral targets are developed and come into force."*

This was then amended to

"*Having regard to current knowledge, a carbon management plan should be produced as part of the Development Consent Order submission and include…*

*…*

*where there are residual emissions, the level of emissions and the impact of those on any relevant statutory carbon budgets*"

39. The amendment was made simply better to reflect the correct legal position, which is that the only statutory targets currently in existence are national carbon budgets (see *Bristol Action Network Co-Ordinating Committee v Secretary of State for Levelling Up, Housing and Communities* [2023] EWHC 171 (Admin) and *R (on the application of Boswell) v Secretary of State for Transport* [2024] EWCA Civ 145). It was not judged to be material, nor was it material.

*Ground 3B: Alleged breach of the SEA Regulations*

40. The Claimant's attempt to rely on the SEA Regulations adds nothing to the allegations above and is also hopeless. For the reasons set out above, there was no need to re-consult or re-assess the NNNPS 2024 pursuant to the SEA Regulations as the Claimant

asserts because the changes did not make a material difference to the policies adopted, nor did they affect the outcome of the SEA. This is clear from the Post-Adoption Statement at section 5. That states in terms that the changes to the NNNPS 2024 following the consultation did not materially alter the results of the original AoS. As explained in the statement of Catherine Miller, the changes to the wording of the carbon policies were specifically drawn to the attention of the consultants who had prepared the AoS and they concluded that the changes did not affect the outcome of the SEA.

41. Ground 3B therefore goes nowhere and is simply a disagreement with the policies included in the NNNPS 2024. It is unarguable and permission should be refused.

***Ground 4: Alleged breach of the SEA Regulations in relation to alternatives***

42. The Claimant alleges a failure to consider alternatives for the purposes of the SEA Regulations. It is well-established that the selection of reasonable alternatives is a matter of evaluative assessment for the decision-maker, subject to review on normal public law principles. The decision maker has a substantial area of discretion as to the extent of the inquiries which need to be carried out to identify reasonable alternatives which should have been examined in greater detail (*Ashdown Forest Economic Development LLP v Wealden DC* [2015] EWCA 681). If an alternative is incapable of meeting the identified objectives, such that in practice it would never be pursued, there is no point in subjecting it to environmental assessment (*R (Friends of the Earth) v Welsh Ministers* [2015] EWHC 776).

43. The Claimant's argument appears to be that the Defendant could not have rejected alternatives on the basis that they did not meet the objectives of the plan, because the objectives of the plan were unclear. Such a contention is unarguable.

44. The "objectives… of the plan" must be identified for the SEA Regulations. The objectives of the NNNPS 2024 were clearly identified in the Statement of Need in section 3. Further, as set out in the original written ministerial statement announcing the review, and the background section of the AoS (section 1.2), the NNNPS 2024 was to be in line with Government environmental and transport policy, so that the NPS supports Government commitments for appropriate development of infrastructure. This

is set out the original written ministerial statement announcing the review, and the background section of the AoS (section 1.2).

45. The AoS Appendix 2 Scoping Report provides a detailed review of the "*[k]ey policy and legislative drivers, objectives and targets relevant to the NNNPS*" across a host of key areas. To suggest that this does not clearly set out the objectives for the NNNPS 2024 in detail, or that it does not align with the high-level objectives set by the Government, is obviously wrong. The process is also described in the Post Adoption Statement at section 2.2.

46. The Claimant at **SFG/70** alleges that the description of the approach to the NNNPS 2024 as "vision-led" is unclear and cannot be an objective of the NPS. This vision led approach is in fact clearly identified in the AoS Appendix 1: Development of Alternatives as a key assumption:

> ***1.1 Key assumptions and principles***
> *1.1.1 General assumptions*
> *[…]*
> *• The Government is committed to a vision led approach to transport development. This underlying commitment means that the alternative scenarios presented are not vastly different in their approach. Rather, they present subtle variations with regard to the way issues (and therefore investment) are prioritised."*
> *[…]*
> *1.1.2 SRN*
> *[…]*
> *• Under all alternative scenarios, funding for new interventions that increase capacity on the network will be subject to the principle that the purpose of development of the SRN is to bring forward individual schemes to tackle specific issues shifting to a vision led approach as committed to in the Transport Decarbonisation Plan, rather than to meet unconstrained traffic growth (i.e., 'predict and provide')."*

47. The Claimant is therefore clearly wrong to suggest that the objective of the NNNPS 2024 is unclear. It is also wrong for the Claimant to suggest that one of the key objectives of the NNNPS was a "*thorough examination of the… statement of need*". First, that suggestion is based on a selective quotation. The relevant quotation in fact refers to a thorough examination of the modelling and forecasts which support the

statement of need. Second, and more importantly, the description referred to by the Claimant is a description of the reasons for the review under s.6 PA 2008, not the objectives of the plan itself, which is the NNNPS 2024 as a whole.

48. As to the assessment of alternatives, the Claimant attempts to advance its own alternative as being: "demand management" but without any details of what that alternative is in fact said to comprise (**SFG/70**). The Claimant's attempted invocation of such a broad policy concept on its own in this context is misconceived, and in any event cannot possibly be a proper basis for alleging any error of law in the Defendant's approach to alternatives in the exercise of evaluative judgment.

49. Quite apart from that, a potential alternative including demand management focusing on other policy levers to reduce demand on the roads (by improvements to public transport, walking and cycling) was in fact specifically considered and addressed in Appendix 1 of the AoS: Development of Alternatives under the heading "Demand Management", "Alternative 1" (see p.4 **[ ]**). Other demand management options such as road charging were not taken forward for assessment in the AoS because they were not consistent with government policy (see Catherine Miller W/S at **[x]**). That was a judgment the Secretary of State was entitled to reach.

50. Ground 4 is therefore also unarguable. Alternatively, permission should be refused on the basis that it is highly likely that the result would have been the same pursuant to s.31(3C-D) Senior Courts Act 1981, for the reasons set out above.

***Ground 5: Alleged breach of the SEA Regulations by virtue of identifying and evaluating the targets set under the Environment Act 2021 ("EA 2021")***

51. Under this ground, the Claimant alleges that the AoS failed to assess the likely significant effects on air quality and biodiversity with reference to long-term targets in the Environmental Targets (Fine Particulate Matter) (England) Regulations 2023 ("**the PM Regulations**") and (possibly, although it is not clear from the SFG) the Environmental Targets (Biodiversity) (England) Regulations 2023 ("**the Biodiversity Regulations**"). Neither allegation has any merit.

52. The PM Regulations set a long-term target to reduce the annual mean concentration of fine particulate matter $PM_{2.5}$ so that it is equal to or less than 10 µg/m³ by 2040 (measured at relevant monitoring stations) ("the $PM_{2.5}$ Target").

53. Regulations 4, 7 and 14 of the Biodiversity Regulations specify long term targets in respect of biodiversity: to reduce the risk of species' extinction by 2042 when compared to 2022 (regulation 4); to restore or create in excess of 500,000 hectares of a range of wildlife-rich habitats by 2042 compared to 2022 (regulation 7); and to reverse the decline of species abundance by 2042 (regulation 14).

54. Following pre-action correspondence, the Claimant now appears to accept that the targets were in fact taken into account, but nonetheless seeks to allege that there is "*no indication whatsoever that they informed the assessment undertaken*" (**SFG/72**).

55. On any proper reading of the documents supporting the NNNPS 2024 it is clear this is wrong and the targets were lawfully taken into account.

56. The Claimant's case, however, now appears to be that anything which had not been "*completely finalised by the Scoping Report, even if certain forthcoming legal duties had been signposted, were not included in the AoS's baseline*" (**SFG/74**). This is simply incorrect.

57. The Scoping Report defined the scope and level of detail of the AoS. Statutory bodies were consulted on this in March 2022. The Scoping Report was updated in light of consultee comments and was published at the same time as the AoS, which itself was consulted on in March 2023 alongside the draft NNNPS. The Scoping Report at Appendix 2 to the AoS set out a current baseline, including relevant legislation, policies, plans and programmes which could influence the NPS. On the issues of biodiversity and air quality, the Scoping Report set out that the EA 2021 required Government to set statutory targets to reverse the decline in species abundance (see section 4) and that there would be new legally binding ambient targets for fine particulate matter (see section 5).

58. The Scoping Report was written at the time that the Department for Environment, Food and Rural Affairs ("**Defra**") was engaged in consultation on proposed targets and the Scoping Report makes explicit mention of the proposed targets (see pp.22-26 for air quality and pp.14-21 for biodiversity) (see also, Catherine Miller W/S at **[x]**). The proposed target for $PM_{2.5}$ at the time the AoS Scoping Report was prepared was the same as the target ultimately adopted in the Environmental Targets (Fine Particulate Matter) (England) Regulations 2023 ("**the PM Regulations**"). Thus, it is misconceived to say that the targets were not considered as part of the baseline in the AoS. They were considered in the baseline and necessarily informed the assessment of likely significant effects.

59. The AoS was carried out by competent experts and was undertaken alongside the development of the drafts of NNNPS. It was an iterative process (see AoS section 5) as is normal practice. The assessment work included reviews of emerging drafts of the NNNPS and recommendations as to the content of the drafts. This was specifically addressed in the AoS at 5.1:

> *"Some key amendments made to the Draft NNNPS as a result of these reviews include the following:*
> *• Stronger references to any future species or habitats targets which may be set in the future as part of the Environment Act process;*
> *• A reframing of the biodiversity mitigation section to clarify the importance of enhancement in addition to mitigating harm and providing compensation;*
> *• Strengthened requirements for air quality assessments ensuring that all schemes likely to have adverse effects on air quality are assessed, and a requirement for refusal of consent where the increase in air pollutant emissions resulting from the proposed scheme would significantly impact the Government's ability to comply with a statutory limit or statutory air quality objective;*
> *• Strengthened requirements for applicants to work with relevant authorities to avoid any breach of air quality limits or objectives;*
> *• A stronger requirement in the section on impact on transport networks which requires applicants to provide evidence that new severance issues (relating to non-motorised users) have been addressed;*
> *• The land use section been strengthened to require applicants to consider whether prior extraction of minerals would be appropriate; and*
> *• A recognition that soils are important carbon sinks."*

60. The NNNPS 2024 therefore reflects the changes in environmental legislation that took place as it was being developed and adopts an entirely lawful approach. In particular, para 4.26 requires the Secretary of State to be satisfied that any biodiversity net gain objective for NSIPs has been met and the long-term targets for biodiversity are expressly referred to in para 5.44. For air quality, applicants are required to consider the PM Regulations and any available guidance (see para 5.13) and the Secretary of State is required to take into account any relevant statutory air quality limits (see para 5.22) (see also the Consultation Response at paras 2.54, 2.78 and 2.79).

61. The AoS assessed the effects of the draft NNNPS on biodiversity and air quality as "minor negative" (and "uncertain" with respect to changes from direct emissions from railways). Any likely significant effects of the NNNPS 2024 were therefore identified and assessed. The Post-Adoption Statement identifies that the changes to the NNNPS 2024 arising from the consultation and parliamentary scrutiny had not materially altered the results of the original AoS.[6] As is clearly stated in the AoS, the NNNPS 2024 is a non-spatial strategy, so it does not identify the precise location and quantum of road and rail development. The impacts of individual Schemes will be assessed against the policies in the NNNPS 2024 and will be the subject of their own environmental impact assessment, taking into account any relevant long-term targets. These are all matters of evaluative judgment.

62. In light of the above, it is unclear what additional consideration the Claimant is in fact alleging in substance should have been given to $PM_{2.5}$ in the circumstances, particularly when concentrations of $PM_{2.5}$ for the purposes of the PM Regulations are measured at specific monitoring stations and the contribution of any particular road scheme to concentrations can only be ascertained once the detail of that scheme is known. The reference to the Defra at **SFG/80** is taken out of context. The Defra modelling was prepared for the purpose of developing the targets and makes it clear that the scenarios modelled were hypothetical and that each scenario contained multiple measures so as

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[6] Department for Transport, National Networks National Policy Statement: *Appraisal of Sustainability Post-Adoption Statement* At [5].

to explore the feasibility of different target levels and not all measures within a scenario needed to be implemented. At p.109:

> *"These emissions scenarios were modelled to provide a range of plausible emissions reductions; however, this does not mean that a particular scenario needs to be followed to meet the proposed targets or that all measures within a scenario would need to be implemented. Policies to meet the targets will be developed and consulted on separately and could include measures from any scenario or none. It should not be interpreted that by selecting a particular target that this will definitely mean a particular measure will be needed or implemented"* [7]

63. Thus, it is unclear what error of law is in fact being alleged here, given the above but no arguable error is being identified. It is well-established that the content of an Environmental Report is a matter of evaluative judgment for the decision maker. In circumstances where: (a) the NNNPS 2024 is a non-spatial strategy and the particular impacts of individual schemes are inevitably yet to be identified; (b) the targets are long-term and specific policies for meeting them have yet to be formulated; (c) the targets are required to be considered as part of decision making for specific Schemes; and (d) the targets were taken into account and changes made to the NNNPS 2024 and a judgment reached that the AoS conclusions had not materially altered, it cannot reasonably be alleged that the assessment carried out for the purposes of the AoS was unlawful.

64. Ground 5 is unarguable and permission should be refused.

**Aarhus Convention Claim**

65. The Defendant agrees that the claim is an Aarhus Convention Claim and that the costs capping regime in CPR rr.46.24 to 46.28 should apply.

66. The Defendant does not agree that the default costs cap should be reduced in these proceedings:

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[7] Witness Statement of Dr Catherine Miller at **[68].**

(1) It is not the case that the Claimant does not have funds; rather, it asserts that its own internal allocation of those funds to work streams other than this case renders the proceedings prohibitively expensive. The internal allocation of funds is self-serving, and a matter for the Claimant, but it cannot of itself justify a reduction in the cap.

(2) The Claimant relies upon the expense of other judicial review proceedings. That the Claimant has chosen to bring repeated unsuccessful challenges to Government decisions is plainly not a reason to reduce the cap. To the contrary, it emphasises the importance of the Claimant being subject to the principle of paying costs for such unsuccessful claims and the costs cap not serving to encourage further unmeritorious litigation. This is particularly so when many of those claims have failed at the permission stage (e.g. the challenge to the decision not to suspend the NPSNN 2014 and the challenge to the A428 Black Cat Development Consent Order).

**Conclusion**

67. For the reasons set out above, the Defendant submits that permission to apply for judicial review should be refused.

68. The Defendant seeks its costs of preparing the Acknowledgement of Service pursuant to *R (Mount Cook Ltd) v Westminster CC* [2003] EWCA Civ 1346, subject to the default Aarhus costs cap. A costs schedule will be provided separately.

**JAMES STRACHAN KC**
**ROSE GROGAN**
**DANIEL KOZELKO**

**29 August 2024**